

**“ BURDEN SHARING IN INTERNATIONAL REFUGEE LAW:
A STUDY OF THE LEGAL AND INSTITUTIONAL FRAMEWORK VIS
A VIZ STATE PRACTICE ”**

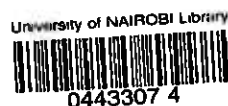
**SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE AWARD OF A DEGREE OF MASTERS OF ARTS (MA)
INTERNATIONAL STUDIES**

**WANJIKU K. KAMAU
R50/7741/05**



**UNIVERSITY OF NAIROBI, INSTITUTE OF DIPLOMACY AND
INTERNATIONAL STUDIES**

2007



bd. 315073

1D15

Afr

Jx

4292

.R4W3

DEDICATION

To the many refugees and asylum seekers who have lost the protection of their home governments; who toil daily for the prospect of a better tomorrow despite the rigours and challenges of unacceptance in foreign lands; and to the governments who open their borders and share limited resources with a foreign people seeking refuge and shelter from strife. May lasting solutions be diligently sought.

ACKNOWLEDGEMENT

The writing of this work has been made possible through the invaluable contribution and enablement of various people in different capacities.

I wish to acknowledge the immense contribution and wise guidance of my supervisor, Dr. Kithure Kindiki, who shaped and directed my thoughts towards the completion of this work.

I am grateful for the support and assistance received from the Institute of Diplomacy and International Studies, University of Nairobi.

Many thanks to my friends Jaquiline Iwiya, Rosa Nduati-Mutero, Sarah Muringa and Angeline Wanjiru who persistently challenged me toward the timely completion of this work.

I acknowledge with deep gratitude the support and encouragement of my husband, Vincent, whose insight, wise counsel and good cheer have been invaluable in my pursuit of excellence in the many dimensions of my life.

LIST OF ABBREVIATIONS

- 1. AALCC - Asian- African Legal Consultative Committee.**
- 2. ASEAN- Association of Southeast Asian Nations**
- 3. ECHR - European Court of Human Rights.**
- 4. ER - England Reports.**
- 5. EU - European Union**
- 6. ExCom- Executive Committee (of UNHCR).**
- 7. GLR - Great Lakes Region**
- 8. HL - House of Lords.**
- 9. ICJ - International Court of Justice.**
- 10. ICRC - International Committee of the Red Cross.**
- 11. IJRL - International Journal of Refugee Law.**
- 12. ILM - International Legal Materials.**
- 13. OAU - Organization of African Unity (Currently African Union)**
- 14. SADC- Southern African Development Community**
- 15. UN - United Nations.**
- 16. UNTAC- United Nations Transitional Authority for Cambodia**
- 17. UNGA - United Nations General Assembly**
- 18. UNHCR - United Nations High Commissioner for Refugees.**

LIST OF CONVENTIONS

1. Convention Concerning the Status of Refugees Coming from Germany, 192; LNTS No. 4461.
2. Convention Relating to the International Status of Refugees, 1933; 159 LNTS No. 3663.
3. Convention Relating to the Status of Refugees, July 28, 1951; 189 UNTS 150 (entered into force April 22, 1954).
4. European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 312 UNTS 221, ETS 5, as amended by Protocol No. 3, ETS 45, Protocol No. 5, ETS 55, and Protocol No. 8, ETS 118.
5. OAU Convention on the Specific Aspects of Refugee Problems in Africa, opened for signature on September 10, 1969; 1000 UNTS 46 (entered into force June 20, 1974).
6. Protocol Relating to the Status of Refugees, January 31 1967; 19 UST 6223, 606 UNTS 267 (entered into force October 4, 1967).
7. The 1984 Cartagena Declaration on Refugees, Regional Instrument 206, UNTS GVE.96.0.2 (1995)
8. UN Declaration on Territorial Asylum, UNGA Res. 2312 (XXII), 14 December, 1967; UN GAOR Supp. (No.16) at 81, UN Doc. A/6716 (1967)
9. Universal Declaration of Human Rights, December 10, 1948 UNGA Res. 217 (III); UN Doc. A / 810 (1948).

10. Vienna Convention on the Law of Treaties, UKTS No. 58 (1980), Cmnd. 7964; 8 ILM 679 (1969). In force since 1980.

TABLE OF CONTENTS

<i>Dedication</i>	<i>ii</i>
<i>Acknowledgement</i>	<i>iii</i>
<i>List of Abbreviations</i>	<i>iv</i>
<i>List of Conventions</i>	<i>v</i>
<i>Table of Contents</i>	<i>1-3</i>
Chapter One: Background	4
1.0 Introduction	4
1.2 Background:	5
1.3 Problem Statement	10
1.4 Research objectives	14
1.5 Justification of the Study:	15
1.6 Scope of the Study:.....	17
1.7 Literature Review:.....	17
1.8 Conceptual Framework:.....	23
1.9 Hypotheses:.....	24
1.10 Research Methodology:.....	25
Chapter Two: Burden Sharing And Refugee Protection	27
2.1 Introduction to the International Refugee Protection Regime:.....	27
2.2 Background to the Principle of Burden Sharing	33
2.2.1 <i>Economic Impact</i>	34
2.2.2 <i>Environmental Impact</i>	35
2.2.3 <i>Security Concerns</i>	35
2.3 The Concept and Function of Burden-sharing.....	37
2.4 Legal Basis of the Principle of Burden-Sharing	41
2.5 Burden-Sharing: The Challenge	47
2.5.1 <i>The Demise of the Interest –Convergence</i>	49
2.5.2 <i>The Politics of Non-Entrée</i>	52
2.5.3 <i>The “Right to Remain”</i>	52

2.6	Considering the Security Burden.....	53
2.7	Relegation of Burdens: A Look at State Practice.....	58
2.8	Accounting for unequal distribution of Refugees:	61
2.8.1	<i>Free-Riding Opportunities</i>	61
2.8.2	<i>State Interests</i>	62
2.8.3	<i>Structural Pull Factors</i>	64
2.8.3.1	<i>Solidarity with refugees</i>	65
2.8.3.2	<i>Interest-based motivations</i>	65
2.9	Burden-Sharing Efforts: Past International Action:.....	68
2.9.1	<i>National Reactions</i>	69
2.9.2	<i>Regional Efforts</i>	69
2.9.3	<i>International Measures</i>	70
2.9.4	<i>Success Stories</i>	71
2.10	Conclusion:.....	72
 Chapter Three: The Burden Sharing Debate: Towards Reformulation.....		74
3.1	Background:	74
3.2	Formulating a Burden-sharing Regime: Key principles.....	77
3.2.1	<i>Interest Convergence Groups</i>	78
3.2.2	<i>Common but Differentiated Responsibility</i>	79
3.2.3	<i>Solution-Oriented Temporary Protection</i>	80
3.2.4	<i>Residual Solutions</i>	81
3.2.5	<i>Viable Repatriation</i>	82
3.3	Identifying options for formulation of burden-sharing regimes:	82
3.3.1	<i>Policy Harmonisation</i>	82
3.3.2	<i>Hard Quotas</i>	84
3.3.2.1	<i>Sharing Money</i>	84
3.3.2.2	<i>Sharing People</i>	87
3.3.3	<i>Market Mechanisms</i>	89
3.3.3.1	<i>Resettlement/Dispersal</i>	89
3.3.3.2	<i>Explicit Trading</i>	91
3.3.3.3	<i>Comprehensive (Implicit) Trading</i>	93

3.3.4	<i>Interest-Convergence groups</i>	96
3.4	Conclusion.....	97
Chapter Four: Conclusions And Recommendations.....		100
4.1	Background.....	100
4.2	Chapter Conclusions:	100
4.3	Recommendations:.....	104
4.3.1	<i>To Individual States:</i>	105
4.3.1.1	<i>Building awareness and public support for the rights of refugees.</i>	105
4.3.1.2	<i>Ratification and implementation of International Treaties.</i>	105
4.3.1.3	<i>Enforcement of the Principle of Non-Refoulment.</i>	106
4.3.1.4	<i>Ending practices that prevent or deter asylum-seekers from pursuing claims.</i>	107
4.3.1.5	<i>Provision of a fair and satisfactory asylum procedure.</i>	107
4.3.1.6	<i>Acceptance of responsibility for examining asylum claims.</i>	108
4.3.1.7	<i>Protection of rights of refugees in situations of mass exodus.</i>	108
4.3.2	<i>To States Collectively:</i>	109
4.3.2.1	<i>Base repatriation programs on human rights standards.</i>	110
4.3.2.2	<i>Strengthening responsibility-sharing.</i>	110
4.3.2.3	<i>Enhance accountability within the international system.</i>	111
4.3.2.4	<i>Improving the monitoring mechanism of the Refugee Convention.</i>	112
4.3.2.4.1	<i>Monitoring:</i>	113
4.3.2.4.2	<i>State reporting:</i>	113
4.3.2.4.3	<i>UNHCR access:</i>	113
4.3.2.4.4	<i>Right to contact UNHCR:</i>	114
4.3.2.4.5	<i>Participation in refugee status determination procedures:</i>	114
4.3.2.4.6	<i>UNHCR advisory services:</i>	114
4.3.2.4.7	<i>State practice:</i>	115
4.4	Conclusions.....	116
Bibliography:		119

CHAPTER ONE: BACKGROUND

1.0 Introduction

Beginning in the immediate post Second World War era, refugees came to be associated with special measures for protection and assistance. International treaties providing them significant guarantees were negotiated and adopted, and an important international institution, the Office of the United Nations High Commissioner for Refugees, was created by the UN solely to cater for their welfare.

Non-respect for human rights and international humanitarian law is a major cause of refugee flows. Non-respect for international refugee law standards is a major cause for human misery, wasted human potential and the onward, often irregular, movement of refugees. And, non-respect for painstakingly achieved fundamental legal guarantees in asylum procedures and decision-making is a major reason why many refugees are not able to access and enjoy the protection they deserve.

As elsewhere, there is a need in the refugee area, to reinvigorate the rule of law dimension and in particular its international foundations. There is also a need to reaffirm the humanitarian values of the international refugee protection regime, which is a complex of international practice and precepts drawn from international refugee law, international human rights law, and general principles of international law. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the cornerstones of this complex.

The history of responses to international refugee movements, and the development of legal and organisational norms to shape them, reveals a continuing concern on the part of the international system to codify, order, and make stable a process which is inherently unstable and presumed to be transitory.

The protection of refugees is primarily the responsibility of states. The legal framework that supports the international protection regime was established by states. Through the years, states have affirmed their commitment to protecting refugees by acceding to the 1951 Convention¹, the cornerstone legal instrument on refugee protection. The Convention, which was negotiated and adopted by states, enumerates the rights and responsibilities of refugees and obligations of states that are parties to it. As present, more than 140 states² have acceded to the Convention and its Protocol.³ In addition, as members of the UNHCR Executive Committee, 57 governments help shape the organization's protection policies and assistance activities.⁴

1.2 Background:

Under the terms of international law, primary responsibility for protecting and assisting refugees lies with the host countries as is spelt out in the 1951 Convention and its 1967 Protocol. While regional and international burden-sharing initiatives may be needed to assist host States, this does not diminish their responsibility in

¹ Convention Relating to the Status of Refugee, July 28, 1951; 189 UNTS 150 (entered into force April 22, 1952)

² UNHCR and IPO, *Refugee Protection, A Guide to International Refugee Law*, Handbook for Parliamentarians, Vol 2 2001, p.1

³ Protocol Relating to the Status of Refugees, Jan 31 1967, 19 UST 6223; 606 UNTS 267 (entered into force Oct 4 1967).

⁴ Supra note 2, p. 8

regard to the refugees on their territory. Burden-sharing has three components: national, regional and international. The two latter components should support and complement national responsibilities. Even in situations where regional or international actors participate in burden-sharing activities, there should be full recognition of the heavy burden that is placed on host States, particularly during the initial emergency phase of large-scale influxes and refugees or returnees, or where refugee situations are prolonged.

The concept of burden-sharing in relation to refugees has been present since the inception of UNHCR. Its documented origins are found the 1951 Convention relating to the Status of Refugees, which expressly acknowledges that *“the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.”*⁵

In addition to the reference to burden sharing alluded to in the Preamble to the 1951 Convention, the concept of burden-sharing is included in many regional instruments as well. The phenomenon of large-scale influx of refugees in Africa, arising from the process of decolonization in the 1960's, led to the first substantive regional formulation of this concept in the refugee context. The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa provides that *“where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the*

⁵ Paragraph 4 of the Preamble

OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.”⁶

A number of European Union texts have also referred to the need for international solidarity and burden-sharing, such as the 1995 European Council Resolution on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons.

With respect to countries in Asia, this concept is included in Paragraph III of the 1987 Addendum to the 1966 Bangkok Principles Concerning the Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee (AALCC).⁷

The term ‘burden-sharing’ was first prominently used in the context of debates about NATO contributions in the early 1950s.⁸ The essence of these debates, which continue until today, has been about sharing defense costs among the members of the North Atlantic Alliance, that is, getting the Europeans to pay more. The adoption of this terminology in the context of forced migration is of course not unproblematic. However, despite its potentially prejudicial connotation in a human rights context in which one might wish the language of costs and benefits to be absent, the term ‘burden-sharing’ is used here to reflect the way the debate about the perceived and

⁶ Article II(4) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa

⁷ The Paragraph reads: “The principle of international solidarity and burden-sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.”

⁸ Boyer, M.A; “Trading public goods in the Western alliance system.” *Journal of Conflict Resolution* vol. 33(4) 1989; p.68.

real inequalities in the distribution of displaced persons and refugees has been conducted in Europe over recent years. Attempts to replace the term in this area with a call for responsibility sharing or the 'equal balance of efforts' between the Member States have had little impact on the way the public debate has been led.⁹

In Africa as in other regions, it is undeniable that the burden placed on countries by refugee and returnee populations has been borne primarily at the national level. Providing food, clothing and shelter is only a small portion of the overall cost. There are also economic, socio-political, environmental and security costs associated with hosting refugees. The presence of large refugee/returnee populations leads to substantial demands on food, energy, transportation, employment and public services such as education, health and water facilities. The financial costs have to be seen in the context of economic reforms being implemented simultaneously in many of the developing countries. Further, the sudden influxes of large refugee populations often lead to serious, uncontrolled environmental imbalances which can affect entire eco-systems. Refugees also often create an unexpected and massive demand for scarce natural resources such as land, fuel, water, food and shelter materials, with long-term implications for their sustainable regeneration. The impact in the Social-political domain is notably felt when refugees or returnees are from different cultural, ethnic, religious, or linguistic groups from the local population, leading to an exacerbation of social tensions.

The presence of large refugee/returnee populations can have serious implications for internal security, particularly in situations where the ratio of these populations to

⁹ Ibid

the local populations is high. It can also have implications for regional stability. The problems of the politicisation and militarization of refugee camps and settlements are well known. As a result, substantial demands are often put on police and armed forces of countries of asylum and countries of origin in order to ensure the security and stability of areas affected by large refugee/returnee populations.

Assisting and protecting refugees is therefore a great burden for host countries. The burden is even more serious for developing countries, since hosting refugee populations can impact economic development. Countries that already suffer from widespread poverty and a weak economy may not have the resources to properly assist and protect refugees.

There is increasing recognition of the extent to which large refugee populations may impede or jeopardize the development efforts of developing nations. Some of the largest refugee concentrations are found in countries that already suffer from weak economies and poor infrastructure, as well as widespread poverty. National and local authorities in these countries are often compelled to divert considerable resources and manpower to deal with issues relating to refugee populations, detracting from the pressing demands of their own development. Because the costs involved with hosting refugees are high, countries must make an effort to share this responsibility with others. Burden-sharing means dividing the cost of hosting refugees among several different countries. It helps the host country provide better protection to the refugees and offer resources so they are healthy and safe.

1.3 Problem Statement:

International refugee protection is in crisis. As armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, many governments feel unable to receive all refugees who seek their protection. States are increasingly withdrawing from the duty to provide refugees with the protection they require.

During the past several years, international refugee law has shown, contrary to international human rights law, distinctive signs of regressive rather than progressive development in terms of its interpretation and application by states. While many provisions of human rights treaties have benefited from liberal interpretations advanced by competent courts and other international bodies, thereby enhancing their scope of application, fundamental norms of international refugee law, such as the 1951 Convention's definition of the term "refugee," have been interpreted by governments and national courts ever more restrictively, eventually resulting in substantial gaps in international refugee protection. In addition, states have increasingly resorted to various restrictive measures—such as visa requirements, carrier sanctions, and safe third country rules—in order to deny asylum seekers access to territory or to asylum procedures. Worse still, instances of mass *refoulement* of refugees have taken place, in blatant violation of fundamental principles of international refugee law. In short, international refugee law appears very much under siege.¹⁰

¹⁰ Marjoleine Zieck; *UHCR and Voluntary Repatriation of Refugees: A Legal Analysis*; The Hague, Boston, London: Martinus Nijhoff Publishers, 1997. Pp, xi, 484

The problem that the present system gives rise to, and which is to be addressed in this project is the systematic bias in cost distribution among receiving states. Most refugees originate in, and are accommodated in the world's poorer countries. Countries in Africa, in particular, continue to host very large numbers of refugees despite enormous political, economic, environmental, and social problems. By addressing some of the political and financial costs of hosting refugees or rehabilitating returnees, burden-sharing mechanisms established by the regional communities, could contribute to alleviating the problems faced by these host countries, and could assist them to respect their international obligations in this regard.

Despite the fact that the North protects only about 20% of the world's refugee population, its governments have adopted sophisticated policies of *non-entrée*, designed to keep refugees from ever reaching their territories. Visa requirements for nationals of refugee-producing countries, backed up by carrier sanctions make it difficult for most refugees to even contemplate traveling to the North. Refugees who circumvent the visa barrier are increasingly deflected back to the countries transited during their escapes, even when these intermediate states are unable to offer them meaningful protection. Others have faced interdiction on the high seas or in artificially designated "international zones."¹¹

The principle of burden-sharing is facing massive challenges in refugee protection by states. Many individual governments are creating more restrictive refugee policies. Too often, national burden-sharing initiatives are motivated by the desire to

¹¹ Ibid

keep refugees out, rather than a desire to protect them. The resulting policies prevent large refugee populations from entering a nation, such that a single population must be dispersed among several host countries, or else the population is simply relocated to one, often impoverished, host country. These “burden-sharing” policies do not often equally distribute the burden of aiding refugees. Instead, they may reinforce the burden placed on poor host nations.

In many countries, the pre-occupation with domestic interests over those of refugees is clearly gaining the upper hand. The dialogue on refugees has become centered on priorities such as national security, law and order and a concept of the social security of the national population that allows little room for the elevation of refugees. The notion that refugees are or should be the subject of preemptory, priority rights is evidently losing ground. Just as troublingly, this preponderance of domestic priorities has come to be instrumentalised in ways that have included resort to the violation of the rights of refugees as a matter of deliberate state policy. The system of refugee protection is not simply weathering more protracted stress from interests with which it has always been in competition. As a postulate of the domestic legal and political order, it is being purposely devalourised, undermined and swept aside.¹²

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honouring the

¹² McNamara: “*The future of Protection and the Responsibility of the State*”, International Journal of Refugee Law Vol. 10, Nos. 1&2, 1998, p. 230 Speaking in 1998 in the aftermath of the tragedies in the Great Lakes region, UNHCR's Director of International Protection, Dennis McNamara, described the situation as follows: “*When governments openly, systematically and intentionally violate the most basic principles of refugee protection with apparent impunity, the system itself is fundamentally weakened. This has happened consistently in the Great Lakes region in recent times and, regrettably, continues today. UNHCR and the refugee principles on which its work is based have been abused and brushed aside to a degree never seen before.*”

right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards. The UNHCR shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and inter-governmental initiatives that undermine this principle. So long as there is equivocation on the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility toward them.¹³

Ironic though it may seem, the present break down in the authority of international refugee law is attributable to its failure to explicitly accommodate the reasonable preoccupations of governments in the countries to which refugees flee. International refugee law is part of a system of state self-regulation. It will therefore be respected only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests.

In contrast, refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum seekers are able to reach. It is a preemptory regime. Apart from the right to exclude serious criminals and persons who pose a security risk, the duty to avoid the return of any and all refugees who arrive at a state's frontier takes no account of the potential impact of refugee flows on the receiving state. This

¹³ Ibid

apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether.

1.4 Research objectives

The objective of this study is firstly, to critically examine the existing legal and institutional framework in International Refugee Law so as to establish the extent to which the principle of burden sharing is encapsulated within the said framework. To this end, the study will specifically analyse the 1951 Convention and its 1967 Protocol with a view to establishing whether the existing international legal framework adequately provides for the protection of refugees; or whether there exists a lacunae that requires formulation of new laws. With regard to the institutional framework for refugee protection, we shall analyse the capacity of the UNHCR to fulfill its part of its mandate of integrating or resettling refugees in second countries of asylum where conditions are not conducive for them to return to their home countries.

Secondly, we will critique state practice in as far as burden sharing in the field of refugee protection is concerned. In this regard, we shall seek to examine the practical implementation of the principle of burden sharing, the contribution of developing countries and the emerging trends in international refugee regime generally.

Thirdly, we shall make recommendations for formulation of a more streamlined legal and institutional framework to govern the identification and protection of refugees. The aim here is to attempt a practical yet globally acceptable formula for

burden sharing. We shall argue that burden sharing can only be practically possible where there exists a convergence of interests between the obligations of states towards their nationals on one hand, and the obligations of states under international law on the other hand.

1.5 Justification of the Study:

There are over 22 million refugees spread all over the world.¹⁴ No region is spared the agony of the tragic movements of scores of men, women and children uprooted from their homes and land because of armed conflict, natural disaster and /or intolerance. These people seek either temporary refuge pending a change of circumstances that will allow their return home in safety and dignity; or new homes where they can re-establish their lives in peace and security. Whether viewed in terms of numbers, causes, or geography, the world today is faced with a refugee problem, the dimensions of which have never been experienced before and the consequences of which, if left unchecked, will be profound.¹⁵

The refugee problem is a world wide phenomena and it inextricably linked with other major international problems of the present time. Hence, issues relating to refugees can no longer be seen as a problem particular to a country or a region; and a global approach has become imperative.

¹⁴ Statistics according to the UNHCR as at 2002. See UNHCR and IPO, *"Refugee Protection, A Guide to International Refugee Law"*, Handbook for Parliamentarians, Vol 2 2001, p. 5.

¹⁵ Jean-Pierre Hocke, *"The Need for political Will to Resolve Today's Refugee Problem"* in Gill Loescher and Laila Loescher (eds), *"Refugee Issues in International Relations"* (Clarendon Press, Oxford, 1990); pp 4-5

It is therefore essential to have a more structured, and therefore dependable, system for sharing this burden between a wider number of actors. The logic of burden sharing is clearly an essential ingredient to the formulation of a more effective response to the deficiencies of the current system. The burden sharing debate must, however, recognize that states, specifically those in developing countries face burdens beyond the traditional dual mandate burdens of protection and assistance.

Secondly, it is beneficial to understand that states are primarily responsible to their own nationals as far as provision of food, education, health care, security and other needs are concerned. The obligations of states toward their nationals are often in conflict with the obligations placed upon states by international law. This often becomes an area of conflict whereby states are unable to share the burden of hosting and/or caring for refugees due to pressure to meet their obligation towards their national. The specific needs, priorities and security concerns of, particularly developing states who host the overwhelming majority of the world's refugees, cannot be ignored.

Given that a state's decision to grant asylum is dependent upon several considerations, refugee protection must develop an approach that addresses state interests if it is to remain relevant in cases of conflict-induced forced migration. This convergence of refugee protection and states' interests is both necessary and possible.

1.6 Scope of the Study:

The study will analyse the development of the principle of burden sharing within the context of international refugee law, and the practical realities of state practice in as far as burden-sharing in the refugee protection arena is concerned. The intention of the study is, in as much as is possible, to analyse the evolving trends within the international system with respect to burden sharing mechanisms, to take stock of international response to refugees and asylum seekers and to make a proposal for formation of burden sharing mechanisms and regimes.

1.7 Literature Review:

There is a mass of literature on the area of burden sharing in international refugee law. Currently, there are several debates raging within the field of burden sharing, which debates will largely inform the findings made in this study.

A major debate in contemporary international refugee law is the perceived conflict between burden sharing in refugee issues on the one hand, and the duty of the government towards its citizens. With the increasing democratisation of countries, host governments are more sensitive to negative public reactions to the presence of foreigners, including refugees and there is rising pressure from local populations for the government to implement domestic programs rather than giving assistance to 'foreigners.'

As fewer and fewer states see the reception of refugees to be reconcilable to their own national interests, the focus of international attention has shifted away from the provision of asylum to refugees, and toward the eradication of the "root causes" of

refugee migrations. The rhetoric of commitment has not, however, been matched by official action to put down human rights abuse and violence in other than the small minority of countries of origin of strategic importance to powerful governments. Yet under the guise of the so-called "right to remain," refugees are increasingly forced to remain within the boundaries of their own countries in unsafe conditions, as was the case in Bosnia, Kurdistan, and Rwanda.¹⁶

This challenge is made greater by the fact that one state's policy decisions on the relative leniency or restrictiveness of its asylum regime often creates negative externalities for other states and can thus lead to strained relations between states.¹⁷ There has therefore been increasing dissatisfaction with the system of international refugee protection which, in the eyes of many, suffers from substantial burden-sharing problems.

Schuck emphasises that states are motivated largely by what they regard as their national self-interest and that they differ significantly in both the attitudes and the resources that they bring to refugee policy. Taking Japan as an example, he suggests that any regional or global quota system would assign it a large quota on the basis of its wealth. *'With a remarkably homogeneous population and no tradition of refugee protection, immigration, or assimilation of foreigners, Japan would presumably be eager to purchase a discharge of its large protection obligation from another country [...] at a high*

¹⁶ Ibid

¹⁷ Recent examples were the strained relations between Denmark and Sweden following the introduction of highly restrictive asylum measures by the new conservative government in Denmark and the controversy about the Sangatte refugee camp which soured relations between France and Britain.

price, reflecting both its high cost of living and its determination to maintain its ethnic homogeneity'.¹⁸

In recent years, a number of academic commentators have called for the creation or recognition of a norm of equitable international burden-sharing for refugees¹⁹ and the establishment of concrete refugee burden-sharing mechanisms at the regional or global level²⁰. They further argue that burden-sharing initiatives that attempt to force all nations to increase contributions in a particular category of provision are likely to be counterproductive for the efficient provision of collective goods such as refugee protection.

It can then be argued that the provision of this collective good is closer to optimality when countries are able to specialize with regard to their contributions. The existence of country-specific benefits from refugee protection combined with tendencies for specialisation in states' contributions can both help to raise the efficiency of refugee protection efforts. When just looking at reactive protection contributions as most burden-sharing models do, it is tempting to suggest that some larger countries should be contributing more in this area. Equalizing reactive contributions also appears to be the general thrust of recent European policy

¹⁸ Schuck, P. "Refugee Burden-Sharing: A Modest Proposal." *Yale Journal of International Law* vol 22. (1997); p. 284

¹⁹ Hathaway J and Neve A 'Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', *Harvard Human Rights Law Journal*, 1997 Vol. 10), p.115-211.

²⁰ James Hathaway, *Can international Refugee Law Be Made Relevant Again?* USCR article found in http://www.refugees.org/world/articles/intl_law_wrs96.htm..

initiatives. However, any attempt to impose quotas and such like should be seen as a hindrance toward greater specialisation and trade, with adverse overall effects.²¹

Scholars have argued that burden-sharing initiatives, if they are to strengthen refugee protection, need to be aware of variations in states' preferences and need to recognize comparative advantages possessed by individual states; for if they do not, they risk to undermine the search for more effective refugee protection efforts.²²

Kourula Pirkko argues that international co-operation touches on contemporary contents of international solidarity and burden sharing not only financial contributions for refugee assistance, international protection and development programs but also States' full participation in and support to the facilitation of solutions. Burden sharing calls for commitment, consistence and greater initiatives by states to address exclusion and displacement in global, regional, national and societal contexts.²³

Scholars also argue that the manifestation of burden sharing places particular demands in the handling of state's domestic affairs, for example, in relation to the admission and treatment of asylum seekers and refugees in a manner to contribute to the enhancement of respect for human rights and to conflict resolution.²⁴

²¹ Schuck, P. "Refugee Burden-Sharing: A Modest Proposal." *Yale Journal of International Law* vol 22. (1997); p. 284

²² Ibid

²³ Supra note 21, p. 358

²⁴ Hartling Poul, "International Solidarity and the International Protection of Refugees"; (Congress on International Solidarity and Human Actions, International Institute of Humanitarian Law, San Remo, Sept. 1980); pp. 237-243

Writing on the impact of refugee flows on development in Africa and the need for urgent burden sharing measures, Robert Gorman contends that durable solutions for protection of refugees can no longer be conceived of as only requiring assistance to the refugees themselves; as it is no longer possible to ignore the implications of refugee movements on development.²⁵

A second debate in the area of burden sharing relates to the effect of public perception of refugees on the reaction of their governments. Adrienne Millbank argues that public opinion of refugees affects government's reaction to the refugees. The majority of refugees are fleeing to equally poor countries and the media is full of images of people who have obviously been driven from their homes and who are clearly in need of assistance. When asylum seekers journey to Western countries, people become suspicious of their motives.²⁶ Millbank argues that in Europe, acceptance rates are low, and the public often concludes that most people seeking asylum are doing so for economic and social reasons.

The fact that countries deal with asylum seekers as an issue of migration control, and of domestic politics, is anathema to many people who sympathise with their situations. That racism and xenophobia are now commonly described as 'rampant' in European countries supporters of asylum seekers attribute to unreasonably high rejection rates, and 'human deterrence' measures of detention, and reduced welfare and other measures of social exclusion. Other commentators focus on the fact that public hostility to asylum driven migration has weakened the capacity of Western

²⁵ Gorman, R. F., *Coping with Africa's Refugee Burden: A Time for Solutions*, (Martin Nijhoff Publishers, Dordrecht, 1987) p. 8

²⁶ Adrienne Millbank, *"The Problem with the 1951 Refugee Convention"* Research Paper 5 2000-01, Social Policy Group, 5 September 2000

European governments to develop managed migration programs at a time when these are needed to fill skills shortages. Polls in EU countries consistently reveal a majority opinion in favour of curtailing asylum seeker rights and against further immigration.²⁷

Pirkko Kourula in his book, *Broadening the Edges: Refugee Protection and International Protection Revisited* argues that despite the problems present by the present refugee protection system, time does not seem to be ripe for a new convention regime for refugees. He argues that the institutional framework that is already in existence must be streamlined and continuously checked in order to maintain and enhance its responsiveness.²⁸ Within States political will needs to become sufficiently mature to allow for the formulation of a workable strategy for burden sharing and refugee protection generally, within states and between states.²⁹

Arguing that Refugee Law is limited and outdated, James Hathaway has advocated replacing the Convention with a more equitable model of international refugee law, which *"... would allow more good to be done for more refugees than is possible under the present regime. The small minority of refugees who presently find solid protection in developed states may see a reduction of its relative privileges under such a system, but a reduction in the Cadillacs of the few could, I believe, provide bicycles for the many"*.³⁰

²⁷ In a *Forsa* poll published July 2000 the majority of Germans indicated that they wanted rights to asylum limited, and that they considered there were 'too many foreigners' in the country. In a Eurobarometer survey commissioned by the EU several years ago one third of respondents openly described themselves as 'racist', and only a minority considered immigration would bring their country any real benefits. Described in Jeffrey Smith, *'Europe Bids Immigrants Unwelcome'*, *Washington Post Foreign Service*, 23 July 2000.

²⁸ *Supra* note 18, p. 339

²⁹ *Ibid*

³⁰ James Hathaway, *Can international Refugee Law Be Made Relevant Again?* USCR article found in http://www.refugees.org/world/articles/intl_law_wrs96.htm.

This project goes beyond outlining the existing legal instruments for protection of the refugees. It offers a critical analysis of the adequacy and operations of the existing legal and institutional frameworks. It further examines state practice in so far as refugee protection is concerned, and the factors that account for the failures of the existing refugee protection structure. Further, this project offers recommendations for the formulation of an enhanced monitoring system that will ensure that the protection of refugees is not left entirely to the goodwill of the host state.

1.8 Conceptual Framework:

This study rests heavily on the interest convergence theory proposed by James C. Hathaway. Within the realm of International Refugee Law specifically, and International Law in general, there is a growing debate on the issue of whether states can adhere to rules made under international law where such rules do not conform to the interests of the state.

Hathaway argues that states now increasingly make binding commitments to a wide variety of regional and other sub-global organizations, based on common interests such as free trade, security, the environment, economic development, and shared heritage. He reckons that these interstate associations are an effective forum for the design and delivery of mechanisms of common but differentiated responsibility for refugee protection.³¹ He argues that the precise mechanisms by which interest

³¹ Hathaway argues that the impetus for states to share refugee protection responsibilities should come from an appreciation that cooperation through an interest convergence group offers them a form of collective insurance should they, or a state with which they have close ties, ever be faced with a refugee influx. It is only by ensuring the broad distribution of the responsibility of physical protection, and the reliable availability of fiscal support, that states will come to see the enforcement costs of *non-entrée* as being more

convergence groups fashion a model of common but differentiated responsibility will vary. Absolutely critical to the successful implementation of a cooperative process, however, is the willingness of interest convergence group members to make a binding commitment to convene whenever a member state perceives itself to be unable to cope with a refugee protection responsibility. The meeting of the interest convergence group must happen quickly, so that an appropriate response to a refugee crisis can be designed and put in place before there is a risk of the denial of protection.³²

Haggard and Simmons argue that the growth of international regulatory regimes is often opposed by many national interests, especially when international rules threaten to reduce the wealth or power of a country's interest groups. They argue that the country's interest groups bring pressure on governments to ignore regime rules and to frustrate international rule-making.

1.9 Hypotheses:

The study proceeds on the presumption that the existing legal and institutional framework for international refugee law supports the principle of burden-sharing. This study makes the assumption that there exist weaknesses in the legal and institutional framework for the protection of refugees, and that those weaknesses account for the failure by states to comply with their duty to co-operate in the protection of refugees.

expensive than simply living up to protection obligations. This is particularly crucial in situations of mass influx.

³² James Hathaway, *Can international Refugee Law Be Made Relevant Again?* USCR article found in http://www.refugees.org/world/articles/intl_law_wrs96.htm.

This study is based on the hypothesis that states are more prone to pursue their national interest rather than share the burden of refugee protection as is required of them under international refugee law; and therefore in the absence of a convergence between the interests of the state and those of the international community, burden sharing mechanisms are bound to fail.

1.10 Research Methodology:

Research for this project will focus secondary data obtained from the various instruments and texts and commentaries on international refugee law. We shall also rely on data collected on the current trends in burden sharing, to draw a comparative analysis between the principle of burden sharing as encapsulated in the legal framework and states' practice.

1.11 Chapter Breakdown

Chapter one begins with an introduction to international refugee law and a background to the principle of burden sharing as enunciated in international refugee law. It then proceeds to give the statement of the problem as well as the justification and scope of the study. The Chapter also analyses available literature on the subject of burden sharing and introduces the conceptual framework of the study as well as the working hypotheses and methodology of research applied in the study.

Chapter Two begins with an analysis of the fundamental concepts of the Refugee Protection Regime. This analysis aims at obtaining an understanding of the principles of the right to asylum, non-refoulement, and burden sharing being the

core principles of the refugee protection regime. The Chapter then proceeds to a detailed analysis of the concept, function and the legal basis of principle burden sharing in the realm of refugee law. The chapter takes a practical focus on the challenge of burden sharing, analyzing states practice and past burden sharing efforts.

Chapter Three aims to identify the possibilities and options for the formulation of workable burden sharing regimes. The Chapter offers an in-depth analysis of various core principles which are necessary for the formulation of such a regime.

Chapter Four makes a summary of conclusions arrived at and offers practical recommendations that could be applied at state level and at the international level to enhance burden sharing for the effective protection of refugees. This chapter further makes proposals for the enhancing of the capacity of the UNHCR to perform its supervisory role.

CHAPTER TWO: BURDEN SHARING AND REFUGEE PROTECTION

2.1 Introduction to the International Refugee Protection Regime:

International refugee protection is the system which has been devised by the international community to enable refugees to gain access to the safety and security that they are compelled to seek away from home. It makes it possible for them as persons who have lost or are unable to claim national protection in both its legal and territorial sense, to find another approximate, extra-territorial framework to secure their lives, safety and liberty.

It is called "international protection" because those who are unable to benefit from the national protection of their countries of origin come to obtain the substitute protection of another state and the international community acting in concert together. In this context, the system guarantees refugees access to safety, security and the ability to recreate the normalcy and fulsomeness of a human life to the greatest degree possible.

The legal structure, definition and essential elements of the system are derived, in the first instance, from the explicit and implicit dictates of international human rights law and, secondly, treaty law. The latter refers to international refugee instruments which set down more specific principles, standards, rights and obligations. From the point of view of human rights law, refugees have the same

rights to life, liberty and security as any other human being, wherever they may find themselves and under whatever status.³³

Given this primacy of human rights obligations, refugee-specific instruments serve to articulate precision, coherence and predictability in the international protection system. There are two main international legal instruments that are applicable to the international community. The first is the 1951 United Nations Convention Relating to the Status of Refugees,³⁴ and the second is the 1967 Protocol Relating to the Status of Refugees³⁵.

The 1951 Convention is a landmark instrument in the setting of standards for the treatment of refugees. It incorporates, either directly or as an inevitable interpretation, the fundamental concepts of the refugee protection regime, which are as relevant in the contemporary context as they were in 1951. These include the principle of non-refoulement, namely, that refugees should not be returned to persecution or the threat of persecution; that protection be extended to all refugees without discrimination; that since the grant of asylum may place unduly heavy

³³ This essential basis for refugee protection is explained, once again, by Goodwin-Gill who poses the question "what is it in a refugee's claim that requires it to be met?" and answers that:

"It is the right of every human being to life, liberty and security which may be jeopardized by breach of the principle of refuge. At this level, there is no essential difference between the claim of the potential victim of persecution and that of the potential victim of violence as, in either case, the refusal of refuge may be a critical link in the causative chain leading to the loss of life, liberty and security": Guy S. Goodwin-Gill, 1989. "The Language of Protection", *International Journal of Refugee Law* (p. 15). See also Lawyer's Committee for Human Rights, 1995. *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York. "refugees have human rights...And the rights to which they are entitled are not simply a special set of rights laid down in international refugee treaties, but the whole range of civil and political as well as economic, social and cultural rights contained in the UN and OAU treaties." (p. 4)

³⁴ The "1951 Refugee Convention," as it is commonly referred to, was adopted in Geneva on 28 July 1951. The text of the Convention is to be found in UNHCR, 1991. *Collection of International Instruments Concerning Refugees*, Geneva, (p.10).

³⁵ The "1967 Protocol" was adopted on 31 January 1967. The text of the Protocol is found in the *Collection*, op cit., note 14 (p. 40).

burdens on certain countries, a satisfactory solution of the problem of refugees can be achieved only through international cooperation; and that cooperation by states with the UN High Commission for Refugees is essential if the effective coordination of measures taken to deal with the problem of refugees is to be ensured.

The system of refugee protection elaborated in refugee law instruments sets down criteria for claiming the protections they establish, the key element being the definition of a refugee. According to the 1951 Convention, a refugee is a person who, because of 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.³⁶

The 1969 OAU Convention³⁷ employs this definition of a refugee as well and further adds what is commonly referred to as the "expanded OAU definition". It provides that "the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."³⁸

³⁶ Article 1 of the 1951 Refugee Convention.

³⁷ The "1969 OAU Convention" was adopted in Addis Ababa on 10 September 1969. The text of the Convention is found in the Collection, op cit., note 14 (p. 193).

³⁸ Article 1(2) of the 1969 OAU Convention

Persons or groups who meet these criteria are owed the obligation to be treated in accordance with certain human rights and refugee-specific standards. The most important of the pertinent rights and responsibilities can be stated briefly. They include the duty of a state to admit the refugee into the territory in which he or she seeks safety, for the refugee to be enabled to enjoy asylum and, above all, not to be returned to danger. These twin principles, admission into asylum³⁹ and the prohibition of forcible return⁴⁰, or the non refoulement principle as it is also known, are the cornerstones of the system of international protection.

The last of these rights are designed to create for the refugee a path towards his or her becoming again a full member of a community. The refugee should thus be able either to integrate legally, socially and economically in the country of asylum, another country or to return in safety, dignity and security to the country of origin. Other rights include exemption from the doctrine of reciprocity and exceptional measures which an asylum state can otherwise take against nationals of a foreign state, entitlement to travel documents, identity cards, administrative assistance, transfer of property and non-punishment for illegal entry or presence in the country of refuge.⁴¹

³⁹ With regard to the duty of admission, the 1969 OAU Convention states: "Member states of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality"; Article II (2) of the 1969 OAU Convention ³⁹

⁴⁰ The obligation to protect refugees from being returned to territories where they may face danger and to ensure that they are admitted into safety is spelt out in the provision stating: No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out [in the Article which defines who is a refugee. Article II (3) of the 1969 OAU Convention.

⁴¹ Guy S. Goodwin-Gill, 1989. "The Language of Protection", International Journal of Refugee Law (p. 15). See also Lawyer's Committee for Human Rights, 1995. African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention, New York. "refugees have human rights...And the rights to which they are entitled are not simply a special set of rights laid down in international refugee treaties, but the whole range

One of the most important provision for the protection of refugees is the right to *non-refoulement*. A refugee's right to be protected against forcible return or, *refoulement*, is set out in Article 33 of the the 1951 Convention.⁴² *Refoulement* is also prohibited explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁴³, the Fourth Geneva Convention of 1949⁴⁴, the International Covenant on Civil and Political Rights⁴⁵, the Declaration on the Protection of all People from Enforced Disappearance⁴⁶, and Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁴⁷

In addition, *refoulement* is prohibited explicitly or through interpretation in a number of regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamentals Freedoms⁴⁸, the American Convention on Human Rights⁴⁹, the OAU Refugee Convention⁵⁰, and the Cairo Declaration on the protection of Refugees and Displaced Persons in the Arab World⁵¹. It is widely accepted that the prohibition of *refoulement* is part of

of civil and political as well as economic, social and cultural rights contained in the UN and OAU treaties." (p. 4)

⁴² Article 33(1) of the 1951 Convention: No contracting state shall expel or return 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.

⁴³ Article 3

⁴⁴ Article 45, paragraph 4

⁴⁵ Article 45

⁴⁶ Article 8

⁴⁷ Supra note 2, p. 14

⁴⁸ Article 3

⁴⁹ Article 22

⁵⁰ Article II

⁵¹ Article 2

customary international law. This means that even states which are not party to the Refugee Convention must respect the principle of *non-refoulement*.⁵²

The Universal Declaration of Human Rights states that everyone has "*the right to seek and to enjoy in other countries asylum from persecution*,"⁵³ whereas international refugee law provides that no country shall return a refugee to a country where "*his life or freedom would be threatened*." The right to seek asylum has in recent years been challenged by state practice. For example, on January 3rd 2007, Kenya closed its border with Somalia and expelled some 400 asylum seekers. According to Kenya's Minister of Foreign Affairs Raphael Tuju, the border was closed to prevent the Union of Islamic Courts from escaping into Kenya, thereby preventing a regionalization of the conflict and a threat to Kenyan security.⁵⁴ As argued by Tuju: "*Kenyans are overburdened, in fact Europe and America does not give us enough aid to support these refugees – other nations should also take the burden*."⁵⁵

Although the fundamental concepts of the international refugee protection regime remain intrinsically sound, contemporary realities on the ground demand some adjustment. There are gaps in protection, which need to be bridged through complementary mechanisms.

⁵² Supra note 2, p. 14.

⁵³ Article 14(1)

⁵⁴ The decision was criticized by the United Nations and human rights organizations. Within hours of the border closure, the United Nations High Commissioner for Refugees (UNHCR) said that while Kenya has a right to ensure its security, it also "has a humanitarian obligation to allow civilians at risk to seek asylum on its territory." The UNHCR was right to question Kenya's decision, but the balance between national security and refugee protection is not always that simple, and a rush to judgment is not always the best response.

⁵⁵ Daily Nation, Nairobi, 4th January 2007, p. 3

2.2 Background to the Principle of Burden Sharing

Because refugees flee their home countries to escape violence or persecution, they almost always need emergency assistance, food, water, clothing and shelter. If the refugees must stay in their host country – the country that takes them in – for a long time, they also require health care, schooling and jobs.

Assisting and protecting refugees is therefore a great burden for host countries. The burden is even more serious for developing countries, since hosting refugee populations can impact economic development. Countries that already suffer from widespread poverty and a weak economy may not have the resources to properly assist and protect refugees.

Hosting refugees is, above all, an important and necessary responsibility. Refugees must be protected and their rights must be upheld. But because the costs involved with hosting refugees are high, countries must make an effort to share this responsibility with others. Burden-sharing means dividing the cost of hosting refugees among several different countries. It helps the host country provide better protection to the refugees and offer resources so they are healthy and safe. But countries disagree over who should share this burden and how. For instance, countries may insist that they are only able to protect refugees in their own regions. Also, some insist that many countries should agree to host refugees so that one host nation does not have the single, or the greatest, burden.

Safeguarding refugees is an important responsibility that countries must take very seriously. Although hosting refugees can be expensive and difficult, refugees' human rights must be protected at all costs. But in order to effectively protect refugees, a host country must have the proper resources. Providing food, clothing and shelter is only a small portion of the overall cost.

The concept of burden-sharing in refugee crises dates back to when the international community first started to recognize refugees. Paragraph Four of the Preamble to the *1951 Convention relating to the Status of Refugees* states, "*The grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.*" There are also economic, environmental and security costs associated with hosting refugees⁵⁶.

2.2.1 *Economic Impact*

Refugee flows affect the economy of the host country in several serious ways. First, refugees need public services such as education, health care and sanitation facilities. They also require resources that may sometimes be scarce, such as energy, food, water, transportation and employment. When the host country's government must use money or resources to help the refugee population, fewer resources are available for its own citizens.

⁵⁶ Burden-Sharing: Discussion Paper Submitted by UNHCR Fifth Annual Plenary Meeting of the APC" <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/17.html>

This impact is even more severe when the host country is poor. Unfortunately, many of the countries that host the largest refugee populations are developing countries. Meanwhile, refugees fleeing a conflict area may go to a neighboring country that is facing economic troubles because of that same conflict.

2.2.2 Environmental Impact

Any large influx of people can disrupt ecosystems by creating large amounts of waste and by using more natural resources. Countries face this problem when hosting refugee populations. Refugees require land, a scarce resource in many countries, to live on and sometimes to cultivate.

Increases in the demand for other natural resources such as food, water and fuel also place strains on the environment. Refugees may also need to cut down trees and other vegetation to use as firewood or material to build shelters. When this demand for resources is extremely large, it can affect the long-term ability of these resources to regenerate.

2.2.3 Security Concerns

Even though refugee camps are designed to protect refugees, they are often located near conflict areas. Violence can also break out in a camp just like it can in any community. But policing camps and protecting refugees can be expensive. Cities and towns spend millions of dollars to protect citizens and the same is true for areas that must protect refugees.

There are many different ways for the international community to help share the burden on countries that host refugees. Assistance can come in the form of technical expertise, human resources, money or supplies. But most effective way to share a refugee burden is for other countries to host some of the refugees on their own territory. Even though financial contributions are helpful, the most serious burdens are faced by states that actually have refugees living within their borders.

This is not always possible, especially if refugees are fleeing a remote area. It would be expensive and difficult, for instance, for refugees from an African country to travel to northern Europe in large numbers. In addition, many developed countries also have laws preventing many refugees from entering the state. So even if people fleeing a conflict or persecution can make it to the new land, they may be turned away. Other methods of sharing the burden of refugees are for some countries to contribute necessary resources. These include: wood for housing; crops or food products to feed the refugees; and experts or officials to oversee services like education, health care and sanitation.

Refugees may have to live in a host state for a long time. Therefore, it is important to remember that burden-sharing programs must be long-term and not simply implemented at the start of a refugee crisis. There is also a need for burden- and responsibility-sharing when refugees return to their country of origin. If the refugees' homes and land have been destroyed, they will need assistance to rebuild their communities and resume their lives. Conflict-torn countries generally do not

have the means to repair their own lands, and so require aid from other countries or organizations.

2.3 The Concept and Function of Burden-sharing

Rising numbers of refugees have meant that forced migration is now regarded as one of the key challenges facing nation states today.⁵⁷ The largest part of the world's 15 million asylum seekers in 2001 sought refuge in developing countries. However, since the early 1980s the number of asylum seekers in Europe has increased almost tenfold to 970.000 in 2001. The distribution of increased numbers of refugees has been very uneven. In the period between 1985 and 1999, Switzerland as the largest recipient of asylum seekers on average relative to its population size, was faced with 30 percent more asylum applications than Sweden, 40 percent more than Germany, 6 times as many as France and the UK, 30 times as many as Italy and 300 times as many as Portugal and Sweden⁵⁸.

This challenge is made greater by the fact that one state's policy decisions on the relative leniency or restrictiveness of its asylum regime often create negative externalities for other states and can thus lead to strained relations between states.⁵⁹ There has therefore been increasing dissatisfaction with the system of international

⁵⁷ "Refugee" here is used in its broadest connotation to characterize individuals who have left their country in the belief that cannot or should not return to it in the near future, although they might hope to do so if conditions permit. In this usage, the category includes those recognized under the Geneva Convention but also those who have applied for refugee (or a subsidiary) protection status.

⁵⁸ UNHCR, *Refugees and Others of Concern to UNHCR - Statistical Overview*; Geneva, 1999.

⁵⁹ Recent examples were the strained relations between Denmark and Sweden following the introduction of highly restrictive asylum measures by the new conservative government in Denmark and the controversy about the Sangatte refugee camp which soured relations between France and Britain.

refugee protection which, in the eyes of many, suffers from substantial burden-sharing problems.

A commitment to international solidarity and burden-sharing in relation to refugees at least rhetorically, has been present since the inception of UNHCR. Its documented origins are found in Paragraph 4 of the Preamble of the 1951 Convention relating to the Status of Refugees, which expressly acknowledges that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation." There have also been a number of concrete examples of international refugee burden-sharing arrangements in the period after the end of World War II, during the 1970s with the 'Comprehensive Plan for Action' (boat people) and during the 1990s (Kosovo Evacuation Plan).

In recent years, a number of academic commentators have called for the creation or recognition of a norm of equitable international burden-sharing for refugees⁶⁰ and the establishment of concrete refugee burden-sharing mechanisms at the regional or global level⁶¹.

⁶⁰ Hathaway, J. and Neve, A., 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', Harvard Human Rights Law Journal, Vol. 10 1997; p.115-211 and Fontenye J-L; 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees', Australian Yearbook of International Law, Vol 8, 1983, pp.162-88.

⁶¹ Schuck, P; "Refugee Burden-Sharing: A Modest Proposal." Yale Journal of International Law . (1997). Vol. 22; Noll, G "Prisoner's Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union." German Yearbook of International Law . (1997). Vol. 40: pp.405-37 and Thielemann, E. "Why European Policy Harmonization Undermines Refugee Burden-Sharing", European Journal of Migration and Law, (2004) Vol. 6, No. 1, pp. 43-61

The term 'burden-sharing' was first prominently used in the context of debates about NATO contributions in the early 1950s⁶². The essence of these debates, which continue until today, has been about sharing defence costs among the members of the North Atlantic alliance (that is, getting the Europeans to pay more). The adoption of this terminology in the context of forced migration is of course not unproblematic. However, despite its potentially prejudicial connotation in a human rights context in which one might wish the language of costs and benefits to be absent, the term 'burden-sharing' is used here to reflect the way the debate about the perceived and real inequalities in the distribution of displaced persons and refugees has been conducted in Europe over recent years. Attempts to replace the term in this area with a call for responsibility sharing or the 'equal balance of efforts' between the Member States have had little impact on the way the public debate has been led.

This has been also recognised by the EU where refugee burden-sharing has been discussed since the mid-1980s and to which the EU has repeatedly stated its commitment. Most recently, this commitment was reiterated at the Brussels European Council meeting in November 2004. In their final declaration, EU leaders stressed that the development of a common policy in the field of asylum, migration and borders "should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical co-operation between member states".⁶³ This concern has been echoed by the UNHCR for which 'Burden-

⁶² Olson, M. and R. Zeckhauser "An Economic Theory of Alliances." *Review of Economics and Statistics*; (1966). Vol.48: pp. 266-79; O Neal, J. R. "The Theory of Collective Action and Burden-sharing in NATO." *International Organization*; (1990). Vol. 44(3): pp. 379-402 and Boyer, M. A. "Trading Public Goods in the Western Alliance System." *Journal of Conflict Resolution*; (1989). Vol. 33(4)

⁶³ Brussels European Council, 4/5 November 2004, Presidency Conclusions, page 18.

sharing is a key to the protection of refugees and the resolution of the refugee problem'.⁶⁴

UNHCR's former High Commissioner has stressed:

*'There is a need for responsibility- and burden-sharing within the EU [...] I fear that high protection standards will be difficult to maintain in a system which shifts responsibility to states located on the external border of the EU, many of which have limited asylum capacity.'*⁶⁵

A sceptic might regard the refugee burden-sharing debate among Western politicians as being full of empty rhetoric, a debate that reflects wishful thinking on the part of some and the manipulative avoidance of tackling the real issues by many others who are well aware that 14 out of the world's 15 million refugees each year are accommodated by developing countries.

The logic of burden-sharing rests on the axiom that an inequitable distribution of costs and responsibilities in protection will generate not only a maximum of fairness among states, but also a maximum of openness vis-à-vis protection seekers. Where a collectivity of states shares the task of protection, peak costs will be avoided and existing resources will be fully exploited. The two beneficiaries of such arrangements are the host states and the protection seekers. First, states engaging in burden-

⁶⁴ Official Documents Burden-Sharing - Discussion Paper Submitted By UNHCR Fifth Annual Plenary Meeting of the APC; ISIL Year Book of International Humanitarian and Refugee Law, Vol. 17 (2001)); URL: <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/17.html>

⁶⁵ It has often been emphasised, that the traditional "countries of immigration" (Australia, Canada, New Zealand and the United States) offered resettlement places for up to 100,000 refugees in 2004, whereas Europe as a whole only made 4,700 places available. United Nations High Commissioner for Refugees, Mr. Ruud Lubbers, Talking Points for the Informal Justice and Home Affairs Council (Luxembourg, 29 January 2005)

sharing cut their total costs. Second, the number of protection seekers finding haven is more than it would be in absence of burden-sharing arrangements.

Indisputably, responsibility for refugee protection is unequally shared, whether among the states of the North and South, or at regional levels. It is reasonable to assume that receptive inequalities impact on law and that actors seek to influence these inequalities through the instrument of law.

2.4 Legal Basis of the Principle of Burden-Sharing

The principle of burden-sharing, which requires states to co-operate in dealing with the global refugee problem, is not merely a moral but a legal principle. It is, arguably, a principle of customary international law. Such a characterization can be sustained by considering the following chain of evidence, that is, firstly, the provisions of universal and regional conventions and declarations on refugees, second, the conclusions adopted by the Executive Committee of the UNHCR Programme, thirdly, the General Assembly resolutions on the problem of refugees, fourthly, a host of conventions and declarations which endorse the general principle of international cooperation in diverse fields of international life, and fifthly, state practice relating to settlement and local integration as well as financial assistance to host states and institutions such as the UNHCR, and the United Nations Relief and Works Agency.⁶⁶

⁶⁶ Chimni, B.S. 'The Global Refugee Problem in the 21st Century and the Emerging Security Paradigm: A Disturbing Trend.' in A. Anghie and G. Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*. The Netherlands, Kluwer Law International; 1998; p. 21

The origin of the principle of burden-sharing in the post-war period, and in a refugee specific context, can possibly be traced to the 1951 Convention Relating to the Status of Refugees⁶⁷ which states, in its preamble, that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.⁶⁸

There was, however, no substantive provisions devoted to the principle in the 1951 Convention. The first substantive formulation on burden-sharing was contained in Article 2 (2) of the 1967 Declaration on Territorial Asylum which states that where a state finds difficulty in granting or continuing to grant asylum, states, individually or collectively through the United Nations, shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that state.

At the regional level, the OAU Convention contains an important provision on burden-sharing. Article 2 (2) states: "where a member state finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other member states and through OAU, and such other member states shall, in the spirit of African solidarity and international cooperation, take appropriate measures to lighten the burden of the member state granting asylum".⁶⁹

⁶⁷ 189 UNTS 150.

⁶⁸ Ibid., Preambular para. 4.

⁶⁹ See also OAU Doc.BR/COM/XV/55.90, Khartoum Declaration on Africa's Refugee Crisis, 1990; International Journal of Refugee Law (vol. 3, 1991), pp. 153-157.

The Cartagena Declaration also emphasizes the need for burden-sharing. In the preambular paragraphs, it underlines the need to request immediate assistance from the international community for Central American refugees, to be provided either directly, or through bilateral or multilateral agreements, or through UNHCR and other organizations and agencies.⁷⁰

The Asian-African Legal Consultative Committee (AALCC) adopted in 1987 an addendum to its 1966 principles calling for greater international burden-sharing. The report of the AALCC on the adoption of the addendum states: "in the light of the exchange of views and the material placed before the committee... the conclusion could be drawn that the principle of international solidarity in dealing with the refugee situations and the concept of burden-sharing in that context appear by now to be firmly established in the practice of states".⁷¹

There were additional principles adopted by the committee, namely, firstly, that the refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and, as such, the principle of burden-sharing should be viewed in that context; secondly, that the principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for refugees whether

⁷⁰Cartagena Declaration on Refugees, Nov. 1984, Regional Instrument 206, UN Sales No. G.V.E.96.0.2. Conclusion 11 of the Declaration also stresses the need "to make a study, in countries in the area which have a large number of refugees, of the possibilities of integrating them into the productive life of the country by allocating to the creation or generation of employment the resources made available by the international community through UNHCR, thus making it possible for refugees to enjoy their economic, social and cultural rights".

⁷¹ See generally, UNHCR, *Collection of Record on International Refugees and Displaced Persons*, Vol. II (UNHCR, Geneva, 1995), pp. 63-64.

within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing access to refugees in countries outside the region due to political, social and economic considerations; thirdly, that the principle of international solidarity and burden-sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to states in protecting and assisting refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees; and fourthly, that international solidarity and cooperation in burden-sharing should be manifested, whenever necessary, through effective concrete measures in support of states requiring assistance whether through financial or material aid, or through resettlement opportunities.⁷²

The conclusions of the Executive Committee of UNHCR contain a large number of references to the principle of burden-sharing. For example, Conclusion No. 22 on Protection of Asylum-Seekers of Large-Scale Influx stresses the need to 'establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum-seekers'. The conclusion proceeds to state that: a mass influx may place unduly heavy burdens on certain countries and that a satisfactory solution to the problem, international in scope and nature, cannot be achieved without international cooperation. States shall, within the framework of international solidarity and burden-sharing, take all

⁷² Ibid

necessary measures to assist, at their request, states which have admitted asylum-seekers in large-scale influx situations.

These Conclusions have been, in one form or another, reiterated by the Executive Committee since. For example in 1988, it reaffirmed that refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of states to respond in concert and whole-heartedly, in a spirit of true humanitarianism and international solidarity. It went on to stress that the principle of burden-sharing has a fundamental role to play in encouraging a humanitarian approach to the grant of asylum and in the effective implementation of international protection in general. Finally, it recalled that in all circumstances, the respect for fundamental humanitarian principles is an obligation for all members of the international community, it being understood that the principle of solidarity is of utmost importance to the satisfactory implementation of these principles.⁷³

More recently, the Executive Committee has recognized that countries of asylum carry a heavy burden including, in particular, developing countries with limited resources, and those which, due to their location, host large numbers of refugees and asylum-seekers. The Committee reiterated in this regard its commitment to uphold the principles of international solidarity and burden-sharing and called on governments and UNHCR to continue to respond to the assistance needs of refugees until durable solutions are found.⁷⁴

⁷³ Conclusion No. 52 (XXXIV) entitled 'International Solidarity and Refugee Protection' which was adopted by the Executive Committee of UNHCR in 1988.

⁷⁴ Conclusion No. 79 (XXVII) adopted in 1996.

These conclusions also find their place in the General Assembly resolutions dealing with the problem of refugees. For example, a General Assembly resolution of 1991,⁷⁵ stresses the need to find ways in which burden-sharing mechanisms might be strengthened, and goes on to urge the international community, including non-governmental organizations, in accordance with the principle of international solidarity and in the spirit of burden-sharing, to continue to assist the countries, in particular those developing countries that despite limited resources, continue to admit large numbers of refugees and asylum-seekers on a permanent or temporary basis.

The element of *opinion juris* is clearly present inasmuch as no state rejects the idea of burden-sharing. While the current practice of burden-sharing, by western states in particular, appears to suggest otherwise, they do not involve a rejection of the principle of burden-sharing, but its violation or one could say a controversial and illegitimate interpretation of it. A rejection of the principle would, in the final analysis, involve the denial of the core principle of non-refoulment. The links between the principle of burden-sharing and the principle of non-refoulment have been noted by a number of established scholars.

Atle Grahl-Madsen has observed that the principle of non-refoulment is part of a sacred trust, but the principle does not stand alone. It is, indeed, closely connected

⁷⁵ G.A Res. 46/106, 16 Dec., 1991, on the Office of the UNHCR.

with the principle of burden-sharing.⁷⁶ Goodwin-Gill writes, "*the peremptory character of non-refoulment makes it independent of principles of solidarity and burden-sharing, but these cannot be ignored in a society of inter-dependent states. In situations of large-scale influx, protection cannot cease with the fact of admission; on the contrary, it must move towards solutions in full knowledge of the political and practical consequences which result from a state abiding by non-refoulment*".⁷⁷

2.5 Burden-Sharing: The Challenge

Given that international protection must palpably centre upon the human rights of refugees, the reality in most states shows a system that is being stood on its head. Increasingly, the priority shaping both state and community response towards refugee protection is the "protection" of the country of refuge from refugees themselves. Thus, containment, rather than protection, is figuring as a major purpose in the relationship with refugees at the national level.

One hastens to underline that in a number of countries, the authorities and people still strive, often gallantly, to meet the obligations owed to refugees. Moreover, policies, legislation and administrative practices, which are positive and progressive, are undeniably still part of the picture of the refugee reality. Be that as it may, the pre-occupation with domestic interests over those of refugees is clearly gaining the upper hand.

The dialogue on refugees has become centred on priorities such as national security, law and order and a concept of the social security of the national population that

⁷⁶ Atle Grahl-Madsen, "Refuge in Canada: The Legal Background," in H. Adelman and C.M. Lanphier, (eds), *Refuge or Asylum: A Choice for Canada*, (York Lanes Press, Toronto, 1991), p. 8.

⁷⁷ Guy Goodwin-Gill, *The Refugee in International Law*, 2nd Ed; (Clarendon Press, Oxford, 1996), p.201.

allows little room for the elevation of refugees. The notion that they are or should be the subject of preemptory, priority rights is evidently losing ground. Just as troublingly, this preponderance of domestic priorities has come to be instrumentalised in ways that have included resort to the violation of the rights of refugees as a matter of deliberate state policy.

The system of refugee protection is not simply weathering more protracted stress from interests with which it has always been in competition. As a postulate of the domestic legal and political order, it is being purposely devalourised, undermined and swept aside.

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards.

The UNHCR shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and inter-governmental initiatives that undermine this principle. So long as there is equivocation on the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility toward them.

Ironic though it may seem, we believe that the present break down in the authority of international refugee law is attributable to its failure to explicitly accommodate the reasonable preoccupations of governments in the countries to which refugees flee. International refugee law is part of a system of state self-regulation. It will therefore be respected only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests.

In contrast, refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum seekers are able to reach. It is a preemptory regime. Apart from the right to exclude serious criminals and persons who pose a security risk, the duty to avoid the return of any and all refugees who arrive at a state's frontier takes no account of the potential impact of refugee flows on the receiving state. This apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether.

2.5.1 The Demise of the Interest -Convergence

As argued above, part of the explanation for the increasingly marginal role of refugee law in defining the international response to involuntary migration may be the demise of the interest-convergence. Much of the debate during the drafting of the 1951 Refugee Convention was devoted to how best to protect the national self-interest of receiving states. The Convention grants states wide-ranging authority to deny refugee status to criminals and persons perceived to endanger national security. Perhaps more fundamentally, there was agreement that international

refugee law would not impose a duty on states to admit permanently all refugees who arrive at their borders. Instead, refugees are to be afforded protection against refoulment.

In this sense, refugee law is clearly based upon a theory of temporary protection. Despite this legal prerogative to admit refugees only as temporary residents, many developed states initially believed that their domestic interests would be served by granting permanent resident status to refugees. Because refugees seeking protection in the years following the Second World War were of European stock, their cultural assimilation was perceived as relatively straightforward. Refugees also helped meet acute post-war labour shortages. The reception of refugees opposed to communist regimes, moreover, reinforced the ideological and strategic objectives of the capitalist world. This pervasive interest-convergence between refugees and the governments of industrialized states resulted in a pattern of generous admission policies.⁷⁸

The reasons that induced this openness to the arrival of refugees have, however, largely withered away. Most refugees who seek to enter developed countries today are from the poorer countries of the south. Their different racial and social profile is seen as a challenge to the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labour. Nor is there ideological or strategic value in the admission of most refugees. On the contrary, governments more often view refugee protection as

⁷⁸ J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (Harvard Human Rights Journal, 1997) p. 10.

an irritant to political and economic relations with the state of origin. In these circumstances, it is not surprising that governments have rejected the logic of continuing to grant refugees permanent residence status. States have not, however, responded by reverting to the Refugee Convention's duty to admit refugees only temporarily. Such a policy shift was proposed by Norway, but the governments of most other industrialized countries have instituted temporary protection only on a situation-specific context.⁷⁹

This resistance to treating temporary protection as the norm is partly explained by deeply ingrained policy preferences in traditional countries of immigration, such as the United States, Canada and Australia. Any attempt to end the now-routine linkage between refugee status and permanent residence in these states would require fundamental amendments to domestic immigration legislation built up during the era of openness to Cold War refugees. While European governments historically have been more receptive to the admission of temporary residents, they are now concerned with ensuring that temporary protection of refugees can be brought to an end.⁸⁰

The viability of temporary protection as a way of reconciling the needs of refugees to the national interests of receiving states has not, however, been explored seriously to date. This is because governments of the industrialized world have new options to prevent refugee flows from challenging their sovereign authority over immigration. States now believe that technologies of border control can prevent most asylum

⁷⁹ Ibid., p. 17.

⁸⁰ Ibid., p. 18.

seekers from ever reaching their territories. Since legal duties to refugees arise only once refugees successfully access a state's jurisdiction, why not simply keep refugees at arms length?

2.5.2 *The Politics of Non-Entrée*

Instead of embracing the Refugee Convention's solution of temporary protection, the response of developed states to the absence of an interest-convergence between refugees and receiving states has been to avoid receiving claims to refugee status altogether. Most Northern states have implemented *non-entrée* mechanisms, including visa requirements on the nationals of the refugee-producing states, carrier sanctions, burden-shifting arrangements, and even the forcible interdiction of refugees at frontiers and in international waters. The simple purpose of *non-entrée* strategies is to keep refugees away. *Non-entrée* is an explicable, reprehensible, response to the breakdown of the social and political conditions that previously led industrialized countries to assimilate refugees.

2.5.3 *The "Right to Remain"*

Northern governments have recently extended their prophylactic program by championing the refugee's "right to remain" in his or her own state. The "right to remain" is superficially attractive. After all, the best solution to the refugee problem is obviously to eradicate the harms that produce the need to escape. It is such a seductive notion that, even the UNHCR has joined in the call for a redefinition of refugee protection to focus on "preparedness, prevention and solutions".⁸¹

⁸¹ Ibid, p. 20

In reality, however, no international commitment exists to deliver dependable intervention to attack the root causes of refugee flows, clearly a condition precedent to the exercise of any genuine right to remain. There is no credible evidence that intervention will ever evolve into more than a discretionary response to the minority of refugee-generating situations that are of direct concern to powerful states. The interventions in both Iraqi Kurdistan and in the former Yugoslavia were responses to the clear risk of refugee flows toward the developed world.⁸² Most perniciously, these two examples of intervention to enforce the "right to remain" suggest that this so-called "right" is essentially a means to rationalize denying at-risk persons the option to flee. Each UN intervention was inextricably tied to border closures that left no way for would-be refugees to access meaningful safety abroad.

2.6 Considering the Security Burden

Recent history has painfully illustrated the deficiencies in the international response to mass migration. From the Balkans to the Great Lakes Region of Central Africa (GLR), efforts to ensure international protection for refugees have been repeatedly frustrated as states have expressed an increased reluctance to offer asylum. These frustrations have prompted some authors to call for a new approach to 'burden sharing' by identifying mechanisms through which the burdens borne by countries offering asylum could be more equitably distributed among a greater number of states⁸³

⁸² Ibid., p. 19.

⁸³ Hathaway, James C. (ed.) *'Reconceiving International Refugee Law'*; Nijhoff Law Specials 30. London: Martinus Nijhoff, 1997; Schuck, Peter *'Refugee Burden-Sharing: A Modest Proposal.'* *Yale Journal of International Law*; (1997) Vol. 22(2).

The scope of the burden sharing debate, however, does not fully respond to the current deficiencies in refugee protection as it excludes an understanding of the security implications of hosting refugees. The legitimate security interests of the ~~country of asylum are defined here as the 'security burden': the threats perceived by~~ a host state related to the granting of asylum and the resources required to effectively address those threats.⁸⁴ This burden, like the traditional 'dual mandate' burdens of protection and assistance identified in Chapter 2 of the 1951 Statute of the UNHCR, can and should be shared by the international community.

First, it is argued that the current international debate surrounding burden-sharing focuses on the dual mandate burdens and omits the security burdens. Second, while recent initiatives to ensure the security of host states through a 'ladder of options'⁸⁵ represent an important foundation, they respond to only one aspect of the security burden.

There are many cases in recent history where states have perceived refugee protection and their national security interests to be contradictory, and consequently have restricted asylum. This crisis in asylum has led a diverse group of actors to critically re-examine the international response to forced migration. It is now widely accepted that states shoulder a significant security burden by hosting refugees. In the spirit of international solidarity, some actors have called for a more structured

⁸⁴ Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed., (Harvester Wheatsheaf, London, 1991), p. 89.

⁸⁵ As articulated in the "Ladder of Options" Information Note presented to the Standing Committee of the Executive Committee of the High Commissioner's Programme (EXCOM) on 11th February 1999.

and, therefore dependable system for sharing this burden between a wider number of actors.

The burden-sharing debate must recognize that some states face burdens beyond the traditional dual mandate burdens of protection and assistance. Many asylum states have changed their hosting policies due to security considerations. Consequently, if the international debate on burden-sharing is to effectively address the most pressing burdens borne by host states, it must respond to the security burden. Given the changing nature of conflict and security in the Third World since the end of the Cold War, it is now clear that forced migration can cause insecurity.

As demonstrated by recent events in the Great Lakes Region, refugee warriors have regionalized the conflict of their country of origin by employing refugee camps as a base of operations and refugees as a shield.⁸⁶ In these cases, forced migration poses a direct security risk. The security implications of hosting victims of forced migration are not, however, limited to refugee warriors and the direct security burden. Changes in the balance of political opportunity and feelings of relative deprivation within the host community, compounded by the effects of group identity, can exacerbate pre-existing tensions within a country and lead to conflict. In these cases, migrants cause an indirect security burden, which is potentially as explosive as the direct security burden.

⁸⁶ Christina Boswell, *The Conflict Between Refugee Rights and National Interests: Background and Policy Strategies*, (UNHCR, Geneva, 1991), p. 28.

It is important here to note that the logic of burden sharing can be applied to the security burden. UN Security Council resolution 1208 of 19 November 1998 affirmed 'the primary responsibility of States hosting refugees to ensure the security and civilian and humanitarian character of refugee camps...' but it also notes that 'a range of measures by the international community are needed to share the burden borne by ... States hosting refugees...'

Clearly, there is a need to share the material and legal burden of hosting refugees, but not at the expense of state security. As recent events have illustrated, the security burden is the most explosive of the three burdens. There is an urgent need to address this burden in an effective and comprehensive way by applying the logic of burden sharing, as suggested by the Security Council resolution.

The relationship between national security and a state's decision to grant asylum must be understood. Consider the following series of propositions: First, states have a 'security imperative'; second, states grant asylum; and given the security imperative, and given that states will compromise the security imperative to grant asylum only under very limited conditions, the security imperative must be guaranteed before a country will be willing to grant asylum.

To test this set of propositions, it is important to understand first that there is no right to asylum, only the right to 'seek and enjoy in other countries asylum from

persecution'⁸⁷. Given that states grant asylum, the position of states 'must be seriously considered'⁸⁸ when addressing the current 'crisis in asylum'.

The 'security imperative' of the state is that 'one of the primary roles of the state is to provide peace and security for its citizens within the national territorial boundaries as well as to ensure their protection against threats from outside'⁸⁹. Security is an absolute priority for states; the granting of asylum is not. In fact, under the 1951 Convention, states are prohibited from expelling a refugee from their territory 'save on grounds of national security or public order'⁹⁰.

This priority has been endorsed by HCR Ogata, who argued at the 49th Session of EXCOM that '*the best way to uphold refugee protection ... is to take into consideration the security interests of states*'⁹¹. These 'security interests' were clearly demonstrated in the Great Lakes Region towards the end of 1996, and illustrated how state practice is increasingly influenced by the security implications of hosting refugees. As Weiner argues, migration and refugee issues, are no longer the sole concern of ministers of labour and immigration, but are now matters of high international politics, engaging the attention of heads of state, cabinets, and key ministries involved in defence, internal security and external relations⁹².

⁸⁷ Universal Declaration of Human Rights 1948: Art. 14(1)

⁸⁸ Barutciski, Michael; '*Developments: Involuntary Repatriation when Refugee Protection is no Longer Necessary: Moving Forward after the 48th Session of the Executive Committee.*' (1998) *International Journal of Refugee Law* 10(1/2); p. 241

⁸⁹ Maluwa, Tiyanjana 'The Refugee Problem and the Quest for Peace and Security in Southern Africa.' *International Journal of Refugee Law* (1995) vol.7(4), p. 654

⁹⁰ Art. 32(1)

⁹¹ UNHCR; 'Report of the 49th Session of the Executive Committee of the High Commissioner's Programme': UN Doc. A/AC.96/911. 12 October; p. 19

⁹² Weiner, Myron (ed.); "*International Migration and Security*"; Boulder, CO: Westview; 1993; p. 1

2.7 Relegation of Burdens: A Look at State Practice

Because there is as yet no practical commitment on the part of governments universally and immediately to address all risks of violence and other human rights abuses, desperate people will continue to migrate in search of protection. They should not be prevented from seeking refuge. Until and unless effective and timely intervention is a dependable reality, the right to solicit safety abroad remains a critical moral imperative, the only truly autonomous response to the violation of basic human rights.

As the global refugee situation expands in scope and becomes more complex, there is no substitute for a concerted and coordinated response on the part of the international community. The principle of burden-sharing is now well recognized. However, it is more often than not flouted by rich countries. This blunt assault by the North on refugee migration has reinforced the confinement of most of the world's refugees to their regions of origin in the South⁹³.

Africa shelters more than double the number of refugees protected in all of Europe, North America and Oceania combined. The Ivory Coast alone protects nearly twice as many refugees as are presently in the United States of America. In desperately poor countries like Jordan, Djibouti, Guinea, Lebanon, and Armenia, the ratio of refugee population to the total population is about 1:10.⁹⁴ Yet, refugee law establishes no burden-sharing mechanisms to offset the enormous contributions made by these reception countries of the South.

⁹³ Guy S. Goodwin, *"The Refugee in International Law"*; 2nd ed. (Clarendon Press, Oxford, 1996); p. 19

⁹⁴ *Ibid.*, p. 20

Refugees increasingly find themselves faced with restrictive practices such as border closures, interdictions at sea, expulsions, premature return to an insecure environment and prolonged detention imposed by countries that have the financial means and, indeed, the duty to give them asylum and protection. It should be noted that the wave of restrictive practices in the most prosperous parts of the world has a detrimental impact in the rest of the world when it comes to refugee protection.

There is yet another, and an even more important, reason why the principle of burden-sharing needs to be strengthened further. As is well known, it is predominantly developing countries that constitute countries of origin as well as asylum. Host developing countries put at risk their fragile environment, economy and social fabric to provide refuge to millions of refugees. Addressing the needs of these countries must, therefore, move to the forefront of the refugee agenda. It is essential that the economic and social impacts of massive refugee populations on developing countries be systematically assessed and effective means of global cooperation found to address it.

Simply put, the risk of a downward spiral in the quality of protection formally guaranteed by international law is too great. Two specific concerns appear paramount: reliance on *individuated state responsibility* and the *absence of a meaningful solution orientation*. First and most fundamental, there is a desperate need to meaningfully share burdens and responsibilities towards refugees. Under the current international regime, when refugees arrive in an asylum state, that state is solely responsible for their protection. As such, the distribution of state

responsibility toward refugees is based primarily upon accidents of geography and the relative ability of states to control their borders. Any assistance received from other countries or the UNHCR is a matter of charity, not of obligation.

The present system of unilateral, undifferentiated state obligations is unfair, inadequate, and ultimately, unsustainable. As states have no means of looking to their neighbours or the international community at large for assistance and solidarity, there is a perverse logic to the option of closing borders and preemptively avoiding any responsibility for providing protection.

Closely related to this problem of atomized responsibility is the failure to allocate the fiscal resources available for refugee protection to greatest advantage. Specifically, to the extent that the relatively recent breakdown of refugee protection within Southern regions of origin derives from a scarcity of funds, it is potentially remediable. The amount of money spent in the North to evaluate and process the claims of the 20% minority of refugees it receives dramatically dwarfs the resources available to protect the 80% of the refugee population located in the South.⁹⁵ Under a more collaborative approach to refugee protection, the same resources presently spent to receive refugees could be reassigned to where they are most likely to benefit the greatest number of refugees.

Second, refugee protection needs to become seriously solution-oriented. Lip service is paid to the importance of identifying "solutions" to the refugee crisis. As normally

⁹⁵ Ibid., p. 21.

understood, this means ending the violence or other human rights abuses that induce refugee flight, so that refugees can go home safely. Yet, even as states and the United Nations are increasingly aware of the need to intervene against the phenomena that force refugees from their homes, little has been done to re-tool the mechanisms of refugee protection itself to complement this solution-oriented vision.

2.8 Accounting for unequal distribution of Refugees:

When trying to account for the current distribution of refugee burdens among countries, three principal explanations can be identified. These explanations are related to free-riding opportunities, state interests and variation in pull-factors.

2.8.1 *Free-Riding Opportunities*

There have been protests and free-riding accusations from the main receiving countries as well as resulting threats by some states to opt out of the Convention for the Protection of Refugees. A number of scholars, most prominently Suhrke⁹⁶ have suggested that refugee protection has at least in part; important 'public good' characteristics.

Suhrke argues that the reception of displaced persons can be regarded an international public good from which all states benefit. In her view, increased security can be regarded as the principal benefit, as an accommodation of displaced persons can be expected to reduce the risk of them fuelling and spreading the conflict they are fleeing from. A public good is defined by its properties of non-

⁹⁶ Suhrke, A; "Burden-sharing during Refugee Emergencies: The Logic of Collective Action versus National Action." *Journal of Refugee Studies*; (1998). Vol. 11(4): pp. 396-415.

excludability and non-rivalry. It is these properties which set it apart from a private good. The provision of a public good, such as the additional security provided by refugee protection, benefits not only countries which contribute to the protection of displaced persons but these benefits are also extended to other actors at no marginal cost. One might therefore expect substantial free-riding opportunities, similar to those that have been observed with regard to the provision of other international public goods such as collective defence.

Unlike in the case of peace-keeping operations where empirical evidence suggests that larger countries have been exploited by small countries, no similar picture emerges when analysing the refugee reception burden. In fact, available evidence suggests that in the case of the reception of refugees, it is the smaller states which appear to shoulder disproportionate burdens.⁹⁷

2.8.2 *State Interests*

Another way in which to try to explain the unequal distribution of refugee burdens is to analyse specific state interests or countries' normative preferences in this area. Economists have developed a refined version of Olson's public goods approach, one that is based on the so-called 'joint product' model⁹⁸. This model suggests that what might appear as a pure public good often brings in fact excludable (private) benefits to a country.

⁹⁷ Olson, M. and R. Zeckhauser; "*An Economic Theory of Alliances.*" *Review of Economics and Statistics* (1966). Vol. 48: pp. 266-79.

⁹⁸ Sandler, T. and J. F. Forbes "*Burden-Sharing, Strategy and the Design of NATO.*" *Economic Enquiry* (1980); Vol. 18(3): pp. 425-444.

From this 'joint-product model', however, we would expect that a country's contributions to the provision of a particular collective good (which has both public and private characteristics) will be positively related to the proportion of excludable benefits accruing to that country. It seems reasonable to assume that one country's efforts in the area of refugee protection will have some positive spill over effects to other countries in the region. However, refugee protection arguably, provides a spectrum of outputs ranging from purely public to private or country-specific outputs⁹⁹.

This means that refugee protection provides more than the single output of 'security' implied by the pure public goods model: it also provides country specific benefits such as status enhancement or the achievement of ideological goals¹⁰⁰. Moreover, we can also expect relatively more benefits from refugee protection measures accruing to countries closer to a refugee generating conflict. In other words what is often regarded as a public good has in fact excludable private benefits to a country.

The 'joint product model' suggests that a country's contributions to the provision of refugee protection will be positively related to the proportion of excludable benefits accruing to that country. However, empirical tests on this in the area of refugee protection have produced mixed results. During the Kosovo conflict, Greek sensibilities concerning its minority in the north of Greece meant that Greece

⁹⁹ Ibid; p. 430

¹⁰⁰ such as during the cold war when the West was keen to accept political refugees from behind the Iron Curtain

accepted a lot fewer Kosovo refugees than one would have expected on the basis of geographic proximity.¹⁰¹

From a norm-based perspective, patterns of burden-sharing can be explained in two ways. First, burden-sharing bargains can be guided by notions of equity, basing the distribution of burdens on some key that is linked to the actual capacity of the different participants of the burden-sharing regime. A second way of explaining patterns from a norm-based perspective is to look at variations of the participating states commitment to norms that are related to the burden to be shared. From this perspective the burden that a state is prepared to accept will be linked to the strengths of a state's preferences on safeguarding certain norms; such as general human rights standards or norms of distributive justice.¹⁰²

2.8.3 Structural Pull Factors

Under the current international refugee protection regime, states of first asylum are obliged to determine the status of asylum seekers, that is, assess whether they qualify as refugees under the 1951 Geneva Convention. Differences in structural pull factors such as non policy-related factors that make some host countries more attractive than others have a very strong effect on the relative distribution of asylum

¹⁰¹ Thielemann, E; 'Does Policy Matter? On Governments' Attempts to Control Unwanted Migration', LSE European Institute Working Paper (2003).

¹⁰² It has been shown that states' willingness to shoulder protection burdens are positively correlated with their relative commitment to the norm of solidarity with people in need and that countries which accept a disproportionate number of protection seekers are also the ones with a strong commitment to domestic redistribution (extensive welfare states) and above average foreign aid contributions. A state's greater willingness to accept burdens for whatever of the above reasons often means that it will adopt a relatively lenient policy regime (more access, more attractive reception/integration package). However, there are reasons to expect that structural determinants are more important than policy-related factors for attempts to explain the relative distribution of asylum burdens among countries. Thielemann E.; 'Between Interests and Norms: Explaining Patterns of Burden-Sharing in Europe', Journal of Refugee Studies, 2003 Vol.16, No.3, pp. 253-73.

seekers.¹⁰³ Such Pull-factors include solidarity with other countries and with refugees, and interest-based motivations to protect refugees.

2.8.3.1 Solidarity with refugees

Thielemann argues that norm-guided behaviour has played a significant role in the relationship between recipient Member States and protection seekers which has had an indirect effect on the burden-distribution among the Member States¹⁰⁴. One finds evidence for the claim that a country's willingness to receive refugees is positively related to its more general commitment to norms such as distributive justice¹⁰⁵. Thielemann thus suggests that looking at countries' commitment to certain distributive and humanitarian norms can help to explain the willingness of states to accept a burden sharing regime from which they appear to loose out, as these states would have accepted higher costs even in the absence of such a regime¹⁰⁶.

2.8.3.2 Interest-based motivations

Even if norms are likely to play some role one can expect interest-based motivations to be paramount for most if not all states. Some principal interest-based motivations to cooperate on refugee burden-sharing initiatives include cost-benefit considerations and achieving particular objectives related to protection or other state interests at lower costs. One potential motive for burden-sharing based on cost-

¹⁰³ Thielemann, E; *'Why European Policy Harmonization Undermines Refugee Burden-Sharing'*, European Journal of Migration and Law, (2004) Vol. 6, No. 1, pp. 43-61

¹⁰⁴ Thielemann, E. *'Does Policy Matter? On Governments' Attempts to Control Unwanted Migration'*, LSE European Institute Working Paper 2003.

¹⁰⁵ Using overseas development aid, recognition rates and domestic social spending as proxies for a states' commitment to such norms one finds evidence for the claim that the variation of Member States' norm based commitment, for example, was positively correlated with their relative willingness to accept Kosovo refugees under the Kosovo Humanitarian Evacuation Programme (HEP).

¹⁰⁶ Supra note 195.

benefit considerations, is the insurance rationale propagated by Thielemann¹⁰⁷. He argues that a suitable burden-sharing regime can provide a degree of mutual insurance against the occurrence of a particular external shock that might put pressures on certain countries. Burden-sharing schemes allow states to set off today's contributions against the expected reduced costs in a future crisis. Thielemann argues that on the basis of an insurance rationale, it might make sense for states to accept losses in the short term in order to insure themselves against the possibility of being faced with even higher costs at some point in the future¹⁰⁸.

Schuck writes that states 'might be attracted to burden-sharing for the same reason that many individuals are attracted to catastrophic health insurance. He argues that states may rationally prefer to incur a small and predictable protection burden now in order to avoid bearding large, sudden, unpredictable, unwanted, and unstoppable refugee inflows in the future.¹⁰⁹ From a cost-benefit perspective, however, such a scheme can only be expected to include those who have a similar perception of risks that are worth sharing and such a scheme will only be agreed upon when contributions reflect the differences in the relative risk perception of each participant.

One of the principal objectives to any attempt to cooperate in the area of refugee protection appears to be to achieve particular objectives related to protection or other state interests at lower costs. There has been widespread concern among

¹⁰⁷ Thielemann E.; *'Between Interests and Norms: Explaining Patterns of Burden-Sharing in Europe'*, *Journal of Refugee Studies*, 2003 Vol.16, No.3, pp. 271-273.

¹⁰⁸ *Ibid*, page 272.

¹⁰⁹ Schuck, P. *"Refugee Burden-Sharing: A Modest Proposal."* *Yale Journal of International Law* (1997). Vol. 22. p. 249

countries in recent years about the costliness and inefficiencies of existing arrangements¹¹⁰ where refugee burdens are above all as a result of structural factors over which countries have little control. Western States in particular have been concerned to improve 'the judicial and administrative efficiency of asylum processing'¹¹¹. Similar concerns have been raised by the UNHCR.¹¹²

Reducing costs through burden-sharing appears a viable avenue for those with above average burdens or those who can successfully negotiate sufficient side payments in other issue areas that can make it worth their while to accept an increase in their refugee-related costs. Moreover, some burden sharing initiatives will be motivated by the prospect of efficiency gains through burden-sharing initiatives such as joint processing, the provision of more effective deterrence of non-genuine asylum-seekers, and the reduction of secondary applications.

Heckmann and Tomei¹¹³ stress that above all, burden-sharing offers some countries the prospect of reducing their own costs. It is therefore not at all surprising that the first substantial burden-sharing proposals in this area in the early 1990s were initiated by Germany, the EU country most affected by the war in former Yugoslavia.

¹¹⁰ It has been estimated that Western States spend around \$10 billion each year on fewer than half a million asylum seekers, most of whom are not in need of international protection (Flint, in Betts 2005:2)

¹¹¹ Betts, A. "What does 'efficiency' mean in the context of the global refugee regime?" COMPAS Paper No.9, (2005) University of Oxford.

¹¹² "There has been some debate in recent years about what constitutes 'fairness' and 'efficiency' in procedures, against the backdrop of mixed migratory movements, smuggling and trafficking of people and a degree of misuse of the asylum process for migratory outcomes. States have legitimate concerns as regards procedures that are unwieldy, too costly, not necessarily able to respond effectively to misuse, and result in the unequal distribution of responsibilities". Global Consultations on International Protection, 2nd Meeting, EC/GC/01/12, 31 May 2001, 'Fair and efficient Asylum Procedures', Introduction, p. 2, Para.3; in Betts (2005).

¹¹³ Heckmann, F. and V. Tomei Zur Dialektik von Kooperation und Nicht-Kooperation in der internationalen Migrationspolitik, in: S. Angenendt (ed.), Migration und Flucht, (1997). München: Oldenburg Verlag.

Related, but perhaps even more important, can be the motive of reducing negative externalities that are prevalent in the existing system. A frequently used concept in environmental economics, the concept of externalities in the refugee context suggests that the failure of a given states to internalize the full costs of their restrictive asylum and refugee policies will impose costs on other countries.

Finally, the idea of variations in countries' reception capacities and the associated suggestion that some states might find it easier to contribute to refugee protection in ways other than by accepting refugees into their territory, has led to the development of refugee burden-sharing models that consider the possibility of trade between countries according to their comparative advantage in refugee protection contributions.¹¹⁴ By allowing states to contribute to regional/international refugee protection programs in ways that they find least difficult, states might be able to provide more protection at much reduced costs. Given that states' interests vary, countries are likely to favour different types of burden-sharing regimes.

2.9 Burden-Sharing Efforts: Past International Action:

Countries have dealt with the issue of burden-sharing on the national, regional and international levels.

¹¹⁴ Jandl, M; "Structure and Costs of the Refugee and Asylum Systems in Seven European Countries"; (1995), Vienna, ICMPD. (1995). Jandl suggests that the average costs per asylum seeker for processing, care and maintenance, varied between \$16,596 in Denmark and \$4622 in Austria. From this, one can safely assume that the costs in non developed and developing countries are just but a mere fraction of these estimates. However, it is of course true that countries are not just and perhaps not even primarily concerned about the financial costs they incur but also the significant social and political costs involved in accepting refugees.

2.9.1 National Reactions

Many individual governments are creating more restrictive refugee policies. Too often, national burden-sharing initiatives are motivated by the desire to keep refugees out, rather than a desire to protect them. The resulting policies prevent large refugee populations from entering a nation, such that a single population must be dispersed among several host countries, or else the population is simply relocated to one, often impoverished, host country.¹¹⁵

These “burden-sharing” policies do not often equally distribute the burden of aiding refugees. Instead, they may reinforce the burden placed on poor host nations.

2.9.2 Regional Efforts

The Organization of African Unity (OAU)¹¹⁶ was the first body to address the issue of burden-sharing on the regional level. Decolonization in Africa in the 1960s led to unrest and created large numbers of refugees; burden-sharing became an important issue. The 1969 OAU Convention *Governing the Specific Aspects of the Refugee Problem in Africa* states that “where a member state finds difficulty in continuing to grant asylum to refugees... member states shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member state granting asylum.”¹¹⁷

¹¹⁵ Christina Boswell, “Burden Sharing in the New Age of Immigration,” Migration Policy Institute, Accessed 30, May 2007, <http://www.migrationinformation.org/Feature/display.cfm?id=173>

¹¹⁶ Currently named African Union (AU)

¹¹⁷ “OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa,” African Union, Accessed 30 May 2007, http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf

The European Union (EU) has also addressed the issue of refugee burden-sharing through the 1995 *European Council Resolution on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons*. The resolution calls for making each European country's policies toward refugees the same, so that there is no reason that one state would be more attractive to fleeing refugees than any other. The European Council decision of 28 September 2000 established a European Refugee Fund. The goal of the fund is to help share the financial burden associated with refugees.

Countries in Asia addressed the issue in Paragraph III of their 1987 *Addendum to the 1966 Bangkok Principles Concerning the Treatment of Refugees* adopted by the Asian-African Legal Consultative Committee (AALCC). Paragraph III states, "The principle of international solidarity and burden-sharing should be seen as applying to all aspects of the refugee situation." The document calls for burden-sharing efforts to include improving the treatment of, and conditions for, refugees, as well as providing long-term durable solutions to refugee issues.

2.9.3 *International Measures*

United Nations High Commissioner for Refugees Executive Committee (ExCom) *Conclusion 22* is subtitled the *Protection of Asylum Seekers in Situations of Large-Scale Influx*. It acknowledges the impact that refugee flows can have within a country, and calls on all countries, in the spirit of international solidarity, to share this burden at the request of the host state. UNHCR stresses that sharing the refugee burden is key to protecting refugees and minimizing the negative effects of refugee movements.

However, even when burden-sharing does not occur, host states still have the obligation to protect and assist refugees.

Above all, UNHCR, as well as organizations such as the international human rights monitor Amnesty International, have stressed that countries must make protecting refugees their highest priority in burden-sharing arrangements. Amnesty International has issued a list of principles that all burden-sharing initiatives should abide by. To start, burden-sharing arrangements should be consistent with international refugee and human rights law. Refugees have the right to an effective and voluntary solution to their displacement. Arrangements should also take age and gender perspectives into consideration, and must ensure protection without discrimination.¹¹⁸

2.9.4 *Success Stories*

The 1990 Paris Peace Accords included important burden-sharing initiatives that helped return 370,000 Cambodian refugees in Thailand to their home country. This effort was an example of successful work between UN bodies, nongovernmental organizations (NGOs), and countries. The UN Transitional Authority for Cambodia (UNTAC), UNHCR, and the national governments were key actors in resolving the crisis.¹¹⁹

¹¹⁸ "UNHCR's Forum & Executive Committee Basic Human Rights Principles Applicable To Responsibility- And Burden-Sharing Arrangements" 2004 Amnesty International, <http://web.amnesty.org/library/index/ENGIOR420072004> 1 March 2004.

¹¹⁹ "Burden-Sharing: Discussion Paper Submitted by UNHCR Fifth Annual Plenary Meeting of the APC"

Another important example of successful burden-sharing was the evacuation of refugees from Kosovo in 1999. Through the Humanitarian Evacuation Programme, countries agreed to take in refugees to lighten the burden of Macedonia, which sheltered a large proportion of the refugee population. The program was particularly effective because even states outside of the region agreed to host refugees. Countries as far as Australia and New Zealand participated in the effort.¹²⁰

2.10 Conclusion:

There are many different ways for the international community to help share the burden on countries that host refugees. Assistance can come in the form of technical expertise, human resources, money or supplies. But most effective way to share a refugee burden is for other countries to host some of the refugees on their own territory. Even though financial contributions are helpful, the most serious burdens are faced by states that actually have refugees living within their borders. This is not always possible, especially if refugees are fleeing a remote area. It would be expensive and difficult, for instance, for refugees from an African country to travel to northern Europe in large numbers. In addition, many developed countries also have laws preventing many refugees from entering the state. So even if people fleeing a conflict or persecution can make it to the new land, they may be turned away.

Other methods of sharing the burden of refugees are for some countries to contribute necessary resources. These include: wood for housing; crops or food

¹²⁰ Supra

products to feed the refugees; and experts or officials to oversee services like education, health care and sanitation. Refugees may have to live in a host state for a long time. Therefore, it is important to remember that burden-sharing programs must be long-term and not simply implemented at the start of a refugee crisis.

There is also a need for burden- and responsibility-sharing when refugees return to their country of origin. If the refugees' homes and land have been destroyed, they will need assistance to rebuild their communities and resume their lives. Conflict-torn countries generally do not have the means to repair their own lands, and so require aid from other countries or organizations.

Most refugees cherish a hope of return. Protection, if carefully designed and delivered, is the critical complement to root causes intervention. Even as states give increasing attention to efforts intended to end the need to flee, we must not fail to renovate the means by which we protect those who cannot wait for our efforts to succeed. We believe that solution-oriented temporary protection, conceived within a framework of common but differentiated responsibility toward refugees, offers the best hope of keeping the institution of asylum alive.

THE BURDEN SHARING DEBATE: TOWARDS REFORMULATION

3.1 Background:

The desirability of 'distributing the burden of refugees equitably' is clearly articulated in the Preamble to the 1951 Convention relating to the Status of Refugees.¹²¹ The means by which this ideal may be realized has been debated for some time.¹²² At the core of early burden sharing proposals was the understanding that 'collective action would strengthen protection for refugees by reducing inequities among recipient states'.¹²³ The current 'crisis in asylum', characterised by reductions in asylum amongst countries of both the North and the South, has rekindled the burden sharing debate.

Barutciski¹²⁴ notes that after the 48th Session of EXCOM, 'the Chairman observed that '... *the institution of asylum was under serious threat due to the reluctance of host states to assume the burden associated with refugee protection.*' Barutciski emphasises that 'any analysis of the current situation has to be placed against this backdrop'.¹²⁵

Indeed, Augustine Mahiga, the UNHCR Deputy Director, Great Lakes Unit in his analysis of the Refugee situation in Tanzania notes that the speeches delivered by

¹²¹ Which states that: 'the grant of asylum may place unduly heavy burdens on certain countries, and ... a satisfactory solution ... cannot therefore be achieved without international cooperation.'

¹²² Fonteyne, J.-P. L. 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees.' *The Australian Year Book of International Law* (1980) Vol 8; and Grahl-Madsen, A. 'Ways and prospects of international co-operation in refugee matters' *AWR Bulletin*. (1983) Vol. 23(2/3).

¹²³ Suhrke, Astri; 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.' *Journal of Refugee Studies* (1998) Vol. 11 (4).

¹²⁴ Barutciski, Michael 'Developments: Involuntary Repatriation when Refugee Protection is no Longer Necessary: Moving Forward after the 48th Session of the Executive Committee.' *International Journal of Refugee Law* (1998) Vol. 10 p. 237.

¹²⁵ Ibid

politicians indicating a reduced willingness to host refugees and calling for greater international solidarity in light of the refugee crisis 'could have been delivered verbatim by any developing country hosting significant numbers of refugees'¹²⁶.

Rooted in a desire to reverse the emerging restrictive asylum trends, and thereby increase both the quality and quantity of asylum, there has been a recent resurgence of interest in the prospects of burden sharing.

The most comprehensive attempt to realize effective burden sharing followed the six-year project '*Towards the reformulation of international refugee law*'¹²⁷. The conclusions of the Reformulation Project flow from an understanding that during the post-war era: '... there was a pervasive interest convergence between refugee and host populations. Without such a natural symmetry, however, refugee law can function only if there is a mechanism in place to mitigate the burdens of receiving states'¹²⁸.

The Reformulation Project proposes such a mechanism to alleviate burdens based on four principles. First, it argues that refugee protection should actively seek solutions in line with state interests, and 'not be bartered away as part of the current upsurge of interests in addressing the "root causes" of involuntary migration'¹²⁹.

¹²⁶ Mahiga, Augustine () 'The International and the UNHCR Humanitarian Response to the Rwanda Emergency.' Paper presented to the International Workshop on the Refugee Crisis in the Great Lakes Region, Arusha, Tanzania, 16 - 19 August. — (1997) 'A Change in Direction for Tanzania.' *Refugees* 110, Special edition: 'Crisis in the Great Lakes : Anatomy of a Tragedy' Winter.

¹²⁷ The Reformulation project, based at the Centre for Refugee Studies at York University (CRS) and under the direction of James Hathaway

¹²⁸ Hathaway, James C. and R. Alexander Neve 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection.' *Harvard Human Rights Journal* (1997) Vol. 10, p. xxii.

¹²⁹ *Ibid*, p. xxiii

The Reformulation Project also argues that refugee law should adopt a more 'robust' concept of temporary protection according to the logic that 'if the protection of refugees is ... respectful of human dignity, it need not be permanent'¹³⁰. Third, the Project emphasises the 1951 Convention's 'unnecessarily rigid definition of state responsibilities'¹³¹ and concludes that there is no need to assume that every state will play an identical role.¹³²

Finally, it argues that the institutions of the international refugee regime need to be 'retooled' to 'promote and coordinate a process of collectivized responsibility'¹³³, thereby ensuring confidence amongst states that a more systematised and coordinated approach to burden sharing would result in a more dependable response. The Reformulation Project concludes that burden sharing would be more effectively administered if it took place in the context of pre-negotiated responsibilities within 'interest-convergence groups'.

The most salient critiques of this proposals have focused on: the capitulation to state interests, the lack of evidence that a systematised set of arrangements would be more effective, that formalized schemes would result simply in burden-shifting and 'beggar-thy-neighbour' policies, that the interest of the North wanes once refugees are contained in the South, that the proposals commodify refugees, and that states are not likely to commit to additional obligations.

¹³⁰ Ibid

¹³¹ Ibid, p. xxiv

¹³² Referred to as 'common but differentiated responsibilities'

¹³³ Supra, note 2

It is important to understand how these issues were addressed at the 49th Session of EXCOM, where 'International Solidarity and Burden Sharing in all its Aspects' was adopted as the annual theme¹³⁴. In the Chairman's summary of the debate, it was recognised that the theme was challenging, 'even though international solidarity and burden sharing are not new concepts'¹³⁵.

There was widespread support for the concept of burden sharing and international solidarity, but not for the systemisation of a burden sharing system or for the introduction of obligations in addition to those of the 1951 Convention. There was endorsement for the 'institutional collaboration at the operational, advocacy and fundraising levels', but there was 'less support for global mechanisms'¹³⁶. Clearly, there was no political will for the type of mechanisms proposed by the Reformulation Project. This must lead to the question of the necessity of new mechanisms in the eyes of those intimately involved in refugee protection.

3.2 Formulating a Burden-sharing Regime: Key principles

James C. Hathaway¹³⁷ has made a proposal for the reform of the mechanisms of the international system of refugee protection. Hathaway's proposal rests on five key principles:

¹³⁴ UNHCR, 'Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees': UN Doc. A/AC.96/904. (1998c) 7 September.

¹³⁵ Ibid

¹³⁶ UNHCR, 'Report of the 49th Session of the Executive Committee of the High Commissioner's Programme': UN Doc. A/AC.96/911. (1998d) 12 October.

¹³⁷ James C Hathaway, *Toward the Reformulation of International Refugee Law: A Model for Collectivized and Solution-Oriented Protectio*; keynote speech delivered at Osgoode Hall Law School of York University, Toronto

3.2.1 *Interest Convergence Groups*

Hathaway argues that states now increasingly make binding commitments to a wide variety of regional and other sub-global organizations, based on common interests such as free trade, security, the environment, economic development, and shared heritage. These interstate associations are an effective forum for the design and delivery of mechanisms of common but differentiated responsibility for refugee protection. The impetus for states to share refugee protection responsibilities should come from an appreciation that cooperation through an interest convergence group offers them a form of collective insurance should they, or a state with which they have close ties, ever be faced with a refugee influx. It is only by ensuring the broad distribution of the responsibility of physical protection, and the reliable availability of fiscal support, that states will come to see the enforcement costs of *non-entrée* as being more expensive than simply living up to protection obligations¹³⁸. This is particularly crucial in situations of mass influx.

Strong, active, and large organizations like the Commonwealth, the Organization of American States, the Council of Europe, and the African Union are obvious candidates. Yet meaningful cooperation is also viable within more narrowly focused sub-global associations, such as ASEAN (the Association of Southeast Asian Nations), CARICOM (the Caribbean Community), or SADC (the Southern African Development Community), particularly where the efforts of member states are externally supported. The effective networking of these sub-global organizations is a

¹³⁸ Ibid

practical way to develop a workable and substantive system of global collective responsibility toward refugees.

The precise mechanisms by which interest convergence groups fashion a model of common but differentiated responsibility will vary. Absolutely critical to the successful implementation of a cooperative process, however, is the willingness of interest convergence group members to make a binding commitment to convene whenever a member state perceives itself to be unable to cope with a refugee protection responsibility. The meeting of the interest convergence group must happen quickly, so that an appropriate response to a refugee crisis can be designed and put in place before there is a risk of the denial of protection.¹³⁹

3.2.2 *Common but Differentiated Responsibility*

It is important to recognize that there are very real differences in the manner in which different countries can best contribute to the successful implementation of a more collectivized system of refugee protection. Beyond a common duty of all states to provide first asylum, there is no reason to expect every country to play an identical refugee protection role.

Within an interest convergence group, a state experiencing an influx of refugees will require assistance from other member states in a variety of ways. Some governments will be amenable to sharing the responsibility of providing physical protection¹⁴⁰. Others will be willing to permanently resettle those refugees whose special needs require immediate permanent integration, or those refugees who cannot return

¹³⁹ Ibid

¹⁴⁰ Ibid

home after a reasonable period of time has passed. Some states may be best situated only to provide major fiscal support. Clear criteria, established in advance and supervised by UNHCR, should guide this process of distributing responsibilities and burdens among states.

3.2.3 *Solution-Oriented Temporary Protection*

This is an approach which acknowledges the basic rights of refugees, and prepares for return. This approach helps to lay the groundwork for solutions. Many states have mistakenly suggested that the rights guaranteed by the *Refugee Convention* and international human rights law do not govern the treatment of refugees protected on a temporary basis. This is not the case. The international rights regime applies, and provides a solid framework for the delivery of effective protection. The mistreatment of refugees is not only an offence against human dignity, but makes it unlikely that refugees will cooperate with asylum state authorities in facilitating temporary protection, and ultimately repatriation.

Refugee protection is rarely delivered in a manner which prepares for the eventual return home of refugees. Rather than isolating refugees and denying them opportunities for meaningful employment and education, a solution orientation requires that refugees use their time abroad to develop skills and abilities that will enable them to play productive roles in their home countries. The social and collective structures of refugee communities should be supported, so that there continues to be a meaningful bond to the traditions and beliefs of the country of origin. In all ways, protection must anticipate the needs and challenges of

repatriation and reintegration, in a way that empowers both refugees and their communities.¹⁴¹

3.2.4 *Residual Solutions*

It is envisioned that if protection is delivered in a rights-regarding and solution-oriented manner, significant numbers of refugees will want and be able to return home safely and successfully. The prospect of viable repatriation is obviously greater if the international community consistently and effectively intervenes in response to human rights abuse.

There will be instances, however, in which safe return does not become possible within a reasonable period of time. Refugee status should be finite, and should not result in refugees being forced to wait indefinitely before being allowed to rebuild their lives for the long-term. We believe that five years is a fair and workable benchmark, after which permanent status should be made available. If secure permanent resettlement is to occur in these cases, it will likely be necessary for an agency such as the UNHCR to seek to involve states from outside the interest convergence group, as the resettlement burden will need to be widely dispersed. For some groups of refugees, permanent resettlement in the country of temporary asylum may be the most attractive and viable option. Those states will likely require financial assistance and incentives if they are to permanently absorb significant numbers of refugees.

¹⁴¹ Ibid

3.2.5 *Viable Repatriation*

Refugee protection should be understood to be a human rights remedy in which return home when conditions have become truly safe is a vital element. Voluntary repatriation is obviously preferable, but an insistence on the voluntary nature of repatriation is misguided. A commitment to mandated return, carried out in a dignified and rights-regarding manner, will also be necessary to ensure that asylum capacity is continually regenerated to accommodate future individuals in need of protection abroad. Successful repatriation requires efforts to maintain ties between the refugee and stayee communities, the provision to refugees of clear and accurate information regarding conditions in their country of origin, and guarantees of grassroots-focused repatriation aid and development assistance¹⁴².

3.3 Identifying options for formulation of burden-sharing regimes:

Three principal options for refugee burden-sharing systems can be identified based on the mechanisms adopted in the EU. These are policy harmonisation, quotas and a system based on market mechanisms¹⁴³.

3.3.1 *Policy Harmonisation*

One possible approach in achieving more equitable distribution of refugee-related burdens is to take a common policy approach through the harmonizing of domestic refugee legislation. The former High Commissioner for Refugees argued that “for European governments to manage rather than simply react to the asylum challenge,

¹⁴² Ibid

¹⁴³ Fonteyne, J.-P. L. 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees.' *The Australian Year Book of International Law* (1980) Vol 8

they need to share, not shift burdens, and to harmonise not only their laws but also their practice".¹⁴⁴

The EU has since the mid 1980s worked towards the convergence of Member States' laws on forced migration. What started with initially non-binding intergovernmental instruments has since then been followed by developments in Community law. Important stepping stones were the 1995 Resolution on Minimum Guarantees for Asylum Procedures¹⁴⁵, the 1999 Amsterdam Treaty establishing a Common European Asylum System, the 2002 political agreement regarding a common definition for persons eligible for refugee and subsidiary protection status and the 2003 directive on common reception¹⁴⁶.

Some have suggested that some of these steps have already contributed to a limited convergence of Member States' refugee burdens since the early 1980s. The significance of these initiatives notwithstanding, policy harmonization can of course only address imbalances which are due to differences in domestic legislation in the first place. As discussed above, policy differences are only one of several determinants for a protection seeker's choice of host country, with structural factors such as historic networks, employment opportunities, geography or a host country's reputation being at least equally, if not more, important¹⁴⁷.

¹⁴⁴ Ruud Lubbers, UNHCR High Commissioner for Refugees, 5 November 2004

¹⁴⁵ Council Resolution of 20 June 1995, OJ C 274

¹⁴⁶ Grahl-Madsen, A. 'Ways and prospects of international co-operation in refugee matters' AWR Bulletin. (1983) Vol. 23(2/3).

¹⁴⁷ Thielemann, E. (2003), 'Does Policy Matter? On Governments' Attempts to Control Unwanted Migration', LSE European Institute Working Paper 2003-2, <http://www.lse.ac.uk/collections/europeanInstitute/workingpaperindex.htm>.

3.3.2 *Hard Quotas*

3.3.2.1 *Sharing Money*

The process of tackling disparities in refugee burdens through policy harmonization is slow and is likely to remain limited in its effect due to the existence of structural pull factors. Thus, other complementary strategies need to be explored. One other way is to address disparities retrospectively, through the payment of financial compensation to the most popular destination countries¹⁴⁸.

At the global level, countries' voluntary contributions to UNHCR to help the organization run assistance programmes in those refugee hosting countries that face disproportionate burdens, can be regarded as one, albeit limited, form of such financial burden-sharing arrangements¹⁴⁹. As most of these contributions constitute 'tied aid', that is, have strings attached to them as to how they can be spent, it is of course clear that the motivation behind these payments can be quite complex. In the EU, explicit fiscal burden-sharing in the asylum field has been taking place since the establishment of the European Refugee Fund¹⁵⁰.

With its Decision of 28 September 2000, the Council established the European Refugee Fund (ERF)¹⁵¹. Created on the basis of Article 63(2)(b) of the Treaty establishing the European Community, the ERF is mandated to allocate resources proportionately to the burden on each member state by reason of their efforts in

¹⁴⁸ Grahl-Madsen, A. 'Ways and prospects of international co-operation in refugee matters' AWR Bulletin. (1983) Vol. 23(2/3).

¹⁴⁹ Acharya, A. and Dewitt, D.B., 'Fiscal Burden-Sharing', in: J. Hathaway (ed.) *Reconceiving international Refugee Law*, (The Hague/London: Martinus Nijhoff; 1997) p. 39

¹⁵⁰ Thielemann, E; 'Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-Payments and the European Refugee Fund', *Journal of Common Market Studies*, (2005) Vol. 43, No. 4, pp. 807-24

¹⁵¹ OJ L 252/12 of 6 October 2000

receiving refugees and displaced persons. Its rationale is *'to demonstrate solidarity between member states by achieving a balance in the efforts made by those Member States in receiving refugees and displaced persons and bearing the consequences of so doing'*¹⁵². The ERF has operated since 1 January 2000 and aimed to disburse a total of Euro 216 million according to two elements, a fixed and a proportional one. First, the Fund was mandated to disburse an equal flat rate amount to each participating Member State irrespective of the number of displaced persons in its territory. The remaining resources were distributed in proportion to the number of displaced persons in each Member State¹⁵³.

The question about the Fund's effectiveness has been a subject of debate. While the fixed element, is likely to have played an important role in getting overall agreement on the principle of the Fund as every Member State did receive something from the Fund, it has been ineffective regarding the Fund's 'balance of effort' objective. If each Member State receives the same amount from this fixed element of the Fund, no progress in terms of burden-sharing is to be made. This appears to have been recognised as the decision establishing the fund prescribes a scaling down of this element over the Fund's five year period. It is often argued that in terms of the Fund's solidarity objective, the fixed element has played an important role, as it has supported Member States with less developed protection systems irrespective of the number of displaced persons they received¹⁵⁴.

¹⁵² Ibid Paragraph 21.

¹⁵³ Supra, note 150

¹⁵⁴ Ibid

However, it of course has also supported Member States with well developed asylum systems and small numbers of protection seekers in equal measure. It is difficult to argue therefore that the Fund's fixed element is an effective expression of Community solidarity. If the objective of the Fund is to help particular Member States to develop their asylum institutions, then there must be better ways of doing this than by giving each Member State the same amount¹⁵⁵.

Regarding the Fund's proportional element, Thielemann has argued that although having performed better, the solidaristic and redistributive effect achieved here remains very much sub-optimal. Currently that part of the Fund is distributed on the basis of the absolute number of displaced persons received in a Member State. This means that a particular number of protection seekers triggers the same amount of money under this category irrespective of the receiving country concerned¹⁵⁶.

This has led to the result that countries with large absolute numbers have benefited disproportionately, despite the fact that relative to their population or size of GDP, or any other absorption capacity measure one might choose, other countries with much greater relative burdens or responsibilities have benefited less. The underlying assumption appears to be that a particular number of protection seekers received, require the same amount of effort, no matter whether the receiving state is small or large, rich or poor, etc. This is clearly not the case, as a certain number of protection seekers received will require greater efforts by a small country than a large one¹⁵⁷. In

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid

other words, the Fund's redistributive element currently compensates Member States according to the absolute numbers of protection seekers received rather than according to the relative responsibilities or burdens that Member States are faced with. From a solidarity or burden-sharing perspective this appears sub-optimal.

3.3.2.2 *Sharing People*

A second type of quota-based burden-sharing proposal, and one that has received considerable attention in recent years, is based on the idea of a physical sharing of people between European states on the basis of a fixed distribution key that tries to take account of countries' relative protective capacities.

Schuck mentions several possible criteria on which such a key could be based. These are national wealth, assimilative capacity, or population density, or the possibility of devising a multi-factor distribution key¹⁵⁸. The first explicit references to such burden-sharing ambitions were made by EU ministers responsible for asylum and immigration at their meeting of 30 November and 1 December 1992¹⁵⁹. These deliberations led to a German Presidency Draft Council Resolution on Burden-sharing in July 1994¹⁶⁰.

This proposal foresaw the reception of refugees according to a key which was based on three criteria which were given equal weight. These are population size, size of

¹⁵⁸ Schuck, P.; "Refugee Burden-Sharing: A Modest Proposal." *Yale Journal of International Law* (1997) vol. 22; pp 279-81

¹⁵⁹ UNHCR; 'Collection of international instruments and other legal texts concerning refugees and displaced persons', Volume II, Regional Instruments, UNHCR, Geneva 1995. Geneva, UNHCR.

¹⁶⁰ Council Document 7773/94 ASIM 124

member state territory and the GDP of the member state¹⁶¹. The centrepiece of the German draft foresaw the introduction of a compulsory resettlement mechanism. The text of the proposal stated: *'Where the numbers admitted by a Member State exceed its indicative figure [], other Member States which have not yet reached their indicative figure [] will accept persons from the first State.'*

Perhaps unsurprisingly, however, this proposal did not find the necessary support in the Council. In particular, the UK, which had received relatively few asylum seekers until that point, was strongly opposed to such a scheme. Some Council members also expressed the concern that this proposed 'physical' burden-sharing regime, which would have allowed the transfer of refugees without their consent, might violate established human rights.

Although ultimately, the redistribution of protection seekers from one host territory to another on the basis of some measure of reception capacity, might be the most effective way to address disparities in refugee burdens, it is also the most controversial one. Advocates of such policies argue that this is the only way to effectively equalize the costs incurred by host territories, as such measures capture not only costs linked to reception and determination but also those less quantifiable costs related to the integration of protection seekers. Opponents emphasize the risks to both the individual and to the new host territories, which might lack the social

¹⁶¹ The form of the suggested redistributive mechanism followed the example of German domestic legislation, which stipulates a population based key for the distribution of asylum seekers among the German Länder (see section 45 of the German Asylum Procedure Act (Asylverfahrensgesetz)).

support networks of the protection seekers' initial destination and which could even lead to higher total costs for the countries operating such a scheme.

3.3.3 Market Mechanisms

A third category of burden-sharing regimes are those that rely on market mechanisms to achieve a spreading of responsibilities in this area. Three types of market-based approaches are: (1) resettlement/dispersal, (2) (explicit) trade in protection quotas and (3) a more comprehensive (implicit) trading mechanism for protection contributions.

3.3.3.1 Resettlement/Dispersal

One established model of non-quota based burden-sharing is the idea of 'voluntary pledging' which has been the mechanism underlying refugee resettlement. Resettlement was first comprehensively used during the Indo-Chinese refugee crisis of the late 1970s and is based on the idea of voluntary offers by states to accept refugees into their territory. Some Western states have accepted significant numbers of refugees through this route.

A recent EU initiative which is based on a similar mechanism is the 2001 Council Directive on Temporary Protection in the Case of Mass Influx¹⁶². The directive develops a range of non-binding mechanisms based on the principle of 'double voluntarism', which the agreement of both the recipient state and the individual protection seeker is required before protection seekers can be moved from one

¹⁶² Council Directive 2001/55/EC of 20 July 2001, OJ L 212, 7 August 2001

country to another. Under this instrument, Member States are expected, in spirit of 'European solidarity', to indicate their reception capacity and to justify their offers. These pledges are to be made in public, allowing for mechanisms of peer pressure or 'naming and shaming'. The directive has not yet been used and therefore the effectiveness of this new instrument of 'soft' co-ordination still remains to be tested in practice.

One finds more established systems for refugee resettlement in the dispersal regimes operated inside in many states in particular traditionally centralized ones. The UK dispersal scheme is a prominent example¹⁶³. Given large inflows of refugees that were increasing the pressure on already scarce accommodation in London and the South East of England led the UK government to introduce a voluntary dispersal scheme for asylum seekers in 1998, followed by a more comprehensive scheme was subsequently incorporated into the government's 1999 Immigration and Asylum Act. Under this scheme, asylum seekers will be dispersed to 'cluster areas' outside London and the South East, in which there is a sufficient supply of suitable accommodation. The Act contains provisions for the reimbursement of participating local authorities for any additional costs incurred in accommodating and supporting asylum seekers¹⁶⁴.

The question that requires consideration is whether this kind of dispersal system can be transferred to the international level with great success. Would states be prepared

¹⁶³ Boswell; 'Burden-Sharing in the EU: Lessons from the German and UK Experience', *Journal of Refugee Studies*, (2003). Vol. 16, No. 3.

¹⁶⁴ Ibid

to pay money to other states in exchange for a relief in their refugee protection burden? It has been argued that states have already been doing so. There are examples where in the past some states have paid other states to protect refugees, with wealthy states giving money to countries neighbouring Rwanda during the recent refugee crisis there¹⁶⁵ and Australia paying Nauru for processing asylum seekers that the Australian Navy prevents from reaching Australian territory.

The disadvantages of a centrally administered international refugee protection fund which would be financed by state contributions and dispersed according to states' offers to receive refugees, entails at least two disadvantages. Firstly, according to Schuck¹⁶⁶ 'it would restrict the acceptable currency of trade to cash, thereby limiting the number and flexibility of possible transactions. Secondly, 'a centralized system would be more complex and involve higher transaction costs.'¹⁶⁷ This is why Schuck has argued for a more decentralized market-based burden-sharing system based on a more explicit trading mechanism.

3.3.3.2 *Explicit Trading*

This model proposed by Schuck is made up of two components¹⁶⁸. The first is based on a traditional quota system. Schuck proposes formation of an international agency which would assign to each participating state a refugee protection quota according to some agreed criteria of reception capacity. A state's quota would make it responsible for a certain number of refugees.

¹⁶⁵ Schuck, P. "Refugee Burden-Sharing: A Modest Proposal." *Yale Journal of International Law* (1997). Vol. 22; pp 234-4.

¹⁶⁶ *Ibid*, p. 280

¹⁶⁷ *Ibid* p. 284

¹⁶⁸ *Ibid*; pp.282-288

The second element is the model's trading component. Under it, the participating states would be permitted to trade their quota by paying others to fulfill their obligations. Once a state receives its quota, it must decide whether it will discharge it by offering protection to refugees on its own territory either temporary safe haven or permanent resettlement; or whether to transfer part or its entire quota obligation to one or several other state(s) in a voluntary public transaction. The payment could take the form of cash or any other resources that the transferee values; for example, credit, commodities, development assistance or political support.¹⁶⁹ Schuck concludes that *'under the trading system the transferor can only induce the transferee to accept the transferor's obligation by paying the transferee enough to compensate it for the additional burden of accepting the transferor's quota'*.¹⁷⁰

Schuck emphasises that states are motivated largely by what they regard as their national self-interest and that they differ significantly in both the attitudes and the resources that they bring to refugee policy. Taking Japan as an example, he suggests that any regional or global quota system would assign it a large quota on the basis of its wealth. *'With a remarkably homogeneous population and no tradition of refugee protection, immigration, or assimilation of foreigners, Japan would presumably be eager to purchase a discharge of its large protection obligation from another country [...] at a high price, reflecting both its high cost of living and its determination to maintain its ethnic homogeneity'*¹⁷¹. This is why Schuck regards interstate heterogeneity as to their

¹⁶⁹ It is possible for states to decide not to trade at all but expect still an improvement on the status quo. 'Even in this case, refugee protection would still be better off than under the existing system because of the quota state's commitment to its initial quota.' (Schuck 1997: p.284).

¹⁷⁰ Supra note 166, p. 284

¹⁷¹ Ibid, p. 284

attitudes towards refugees and their resources for dealing with them, as a potential policy virtue.

Schuck further argues that trading mechanisms '*can encourage states to exploit their heterogeneity through exchanges that serve both their self-interest and the public interest in refugee protection. A properly regulated market in refugee protection quotas promises to accomplish both these ends*'¹⁷². By facilitating voluntary trades, Schuck therefore expects his proposed scheme to reduce the overall cost of the refugee protection system.

Several objections have been made against this scheme which above all relate to the scheme's workability, concern about protection safeguards and the unease about treating refugees as commodities in inter-state transactions.¹⁷³ A more general criticism of the Schuck model is its narrow focus on only *one* aspect of states' contributions to refugee protection. It is this particular criticism that is sought to be dealt with by the comprehensive (implicit) trading model of burden sharing.

3.3.3.3 Comprehensive (Implicit) Trading

An alternative 'trade based' model proposed by Boyer¹⁷⁴ suggests that countries are expected to specialise according to their comparative advantage as to the type and level of contribution they make to international collective goods. Applied to the area of forced migration, it has been suggested that countries can contribute to refugee

¹⁷² Ibid, p. 283

¹⁷³ Anker, D., Filtzpatrick, J. and A. Shacknove, "Crisis and Cure: A Reply to Hathaway/Neve and Schuck", *Harvard Human Rights Journal*, (1998) Vol. 11, pp. 295-310.

¹⁷⁴ Boyer, M. A.; "Trading Public Goods in the Western Alliance System." *Journal of Conflict Resolution*; (1989); vol. 33(4).

protection in two principal ways: proactively, through peace-keeping/making and reactively, by providing protection for displaced persons.

In contrast with the theoretical predictions found in the public goods arguments by Olson and Zeckhauser¹⁷⁵ which predict the 'exploitation of the big by the small' in which it is argued that it is the larger countries which bear a disproportionately large share of the peacekeeping burden¹⁷⁶, no similar exploitation, however, exists with regard to refugee burdens. If anything, it is the smaller countries which bear a disproportionately large share of responsibilities when it comes to receiving refugees.

Olsen's argues that holding all other factors constant, it is the larger states whose actions will make more of a difference to the total common effort than the actions of small states. As a result, larger states will tend to contribute a disproportionate share to the overall effort as smaller states, whose individual contribution will not be as crucial anyway, have a strong incentive to free-ride on the efforts of the larger states¹⁷⁷.

With some countries making disproportionate contributions in 'pro-active' refugee protection contributions (through peace-keeping) and other countries contributing in a disproportionate way with 'reactive' measures related to refugee reception, there

¹⁷⁵ Olson, M. and R. Zeckhauser "An Economic Theory of Alliances." *Review of Economics and Statistics*; (1966), Vol. 48, pp266-79.

¹⁷⁶ Shimizu H. and T. Sandler, *Peacekeeping and Burden Sharing: 1999-2000*, *Journal of Peace Research*, (2002), Vol. 39, No. 6, pp. 651-68.

¹⁷⁷ *Supra* note 176, p. 270

appears to be some support for the Boyer's trading model¹⁷⁸. Moreover, such apparent specialisation in countries' contributions has potentially important implications for attempts to develop multi-lateral burden-sharing initiatives that are perceived to advance states' interests in providing for more equitable, efficient and effective refugee protection. First, evidence of inter-country specialisation also suggests that refugee provision is perhaps not as inequitable as often assumed by those who examine countries' willingness to accept displaced persons on its own.

Second, it is possible that burden-sharing initiatives that attempt to force all nations to increase contributions in a particular category of provision are likely to be counterproductive for the efficient provision of collective goods such as refugee protection. It can then be argued that the provision of this collective good is closer to optimality when countries are able to specialize with regard to their contributions.

The existence of country-specific benefits from refugee protection combined with tendencies for specialisation in states' contributions can both help to raise the efficiency of refugee protection efforts. When just looking at reactive protection contributions, it is tempting to suggest that larger countries should be contributing more in this area. Equalizing reactive contributions also appears to be the general thrust of recent European policy initiatives. However, any attempt to impose quotas and suchlike measures should be seen as a hindrance toward greater specialisation and trade, with adverse overall effects.

¹⁷⁸ Supra note 177.

Burden-sharing initiatives, if they are to strengthen refugee protection, need to be aware of variations in states' preferences in this area and need to recognize comparative advantages possessed by individual states in this area. If they do not, they risk undermining the search for more effective refugee protection efforts.

3.3.4 *Interest-Convergence groups*

Hathaway and Neve¹⁷⁹ have proposed a system of burden sharing in which states would form regional "interest- convergence groups" in which poorer states in a region would agree to host the majority of refugees produced in the region, and richer states in the region would agree to finance the costs of refugee protection incurred by those host states. In this regime, Refugee claimants in the wealthier states would be deported to safe, poorer countries for refugee status determination proceedings. This would eliminate the incentive of both refugees and economic migrants to seek asylum in wealthier countries, which would allow developed states to dismantle their current costly refugee status determination institutions and *non-entree* policies.

Another variation on this theme pioneered by Hathaway, Neve and Schuck is the use of a voucher system for refugees¹⁸⁰. Suppose that refugees from developing countries who migrate to developed countries, rather than being entitled to remain in the developed country, were given a voucher that entitled a country that accepted the refugee to a payment from an international fund.

¹⁷⁹ Hathaway J and Neve A 'Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', Harvard Human Rights Law Journal; 1997 Vol. 10), p.115-211.

¹⁸⁰ Ibid; p. 158.

As a condition to receiving the voucher payment, the host country would have to provide the refugee with an internationally agreed-on set of rights, akin to the current rights provided refugees under the 1951 Convention. The payment would be set large enough to induce some country to accept the refugee. Indeed, one can imagine a centralized market in refugee vouchers, similar to the quota market envisioned by Schuck, in which prospective host countries would bid on the right to host refugees. Furthermore, the rights afforded refugees by their host state could be substantially expanded from the fairly paltry set of rights given them under the current 1951 Convention¹⁸¹.

3.4 Conclusion

It has been shown that the distribution of refugee burdens amongst states is highly unequal, even when different reception capacities of countries are taken into account and it has been argued that this distribution is largely due to structural factors beyond states' control. It has also been argued that given the likely adverse consequences from 'a race to the bottom' by states trying to avoid disproportionate burdens, the development of effective burden-sharing regimes appears to be in the interest of both refugees and countries of destination. The establishment of such regimes does not have to rely on appeals to solidarity but can be promoted by appealing to clear albeit varying benefits that can accrue to states in terms of increased security, lower costs, ensured adherence to international obligations, etcetera

¹⁸¹ Ibid

Finally, the discussion above makes the case for a more a comprehensive burden-sharing approach. It has been argued that policy harmonisation and quota-based burden-sharing regimes on their own are unlikely to provide satisfactory results. By outlining a number of market-based approaches, we hope to stimulate the search for more effective burden-sharing solutions.

Our argument is that states must make a transition away from traditional ways of thinking about refugee flows and solutions. Consideration should be given to implementing refugee law on the basis of a more equitable understanding of responsibility sharing and burden sharing. We believe that collectivized and solution-oriented temporary protection presents the best option regularly to replenish at least a substantial part of the world's asylum capacity.

No approach to refugee protection, standing on its own, can eradicate the need for persons to flee from serious harm. The goal of refugee protection as conceived in international law, and the goal of any burden-sharing formula must be to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return.

Whereas past proposals for international burden-sharing regimes in the West particularly the EU have sometime been rightly criticised for undermining individual rights and for shifting burdens to the South, we suggest that the establishment of regional burden-sharing regimes, like the one discussed here for the EU, can bring substantial benefits with fewer shortcomings, while also being politically more feasible.

Given the deplorable developments of recent years that have led to the current refugee dilemmas, the need to further explore new options to build a more equitable, efficient and effective international refugee burden-sharing regime appears to be more urgent than ever.

The difficulties countries face when protecting refugees, as well as the various economic, social and environmental effects that a refugee population has on its host state are key aspects for consideration. The international community should consider coordinating burden-sharing policy at the national, regional, and international levels. The needs of refugees at various stages in a refugee crisis, from emergency assistance to long-term solutions, should also be considered. Above all, any burden-sharing mechanism must be formulated in a manner that helps to better assist and protect refugees in accordance with international law.

CHAPTER FOUR:

CONCLUSIONS AND RECOMMENDATIONS

4.1 Background

Over the past decades, widespread disregard for human rights has caused one refugee crisis after another. At the same time, the system devised to protect refugees has fallen into disarray, with states showing increasing reluctance to host refugees. Every day, governments violate the principle of *non-refoulement*, the fundamental basis of refugee protection. UNHCR, the agency set up to guarantee international protection for refugees, appears unable to ensure that states fulfill even their minimum obligations towards those forced to flee their country.

The international law regime for the protection of refugees seems to be in crisis. Many people who deserve protection are falling through the net; denied access to asylum procedures, wrongly told they do not qualify as refugees and sent back to countries where they will not be safe. However, instead of enhancing refugee protection, governments are trying to restrict even further the definition of who qualifies for protection and the degree of protection they should receive. The stark reality is that governments, both individually and collectively, are unwilling to commit themselves to a greater degree of protection due to monetary, logistical and security limitations.

4.2 Chapter Conclusions:

In Chapter One, we gave an introduction to international refugee law and a comprehensive background to the refugee problem insofar as burden sharing is

concerned. We then justified the study, analysed available literature on the subject of burden sharing and introduced the conceptual framework of the study as well as the working hypotheses and methodology of research. From the onset, we set out to analyse the existing institutional and legal framework for refugee protection and burden sharing and the efficacy of the existing framework. We also sought to test the theory of interest convergence as far as burden sharing in refugee law is concerned.

In chapter two, we analysed the major legal instruments governing the international refugee protection regime and the various developments in that regime. Also extensively analysed in chapter two is the legal basis and scope of the right to asylum as well as the principle of non-refoulment, its practice and implications. The principle argument here was that the duty of non-refoulment extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition.¹⁸²

This chapter also carried an in-depth analysis of the concept of burden-sharing, its legal basis and function. We further analysed the challenge of ensuring compliance by the international community with the principle of burden-sharing. We argued that the present breakdown in the authority of international refugee law may be attributable to its failure explicitly to accommodate the reasonable preoccupations of governments in the countries to which refugees flee. We further looked at the

¹⁸² See Article 2 (3) of the OAU Convention. See also Declaration on Territorial Asylum, Art.3, G.A Res. 2312, 22 UN GAOR Supp. (No.16) at 81; UN Doc. A/6716 (1967).

mechanisms employed by states in order to avoid taking responsibility for refugees, such as, the politics of *non-entrée* and the arguments on the "right to remain". We found that state practice, indeed, indicates the relegation of burdens to the South by the countries of the North, insofar as refugee protection is concerned. This blunt assault by the North on refugee migration has reinforced the confinement of most of the world's refugees to their regions of origin in the South.

In chapter Three, focus was on the challenge and effort of formulating burden sharing mechanisms and regimes. We analysed the contribution of scholars such as Hathaway, Neve, Schuck and Boyer in attempting to lay down principles for formulation of burden sharing regimes. Chapter Three was geared towards formulating a lasting and formidable solution to the challenge of burden sharing.

We argued that states must make a transition away from traditional ways of thinking about refugee flows and solutions, and that consideration should be given to implementing refugee law on the basis of a more equitable understanding of responsibility sharing and burden sharing. We further argued that collectivized and solution-oriented temporary protection presents the best option regularly to replenish at least a substantial part of the world's asylum capacity.

From the onset, we set out to test the hypothesis that principle of solidarity is of utmost importance to the satisfactory implementation of fundamental humanitarian principles whose respect is an obligation of all states. We have established that refugee law is embedded in fundamental humanitarian principles and that, consequently, the lack of clear-cut and streamlined measures for implementation would result in serious breaches of human rights, hence enhancing the refugee crisis.

We also sent out to investigate the interest-convergence theory which states that where the interests of states are not merged with international obligations, then states opt not to comply with their obligations under international law.

The findings made in each of the preceding chapters lead to the conclusion that this is not so much a time to call for bold new measures by the international community; rather, it is a time to remind the world's governments of their existing obligations towards refugees and to urge them to ensure that these minimum standards are respected. This reminder is warranted as governments continue to use internal legislation and policies aimed at limiting the application of international humanitarian law to protect refugees who are often a result of gross breaches of human rights.

We do however make the finding that in as far as the legal framework for refugee protection does not make concrete direction as to the burden sharing dilemma; and in so far as the legal and institutional framework for refugee protection fails to appreciate the concerns of states with regard to the burden of hosting and caring for refugees, then the existing legal and institutional framework though well intended, fails to adequately provide a secure mechanism for the protection of refugees.

As argued, our belief is that the present break down in the authority of international refugee law with respect to sharing of burden amongst states is attributable to the failure of international refugee law to explicitly accommodate the reasonable preoccupations of governments in the countries to which refugees flee. International refugee law is part of a system of state self-regulation. It will therefore be respected

only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests.

As noted, our findings indicate that there are very real differences in the manner in which different countries can best contribute to the successful implementation of a more collectivized system of refugee protection. Beyond a common duty of all states to provide first asylum, there is no reason to expect every country to play an identical refugee protection role. By allowing states to contribute to regional/international refugee protection programs in ways that they find least difficult, states might be able to provide more protection at much reduced costs. Given that states' interests vary, countries are likely to favour different types of burden-sharing regimes.

Nevertheless, we call on states to ensure that the full framework provided by international human rights law is applied to the protection of refugees. We believe that basic human rights principles provide an inviolable standard of protection for all people, regardless of asylum decisions made by individual states. In that light, we make the following recommendations which outline the minimum steps necessary to protect the human rights of refugees so that they are safe from further harm and are treated with dignity.

4.3 Recommendations:

The battle for the protection of refugees can be fought both at the state level and at the international level. In recognition of this fact, the following recommendations are suggested for implementation by individual states.

4.3.1 To Individual States:

Many asylum-seekers are turned back at the border without a hearing; detained as "illegal immigrants"; subjected to further violence or squalid conditions in refugee camps; put through summary and unfair asylum procedures; or sent back to the country they fled. Governments in countries of asylum need to consider the following strategies in order to help alleviate the plight of refugees.

4.3.1.1 Building awareness and public support for the rights of refugees.

Governments in countries of asylum often obscure the relationship between human rights violations and the protective needs of refugees. As the number of those seeking protection increases, governments seem less willing to live up to their international obligations. Many governments which have offered people asylum in the past are now restricting access to their countries, often justifying such actions on the grounds that they are responding to economic difficulties or anti-immigrant attitudes and growing xenophobia within their societies. Host countries should conduct public information campaigns drawing attention to the human rights concerns underlying the plight of refugees and the obligations of states to protect them.

4.3.1.2 Ratification and implementation of International Treaties.

Ratification of international treaties relating to the protection of human rights and the rights of refugees demonstrates states' commitment to the values endorsed by the international community. All states should accede to and implement the 1951

Convention Relating to the Status of Refugees¹⁸³ and its 1967 Protocol,¹⁸⁴ as well as relevant additional regional refugee treaties.¹⁸⁵ They should also accede to and implement international and regional human rights treaties. States should apply the full range of refugee and human rights treaties in determining who is entitled to protection as a refugee. Their assessment of claims should be based on international and regional refugee instruments and relevant human rights instruments as opposed to internal policies only.

4.3.1.3 *Enforcement of the Principle of Non-Refoulement.*

The fundamental basis of international refugee law is the established principle of *non-refoulement*. It is a norm of customary international law, binding on all states irrespective of whether they are party to the UN Refugee Convention, and states cannot derogate from it. States should adhere to the full range of other international human rights standards so that refugees are not sent back to face grave human rights violations, such as torture, "disappearance" or execution. States should ensure that the principle of *non-refoulement* applies irrespective of whether an asylum-seeker has been formally granted refugee status. States should not interpret the phrase "coming directly" in Article 31 of the UN Convention in a manner that excludes refugees who merely travel through another country before applying for asylum.

¹⁸³ Convention Relating to the Status of Refugee, July 28, 1951; 189 UNTS 150 (entered into force April 22, 1952).

¹⁸⁴ Protocol Relating to the Status of Refugees. Jan 31 1967; 19 UST 6223, 606 UNTS 267 (entered into force Oct 4 1967).

¹⁸⁵ E.g. The 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa. Opened for signature on Sept. 10, 1969; 1000 UNTS 46 (entered into force June 20, 1974).

4.3.1.4. Ending practices that prevent or deter asylum-seekers from pursuing claims.

States should ensure that any restrictive measures, such as visa controls, carrier sanctions and interdictive border controls, do not in effect prevent asylum-seekers obtaining access to their jurisdiction or asylum procedures. Governments should not deny asylum-seekers access to adequate means of subsistence while their asylum application and any appeal is being considered. This of course should be done taking into consideration the cultural and socio-economic implications on the receiving country.

4.3.1.5. Provision of a fair and satisfactory asylum procedure.

In each state, the body responsible for deciding asylum claims must be independent and specialized, with sole and exclusive responsibility for dealing with such claims. The decision-makers must have expertise in international human rights and refugee law. At all stages of asylum and related procedures, including expulsion or detention hearings, an asylum-seeker should have the right to legal counsel, be notified of that right, have access to qualified interpreters, and have the right to contact UNHCR and other relevant non-governmental organizations.

Every asylum-seeker must have the right to appeal where their claim is originally rejected. Appeals should normally be of a judicial nature and heard by a different body from that which heard the case in the first instance. An appeal should include a full examination of the case given the gravity of the interests at stake. Asylum-seekers must be allowed to stay in the host country during the asylum determination procedure.

4.3.1.6 Acceptance of responsibility for examining asylum claims.

Increasing numbers of governments are avoiding their responsibility for examining asylum claims or transferring it to other countries. They are "safe third country" practices, which lead to the automatic return of people from one country to another. The state in which an asylum-seeker lodges an asylum claim should normally assume responsibility for substantively examining that claim.

While temporary protection schemes, or the granting of *de facto* or some form of humanitarian status, may sometimes provide interim protection, they should not be used to deny asylum-seekers access to a determination of the substance of their claim under the UN Refugee Convention. All persons granted some form of interim protection must be given an opportunity to have their individual asylum claim assessed in a fair and satisfactory procedure, to determine if they are still in need of protection, before a decision is made to remove them from the country of asylum.

4.3.1.7 Protection of rights of refugees in situations of mass exodus.

States should explicitly endorse the fundamental obligations established in EXCOM Conclusion 22, that is, in situations of mass exodus, asylum-seekers should be admitted to the state where they first enter, at least on a temporary basis pending arrangements for a durable solution. In all cases, the fundamental principle of *non-refoulment*, including non-rejection at the frontier, must be observed scrupulously; asylum-seekers in mass exodus situations should not be penalized or treated unfavourably solely on the grounds that their presence in the country is unlawful. They should not be subjected to restrictions on their movements except those which

are necessary in the interest of public health and public order; states where large groups of refugees seek asylum should respect the refugees' fundamental civil rights and should ensure that they have the basic necessities of life.

The refugees should not be subjected to cruel, inhuman or degrading treatment and should not suffer discrimination; states should provide the means for asylum-seekers to stay in a place of safety; and all governments should provide effective assistance, including financial support and resettlement opportunities, to states that host large numbers of refugees, for as long as it is required.

Governments, in consultation with UNHCR and non-governmental organizations, should agree on standards for the use of temporary protection schemes in situations of mass exodus. Such temporary protection schemes should not be used to undermine existing standards under the UN Refugee Convention.

4.3.2. To States Collectively:

At the international level, there is no coordinated scrutiny or monitoring of refugee protection, and considerations other than human rights often drive refugee policies. The crisis in refugee protection and related human rights issues are not being addressed in a comprehensive way. In the light of this fact, the following measures are recommended:

4.3.2.1. Base repatriation programs on human rights standards.

The internationally agreed standard on repatriation is based on the respect of the voluntary and individual character of repatriation and the need for it to be carried out under conditions of absolute safety. Experience, however, shows that many repatriations are not voluntary. The principle of *non-refoulement* should not be violated in repatriation schemes. Repatriation schemes should include human rights guarantees at all stages of the return. Repatriation should not be imposed until there is a fundamental and lasting change in the human rights situation in the country of return. The international community, including governments, international organizations and non-governmental organizations, should immediately agree on how to provide an independent human rights assessment and monitoring system for repatriation programs.

4.3.2.2 Strengthening responsibility-sharing.

States should equitably share the responsibility for hosting refugees and funding their support. States should not bear a disproportionate share of the responsibility simply because of their geographical location.

The fact is that, in many instances, host states may not have the monetary and structural capacity to retain and maintain asylum-seekers in accordance with the standards set out in refugee instruments. Host states are confronted by political, social and economic hurdles which influence their ability to maintain refugees within their borders, and afford them the treatment required of an asylum state towards asylum-seekers. These political, social and economic influences often lead to

expulsion of the refugees or their retainment albeit in harsh, degrading and inhumane living conditions. In the light of this, states must cooperate in sharing the responsibility of maintaining refugees, if the objectives of the 1951 UN Convention and its Protocol are to be achieved.

UNHCR funding arrangements should urgently be reviewed to create an adequate mechanism for funding ongoing programs and, in particular, to improve the support for those states which bear the overwhelming burden of hosting refugees. UNHCR depends entirely on donations from states to fund its programs. In recognition of the effort made by UNHCR in protecting refugees, states should develop internal policies to ensure that they continually and regularly support UNHCR financially. In addition, states should take steps to enable UNHCR to implement its protection mandate in a consistent manner and should not impose their political agendas on the body.

Burden sharing should not be used to prevent refugees from seeking asylum in the country of their choice or to limit protection to the region of origin. All states should share responsibility for hosting refugees by making resettlement within their borders a viable option.

4.3.2.3 Enhance accountability within the international system.

At present, little information is provided by governments about the protection they offer refugees and how they apply international refugee law. This makes it more difficult to hold governments to account if they fail to live up to their obligations

towards refugees. States should comply with their reporting obligations under the UN Refugee Convention. These reports should then be submitted by UNHCR to the UN General Assembly. The UN General Assembly should establish an impartial mechanism to monitor the compliance by states parties to the UN Refugee Convention and its 1967 Protocol.

4.3.2.4. Improving the monitoring mechanism of the Refugee Convention.

A specific element of UNHCR's international protection function is its supervisory responsibility, as contained in paragraph 8 of the UNHCR Statute. This right and duty on the part of UNHCR to intervene corresponds to States' treaty obligations in this area, as foreseen by Article 35 of the Refugee Convention, Article II of its 1967 Protocol, Article VIII of the 1969 OAU Refugee Convention, and Recommendation (e) of the 1984 Cartagena Declaration. Pursuant to Article 35 (2) (b and c) of the 1951 Convention, States undertake to provide UNHCR, in the appropriate form, with information and statistical data concerning the implementation of the 1951 Convention, including laws, regulations and decrees relating to refugees.

The rationale behind UNHCR's supervisory function is the general idea that international supervision by an international organisation is indispensable for a functioning framework of international co-operation and to prevent the collapse of such a system. In the context of refugee protection, it is important to ensure the resolution of refugee problems and common interpretation and implementation of international refugee law on the basis of objective evaluations and judgements.

The following are essential elements for UNHCR to fulfil its supervisory duty effectively:

4.3.2.4.1 Monitoring:

UNHCR is entitled to monitor refugee status determination and treatment in respect of individual cases, with a view to identifying major protection problems, and to recommend that Governments should contribute to achieving rapid solutions to such problems.

4.3.2.4.2 State reporting:

UNHCR should follow up on the application and implementation of the Refugee Convention and Protocol as well as applicable regional instruments in various Member States, including national practice and procedures for the recognition of refugee status, and submit a report to the Executive Committee on the subject. Governments should co-operate with UNHCR in matters relating to the implementation of the international refugee instruments. In order to facilitate UNHCR's supervisory role, they should provide information and statistical data concerning implementation.

4.3.2.4.3 UNHCR access:

UNHCR should be given prompt and unhindered access to asylum applicants, refugees and returnees and shall be allowed to supervise the well-being of persons entering reception centres, camps or other refugee settlements. UNHCR should also

have the capacity to monitor the personal security of refugees and asylum-seekers and take appropriate action to prevent or redress violations thereof.

4.3.2.4.4 Right to contact UNHCR:

Asylum seekers and refugees, including those being detained, should be entitled to contact UNHCR and should be duly informed of this right.

4.3.2.4.5 Participation in refugee status determination procedures:

UNHCR should actively and consistently participate in various forms in procedures for determining refugee status. It may be necessary for UNHCR, with the consent of the authorities of the asylum country, to certify that a person is considered a refugee within the UNHCR mandate.

4.3.2.4.6 UNHCR advisory services:

UNHCR should provide constant advice on the practical application of the provisions of international refugee instruments by countries exposed to large-scale influx of refugees. As for the application of the cessation clauses, UNHCR should be appropriately involved.

UNHCR should strive to maintain constant dialogue on developing standards of protection with Governments, non-governmental organisations and academic institutions and to fill lacunae in international refugee law, particularly regarding asylum-seekers and the physical protection of refugees and asylum-seekers. The fact that UNHCR issued a Handbook relating to procedures and criteria for determining

refugee status and that UNHCR was asked to circulate significant decisions on the determination of refugee status is indicative of UNHCR's role in any harmonisation process.

4.3.2.4.7 *State practice:*

States' support of the various elements of UNHCR's supervisory function has found an important expression in the above-cited Conclusions of the Executive Committee. In general, most States foresee, at a minimum, an advisory-consultative role for UNHCR in national refugee status determination procedures. States should ensure that UNHCR is notified of asylum applications, is informed of the course of the procedures and has guaranteed access to files and decisions which may be taken up with the authorities, as appropriate. States should also grant asylum applicants and refugees access to UNHCR and vice versa, either by law or administrative practice.

While the above paragraphs set out the basic framework for the exercise of UNHCR's supervisory role, there are areas that require further examination. These include the following: in view of differing interpretation regarding the content/application of provisions of the international refugee instruments, the question of possible measures to reach a common understanding of these provisions; State reporting as a whole in the refugee protection context; the question of institutionalising a constructive dialogue with States Parties to the international refugee instruments on their implementation at regular intervals (with a comparison with the human rights treaty monitoring bodies); and measures of enforcement,

including models of international supervision that could usefully be adapted to the international refugee protection context.

4.4 Conclusion

In an ideal world, a system to share the burdens and responsibilities of refugee protection would operate at the global level. A universal system could spread the costs of providing asylum among the largest number of states, thereby minimizing the risk of an unacceptably high cost being imposed on any particular government. It is the considered view of most contributors to our consultations, however, that there is at present an insufficient sense of "connectedness" among states at the universal level to generate a formal, binding commitment to collectivize the costs of refugee protection. While not ruling out the potential for a more universal system in the future, we have been persuaded that a dependable regime of shared responsibility toward refugees is presently most viable within associations of states at the sub-global level.¹⁸⁶

Enhanced solidarity among states at the sub-global level is advocated as a practical yet principled means to implement the universal commitment to refugee protection undertaken by state parties to the Refugee Convention. The present global system of cooperation in refugee protection has relied on vague promises of cooperation among governments, accompanied by often undependable funding. It has proved

¹⁸⁶ Organizations that already allow states to work effectively together, and to which governments are prepared to make binding commitments (for example, by reason of economic and trading relationships, shared religion or language, common political or legal traditions, or similar security objectives) are logical sites in which to fashion a collectivized approach to refugee protection. Associations that link North and South, and which have a broadly based membership -- such as our co-host for this meeting, the Commonwealth of Nations -- are best positioned to facilitate a workable regime of burden and responsibility sharing for refugees.

unable to answer the concerns of front-line receiving states, which have become increasingly and understandably loathe relying on purely discretionary support. The quality of refugee protection has suffered accordingly.

Because governments have traditionally been prepared to make more dependable commitments at the sub-global level where their influence is greatest and their interests are more directly implicated, the model we propose is positioned to give substance to the rhetoric of interstate cooperation. Security, economic, and other concerns should be invoked to motivate states outside the various sub-global organizations to support the organizations' refugee protection efforts, albeit generally by fiscal or other forms of residual assistance. To the extent that UNHCR plays an effective role in coordinating the work of the sub-global organizations that undertake refugee protection responsibilities, a universal protection system can emerge in practice. While our primary objective in promoting sub-global cooperation is clearly to find a way to make refugee protection feasible, this strategy will lay the groundwork for a more reliable form of global cooperation.

Second, refugee protection needs to become seriously solution-oriented. Lip service is paid to the importance of identifying "solutions" to refugeehood. As normally understood, this means ending the violence or other human rights abuse that induced refugee flight, so that refugees can go home in safety. Yet even as states and the United Nations are increasingly aware of the need to intervene against the phenomena that force refugees from their homes, little has been done to re-tool the mechanisms of refugee protection itself to complement this solution-oriented vision. Even when it becomes objectively safe for refugees to return to their countries of

origin, the potential for repatriation is often frustrated by the failure to take effective steps to ensure that the eventuality of return home remains viable.

Repatriation will often be unsuccessful where family and collective social structures of refugees have not been sustained during the period of protection abroad, or if refugees were denied opportunities to develop their skills and personalities in the asylum state, or when the place of origin sees the return of refugees as a threat. In such circumstances, repatriation efforts may lead only to poverty, violence, and even further flight. To develop the potential for repatriation continually to regenerate asylum capacity, we propose a model of dignified temporary protection, coupled with an effective system of repatriation aid and development assistance.

Bibliography:

Texts:

B.S Chimni, *"International Law and World Order: A Critique of Contemporary Approaches"*; (Sage Publications, New Delhi, 1993)

B.S Chimni, *"International refugee Law: A Reader"*, (Sage publications, London 2000)

Clauden M. Skran, *Refugees in Interwar Europe: The Emergence of a Regime*, (Clarendon Press, Oxford, 1995)

Gallie, W. B; *"Philosophy and Historical Understanding"*, (Chatto and Windus, London, 1964)

Gorman, R. F., *"Coping with Africa's Refugee Burden: A Time for Solutions"*, (Martin Nijhoff Publishers, Dordrecht, 1987)

Guy S. Goodwin, *"The Refugee in International Law"*; 2nd ed. (Clarendon Press, Oxford, 1996)

Handbook on Procedures and Criteria for Determining Refugee Status, (UNHCR, Geneva, Sept., 1979)

Hathaway J. C, *"The Law of Refugee Status"*, (Butterworths, Toronto, 1991)

Jackson, Ivor C, *"The Refugee Concept in Group Situations"*, (Martinus Nijhoff Publishers, The Hague, 1999)

Jean-Pierre Hocke, *"The Need for political Will to Resolve Today's Refugee Problem"* in Gill Loescher and Laila Loescher (eds), *"Refugee Issues in International Relations"* (Clarendon Press, Oxford, 1990);

John Morrison, *The trafficking and smuggling of refugees: the end game in European asylum policy?* (UNHCR, Geneva, July 2000)

Louise W. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations- Its history and work, 1946-1952* (Oxford University Press, London, 1956)

Marjoleine Zieck; *UHCR and Voluntary Repatriation of Refugees: A Legal Analysis*; The Hague, Boston, London: Martinus Nijhoff Publishers, 1997.

Patricia Tuitt, *False Images- Law's Construction of the Refugees*, (Pluto Press, London, 1996)

Pirkko Kourula, *Broadening the Edges: Refugee Protection and International Protection Revisited*, (Martinus Nijhoff Publishers), The Hague, 1997)

Skran C. M; *"Refugees in Inter-war Europe: The Emergence of a Regime"*; (Clarendon Press, Oxford, 1995)

UNHCR and IPO, *"Refugee Protection, A Guide to International Refugee Law"*, Handbook for Parliamentarians, Vol 2 2001.

Journals and Articles

Adrienne Millbank, *"The Problem with the 1951 Refugee Convention"* Research Paper 5 2000-01, Social Policy Group, 5 September 2000

Guy S. Goodwin-Gill, 1989. "The Language of Protection"; *International Journal of Refugee Law*.

Jeffrey Smith, 'Europe Bids Immigrants Unwelcome', *Washington Post Foreign Service*, 23 July 2000.

Astri, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.' *Journal of Refugee Studies*, vol. 11, No.4, 1998

Boyer, M.A; "Trading public goods in the Western alliance system." *Journal of Conflict Resolution* vol. 33(4) 1989; p.68.

Hartling Poul, *"International Solidarity and the International Protection of Refugees"*; (Congress on International Solidarity and Human Actions, International Institute of Humanitarian Law, San Remo, Sept. 1980)

Hathaway J and Neve A '*Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection*', Harvard Human Rights Law Journal, 1997 Vol. 10)

James Hathaway, *Can international Refugee Law Be Made Relevant Again?* USCR article found in http://www.refugees.org/world/articles/intl_law_wrs96.htm.

McNamara, "*The future of Protection and the Responsibility of the State*", International Journal of Refugee Law Vol. 10, Nos. 1&2, 1998

Schuck, P. "*Refugee Burden-Sharing: A Modest Proposal.*" Yale Journal of International Law vol 22. (1997)