

REFUGEE LAW  
INITIATIVE

SCHOOL OF  
ADVANCED STUDY  
UNIVERSITY  
OF LONDON

# The Future of Refugee Law

RLI Working Paper Series  
*Special Edition (16–22)*

A special edition of papers arising from RLI's Inaugural Annual Conference, *The Future of Refugee Law*  
29 June – 1 July 2016  
Senate House, London



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# **The Future of Refugee Law?**

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## **REFUGEE LAW INITIATIVE**

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RLI Working Paper No. 16

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## International refugee law – yesterday, today, but tomorrow?

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### Introductory note

This paper is based on two talks, the first being a presentation on 29 June 2016 at the Conference on 'The Future of Refugee Law', organised by the Refugee Law Initiative, University of London; and the second being the Sir Kenneth Bailey Memorial Lecture at the University of Melbourne on 14 September 2016.

### Keywords

1951 Convention, UN, League of Nations, Nansen, EU, UNHCR

## Introduction

For many of those who supported the United Nations at its inception, social justice and economic advancement were as important to international harmony as the prevention of war. Today, these needs are no less a concern, even if the realities of population growth, under-development, under-investment, and a world still riven by inequality might lead us to question just how far we have come.

The picture is by no means entirely negative, however, and the international refugee regime demonstrates good evidence of co-operation, of solutions found and protection ensured; of progress, of a substantial degree of resilience, a solid historical base in the practice of States, and the capacity to evolve. We do move on, and even if that does not necessarily lead to progress in all things, it may mean that certain issues are now more clearly delineated, and that we can look to the future with a measure more confidence.

Of course, like so much of the law which regulates relations between States and their conduct towards individuals, certain elements remain contested. Whether the regime can respond effectively to today's challenges may be doubted, for much depends on political will among States; and on a quality of leadership and vision seen before, but which today seems only too lacking.

Still, it helps to look to the past. International lawyers do that a lot, seeking patterns of behaviour which, in their turn, may herald the emergence or consolidation of a customary rule of law and the sense of an obligation. But we also look to the past empathetically, to gain understanding of how earlier, not so dissimilar situations were encountered, how they were perceived and analysed, and how they were met. It is not that history repeats itself, or can be made to repeat itself; or that what worked then, must necessarily work now. It is simply that there are lessons to be learned and mistakes to be avoided.

## 1. International refugee law yesterday

So let's go back to the beginning, and see how the history of international refugee law closely parallels the modern history of international law and organisation.

It all began at a meeting in Paris in February 1921. Gustave Ador, then President of the International Committee of the Red Cross (ICRC), met with the President of the Council of the League of Nations, and brought up the urgent problem of several hundred thousand Russian refugees then adrift in Europe and elsewhere – adrift and without protection, written off by their country of origin, with no prospect of settling locally, of finding employment, let alone of moving on to other countries. The ICRC and the League of Red Cross Societies took up the challenge of relief, with considerable assistance from the American Red Cross and the International 'Save the Children' Union. But relief was not enough, the resources of voluntary organisations were rapidly diminishing, and something had to be done with regard to legal status, employment and emigration. There was no better organisation than the League, argued the ICRC, to look into the issues, and only the League was in a position to surmount the political and social difficulties and come up with solutions.

In a letter on 15 June 1921 to the President of the Council of the League, Gustave Ador urged it to take the necessary action. The Secretary-General, Sir Eric Drummond, sounded out governments on what to do, and many responded positively, favouring both 'a general organisation under the auspices of the League', and a High Commissioner – someone with personal authority, able to secure the necessary support from governments, to influence non-governmental organisations and gain their respect. Such a High Commissioner would define the legal status of the refugees, organise their repatriation or allocation to other States, find them productive employment (a recurring theme) and, together with philanthropic organisations, undertake relief work. This would cost money, of course, and although it was briefly considered that 'funds belonging to former Russian Governments, ... at present deposited in various countries' might be used, nothing came of the idea.

A conference duly took place in Geneva from 22–25 August 1921. The Norwegian, Fridtjof Nansen was proposed as High Commissioner – he had already worked on famine relief in Russia and on the repatriation of former prisoners of war – and a telegram was sent off. On 1 September, he replied by letter, accepting the post, and at once began the search for solutions. One of the first problems was that of Russian refugees in Constantinople, many of them now 'absolutely without resources'. For them, as for others, Nansen saw answer as settling them 'in productive employment in countries where they will not become a charge on the public funds'. He set about finding opportunities, the governments of Bulgaria and Czechoslovakia stepped up, and Nansen then turned to organising transport, visas and transit.

A year later, he was able to report that funds had also been provided by Member States and by the American Relief Association for the 'evacuation' (we would now say 'resettlement') of Russian refugees from Constantinople, with the Serb-Croat-Slovene State also assisting. In the meantime, of course, Nansen had secured the agreement of governments under the Arrangement of 5 July 1922 to issue identify certificates to Russian refugees – a simple administrative step which was highly instrumental in their ultimately finding solutions. Almost all League members adopted the system, together with Germany, a non-member.

He also called attention to issues which even then were of critical concern, just as they are today. He noted the 'exceedingly unhappy situation of Russian refugee children', and that some 140,000 refugee children were estimated to be in Europe. An orphanage was transferred *in toto* from Constantinople to Belgium, while other groups of children were evacuated to France and Bulgaria, special provision being made for their education.



No less in need of special attention were refugee invalids, and refugees in the Far East, including problematic numbers in China who had been engaged in military activities in their home country. He intervened with Romania to prevent the threatened expulsion, for 'military reasons', of some 10,000 Russians who had lost their nationality and who could only return to their country, 'at a grave personal risk'. Mass expulsion was averted, although on condition that interested organisations make arrangements, 'for their satisfactory evacuation elsewhere'. Similar issues arose in Poland, which proposed the expulsion of all 'non-political refugees'. The High Commissioner again intervened, noting that many had lost their Russian nationality and would not have been allowed to return in any event. 'Resettlement' opportunities were negotiated with the United States, even as discussions were initiated with the Soviets on the repatriation of those wishing to return.

When we think of the cardinal principle of *non-refoulement* today – the rule which prohibits the return of the refugee to wherever he or she may run the risk of persecution – we tend to look back no farther than the 1951 Convention relating to the Status of Refugees, or perhaps to the 1933 Convention on the International Status of Refugees. But the idea, the principle, was already implicit in the doctrine of refugee protection and assistance in the 1920s. The League and the ICRC both accepted that, if refugees were to return to Russia, then this would need to be accompanied by assurances of the 'most elementary security and the prospects of conditions at least as favourable as those under which they are now living'. Even in the absence of any explicit treaty provision, Nansen felt able to intervene with States to stop the threatened return of refugees.

In the League's attention to the situation of Russian refugees (soon joined by other groups and categories), we can see protection against forcible return and other emerging principles at work – recognition of responsibility to assist countries of first refuge; acceptance of the importance of a set of solutions to be promoted with and by States, including emigration (but with that emphasis always on 'productive employment'), and special measures for vulnerable groups; and recognition of the value of identity certificates, followed rapidly by the refugee passport.

The numbers of refugees in Europe always exceeded the 800,000 or so Russian refugees to which reference is often made, and other categories likely brought the figure to 3 million, if not more. In 1923, Armenians were added to the High Commissioner's mandate, followed by Assyrians, Assyro-Chaldeans and Turkish refugees in 1928. Although each of these later groups was seen to share certain common characteristics – the refugee was outside his or her country of origin, no longer enjoyed its protection, and had not acquired the protection of another – States preferred an *ad hoc*, group by group approach, seeking to limit their commitments to known categories and staying away from any general description of unknown quantity. However, this was not Nansen's view. On the contrary, as Louise Holborn noted, he believed that long-range plans, 'carefully conceived and carried through would prove not only far more successful but much less costly than the relief and piecemeal efforts being made'.

In 1930, Fridtjof Nansen died. No new High Commissioner was appointed at the time, but the functions and responsibilities were transferred to a new office, named in his honour. In October 1933, as the Nansen Office itself was on the point of winding up and on the eve of a decade or so of devastating displacements, a diplomatic conference was convened in Geneva to draft a convention on the legal status of the refugee, and to promote the principle of equal treatment with nationals. It was to be the first occasion in which the principle of *non-refoulement* was mentioned in an international agreement, in which limitations on expulsion were mooted, and in which access to education was seen as essential to equality.

More significant, perhaps, was the emphasis which delegates gave to national interests, particularly in the case of the so-called front-line States. For Poland, the refugee question looked quite different than for those countries more distant, where refugees arrived only after having passed through a sort of filter. Similarly, when the question of putting return clauses on Nansen certificates came to be discussed, together with whether refugees should be allowed to go back unhindered to the country of issue, the interventions of those days sound all too familiar, especially when placed alongside current proposals for revision of the Dublin scheme and the 'common European asylum system'. Austria, for example, wanted to consider each potential readmission on a case by case basis. Finland thought that frontline receiving States deserved special attention, and that no one could think of *obliging* such States to readmit every refugee who had ever stayed there. Greece, too, said that a refugee's departure was considered definitive, and Poland was of much the same view. The 1933 Conference wound down to its conclusion with little apparent enthusiasm. Only three States signed on the day, and ultimately only eight States ratified the convention, three of them with substantial reservations and declarations.

All the while, the flight from Nazism took hold. To their credit, in one small respect at least, States agreed that there should be a new High Commissioner responsible for Refugees (Jewish and other) coming from Germany, but formally outside the League owing to Germany's continuing membership. James McDonald was appointed to the post, also in October 1933, and was tasked to 'negotiate and direct' the 'international collaboration' necessary to solve the, 'economic, financial and social problem of the refugees...'. It got worse. Doors were closed, the pressure grew, and while private organisations might do their best for the refugees, it was not enough just to help those who fled. Major efforts were needed to remove or mitigate the causes, and this, said McDonald in his December 1935 letter of resignation, was a political function and therefore the responsibility of the League itself, given the danger to international peace and security.

By this time, however, the League was too weak to influence events. A new High Commissioner was appointed to succeed McDonald, with his mandate extended to refugees from Austria after the Anschluss in 1938; and a new organisation was created, the Intergovernmental Committee on Refugees, following the Evian conference that

year. Events, however, rapidly took over. Notwithstanding the times, notwithstanding knowledge of events and of persecution and of flight, humanitarian responses were not the order of the day. On the contrary, refugees were seen as potential threats – to the economy, to social cohesion, to the process of ‘appeasement’. As Louise Holborn concluded in May 1939, the League had,

‘... handicapped itself... first by always dealing with [refugee work] as a humanitarian question instead of treating it as a political one and striking at the root of the problem... by negotiations with the refugee-producing countries; and second by its unwillingness to commit itself to long-range plans.’

It is ironic that the architecture of international law and organisation set up for refugees in the new era of the United Nations did little at the time to engage with these concerns. To this day, causes remain a fundamental challenge to a community of States and to an organisation premised on non-intervention, while the seductive but illusory pull of ‘temporariness’ continues to influence policies and practices at both national and international level.

## 2. International refugee law today

When States finally came together in the new United Nations, refugees were high on the agenda. In its first London session in February 1946, the General Assembly identified three principles which had already figured in League of Nations doctrine, but which now acquired new salience: first, that the refugee problem was international in character; second, that there should be no forced return of those with valid objections to going back to their country; and third that, subject to this consideration, repatriation should be promoted and facilitated. While the UN necessarily built on what had gone before, there was one major, significant difference. With the adoption of the Universal Declaration of Human Rights in 1948, the individual was now clearly in the frame; and while sovereignty and non-interference might continue their role, the movement of refugees between States and the entitlement of refugees to protection was clearly a matter of international law.

The Constitution of the UN’s first agency, the International Refugee Organisation (IRO), was adopted in December 1946, and focussed on finding solutions for those displaced by the Second World War and by contemporaneous political developments. Co-operation was as limited as it had been in the time of the League, even though a reading of the Article 1 of the United Nations Charter might have hinted at something stronger. Recent developments, even within such a supposedly well-integrated regional organisation as the European Union, have shown only too well how difficult it is to distil the principle of co-operation into practical results. Self-interest remains at the heart of the matter, and action in pursuit of solutions for refugees depends, as it always has done, on the formal consent of States, staggering from one crisis to another.

The IRO’s successes and failures cannot be separated from its political context. On the one hand, it undertook comprehensive resettlement activities, but on the other, it was expensive, consistently criticised by the eastern bloc and, for some of its western supporters, unsuited to broader political purposes. Even though there were then some fifty-four members of the United Nations, only eighteen joined the organisation and contributed to its programmes, either financially or with commitments to the resettlement of Europe’s refugees and displaced.

Alternatives were debated in the Third Committee and the Economic and Social Council in the late 1940s, and States agreed that the IRO should be replaced by a non-operational subsidiary organ of the General Assembly, the Office of the United Nations High Commissioner for Refugees (UNHCR), whose work would be ‘complemented’ by a new convention on the status of refugees. UNHCR, which came into being on 1 January 1951, was formally entrusted with responsibility to provide international protection and, together with governments, to seek permanent solutions for the problem of refugees. But its work was also to be ‘humanitarian’ and ‘non-political’ and, as with the League, prevention and causes were none of its business.

In addition, when States came to draft the 1951 Convention, they expressly declined to write in specific obligations on co-operation, which the then UN Secretary-General saw as crucial to an effective regime. His suggestion for an article on burden-sharing was rejected, as was his proposal that States give ‘favourable consideration’ to admitting refugees. It is precisely in these areas – causes and co-operation – that the international refugee regime reveals its incompleteness, and this helps to explain many, if not all, of the actions taken by States, particularly unilaterally, and of the concerns which many also share.

Although the occasional official or politician may complain that the 1951 Convention is unsuited for today’s conditions and call for an overhaul of the legal framework, they are generally hard pushed to say what exactly is wrong. There is a debate here, which is worth having. Perhaps the refugee definition is not wide enough and it should be re-drawn to embrace more clearly the ‘new’ categories of displaced? Or perhaps the principle of family unity should be moved from the Final Act into the body of the Convention? That does not seem to be what they want, but neither do the proponents of ‘reform’ seem inclined to challenge the core meaning of protection, and to demand the power to send people back to where they will be at risk of death, persecution, torture, or other serious violations of their human rights.

There are still undoubted strengths in international refugee law, as it has evolved in practice and in the institutions set up by States. The 1951 Convention and its ‘updating’ 1967 Protocol are now complemented by regional arrangements in Africa, Central America and Europe. The protection of refugees has itself evolved and been strengthened by developments in the general field of human rights, while the principle of *non-refoulement* is manifestly one of customary international law.

International refugee law is a dynamic regime, a matter of what is written, what is done, what is expected. It is an *international* regime, in that it links a treaty concluded under the auspices of the United Nations, to an agency – a subsidiary organ of the General Assembly accepted by States both as partner and supervisory mechanism; and then to a forum of States, the UNHCR Executive Committee.

In practice, the links are more extensive still. UNHCR's staff of 9,000 plus operate, and inter-operate with States at the official level, in 125 countries worldwide. UNHCR will often be involved when refugee status decision-making authorities seek to apply international criteria to the disparate facts of individual lives. Whenever and wherever people arrive in search of protection, whether or not in large numbers, it is UNHCR's responsibility to provide protection, that is, to intercede with governments, if necessary, to ensure that those in need are identified and treated accordingly. UNHCR may not have the authority to bind States or to interpret legal matters with final effect, but the role with which it has been entrusted by States means that its views must be considered in good faith, and justifiable reasons given for disagreement. In such contexts, national and international officials are engaged in common cause, as indeed they have been, if not since time immemorial, then at least since 1921.

The essence of refugee protection today can be stated quite simply. The refugee is someone whose status is defined and recognised by international law, both under treaty and as a matter of customary international law. He or she *does* have a right to seek asylum, and the search for refuge is *not* a criminal act from an international law perspective, whatever States may pretend. It follows that refugees in search of protection are not to be penalised because of their illegal entry or presence, and that each claim must be examined on its merits; in this context, the precise standard of international due process may be a work in progress, but the essentials are emerging in the practice of States and in light of overarching principles of human rights.

Above all, as over ninety years of sufficiently conforming practice have confirmed, the refugee must not be *refouled*. There are gaps and grey areas which States can exploit in their own interest – the gap between *non-refoulement* and asylum, for example, which human rights is seeking to bridge; or the gap between primary obligations and responsibility when it comes to identifying which State or group of States should protect and assist. But the core is clear, and at the risk of simplifying a complex scenario, the outlines of the scheme of protection are self-evident in those *primary rules* which lay down the parameters for State action, indicating the limits beyond which the State cannot go without incurring responsibility for its actions.

The fundamental rules of the international refugee regime are *primary* in the sense that, unless there are very exceptional circumstances, they can override or trump other important interests, commonly expressed in terms of sovereign powers. They change the picture, they lay down the conditions for *subsequent* State conduct (not to return a refugee to where he or she may be persecuted; not to penalise a refugee by reason of illegal entry; to deal with a person *as a refugee*, and within the framework of protection, co-operation and solutions provided by international law and its institutions). Such primary rules do not necessarily provide solutions for every resulting problem, but they are the essential juridical basis – the framework – from which 'subsidiary' rules will take their normative and constructive force.

Refugees, for example, commonly use the same means of travel and entry as irregular and undocumented migrants. What States do to combat smuggling and trafficking has a major impact on refugee protection, and here the primary rules emphasise the clear distinctions to be made between refugees and those not in need of international protection, who fall under other legal regimes. It is in the very process of making such distinctions that the key to appropriate solutions is found, whether within the field of international refugee law or of international law at large.

The challenges today lie precisely at the intersection between the implementation of international protection obligations, on the one hand; and the orderly and humane management generally of the movement of people between States, on the other.

### 3. International refugee law tomorrow?

Does international refugee law, with all its constraints on States' freedom of action, have a future? Certainly, the present international community of independent 'sovereign' States will continue, and people will continue to move between States in search of refuge and livelihood opportunities. As States look for solutions, history and practice suggest that perceptions of self-interest will continue to influence policy and their readiness to co-operate with others. At the same time, with an eye on the goal of mitigating the necessity for flight, some States will increasingly call for a review of those aspects of 'sovereignty' which are obstacles to humanitarian action: the unrealised potential of the 'responsibility to protect' may yet come into its own.

Clearly, international refugee law will have to find its place in a world of increasing international migration, in a highly globalised and securitised political and economic context. Although the differences are readily explicable in the abstract, there is no clear bright line between the refugee and the economic migrant, no matter what the UNHCR *Handbook* may wish. But that is not so much a problem, as an urgent invitation finally to introduce a workable international legal framework for the governance of migration and for the protection of the rights of migrants, irrespective of their status.

In 1946, the General Assembly recognised that the refugee problem was international in scope and nature, by which it meant that no one State should be expected or required to shoulder responsibility on its own. Even as States have attempted, and continue to attempt, to assert unbound unilateral sovereign competence in such matters, it is now evident that the multiple and multi-dimensional interests of States require international co-operation for their

realisation, and that this, in turn, will require States to deal with one another – States of origin, States of transit, States of intended or eventual destination – on a basis of equality and equity.

### *3.1 A European perspective*

The recent and ongoing crisis in Europe has exposed the illusion that there was much ‘common’ in the so-called ‘Common European Asylum System’. Bearing in mind the principles of solidarity, co-operation and fair sharing of responsibility, one can see that ‘expectations’ of Greece’s ability to manage the EU’s external borders were never well-founded; it was just wishful thinking, as it is also with regard to other Member States who have faced large numbers of refugees and asylum seekers.

As many have emphasised, the only way to get into the EU as a refugee is, in fact, irregularly. While the EU has institutionalised a broader protection base for those who get there (Convention refugee status, subsidiary protection, humanitarian grounds), it has remained more or less closed to applications ‘from outside’. Hence the advocacy, over many years, for opening up avenues for legal admission by refugees presently in non-EU countries, including humanitarian visas, more generous family reunion, study opportunities, and the like; the response has been mainly rhetorical, not substantive.

Recent events have showed also the critical need for immediate shelter and assistance for those on the move, no less than for support so that transit and receiving States can provide reception facilities and a measure of control and organisation, both for better management and to bring assurance to those on the move and the communities through which they pass or where they remain. Such first steps are crucial, not only to avoid inhumane and degrading conditions contrary to the European Convention on Human Rights and the EU Charter, but also to open the way to considered and defensible evaluations of overall protection needs, and to engage in the essential processes of identification and security assessment.

A co-ordinated, collaborative European response could help to avert a future race to engage in border closures, summary denial of entry and removals inconsistent with EU and international law, or which pass on an insupportable burden to ‘front-line’ EU and non-EU States. In addition, well-structured, co-ordinated and organised reception can and should be the pathway to protection decision-making, whether on a group or individual basis.

A truly communitarian response would put fairness front and centre. What is needed, is for responsibility for determining protection claims to be transferred from the national to the EU level. For there will be no end to chaos and fragmentation unless refugee reception and status determination are truly Europeanised, with decision-making by a European body competent to fulfil collectively the individual obligations of Member States and the policy and protection goals of the EU.

### *3.2 An international perspective*

International law is not itself a ‘solution’ to the problem of refugees and the challenges produced by migratory flows, but it can be a facilitator and a guide to the principled effectiveness of measures which States may take or contemplate. In this sense, it offers a framework and the goals by which to judge the viability of process and the quality of success, if any. International law thus conditions the sovereignty dimension, particularly when considered within the institutional context of the United Nations.

Despite the General Assembly’s 2003 decision to put UNHCR’s mandate on a permanent footing (‘until the refugee problem is solved’), nothing much else has changed – States continue to see the refugee problem as essentially ‘temporary’ in nature. This might be thought encouragingly optimistic, and evidence of their intent and willingness to ensure that solutions to forced migration will be quickly forthcoming, and that no refugee situation should become protracted through time. The consequence, however, is that States remain unwilling to commit themselves to humanitarian and protection realities without limit of time.

The idea that refugee situations are ‘temporary’ has a certain seductive appeal, despite the multiple lessons of history. What we do know, is that refugees will move, from persecution and conflict to places of refuge, and from places of uncertain or strained refuge, to places of actual or perceived greater security. The fact that we will not know exactly how many is itself reason enough to put institutionalised mechanisms of mutual support into place, recognising also that there is no working or workable conception of the ‘temporary’ (as a predictive tool), which allows or justifies the muddle-headed, short-sighted, often quite mean-spirited policy and legislative proposals which have emerged from the dark side in recent months. Looking at the broader issues raised by an increasingly mobile world in which, too often, those on the move are left adrift, abused, and without protection, novel, long-range thinking is clearly called for, much as Nansen and McDonald thought in earlier times, even if on somewhat different issues.

The UN Secretary-General has urged States to commit to upholding safety and dignity in large movements of both refugees and migrants, to commit to a Global Compact on responsibility sharing for refugees and migrants, and to commit to a Global Compact for safe, regular and orderly migration. The ‘New York Declaration’, adopted on 19 September 2016 by Heads of State and Government meeting in the General Assembly is full of fine words, very fine words, recognising that the world is a better place for the contribution made by migrants, and re-affirming that the human rights of all refugees and migrants, regardless of status, are to be protected. It acknowledges finally that large-scale movements are such that no one State can manage them on its own, and that greater co-operation is called for if

lives are to be saved, root causes addressed, and prevention and mediation of conflict promoted. It proposes a number of 'commitments', which include working to address root causes, to prevent or resolve conflict, and to promote human rights. The 1951 Convention and the 1967 Protocol remain the 'foundation' of the international refugee protection regime, in which human rights and humanitarian law also play their part, and in which there needs to be 'a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees'.

The proposed 'Comprehensive refugee response framework' offers an outline for the future, regarding reception and admission, meeting immediate and ongoing needs, supporting host countries and communities, and working towards durable solutions. The primary goal remains return to countries of origin, with legal stay in host States in the interim and an emphasis on measures to foster self-reliance. Third States are then encouraged to make available or expand resettlement opportunities and what are now called 'complementary pathways for admission'. But this, and the rest, remains just an outline. It is not the 'Global Compact' that the Secretary-General hoped for – that is postponed to 2018; rather, it is a pilot project, a scheme for action to be pursued by UNHCR and States, to see how it all works out. Does it add anything to what is already in place and what is already being done? That seems doubtful; its value for the moment may lie in its calling attention, once again, to the need for a 'comprehensive' approach.

Next, the Declaration proposes a number of steps, 'Towards a global compact for safe, orderly and regular migration'; this, too, is a work in progress, with 2018 also as the intended dateline. Once again, this is to be a process of intergovernmental negotiations, and considerably more time and effort will be required to bring States to any sort of consensus on such contested questions. At this stage, the proposals do little more than highlight issues and identify 'actors', including the Special Representative of the Secretary General for International Migration, the International Labour Organisation, the High Commissioner for Human Rights, and the International Organization for Migration. The effective protection of migrant rights, however, remains to be included, developed and placed on a more effective and credible institutional base.

#### 4. Alternative ways and other things to do

There is still much to be done at the international level, over, above and beyond the New York Declaration. Among others, the competencies of the Security Council and the UN Secretary-General should be revisited seriously and urgently, with a view to anticipating crisis, acting to mediate and prevent conflict, and moving to counteract the necessity for flight, for example, through effectively operationalised 'safe zones'.

What we know, and what we keep re-learning, is that if security against displacement by conflict is not provided, and if security conditions in countries of first refuge, fall short of providing assistance, livelihood, education and at least some opportunity, then refugees will continue both to flee and to keep moving. That is the lesson of experience, after experience, after experience.

Another lesson from history has been the disinclination on the part of States to place refugee and humanitarian funding on a more secure basis. Alternatives have certainly been debated – the International Finance Facility, for example, back in 2005 – but effective planning and costs management demand at least a proportion of guaranteed funds. Perhaps some use might also be made of the frozen assets of States responsible for refugee and forced migration and population displacement, with the Security Council and/or States, acting through regional and related organisations, using sanctions and related competencies to free up funds for humanitarian assistance.

If there is one weakness in the regime established by the 1951 Convention/1967 Protocol relating to the Status of Refugees, it is in the failure of these instruments to establish clearly which State should be responsible for determining claims to protection; and which State or States should contribute to relieving countries of first asylum, and how. The resulting 'legal hole', has not been resolved through the political mechanisms of the regime at large, for example, in the now 98 Member State Executive Committee of the UNHCR Programme. Here, international experience in environmental protection may offer a model, and an opportunity to investigate the possibility of States committing to an outline instrument, a framework convention for durable solutions, setting out certain objectives to which they would agree in principle, while leaving a measure of discretion in the implementation of those agreed objectives. In this way, specific targets and detailed rules (if needed) could be addressed in a separate protocol, oriented to context and particular circumstances. A framework convention could thus strengthen the basics, while allowing specific challenges to be dealt with by groups of States contoured more precisely by shared national or regional interests, proximity, alliance, and the like. The key to such an approach would be to institutionalise a permanent 'steering group' within the treaty regime, competent to call a meeting of States party and to set the agenda; the UNHCR Executive Committee might be the place.

Keeping asylum 'alive' means matching it also with viable migration management. States have long resisted the 'internationalisation' of migration at large, and the results have been ineffective and inefficient, on the one hand, and insecurity and human rights violations, on the other. No international agency is yet responsible for the protection of forced migrants, and for working with governments to find solutions or improve arrangements for those outside their country, who may not fit within traditional categories. Change is urgently needed, on both fronts.

Over the years, the UN General Assembly has expressly affirmed that UNHCR's 1950 mandate extends beyond its original terms, and that it also includes stateless persons, the internally displaced, and others 'of concern'. This does not lead to new obligations on States additional to those to which they have consented by becoming party to treaties, or which are applicable under customary international law, but it does help to contextualise issues like protection in an operational

sense. There has always been a disjuncture in practice, and a certain tension, between the institutional responsibilities of UNHCR, the obligations of States, and their 'sovereign' interests – this is part of what makes international refugee law such a dynamic system.

A number of radical, institutional changes could enable the international system to develop and maintain capacity to respond effectively to today's population displacements and to those which, inevitably, will follow. A first necessary step in 'nudging' the regime towards greater equity and more effectiveness is to 'internationalise' certain key migration issues, in particular, by providing for the protection or better protection of those moving between States who have no claim to enter or remain, but who are effectively adrift, exploited, detained, abused, and worse. This would not only improve the situation of countless individuals and families, but would also better serve the interests, including the security interests, of States, and constitute an important step towards better management.

This can be achieved not by a new treaty, which is unlikely today, but by an imaginative use of existing institutions engaging with practical matters – in this case, by having the UN General Assembly revise the UNHCR Statute for the 21st century. Revision is needed in any case, both to do away with historical anomalies and redundancies, but more particularly, to reflect changes already made and to bring in new tasks that call for the application of UNHCR's extensive and unique protection and assistance experience. In short, the organisation's mandate should expressly encompass refugees, stateless persons, the internally displaced, and migrants or those otherwise displaced, who are without or in need of protection.

This is just a beginning, but it could offer States an established and accepted partner, capable of operating across the whole spectrum of the movement of people between States; open up possibilities for future developments, for example, in standard-setting and strengthening regional opportunities; and keep human rights and protection front and centre in debate, policy and practice.

The basic rules of international refugee law are well-understood, and they do condition action and reaction. Related areas, however, are not so well regulated and regime gaps, both universal and regional, are readily exploited. There is a great need for leadership, joined up thinking, structural change, and UNHCR could take the lead – institutional responsibility can be extended and enhanced, while States can be left to watch and learn until such time as they are ready and able to take on more in the way of obligation.

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# The universal asylum system and the 2016 New York Declaration: towards an improved 'global compact' on refugees?

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## Abstract

Refugee law and the international system for refugee protection have lately come under unprecedented strong pressure. The reason is a combination of historic high numbers of refugees and a declining will of politicians, governments and populations in many receiving states to publicly support the ideal and practice of refugee protection. Critical analysis of the current regime may however also present an opportunity for constructive reform. This paper discusses prerequisites for conditional reform of the present system for international refugee protection. The existing global system – termed the 'universal asylum system' – is fragmented, but at the same time its core legal structures are sound and the system as a whole is more coherent than often asserted. Extended global cooperation, in particular with a view to burden sharing and sharing of responsibility for refugee protection, seems to be necessary.

The first phase of the debate has now come to end at the global level, by the adoption of the 2016 New York Declaration. This potentially very important document reinforces worldwide political support for the existing legal and institutional structures. It also expresses a clear intent to move forward.

After reviewing earlier successful cases of cooperation on a temporary or ad hoc basis, as well as suggestions for reform made by scholars, the picture emerges that the next step for the world community will be crucial. We believe that there is a need for new body – a 'Global Compact' institution – that should be empowered to call new high-level conferences, if necessary, and making non-binding recommendations for concerted global initiatives on burden-sharing mechanisms and fair responsibility sharing among states and other stake-holders within a renewed universal refugee protection regime. We think that the earlier success of the Helsinki Final Act, on peace and security and human rights protection, might serve as useful inspiration in this regard.

## Keywords

Universal Asylum System, 2016 New York Declaration, Burden sharing, Institutional Reform, Helsinki Final Act



## 1. Introduction

Refugee law and the international system for refugee protection have lately come under unprecedented strong pressure. The reason is a combination of historic high numbers of refugees and a declining will of politicians, governments and populations in many receiving states to publicly support the ideal and practice of refugee protection. Millions of refugees from Syria and the Middle East have tried to flee to Europe, while most refugees remain in the region or are internally displaced. Adding high numbers of refugees and asylum seekers from Afghanistan and several African countries, this has caused the perception of an acute global crisis, not only for effective refugee protection, but also for the international refugee regime. This development begs critical analysis of the current regime, but may also present an opportunity for constructive reform.

A core question is whether the present refugee and asylum system is now ripe for termination or reinforcement, or rather whether the status quo should be maintained. For example, it has been suggested by some circles especially in social media debate and by some governmental representatives in public that the 1951 Convention relating to the Status of Refugees (henceforth 'the 1951 Convention') and its 1967 Protocol are outdated and thus should be replaced with a 'Quota System' globally or regionally for European states. Well-intended as they might be, such radical proposals are neither desirable nor very realistic. Essentially, there are three main sustainable policy options for the world community, which are cumulative rather than alternative:

- a. Uphold the present system and make it more efficient and fair;
- b. Discuss new additional mechanisms for mass flight situations;
- c. Renew the focus on causes and responsibility for refugee movements.<sup>1</sup>

Considering the New York Declaration for Refugees and Migrants (adopted by consensus at the UN General Assembly, 19 September 2016<sup>2</sup>) (henceforth the 'New York Declaration' or 'the Declaration') it may seem as though the major choice between future termination or reinforcement of the system has already been made by the world community – fully in line with the first bullet point above.

The more than 190 Heads of State and Government and other High Representatives present reaffirmed all the fundamental principles of the UN and global international law relating to refugees and migrants and expressed their intention to fully comply with them. Despite being a political declaration of collective intent and not a legally binding instrument, the importance of the Declaration for the future direction of global refugee protection should not be underestimated.

In concise language, it was solemnly declared:

We reaffirm the purposes and principles of the United Nations Charter. We reaffirm also the Universal Declaration of Human Rights and recall the core international human rights treaties. We reaffirm, and will fully protect, the human rights of all refugees and migrants, regardless of their status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law, and where applicable, international refugee law and international humanitarian law.<sup>3</sup>

Furthermore, the 1951 Convention and its 1967 Protocol is still being endorsed as 'the foundation of the international refugee protection regime'.<sup>4</sup> The current importance of their full and effective application by the respective states parties and the fundamental values they represent are recognised.<sup>5</sup> Consequently, the somewhat hyped alternative of terminating the present system and replace it with something else must now be considered moot as incompatible with the New York Declaration.

The New York Declaration emphasises the need to address the root causes of crisis situations caused by armed conflict, violence and terrorism, and the need to prevent or resolve conflict by peaceful means.<sup>6</sup> In this context it is assumed that displacement could be reduced if all parties to armed conflict respected international humanitarian law.<sup>7</sup> Apart from this factual assessment, it is significant to note that serious violations of international humanitarian law and human rights law ultimately forms part of international criminal law on individual responsibility for core universal crimes; including but not limited to war crimes and crimes against humanity. The Declaration is therefore closely aligned to the third bullet point above as well, although this part of the Declaration needs further elaboration in the processes ahead.

1 This article builds on views and ideas in Terje Einarsen, 'The Universal Asylum System: Towards Termination or Reinforcement?' presented at 'The Future of Refugee Law', 1st Annual Conference, Refugee Law Initiative, University of London, 29 June – 1 July 2016. See presentation slides, available at [www.sas.ac.uk/rli/annual-conference/1st-annual-conference/annual-conference-poster-presentations](http://www.sas.ac.uk/rli/annual-conference/1st-annual-conference/annual-conference-poster-presentations). Marthe Engedahl has provided drafts for chapters 3 and 4 for the purpose of this article. The authors would like to thank the reviewers for useful comments.

2 United Nations, *New York Declaration, Addressing Large Movements of Refugees and Migrants*, 19/09/2016 (including an annex on a comprehensive refugee response framework and another on a global compact for safe, orderly and regular migration), see [https://refugeesmigrants.un.org/sites/default/files/a\\_71\\_11.pdf](https://refugeesmigrants.un.org/sites/default/files/a_71_11.pdf)

3 Ibid., para. 5.

4 Ibid., para. 65.

5 Ibid.

6 Ibid., para. 64.

7 Ibid.

What is developed more in the New York Declaration, though, is how the present refugee protection system could be made more efficient and fair through concerted and more streamlined efforts. Hence, the attached Comprehensive Refugee Response Framework (CRRF) outlines a fairly-structured and innovative way forward for the world community in its quest for enhanced refugee protection and fair sharing among states of burdens and responsibilities. It should lead to the adoption in 2018 of a new 'Global Compact on refugees'.<sup>8</sup> The UN High Commissioner for Refugees (UNHCR) is entrusted an instrumental role in this process.<sup>9</sup>

We agree fully with the spirit and objectives of the New York Declaration. The question is of course whether the CRRF and the forecasted 'Global Compact' will in fact lead to substantial progress in accordance with the aims.

We would suggest that it is also an urgent matter to discuss what tools should be added to the existing toolkit of refugee protection mechanisms to facilitate fair and efficient responses to large movements of refugees and ensure the operation of a well-functioning global regime in the future. Hence academic (and media) attention should in our opinion now focus more on constructive contributions to the process ahead and critical assessments of what should be done – and how – to improve the system within the parameters set. With respect to those parameters, however, the research community should not necessarily interpret the New York Declaration and its annexes narrowly. In other words, the UNHCR-led process might be an opportunity also for discussing reinforcement of the current regime by means of complimentary mechanisms, pilot projects, or concrete application of the CRRF not necessarily envisaged by states or the UNHCR thus far. Such discussions require as a baseline a comprehensive understanding of the existent legal and institutional framework.

In the following the core structures of the current system, which we may refer to as 'the universal asylum system', is first explained and linked to the New York Declaration (section 2). In section 3, we recall certain models of international burden- and responsibility sharing in theory and practice, and in section 4 we discuss this platform of earlier knowledge with a view to a renewed 'Global Compact' on refugees. Some preliminary conclusions are drawn in section 5.

## 2. The Universal Asylum System – fragmented yet coherent

### 2.1 Legal framework and terminology

This section takes stock of the core normative legal framework and the key international institutions like the UNHCR that comprise the essence of the current universal asylum system. The normative system is represented essentially by the 1951 Convention and its 1967 Protocol. However, the entire contemporary international and institutional system for the protection of refugees and assistance to refugee populations should be considered (see also sections 2.2–2.4).

The current refugee regime has frequently been portrayed as fragmented, and limited in scope, often referring to the 1951 Convention's refugee concept, which is partly also the reason why it has been challenged lately. In this section, we shall establish that, while the universal asylum system is quite fragmented with some notable shortcomings, it is also (reasonably) coherent as a *universal* protection system: one that is based on binding international law and proclaimed fundamental values and interests of the world community. Furthermore, the present system is not as limited as sometimes perceived, although it falls outside the capacity of this paper to provide full evidence in that regard.

In this paper, we have chosen to use the phrase the 'universal asylum system' to better capture the global nature of the system and the underlying the refugee problem, but otherwise it is used in a descriptive manner, synonymous with expressions such as the 'international refugee regime' or the 'refugee protection system'. This is arguably thought provoking, since the concept of 'asylum' is not clearly defined in international law and is being used with different connotations.<sup>10</sup> Notably, the concept of asylum may have a different content within different national jurisdictions. Asylum at the national level is often perceived as a legal institution encompassing the possibility of a formalised residence permit to be domestically granted to asylum-seekers recognised as refugees, and the notion may as well include the international and domestic legal effects of such permission.

Under general international law, 'asylum' does not, however, entail a right for refugees to be granted a *formalised national permission* neither to enter a specific country nor to reside there. However, the notion of 'asylum' should not be abandoned internationally just because it may have a different legal content as compared to domestic law. On the contrary, independent lawyers may usefully underline the universality and *lex lata* character of certain aspects of asylum under current international law exactly when refugee law is under pressure, since a change of international obligations of states requires more than expressions of political viewpoints *lex ferenda*.<sup>11</sup>

For this reason, it is important that the New York Declaration reaffirmed 'respect for the institution of asylum and the right to seek asylum' [...] [and] the fundamental principle of *non-refoulement* in accordance with international

<sup>8</sup> Ibid.; *Annex I, Comprehensive Refugee Response Framework*, para. 17–19.

<sup>9</sup> The New York Declaration stipulates that UNHCR shall engage with states and consult with all relevant stakeholders over the coming two years, with a view to implementation of CRRF. In 2018, UNHCR shall submit a proposed Global Compact to the General Assembly, based on the CRRF and the outcomes on the consultation and evaluation process with states and other stakeholders.

<sup>10</sup> For example, the notion of 'diplomatic asylum' raises distinct issues beyond the scope of this paper.

<sup>11</sup> Revision of multilateral treaties, for example, usually requires specific procedures to be followed. See e.g. Article 45 of the 1951 Convention relating to the Status of Refugees.

refugee law;<sup>12</sup> as well as recognised more generally that 'international refugee law, international human rights law and international humanitarian law provide the legal framework to strengthen the protection of refugees.'<sup>13</sup> The statements form a concise and more concerted expression by high representatives of the world community than ever before; while the 1951 Convention and the 1967 Protocol certainly remain the foundation of the international refugee protection regime, the legally binding international law framework clearly reaches beyond the treaty law obligations of the 148 states now parties to one or both of these instruments. Hence this paper posits a notion of an extended refugee protection regime, one which applies to both the (cumulative) substance of international law and to states *not* parties to the main refugee law instruments; the latter may nonetheless may have obligations owed to refugees and similarly situated persons under related international treaty law and/or customary international law.

## 2.2 Key norms and institutions of the universal asylum system

### 2.2.1 Solidarity with refugees and disproportionately affected states

The universal asylum system established since World War II has certain key normative and institutional foundations. Its historical background is still relevant for understanding its scope and functions, namely unresolved and serious refugee situations endured between the two world wars, and the continued and increased presence of refugees during and after World War II.<sup>14</sup>

That emerging system was being based on a human rights conception of the legitimate and paramount aim of protecting refugees from persecution under all circumstances, by providing an international framework for asylum in other countries – albeit with the exceptions for fugitives from genuine justice and for persons being suspected of having committed war crimes or other universal crimes. The rules were expressed in Article 14 of the Universal Declaration of Human Rights (UDHR).<sup>15</sup> This idea of enhanced international refugee protection is linked to a notion of global solidarity based on enlightened self-interest; that we may all, as human beings of larger societies, become refugees, or our children, or grandchildren. The Preamble and Article 1 of the UN Charter suggest that this rationale is closely tied also to the aims and purposes of the UN. In fact, only a few modern states have not experienced that a significant number of their inhabitants at some point in time became refugees or internally displaced because of armed conflict or targeted persecution.

The prevailing understanding has thus for a long time been that the refugee problem is global in nature. New refugee situations may in principle occur almost anywhere, any time, while experience has shown that receiving neighbouring countries, transit countries, as well as many other receiving states, are not always able or willing to handle the ensuing difficulties in ways that respect and secure the dignity of forced migrants. This understanding, that the refugee problem thus requires serious global commitment, has however been put into question as more states and refugee populations have been left struggling while common legal obligations are being violated or circumvented by several governments pursuing more restrictive policies.

It is thus potentially important that the need for deepened solidarity with refugees and the most affected states is now being expressed in common language by the world community. Hence the New York Declaration declares a 'profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves and their families from their homes.'<sup>16</sup> Furthermore, the global nature of the refugee problem is once again underlined.<sup>17</sup> Especially when the movements are large, neighbouring developing countries are often disproportionately affected, sometimes with serious repercussions for the refugees arriving there.

Furthermore, the non-binding character of the UDHR has not prevented several human rights norms from developing into customary international law, and it seems today arguable that the initial moral imperative of solidarity with refugees is now prone to be complemented by an emerging general legal principle of international law of global solidarity with refugees and disproportionately affected states. Despite its legally non-binding character, the New York Declaration and the processes ahead may provide support for such a claim.

### 2.2.2 The right to seek asylum

The first legal pillar of the universal refugee system is a liberating and straightforward response to this latter difficulty for the refugees: the establishment of *a universal right to seek asylum* in other countries from persecution – which is

12 United Nations, New York Declaration, para. 67.

13 Ibid., para 66.

14 For an account of the historical origin of the current system, as well as the drafting history of 1951 Convention and its 1967 Protocol, see e.g. various articles and commentaries in Andreas Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol – A Commentary* (Oxford: Oxford University Press, 2011).

15 Article 14 states as follows: '(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

16 See United Nations, New York Declaration, para. 8.

17 Ibid., para. 7: 'These are global phenomena which call for global approaches and global solutions. No one State can manage such movements on its own.'

not limited to a neighbouring country.<sup>18</sup> The human right to leave any country, including the country of origin, the fundamental principle of *non-refoulement*, and the exemption from punishment for seeking asylum in good faith, are bearing elements that operationalise the right.<sup>19</sup>

Obstructions by states, however, might be lawful, or may operate within the grey-zones of international law, and are frequently used to limit the application of this right in practice. This could be done, for instance, by introducing visa requirements, carrier sanctions, and physically closing borders by using fences or walls. Clearly, refugees do not have a right to a visa under international law, i.e. a predetermined permission to enter a country to seek asylum there. This was made clear in the preparatory discussions of UDHR Article 14, and the 1951 Convention and later international instruments have not really changed much in this respect.

Nevertheless, the principle of *non-refoulement* refuses a neighbouring state to the refugee situation to reject asylum-seekers at their borders. This principle, of course, applies to developing states as well as to developed states. Furthermore, the principle is recognised as a fundamental legal principle, with a legal basis in customary international law and/or the general principles of international law that consequently extends beyond the 1951 Convention and its 1967 Protocol.

With respect to access to transit states and destination states farther away, the legal issues are somewhat more complicated, and they are not further pursued in this article.<sup>20</sup> As underlined also in the New York Declaration, states have rights and responsibilities to manage and control their borders.<sup>21</sup> A balance must be struck, however, so that border control measures and procedures are implemented in compliance with obligations under international law, in particular international human rights law and refugee law.<sup>22</sup> Hence a person under actual jurisdiction of state authorities cannot be denied refugee protection and certain procedural safeguards against return without proper status determination. This is also true with regard to restrictive extraterritorial measures, such as interception of asylum seekers at the high seas; as have been underlined by international courts.<sup>23</sup> It should also be noted that member states to the 1951 Convention and/or its 1967 Protocol may not necessarily transfer their obligations towards refugees within their jurisdiction to other states by moving the asylum seekers onwards or back to an earlier transit state, at least not without clear agreements guaranteeing their inherent and express rights as (potential) refugees under applicable international law.<sup>24</sup>

Finally, it is always a matter of state discretion whether to provide access to individual asylum procedures or to offer refugee protection on a collective basis without detailed individual procedures, so long as individual persons within an exposed group are not suspected of serious crimes that should lead to exclusion from refugee status under the 1951 Convention, see its Article 1F.

### 2.2.3 The right to enjoy asylum

The human right to enjoy in other countries asylum from persecution is the second legal pillar of the universal refugee system. To 'enjoy' asylum from persecution is equivalent with effective international protection of a certain standard, including respect for other human rights applicable to refugees. The concept is different from a formal grant of asylum in a written decision and it does not require a formal permission of residency. However, it implies, as a minimum, a governmental consent to sojourn. Consequently, a receiving state must provide either de jure permanent permission to residency, de jure temporary permission to remain on the territory, or an explicit or implicit consent to stay, so long as the danger persists.

The principle of *non-refoulement*, the prohibition to forcibly return refugees or asylum seekers to a country in which they risk being subjected to persecution, is thus an inherent part of the right to 'enjoy asylum'. It also includes the prohibition of indirect return to persecution to any country that would itself be inclined to breach the principle of *non-refoulement*.

Enjoying asylum may furthermore include a number of specific refugee rights and standards with corresponding obligations of the member states,<sup>25</sup> as well as general human rights protection according to international human rights law, while refugees stay in the country of asylum.<sup>26</sup> Convention refugees are furthermore protected from being returned or transferred to other countries where the rights protection is substantially sub-level of the refugee rights

18 See UDHR, Article 14.

19 These rights have been expressed in various international declarations and treaties on human rights including the 1951 Convention, see e.g. the International Covenant on Civil and Political Rights Article 12 (on the right to leave any country) and the 1951 Convention Article 31 (on exemption from penalties) and Article 33 (*non-refoulement*).

20 For an instructive introduction and account, see e.g. Thomas Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).

21 See United Nations, New York Declaration, para. 24.

22 Ibid.

23 See e.g. *Case of Hirsi Jamaa and Others v. Italy*, Grand Chamber of the European Court of Human Rights, Judgment of 23 February 2012.

24 The Dublin system that applies to asylum seekers arriving in any European State participating in the Dublin system, might be an example of such an international and multilateral agreement, although in practice the guarantees have not always been fulfilled. See e.g. the illustrative case of *M.S.S. v. Belgium and Greece*, Grand Chamber of the European Court of Human Rights, Judgment of 21 January 2011.

25 See especially 1951 Convention Articles 1 and 3–32.

26 On the different rights of refugees and their application, see e.g. James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

and state obligations under the 1951 Convention and its 1967 Protocol, also as applied in practice.<sup>27</sup>

International human rights law expands to a certain extent on the personal scope and material protection standards offered by the 1951 Convention and its 1967 Protocol. For example, the *non-refoulement* rules as clarified in the jurisprudence of the UN Human Rights Committee under the International Covenant on Civil and Political Rights, by the Committee against Torture under the UN Convention against Torture, and by the Inter-American Court of Human Rights and the European Court of Human Rights, are more absolute in nature as compared to the *non-refoulement* rule of Article 33 of the 1951 Convention. While the latter provision makes an exception for refugees constituting a security risk or a community danger in the receiving state, this exception has not been considered applicable under international human rights law.<sup>28</sup> Furthermore, although there is substantial overlap of the personal scope of *non-refoulement* under the 1951 Convention and its 1967 Protocol on the one hand and on the other hand various other *non-refoulement* rules in other human rights instruments at the global and regional levels, they may also each have some specific fields of application which in sum thus provide international protection to a somewhat broader range of refugees and persons similarly situated than 'convention refugees' under the 1951 Convention, see Article 33 taken in conjunction with Article 1 (definition of refugees).

The grey zones of interpretation and application of the refugee concept in the 1951 Convention and its 1967 Protocol have been intensely discussed in refugee law theory and practice.<sup>29</sup> The supervisory role of the UNHCR under Article 35 of the 1951 Convention has in this regard no doubt contributed to more clarity, while authoritative interpretation by an international refugee court, with a view to more equal and coherent implementation of refugee rights in national asylum practice would have been welcome from the perspective of legal certainty and the rule of law. As noted also below (section 2.4), state parties to the 1951 Convention have never made use of the compulsory jurisdiction of the International Court of Justice (ICJ) under Article 38, and state representatives have never seriously discussed the option of an international 'refugee court'.

However, many international legal issues relating to the enjoyment of asylum have been (largely) clearly settled with the assistance of UNHCR, international law theory, and supreme national courts of law. In addition, the drafting history of the 1951 Convention and its preparatory documents has become better known, more available for research, and analysed in the literature in recent years.<sup>30</sup> This has also contributed to understanding that the refugee definition was intended to be substantially broad and inclusive by its drafters, hence considered to cover individuals and groups exposed to persecution in a wide range of circumstances in a society, including situations of war, occupation, and targeted violence against minority groups in society as well as individuals and associations persecuted for their views and manifestations. As such, the 1951 Convention and its 1967 Protocol is still highly relevant with respect to large movements of refugees in the contemporary world.

Regional instruments also back up the enjoyment of asylum, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees (in the Americas).<sup>31</sup> In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights upholds and reinforces important aspects of the right to seek and to enjoy asylum.

#### 2.2.4 International institutions

The universal asylum system requires international cooperation and international institutions established for that purpose to facilitate refugee protection and assistance to refugees, especially when singular states are struggling to meet their international obligations and the needs of refugees alone. UNHCR, the principal refugee agency of the United Nations, is of course the most important global institution for this purpose, accompanied by UNRWA (for Palestine refugees). The main functions of the UNHCR are: to provide assistance to refugees in countries of asylum (in particular in developing countries), to facilitate solutions and temporary protection, and to supervise the application of the 1951 Convention and its 1967 Protocol. With respect to solutions, UNHCR will facilitate voluntary repatriation to the country of origin when the country is safe again, integration in the country of asylum and respect for refugee rights there, and, if possible, resettlement in third states that is usually pursued through permissions granted by the relevant state with a view to permanent settlement.

Several other UN bodies and institutions are also more or less involved, directly or indirectly, in the universal asylum system. They include but are not limited to the General Assembly, the General Secretary, and treaty supervisory bodies under various human rights treaties. Involvement might also still be mostly potential. For example, the UN Security Council should probably be more active with a view to large-scale refugee problems with implications for peace and security, since movements of refugees are often caused by situations also constituting threats to peace and security in

27 For an informative overview of legal issues and discussion in this regard, see e.g. Rainer Hofmann and Tillmann Löhr, 'Requirements for Refugee Determination Procedures', in Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees*, pp. 1081–1128.

28 This position, which has since also been followed in other cases before different international judicial review bodies, was first authoritatively expressed in the case of *Chahal v. United Kingdom*, Grand Chamber of the European Court of Human Rights, Judgment of 15 November 1996.

29 See e.g. James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edition, Cambridge University Press, 2014); Andreas Zimmermann and Claudia Mahler, in Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees*, pp. 281–464; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edition, Oxford University Press, 2007).

30 See generally Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees*. On the drafting history of those instruments (with particular emphasis on the refugee definition) see Terje Einarsen, 'Drafting History of the 1951 Convention and its 1967 Protocol', in Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees*, pp. 37–73.

31 This is noted also in the New York Declaration, para. 66.

the first place, and may next increase such threats when receiving states struggle due to movements across borders. Another example is the compulsory jurisdiction of the ICJ under Article 38 of the 1951 Convention, a competence that has never been activated.

Before moving on to a more concrete discussion of the traditional and future challenges of international refugee protection, particularly with respect to burden and responsibility sharing, it is necessary to stress that many large-scale refugee situations since the establishment of UNHCR in 1950 have been dealt with and often to the satisfaction of state parties, as well as majority of refugees. In other words, the key structures are in place, and have protected many millions of refugees since World War II.

### 3. Burden and responsibility sharing under the universal asylum system

#### 3.1 *The refugee convention and the New York Declaration*

As we have seen, the 1951 Convention and its related documents clearly map out the rights of a refugee and the responsibilities of the refugee receiving country. The preamble of the 1951 Convention recognises that ‘the grant of asylum may place unduly heavy burdens on certain countries’, such that real global protection ‘cannot therefore be achieved without international co-operation’.<sup>32</sup> The 1951 Convention and its 1967 Protocol constitute in fact the principal example of such legally binding cooperation for refugee protection.

Nevertheless, the 1951 Convention does not establish any legally binding obligation that places responsibility on other countries than the country of asylum, and it does not specify what international co-operation may entail in extension of the 1951 Convention. The same holds for the 1967 Protocol. On many occasions this has been identified as the Achilles heel of the universal refugee system.<sup>33</sup> It is thus important that bridging the perennial gap between the rights of the refugee and the responsibility of the world community at large was set as the primary objective of the UN Summit.<sup>34</sup>

In the field of international refugee protection collective efforts have most often been ad hoc, without states giving any long-term commitments on specific, collectively binding mechanisms. Non-binding declarations made by the international community that focus on solidarity and burden sharing is nothing new. What is potentially different this time is the explicitly formulated determination on finding ‘long-term and sustainable solutions’.<sup>35</sup>

The challenge then it seems, lies in identifying realistic, effective and sustainable models that can be operationalised and that will lead to a coherent implementation of the already existing legal framework, possibly also to extensions. In the section that follows we review selected models of cooperation that have been assessed as successful implementations in practice and of reform suggestions that could be relevant to the process towards reaching the objectives of the New York Declaration. Recognising that a range of academics and practitioners have provided valuable contributions that could also be highly relevant, the context here only permits us to look at a small selection of proposals that might have deserved mentioning.

#### 3.2 *Implemented models: identifying factors of success*

##### 3.2.1 *Refugees under the mandate of IRO*

Between 1947 and 1950 some 1.3 million World War II-refugees and displaced people were transferred from refugee camps in the western zones in Europe to Western European countries and this enterprise has by some been defined as a success.<sup>36</sup> Despite a significant number of refugees – 410 000 – were considered ‘hard core’ and almost impossible to resettle, the burden-sharing model in the post-war period did offer durable solutions to the great majority of the people uprooted as a result of the war. The burden-sharing mechanisms triggered were ad hoc and not intended to put binding obligations on states with respect to future refugee situations.

In short, three factors could be identified as the keys to realisation of the scheme:<sup>37</sup> cultural and ethnic ties between the refugees and the receiving countries; need for labour in the third country; and finally, the principal receiving countries had been central parties in the war, thus the feeling of moral obligation was strong. Even though a formal distribution key was not established there were enough countries offering to resettle most of the displaced persons defined as refugees by the International Refugee Organization (IRO). Thus, the IRO functioned as a facilitator of resettlement, while leaving each receiving country free to decide on specific intake criteria based on its preferences.

##### 3.2.2 *The Comprehensive Plan of Action*

32 See the 1951 Convention, Preamble, fourth paragraph.

33 See e.g. United Nation General Secretary, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, 21/04/2016, [http://refugeemigrants.un.org/sites/default/files/in\\_safety\\_and\\_dignity\\_-\\_addressing\\_large\\_movements\\_of\\_refugees\\_and\\_migrants.pdf](http://refugeemigrants.un.org/sites/default/files/in_safety_and_dignity_-_addressing_large_movements_of_refugees_and_migrants.pdf)

34 Fillippo Grandi address to *Summit on Addressing Large Movement of Refugees and Migrants*, at United Nation General Assembly in New York 19/09/2016, [www.unhcr.org/en-us/news/latest/2016/9/57dfa1734/un-summit-commits-protect-refugee-migrant-rights.html](http://www.unhcr.org/en-us/news/latest/2016/9/57dfa1734/un-summit-commits-protect-refugee-migrant-rights.html)

35 United Nations, New York Declaration, Annex I, Comprehensive Refugee Response Framework, para. 10.

36 Astri Suhrke, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’, *Journal of Refugee Studies*, 11 (1998), pp. 396–415, at p.404.

37 Ibid.

The resettlement of approximately 1.1 million Vietnamese refugees to the US and other anti-communist regimes in the Western world after 1975 is as another example of an ad hoc implemented responsibility and burden-sharing scheme that was built on collective agreement between first countries of asylum and secondary receiving countries. Initially, the response to the so-called plight of the 'boat people' was handled through what has been framed as a 'market system of resettlement',<sup>38</sup> where access to a first country of asylum was dependent on the willingness of third countries to accept resettled refugees. The process was steered by selection criteria linked to immigration concerns, so-called humanitarian obligations and political factors, resembling the mechanism established in the post-world war distribution of refugees.

After a decade, dwindling support to the resettlement scheme led to a second phase of the international burden-sharing response to the Vietnamese refugee situation,<sup>39</sup> eventually resulting in the Comprehensive Plan of Action (CPA) to be established in 1989 after a series of UNHCR-led negotiations between country of origin, country of first asylum and potential countries of resettlement.<sup>40</sup> The countries of asylum agreed to stop the deterrence policies that had been on the rise and to undertake individual asylum assessment procedures, while the country of resettlement agreed to resettle all genuine refugees and the country of origin agreed to accept voluntary returnees that were not considered genuine.<sup>41</sup> However, the refugee receiving countries were given the discretion they wanted to establish unilateral selection procedures and intake-criteria.<sup>42</sup>

Many have stressed the role of the US and its influence on other countries of CPA resettlement, as key to its successful implementation. It is plausible to conclude that fundamental to the scheme was not an altruistic concern for refugee protection, but the geopolitical security interests in the region of the US and the central role that was played by the UNHCR as driver towards a collective effort,<sup>43</sup> and that 'humanitarian imperatives alone would not have sufficed to sustain' the CPA.<sup>44</sup>

### 3.2.3 The Kosovo crisis

A third example of successful and voluntary ad hoc burden sharing took place in Europe in the aftermath of the international intervention in the former Yugoslavia. The initial phase of the Kosovo refugee crisis was caused by clashes between the Kosovo Liberation Army and Serbian security forces in the former Federal Republic of Yugoslavia, and by the severe human rights abuses against the Kosovar Albanian population during 1998 and the beginning of 1999.<sup>45</sup> Even before the NATO bombing started in March 1999, the number of displaced people was huge and resulted in a mass influx of refugees to neighbouring countries such as Albania and Macedonia.<sup>46</sup> In a matter of days after the first NATO air strikes, tens of thousands of refugees started arriving in Macedonia and Albania, resulting in a practically closed Macedonian border through the employment of go-slow processes. In what is named the Blace Field, refugees were stuck between Yugoslavia and Macedonia in very poor conditions.<sup>47</sup> On the contrary, Albania welcomed the refugee 'with open arms'.<sup>48</sup> In Macedonia, however, the ethnic balance was considered fragile. An increased share of Albanian's of the total population was for instance believed to increase the risk of Macedonia becoming directly involved in the Kosovo conflict.<sup>49</sup>

The international community was criticised for having responded late to the Kosovo crisis, because of few geopolitical or economic interests in the region.<sup>50</sup> However, when first deciding to intervene, all the refugees in Blace were moved to camps built by NATO, evacuated through the Humanitarian Evacuation Program (HEP) or Humanitarian Transfer Program (HTP) – and the space was empty after just a few days.<sup>51</sup> This has been seen as an extremely efficient burden-sharing scheme, established on ad hoc basis in order to respond to strong international public pressure. Because the evacuation programmes linked admission into Macedonia with distribution schemes with the US and 27 more countries, refugees regained access to Macedonia on the condition that they would only stay in the first country for a

38 Ibid., p. 406

39 Ibid.

40 For an instructive introduction and account, see e.g. Lawyers Committee for Human Rights, *Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Refugee Convention*, October 1991

41 Alexander Betts, 'Refugees in International Relations', in Alexander Betts and Gil Loescher (ed.), *Refugees in International Relations* (Oxford University Press, 2011), p. 71.

42 Suhrke, 'Burden-sharing during Refugee Emergencies', p. 406.

43 Betts, 'Refugees in International Relations', p. 73.

44 Suhrke, 'Burden-sharing during Refugee Emergencies', p. 406.

45 Human Rights Watch, *Under Orders. War Crimes in Kosovo* (2001), p. 110.

46 Numbers differ. While Human Rights Watch estimated a total 370,000 displaced people, other have operated with lower figures, see Meltem Ineli-Ciger, 'Why do States Share the Burden During Refugee Emergencies?', *Suleyman Demirel University Faculty of Law Review*, 5 (2015), pp. 65–97, at p. 79.

47 Michael Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing', *Journal of Refugee Studies*, 14 (2001), pp. 95–134, at p. 98.

48 Human Rights Watch, *Under Orders*, p. 114.

49 Barutciski and Suhrke, 'Lessons from the Kosovo Refugee Crisis', p. 96.

50 Sophia Benz and Andreas Hasenclever, in Betts and Loescher, *Refugees in International Relations*, p.199.

51 Barutciski and Suhrke, 'Lessons from the Kosovo Refugee Crisis', p. 99.

very limited period. The World Bank and a wide range of countries contributed financially.<sup>52</sup>

The willingness of the international community to engage in a mechanism for sharing of burdens in the Kosovo situation has by some been linked to the involvement by NATO and the perceived moral obligation to protect victims of this war.<sup>53</sup> The US took on the role of leadership, while the UNHCR on the other hand was partly critical to the HEP and HTP models that were being implemented. Both geopolitical interests in Macedonia, as it was used as a military base for the operation against Yugoslavia, and humanitarian concerns, have been identified as the motivating factors behind the initiative.<sup>54</sup> In retrospect, the collective effort to provide refugee protection has been generally celebrated for its unprecedented effectiveness.<sup>55</sup>

### 3.2.4 Lessons for future international cooperation

The principal conclusion drawn from some of the successful stories in the complicated history of international cooperation regarding protracted refugee situations is that countries prefer ad hoc schemes of burden-sharing. Secondly, realisations of these burden-sharing schemes are likely to be conditioned upon the specific historical context, geopolitical and economic interests, and international power-relations. This is supported by the conclusion made by Ineli-Ciger in her account of state behaviour in protracted refugee situations.<sup>56</sup> She observes that every state has different interests represented in a specific refugee situation, and while some states are heavily invested in one way or the other, others might be generally unaffected. The interests affected by a refugee crisis influence the willingness of a specific government faced with a choice of contributing to a burden-sharing scheme or not.

The wording of the New York Declaration, however, seems to imply that all states now have committed themselves to look for long-term, improved responsibility and burden-sharing mechanisms that will cater to a more stable and efficient response to refugee situations. The greatest challenge lies perhaps in establishing a new and effective institutional framework that is acceptable to states.<sup>57</sup>

The next section will first take stock of selected earlier reform suggestions set forth by scholars of refugee law and protection. The different models and initiatives proposed are not necessarily mutually exclusive and thus some might be implemented simultaneously within a structured global framework, depending on the concrete circumstances of a specific refugee situation. We have grouped the proposals into three categories, which are labelled 'redistribution of refugees', 'internationally administrated temporary protection' and 'development schemes'.

## 3.3 Models of international cooperation proposed in the literature

### 3.3.1 Redistribution of refugees

In his *Plan for distribution of Asylum-Seekers*, Grahl-Madsen proposed a Western European responsibility-sharing mechanism, building on national quotas for redistribution of refugees from the country of first asylum that would be determined by means of a distribution key on the basis of gross national product of a given country.<sup>58</sup> Asylum seekers in countries of first asylum could be redistributed to other countries in the same region, but no country would be forced to admit any person whom might pose a threat to national security or public order, and no refugee would be forced to be sent to a country against his or her will. While emphasising that the obligation undertaken by the state would have an absolute ceiling, making sure that each state would only agree to host refugees 'within a reasonable limit'<sup>59</sup>, the plan also foresees that, if the number of refugees drastically exceeds the estimated number, then 'ad hoc measures will have to be taken'.<sup>60</sup>

It has also been proposed global burden-sharing mechanisms where the number of refugees redistributed to a given country would be based on landmass and population density.<sup>61</sup>

Based on some of the same principles, Schuck (1997) presented a comprehensive account of a market-based burden-sharing model of refugee regulation.<sup>62</sup> It had the following points of departure: the burdens laid on refugee receiving states must be reduced by establishing a set of obligations that other states are willing to accept and implement; and, these obligations must be allocated in a way that the states consider fair.<sup>63</sup> The system proposed is based on a voluntary and binding quota system that a group of states agree to participate in, where an institution is mandated to decide

52 Ineli-Ciger, 'Why do States Share the Burden During Refugee Emergencies?', p. 81.

53 Ibid.

54 Barutciski and Suhrke, 'Lessons from the Kosovo Refugee Crisis', p. 99.

55 Ibid.

56 Ineli-Ciger, 'Why do States Share the Burden During Refugee Emergencies?', p. 90.

57 See section 4 for a further discussion on this.

58 Atle Grahl-Madsen, 'Further Development of International Refugee Law', *Nordic Journal of International Law*, 35 (1965), pp. 159–80, at p. 165.

59 Ibid.

60 Ibid, p. 169.

61 James Hathaway and Alex Neve, 'Making International Refugee Law relevant again', *Harvard Human Rights Journal*, 10 (1997), pp. 115–211, at p. 204.

62 Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *The Yale Journal of International Law*, 22 (1997), pp. 243–97.

63 Ibid., p. 246.



the refugee protection quota for each member state. To be implemented, the quotas assigned to each state must be perceived as fair, as this will also make it easier for member states to induce more countries to take part in the system. A state is permitted to pay another member state to fulfil the protection needs of refugees assigned to them, thus Schuck introduces a system for trading in refugees.<sup>64</sup> He argues that a regional or sub-regional level of implementation would be the most efficient solution, due to both economic and political reasons. A quota system based on binding but voluntary membership would provide the states with 'refugee crisis insurance', as it increases control over future refugee inflows and gives the member states the flexibility they need.<sup>65</sup>

If agreed upon by the world community, a burden-sharing system based on a binding quota system would in theory be extremely easy to operationalise and it would also satisfy some numeric standard of what seems fair. However, these mechanisms raise a range of practical questions. As we have seen, states are more inclined to contribute if rather specific conditions are in place. Considering the current political climate, where more and more creative deterrence policies are on the rise,<sup>66</sup> and key refugee-hosting countries, such as Kenya, have decided to shut major refugee camps, referencing restrictive migration policies in Europe,<sup>67</sup> it seems utopic that states would accept binding burden-sharing quotas on a general basis. On the other hand, if every state committed to shoulder their part of the burden by agreeing to a fairly-defined and limited quota system, solidarity between states would perhaps grow stronger as every country would be obligated to take part and share some of the burden.

If states in fact would prove willing to negotiate a formalised quota, Suhrke has pointed out the risk of states trying to fix the number of refugees to be resettled in the lowest possible amount, thus restricting the potential efficiency of the system.<sup>68</sup> In the view of Hathaway and Neve, formalised quotas, as a starting point for resettlement, should 'at most serve only an auxiliary function in defining the basis for responsibility sharing.'<sup>69</sup> They argue that such a system has the potential of damaging the commitment necessary to secure refugee protection, which is probably a valid point. Even though a quota system might seem fair in numeric terms, by excluding other factors in deciding on resettlement schemes, such as the state's willingness to receive a specific group of refugees, it could in the long-run contribute to dwindling support to secure the human rights of all refugees while in refuge. Thus, pre-defined and binding quota systems could endanger the fundamental access to refugee protection that the system is built to provide.

### 3.3.2 Internationally administrated temporary protection

In their article 'Making International Refugee Law relevant again', Hathaway and Neve (1997) make an elaborate argument for a shift towards what they call 'solution-oriented temporary protection of refugees'.<sup>70</sup> The reform presented is universal in its scope and sub-global in its implementation, and in line with the current legal framework of refugee law. It would be organised around separate entities called *interest-convergence groups*,<sup>71</sup> consisting of inner and outer core member states. Arguing that a universal burden and responsibility sharing system would be the better one, they conclude that a sub-global system is probably more realistic.<sup>72</sup> Implementation would be based on assessment of the physical security of the refugees concerned, the functional compatibility between the refugee population and the refugee receiving states, cultural harmony, and lastly, the geographical proximity that would contribute in making repatriation a foreseeable solution.<sup>73</sup>

They claim that four main features of the proposed system could make states willing to agree on binding obligations. First, it would equip states with a more sustainable approach to control migration, as focusing on deterrence policies will not prove viable in the long run. Second, it would meet the interests as identified in the analysis, such as geopolitical and economic considerations. More vaguely defined interests, such as cultural and religious ties with countries of first asylum are presented as a third factor that would create incentives for states to commit to sub-regional burden-sharing mechanism. Fourth, they argue that a profound interest in refugee protection and development issues could also motivate states to agree to legally binding obligations.<sup>74</sup> Other countries that are neither inner nor outer core members would also be welcome to contribute to the burden-sharing mechanism.

The shift to a sub-global, temporary protection regime as stipulated by Hathaway and Neve, offers a quite flexible, but at the same time principled model of cooperation. Writing in line with a regional approach to refugee burden-

64 Ibid., p. 248.

65 Ibid., p. 250.

66 James Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law*, 53 (2014), pp. 235–84.

67 Government of Kenya Ministry of Interior and Coordination of National Government, *Government Statement and Update On the Repatriation for Refugee and Scheduled Closure of Dadaab Refugee Camp*, see [www.interior.go.ke/?p=3113](http://www.interior.go.ke/?p=3113)

68 Suhrke, 'Burden-sharing during Refugee Emergencies', p. 414.

69 Hathaway and Neve, 'Making International Refugee Law relevant again', p. 204.

70 Ibid., p. 181.

71 The term is used by Hathaway and Neve to describe 'sub-level associations of states that ought reasonably to feel drawn together to create a mechanism of shared responsibility for refugee protection' and as a result commit themselves to a system of response mechanisms triggered by mass refugee situations, see *ibid.*, pp. 188 and 190–2.

72 Hathaway and Neve refers to a forthcoming conclusion of Asha Hans and Astri Suhrke on the relationship between *realpolitik* on the one hand and on the other hand legal obligations and humanitarian considerations, see *ibid.*, p. 187.

73 Ibid., p. 204.

74 Ibid., pp. 192–4.

sharing, Suhrke and Hans base their own reform proposal on the assumption that an 'elaborate and universalized system of humane responsibility sharing [is] unworkable' due to *realpolitik* concerns that shapes the behaviour of states.<sup>75</sup> Thus, the responsibility sharing system they draft are based on a two-tier model of both regional protection and extra-regional obligations, where the physical responsibility for a specific group of refugees is placed within the geographical area in which the refugee's country of origin is located, while the international community as a whole is committed to economic support.<sup>76</sup> The structural premise of this scheme is that providing improved temporary protection 'within the region' would be preferable, since proximity to the refugee's country of origin makes repatriation easier. This kind of sharing of regional protection and universal responsibility would also make it easier to obtain the political support needed. A mechanism for financial support from countries outside the region would in this case be essential to actual implementation.<sup>77</sup> Instead of establishing a systematic and long-term burden-sharing scheme, that potentially motivates states to demand greater control over membership and caseloads, Suhrke and Hans argued that a regional system of *shifting* refugees from one country to another *within* the specific region would allow the countries involved to develop sustainable intake criteria in times of large-scale movement.<sup>78</sup> Thus their model of internationally administrated temporary protection in the region also includes elements of a regional redistribution model.

Applying a quite different approach to reforming the universal system of refugee protection, Burton quite early on looked at the possibility of developing a complimentary system of refugee protection through international leasing of territory.<sup>79</sup> The idea is that leasing agreements between the international community and an individual state would entitle the international community with the right to use a specific piece of land refugees already occupy. Furthermore, the leasing agreements she proposed would commit the host country to allow an 'international human rights monitoring team' unhindered contact with the refugee population on the leased land. Burton argued that this solution would result in higher degree of accountability for all parties involved, including UNHCR, host countries and refugees, especially to people seeking refuge in countries that have not ratified the 1951 Convention or its 1967 Protocol. It would provide the international community with the means necessary to offer effective security to the refugee population in the area. Burton argues that the refugee receiving states then would 'obtain sorely needed payment' to cover the economic burden of housing refugees, and in addition expenses such as cost of food, housing, clothing, health care and so on would be covered by the international community.<sup>80</sup>

A contract could be given on a perpetual term, with access to terminate it on 30 days' notice for both parties, or it could be stipulated to 'run with the refugees' so that the rights of the international community to access and dispose over land would be dependent on where the refugees are. While discussing how to determine the cost of leasing, Burton does not offer any specific solution, concluding that the amount may vary with the willingness of the international community to compensate the host country.<sup>81</sup>

The idea was taken a step further by Einarsen, proposing a possible future complimentary model of regional temporary protection, on UN-leased territory in a safe country in the region based on a clear and voluntary agreement.<sup>82</sup> This proposal, entitled *International Territories of Asylum*, is not limited to leasing agreements of land already occupied by refugees. It makes clear that the world community, as represented by the United Nations and the specific institutions that would be established, and with the support of the Security Council, would assume full responsibility for the protection of the refugees and security issues on the leased territory. Unarmed *prima facie* refugees would have voluntary access to the leased territory.

The ITA-model would be dependent upon global sharing of responsibility; provision of temporary 'international territory' by host countries in the region, physical and legal protection and humanitarian assistance (the UN as such and the UNHCR, in cooperation with other organisations) and financial and political support from other states. A limited settlement and resettlement programme would be an integrated part of this model, with a view to assisting refugees with particular needs but also in order to prevent the leased territories from becoming permanent places within which refugees are contained.<sup>83</sup> This model could easily be combined with development schemes and employment of refugees, including contracts with enterprises and entrepreneurs with a view to building infrastructure on the leased territory (see next section 3.3.3).<sup>84</sup>

### 3.3.3 Development schemes

Along with Collier, a development-economist and former director of the Development Research Group of the World

75 Astri Suhrke and Asha Hans, 'Responsibility Sharing', *Refugee. Canada's Journal on Refugees*, 15 (1996), pp. 12–13.

76 Ibid.

77 Ibid., p. 13.

78 Ibid.

79 Eve Burton, 'Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries', *Columbia Human Rights Law Review*, 19 (1988), pp. 307–32, at p. 309.

80 Ibid., p. 319.

81 Ibid., p. 321.

82 Terje Einarsen, 'Mass Flight: The Case for International Asylum', *International Journal of Refugee Law*, 7 (1995), pp. 552–78.

83 Ibid., p. 570.

84 A more radical proposal would be to create a new nation for refugees: see the critical remarks in this regard by Alexander Betts, 'Is creating a new nation for the world's refugees a good idea?', *The Guardian*, 4 August 2015, [www.theguardian.com/global-development-professionals-network/2015/aug/04/refugee-nation-migration-jason-buzi](http://www.theguardian.com/global-development-professionals-network/2015/aug/04/refugee-nation-migration-jason-buzi).

Bank, Betts introduces a *development-based approach to refugees*.<sup>85</sup> They argue that by focusing on opportunities of employment in *economic zones*,<sup>86</sup> this would generate both better conditions for the refugees and for economic growth in the refugee receiving country. Their call for reform is premised on the assertion that the current refugee regime is based on a 'boats-and-camps approach' that neither improves the lives of the refugees and the prospects of the specific region, nor satisfies the economic and security interests of the refugee receiving country.<sup>87</sup> By looking beyond refugees as a humanitarian challenge and instead framing refugees as a development opportunity, it is argued that such a model has the potential to curb the often exhausting and dangerous travels that refugees are forced to make. In practice Betts and Collier suggest offering jobs to a set number of refugees based on the preferences of each specific country in special economic zones that are either already existing or that would be set up. Both national and foreign firms, amongst them firms operating in the refugee country of origin, can set up operations. As in the models suggested by Burton and Einarsen, land and locating refugees within a geographical area is central, however in the model presented by Betts and Collier, one of the major contributions expected of the international community involves encouraging businesses to invest in the zones through giving financial incentives such as subsidies and trade concessions. If implemented, they argue, the refugee population would be jobs-generating and thus potentially spur on development processes in the refugee population which would also benefit the rebuilding of the country of origin, and for the host countries as it gets the opportunity of taking advantage of economies of scale.<sup>88</sup>

The model, which is already being tried out in Jordan, a process which Betts and Collier is deeply involved in,<sup>89</sup> raises however some fundamental questions related to labour standards and human rights. Betts admits that the model of employment 'is not optimal' but the second-best option. He might have a point. Perhaps this is a model to be tried out and evaluated, and if successful, it could be one of a set of schemes that could be implemented in times of protracted refugee situations. We tend to agree with Betts (2015) when he assumes that 'we need innovative and creative solutions. At the heart of this must be a rethinking of the political geography of asylum'.<sup>90</sup>

### 3.3.4 Holistic reform of international refugee protection

Recently, a range of refugee law scholars have made strong cases for also strengthening the empowerment of refugees, through investing in education and providing access to employment. Several different new elements with a view to extended cooperation might be envisaged within a reinforced international framework.

Gammeltoft-Hansen has made the argument for a reform compatible with the framework of the 1951 Convention, based on five premises.<sup>91</sup> First, a reform needs to be *holistic* in the sense that legal, economic and political considerations must be addressed. Second, it needs to be inclusive and global in its scope, not Eurocentric. Third, it needs to retain the notion that protection is granted on a temporary basis. Fourth, it should apply differentiated responsibilities dependent on the state's ability and appropriateness; and lastly, it must build on innovative and broader perspectives on the ways in which refugee protection is organised and implemented. Gammeltoft-Hansen argues that to solve the inherent challenges in the shaping of refugee policy states must facilitate actual access to education, to the labour market, provide microloans, thus creating an environment for the refugee to live an active and meaningful life. This could be financed through investment plans in developing countries which host most of the world's refugees. This seems to be in line also with recent contributions made by Hathaway and Neve, amongst others.<sup>92</sup> Milner, agreeing with the conclusions made by Betts, argues that reform today requires 'taking the issue of refugees out of a humanitarian silo and integrating refugee issues into the UN's work in areas such as development and peace building'.<sup>93</sup>

## 4. Towards an improved 'Global Compact' on refugees?

### 4.1 The Comprehensive Refugee Protection Framework as baseline

Despite numerous earlier attempts by scholars, experts and practitioners to propose ways forward towards enhanced

85 Alexander Betts and Paul Collier, 'Help Refugees Help Themselves: Let Displaced Syrians Join the Labour Market', *Foreign Affairs*, 94 (2015), pp. 84–92.

86 An economic zone or what is normally called a 'special economic zone' could be defined as 'demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory. These differential rules principally deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory', World Bank Report, *Special Economic Zones. Progress, Emerging Challenges and Future Direction* (2011), p. 12.

87 Betts and Collier, 'Help Refugees Help Themselves', p. 85.

88 *Ibid.*, p. 88.

89 Alexander Betts and Paul Collier, 'Jordan's Refugee Experiment. A New Model for Helping the Displaced', *Foreign Affairs* (2016), postscript 28/04/2016, [www.foreignaffairs.com/articles/middle-east/2016-04-28/jordans-refugee-experiment](http://www.foreignaffairs.com/articles/middle-east/2016-04-28/jordans-refugee-experiment).

90 Betts (2015), 'Is creating a new nation for the world's refugees a good idea?'

91 Thomas Gammeltoft-Hansen, *Escaping Realities? Why European refugee policies have failed and what could be done instead* (Oslo, 6 April 2016), see [www.uio.no/studier/emner/jus/jus/JUS5530/v16/undervisningsmateriale/slides-from-the-pa-flukt-presentation.pdf](http://www.uio.no/studier/emner/jus/jus/JUS5530/v16/undervisningsmateriale/slides-from-the-pa-flukt-presentation.pdf).

92 James Hathaway (2016) 'A global solution to a global refugee crisis', *openDemocracy.net*, [www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis](http://www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis) and Alex Neve (2016) 'Refugee reform must become a global project', *openDemocracy.net*, [www.opendemocracy.net/openglobalrights/alex-neve/refugee-reform-must-become-global-project](http://www.opendemocracy.net/openglobalrights/alex-neve/refugee-reform-must-become-global-project).

93 James Milner (2016) 'Rediscovering a winning formula for refugee protection', *openDemocracy.net*, [www.opendemocracy.net/openglobalrights/james-milner/rediscovering-winning-formula-response-to-hathaway](http://www.opendemocracy.net/openglobalrights/james-milner/rediscovering-winning-formula-response-to-hathaway).

international refugee protection, especially with a view to improving the structures for the management of large-scale refugee movements, states have for a long time been reluctant to confront the challenges in a concerted manner and discuss new innovative ideas. Apparently, the global refugee crisis through its proportions and the potentially negative regional and global impact on conditions for peace and security and social developments has finally led to some kind of mental change among state leaders.

For the first time the collective world community through their high representatives has explicitly recognised the urgent need for extended international cooperation on refugee protection. For example, in order to address the needs of refugees and receiving states, it is now declared a common aim to seek 'more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States'.<sup>94</sup> What makes this and similar statements more than just nice words is that CRRF was made part of the document and the proposed next step towards a new 'Global Compact' on refugees in 2018.

The stated objective of the CRRF, and thus by implication also an objective of the future 'Global Compact', is fourfold: to ease pressures on host countries of refugees; to enhance refugee self-reliance; to expand access to third-country solutions; and to support conditions in countries of origin for return in safety and dignity.<sup>95</sup> Generally speaking the CRRF is a mix of some new and some traditional elements of extended international cooperation beyond the core legal obligations of the 1951 Convention and other human rights instruments. Such measures are typically facilitated and organised by the UNHCR and its partners, in cooperating with host states. This is clear already from the main titles of the CRRF; 'Reception and admission', 'Support for immediate and ongoing needs', 'Support for host countries and communities', and 'Durable solutions'. However, the language makes clear that the CRRF is about intensified commitments with concrete expectations on several points.

Consequently, by endorsing the New York Declaration, the world community should now be seriously committed to start working towards the adoption of a renewed global compact on refugees. The word 'compact' in this context points in the direction of a possibly legally binding, worldwide agreement. However, the agreement must not necessarily be legally binding. In fact, there are good arguments in favour of a non-legally binding agreement. First, a legally binding agreement can only be achieved through a multilateral convention in this case, which would entail not only a slow process but also a substantial risk of failure. If only some states would ratify the new treaty framework and take on legally binding obligations, the whole purpose of extended global cooperation would be undermined. Secondly, there are precedents showing that a non-binding declaration might be more effective in some cases, and we believe this is the case here. As pointed out by UNHCR's Assistant High Commissioner for Protection, the Universal Declaration of Human Rights was, like the New York Declaration, adopted as a political declaration, but still revolutionised human rights.<sup>96</sup>

We agree that what is most important now is to create a solid enough platform for enhanced refugee protection and possibly more creative sharing of burdens and responsibilities within a structured framework. That framework should build on the CRRF but it must become significantly reinforced by the 'Global Compact'. Otherwise, the momentum gained by the New York Declaration would be wasted.

The processes ahead should involve a 'multi-stakeholder approach'.<sup>97</sup> This entails including a wide range of actors, besides states, the UNHCR, and other UN related organs, such as international financial institutions, regional coordination and partnership mechanisms and civil society partners, including the private sector. In accordance with the CRRF, countries of the world have now committed themselves to aim for higher numbers of resettled refugees and to provide other legal pathways for refugees to seek protection.<sup>98</sup> Furthermore, non-receiving states will participate in mobilising resources in an effective manner and extend finance lending schemes for developing and middle-income countries that have received a high number of refugees.<sup>99</sup> In addition to providing reception and admission practices in line with the framework and humanitarian assistance, host states are expected to encourage empowerment of the refugees living there.<sup>100</sup> This approach seems to reflect thoughts and ideas earlier provided by researchers and experts in section 3 above and could also imply that the outlined plans for a future Global Compact on refugees comprise institutional reinforcement.

Although the CRRF has already received criticism for its lack of more substantial proposals for much needed reinforcement and reform of the present international protection system, and for not offering concrete solutions to the shortcomings of the current system,<sup>101</sup> we are still inclined to interpret the CRRF as an ambitious first step towards a universal agreement on constructive responses to situations of large-scale refugee movements. Given that states

94 See the United Nations, New York Declaration, para. 68.

95 Ibid., Annex I, Comprehensive Refugee Response Framework, para. 18.

96 Volker Türk, 'Q&A: The New York Declaration is a "once in a lifetime chance" for refugees', UNHCR home page, 30 September 2016, [www.unhcr.org/news/latest/2016/9/57ee3af54/qa-new-york-declaration-once-lifetime-chance-refugees.html](http://www.unhcr.org/news/latest/2016/9/57ee3af54/qa-new-york-declaration-once-lifetime-chance-refugees.html).

97 Ibid., para. 2

98 Ibid., para. 10

99 Ibid., para. 6 a

100 Ibid., para. 13 c

101 See e.g., *7 actions world leaders urgently need to take to make a new deal for refugees, migrants and societies a reality. Civil Society Response and Scorecard for the UN High-Level Summit 'New York Declaration for Refugees and Migrants'*, by Act Now, [http://refugees-migrants-civilsociety.org/wp-content/uploads/2016/09/Act-Now-Statement-and-scorecard-for-UN-Summit-for-Refugees-and-Migrants\\_16-Sept.2016.pdf](http://refugees-migrants-civilsociety.org/wp-content/uploads/2016/09/Act-Now-Statement-and-scorecard-for-UN-Summit-for-Refugees-and-Migrants_16-Sept.2016.pdf).

should not realistically be expected to adopt the most radical mechanisms proposed in theory immediately, the question is whether and how the 'Global Compact' in practice might become something more than the CRRF.

#### 4.2 Institutional reinforcement through a procedural mandate?

How does the world community move from the set of tendencies staped out in the CRRF to agreeing on practical institutional, organisational and legal reform? At an institutional level expansion of the procedural powers that lies within the UN system could be one feasible way of strengthening the structures to facilitate cooperation. More specifically, this could entail mandating an organ with the authority to summon states for conferences to discuss measures to be taken in specific situations. The organ could either be UNHCR with an expanded mandate or a new organ consisting of representatives from the UNHCR, the International Organization for Migration (IOM), which now has been made a 'related organisation' of the UN, state representatives and other relevant stakeholders.

Recalling the multi-stakeholder approach called for in the CRRP, the last alternative might be best suited to meet the objectives of the Declaration. Within this institutional reform, attendance at conferences would be mandatory. If no agreement is reached, there must still be a follow-up mechanism, if the 'Global Compact' is going to serve its purpose.

The conclusions made in section 3 do indicate that states prefer non-binding, short-term solutions to specific refugee situations rather than engaging in long-term binding commitments of international cooperation. Without being naïve, it is worth acknowledging that this is the first time in the UN's history that all its members have agreed to engage in negotiations related to strengthening cooperation on refugee protection. Taking this into account, previous experiences with reluctant states are not necessarily decisive for the future outcome of the present process.

The creation of a permanent common platform for dialogue on international cooperation should be a part of a 'Global Compact', and this would most likely require an additional institutional framework to what already exists. In other words, there is a clear and present need for a follow-up institutional mechanism to be established with the framework of the 'Global Compact'. Inspiration for this could be sought in the earlier Helsinki process and the Helsinki Final Act, which contained a follow-up mechanism that secured the success of that important, non-legally binding framework for international cooperation on peace and security and human rights protection.<sup>102</sup> It secured a continuous multilateral process, which included 'meetings of experts of the participating States, and also within the framework of existing organizations such as the United Nations Economic Commission for Europe and UNESCO (...)'. We would suggest, in line with the multi-stakeholder approach of the New York Declaration, that a representative body of stakeholders should be established within the parameters of the Global Compact. The UNHCR should be its chairperson.

By strengthening early warning, in line with the CRRF, the new body or institution should be able to summon members at an early stage so that planning for preventive measures could be a feasible alternative to the ad hoc measures that we often see today. Such a mechanism could facilitate the implementation of a thought through burden and responsibility sharing scheme, developed to meet the specific needs of a specific situation. Such a mechanism could serve as a systematic and efficient response in accordance with the spirit of the New York Declaration and the proposed Global Compact. As we have seen in section 3, the international community has proved willing to engage in ad hoc models of resolving mass refugee situations that have sought to share financial and material costs between countries and to resettle refugees from the country of asylum to a third country. Notwithstanding arguably successful cases of international collaboration, the outspoken premise of the New York Declaration is a need to establish permanent mechanisms to be triggered at an earlier stage than what we have seen in the past.

To be an effective institutional mechanism leading to constructive outcome, the organ should also be mandated to make advisory suggestions regarding schemes that should be enforced to meet the specific demands identified. A predetermined list of schemes should be developed and agreed upon by the member states during the process towards the 'Global Compact' to minimise the chances of disagreement when the situation calls for an efficient and collective operation. Perhaps this institutional structure is one way of meeting both the conceived preference towards ad hoc models of cooperation, as the states would have to deal with every incident of mass refugee movement in an individual process, while at the same time, if implemented in accordance with its purpose, the chances of reaching an agreement in a faster pace could increase. Additionally, the assessment of the implemented models showed us that a key factor of success in international cooperation has been the leadership of a strong actor. If the body proposed ceases the opportunity and fills its mandate as granted by the Declaration and the Compact, perhaps it could be the kind of 'strong leader' through such a soft-law mechanism that is needed to initiate and implement useful schemes of international refugee cooperation.

Implicit in its mandate to summon member states would be competence to identify groups or situations of refugees that the world community needs to prioritise. As noted in section 3 above, a wide range of factors such as geopolitical, cultural, political and economic incentives affect which situations of mass movement get much attention and which do not. A body with a procedural mandate as suggested above would arguably be able and willing to make independent and fair proposals in a global perspective for states to consider and eventually adopt. Importantly, the institution envisaged could also be mandated to suggest pilot projects based on new and innovative reform ideas that are currently being developed, and bring together representatives of member states and other stake holders in working groups to implement these projects. It could also engage in dialogue with host states, countries of origin, and countries

102 See *The Final Act of the Conference on Security and Cooperation in Europe*, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration), available at: <http://hrlibrary.umn.edu/osce/basics/finact75.htm>.

of resettlement, as well as with the refugee communities affected, and NGOs, to analyse which pilot projects would be suited in a concrete situation. By including financial institutions such as the World Bank, and other private sector actors, opportunities for entrepreneurship and employment in the formal labour market could be tested more systematically.

A likely by-product of such a step-by-step reform would be a renewed focus also on causes and responsibility for refugee movements. Another theme not elaborated further in this paper, concerns the financing of Global Compact mechanisms for extended international refugee protection. The global community of states should however be willing to consider innovative ideas, such as a UN 'refugee tax' on international arms transfers.<sup>103</sup>

## 5. Conclusion

In this paper, we have discussed the prerequisites for conditional reform of the present system for international refugee protection. The existing global system – termed the 'universal asylum system' – is fragmented, but at the same time its core legal structures are sound and the system is more coherent than often asserted. However, the dimension and complexity of the current world refugee crisis has sparked a necessary debate on intensified global cooperation, especially with a view to extended international cooperation on burden-sharing and sharing of responsibility for refugee protection that extends clearly beyond the existing legal frameworks as represented by the 1951 Convention and its 1967 Protocol.

The first phase of this debate has now come to end at the global level with the New York Declaration. This potentially very important document reinforces worldwide political support for the existing legal and institutional structures. It also expresses a clear intent to move forward towards extension of international refugee protection in a structured manner. Going forward, we believe it is recommendable to remain open for new inventive ideas in addition to stay confident in well-known tools that have earlier been employed with success.

After reviewing some earlier successful cases of cooperation on a temporary or ad hoc basis, as well as suggestions for reform made by scholars of international refugee protection, the picture emerges that the next step for the world community will be crucial. In our opinion, it is now urgent that international stakeholders, particularly UNHCR, keep an open mind and a desire to really improve the system. We believe this to be possible: a golden opportunity exists if an additional institutional framework will be enacted as a continuous follow-up mechanism. There is a need for new body – a 'Global Compact' institution – that should be empowered to calling for new high-level conferences, if necessary, and making non-binding recommendations for concerted global initiatives on burden-sharing mechanisms and fair responsibility sharing among states and other stake-holders within a renewed universal refugee protection regime. We think that the earlier success of the Helsinki processes and the Helsinki Final Act, on peace and security and human rights protection, might serve as useful inspiration in this regard.

103 This was proposed by Einarsen at 'The Future of Refugee Law' conference, see supra note 1.

# The origins of 'burden sharing' in the contemporary refugee protection regime

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## Abstract

The crisis in Syria, which has given rise to the largest refugee outflow in many decades, has once again thrown into relief a recurring tension in the global refugee regime. On the one hand, the regime is premised on the understanding that individual host States will provide protection to refugees on behalf of the international community. On the other, State contributions as host countries are necessarily unequal, even arbitrary, with States in the 'global south' hosting 86 per cent of the world's refugees as at the end of 2015.

At the heart of these tensions is a key set of principles: international cooperation, solidarity, burden sharing and responsibility sharing ('burden sharing') between States in the refugee regime. Recital 4 of the preamble of the 1951 Convention relating to the Status of Refugees (1951 Convention) expresses this as follows:

Considering 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.

Through an analysis of the *travaux préparatoires* of the 1951 Convention, this paper serves as a first step in reconsidering some longstanding assumptions with respect the principle of burden sharing in international refugee law. There are two key findings. First, the *travaux préparatoires* reveal (say some of the drafters) that the burden sharing provision in recital 4 of the preamble was intended to have a surprisingly specific purpose. Second, I demonstrate that ultimately the inclusion of burden sharing in the preamble was the result of a 'double compromise' that continues to impact our understanding of the principle today.

## Keywords

International cooperation, burden sharing, solidarity, *travaux préparatoires*, 1951 Convention

# 1. Introduction<sup>1</sup>

## 1.1 Background

The crisis in Syria, which has given rise to the largest refugee outflow in many decades,<sup>2</sup> has once again thrown into relief a recurring tension in the global refugee regime. On the one hand, the regime is premised on the understanding that individual host States will provide protection to refugees on behalf of the international community. On the other hand, refugee protection obligations under international law generally attach to the State that has jurisdiction over an individual asylum-seeker or refugee.<sup>3</sup> State contributions as host countries are necessarily unequal, even arbitrary, as most refugees at least initially arrive and stay near to their countries of origin, where they are first able to reach safety.<sup>4</sup> At the end of 2015, primarily by virtue of geographic proximity to refugee origin countries, States in the 'global south' hosted 86 per cent of the world's refugees.<sup>5</sup> This is not just a 'north-south' issue however: within the European Union there have also been serious concerns about the uneven distribution of State responsibilities for refugees – a concern that significantly magnified with the large increase in arrivals in 2015 and 2016.<sup>6</sup>

At the heart of these tensions is a key set of principles: international cooperation, solidarity, burden sharing and responsibility sharing (hereafter 'burden sharing'<sup>7</sup>) between States in the refugee regime. Recital 4 of the preamble of the 1951 Convention relating to the Status of Refugees (1951 Convention) expresses this as follows:

Considering 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.<sup>8</sup>

Presented in this way, burden sharing appears to represent a call for collective action to resolve refugee challenges, as well as the notion that granting asylum may create difficulties for some States. But the nature, meaning and scope of burden sharing, its legal relevance within the refugee regime, and what exactly it requires, or not, of States is still frequently described as unclear.

This is not to say that literature, policy and practice on burden sharing is lacking. To the contrary. Since at least the 1970s there has been a cyclical rise and fall in academic and policy interest in burden sharing, coinciding with high-profile, large-scale refugee crises and (more/less) successful efforts by the international community to respond. Previous peaks of interest include the late 1990s and early 2000s, following the conflicts in the former Yugoslavia and in Kosovo,<sup>9</sup> and the late 1970s and early 1980s, following the outflow of refugees from Vietnam and in Central America.<sup>10</sup> The crisis in Syria, and particularly its impact in Europe have, once again, heightened policy and academic interest in burden sharing – including within the United Nations, with the issue being discussed at a series of meetings in 2016 culminating in the adoption of the New York Declaration for Refugees and Migrants by the UN General Assembly in September.<sup>11</sup>

For all this renewed interest in burden sharing, the current discussion in many ways echo previous periods in that it involves an entrenchment, rather than a reconsideration, of certain preconceptions. First, the assumption that

1 The opinions expressed are those of the author, and do not reflect the views of the United Nations.

2 UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>.

3 UNHCR, 'Burden-Sharing – Discussion paper submitted by UNHCR Fifth Annual Plenary Meeting of the APC', *ISIL Yearbook of International Humanitarian and Refugee Law*, 17 (2001), [www.worldlii.org/int/journals/ISILYBIHRL/.../17.rtf](http://www.worldlii.org/int/journals/ISILYBIHRL/.../17.rtf), p. 2. See also: UNHCR, *Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing*, November 2010, [www.refworld.org/docid/4cd12d3a2.html](http://www.refworld.org/docid/4cd12d3a2.html), pp. 3–4.

4 UNHCR, *The State of the World's Refugees: In Search of Solidarity* (Oxford: Oxford University Press, 2012), at 197. Cf. Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *Legal Research and Protection Policy Research Series* (Geneva: Department of International Protection, UNHCR, 2003), [www.refworld.org/pdfid/3f4de85d4.pdf](http://www.refworld.org/pdfid/3f4de85d4.pdf).

5 UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>, p. 2.

6 For latest data on arrivals across the Mediterranean, see UNHCR, *Refugees/Migrants Emergency Response – Mediterranean*, updated regularly, <http://data.unhcr.org/mediterranean/regional.php>.

7 See further Part I.B below for an explanation with respect to terminology.

8 1951 Convention Relating to the Status of Refugees, United Nations Treaty Series, vol. 189, p. 137; 1967 Protocol Relating to the Status of Refugees, United Nations Treaty Series, vol. 606, p. 267.

9 See generally: Astri Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action', *Journal of Refugee Studies*, 11 (1998), pp. 396–415, at p. 315; Michael Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing', *Journal of Refugee Studies*, 14 (2001), pp. 95–115.

10 See generally: Richard Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?', *International Journal of Refugee Law*, 18 (2006), pp. 537–70; Alexander Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA', *New Issues in Refugee Research* (UNHCR, 2006), [www.refworld.org/docid/4ff163c82.html](http://www.refworld.org/docid/4ff163c82.html).

11 The New York Declaration contains language acknowledging 'a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner' (para. 11), as well as 'the centrality of international cooperation to the refugee protection regime' (para. 68). States 'commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States' (para 68): United Nations General Assembly, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 19 September 2016, [www.unhcr.org/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html](http://www.unhcr.org/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html). See also Executive Committee Conclusion No. 112 (LXVII) (2016) on 'International cooperation from a protection and solutions perspective', [www.refworld.org/type,EXCONC,UNHCR,,57f7b5f74,0.html](http://www.refworld.org/type,EXCONC,UNHCR,,57f7b5f74,0.html).



burden sharing, while a desirable part of the international refugee regime, is a vague principle in terms of its scope and normative content, and is more relevant politically than legally.<sup>12</sup> Second, the assumption that States are failing to sufficiently share burdens in practice – as evidenced by the inequitable distribution of refugee hosting responsibilities between countries.

The purpose of this paper is to serve as a first step in reconsidering these preconceptions about the scope and nature of burden sharing in the refugee regime as it is currently structured, by going back to the origins of the insertion of the reference to burden sharing in the preamble of the 1951 Convention. Following brief notes on terminology (Part I.B) and the architecture of the 1951 Convention (Part I.C), Parts II and III analyse the travaux préparatoires of the 1951 Convention with respect to the 'burden sharing provision', which was initially envisaged for the operative part of the 1951 Convention and was ultimately included in recital 4 of the preamble. My focus is on understanding the apparent purpose of the provision as written, according to its drafters.<sup>13</sup> In Part IV, I draw attention to a number of issues emerging from the travaux préparatoires that continue to have implications for the principle of burden sharing and the operation of refugee regime as a whole – and indeed go some way to explaining the significant confusion in which we find ourselves today.

## 1.2 Note on terminology

In international refugee instruments and also in the literature there are four separate terms that are used, both interchangeably as well as consecutively, to refer to similar ideas: (1) international cooperation; (2) international solidarity; (3) burden sharing; and (4) responsibility sharing.<sup>14</sup> While used interchangeably in policy contexts, it is arguable that these terms are not completely synonymous from an international legal perspective.<sup>15</sup> For the purposes of this paper, I continue to use the term 'burden sharing' because, based on my research to date, this is the term that most clearly encapsulates what I understand to be the scope of the principle as applied in contemporary practice. (See further Part IV below).

## 1.3 Note on the architecture of the 1951 Convention

The 1951 Convention is, together with the Office of the United Nations High Commissioner for Refugees (UNHCR), an important pillar of the modern refugee regime.<sup>16</sup> It was adopted following the United Nations Conference of

12 For example, UNHCR's former Assistant High Commissioner for Protection, Erika Feller, has stated that: '...the current displacement situation, even as desperate as it is, may nevertheless offer a rare opportunity to build upon the foundations of the 1951 Refugee Convention, through a process to finally clarify the meaning of international solidarity and the general content of burden sharing. ... The absence of agreement around what burden and responsibility-sharing should actually lead to has been a serious loophole in the protection architecture and the opportunity to remedy this now has at least a fighting chance': Erika Feller, *Protection Elsewhere – But Where? National, Regional and Global Perspectives on Refugee Law*, Keynote Address, November 2015, [www.kaldorcentre.unsw.edu.au/sites/default/files/Conference2015\\_Keynote.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Conference2015_Keynote.pdf). Prior to his departure, the former High Commissioner for Refugees, Antonio Guterres, noted: 'As we face the highest levels of forced displacement in recorded history, the institution of asylum must remain sacrosanct, honoured as one of the deepest expressions of humanity – especially now as it is being so severely tested in many parts of the world. It is my conviction that the best way to do this is through genuine international cooperation and equitable burden and responsibility sharing. In fact, if there is one Protocol that is yet to be drafted to complement the 1951 Convention, it is one on international solidarity and burden sharing': Antonio Guterres, *Opening remarks at the 66th session of the Executive Committee of the High Commissioner's Programme*, October 2015,

<http://unhcr.org/56122bd76.html>. See also Alexander Betts, 'The Political Economy of Extra-Territorial Processing: Separating 'Purchaser' from 'Provider' in Asylum Policy', *New Issues in Refugee Research* (UNHCR, 2003), [www.refworld.org/pdfid/4ff2b2b82.pdf](http://www.refworld.org/pdfid/4ff2b2b82.pdf), p. 2. ('Without any binding enforcement mechanism, the 1951 Convention and UNHCR's ExCom can only rely on gentle persuasion or innovation to coax states towards greater cooperation to create a more sustainable asylum regime'); Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *Legal Research and Protection Policy Research Series* (Department of International Protection, UNHCR, 2003), [www.refworld.org/pdfid/3f4de85d4.pdf](http://www.refworld.org/pdfid/3f4de85d4.pdf), p. 608. ('While international law imposes no obligation on states to accept refugees for permanent resettlement, agreements to share responsibility for doing so are highly beneficial and therefore strongly encouraged by UNHCR and others.')

13 As distinct from seeking to use travaux for interpretative purposes. I note the warning provided by Hurwitz: 'The travaux préparatoires should be used with particular caution in the case of the Refugee Convention, given that only 26 States participated in the draft of the Convention to which 144 States are now party': Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), p. 132. It is therefore not my intention to imply that the approach of the drafters with respect to recital 4 of the preamble is conclusive of its meaning and scope today.

14 Hurwitz identifies two additional terms that are also relevant in the general international law context: 'good neighbourliness' (part of the law of co-existence, entails respect by States of their obligations under public international law, above all its basic principles) and 'comity' (a species of accommodation not unrelated to morality, implying neighbourliness, mutual respect and the friendly waiver of technicalities, rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them): Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), p. 167. As discussed in Part IV below, the drafters of the 1951 Convention also referred to the term 'international collaboration', as a further alternative.

15 See below, Part IV.B. See also, e.g., Jost Delbrück (ed.), *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law*, 23–26 May 2001 (Berlin: Duncker & Humblot, 2002).

16 For the purposes of this paper, the 1951 Convention signals the start of the modern refugee protection architecture that is still in place today. For further details with respect to the refugee regime in place prior to 1950 see generally Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995). I note that that many States, including significant host States, are not 1951 Convention signatories. Further, the modern refugee protection regime now extends beyond the 1951 Convention to include regional instruments, conclusions on international protection adopted by UNHCR's Executive Committee, General Assembly resolutions and customary international law, amongst others. Accordingly, any analysis of burden sharing as contained in the 1951 Convention does not conclude consideration of the operation of burden sharing principles in the refugee regime as a whole.

Plenipotentiaries on the Status of Refugees and Stateless Persons (held in Geneva from 2 to 25 July 1951<sup>17</sup>) and entered into force in April 1954. The 1951 Convention broke new ground in several respects.<sup>18</sup> For the purposes of this paper, the most significant were that:

- a. By adopting a general definition of a 'refugee' based on a well-founded fear of persecution, the 1951 Convention went further than earlier refugee treaties, which had referred to specific national and ethnic groups rather than establishing generalised criteria that could fit future situations;<sup>19</sup>
- b. Under the International Refugee Organization (IRO) (1946–52), repatriation and large-scale resettlement were the primary solutions envisaged for refugees.<sup>20</sup> Conversely, the 1951 Convention was premised on the grant of permanent asylum to refugees by what today would be termed 'first countries of asylum.' Its purpose was to set out internationally consistent and generally higher standards of treatment for refugees in such countries, including access to courts (Article 16) and the labour market (Article 17) on a 'national treatment' or 'most-favoured nation' basis. In other words, the 1951 Convention was essentially an agreement between States as to how they would treat refugees on their territories.<sup>21</sup>

Contrary to contemporary criticisms that the 1951 Convention is too narrow to accurately capture the full scope of displacement, the Convention was seen at the time of its adoption as imposing significant obligations on host States/countries of first asylum – both because of the generalized refugee definition and the presumption that host States would provide permanent asylum to refugees who found themselves on their territory. Again, large-scale resettlement, which had been the primary solution provided under the IRO but was costly and from which the United States wanted to distance itself<sup>22</sup> was no longer to be the default solution. Instead, the principal operating assumption was that the governments in whose territories refugees resided should care for them as far as possible.<sup>23</sup> As an agreement between host States as to how they would treat refugees, the 1951 Convention notably does not address the question of admission to any country or establish a right to seek asylum. Further, it does not apportion responsibility between States, for example, by prescribing which State should deal with a claim to refugee status or establishing quotas for admission.<sup>24</sup> The exception to this is the burden sharing provision, ultimately included in recital 4 of the preamble, to which I now turn.

17 The procedural history of the 1951 Convention is summarised in Guy Goodwin-Gill, 'Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees', *United Nations Audiovisual Library of International Law* (2008), <http://legal.un.org/avl/ha/prsr/prsr.html>.

18 See further: National Population Council, *National Population Council's Refugee Review* (Australian Government Publishing Service, 1991); Louise Holborn, *Refugees: A Problem of Our Time* (vol I) (New York: The Scarecrow Press, 1975).

19 See, e.g., Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, Article 1 ('The present Convention is applicable to Russian, Armenian and assimilated refugees, as defined by the Arrangements of May 12th, 1926, and June 30th, 1928, subject to such modifications or amplifications as each Contracting Party may introduce in this definition at the moment of signature or accession.')

20 See generally: Holborn, *Refugees: A Problem of Our Time*, pp. 29-33. The International Refugee Organization (IRO) was non-permanent specialised agency of the United Nations. Its 'wide range of functions made it possible for the first time to approach the refugee problem in all its phases: identification, registration, and classification; care and assistance; and repatriation or resettlement and reestablishment in countries able to receive those refugees who were under the mandate of the IRO' (p. 31). This 'complex operation could be accomplished only through joint effort by the member governments of the IRO, the governments of asylum and of resettlement, the international and national voluntary agencies, and several UN organizations' who 'worked together in a three-phase effort towards a final settlement of refugees' involving: (1) temporary relief activities of care and maintenance; (2) the movement of refugees out of the countries of temporary hospitality through either repatriation or resettlement; (3) the establishment of the refugee as a person possessing full citizenship and thus adequate legal protection and the means of earning his livelihood' (p. 32). Accordingly, 'in contrast to the overseas migrations of former centuries, post-war migrations were thus planned and coordinated to a large extent by an international organization with enormous individual and collective resources' (p. 32). Holborn provides further information about the various resettlement programmes adopted by the IRO, including mass settlement, individual migration and the Resettlement Placement Service (p. 32), noting that the immediate post war years provided a favorable environment for resettlement of refugees (p. 33).

21 Guy Goodwin-Gill, 'Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees', *United Nations Audiovisual Library of International Law* (2008), <http://legal.un.org/avl/ha/prsr/prsr.html>; Holborn, *Refugees: A Problem of Our Time*, p. 84 (noting that '(t)he effect of the Convention was to establish a code of the basic rights of refugees, rights which signatories of the Convention pledged themselves to respect').

22 See generally Holborn, *Refugees: A Problem of Our Time*, noting that the United States believed 'it had done its share' (p. 61). 'The Western European countries realized that, given the new US policy, there was no realistic hope of the IRO continuing to handle the problem of refugees by relieving the countries of first asylum of their presence' (p. 62). Further '(e)veryone, both in Europe and overseas, realized that the major burden of the remaining refugees would now have to be carried by the countries of first asylum, and the issue to be decided was what if any assistance the international community was going to provide to those countries...' (pp. 61–2). See also, *Refugees. Study of Statelessness. Communication from the International Refugee Organization*, Document E/1392, 11 July 1949, para. 3, noting that the Member States of the IRO would, on dissolution of the IRO, 'consider themselves as being relieved ... of the responsibility which will rest upon them until then as members of the Organization', although 'The delegations of certain European States...wished to make clear that they considered the necessity for international action to be as great in the field of international assistance as in the field of protection...' (para. 8(f)).

23 'International assistance should be authorised only as a supplement [to ordinary government services], and for a limited time': Holborn, *Refugees: A Problem of Our Time*, p. 138. See also *Refugees. Study of Statelessness. Communication from the International Refugee Organization*, Document E/1392, 11 July 1949, para. 76(a) ('It is assumed that after the termination of the IRO programme, any care and maintenance required by refugees will, in general, be provided by the Governments of the countries in which they reside. Coordination of the work for refugees of humanitarian relief organizations might, however, usefully be undertaken at an international level'; and para. 76 (b) 'It is also assumed that after the termination of the IRO programme resettlement operations on an international scale will cease. A future international agency...might however be able to interest reception countries in the admission of refugees needing resettlement, or facilitate the resettlement of refugees under migration schemes').

24 Guy Goodwin-Gill, 'Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees', *United Nations Audiovisual Library of International Law* (2008), <http://legal.un.org/avl/ha/prsr/prsr.html>.

## 2. Analysis of the travaux préparatoires: efforts to include burden sharing in the operative part of the 1951 Convention

The original draft text of the 1951 Convention proposed by the Secretariat in January 1950 included a 'Chapter II' entitled 'Admission', which contained an article as follows:

### Article 3

(1) In pursuance of Article 14 of the Universal Declaration of Human Rights, the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution on account of their race, religion, nationality or political opinion.

(2) The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to persons to whom paragraph 1 refers. They shall do so, inter alia, by agreeing to receive a certain number of refugees in their territories.<sup>25</sup>

In the comments on the text by the Secretary-General, it was clarified that the article 'does not touch on the actual status of refugees and lays down no binding legal obligations. It does, however, indicate a number of guiding principles which it might be thought desirable to incorporate in the Convention.'<sup>26</sup> The rationale for paragraph 2 above,<sup>27</sup> as set out by the secretariat, was that 'owing to their geographical position and liberal traditions, some States are destined to become the initial reception countries for refugees', and that '[i]t is but just that other countries should not allow these [States] to bear the whole burden and by agreeing to admit a certain number of refugees to their territory should assume their equitable share'.<sup>28</sup> Again, however, the secretariat stressed that '[c]learly no binding and precise obligations can be imposed on Governments – for example by specifying the extent to which they must agree to receive refugees on their territory. It is for this reason that the Article includes the deliberate vague form of words: 'a certain number of refugees'.<sup>29</sup>

Accordingly, the question of relieving the 'burden' on States receiving large numbers of refugees was initially envisaged as forming part of the operative part of the 1951 Convention, and explicitly linked to the question of admission as well as efforts to recognise a 'right' to seek asylum along the lines of Article 14 of the Universal Declaration of Human Rights (UDHR). At this same time, it is striking that even for the Secretary-General there was no intention to make this provision either 'legally binding' or more precise in terms of State obligations.

It was ultimately these characteristics that served as a basis for several States to object to inclusion of the article in the substantive part of the 1951 Convention in early discussions. Venezuela, for example, 'observed that it was generally accepted in international law that only those provisions which imposed obligations on the signatories were included in the articles of international instruments; clauses containing statements of principle, hopes, wishes, etc. were generally inserted in the preamble and not in the operative part'.<sup>30</sup> As Chapter III 'did not...impose any specific obligation' but 'simply stated a general principle', the text 'was unnecessary, since it was obvious that the effectiveness of the convention would depend on the goodwill and the spirit of solidarity of the signatory States'.<sup>31</sup>

France was the primary proponent of retaining Chapter II in the text of the 1951 Convention, for reasons explored further in Part III. The delegation noted that 'if countries far from whence the refugees were coming were not prepared to make some effort to relieve the burden assumed by initial reception countries, the latter would be unable to support indefinitely the considerable commitments resulting from their liberal policy and the Committee's work would be absolutely purposeless'.<sup>32</sup> France stressed that 'a wish expressed in the preamble of the convention or in a separate text would certainly not have the same force as a moral obligation set forth in the body of the convention'.<sup>33</sup> With respect to allegations that the language of the article was 'vague', the French delegate stated that 'he feared that the article would give rise to insuperable objections if the obligation stated therein was couched in more specific form'.<sup>34</sup>

25 Ad Hoc Committee on Statelessness and Related Problems, *Memorandum by the Secretary-General, Annex: Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)*, United Nations Economic and Security Council, E/AC.32/2 (3 January 1950), pp. 22–3.

26 Ad Hoc Committee on Statelessness and Related Problems, *Memorandum by the Secretary-General*, pp. 22–3.

27 I have not summarised the discussions on the issues with respect to admission in paragraph 1. However, it was the strong position of the United States that the convention 'must deal with the rights of refugees who had already been admitted into a country, without seeking to establish who should admit them and in what circumstances'. Ad Hoc Committee on Statelessness and Related Problems, First Session, *Summary Record of the Seventh Meeting*, United Nations Economic and Social Council, E/AC.32/SR.7, 2 February 1950, para. 29. See also the comments of the United Kingdom, para. 35. France strongly opposed this noting '[i]t was indisputable that the most essential, most urgent and primary right for the refugee was that of finding a reception country; otherwise he would never obtain the status of a refugee and would never be able to benefit by the legal protection provided by the convention': para. 42.

28 Ad Hoc Committee on Statelessness and Related Problems, *Memorandum by the Secretary-General*, pp. 22–3.

29 Ibid.

30 Ad Hoc Committee on Statelessness and Related Problems, First Session, *Summary Record of the Seventh Meeting*, para. 8.

31 Ibid., para. 9.

32 Ibid., para. 13.

33 Ibid., para. 22. See also para. 44 (noting 'a mere expression of hope in the preamble or in a separate resolution would not have the same binding character as a moral commitment explicitly accepted by plenipotentiaries on behalf of the States principles').

34 Ibid., para. 43. 'Certainly, all delegations were fully aware that their countries were under a moral obligation to assist the initial reception

Likewise, the Chairman (Canada) argued that the Committee 'should not allow itself to be excessively influenced by legal considerations in seeking to formulate provisions to ensure that a certain category of human beings, the refugees, should receive the minimum considerations to which they were entitled'.<sup>35</sup> Denmark also noted that first asylum countries ('which received refugees and for which it was in practice impossible to question their admission') required 'assurance that other countries would favourably consider admitting refugees'; otherwise 'if such assurances were not given to countries of initial reception, some of them might be somewhat apprehensive about opening their doors to refugees'.<sup>36</sup>

The factual premise of the need for burden sharing itself was not called into question. The United Kingdom noted that '[i]t was only natural' that 'countries geographically adjacent to the refugees' countries of origin' should wish the burden on them to be shared, and that 'it was to be hoped that the latter group would provide them with all requisite assistance, as in fact it had already done in the past'.<sup>37</sup> Likewise the United States 'was in no way seeking to avoid the obligations of international solidarity'; rather 'the question...was whether the obligation to relieve the burden of the initial reception countries should appear in the operative part of the convention'.<sup>38</sup> Several States advocated for the burden sharing provision to be included either in the preamble or in a General Assembly resolution.<sup>39</sup> Indeed, Brazil suggested that a General Assembly resolution could 'stipulate the method by which that principle of international solidarity could be put into practice',<sup>40</sup> while the United States said that 'in the interests of [receiving countries] it would be better for the problem to be raised in the United Nations rather than within the framework of the Convention'.<sup>41</sup>

The Committee ultimately voted by six votes to three with two abstentions that no clause on admission – and thus on burden sharing – should be included in the operative part of the 1951 Convention. The question was left open of finding 'another place' for the reference, either in the preamble or a resolution of the General Assembly. Following the vote, the Chairman specifically stated that 'he hoped that the fundamental idea of that clause would be expressed in the generous spirit which the initial reception countries had the right to expect'.<sup>42</sup> And in prescient remarks, the Director-General of the IRO cautioned that:

...one of the fundamental characteristics of the refugee problem produced by the Second World War and its aftermath has been the continuing influx of refugees into certain countries which have been called upon to bear the brunt of providing first asylum. It would... be opportune for an attempt to be made on the international level to deal with the problem of admission, and also to provide some means whereby the burden imposed upon countries of first asylum might in some degree be shared by the other members of the international community of nations through the inclusion in the international convention relating to the status of refugees of provisions concerning the admission of refugees ... the Director General of the IRO therefore considers that it is his duty to point out the special need for the inclusion in the draft Convention Relating to the Status of Refugees of provisions concerning admission, and that a failure to include any such provision will leave a most serious gap in the Convention.<sup>43</sup>

### 3. Analysis of the travaux préparatoires: including burden sharing in the preamble

After early attempts to include burden sharing in the operative parts of the 1951 Convention failed, focus was then turned to the preamble.<sup>44</sup> The text of what became recital 4 was initially proposed by France as follows:

But considering that the exercise of the *right* of asylum places an undue burden on certain countries *because of their geographical situation*, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved

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countries to solve the refugee problem and that it was impossible to specify exactly the extent of that obligation because it was not possible to foresee in advance how it would be put into practice in each particular case.

35 Ibid., para. 19.

36 Ibid., para. 30.

37 Ibid., para. 32.

38 Ibid., paras. 38–39.

39 E.g., by Venezuela. Ibid., para. 12.

40 Ibid., para. 17.

41 Ibid., para. 39.

42 Ibid., para. 50.

43 Ad Hoc Committee on Refugees and Stateless Persons, *Refugees and Stateless Persons. Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems (Document E/1618)*, Memorandum by the Secretary-General, United Nations Economic and Social Council, E/AC.32/L.40 (10 August 1950), paras. 4, 13.

44 The preamble was discussed by the Ad Hoc Committee on Statelessness and Related Problems (16 January–16 February 1950) and the Social Committee of the Economic and Social Council (meeting in July and August 1950). The draft refugee definition and the preamble as amended were adopted by the Economic and Social Council on 11 August 1950. See further, Guy S Goodwin-Gill, 'Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees', *UN Audiovisual Library of International Law* (2008), <http://legal.un.org/avl/ha/prsr/prsr.html>.

without international cooperation to help to distribute refugees throughout the world.<sup>45</sup> (emphasis added)

The French delegate justified the insertion of the proposed clause by noting that 'the grim reality which the Ad Hoc Committee (on Statelessness and Related Matters) would have to take into account was that a number of countries were overburdened with refugees and were threatened with continuous new intakes'.<sup>46</sup> The French delegate clarified that this included Austria, which hosted 450,000 refugees in a total population of 7 million inhabitants; as well as France itself which had recorded a monthly flow of 4,500 refugees fleeing the Franco dictatorship in Spain at the time the 1951 Convention was drafted, and had hosted up to 500,000 refugees by this point.<sup>47</sup> The French delegate stated that '[i]f that situation were not taken into account, the instrument created might prove incapable of serving its purpose'.<sup>48</sup> In other words, speaking as a host country experiencing what has come to be known as a 'mass influx', France was concerned that if the burdens experienced by such States were not accounted for, the 1951 Convention may be unable to be meaningfully applied in practice. This assumption – the factual necessity of international cooperation to ensure that the 1951 Convention could be applied by certain States experiencing mass influx – is the starting point for understanding the intention of the French delegate with respect to the clause. Echoing both the Secretary-General in his initial proposal for the clause, as well as many receiving countries today, the French delegate emphasised that geography would mean that some States would always receive larger flows of refugees than others;<sup>49</sup> the need for the 1951 Convention to ensure 'equity' for those States in this respect;<sup>50</sup> and the fairly onerous obligations that the 1951 Convention imposed through the generalised refugee definition and the high standards of treatment to be provided by contracting States.<sup>51</sup>

As with the brief discussion that had initially taken place when burden sharing was proposed for the substantive part of the 1951 Convention, in principle no delegation disagreed with the factual premise of recital 4. The United States, for example, noted that '[i]t went without saying that there should be international cooperation to alleviate the burden falling on certain countries because their geographical situation was such that an inordinately large number of refugees fled to them'.<sup>52</sup> Some delegations went further, referring, in the case of Mexico, to the fact that the clause 'had the further merit of seeking to awaken a feeling of collective responsibility'.<sup>53</sup> Nonetheless, the discussions among the drafters of the 1951 Convention reveal certain ambivalences about the burden sharing provision, both in terms of form and substance.

I address these issues in turn below.

### 3.1 Questions of form: appropriateness of recital 4 for the preamble?

As a first issue, there was significant discussion among delegations about the appropriateness of including the burden sharing provision in the preamble. This was because the provision arguably went beyond the scope of the 1951

45 France: amendment to the draft convention relating to the status of refugees, UN Doc. E/L.81 (29 July 1950), para. 4.

46 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), p. 275.

47 See further Skran, *Refugees in Inter-War Europe*, p. 59, noting that '(a)lthough the number of Spanish refugees approximated the number from the Third Reich, this exodus differed in that it took place within a much shorter period of time, and the responsibility for assisting the refugees fell to one country, France. .... They did not have major difficulties in finding temporary asylum in France but, once there, they still needed some form of international legal protection and a means of earning a living while they waited and hoped for revolution in their home country'.

48 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), p. 275.

49 Noting that '[t]he truth was that certain European countries were the victims of their geographical situation which had made them, for more than 30 years, a haven of refuge in a particularly disturbed part of the world...': Social Committee, *Summary Record of the Hundred and Fifty-Eighth Meeting*, Economic and Social Council E/AC.7/SR.158 (15 August 1950), p. 8.

50 'The wording proposed by the French delegation presented the problem of refugees in terms that were equitable both for the refugees themselves and for the countries receiving them': Social Committee, *Summary Record of the One Hundred and Sixtieth Meeting*, Economic and Social Council, E/AC.7/SR.160, p. 26; '[t]he Committee should not lose sight of the exceptional burdens assumed by certain countries or the need to submit for signature by the Governments especially concerned a text which they would find equitable': *Id.* p. 27; the 'French amendment endeavoured to provide a definition of the refugee problem which would be equitable both to the refugees themselves and to the countries which granted them hospitality...': Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, Economic and Social Council, E/AC.7/SR.166 (22 August 1950), p. 12; 'The rights of countries of refuge should be safeguarded, as well as the rights of refugees': Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 62.

51 Noting 'the Convention itself would entail considerable obligations for the Contracting Parties': Social Committee, *Summary Record of the One Hundred and Sixty-Seventh Meeting*, Economic and Social Council, E/AC.7/SR.167 (22 August 1950), pp. 6–7. The French delegate particularly emphasised his concern about the breadth of the definition of a refugee under discussion: 'Never before had a definition so wide and generous, but also so dangerous for the receiving countries, been put forward for signature by governments.' Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), p. 276. Further 'Mr. ROCHEFORT (France) thought it impossible to begin the general discussion on the definition of the word 'refugee' without first considering the preamble to the Convention relating to the Status of Refugees ... The French delegation would, indeed, find it impossible to give an opinion on the specific issue of the definition of the word 'refugee' unless it could at the same time express its views on the refugee problem as a whole.' Social Committee, *Summary Record of the One Hundred and Fifty-Eighth Meeting*, Economic and Social Council, E/AC.7/SR.158 (15 August 1950), p. 5. The French delegate was also sensitive to the fact that the issue of admission was not governed by the Convention and that, in his view, receiving States would have 'no choice' in this regard, an issue discussed in Part IV.D below.

52 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 84.

53 E/AC.7/SR.166, Economic and Social Council (22 August 1950), p. 13.

Convention which, as outlined above, was essentially an agreement between States as to the standards of treatment to be applied to refugees found on their territory. For example, Belgium was 'not opposed to the ideas expressed in the amendment, but considered that they had no place in the Convention.'<sup>54</sup> Denmark noted that it 'commended his entire support in matters of substance, but some of it perhaps went beyond what one would expect to find in a preamble, although the points covered would require consideration sooner or later.'<sup>55</sup> Most clearly, the representative from Canada stated:

... the draft Convention laid down a series of obligations towards refugees in any country, but contained no article regarding the distribution of refugees. The preamble should surely be directly related to the matter of the Convention. In short the paragraph amounted to an acceptance of a decision on high policy and was therefore unsuited to form part of a preamble to a convention conferring specified rights on specified categories of refugees.<sup>56</sup>

As with initial discussions, delegations opposed to the clause largely advocated for its inclusion in a General Assembly resolution instead. The United States stated several times that 'the substance of the text might be incorporated in a General Assembly resolution, where it would be more proper and effective.'<sup>57</sup> India was 'opposed to inserting something in the preamble which went beyond the scope of the definition or something which was not normally considered proper in such a preamble,'<sup>58</sup> and likewise suggested that the reference would be better suited to a General Assembly resolution.<sup>59</sup> One State – Belgium – took the opposite position, suggesting again that the clause be inserted in the substantive provisions of the Convention: '[t]his delegation, however, would like to go still further and insert after article 26 of the draft Convention another article drawn up in the same terms as those used in the fourth paragraph of the French amendment,'<sup>60</sup> a proposal that ultimately not taken up by other delegations.<sup>61</sup>

France was over the course of the negotiations insistent on the inclusion of the burden sharing clause in the preamble and despite the concerns expressed by several delegations, it was France's argumentation that ultimately prevailed.<sup>62</sup> He was dismissive of including the burden sharing provision in a General Assembly resolution, noting:

Since a preamble formed an integral part of a convention, it carried greater weight than a General Assembly resolution. Although he did not wish to cast doubts on the value of resolutions adopted by the General Assembly he ventured to suggest that in practice some of them had very little positive effect. On the other hand, the preamble being bound up with the Convention would have the same authority as the Convention itself. It was for that reason that the French delegation was pressing for the inclusion in the preamble of the ideas it had put forward, especially as the Convention itself would entail considerable obligations for the Contracting Parties.<sup>63</sup>

He also stated that '[w]hereas the General Assembly's vote was binding only in the moral sense, signature and ratification [of the Convention] imposed financial and other contractual obligations', and that '[t]hat was why, in the draft preamble

54 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 95.

55 Social Committee, *Summary Record of the One Hundred and Sixty-Seventh Meeting*, Economic and Social Council, E/AC.7/SR.167 (22 August 1950), p. 5.

56 Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 19. This statement was also supported by Belgium: Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 20.

57 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 84. See also Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 13, with the United States again noting that his 'only doubt whether those provisions should go into a preamble at all... much of what the French representative proposed to add would be better adopted in the form of a General Assembly resolution...'

58 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 101.

59 Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, pp. 18–19.

60 *Ibid.*, pp. 16–17.

61 Interestingly, despite France's initial advocacy for burden sharing to be included in the operative part of the 1951 Convention, France also appeared to reject the Belgian suggestion to put the clause in a new article, although his reasoning for this was not exactly clear: noting simply it 'would be difficult to find a suitable place for the fourth paragraph, relating to the undue burden certain countries had to bear, in the substantive portion of the Convention'. Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 17. The French delegate later noted that he would indeed have preferred to see the burden sharing provision in the substantive part of the 1951 Convention: 'some provisions had been placed in the preamble which he would have preferred to see in the body of the Convention itself, particularly those stating the need for international cooperation.' Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, A/CONF.2/SR.31 (29 November 1951), p. 25.

62 The French delegate ultimately insisted on the inclusion of the provision, and threatened not to sign the Convention without it. The burden sharing clause was initially rejected by the Committee and watered down in the new draft proposed by the United Kingdom. See, e.g., Social Committee, *Summary Record of the One Hundred and Seventieth Meeting*, Economic and Social Council, E/AC.7/SR.170 (23 August 1950), p. 8: '(t)hough the preamble had originally been based on a French proposal, it had emerged from the Committee shorn of a clause which he felt to be essential, and the French delegation would vote against it if it were put to the vote as it stood'; and '...his delegation was no longer in a position to discuss certain articles of the draft Convention, since neither in the preamble nor in the main body of the instrument was there any safeguarding clause relating to any exceptional situations which might later arise': Social Committee, *Summary Record of the One Hundred and Sixty-Seventh Meeting*, Economic and Social Council, E/AC.7/SR.167 (22 August 1950), p. 12.

63 Social Committee, *Summary Record of the One Hundred and Sixty-Seventh Meeting*, Economic and Social Council, E/AC.7/SR.167 (22 August 1950), pp. 6–7.

that it had submitted, the French delegation had asked that the problem be presented in truly international and equitable terms.<sup>64</sup>

In sum, while the factual premise in terms of the need for international cooperation to support receiving States in certain circumstances was generally supported, it appears that many delegations recognised at the drafting stage an inherent inconsistency in inserting the burden sharing provision into the preamble, given this was unrelated to the purpose and goals of the substantive provisions of the 1951 Convention, which constituted an agreement as to the standards of treatment to be applied to refugees on any particular State's territory. The fact that the burden sharing provision was ultimately retained in the preamble appears to represent a compromise: giving it more weight than a mere reference to the need for international cooperation in a General Assembly resolution, without going so far as to include the clause in the operative part of the 1951 Convention.

### 3.2 Questions of substance: the scope and purpose of the burden sharing provision

#### 3.2.1 The intention of the French delegate – recital 4 as 'safeguarding' or force majeure clause

Compared to the questions of form, the discussion among delegations about the intended scope of the burden sharing provision and its practical implications for States was more limited. However, the travaux préparatoires leave open several questions in this respect.

While the inclusion of the burden sharing provision in the preamble, as opposed to the operative part of the 1951 Convention, would suggest textually that the clause should be read as a mere rhetorical or hortatory appeal,<sup>65</sup> the remarks of the French delegate indicate that he in fact had relatively ambitious legal and practical expectations from the inclusion of the clause. Namely, at many points he characterised recital 4 as a 'safeguarding clause', which could justify a State's failure to implement some of its obligations under the 1951 Convention in certain circumstances.

The obligations flowing from the Convention were such that the day might come when certain countries might find it impossible to honour them: hence the necessity of certain safeguarding clauses. France herself could not be bound by the Convention were it one day to again be faced with an influx of refugees as large as was that of the Spanish Republican refugees, amounting to 500,000.<sup>66</sup>

Further:

For those States who were not in a position to give effect to every article of the Convention, investigation would then reveal that the problem was perhaps beyond these countries, and that it could not be considered that everything was cut and dried and that they were therefore failing in their duty by not applying the Convention in its entirety. It was obvious, therefore, that steps should be taken to ensure that the Convention was applicable in their case. Hence he felt that the mention of 'international collaboration', which had proved its efficacy should be retained, so that a State which failed to carry out its obligations under the Convention would not be regarded as at fault if it found itself in a position which was really beyond it... It was not out of the question that France, for example, would have to deal with a huge influx of refugees. If so, international collaboration would be the only remedy. Without it, the Convention would be quite inapplicable.<sup>67</sup>

This seems to suggest that, for the French delegate, recital 4 would in some instances act almost as a force majeure clause,<sup>68</sup> excusing States experiencing large numbers of arrivals from the breach of at least certain of their obligations under the 1951 Convention. Consistent with this, at a later point in the discussions, the French delegate even sought to include in the Convention's reservation clause a statement that reservations would not be permitted concerning the preamble or articles which included recommendations, an effort that was rejected by other States on the basis that the preamble did not impose any obligations.<sup>69</sup>

The French delegate was, however, somewhat vague about exactly how the burden sharing provision would work as a force majeure clause to excuse States from their obligations in practice. At other points in the discussion he seemed

64 Social Committee, *Summary Record of the One Hundred and Fifty-Eighth Meeting*, Economic and Social Council, E/AC.7/SR.158 (15 August 1950), pp. 6–7.

65 See further, Part IV.C below. Indeed, as noted in Part II, even the Secretary-General in proposing the provision for the operative part of the treaty, suggested it would serve as a 'guiding principle', rather than as a legally binding obligation.

66 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), p. 276.

67 Social Committee, *Summary Record of the One Hundred and Seventieth Meeting*, Economic and Social Council, E/AC.7/SR.170 (23 August 1950), pp. 11–12.

68 There are several definitions of 'force majeure'. See, e.g. John Currie, *Public International Law* (Toronto: Irwin Law, 2001), p. 419, defining force majeure as 'a justification advanced to counter a claim of state responsibility on the basis that the allegedly internationally wrongful act of a state is due to an unforeseen event or irresistible force, beyond the control of the state, which makes it materially impossible for the state to respect an international obligation'.

69 See Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Forty-Third Meeting*, Economic and Social Council, E/AC.32/SR.43 (28 September 1950), p. 7.

to downplay the importance of the provision, characterising it as ‘the recognition of a de facto situation, rather than a statement of a specific obligation’<sup>70</sup> and ‘a minor matter compared with the obligations which it (France) was willing to accept’.<sup>71</sup>

His delegation considered that the preamble represented the only return asked of the international community in exchange for the recognition of its right to determine the status of refugees in the reception countries, such return taking the form of a definition, not of the refugee himself but of the refugee problem, in fair and accurate terms in conformity with reality and the aims pursued. The preamble itself was a modest one, simply a compromise which the French delegation thought a sincere one and likely to prove acceptable to all in its entirety, since it formed a coherent whole.<sup>72</sup>

The vagueness of the French position is best exemplified by the statement below – downplaying the insertion of the burden sharing provision on the one hand, but also reiterating that it would be a ‘safety clause’ for certain States unable to implement their 1951 Convention obligations on the other:

The preamble was not a request to governments but only a statement of certain obvious truths, with an indication of certain situations which might arise and, in that event, of the conclusions to be drawn from them. Recalling once more the undue burden which France had had to bear in the matter of receiving refugees, he thought that all European countries which ran the same risks should be conscious of the need for including such a safety clause in the Convention.<sup>73</sup>

In terms of specifying the scope of the provision that the French delegate had in mind, the below extract is probably the most helpful:

...the original text, which alluded to the exceptional position of certain countries was, he felt, indispensable for continental countries liable to be faced with a large scale influx of refugees. It had been argued that the Convention did not govern the question of admission, but continental countries had no choice in the matter. When faced with a flood of refugees upon their frontiers they could not help but grant them a right of asylum, and possibly refugee status. In the case in point, the normal application of the Convention might be completely invalidated. If, for example as had already happened, a State was suddenly called upon to take in half a million refugees, certain provisions of the Convention, particularly those relating to housing and the right to work, could not be applied without presenting the country concerned with problems which, temporarily at least, would prove insoluble. In such a case there would have to be international collaboration, and it was therefore not demanding too much of countries of immigration to ask for the implicit appeal ... to be retained...<sup>74</sup>

This statement by the French delegate is notable, in that he presumed that receiving States would have ‘no choice’ in terms of the admission of refugees to their territory and the grant of asylum, even in cases of mass influx. Rather, the issue was which other obligations States may not be in a position to apply unless aid was forthcoming – and here France singled out the rights to housing and to employment as examples. I will return to this question, which has significance in the contemporary context, in Part IV below.

It appears that no other State directly contested the force majeure characterisation of the burden sharing provision asserted by the French delegate; although admittedly no State sought to clarify the scope of the provision either or pressed the delegate for more details on how a simple preambular recital could work to excuse a State from its obligations under the 1951 Convention, and in what circumstances. Only one State, the United Kingdom, offered an alternative interpretation of the clause, in justifying the removal of part of the burden sharing provision from the revised preamble at a certain stage of the discussions.<sup>75</sup> The representative noted that while it ‘had not been omitted from the United Kingdom’s amendment by way of dissent from the statement of fact which it contained, which everyone fully recognized’ the fact was that:

...he had doubted the value of introducing in a few words the idea that some other form of international action was necessary. If the notion of international solidarity was retained, it would,

70 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, p. 29.

71 Economic and Social Council, *United Nations Economic and Social Council Official Records*, Eleventh Session, 406th meeting, E\_SR.406\_ENG (11 August 1950), para. 61.

72 Social Committee, *Summary Record of the One Hundred and Fifty-Eighth Meeting*, E/AC.7/SR.158, Economic and Social Council (15 August 1950), p. 11.

73 Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 22. Similarly: ‘The preamble to the Convention should contain various general ideas giving certain guarantees to the Contracting States, should they be prevented by exceptional circumstances from extending the benefits of the Convention to a few hundred or even a few thousand persons’. Social Committee, *Summary Record of the One Hundred and Sixty-Seventh Meeting*, Economic and Social Council, E/AC.7/SR.167 (22 August 1950), p.17.

74 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, p. 26.

75 Specifically, the amendment proposed by the United Kingdom read: ‘Considering that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot be achieved without international cooperation’: Alex Takkenberg and Christopher C. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Convention Relating to the Status of Refugees*, Vol. III, ‘The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2–25 July 1951, Amsterdam 1989, page 29 (noting UK amendment made in A/CONF.2/99, para. 3).



he felt, be interpreted merely as referring to international solidarity achieved through the signing and ratification of the present Convention.<sup>76</sup>

In other words, for the United Kingdom, the simple fact of signing the 1951 Convention was in itself the 'international cooperation' that was referred to in the burden sharing provision of the preamble.

While there was no direct reaction to this comment by the United Kingdom, the statements made by many other delegations in ultimate support of maintaining the burden sharing provision were arguably implicitly supportive of the French delegate's characterisation: Switzerland, for example, 'warmly supported the French representative's remarks',<sup>77</sup> as did Germany,<sup>78</sup> Sweden,<sup>79</sup> and the Netherlands.<sup>80</sup>

### 3.2.2 The scope of 'international cooperation': establishing a positive obligation on other States to assist?

In terms of the scope of recital 4, the focus of the French delegate as outlined above was on its potential to justify or excuse the failure by certain receiving States to uphold some of their obligations under the 1951 Convention in the event of mass influx. France did not go so far as to suggest that recital 4 of the preamble would establish a positive obligation on other States to come to the assistance of receiving States, although in practice this could be logically implied from his characterisation of the provision – a fact that he acknowledges at one point in the discussions, describing the burden sharing provision as amounting to an 'implicit appeal'.<sup>81</sup>

The potential of the clause to establish a positive obligation on States to assist overburdened host countries was thus not discussed during the drafting of the preamble, with two exceptions. First, during a brief exchange on the language in the original draft proposed by France, which contained the qualifier that international cooperation would be undertaken to 'redistribute refugees around the world'. In reaction to this, some States quickly noted that they would not be in a position to accept refugees from other countries, pursuant to the clause. China, for instance, stated that:

...the reference in the fourth paragraph to the necessity for international cooperation to help to distribute refugees throughout the world...the Chinese Government was not in a position to accept refugees from other countries, though in the past China had played its full part by giving asylum, particularly to White Russians and Jews.<sup>82</sup>

Ultimately, the reference to the redistribution of refugees around the world was removed by the drafting committee, leaving simply the reference to 'international cooperation' without further elaboration.

The question of whether recital 4 would establish a positive obligation on States to cooperate to assist overburdened host countries was also touched on in passing during a rather confusing exchange between the United States and France on the meaning of a 'wide degree of international cooperation'.<sup>83</sup> In response to a request from the US delegate to clarify this, France noted that:

The term 'solidarité' used in the French text ('collaboration' in English) was certainly wider than 'cooperation', which referred to States which would accede to the Convention, whereas the former might be extended to cover States which, while not signing the Convention, would be in a position to help in the solution of certain aspects of the problem. The word 'requires' might well be used in connection with the cooperation of States signatory to the Convention...<sup>84</sup>

The suggestion that cooperation could be said to be 'required' of State signatories to the 1951 Convention constitutes the only hint that a positive obligation to assist could be envisaged for non-receiving States party to the 1951 Convention, and in itself the discussion is unclear as to whether the requirement would simply be to cooperate with the High Commissioner for Refugees. The French delegate's suggestion that international 'collaboration' could extend to States who were not party to the 1951 Convention is also interesting, and indicates some potential terminological confusion between 'cooperation' and 'collaboration' in English, and 'solidarité' in French, which is addressed in Part IV.B, below.

76 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, p. 29.

77 *Ibid.*, p. 27.

78 *Ibid.*, p. 27.

79 *Ibid.*, p. 27.

80 *Ibid.*, p. 28.

81 *Ibid.*, p. 26.

82 Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 18.

83 This exchange took place when the stand-alone burden sharing provision had been deleted from the draft preamble, and the French delegate had proposed to re-insert the notion of international cooperation between States into the provision regarding cooperation with UNHCR: Social Committee, *Summary Record of the One Hundred and Seventieth Meeting*, Economic and Social Council, E/AC.7/SR.170 (23 August 1950), p. 10. The draft clause under discussion read: 'The High Commissioner for Refugees will be called upon to supervise the implementation of this Convention, without losing sight of the fact that the effective implementation of this Convention can only be obtained with the full cooperation of States with the High Commissioner and with a wide degree of international cooperation'. Specifically, the United States asked 'what was the exact significance of the proposed phrase 'a wide degree of international cooperation' which was not altogether clear...'

84 Social Committee, *Summary Record of the One Hundred and Seventieth Meeting*, Economic and Social Council, E/AC.7/SR.170 (23 August 1950), p. 10 (also note that '(i)n response (to the French delegate's clarification and proposed alternative language), the United States noted that he 'felt the last phrase add nothing to the meaning of the paragraph and was only confusing').

More generally, there was discussion among the delegates about whether the burden sharing provision created 'obligations'; however it appears this was not about whether the clause would bind other States to come to the assistance of overburdened countries. Rather, it related to concerns that the proposed language of the recital, referring to States that were overburdened 'due to their geographical situation', created obligations for such States with respect to the admission of refugees or their right to seek asylum – both of which were otherwise absent from the 1951 Convention.<sup>85</sup> In response, the French delegate noted that: 'the reference in the fourth paragraph of the preamble to the undue burden placed on certain countries was merely a statement of fact, and was in no way designed to create a legal obligation';<sup>86</sup> and he 'proposed to remove all reference to geographical situation, and again noted that the adoption of the text would not be regarded as imposing on States any obligation in respect of the right of asylum'.<sup>87</sup> In response to these concerns, the reference to the 'right' to asylum was ultimately changed to the 'grant' of asylum,<sup>88</sup> and the reference to the burdens on States due to their geographic situation was removed.

In sum, the travaux préparatoires suggest that the substantive scope of the burden sharing provision, like its inclusion in the preamble, was the result of a compromise. Recital 4 did not go so far as to impose a positive obligation on other States to come to the assistance of overburdened receiving countries. Rather the focus, at least for the French delegate, was on its potential to excuse States receiving large numbers of refugees in the event that they failed to implement all of their obligations under the 1951 Convention, in the absence of support from other States. How this would work in practice was essentially not discussed during the drafting process.

## 4. Relevance for contemporary understanding of the principle of burden sharing

Based on the analysis above, the burden sharing provision contained in recital 4 of the preamble may be said to represent a 'double compromise'. The first compromise was in terms of form: namely, its inclusion in the preamble, as a halfway point between exiling the reference to a General Assembly resolution and including it in the operational part of the 1951 Convention. The second compromise was in terms of substance: namely, claiming a 'weak' force majeure effect from the provision to excuse States receiving large numbers of refugees from upholding their obligations in the absence of international assistance, without going so far as to create a positive obligation for such assistance to be provided.

Against this background, I wish to highlight four issues emerging from the travaux préparatoires with respect to recital 4 that have particular relevance to contemporary debates about the scope and nature of the burden sharing principle in the refugee regime: (1) lack of clarity about the actions that can be said to constitute 'international cooperation'; (2) terminological confusion; (3) the legal value of the preamble; and (4) the ability of receiving States to condition compliance with *non-refoulement* obligations on receipt of international assistance. Together, these issues suggest that the 'double compromise' with respect to the burden sharing provision in terms of form and substance when the 1951 Convention was drafted continues to have consequences for the principle of burden sharing today.

### 4.1 First issue: what actions constitute 'international cooperation'?

Three language changes were made between the initial draft of the burden sharing clause first proposed by the French delegation for the preamble and the final version. First, as noted above, the reference to the 'right to' asylum was changed to the 'grant of' asylum; and the reference to certain countries being exceptionally burdened 'due to their geographical situation' was removed. Both changes were made due to potential 'legal' concerns for receiving countries, namely fears that this language created obligations for them in terms of admission. These changes reflected broader sensitivities during the drafting of the 1951 Convention, which deliberately avoided recognising a 'right' to seek asylum or dealing with the issue of admission (or otherwise) by States, and in that sense are relatively straightforward.

More relevant for the purposes of this paper was the removal of the reference to the goal of international cooperation as being 'to distribute refugees around the world'. In other words, the type of 'cooperation' envisaged initially was explicitly the physical redistribution or resettlement of people out of countries that had become overburdened, consistent with the approach that had been taken under the IRO but which – as mentioned in Part II – the United States in particular was no longer prepared to support on a large scale. The removal of this language has rendered the scope what may

85 For example, Chile suggested that 'on the grounds of legal drafting the reference in the fourth paragraph to the geographical situation of certain countries should be removed...': Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 14. Belgium noted that 'the Chilean representative had made some very pertinent juridical observations on the geographical situation and the right of asylum referred to therein': Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, pp. 16–17.

86 *Ibid.*, p. 15.

87 *Ibid.*, p. 17.

88 The representative from the Netherlands proposed that the words 'right of asylum' be replaced by the words 'right to seek and to enjoy asylum in other countries' which was the wording used in paragraph 1 of Article 14 of the Universal Declaration of Human Rights. The United Kingdom then suggested that the point made by the Netherlands may be met by the substitution of the word 'grant' for the words 'exercise of the right' in the first line. United Nations General Assembly, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, A/CONF.2/SR.31, 29 November 1951, pp. 28–29.

constitute 'international cooperation' more flexible, in terms of potentially encompassing more than the 'sharing' of people, to include the provision of material and financial assistance.<sup>89</sup>

Despite this, it remains the case that the 'sharing' of people through the provision of places for resettlement or humanitarian admission is still seen as the ultimate form of burden sharing today; and whether burden sharing arrangements are assessed to have been successful or not is usually dependent primarily on the number of resettlement or relocation places that were offered by third States.<sup>90</sup> The provision of financial and material assistance by governments to States hosting large numbers of refugees – through UNHCR, other UN agencies or NGOs, or directly via foreign assistance – takes place more or less routinely,<sup>91</sup> but on its own is rarely seen as sufficient to constitute 'burden sharing', and indeed sometimes leads to allegations of 'burden shifting'.<sup>92</sup>

#### 4.2 Second issue: terminology

As suggested in the introduction, the varying terminology that is deployed with respect to the burden sharing principle is a key issue today, with several terms used interchangeably by governments and other actors, including solidarity, cooperation, responsibility sharing and burden sharing. This creates considerable confusion, as these terms arguably are not synonymous.

Unfortunately, the travaux are not helpful in suggesting a preferred term or clarifying the difference between these variations. The drafters did not refer to a principle of 'burden sharing' which only really began to be used in the 1970s with the onset of the 'Indochina' crisis; let alone 'responsibility sharing' which came into usage in the late 1990s, the result of an understandable yet perhaps ill-advised shift to reflect a growing distaste for the characterisation of refugees as 'burdens'.<sup>93</sup> Most of the delegates used the term 'international cooperation', with also some references to 'international solidarity' and 'international collaboration'. However, the one discussion specifically on this issue between the United States and France<sup>94</sup> suggests that there may actually be different meanings as between the final terms adopted in the French ('solidarité') and English ('cooperation') versions of the 1951 Convention.<sup>95</sup> Notably, the French delegate suggested that 'solidarité' in French would equate to the term 'collaboration' in English, while 'cooperation' would be narrower, only applying to State signatories to the 1951 Convention. From an international legal perspective, the principle of 'international cooperation' does have a narrower scope than 'international solidarity'. Amongst other differences, 'cooperation' is generally neutral as to outcome (i.e. States may have a duty to cooperate that could be satisfied regardless of the results of this cooperation), while 'solidarity' tends to imply a normative obligation to support States that face particular difficulties.<sup>96</sup>

89 See, e.g., UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, [www.refworld.org/docid/4e533bc02.html](http://www.refworld.org/docid/4e533bc02.html), p. 15.

90 For example, 'successful' burden sharing arrangements such as the Comprehensive Plan of Action for Indochina and the Humanitarian Evacuation Programme for Kosovo both involved significant temporary relocation or resettlement efforts. See above, footnotes 9 and 10.

91 Admittedly, chronic underfunding of humanitarian operations for refugees has become increasingly problematic: see, e.g., UNHCR, *Global Appeal 2016–2017* (2016), [www.unhcr.org/ga16/index.xml](http://www.unhcr.org/ga16/index.xml).

92 The arrangement between Turkey and the European Union has been a case in point. See, e.g., Jean-Baptiste Farcy, 'EU-Turkey agreement: solving the EU asylum crisis or creating a new Calais in Bodrum?', *EU Immigration and Asylum Law and Policy* (7 December 2015), <http://eumigrationlawblog.eu/eu-turkey-agreement-solving-the-eu-asylum-crisis-or-creating-a-new-calais-in-bodrum/>.

93 'Ill-advised' because the introduction of a new principle of 'responsibility sharing' (in a context where there were already three existing terms – cooperation, solidarity and burden sharing) may have distracted from efforts to better understand the broad principle of burden sharing in practice. Nonetheless, 'responsibility sharing' appears to be the preferred term among many policy makers today. See, e.g., Secretary-General's report, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* (9 May 2016), <http://refugeesmigrants.un.org/secretary-generals-report>, paras. 69–70. For objections to the characterisation of refugees as burdens see, e.g., Catherine Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers', (date unknown), [www.esil-sedi.eu/sites/default/files/Phuong.PDF](http://www.esil-sedi.eu/sites/default/files/Phuong.PDF) ('(i)t must be noted from the outset that the expression 'responsibility-sharing' should be preferred to 'burden-sharing', which suggests that refugees are a burden on the community of states'); Gregor Noll, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field?', *Journal of Refugee Studies*, 16 (2003), pp. 236–52, at p. 237 ('(t)he term 'burden sharing' is a problematic one. It appears to suggest that refugee protection is necessarily burdensome. Whether this is indeed the case, depends much on the time frame one chooses to adopt...'); UNHCR, *Global Consultations on International Protection/Third Track: Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations* (19 February 2001), EC/GC/01/7, [www.refworld.org/docid/3ae6b35418.html](http://www.refworld.org/docid/3ae6b35418.html), p. 1 ('The inclusion of 'responsibility' along with 'burden-sharing' reflects a more positive image of refugees and a stronger framework for international cooperation...'). At the same time, '(a)ttempts to replace the term in this area with a call for responsibility sharing or the equal 'balance of efforts' between the Members States have had little impact on the way the public debate has been led.' Eiko R. Thielemann and Torun Dewan, 'Why States Don't Defect: Refugee Protection and Implicit Burden-Sharing' (2013), <http://personal.lse.ac.uk/thielema/Papers-PDF/Thielemann-Dewan-WEP.pdf>, p. 1 (footnote 2).

94 See above, Part III.B(ii).

95 Recital 4 of the preamble in French reads: 'Considérant qu'il peut résulter de l'octroi du droit d'asile des charges exceptionnellement lourdes pour certains pays et que la solution satisfaisante des problèmes dont l'Organisation des Nations Unies a reconnu la portée et le caractère internationaux, ne saurait, dans cette hypothèse, être obtenue sans une solidarité internationale'. Interestingly, there is a further difference in the French language version, namely the addition of 'dans cette hypothèse', which loosely translated means 'in this context'. This renders the link between countries being burdened and the need for international solidarity to achieve solutions 'in this context' more explicit than is the case in English (which simply uses the term 'therefore' to connect the burdens experienced by certain countries with the need for international cooperation to achieve solutions).

96 Many authors argue that the principle of 'international cooperation' is more firmly embedded in international law than 'international solidarity'. See, e.g., Jost Delbrück, *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law*, May 23–26 2001 (Berlin: Dunker & Humblot, 2002); Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections', in Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010), pp. 3–54; Abdul G. Koroma, 'Solidarity: Evidence of an Emerging International Legal Principle', in Holger P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (The Hague: Martinus Nijhoff Publishers, 2012), pp. 103–29;

Broadly, however, it seems that – like many policy makers today – the drafters were simply not focused on the terminology issue. There was no attempt to specifically use the term ‘cooperation’ to link the principle to, for example, the Charter of the United Nations, Article 1(3);<sup>97</sup> and there was also no explicit discussion on this aside from the exchange between the United States and France, which in any event related to draft language that was ultimately discarded.

The fact that terminology was not clearly resolved at the time the 1951 Convention was drafted has both linguistic and substantive repercussions today, with the terminology used to describe the burden sharing principle continuing to shift, often according to rhetorical expediency. This is problematic because arguably the unclear nomenclature with respect to the burden sharing principle has an obfuscation effect on the identification of its normative content and what it requires of States. For if it is not known what a principle, rule or obligation is called, it is difficult to be clear about what it requires of the actors that are subject to it.

#### 4.3 Third issue: the legal value of the preamble

As demonstrated above, the focus of the objections of many States to recital 4 was that it was to be inserted in the preamble despite the fact that it was ostensibly unrelated to any of the operational provisions of the 1951 Convention. At the same time, almost all States agreed with the ‘factual’ premise of the burden sharing provision, acknowledging indeed that in some cases of mass influx, where national capacities were overwhelmed, the provision of international assistance would simply be unavoidable if refugee rights were to be upheld. The inclusion of the recital 4 in the preamble was a compromise, giving it more weight and significance than if it had been relegated to a General Assembly resolution, without placing it in the operative text.

Despite this, the inclusion of the burden sharing provision in the preamble is an anomaly. Generally, preambular recitals are aspirational and exhortative, and not capable of creating binding legal effects upon the parties or laying down legal obligations.<sup>98</sup> However, despite in early discussions recognising that ‘there was too great a tendency to express ‘pious hopes’ in the preamble which were often completely ignored’<sup>99</sup> the French delegate appeared to envisage that the burden sharing clause could be relied upon by receiving States in certain circumstances to justify a failure to fulfil their obligations under the 1951 Convention. Thus, while the burden sharing provision may have fallen short of creating a positive legal obligation, it was intended by some delegates to have an operational effect in certain specific circumstances, notably cases of mass influx.<sup>100</sup> Although the comments of some of the delegates indicate that they were attuned to this ambivalence,<sup>101</sup> how this would work in practice was not clarified.

Appreciating the political compromise that this represented, by modern standards the inclusion the burden sharing provision in the preamble was in hindsight almost a drafting error in light of the ‘force majeure’ function that it was intended to serve. Based on the travaux discussions, I would argue that recital 4 of the preamble should not be treated as an ordinary preambular paragraph. From the outset, it was intended to have more significance than a mere device for interpretation or a declaration of intention. While I am not seeking to argue that the recital 4 should be treated as a force majeure clause today, for the purposes of this paper I would simply note that the legal relevance of the principle of burden sharing – in the 1951 Convention itself, but also in the refugee regime as a whole – is not determined by the fact that the burden sharing provision was included in the preamble and not in the substantive parts of the 1951 Convention.

Jost Delbrück, ‘The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law’, in Holger P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (The Hague: Martinus Nijhoff Publishers, 2012) pp. 3–16; Rüdiger Wolfrum, ‘Cooperation, International Law of’, *Max Planck Encyclopedia of Public International Law* (2012), <http://opil.ouplaw.com/home/EPIL>; Danio Campanelli, ‘Solidarity, Principle of’, *Max Planck Encyclopedia of Public International Law* (2012), <http://opil.ouplaw.com/home/EPIL>.

97 Article 1(3) of the UN Charter states that one of the purposes of the United Nations is to ‘achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for fundamental freedoms for all without distinction as to race, sex, language or religion’: Charter of the United Nations and Statute of the International Court of Justice (1945), <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

98 Ad Hoc Committee on Statelessness and Related Problems, First Session, *Summary Record of the Seventh Meeting*, para. 13.

99 Indeed, during the discussion, the delegate from Pakistan noted that a preamble usually has two functions: to provide an account of historical antecedents of the operative part and to provide a key for its interpretation: Social Committee, *Summary Record of the One Hundred and Sixty-Sixth Meeting*, p. 21. More generally, ‘(a) treaty’s preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty... The preamble may also incorporate the parties’ motivations for concluding the treaty by describing the foundation of their past present and future relations in so far as it relates to the treaty. Preambles are thus indicia of the intention of the parties to a treaty! Thus, ‘preambles often have primarily political significance and are concerned with explaining the policy rationale that led to the conclusion of the treaty, including the historical, economic and other policy considerations that led to its conclusion...’: Makane Mbengue, ‘Preamble’, *Max Planck Encyclopedia of Public International Law*, 2012, <http://opil.ouplaw.com/home/EPIL>.

100 The fact that the French delegate envisaged the burden sharing provision could potentially serve a force majeure function in cases of mass influx is interesting in light of contemporary claims that the 1951 Convention was not designed to address large-scale refugee movements: see, e.g., Adrienne Millbank, *The Problem with the 1951 Refugee Convention*, September 2000, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP05](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05).

101 For example, the United Kingdom – in introducing a revised preamble – was at pains to note that ‘(a)lthough the preamble was of but slight legal significance and was merely introductory, it was nevertheless important that it should be fairly closely related to the origins of the work with which the Conference had been entrusted, and with the general purpose of the Convention’: Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-First Meeting*, p. 24.

#### 4.4 Fourth issue: the ability of States to condition compliance with non-refoulement obligations on the receipt of international assistance

The function envisaged for recital 4 of the preamble by the French delegation – as a 'safeguarding' or 'force majeure' clause that could excuse the violation of certain provisions of the 1951 Convention by host States in certain circumstances – is both surprising and familiar in light of contemporary discussions about the principle of burden sharing.

It is surprising to the extent that the specific characterisation of the burden sharing provision as a force majeure clause with respect to 1951 Convention obligations has generally been lost in contemporary application. The focus in terms of burden sharing today is generally quite practical in terms of advocating or encouraging the establishment of burden sharing arrangements,<sup>102</sup> in the absence of a strong positive obligation on States to participate, and critiquing the sufficiency or otherwise of the support provided to countries receiving large numbers of refugees. To the extent that there is a normative focus on burden sharing, this is often about using the principle as a basis to propose reforms to the way that the entire refugee protection system is structured,<sup>103</sup> not about exploring the operation of the principle in the regime as currently designed. Accordingly, the legal soundness of treating the burden sharing provision in the 1951 Convention preamble as a force majeure clause has not been put to the test. This may also be because many countries receiving the largest numbers of refugees are not parties to the 1951 Convention or already have explicit reservations to some of the rights that could be affected if the clause was applied in the way the French delegate had envisaged.<sup>104</sup>

At the same time, there is one area where the function of the burden sharing provision envisaged by the French delegation has an echo in contemporary practice: namely, the potential conditioning of the willingness and ability of receiving States to respect the principle of *non-refoulement* contained in Article 33 of the 1951 Convention<sup>105</sup> on the receipt of sufficient international assistance.

As I have established above, for the French delegate the fact that receiving States would continue to allow refugees admission to their territory (and thus provide them with protection against refoulement, at least initially), regardless of the size of the influx, appears to have been taken for granted.<sup>106</sup> His concern was rather with being in a position to assure other 1951 Convention rights to large numbers once refugees were safely on French territory, and he singled out rights such as that to housing and labour market access which could potentially be compromised by receiving States in certain circumstances.

Conversely, in the contemporary context the refusal of some host States experiencing a mass influx to continue to respect the principle of *non-refoulement* unless they receive support from other States has been a significant concern. Notably, there have been several instances in practice where receiving States have closed, or threatened to close, their borders to refugees unless increased international assistance was forthcoming.<sup>107</sup> Indeed, some of the most well-known examples of successful large-scale burden sharing arrangements – including the Comprehensive Plan of Action for Vietnamese refugees and the Humanitarian Evacuation Programme for Kosovar refugees – were triggered by actual or threatened border closures by receiving States.<sup>108</sup> It is arguably also selected border closures by countries such as Turkey<sup>109</sup> that have been behind enhanced international efforts in 2016 to facilitate greater burden sharing for Syrian refugees.

Some host States have gone further and explicitly sought to argue that violations by receiving countries of the principle of *non-refoulement* in the absence of sufficient support from other States would be a responsibility shared by the international community. Turkey speaking to UNHCR's Executive Committee in 1987 argued as follows:

102 See, e.g., UNHCR, *International Cooperation to Share Burden and Responsibilities* (June 2011), [www.refworld.org/docid/4e533bc02.html](http://www.refworld.org/docid/4e533bc02.html); Secretary-General's Report, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* (9 May 2016), <http://refugeesmigrants.un.org/secretary-generals-report> (although arguably this initiative of the Secretary-General also has some normative ambitions).

103 See, e.g., Atle Grahl-Madsen, 'Refugees and Refugee Law in a World of Transition' (1982) *Michigan Yearbook of International Legal Studies* (1982), pp. 65–90 (proposing refugee protection quotas for States based on gross national product and population); Suhrke, 'Burden-sharing during Refugee Emergencies'; James Hathaway & R. Alexander Neve, 'Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), pp. 115–211; Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), pp. 243–97; D. Anker, J. Fitzpatrick, and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, 11 (1988), pp. 295–309.

104 For the reservations to the 1951 Convention, see: [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&lang=en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en). Iran, for instance, has a reservation which states that Articles 17, 23, 24 and 26 of the 1951 Convention are taken to be 'recommendations only'; while Ethiopia has stated that Articles 8, 9, 17(2) and 22(1) are taken to be 'recommendations, not legally binding obligations'.

105 Article 33(1) of the 1951 Convention provides that 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Today, the *non-refoulement* obligation is understood to apply at the borders of a State and prior to admission; and also to apply to asylum-seekers prior to recognition of refugee status: James Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005).

106 See above, Part III.B(i), with the French delegate describing receiving countries as having 'no choice' in terms of allowing admission.

107 See generally: Katy Long, *No Entry! A Review of UNHCR's Responses to Border Closures in Situations of Mass Influx* (2010), [www.refworld.org/docid/4c21ad0b2.html](http://www.refworld.org/docid/4c21ad0b2.html).

108 Long, *No Entry!*

109 See, e.g., with respect to Turkey: 'Migrant crisis: Turkish border guards «kill 11 Syrian refugees, including women and children»', *Sydney Morning Herald* (20 June 2016), <http://m.smh.com.au/world/migrant-crisis/migrant-crisis-turkish-border-guards-kill-11-syrian-refugees-including-women-and-children-20160619-gpmvun.html>.

[N]on-refoulement...had to be scrupulously observed. Nevertheless...countries of first asylum or transit...faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard refoulement as the only way out. If that should occur, they would not be the only ones at fault since the responsibility for ensuring the conditions necessary for observance of the non-refoulement principle rested with the international community as a whole.<sup>110</sup>

Some academics, while not going so far, have also suggested that burden sharing is a practical imperative in some cases to ensure that the principle of *non-refoulement* is respected. As Professor Fonteyne stated in the 1980s: 'Burden sharing, certainly in cases of large scale refugee movements, is a virtual *sine qua non* for the effective operation of a comprehensive *non-refoulement* policy'.<sup>111</sup>

In response to such arguments, UNHCR's Executive Committee, UNHCR itself, and others have, continually stressed that an absence of burden sharing does not justify a failure by a State to implement its *fundamental* refugee protection obligations, most notably access to asylum and respect for the principle of *non-refoulement*.<sup>112</sup> For example, in Conclusion No. 85 (XLIX) (1998), paragraph (p), UNHCR's Executive Committee:

*Recognizes* that international solidarity and burden sharing are of direct importance to the satisfactory implementation of refugee protection principles; stresses, however, in this regard that access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community.<sup>113</sup>

To reiterate, while it was suggested by some of the drafters of the 1951 Convention that the burden sharing provision in the preamble could operate as a force majeure clause with respect to certain of the obligations contained in the 1951 Convention, it does not appear that this was intended to apply to the most fundamental issues of access to asylum and protection against refoulement. Nonetheless, the 'compromise' adopted by the drafters of the 1951 Convention, implying a weak negative force majeure scope to the burden sharing provision with no positive obligation to assist on the part of other States, has arguably rendered such arguments a logical next step. Today, I would argue that the status of *non-refoulement* – as a principle of customary international law<sup>114</sup> and arguably an emerging non-derogable or peremptory norm of international law<sup>115</sup> – would in any event 'trump' any right of receiving States to make respect for Article 33 contingent on the receipt of international assistance as a legal matter, even in cases of force majeure. In other words, even if the principle of burden sharing did justify the failure by receiving States to implement certain of their obligations under the 1951 Convention in cases of mass influx and in the absence of sufficient international support – and this would require further consideration – it is unlikely that this would extend to the *non-refoulement* obligation.

110 Cited in Guy Goodwin-Gill, *Refugees – Challenges for Protection and Assistance in the 21st Century* (Istanbul, 2015).

111 J.-P.L. Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in cases of Mass Influx of Refugees', *Australian Yearbook of International Law*, 8 (1978), pp. 162–88, at p. 175.

112 'Under the terms of international law, primary responsibility for protecting and assisting refugees and returnees lies with the States which are hosting them...While regional or international burden sharing initiatives may be needed to assist host States in fulfilling their obligations towards refugees and returnees, these should not be seen as in any way diminishing the responsibilities of host countries.' UNHCR, *Annual Theme: International Solidarity And Burden-Sharing In All Its Aspects: National, Regional And International Responsibilities For Refugees*, A/AC.96/904, 1998, [www.refworld.org/docid/4a54bc2f0.html](http://www.refworld.org/docid/4a54bc2f0.html), pp. 3–4. See also: J.N. Saxena, 'International Solidarity and the Protection of Refugees', *Congress on International Solidarity and Humanitarian Actions* (San Remo, 1980), p. 303 ('Caution though that principle of burden sharing should not be regarded as a precondition to the observance of basic humanitarian principles [of non-refoulement and asylum]'); Guy Goodwin-Gill and Jane Mcadam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 339 ('While as a matter of law, international protection is not contingent on burden sharing, there is some acknowledgment that practical responses to alleviate the pressure on countries of first asylum may be necessary to ensure that the principle is not violated.') There are also those who suggest that the *non-refoulement* obligation may be conditional in some circumstances: see, e.g., Michael Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing', *Journal of Refugee Studies*, 14 (2001), pp. 95–115, at p. 108 ('Given the consensual nature of treaty law, we cannot expect states to assume an obligation to allow refugees admission onto their territory if there is a serious threat that this would lead to national destabilisation. The most basic principle in international refugee law, *non-refoulement*, should be read in this perspective...'). See also Hathaway, *The Rights of Refugees Under International Law*, pp. 358–9 ('The duty of state parties to respect the principle of *non-refoulement* (at least on a temporary basis) is in fact balanced against a duty of international solidarity owed by other state parties to the receiving country...'). Cf. Hurwitz, stating that 'these views may be reconciled by differentiating *non-refoulement* and its corollary, the granting of temporary refuge or 'admission', which is absolute and unconditional, from asylum understood as a more permanent protection give to refugees and predicated on the existence of effective burden-sharing': Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), p. 145.

113 UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, [www.refworld.org/docid/5698c1224.html](http://www.refworld.org/docid/5698c1224.html), p. 42.

114 See, e.g., UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007), [www.refworld.org/docid/45f17a1a4.html](http://www.refworld.org/docid/45f17a1a4.html).

115 See, e.g., John Currie, *Public International Law* (Toronto: Irwin Law, 2001), pp. 424–25, defining a 'non-derogable norm of international law' and a 'peremptory norm of international law' as 'a rule of international law so fundamental to the international legal order that it cannot be set aside or suspended, upon the express consent of states'.

## 5. Conclusion

This paper has provided a textual analysis of the discussions among the drafters of the 1951 Convention with respect to burden sharing provision contained in recital 4 of the preamble. This serves as a first step in reconsidering some of the preconceptions with respect to the principle of burden sharing in the contemporary refugee regime.

The travaux préparatoires suggest that the insertion of the burden sharing provision in the preamble was an anomaly, resulting largely from compromise. In terms of form, there was significant ambivalence expressed by some delegations with respect to the disconnect between the inclusion of the clause in the preamble and the overall purpose of the 1951 Convention as an agreement between States on how they would treat refugees. Further, the provision was intended to have a clearer function than would normally be attributed to a preambular recital. Notably, while not going so far as to establish a positive obligation to provide international assistance, some of the drafters believed that the clause could be relied on by receiving States to justify or excuse a failure to meet all of their obligations under the 1951 Convention in certain cases of mass influx, unless such international assistance was forthcoming. The potential of the burden sharing provision to act as a force majeure clause with respect to certain obligations under the 1951 Convention was not really clarified by the drafters at the time, and I have suggested that this failure has repercussions today in terms of the arguments made by some host countries with respect to the scope of the *non-refoulement* obligation.

More generally, I argue that these discussions are reflective of a broader tension in the regime that has never been resolved. The purpose of the 1951 Convention regime was to render refugees the responsibility of the State which had jurisdiction over them, irrespective of the size of the refugee influx or how unevenly distributed these responsibilities may be. But practically it is at a minimum inequitable, and in some circumstances impossible, to expect States to provide permanent asylum to large numbers of refugees, for increasingly protracted periods of time, without international support. With the significant scope and scale of the Syria crisis,<sup>116</sup> as well as longstanding host States such as Kenya and Pakistan threatening to return all refugees on their territories,<sup>117</sup> this unresolved structural tension in the design of the 1951 Convention is arguably a challenge for the viability of the regime as a whole going forward.

Despite this, the travaux préparatoires clearly confirm that neither the 1951 Convention regime generally, nor recital 4 in the preamble specifically, were designed to distribute responsibilities and burdens for refugees *equally* between States. In 1950, as is the case now, the political appetite to establish binding quotas to ensure the equitable distribution of refugees was not there. The French delegate insisted on the insertion of the burden sharing provision into the preamble based on an understanding that certain States would always be liable to receive more refugees than others by virtue of their geography. The burden sharing provision was simply designed to respond to potential issues for individual States that could result from this.

That said, since the drafting of the 1951 Convention, the refugee regime has had over 65 years to evolve and expand, with an abundance of developments in terms of normative instruments, institutional frameworks and State practice. The analysis of the travaux préparatoires contained in this paper is thus just the first step in seeking to resolve the question of the legal and normative relevance of the principle of burden sharing in the contemporary refugee regime.

116 See, e.g., UNHCR, *Syria Regional Refugee Response*, updated regularly, <http://data.unhcr.org/syrianrefugees/regional.php>.

117 See, e.g., with respect to Kenya, IRIN, *Has Kenya's brinkmanship over Dadaab worked?* (15 June 2016), [www.irinnews.org/analysis/2016/06/15/has-kenya-s-brinkmanship-over-dadaab-worked?utm\\_source=IRIN++the+inside+story+on+emergencies&utm\\_campaign=58442186c5-RSS\\_EMAIL\\_ENGLISH\\_ALL&utm\\_medium=email&utm\\_term=0\\_d842d98289-58442186c5-15763241](http://www.irinnews.org/analysis/2016/06/15/has-kenya-s-brinkmanship-over-dadaab-worked?utm_source=IRIN++the+inside+story+on+emergencies&utm_campaign=58442186c5-RSS_EMAIL_ENGLISH_ALL&utm_medium=email&utm_term=0_d842d98289-58442186c5-15763241).

## Bilateral resettlement agreements: any promising future for expanding refugee protection space? A case study of the Guantanamo ex-detainees seeking asylum in Central Asia

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### Abstract

In 2014, Kazakhstan received five Guantanamo Bay former detainees as part of a bilateral resettlement agreement with the USA. These detainees, of Yemeni and Tunisian origin, were transferred as asylum-seekers due to a risk of persecution in their countries of origin. Though Kazakhstan is a party to the 1951 Convention Relating to the Status of Refugees since 1998, its policy towards refugees has been rather restrictive and it has never had a national refugee resettlement programme.

Drawing upon the analysis of legal scholarship, policy materials and state practice, this paper explores to what extent this *ad hoc* asylum privately negotiated between states can be regarded as an efficient durable solution for resettled Guantanamo asylum-seekers in Kazakhstan. It also examines to what extent and under what conditions bilateral resettlement agreements could promote more efficient refugee protection in regions with less developed asylum practices.

The paper concludes that bilateral agreements have a strong potential to expand protection space and raise refugee protection standards in states with developing asylum systems and should be used strategically.

### Keywords

Bilateral resettlement agreements, Guantanamo asylum seekers, private asylum, inter-regional burden sharing, refugee protection in Central Asia, protection space



## Introduction

When dealing with asylum claims, states parties to the 1951 Convention relating to the Status of Refugees (the Refugee Convention) can act in three possible ways. Most of the time, states act unilaterally, subject to their international obligations (i.e. *non-refoulement*, non-discrimination and non-penalisation for irregular entry) and their national refugee legislation. The next way to deal with asylum claims is through the multilateral regional cooperation mechanisms that are encouraged by the Preamble of the Refugee Convention.<sup>1</sup> While regional refugee protection frameworks exist in Europe, Africa, and Americas, a similar framework has so far failed to be set up in Asia, the region that has been continuously hosting the largest refugee population.<sup>2</sup> Moreover, the availability of a regional protection framework does not always result in effective cooperation and more efficient refugee protection: as one of the most recent examples of a failure to cooperate under a regional framework can be cited the EU's plan to relocate refugees among EU member-states under the 2015 emergency relocation schemes.<sup>3</sup>

The last remaining way to deal with asylum-seekers and refugees is through bilateral agreements. Bilateral agreements in managing migration, such as readmission agreements, are not new. Yet, in the past five years, a new type of bilateral agreements (including memoranda of understanding) is developing: an agreement for transfer and permanent settlement of refugees that aims specifically at finding a durable solution for refugees in a third country. The best known publicly available such bilateral agreements are the 2011 agreement between Australia and Malaysia<sup>4</sup>, the 2014 MOU between Australia and Cambodia,<sup>5</sup> and the 2016 EU-Turkey deal.<sup>6</sup>

There is another distinct group of bilateral resettlement agreements: the bilateral agreements of the United States of America (the US) with some 30 states in the world on resettlement of the Guantanamo asylum-seekers. The impact of these bilateral resettlement agreements on protection of human rights of Guantanamo asylum-seekers and raising protection standards in resettlement states with less developed asylum practices so far have gained limited scholarly attention. Thus, this paper explores whether bilateral refugee resettlement agreements can promote more efficient refugee burden-sharing and durable solutions for refugees and raise refugee protection standards in states with less developed asylum practices. On the one hand, it might be easier for states to achieve cooperation on a bilateral than a multilateral level given that less individual states' interests need to be balanced out. On the other hand, such bilateral agreements should follow certain principles and safeguards to ensure a meaningful and durable solution for refugees.

The discussion will be built around four parts. Part One will discuss why some of the Guantanamo detainees may have refugee claims and will provide an overview of the countries that reached bilateral resettlement agreements with the US to host the ex-detainees. Part Two will provide an analysis of one resettlement agreement between the US and Kazakhstan, a country with a fairly new asylum system developed under the Refugee Convention regime. This Part will analyse the compliance of the US-Kazakhstan refugee resettlement agreement with international refugee law. Part Three will consider the implementation of the bilateral agreement in Kazakhstan. In particular, it will consider whether the legal status and treatment of the Guantanamo asylum-seekers is compliant with international refugee law and the national refugee legislation of Kazakhstan. Part Three will further provide conclusions whether the US-Kazakhstan bilateral agreement may have resulted in a durable solution for the Guantanamo ex-detainees and could be regarded as an efficient burden-sharing mechanism. Part Four will discuss broader implications of the use of privately negotiated bilateral resettlement agreements and the safeguards that should be included in such agreements to ensure a virtually durable solution for a refugee problem. The paper will conclude with a discussion of the bilateral resettlement agreements' potential to expand refugee protection space in new regions if used in a strategic manner.

The legality of bilateral agreements from the perspective of the US law and policy as well as the discussion of the US's responsibility for creating multiple refugee situations will not be the focus of this paper. Rather the paper will approach the issue of the Guantanamo asylum-seekers from the following perspective: the US as an individual country has faced a need to resettle several asylum-seekers to whom it is not able to provide protection in its territory and approached other states for their assistance and cooperation in refugee burden sharing.

## 1. Background to the US bilateral resettlement agreements

### *Guantanamo detainees: undesirable in the US and non-returnable to home countries*

The US detention facility in Guantanamo Bay, Cuba, was established in 2002 after the September 2001 terrorist attacks in the US and the subsequent US-led 'war on terrorism' in Afghanistan. The detention centre was meant for the detention

1 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Preamble, para 4.

2 Sam Blay, 'Regional Developments: Asia' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), p. 146.

3 Philippe Dam, 'Relocation Farce Brings Shame on Europe', *EU Observer* (4 October 2016), <https://euobserver.com/opinion/135345> (accessed 5 October 2016).

4 Arrangement on Transfer and Resettlement (Australia-Malaysia) (27 July 2011), [www.loyarburok.com/wp-content/uploads/2011/08/Refugee-Swap-Agreement-Msia-Aust-250711.pdf](http://www.loyarburok.com/wp-content/uploads/2011/08/Refugee-Swap-Agreement-Msia-Aust-250711.pdf) (accessed 5 October 2016).

5 Memorandum of Understanding Relating to the Settlement of Refugees in Cambodia (Australia-Cambodia) (26 September 2014), [www.refworld.org/docid/5436588e4.html](http://www.refworld.org/docid/5436588e4.html) (accessed 5 October 2016).

6 EU-Turkey Statement (18 March 2016).

and interrogation of terrorism suspects and alleged members of al-Qaeda terrorist group.<sup>7</sup> Since 2002, there have been 779 detainees all of whom were labelled by the US as 'enemy combatants'.<sup>8</sup> Following the interrogation, it was revealed that most of them had been detained by mistake merely because these people were 'in the wrong place at the wrong time'.<sup>9</sup> The return of detainees started under President Bush's administration with the majority of detainees having been transferred to their countries of origin. In 2009, the next US President Barack Obama issued an order to close the Guantanamo detention centre, which still had 242 inmates.<sup>10</sup> By September 2016, the facility contained 61 detainees.<sup>11</sup>

Reportedly, since 2002, when the US authorities learned about the first detainees who had been captured mistakenly, they were looking for possibilities to return them to another safe country. In effect, the US became a custodian of a certain refugee population, whom it could either repatriate to their home states where they could be at risk of persecution or torture, or resettle in the United States. However, in 2009, the US Congress effectively prohibited the release of any of the Guantanamo detainees to the territory of the US, sanctioning that the defence funds should not be used for such purposes.<sup>12</sup> Some commentators further argued that the resettlement of the Guantanamo detainees to the US could create a 'political firestorm'.<sup>13</sup>

Determined to close the Guantanamo detention facility, the Obama administration has been actively exploring a third solution for Guantanamo detainees with refugee claims through permanent resettlement to third countries. Consequently, the US has engaged in a long and challenging process of negotiating bilateral agreements with many other countries around the world. Negotiations were complicated by the fact that the US itself refused to give refugee status to any of the detainees. Reportedly, all resettlement agreements were negotiated under a high level of secrecy and required from the US both diplomatic pressure and financial bargaining.<sup>14</sup> While the texts of all resettlement deals may not be publicly available, US Special Envoy for the closure of the Guantanamo detention centre Mr Fried confirmed that the US had to negotiate extensive agreements with potential resettlement countries. The main negotiation points covered such issues as the immigration status the detainees would be afforded, repatriation costs covered by the United States, and the services the host country would provide to facilitate the detainees' integration. In addition, the United States attempted to secure assurances from a potential resettlement state that the state would monitor the ex-detainees.<sup>15</sup> Apparently, the condition on monitoring ex-detainees aims to avoid any residual risk of their (re) engagement in terrorist activity. On the other hand, this condition may exacerbate the stigma suffered by detainees even after their release.

When implementing the plan on closure of the facility, the US authorities faced a problem that some of the remaining detainees, who had never been charged for any crime and were subsequently 'cleared for release', were non-returnable to their countries of origin. There were at least four underlying reasons: a reasonable risk of persecution of detainees if returned to their countries of origin, the situation of generalised violence and insecurity in the country of origin, some detainees' statelessness situation, and a risk of detainees' (re-)engaging in terrorist activities. These reasons will now be discussed in more detail.

The first reason why detainees could not be returned to their home countries was that they could face a reasonable risk of persecution there. Some of the supposed combatants turned out to have no connection to al-Qaeda or terrorism, but when 'cleared for release' they demanded not to be returned to their countries of origin due to a claimed fear of persecution.

Among this category of non-returnable detainees, there were two sub-categories. The first sub-category included detainees, who originally escaped religious, ethnic or political persecution in their countries of origin and had been living in Afghanistan or Pakistan for a long time before they were sold to the US forces for a bounty.<sup>16</sup> The most vivid example of such detainees was the Chinese nationals of Uyghur ethnicity. The US authorities established a reasonable risk that the Uyghur detainees could be subjected to trial and even execution in China based on separatism charges.<sup>17</sup>

Another sub-category included detainees who may not have had any persecution risk in their home country before detention. But a reasonable risk of persecution arose due to the very detention and the prolonged incarceration in

7 'Guantanamo Bay: US in Largest Detainee Transfer under Obama', *BBC News* (16 August 2016), [www.bbc.co.uk/news/world-us-canada-37090851](http://www.bbc.co.uk/news/world-us-canada-37090851) (accessed 1 September 2016).

8 Melissa J. Darkee, 'Beyond the Guantanamo Bind: Pragmatic Multilateralism in Refugee Resettlement' *Columbia Human Rights Law Review*, 42 (2011), pp. 697, 698.

9 *Ibid.*

10 Connie Bruck, 'Why Obama Has Failed to Close Guantanamo', *The New Yorker* (1 August 2016), [www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo](http://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo) (accessed 1 September 2016).

11 Dan Lamothe, 'Obama Administration Approves its Largest Single Release of Guantanamo Detainees Ever', *The Washington Post* (15 August 2016), [www.washingtonpost.com/news/checkpoint/wp/2016/08/15/obama-administration-its-largest-single-release-of-guantanamo-detainees-ever/](http://www.washingtonpost.com/news/checkpoint/wp/2016/08/15/obama-administration-its-largest-single-release-of-guantanamo-detainees-ever/) (accessed 1 September 2016).

12 US Public Law 111-32-24 June 2009, 123 Stat. 1859, SEC. 14103.

13 Darkee, 'Beyond the Guantanamo Bind', p. 698.

14 Bruck, 'Why Obama Has Failed to Close Guantanamo'.

15 Darkee, 'Beyond the Guantanamo Bind', p. 714.

16 Center for Constitutional Rights, 'Frequently Asked Questions: International Protection for Guantánamo Prisoners Who Cannot be Safely Repatriated', <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-international-protection-guant-namo> (accessed 1 September 2016).

17 Darkee, 'Beyond the Guantanamo Bind', p. 704.

Guantanamo as terrorism suspects. There is documentary evidence that the ex-detainees returned to Tunisia, Libya and Yemen were subjected to additional scrutiny and investigation, during which they were abused, tortured and in some instances killed.<sup>18</sup> On several occasions, such abuse took place despite the diplomatic assurances earlier given to the US authorities.<sup>19</sup> The US is a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>20</sup> and the 1967 Protocol relating to the Status of Refugees<sup>21</sup> whereby it is bound not to return or transfer people to a place where they could be tortured or persecuted. Among the cleared detainees, there were nationals of several other states also known for widespread human rights abuses and documented instances of torture, and most of them were resettled to third countries.<sup>22</sup>

The second reason for non-return of detainees was that some of them could not return to their home countries due to the general insecure situation in these countries or ongoing armed conflicts. This was the case of detainees were originating from Yemen, Tunisia, Libya and Syria. These detainees could also be considered as refugees under extended refugee definition and qualify for other forms of international protection.

The third reason for non-return was the de-jure statelessness of certain detainees. There were also detainees whose countries of nationality or habitual residence refused their return for being labelled 'the worst of the worst' and 'terrorists' by the US authorities, thus making them de-facto stateless.<sup>23</sup> For example, one of the detainees was born in Saudi Arabia and lived there for 20 years. Also, he had a passport from the Palestinian Authority. However, Israel did not allow this detainee to return to Gaza, while Saudi Arabia did not agree to allow him to reunite with his family in its territory.<sup>24</sup>

The fourth, and final, reason why detainees could not return to their countries of origin was due to a risk of their (re-)engagement in terrorist activities. Many of those detainees released under the Bush Administration returned to a normal life in their homelands.<sup>25</sup> However, there have been exceptions. While it was easier to return detainees to their home countries, some of these countries lacked the motivation to monitor the ex-detainees to ensure that they would not (re)engage in attacks against the US forces in Afghanistan and other places.<sup>26</sup> CIA data suggests that, of the inmates released under the Bush Administration, 21 per cent were confirmed to have re-engaged in militant activity, while 14 per cent were suspected of having done so. Of the releases under the Obama Administration, 5.6 per cent were confirmed to have re-engaged in militant activity and 6.8 per cent were suspected of having done so. Overall, about 30 per cent are believed to have done so.<sup>27</sup> Re-engagement incidents were also reported to have occurred in the first six months of 2016.<sup>28</sup> On the other hand, on some occasions the assessments on re-engagement were made on the basis of non-verified and single opinions and thus can be doubtful.<sup>29</sup>

Besides, another problem was that some of the detainees may not have been part of any terrorist organisation before their detention. But they could have become radicalised during their prolonged detention. Thus, some of the detainees may have participated in the attacks on the US forces abroad in revenge for this very detention. To mitigate this risk, the US authorities decided to discontinue transferring detainees of certain nationalities back to their countries of origin and were trying to resettle them in a third country. The CIA further recommended that the detainees be not transferred to 'countries with ongoing conflict and internal instability' due to the likelihood of reengagement in terrorism. The agency further makes an opinion that 'some detainees who are determined to re-engage will do so regardless of any transfer conditions'.<sup>30</sup>

This point is important for at least two reasons. First, it clearly shows that the US has never been absolutely sure whether and who of the remaining detainees were more likely to (re)engage in terrorism once released. Second, this point may

18 Clive Stafford-Smith, 'Vindicated but Nowhere to Go', *European Law*, 86 (2009), p. 51; 'US/Yemen: Break Impasse on Yemeni Returns from Guantanamo', *Human Rights Watch* (29 March 2009), [www.hrw.org/news/2009/03/29/us/yemen-break-impasse-yemeni-returns-guantanamo](http://www.hrw.org/news/2009/03/29/us/yemen-break-impasse-yemeni-returns-guantanamo) (accessed 1 September 2016).

19 'US: Don't Send Guantanamo Detainees Home to Torture and Abuse', *Human Rights Watch* (5 September 2007), [www.hrw.org/news/2007/09/05/us-dont-send-guantanamo-detainees-home-torture-and-abuse](http://www.hrw.org/news/2007/09/05/us-dont-send-guantanamo-detainees-home-torture-and-abuse) (accessed 1 September 2016).

20 UN Treaty Collection, Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en) (accessed 1 September 2016).

21 UN Treaty Collection, Status of the Protocol relating to the Status of Refugees, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en) (accessed 1 September 2016).

22 The New York Times, *The Guantanamo Docket*, <http://projects.nytimes.com/guantanamo?scp=4&sq=guantanamo&st=cse> (accessed 1 September 2016).

23 Stafford-Smith, 'Vindicated but Nowhere to Go', p. 52.

24 Ibid.

25 Human Rights First, 'Q&A: Transferring Cleared Guantanamo Detainees to Foreign Countries under the SASC FY 2014 NDAA (S. 1197)', [www.humanrightsfirst.org/uploads/pdfs/QA-foreign-transfer-provisions-for-guantanamo-detainees-in-SASC-NDAA.pdf](http://www.humanrightsfirst.org/uploads/pdfs/QA-foreign-transfer-provisions-for-guantanamo-detainees-in-SASC-NDAA.pdf) (accessed 1 September 2016).

26 Bruck, 'Why Obama Has Failed to Close Guantanamo'.

27 Office of the Director of National Intelligence (DNI), 'Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba', [www.dni.gov/files/documents/FINAL%20-%20GTMO%20Unclass%20CDA%20Response%20-%20September%202016.pdf](http://www.dni.gov/files/documents/FINAL%20-%20GTMO%20Unclass%20CDA%20Response%20-%20September%202016.pdf) (accessed 1 September 2016).

28 Mark Hosenball, 'U.S. Confirms Two More Freed Guantanamo Inmates Rejoined Militant Groups', *Reuters* (14 September 2016), [http://uk.reuters.com/article/uk-usa-militants-guantanamo-idUKKCN11K2X9?utm\\_campaign=crowdfire&utm\\_content=crowdfire&utm\\_medium=social&utm\\_source=twitter](http://uk.reuters.com/article/uk-usa-militants-guantanamo-idUKKCN11K2X9?utm_campaign=crowdfire&utm_content=crowdfire&utm_medium=social&utm_source=twitter) (accessed 15 September 2016).

29 Human Rights First, 'Q&A: Transferring Cleared Guantanamo Detainees'.

30 DNI, 'Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay'.

be seen as a weak attempt to avoid any subsequent responsibility for resettling potentially dangerous detainees. At the same time, such recommendation further stigmatises all released detainees as potential terrorists regardless of any real intentions on their part to (re)engage in any terrorism activity. The following sections will demonstrate that this stigmatisation significantly impacted on the restriction of certain rights of the Guantanamo asylum-seekers resettled to Kazakhstan.

As of August 2016, 124 Guantanamo detainees have been resettled to 30 states spanning all geographic regions, including 18 states in Europe (Bulgaria, Belgium, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Portugal, Slovakia, Spain, Switzerland, Albania, Bosnia and Herzegovina, Georgia, Montenegro, and Serbia), three states in Africa (Ghana and Senegal), 3 states in South America (El Salvador and Uruguay), four states in the Middle East (Oman, Qatar, Saudi Arabia, and United Arabs of Emirates), one state in Asia (Kazakhstan), two island-states in the Atlantic Ocean (Bermuda and Cape Verde) and one island-state in the Pacific Ocean (Palau).<sup>31</sup> These countries represent a diverse range of democratic and authoritarian regimes and are at various levels of socio-economic development. While most of the states are parties to the Refugee Convention and have quite developed asylum procedures, a few resettlement states are not parties to the Refugee Convention and its Protocol (e.g. Oman, Saudi Arabia, Qatar and UAE) or may have little experience in effective integration of refugees. Despite the obvious differences, all these states agreed to support the US in its goal to find a safe third country for Guantanamo asylum-seekers.

Each of the bilateral resettlement agreement represents an interesting case for a more in-depth analysis of their implementation as they may trigger refugee protection issues. This paper will be limited to the discussion and analysis of the implementation of only one bilateral agreement – with Kazakhstan, the only Refugee Convention state-party in Asia that agreed to cooperate with the US in resettling Guantanamo asylum-seekers. The analysis will be particularly aimed at assessing whether this bilateral agreement has led or may have prospects to lead to a durable solution for Guantanamo asylum-seekers in Kazakhstan.

## 2. The US-Kazakhstan bilateral resettlement agreement

This section will start with consideration of the definition of ‘resettlement’ under international refugee law. Then it will proceed with an overview of the US-Kazakhstan resettlement agreement and Kazakhstan’s asylum system. After this, the section will discuss whether the concerned resettlement agreement is compliant with international refugee law. Two relevant debates will be explored to establish whether the agreement may be essentially a responsibility-shifting arrangement resulting in insufficient refugee protection for Guantanamo asylum-seekers and lead to violation of their human rights.

### 2.1 Resettlement under international refugee law

Resettlement is widely known as one of the three durable solutions for refugees, which UNHCR is mandated to undertake by its Statute and UN General Assembly Resolutions.<sup>32</sup> Resettlement involves ‘selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status.’<sup>33</sup> This status should comply with two requirements:

1. It should protect a resettled refugee from refoulement, and
2. It should provide a resettled refugee and his/her family or dependant with access to rights similar to those enjoyed by the nationals.<sup>34</sup>

Apart from being a durable solution and a tool for international protection, resettlement is also recognised as a ‘tangible expression of international solidarity and a responsibility sharing mechanism, allowing States to help share responsibility for refugee protection, and reduce problems impacting the country of asylum.’<sup>35</sup>

The following sections will discuss whether the US-Kazakhstan resettlement agreement can be considered an efficient durable solution and a responsibility-sharing mechanism from the international law perspective.

### 2.2 Overview of the US-Kazakhstan Bilateral Resettlement Agreement

Kazakhstan is a party to both the Refugee Convention and its Protocol and is thus bound by both instruments. The US is a party to a Refugee Protocol only, yet it is bound by the Protocol to observe Articles 2-34 of the Convention whilst being required cooperate with UNHCR.<sup>36</sup> According to international law of treaties, the bilateral treaties as *lex specialis*

31 Kate Bennet, ‘On Same Day Trump Says Keep Gitmo “Open”, Obama Makes His Largest Release of Detainees Yet’, *Independent Journal Review* (16 August 2016), <http://ijr.com/2016/08/673655-on-same-day-trump-says-keep-gitmo-open-obama-makes-his-largest-release-of-detainees-yet/> (accessed 1 September 2016).

32 UNHCR, *Resettlement Handbook* (UNHCR 2011) 3.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol) arts 1(1) and 2.

or *lex posterior* should not lead to setting aside a general treaty; instead, the earlier and general instruments should continue control the way the more specific rules under bilateral treaties are being interpreted and applied.<sup>37</sup>

The US-Kazakhstan bilateral resettlement agreement represents an interesting case for several reasons. First, resettlement as a burden sharing mechanism has been arranged not within the same or a broader region what is characteristic for the Australia-Cambodia agreement or the EU-Turkey agreement, but between the countries in two distinct geographic regions (Americas and Asia). Second, resettlement is taking place from a state with more advanced asylum practices and more developed refugee integration programmes to a country with less developed asylum practices and without any experience in accepting refugees under resettlement programmes, what stands out from the usual resettlement practices administered by UNHCR. Third, resettlement and further integration of the Guantanamo asylum-seekers is taking place without cooperation with UNHCR.<sup>38</sup> It appears that the case does not fit squarely into the general practice of refugee resettlement, for example as carried out under the UNHCR mandate. This might be explained by the unique circumstances that preceded the resettlement. It is the first time when a refugee situation arose not due to the actions of a country of origin or the first asylum country (in this case Afghanistan or Pakistan where asylum-seekers were captured), but by a third state's actions – detention by the US forces, transfer to a detention facility under the US jurisdiction and effective control, subsequent prolonged incarceration without a trial, and refusal to allow a release of detainees into the US territory.<sup>39</sup> Despite its exceptionality or rather abnormality, the situation has led to potential refugee claims on the part of some detainees. Given the predicament to which the Guantanamo asylum-seekers have already been subjected, it is highly important to ensure that their rights are no longer violated under international refugee law and human rights law frameworks following the resettlement under bilateral arrangements.

### 2.3 Overview of Kazakhstan's asylum system and practices

Kazakhstan became a party to the 1951 Refugee Convention and its 1967 Protocol in 1998 without any reservations.<sup>40</sup> Since that time it has been slowly and cautiously developing its national asylum system. It took Kazakhstan 11 years to adopt its national refugee law in 2009 and a refugee status determination procedure pursuant to the Refugee Convention. While the text of the national refugee legislation is mostly compliant with international refugee law, the compliance with refugee law may be insufficient in practice, for example, when asylum is sought by nationals of neighbouring states.<sup>41</sup> Next, according to the national law the Kazakhstani asylum authorities apply only a narrow interpretation of the Refugee Convention,<sup>42</sup> thus applicants fleeing serious and indiscriminate threats to life and physical integrity resulting from generalised violence are not eligible for refugee protection in the country. Moreover, asylum authorities require that applicants provide sufficient documentary evidence that they may face *individual* persecution in their countries of origin. Consequently, a majority of asylum-seekers fleeing internal conflicts in Syria, Iraq and Afghanistan have been continuously rejected.<sup>43</sup>

According to UNHCR's data, as of July 2016 Kazakhstan had 653 convention refugees, 'most of which have been staying in Kazakhstan for more than 10 years.'<sup>44</sup> Apparently, Kazakhstan has not been a popular destination for refugees. Yet, despite not having well-developed practices in refugee protection, Kazakhstan has been actively participating in the regional consultative processes on the management of mixed migration flows. The most notable is the Almaty Process bringing together the four states in Central Asia and seven neighbouring states to ensure better protection for refugees and other vulnerable migrants found in mixed migration flows from Asia to Europe. The process was launched and operationalised during the 2011 and 2013 Regional Conferences on Refugee Protection and International Migration that were hosted by the Government of Kazakhstan and supported by UNHCR and IOM. Moreover, the Government of Kazakhstan agreed to host the Secretariat of the Process and serve as the first Chair for the initial period of two years.<sup>45</sup>

### 2.4 Compliance with international refugee law

According to UNHCR's statistics, refugees under its supervision have been generally resettled from states with less developed asylum practices and less developed economies to states with more advanced economies and more favourable conditions for refugees.<sup>46</sup> The resettlement agreement between the US and Kazakhstan stands out from the

37 International Law Commission (58<sup>th</sup> Session), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006), UN Doc A/CN.4/L.682 22

38 Interview with a UNHCR Officer (Geneva, Switzerland, 10 August 2016).

39 Lamothe, 'Obama Administration Approves its Largest Single Release of Guantanamo Detainees Ever'.

40 UN Treaty Collection, Status of the Convention relating to the Status of Refugees, [https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en) (accessed 1 September 2016); UN Treaty Collection, Status of the Protocol relating to the Status of Refugees.

41 Alex Danilovich and Sabina Insebayeva, 'International Humanitarian Law and *Raison D'Etat*: the Balance Sheet of Kazakhstan's Ratification of the Geneva Convention on Refugees', *International Journal of Refugee Law*, 26 (2014), p. 112.

42 Law of Kazakhstan No. 216-IV 3PK as of 4 December 2009 on Refugees (Kazakhstan Refugee Law), art 1(1).

43 Interviews with refugee lawyers (Kazakhstan, May 2016).

44 Website of UNHCR Representation in Kazakhstan, [www.unhcr.kz/rus/central-asia/kazakhstan/](http://www.unhcr.kz/rus/central-asia/kazakhstan/) (accessed 1 October 2016).

45 Cynthia Orchard, 'The Almaty Process: Improving Compliance with International Refugee Law in Central Asia', *International Journal of Refugee Law*, 28 (2016), p. 55.

46 UNHCR, Resettlement Statistical Database Portal, [www.unhcr.org/uk/statistics/unhcrstats/573b8a4b4/resettlement-statistical-database-portal.html](http://www.unhcr.org/uk/statistics/unhcrstats/573b8a4b4/resettlement-statistical-database-portal.html) (accessed 1 October 2016).

UNHCR's practice because under this deal the transfer took place from a state with more developed asylum practices and economy to a state with less developed economy, asylum practices and less favourable conditions for refugees.

In this section, two main debates will be considered. The first is whether the resettlement from more economically developed states to states with less developed economies is compatible with international refugee law. The second debate is whether the US should continue bearing its responsibility for the resettled Guantanamo asylum-seekers after their transfer to a state with a less developed asylum system. The discussion will enable us to assess whether the US-Kazakhstan bilateral agreement is compliant with international refugee law or whether it may lead to a violation of any of the obligations of the US or Kazakhstan under international refugee law.

#### 2.4.1 *Is the resettlement of refugees from developed states to developing states compatible with international refugee law?*

When Australia entered in a bilateral resettlement MoU with Cambodia in 2014, this deal attracted massive criticism. UNHCR characterised this deal as 'a worrying departure from international norms'.<sup>47</sup> It further noted that 87 per cent of refugees were being hosted in developing countries and it was crucial that countries do not shift their refugee responsibilities elsewhere.<sup>48</sup>

The UNHCR's criticism could be similarly applicable to the US-Kazakhstan deal since Kazakhstan is also much less economically developed than the US. On the other hand, if a receiving state is less developed than a sending state, this should not automatically lead to denouncing their bilateral resettlement arrangement. UNHCR's statistics reveal that, while 86 per cent of refugees are located in developing states, 58 per cent of world refugees under UNHCR's mandate live only in 10 countries.<sup>49</sup> This suggests that there are quite a few developing states that may be hosting hardly any refugees and who could potentially participate more in sharing the burden of hosting refugees with other states, both economically developed and developing. Economic development or underdevelopment should not be a criterion for states' participation in burden-sharing mechanisms; to the contrary, the Refugee Convention encourages all states to cooperate in finding a solution to a refugee problem.<sup>50</sup>

Moreover, it can be argued that resettlement of refugees from developed to developing states may yield positive changes in refugee-hosting countries. The financial and technical assistance of more developed states offered to developing states under bilateral resettlement agreements could help improve the standards of refugee treatment in a receiving state in the long run. On the one hand, a receiving state will be bound by the bilateral agreement to provide proper protection to the resettled refugees. This may translate into a more favourable national legal framework and integration programmes that over time can become available to all refugees in the territory and to newly arriving refugees. The financial assistance of the sending state can further improve the standards of living of the local population. On the other hand, appropriate safeguards should be in place to avoid monetisation of refugees' lives and ensure that the economic development of a receiving state takes place not *at the expense* of refugees, but *together with* refugees. Finally, the bilateral resettlement agreements may arguably change the perception of developing states of seeing refugees not as a burden but as an opportunity for development.

There is a related question whether the resettled refugees should be provided with the same level of socio-economic benefits to which they would have been entitled in a sending state. In the abovementioned UNHCR's statement, UNHCR emphasises that the refugees to be transferred to Cambodia under the bilateral resettlement arrangements originally sought protection in Australia<sup>51</sup> implying that the choice of the refugees should have been given certain consideration.

In this respect, there is a scholarly opinion that refugees are not expected to 'enjoy the same overall quality of life in the destination country as in the sending state'.<sup>52</sup> While the receiving state is expected to provide refugees with access to the same *range* of rights to which they would have been entitled in the sending state depending on their level of attachment, the *content* of the concerned rights should be established by the level generally provided to other aliens in the territory of the receiving state or its nationals.<sup>53</sup> Therefore, under this bilateral deal, Kazakhstan is not obliged to accord more favourable treatment to the Guantanamo asylum-seekers than is generally accorded to other foreign nationals or nationals of Kazakhstan depending on the right in question.

Based on the above analysis it can be concluded that the parties to the US-Kazakhstan agreement have not contravened any international refugee law principles and the Guantanamo detainees' rights under the Refugee Convention.

47 'UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation', *UNHCR* (26 September 2014), [www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html](http://www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html) (accessed 1 October 2016).

48 *Ibid.*

49 UNHCR, 'Global Trends: Forced Displacement in 2015' (2016), [www.unhcr.org/576408cd7.pdf](http://www.unhcr.org/576408cd7.pdf) (accessed 1 October 2016).

50 Convention Relating to the Status of Refugees, Preamble, para 4.

51 'UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation'.

52 James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge: Cambridge University Press, 2014), p. 46.

53 *Ibid.*, p. 47.

### 2.4.2 Should the US keep its responsibility towards the Guantanamo asylum-seekers resettled to countries with less developed asylum systems?

According to UNHCR, 'it is generally recognised that a State has jurisdiction, and consequently is bound by relevant international and regional refugee and human rights law obligations, if it has *de jure* and/or effective *de facto* control over a territory or over persons. This includes situations where a State exercises jurisdiction outside its territory.'<sup>54</sup> According to Hathaway, the type and scope of the rights accorded to asylum-seekers and refugees in the territory of a sending state depends on their level of attachment, from being physically present to lawfully residing.<sup>55</sup> The Refugee Convention imposes only one duty upon a sending country: to ensure that a person will not be transferred to the country of origin where he/she may be at risk of persecution.<sup>56</sup>

Refugee law scholarship further argues that, with respect to acquired rights, if a sending state wishes to transfer its protective responsibilities to another state, it has a duty of 'anxious scrutiny' to ensure that each of the entitlements – to which asylum-seekers would be entitled once under a state party's jurisdiction, is honoured in the destination country, and not just that there is protection against the risk of *refoulement* there.<sup>57</sup> Given that the Guantanamo asylum-seekers were under US jurisdiction, though outside its territory, the US is obliged to ensure that the resettled asylum-seekers would be granted the same range of rights if they would have been entitled to them in the US: including non-discrimination in respect of other refugees in the destination country (Article 3), religious freedom (Article 4), respect for personal status (Article 12), access to courts (Article 16), access to administrative assistance (Article 25), issuance of identity documents (Article 27), non-penalisation for illegal entry or presence and freedom from arbitrary detention (Article 31), and consideration for assimilation or naturalisation (Article 34).<sup>58</sup> Though, as was noted above, the scope and content of these rights should be established by the level generally provided to other aliens in the territory of the receiving state or its nationals.<sup>59</sup>

There is another argument why a sending state with more developed asylum practices should retain its responsibility towards refugees resettled to a state with less developed asylum practices. Otherwise, potential poor treatment of refugees in a new destination state may force them to seek asylum elsewhere. If the onward movements continue, such settlement will not be a durable situation. Thus, the sending state should be obliged to keep its responsibility and monitor the integration of refugees in the new state for at least some period to ensure that they receive adequate treatment. Moreover, though resettled refugees under bilateral agreements are no longer under the jurisdiction of a sending state, each state has a right to demand and enforce the proper implementation of an agreement. If a sending state provides financial assistance to a receiving state in the interests of the beneficiaries, i.e. refugees, the sending state should have a right and a bear a duty to monitor that the obligations assumed by the receiving state in respect of the refugees are fully carried out. To ensure proper monitoring, a bilateral agreement should stipulate a complaint mechanism whereby the resettled refugees could contact the sending state and draw its attention to any violation of their rights in the destination state. Finally, through this proper monitoring, the states with developed asylum practices can contribute to raising the refugee protection standards in receiving states and enhancing the overall refugee protection in other regions.

As has been mentioned earlier, there is an important difference between the bilateral resettlement agreements negotiated by the US for the Guantanamo detainees and other known bilateral resettlement agreements, such as EU-Turkey and Australia-Cambodia arrangements: the refugee problem of Guantanamo detainees was created with the direct involvement of the US. From the international refugee law perspective, resettlement of Guantanamo asylum-seekers is an unprecedented case. Some scholars find that the US is morally responsible for finding a solution for the Guantanamo asylum-seekers.<sup>60</sup> Moreover, the fact that the US cannot provide asylum to the Guantanamo asylum-seekers in its territory due to its internal policy should not be seen as a valid argument for shifting the US's responsibility to third states. Therefore, there is a valid argument that the US should continue to be responsible for the Guantanamo asylum-seekers under all its bilateral agreements; at least until their refugee problem is solved either through their permanent settlement or voluntary repatriation to a country of origin.

Regarding the specific US-Kazakhstan agreement, it should also be noted that before hosting the Guantanamo asylum-seekers, Kazakhstan had never had any resettlement or specific refugee integration programmes. Yet, Kazakhstan agreed to participate in this bilateral agreement and support the US in finding a solution for the Guantanamo asylum-seekers. On the one hand, this demonstrates that Kazakhstan, though still developing its national asylum system, is ready to support the refugee problems common to the international community. On the other hand, the country may not have adequate resources, both legal and non-legal, to provide efficient integration and permanent residency to the Guantanamo asylum-seekers. That is why the US should monitor the integration of Guantanamo asylum-seekers in their new asylum state to ensure that their rights are duly observed. Finally, the US itself is one of the top resettlement countries in the world.<sup>61</sup> Given the US's extensive expertise in integration of resettled refugees, the US could also

54 UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (UNHCR 2013) 1.

55 James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 171–90.

56 Convention Relating to the Status of Refugees, art 33.

57 Hathaway and Foster, *The Law of Refugee Status*, p. 41.

58 *Ibid.*, p. 40.

59 *Ibid.*, p. 47.

60 Darkee, 'Beyond the Guantanamo Bind', p. 735.

61 UNHCR, 'Global Trends: Forced Displacement in 2015', p. 3.

provide Kazakhstan with technical assistance in developing its refugee integration programme and improving refugee protection standards and practices in general.

### 3. Implementation of the US-Kazakhstan Resettlement Agreement

The text of the US-Kazakhstan bilateral agreement itself is not publicly available. Nonetheless, there have been a few media reports about the situation of the Guantanamo asylum-seekers in Kazakhstan and their integration-related concerns. This part will explore some of the concerns voiced by the Guantanamo asylum-seekers to establish whether there has been any breach of their rights under international refugee law and the national legislation of Kazakhstan. This analysis is important to ascertain the practical effect of the bilateral resettlement agreement, whether it has resulted or will result in a durable solution for the Guantanamo asylum-seekers and, consequently, whether it can be regarded as a good practice of expanding refugee protection space in new regions.

#### 3.1 *The sources for analysis*

The five Guantanamo detainees of Yemeni and Tunisian origin arrived in Kazakhstan in December 2014.<sup>62</sup> This was the only news that appeared in the local media as well. No more information about the Guantanamo asylum-seekers, their status in Kazakhstan has ever been the focus of attention of the Kazakhstani officials, local NGOs or media. In the absence of the text of the bilateral resettlement agreement in the public domain, the only sources of information that are available for analysis are the interviews of one Guantanamo ex-detainee, Mr Lufti Bin Ali, given to *Vice News* in 2015<sup>63</sup> and the most recent given to *The Guardian* in 2016.<sup>64</sup>

According to the above-mentioned sources, the Guantanamo ex-detainees arrived in Kazakhstan as asylum-seekers and were issued asylum-seekers' certificates. They were then settled into low-populated parts of Kazakhstan that are remote from the two largest cities of the country. The Guantanamo asylum-seekers are provided with free housing, local languages classes, and access to healthcare and medicine. They are free to leave their flat, attend a mosque, but are not allowed to leave their cities and travel to other places either within or outside Kazakhstan allegedly until the end of their two-year integration programme. Moreover, according to media reports, ex-detainees remain under constant surveillance by local police. The integration programme for the Guantanamo asylum-seekers is administered not by the national authorities, but by the Kazakhstani Red Crescent Society, a member of the International Federation of Red Cross and Red Crescent Societies.

This paper does not aim establish the accuracy of statements made in the media reports. Yet, these statements raise several concerns that the treatment of Guantanamo asylum-seekers may not be fully compliant both with the Kazakhstan's international refugee law obligations and its national legislation. The next section will explore these concerns to establish whether the Guantanamo asylum-seekers are in legal limbo.

#### 3.2 *The legal status of the Guantanamo asylum-seekers in Kazakhstan*

##### 3.2.1 *The asylum-seeker's status and access to the national RSD procedure*

According to media reports, the Guantanamo ex-detainees hold an asylum-seeker's certificate and it is not clear whether they have had or plan to have any refugee status determination (RSD) interviews with the local asylum authorities. This statement raises a concern because, in Kazakhstan, the status of an asylum-seeker is of a temporary nature<sup>65</sup> and does not lead to a permanent settlement, which is contrary to the objectives of resettlement as a durable solution.

Domestic refugee law stipulates that the decision on an asylum claim should be taken within three months of its registration, and this period can be extended only up to one calendar year if an additional background check is needed.<sup>66</sup> In case of the Guantanamo asylum-seekers, the fact that they hold an asylum-seeker certificate implies that they have formally applied for protection and their claims have been registered. Yet, if no decision has been taken on their asylum applications after almost two years since their arrival in Kazakhstan, this further implies the breach of the national RSD procedure. On the other hand, if duly processed through the national RSD procedure, the Guantanamo asylum-seekers would hardly be eligible for a refugee status. While they may satisfy the eligibility criteria<sup>67</sup> for refugee status which are equivalent to the criteria under Article 1A(2) of the Refugee Convention, they may further fall under one or more of the exclusion criteria<sup>68</sup> in Article 1F of the Convention. The fact that the US has not granted refugee

62 'Five Guantánamo Prisoners Flown to Kazakhstan for Resettlement', *The Guardian* (31 December 2014), [www.theguardian.com/us-news/2014/dec/31/five-guantanamo-prisoners-flown-to-kazakhstan-for-resettlement](http://www.theguardian.com/us-news/2014/dec/31/five-guantanamo-prisoners-flown-to-kazakhstan-for-resettlement) (accessed 1 September 2016).

63 Simon Ostrovsky, 'Life after Guantanamo: Exiled in Kazakhstan', *Vice News* (15 October 2015), [www.youtube.com/watch?v=dUBbxloGNaw](http://www.youtube.com/watch?v=dUBbxloGNaw) (accessed 30 September 2016).

64 Chris Owen, "'Here I Have Nobody': Life in a Strange Country May be Worse than Guantánamo", *The Guardian* (30 September 2016), [www.theguardian.com/world/2016/sep/30/worse-than-guantanamo-ex-prisoner-struggles-with-new-life-in-kazakhstan](http://www.theguardian.com/world/2016/sep/30/worse-than-guantanamo-ex-prisoner-struggles-with-new-life-in-kazakhstan) (accessed 30 September 2016).

65 The Law of Kazakhstan No. 2337 as of 19 June 1995 on the Legal Status of Aliens (Kazakhstan Aliens Law) art 4.

66 Kazakhstan Refugee Law, art 11(1).

67 *Ibid.*, art 1(1).

68 *Ibid.*, art 12.



status to any of the Guantanamo detainees in its territory and has never fully acquitted any of them of terrorism, coupled with the US CIA's reports on ex-detainees' reengagement in terrorism, can be regarded by Kazakhstani asylum decision-makers as serious reasons for excluding the Guantanamo detainees from refugee status.

Next, Kazakhstani legislation provides asylum-seekers only with the following socio-economic rights: a right to work and entrepreneurial activity, access to healthcare, and access to free interpretation services. The law does not provide any access to social protection, public housing, public aid or any other form of public relief to both asylum-seekers and convention refugees. In practice, housing and financial assistance to the most destitute asylum-seekers and refugees is provided by UNHCR through its implementing partners, one of whom is the Red Crescent Society of Kazakhstan.<sup>69</sup> Media reports suggest that the Guantanamo asylum-seekers have access to public relief and public housing. In this context, on the one hand the integration programme for the Guantanamo asylum-seekers with its housing benefits and monthly allowances can be argued to offer better treatment than is generally provided to other asylum-seekers and convention refugees in the country. On the other hand, the better social protection provided to the Guantanamo asylum-seekers does not resolve the main concern with their status: the asylum-seeker status is temporary and does not give grounds for a permanent residence status which is pre-requisite for naturalisation. This may be indicative of the intentions of Kazakhstan not to give any permanent status to the Guantanamo asylum-seekers, with its role being limited to offering an integration or rehabilitation programme. In this case, the resettlement of the Guantanamo asylum-seekers in Kazakhstan cannot be regarded as a durable solution for their refugee situation.

### 3.2.2 Restriction of the rights to move within the country and leave the country

Media reports suggest that Guantanamo asylum-seekers are not allowed to leave Kazakhstan or move and settle in another part of the country allegedly until the end of their two-year integration programme. Two important aspects need to be analysed here: the legality of the restrictions imposed by the Kazakhstani authorities on asylum-seekers' right to leave the country and their right to move within the country.

Re the latter, it is a well-recognised principle of international law that 'everyone has the right to leave any country, including his own' and to return to his country'<sup>70</sup> and that 'no one shall be arbitrarily deprived of the right to enter his own country.'<sup>71</sup> The Refugee Convention itself does not explicitly provide that a refugee has a right to leave the country of asylum. Yet, this right can be presumed from the content of Article 1C(4) that applies to those refugees who have left the country of asylum and re-established themselves in their country of origin and Article 28 (travel documents) that is applicable to those refugees who wish to travel outside the asylum country 'unless compelling reasons of national security or public order otherwise require.'<sup>72</sup> It follows that under international refugee law any refugee has a right to leave their country of asylum and return to their home country despite any existing risk of persecution. The Kazakhstani national refugee law explicitly recognises the right of any asylum-seeker to voluntary return to the country of origin or travel to another country.<sup>73</sup> It might be assumed that the restriction of the Guantanamo asylum-seekers' right to leave Kazakhstan, at least until the end of an integration or rehabilitation programme, was demanded by the US<sup>74</sup>. However, as was discussed earlier, a bilateral agreement must not violate the states' obligations under the multilateral treaty that is the Refugee Convention.<sup>75</sup> Therefore, any restriction of the Guantanamo asylum-seekers' right to leave the country should be regarded as non-compliant with international refugee law.

On the second point, the Refugee Convention provides that 'each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.'<sup>76</sup> Here, it is important to evaluate whether the movement of the Guantanamo asylum-seekers could be restricted due to any internal regulations applicable to other asylum-seekers or aliens with a temporary status in the country.

Domestic refugee law does not restrict refugees' and asylum-seekers' right to move and choose a settlement location in its territory apart from the requirement that asylum-seekers and refugees should inform the migration authorities on the change of their address within five working days thereof.<sup>77</sup> The Law on the Legal Status of Aliens in Kazakhstan further confirms a general right of any alien to freely move and choose the settlement location within the territory of Kazakhstan 'subject to limitations that can be imposed only for considerations of maintaining national security, public order, health and morality of the population and protection of rights of the nationals of Kazakhstan and other people.'<sup>78</sup>

69 Interview with a UNHCR Officer (Almaty, Kazakhstan, May 2016).

70 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(4).

71 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(4).

72 Refugee Convention Relating to the Status of Refugees, arts 1C(4) and 28.

73 Kazakhstan Refugee Law, art 8.1(6).

74 Ibid. (n 15).

75 International Law Commission (n 37) 22.

76 Refugee Convention Relating to the Status of Refugees, art 26.

77 Kazakhstan Refugee Law, art 8.2(5).

78 Kazakhstan Aliens Law, art 16.

It appears that Kazakhstan as a resettlement state may deny the Guantanamo asylum-seekers' right to move within the territory and choose another location only if there are any compelling reasons to do so due to the national security or public order considerations. According to a scholarly view, the movement and residence of asylum-seekers can be restricted only when it is necessitated by concrete circumstances and justified/proportionate in relation to such circumstances, e.g. in the aftermath of a refugee influx, and any restriction should not last longer than necessary.<sup>79</sup> Thus, it is important to understand whether Kazakhstan may have any compelling reasons to deny the Guantanamo asylum-seekers' right to move within the territory and what could constitute these compelling reasons.

As has been discussed in the previous point, the fact that the US has never acquitted any Guantanamo detainee as not being an 'enemy combatant'<sup>80</sup> and the reports about the re-engagement of some of the released detainees in terrorism can be seen by local decision-makers as compelling reasons to restrict the movement of the detainees on the grounds of security considerations. Nonetheless, such restriction should not be indefinite and should not lead to indefinite denial of a right to leave the territory of Kazakhstan. Otherwise, such restriction will contravene both states' obligations under international refugee law and human rights law. It would be rather regrettable if instead of a cell, the whole country became a detention centre for the Guantanamo ex-detainees.

### 3.2.3 Other prospects for permanent residence in Kazakhstan

As has been discussed above, an asylum-seeker's status does not provide an automatic right to permanent residence in Kazakhstan. It is important to consider whether Guantanamo asylum-seekers may have other ways to get a permanent residence in Kazakhstan and thus find a durable solution in this country.

Under domestic law, refugee status, like an asylum-seeker's status, is of a temporary nature.<sup>81</sup> All convention refugees are obliged to undergo an annual review of their status at the Ministry of Interior. The purpose of this review is to verify whether there have been any significant changes in a refugee's country of origin that would justify the cessation of a refugee status.<sup>82</sup> Moreover, a refugee status holder is not automatically accorded a permanent residence status, a pre-requisite for naturalisation, irrespective of the period of stay in the territory. A Convention refugee must apply for a residence permit on the same grounds as other aliens. As part of this procedure, all aliens must provide a bank statement on sufficient financial solvency and a written consent of the state of origin or an equivalent document confirming his/her right to permanently leave his/ her country of origin.<sup>83</sup> UNHCR finds that these general requirements in effect bar refugees and asylum-seekers from obtaining permanent residency in Kazakhstan since they are often unable to obtain these required documents due to the very nature of their status.<sup>84</sup>

It can be concluded that irrespective of an asylum-seeker or refugee status, the Guantanamo ex-detainees will not be able to obtain permanent residency in Kazakhstan under the national laws.

### 3.2.4 Does the US-Kazakhstan agreement lead to a durable solution?

The analysis of the implementation of the US-Kazakhstan resettlement agreement implies that it cannot be regarded as a durable solution for the Guantanamo asylum-seekers due to certain restrictions and legal gaps in the national legislation. The same concern has been voiced by Jens-Martin Mehler, Deputy Head of the ICRC regional delegation in Central Asia which administers the integration programme for the Guantanamo asylum-seekers, who finds that the Guantanamo asylum-seekers have no future in this country due to the restrictions of the Kazakhstani government.<sup>85</sup>

Essentially, the US-Kazakhstan bilateral agreement has put the Guantanamo asylum-seekers in legal limbo: if the agreement does not specifically demand that Kazakhstan provide a permanent residency status to the ex-detainees, they will never be able to get it through pursuing only local mechanisms designed for aliens in general.

The situation of the Guantanamo asylum-seekers could be resolved if Kazakhstan regularises this grey area by adopting relevant legislation on humanitarian asylum and integration of resettled refugees. Such internal legislation could ensure that the rights of the resettled refugees are duly observed and the integration process is carried out in a meaningful and efficient manner.

79 Chaloka Beyani, *Human Rights Standards and the Free Movement of People Within States* (Oxford: Oxford University Press, 2006), p. 111; Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Oxford: Oxford University Press, 1996), p. 247, Hathaway and Foster, *The Law of Refugee Status*, p. 248.

80 Darkee, 'Beyond the Guantanamo Bind', p. 707.

81 Kazakhstan Aliens Law.

82 Kazakhstan Refugee Law, art 11(5).

83 Regulations on the Issue of Temporary and Permanent Residency Permit to Foreigners and Stateless Persons in Kazakhstan Approved by the Order of the Minister of Interior No. 992 as of 4 December 2015, point 10.

84 UNHCR, *Submission by UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Kazakhstan* (UNHCR 2014), [www.refworld.org/pdfid/5541e1a24.pdf](http://www.refworld.org/pdfid/5541e1a24.pdf) (accessed 1 October 2016).

85 Owen, "Here I Have Nobody".

## 4. Bilateral resettlement agreements: broader implications for refugee protection

It follows from the analysis above that the US-Kazakhstan bilateral resettlement agreement has not resulted in a durable solution for the Guantanamo asylum-seekers, and as such, it cannot be regarded as good practice for refugee protection. Yet, this agreement, together with other US resettlement agreements with 29 countries, presents broader implications for a more efficient use of bilateral agreements in refugee protection in new regions.

First, the US-Kazakhstan bilateral resettlement agreement demonstrates that inter-state cooperation in refugee matters not only within the same region but between two distinct geographic regions is more than a mere theoretical possibility. Next, this agreement together with other similar bilateral US agreements implies that such cooperation is implementable as long as it serves the self-interests of the participating states. In the present case, the self-interest of the US's executive is explicitly evident, i.e. the closure of the Guantanamo detention facility. The self-interests of other participants are not anywhere expressed, but it appears that the US has succeeded in addressing the self-interests of some 30 states that agreed to support the US and host the Guantanamo refugees. Therefore, to achieve more progress on inter-state cooperation in refugee matters, such cooperation should be seen not as the end but rather as the means for achieving the states' self-interests.

Second, the US bilateral resettlement agreements have shown that privately negotiated asylum for concrete asylum-seekers are a new form of inter-state cooperation in refugee protection. Yet, it is important to include several safeguards in such agreements to avoid monetisation of refugees' lives and responsibility-shifting:

- a. A sending state must ensure that a refugee in a receiving state would be entitled by law and in practice to the same range of rights that he/she would have been entitled in the sending state and that the scope of treatment of the refugee will not be less favourable than generally accorded to other aliens and refugees in the receiving state. To this end, the sending state should be kept responsible for refugees for at least some period to ensure that their situation has been permanently resolved. Such safeguards will ensure that a resettlement agreement will not end up in shifting the responsibility from the sending state.
- b. The sending state should be bound to monitor the implementation of a bilateral agreement by the receiving state. Such monitoring will ensure that a receiving state will not use resettlement as an opportunity to improve its economic situation but would indeed provide meaningful protection to refugees.
- c. A refugee should have a right to know what he/she is entitled to in a resettlement state and should have a right to complain to the sending state if the receiving state has been violating a refugee's rights.
- d. Resettled refugees should be allowed to voluntarily leave the resettlement country and return either to their country of origin or seek asylum in a third country. This provision will ensure that the refugees will not end in a situation of an indefinite detention and their rights are duly respected.

Third, bilateral resettlement agreements may be used to encourage non-party states to follow the standards set by the Refugee Convention and the Refugee Protocol. For example, an agreement can contain a clause that the treatment of refugees in the receiving state should comply with the principles and standards set by the Refugee Convention. A similar practice exists in international commercial law where pre-defined INCOTERMS rules developed by the International Chamber of Commerce are regularly incorporated into international sales contracts to avoid uncertainties arising at the stage of contract performance, and thus these rules become binding on the parties.<sup>86</sup>

Fourth, a bilateral agreement can stipulate higher standards of refugee protection than otherwise provided by the Refugee Convention. Moreover, it can stipulate a monitoring mechanism and provide more leverage over the non-compliant states that is absent under the Refugee Convention regime. Such a monitoring mechanism will ensure that the bilateral agreement is properly implemented by the receiving state and the rights and interests of the beneficiaries are duly observed.

### *Long-term effects of bilateral resettlement agreements*

There is a scholarly opinion that 'novel and long-range thinking' should be called for when addressing the contemporary refugee issues.<sup>87</sup> Thus, the impact of bilateral resettlement agreements should be evaluated not only on a short-term basis but also on a long-term basis. In the short term, a bilateral resettlement agreement may benefit only a small number of resettled refugees. Yet, in the long run, the sending states with more developed asylum systems can influence

<sup>86</sup> Jan Ramberg, *ICC Guide to Incoterms 2010: Understanding and Practical Use* (ICC Publishing, 2011).

<sup>87</sup> Guy S. Goodwin-Gill, 'International Refugee Law – Yesterday, Today, but Tomorrow?' (2016), [www.blackstonechambers.com/news/international-refugee-law-yesterday-today-tomorrow/](http://www.blackstonechambers.com/news/international-refugee-law-yesterday-today-tomorrow/) (accessed 1 October 2016).

the positive changes in the overall refugee protection standards and practices in states with less developed asylum systems. For example, the US has one of the largest resettlement programmes in the world. Annually, it provides tens of thousands of quotas for UNCHR-administered resettlement of refugees from other parts of the world. In 2015 as well, the US accepted the highest number of refugees as a resettlement country (66,500 persons).<sup>88</sup> Given the US's expertise in the integration of resettled refugees, it could provide the essential technical assistance and advisory support to the states with less developed refugee integration programmes.

Unfortunately, there is nothing to suggest that forced displacement will cease in any foreseeable future. Such population displacements will continue putting more and more burden on both developing and developed states. Thus, it appears of paramount importance to build the capacity and resilience of a bigger number of states to ensure more efficient and balanced inter-state cooperation globally. UNHCR has been playing the leading role in providing immediate protection to refugees in many developing states. However, if the UNHCR's annual budget (US \$7,232 billion in 2015)<sup>89</sup> were divided by the number of the refugees under its mandate (16.1 million in 2015)<sup>90</sup>, UNHCR can roughly spend only 12 US cents per day to take care after each of a mandate refugee in poorer states. Apparently, this amount is unlikely to lead to any efficient structural changes in refugee protection and treatment in developing states.

Ultimately, providing refugees with primary protection rests with states. That is why states can and should be more proactive in promoting better refugee protection in developing states both within the same region and even between different regions. In this respect, through bilateral agreements and their built-in enforcement mechanisms more developed states can exert much more influence than UNHCR on raising refugee treatment and human rights standards in the states with less developed refugee and human rights practices. Provided the safeguards to avoid monetisation of refugees are in place, the strategic use of bilateral resettlement agreements can promote more efficient refugee protection and support the development of host countries and host communities in the long run. Bilateral resettlement agreements can thus expand protection space in the existing and new regions.

## 5. Conclusions

This paper aimed to assess whether bilateral resettlement agreements privately negotiated by the US for Guantanamo ex-detainees may have resulted in efficient refugee protection and a durable solution of their refugee situation. It further aimed to examine to what extent and under what conditions bilateral resettlement agreements could promote more efficient refugee protection in regions with less developed asylum practices.

To this end, the paper has analysed a bilateral resettlement agreement between the US and Kazakhstan, pursuant to which five ex-detainees of the US detention facility in Guantanamo Bay were transferred to Kazakhstan in 2014. The analysis has established that this agreement cannot be regarded as a good practice of refugee resettlement under bilateral arrangements at least for two reasons. First, due to the restrictions of Kazakhstani national legislation, the Guantanamo asylum-seekers will hardly get any permanent settlement in this country. Thus, their resettlement cannot be considered as a durable solution for a refugee problem. Second, the restriction of some of the rights of the Guantanamo asylum-seekers, such as the right to freedom of movement and the right to leave the resettlement country, raises a concern as contravening international refugee and human rights law and the national legislation of the receiving country.

Nonetheless, the US-Kazakhstan agreement presents several important implications for the use of bilateral resettlement agreements in general. If used in a strategic manner and with a due regard to human rights, it is argued that bilateral resettlement agreements in general have a potential to become an efficient mechanism of inter-state cooperation in refugee protection not only within the same region but also between diverse geographic regions so long as such cooperation serves the self-interests of the participating states. Next, bilateral resettlement agreements can provide more efficient refugee protection and offer a durable solution, subject to introducing safeguards to avoid monetisation of refugees and responsibility-shifting. Such safeguards could include the introduction of a monitoring mechanism for proper implementation of states' refugee obligations that is absent in the Refugee Convention. Finally, in the long run, such bilateral agreements can improve asylum practices and raise refugee protection standards in states with developing asylum systems. Through bilateral agreements, the sending states with developed asylum systems could play a key role in building the capacity and resilience of the resettlement states and expanding protection space in new regions. Thus, the bilateral resettlement agreements have a potential to achieve more meaningful refugee protection not only for the existing but also for future refugee situations.

88 UNHCR, 'Global Trends: Forced Displacement in 2015', p. 3.

89 UNHCR, 'Update on Budgets and Funding for 2015 and 2016 EC/67/SC/CRP.7' (2016), [www.unhcr.org/excom/standcom/570272579/update-budgets-funding-2015-2016.html](http://www.unhcr.org/excom/standcom/570272579/update-budgets-funding-2015-2016.html) (accessed 1 October 2016).

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# Non-refoulement under the Inter-American Human Rights System

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## Abstract

The cornerstone of refugee protection, the principle of *non-refoulement* prohibits the expulsion of an individual to any territory where his life or freedom may be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; or where he may be submitted to torture or other cruel, inhuman or degrading treatments or punishments.

First established in Article 3 of the 1933 Convention relating to the Status of Refugees, the prohibition of *refoulement* has been reaffirmed in international law during the last century, be it through its progressive 'positivisation' in several treaties and soft-law instruments, or by its crystallisation in customary international law. For its humanitarian character, the principle was rapidly transposed to the other regimes of the protection of the human person (e.g., human rights law and international humanitarian law). As a direct consequence of this expansion, the principle had its scope and content enlarged to embrace other persons rather than just refugees and asylum seekers.

As an open concept, prescribed in general and abstract terms, especially in human rights treaties, the scope of the protection deriving from *non-refoulement* may change depending upon the interpretation given by the relevant authorities and tribunals to terms such as, inter alia, 'torture,' 'inhuman and degrading treatment,' 'persecution'. This subjectivity confers to international supervisory organs a distinct role in delineating the scope of the principle within their jurisdictions.

In this sense, the purpose of this work is to identify the scope and content of *non-refoulement* under the Inter-American Human Rights System. The article so concludes that the dimension of *non-refoulement* under the IAHRs is particularly broader than in other jurisdictions.

## Keywords

*Non-refoulement*, IAHRs, 1933 Convention, persecution, torture, inhuman and degrading treatment



## 1. Introduction

*Non-refoulement* is a cardinal principle of refugee law. It protects a refugee from devolution or expulsion to any territory where he may suffer persecution or may be subjected to torture or other cruel, inhuman or degrading treatments or punishments.

First proclaimed in Article 3 of the 1933 Convention relating to the Status of Refugees,<sup>1</sup> the prohibition of *refoulement* has been reaffirmed in international law throughout the last century – be it through its progressive *positivisation* in several treaties and soft-law instruments, or by its crystallisation in customary international law.<sup>2</sup> For its humanitarian character, the principle of *non-refoulement* did not stay circumscribed to the realm of refugee law; on the contrary, it was rapidly absorbed by other branches of international law, e.g., human rights law and international humanitarian law. As a major consequence, it had its scope expanded to embrace other persons rather than just refugees and asylum seekers.

As an open concept, prescribed in general and abstract terms, especially in human rights treaties, the scope of the protection deriving from *non-refoulement* may change depending upon the interpretation given by the relevant authorities and tribunals to key terms such as ‘torture’, ‘inhuman and degrading treatment’, ‘persecution’, among others.<sup>3</sup> This *subjectivity* confers to international courts and national authorities enough leeway to expand the scope of the principle according to the *cas d’espèce*.

In this sense, the purpose of this article is to identify the contours of *non-refoulement* under the Inter-American Human Rights System (IAHRS). Attention will at first be turned to the progressive evolution and consolidation of the concept of *non-refoulement* in International Law. It then shifts to analyse *non-refoulement* under international law of human rights – both universally and regionally – focusing mainly on the role of the regional systems of human rights protection.

Secondly, the work will analyse the structure of the IAHRS in order to investigate *non-refoulement* in the light of the inter-American *corpus juris*. The author dwells upon regional treaties and the case law of the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IAComHR) concerning the topic as to determine the dimension of the principle within the region. The article so concludes that the dimension of *non-refoulement* under the IAHRS is particularly broader, both *ratione materiae*, *ratione personae* and *ratione loci*, than in other jurisdictions. It does not mean, however, that the dimension of *non-refoulement* has been exhausted: on the contrary, the principle/rule is still expanding its scope and content, and Latin America has proven to be a fertile terrain.

## 2. *Non-refoulement* in refugee law

The idea that a State shall not expel an individual to other territories under certain circumstances is relatively recent.<sup>4</sup> In the beginning non-devolution reflected a widespread sentiment that those fleeing their own governments were somehow worthy of protection.<sup>5</sup> However, it was not until 1933 that *non-refoulement* gained the status of a treaty-based provision in Article 33 of the 1933 Refugee Convention. *In litteris*:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.<sup>6</sup>

Even counting on less than 15 ratifications, the 1933 Convention represented an important step towards the consolidation of the principle of *non-refoulement* in International Law.<sup>7</sup>

Following the end of World War II, a new age in international law started to flourish. Inaugurated with the adoption of the Universal Declaration of Human Rights,<sup>8</sup> this epoch would be marked by the elevation of the human person to the centre of the international legal order, a process called the *humanisation* of international law.<sup>9</sup>

In this sense, the humanitarian crises that engulfed Europe in the period demanded a new, and sophisticated, legal instrument to address the challenges of refugee protection. The 1951 Convention, elaborated under this context,<sup>10</sup>

1 Convention relating to the International Status of Refugees (adopted 28 October 1933) League of Nations, Treaty Series Vol. CLIX No. 3663 (henceforth ‘1933 Convention’).

2 UNHCR Refugee Policy and Practice, ‘The Principle of *Non-Refoulement* as a Norm of Customary International Law’, available at [www.refworld.org/docid/437b6db64.html](http://www.refworld.org/docid/437b6db64.html).

3 J. Pirjola, ‘Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept’, *International Journal of Refugee Law*, 19 (2007), pp. 639–60, at p. 644.

4 G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007) 202.

5 *Ibid.*

6 Article 3 of the 1933 Convention.

7 It would be reaffirmed in several other documents, such as Article 4 of the Provisional Arrangement Concerning the Status of Refugees Coming from Germany (1936), and Article 5 of the Convention Concerning the Status of Refugees Coming from Germany (1938).

8 Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/810 (Dec. 10, 1948) (‘Universal Declaration’).

9 T. Meron, *The Humanization of International Law* (The Hague: Martinus Nijhoff, 2006).

10 Humanitarian in character, the 1951 Convention is one of the most widely accepted treaties in contemporary international law, binding upon around 150 States.

has enlarged the scope of refugee protection while extending the legal definition of a *refugee*.<sup>11</sup> Unlike its predecessor, the 1951 Convention was ratified by almost 150 States remaining one of the most universally accepted treaties in contemporary international law.

Among other innovations brought about by the 1951 Convention, Article 33(1) prescribes *non-refoulement* in the following terms:

1. No Contracting State shall expel or return '*refouler*' a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>12</sup>

As one may perceive, the first part of Article 33 states that 'in any manner' a Contracting State will expel or repel a refugee to a territory in which he fears persecution. Article 42(1) also reinforces this interdiction while prohibiting reservations to Article 33.<sup>13</sup> However, the second part of the provision excludes from the protection against *refoulement* those persons who do not deserve refugee protection for having committed serious international crimes, actions against the principles and purposes of the UN, or who are seeking to evade legitimate prosecution for serious domestic crimes.<sup>14</sup> It corroborates with the idea that the principle of *non-refoulement* as prescribed in Article 33 will not encompass those who do not meet the criteria established in Article 1(A)(2) of the 1951 Convention.<sup>15</sup>

Therefore, one can conclude that the scope of the principle of *non-refoulement* conceived under the *corpus juris* of refugee law is limited to those individuals who have successfully fulfilled the criteria contained in the legal definition of refugee, or who are waiting for its recognition (e.g., asylum seekers).

However, for its humanitarian character, *non-refoulement* transcended refugee law finding eloquent expression in other branches of international law. In this sense, it was rapidly incorporated into human rights treaties<sup>16</sup> and international humanitarian rules.<sup>17</sup>

Besides the 1951 Convention, a myriad of other treaties forbids the practice. At the universal level, three are the main treaties prohibiting *refoulement*: the Fourth Geneva Convention (1949), the International Covenant on Civil and Political Rights (1966),<sup>18</sup> and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984).<sup>19</sup> In Africa: the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969)<sup>20</sup> and the African Charter on Human and Peoples' Rights (1981).<sup>21</sup> Within the Inter-American jurisdiction: the American Convention on Human Rights (1969),<sup>22</sup> the Inter-American Convention on Extradition (1981),<sup>23</sup> the Inter-American Convention to Prevent and Punish Torture (1985),<sup>24</sup> and the Cartagena Declaration (1984). In Europe: the European Convention on Human Rights (1950).<sup>25</sup> *Non-refoulement* is also well crystallised in customary international law.<sup>26</sup>

### 3. *Non-refoulement* in international human rights law

As already mentioned, the principle of *non-refoulement* can be identified in several contexts; from refugee law to human rights treaties and humanitarian norms.<sup>27</sup> In a human rights context, *non-refoulement* is regarded as *an obligation not to expel*, which can be distinguished – for didactic purposes – in two categories: a prohibition corollary of the human

11 Article 1A(2) of the 1951 Convention reads as follows: 'the term "refugee" shall apply to a person who (...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

12 Article 33 of the 1951 Convention.

13 Article 42 (1) states that: [a]t the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36–46 inclusive.

14 J.C. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press, 2014) 524.

15 Article 1(A)(2) of the 1951 Convention.

16 Unlike Article 33 of the 1951 Convention, *non-refoulement* under human rights law do not comport exceptions, as we will see below.

17 Article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (or simply 'Fourth Geneva Convention').

18 International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, (hereinafter ICCPR).

19 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 189 UNTS 150 (henceforth Convention Against Torture or CAT).

20 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, (1974) 1001 UNTS 45 (hereinafter 'OAU Convention').

21 African Charter on Human and Peoples' Rights, (1986) 21 ILM 58 (henceforth 'African Charter', 'Banjul Charter' or simply 'ACHPR').

22 American Convention on Human Rights, (1978), B-32 OAS Doc OEA/Ser.K/XVI/1.1.doc.65, Rev 1, Corr 1 of 1 of 7 Jan 1970 (henceforth 'American Convention', 'Pact of San Jose' or simply ACHR).

23 Inter-American Convention on Extradition, (1992) B-47 OAS Treaty Series n 60 (henceforth 'Convention on Extradition').

24 Inter-American Convention to Prevent and Punish Torture, (1987) A-51 OAS Treaty Series n 67 (henceforth 'Inter-American Convention').

25 European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth ECHR).

26 UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law*. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: [www.refworld.org/docid/437b6db64.html](http://www.refworld.org/docid/437b6db64.html) [accessed 22 September 2015].

27 S. Jaquet, 'The cross-fertilization of humanitarian law and international refugee law', *International Review of the Red Cross*, 83 (2001), pp. 658–64.

right to asylum, and one implicitly inferred as an essential obligation of an absolute prohibition (e.g., torture, and other cruel, inhuman and degrading treatments or punishments).

Another distinction concerns the scope of the protection provided by human rights law: differently from refugee law,<sup>28</sup> in a human rights context, the focus is centered on the individual as a *human*, irrespectively of his migratory status. In other words, even if a refugee has lost his status – losing the protection provided by refugee law – he will be protected by human rights law. Therefore, international human rights law ends up serving as a *safety-net* to those individuals who do not benefit from refugee protection.

This section will now examine *non-refoulement* under the light of human rights law – both universally and regionally.

### 3.1 The universal level

At the universal plane, as already mentioned, there are several human rights treaties and soft-law instruments forbidding *refoulement*. Among those, one could select two widely accepted treaties: the ICCPR,<sup>29</sup> and the Convention against Torture.<sup>30</sup>

#### 3.1.1 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention against Torture is clear while prohibiting a State to ‘expel or extradite a person to another State where there are substantial grounds for believing that [s]he would be in danger of being subjected to torture’,<sup>31</sup> independently of her past activities.<sup>32</sup> The scope of protection guaranteed under CAT is considerably wider than the one provided by the 1951 Convention.<sup>33</sup>

Differently from Article 33 of the 1951 Convention, Article 3 of CAT does not comport exceptions to the prohibition of *refoulement*, and it is widely accepted that the prohibition of torture is *jus cogens*. It also encompasses the so-called *chain refoulement* (or *indirect refoulement*), meaning that a State shall not send an individual to a country from where he can be subsequently expelled to a third country, where he may suffer torture.<sup>34</sup>

In this context, *non-refoulement* is strictly circumscribed by the definition of torture contained in Article 1 of the Convention, which reads:

[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>35</sup>

One may extract from the aforementioned definition three main features of the protection guaranteed by CAT: *non-refoulement* may not encompass protection against cruel, inhuman or degrading treatments or punishments;<sup>36</sup> torture shall be conducted by the State or have its acquiescence; any pain or suffering arising only from lawful sanctions does not amount to torture.<sup>37</sup>

#### 3.1.2 The International Covenant on Civil and Political Rights (ICCPR)

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.<sup>38</sup>

28 E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement: Opinion’, in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge, 2003), p. 159.

29 Binding upon 168 States. All States that have ratified or adhered to the American Convention have equally ratified the ICCPR.

30 Binding upon 158 States. From all States that have ratified the American Convention, only Barbados, Dominica, Grenada, Haiti, Jamaica and Suriname did not ratify the CAT.

31 Article 3(1) of the Convention against Torture.

32 A. Duffy ‘Expulsion to Face Torture? *Non-refoulement* in International Law’, *International Journal of Refugee Law*, 22 (2008), p. 380.

33 B. Gorlick, ‘The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees’, *International Journal of Refugee Law*, 11 (1999), p. 481.

34 UN COMMITTEE AGAINST TORTURE, *Korban vs. Sweden*, Judgment of 16 Nov. 1998, CAT/C/21/D/088/1997.

35 Article 1 of the Convention Against Torture.

36 Duffy, ‘Expulsion to Face Torture?’.

37 Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 302.

38 Article 7 of the ICCPR.

In this regard, according to the ICCPR, it is forbidden to expel an individual to a territory where he may be submitted to those ill-treatments.<sup>39</sup> In this case, the prohibition on *refoulement* is inferred as a component of the absolute prohibition of torture as well as inhuman and degrading treatments.<sup>40</sup> Assume the contrary would confront the very spirit of the Covenant. One may see that the threshold between torture and inhuman and degrading treatments does not exist under ICCPR. Thus, *non-refoulement* under Article 7 of the ICCPR is broader than the one enshrined in Article 3(2) of the Convention Against Torture.

### 3.2 The regional level

The regional systems of human rights protection emerged in the awakening of the already mentioned process of *humanisation* of International Law, marking the emancipation of the human person *vis-à-vis* her own State.<sup>41</sup> Each system counts upon judicial and *quasi*-judicial institutions to fulfill its ultimate aims: to safeguard, supervise and enforce fundamental rights as prescribed in regional human rights treaties. They have been serving, *grosso modo*, as instruments to penalise States *vis-à-vis* human rights violations perpetrated against individuals or groups of individuals – who have *locus standi* before those instances. One shall perceive that the primary consequence of the abovementioned process is also a central feature of those systems: the reaffirmation of the individual as subject and the ultimate addressee of International Law.

One can identify three regional systems of human rights protection: the European system, structured upon the European Convention; the inter-American system, based upon the American Convention; and the African system, incumbent to safeguard the Banjul Charter.

Once *non-refoulement* is prescribed in one of those treaties, States may now be held responsible, before an international court, for its violation. Those institutions are also incumbent to interpret regional human rights instruments and – consequently – key terms as ‘torture’, ‘inhuman treatment’, ‘persecution’.

In this topic, we will dedicate our attention to the European and African systems and their relation to *non-refoulement*. The next section is entirely devoted to analysing the inter-American system.

#### 3.2.1 The European Human Rights System (EHRS)

The European Human Rights System (EHRS) is erected upon the European Convention, adopted in 1950. Its judicial body is the European Court of Human Rights (ECtHR). For its *maturity*, the decisions adopted by the European Court have a considerable influence in other jurisdictions, serving, not rarely, as parameters to other international and national tribunals.

The case-law of the ECtHR referring to *non-refoulement* encounters strong support in the absolute prohibition of torture and other cruel, inhuman and degrading treatments or punishments, prescribed in Article 3 of the European Convention.<sup>42</sup> Like Article 7 of the ICCPR, the prohibition on *refoulement* under the ECHR is implicitly regarded in the absolute prohibition of torture as well as other cruel, inhuman and degrading treatments.<sup>43</sup>

In the case of *Soering v. UK*, the Court understood that extraditing a person to a territory where he would suffer torture or other inhuman or degrading treatments or punishments would breach the very spirit of Article 3.<sup>44</sup> In the case of *Chahal v. UK*, the ECtHR had the occasion to affirm that the absolute prohibition contained in the wording of Article 3 encompasses expulsion, independently of the past activities of the individual.<sup>45</sup> The Court stated that:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however, undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the UN 1951 Convention on the Status of Refugees.<sup>46</sup>

More recently, in the case of *Hirsi Jamaa v. Italy*, the ECtHR had the occasion to review the extraterritorial application of the principle of *non-refoulement*.<sup>47</sup>

39 Duffy, ‘Expulsion to Face Torture?’, p. 382.

40 Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 208.

41 A.A.C. Trindade, *International Law for Humankind: Towards a new Jus Gentium* (2nd edn., The Hague: Martinus Nijhoff, 2010), p. 590.

42 Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 311.

43 Article 3 of the European Convention reads: ‘[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment.’

44 ECtHR, *Soering v. UK*, Merits and Just Satisfaction, Judgment of 7 July 1989, Appl.no.14038/88, para 88.

45 ECtHR, *Chahal v. UK*, para 80.

46 Ibid.

47 G S Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement’, *International Journal of Refugee Law*, 23 (2011), p. 450.

Besides the European Convention, the Charter of Fundamental Rights of the EU also has provisions prohibiting *refoulement*. Articles 18 and 19 recognise the right to asylum as a human right while interdicting the removal, expulsion or extradition of an individual 'to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'<sup>48</sup>

### 3.2.2 The African Human Rights System (AHRs)

Erected upon the Banjul Charter – one of the most widely accepted treaties in Africa – the African system is the newest and consequently the less developed regional system of human rights protection. The Charter was adopted under the auspices of the former Organization of African Unity (OAU), in 1981, entering into force five years later. Besides prescribing civil, political, economic, social and cultural rights, the Charter also has provisions relating to *peoples' rights*.<sup>49</sup> To supervise those fundamental rights, the Charter counts upon the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court on Human and Peoples' Rights (ACTHPR)<sup>50</sup> – this last having contentious, conciliatory and advisory powers.<sup>51</sup>

Under the Banjul Charter, one could identify *non-refoulement* implicitly inferred in the absolute prohibition of torture (Article 5), and as an essential part of the right to asylum (Article 12).<sup>52</sup> However, neither the ACmHPR nor the ACTHPR had the opportunity to determine the dimension of the principle within their jurisdiction. One shall not forget that the ACTHPR is still *in statu nascendi*.

Besides the Banjul Charter, another widely accepted treaty in Africa is the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969. More than a *replica* of the 1951 Convention, the OAU Convention tries to address regional issues linked to refugee protection in Africa. If nowadays the refugee problem is regarded from a human rights perspective, the approach chosen by the OAU Convention was heavily influenced by the context of the epoch, i.e., wars of independence and the process of decolonisation.<sup>53</sup> Among the innovations brought about by the OAU Convention, one could identify the extended refugee definition which heavily influenced the Cartagena Declaration. By expanding the refugee definition, the Convention consequently expands the scope of *non-refoulement*, prescribed in its Article II (3).<sup>54</sup>

## 4. The Inter-American Human Rights System

In order to duly determinate the dimension of *non-refoulement* under the IAHRs, it is imperative to analyse – preliminarily – the structure, functions and legal basis of the inter-American institutions.

### 4.1 The structure and functioning of the Inter-American Human Rights System

One can identify the political origins of the inter-American system in the 19th century.<sup>55</sup> However, the current inter-American system of protection of human rights would start to be erected not before 1948, with the adoption of the OAS Charter<sup>56</sup> and, subsequently, the American Declaration. The IAHRs would be entirely structured in the second half of the 20th century following the creation of the IACmHR<sup>57</sup> and the adoption of the American Convention, establishing the IACTHR – a genuine *judicial apparatus* for the supervision and enforcement of fundamental rights within the region.<sup>58</sup>

The normative core upon which the system operates is composed of treaties, soft-law instruments, judicial decisions and other documents; forming a truly body of law, the inter-American *corpus juris*. Besides the treaties already mentioned, the inter-American *corpus juris* also encompasses the two Additional Protocols to the American Convention, the Inter-

48 Charter of Fundamental Rights of the European Union, (2012), 2012/C 326/02, Article 19(2).

49 Article 20(1) of the Banjul Charter.

50 The ACTHPR was created by the Burkina Faso Protocol. Only 26 States have ratified the Protocol since its adoption in 1998.

51 M. Shaw, *International Law* (7th edn., Cambridge: Cambridge University Press, 2014), p. 394.

52 According to Article 12(2) of the Banjul Charter: 'Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.'

53 M Sharpe, 'Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011', *African Journal of International and Comparative Law*, 58 (2013), p. 57.

54 Article II(3) states that: '[n]o 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 Art I, paras 1, 2.'

55 S. Davidson, *The Inter-American Human Rights System* (Aldershot, 1997), p. 1.

56 All OAS member States have human rights obligations under the OAS Charter. However, some have voluntarily assumed additional obligations under the American Convention and other human rights treaties.

57 The IACmHR was created by a resolution of the Fifth Meeting of Consultation of the Ministers of Foreign Affairs at Santiago in 1959. It would be incorporated into the structure of the OAS not before 1967, with the adoption of the Protocol of Buenos Aires.

58 The American Convention was largely influenced by the American Declaration. Even devoid of binding force, the Declaration has a distinguished legal status deemed as an authoritative interpretation of the fundamental rights enshrined in Article 5(k) of the OAS Charter. The Court had the occasion to acknowledge its normative status in its tenth advisory opinion. See also IACTHR, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Colombia, Advisory Opinion OC-10/89, Judgment of 14 July 1989, Series A n 10, IHRL 3429 (IACHR 1989).

American Convention against Torture, the Inter-American Convention on Extradition, the Inter-American Convention on Forced Disappearance of Persons, the Inter-American Convention on the Prevention of Violence against Women, the Cartagena Declaration, among others.<sup>59</sup>

As already mentioned, the IAHRs has a dual structure. All OAS member States<sup>60</sup> have human rights obligations under the OAS Charter, whilst some have assumed additional obligations under the American Convention<sup>61</sup> and other human rights treaties.

Consequently, the IACmHR has a dual nature: it is an autonomous organ of the OAS and has a mandate founded in the American Convention. The Commission is incumbent upon the 'promotion of the observance and defense of human rights' within the inter-American region.<sup>62</sup> To duly perform its duties, the IACmHR possesses functions of both political and *quasi-judicial* nature.<sup>63</sup>

While exercising its political functions, the Commission can publish reports in respect of human rights violations in particular countries,<sup>64</sup> conduct *in loco* observations in a State, and serve the OAS as an advisory organ.<sup>65</sup>

When performing its *quasi-judicial* or *semi-judicial* functions, the IACmHR can analyse individual petitions<sup>66</sup> and claims pertaining to human rights violations, demand data, and make recommendations to States once it verified the exhaustion of domestic remedies;<sup>67</sup> it can also submit cases before the IACtHR<sup>68</sup> – acting as a kind of *Parquet*. One shall notice that the Commission is not a *titulaire* of rights, it is rather a mechanism through which the alleged victims – the real addressees of the Law – can access the Court. Also, in accordance with Article 25 of its Rules of Procedure, the Commission can adopt precautionary measures when the circumstances may pose a 'risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.'<sup>69</sup> Once *refoulement* consists of a *summary reconduction*,<sup>70</sup> those measures can be especially helpful to asylum seekers facing an imminent risk of expulsion.

The IACtHR is the adjudicatory organ of the IAHRs. It is an autonomous judicial institution whose primary purpose is the application and interpretation of the American Convention.<sup>71</sup> Contrary to the IACmHR, the IACtHR was created by the Convention, operative since 1981. To duly perform its mandate, the Court exercises its jurisdiction in two capacities: an advisory capacity<sup>72</sup> and an adjudicatory or contentious capacity.<sup>73</sup>

In its adjudicatory capacity, the Court hears cases relating to violations to the American Convention and its Protocols.<sup>74</sup> The IACtHR also has competence *ratione materiae* to assess violations to other treaties,<sup>75</sup> such as the Inter-American Convention against Torture.<sup>76</sup> However, the Court will only judge cases where the State in question is party to the American Convention and had voluntarily accepted the contentious jurisdiction of the IACtHR. The decisions adopted

59 According to one commentator, the inter-American *corpus juris* also comprehends: the statutes of both the IACtHR and the IACmHR, their case law, and agreements and recommendations from different OAS organs (L. Burgorgue-Larsen and A. Úbeda de Torres, *Les Grandes décisions de la Cour interaméricaine des droits de l'homme* (Brussels, 2008)).

60 The member States are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Saint Lucia, Suriname, St Kitts and Nevis, Trinidad and Tobago, Uruguay, Venezuela.

61 Davidson, above n 74,8.

62 Article 1(1) of the Rules of Procedure of the IACmHR.

63 It is noteworthy that the functions of the IACmHR may vary depending upon the ratification – or not – of the American Convention and the recognition of the adjudicatory jurisdiction of the IACtHR.

64 In the light of Article 60(c) of its Rules of Procedure, the Commission has discretionary powers to decide to – and how – publish its reports. This leeway can be used, as already mentioned, in a way as to penalise States who are in disagreement with their human rights obligations, or the other way around. In this way, if the Commission perceives that a particular State has been adopting substantive measures in order to repair human rights violations, it can decide not to publish them.

65 Article 18 of the Statute of the IACmHR.

66 As an OAS organ, the IACmHR can analyse individual petitions relating to violations to the American Declaration vis-à-vis OAS member States. As a creature of the American Convention, the Commission is competent to assess individual claims against States for violations to the American Convention, even if they are not parties to the Pact of San José.

67 Article 20(c) of the Statute of the IACmHR.

68 Article 61(1) of the American Convention.

69 Article 25 of the Rules of Procedure of the IACmHR.

70 Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 201.

71 Article 1 of the Statute of the IACtHR.

72 Ruled by Article 64 of the American Convention.

73 Ruled by Articles 61, 62 and 63 of the American Convention.

74 Article 63(1) of the American Convention.

75 Burgorgue-Larsen also observes that the IACtHR can analyse violations to other inter-American treaties rather than just to the American Convention, once two conditions are fulfilled: the treaty ought to foresee the competence of the Court; the State accused must be party to the treaty (L. Burgorgue-Larsen, 'El Sistema Interamericano de Protección de los Derechos Humanos: entre classicismo y creatividad', [www.univ-paris1.fr/fileadmin/IREDES/Contributions\\_en\\_ligne/L\\_BURGORGUE-LARSEN/12\\_Burgorgue-Larsen\\_CIDH.pdf](http://www.univ-paris1.fr/fileadmin/IREDES/Contributions_en_ligne/L_BURGORGUE-LARSEN/12_Burgorgue-Larsen_CIDH.pdf)).

76 IACtHR, *Vélez Loor vs. Panamá*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement of 23 Nov. 2010, Series C No. 218, paras 33–34. See also IACtHR., *Case of 'the Street Children' v. Guatemala*, Merits, Judgement of 19 Nov. 1999, Series C No. 63, para 249; IACtHR., *Case of the "White Van" v. Guatemala*, Merits, Judgement of 8 Mar. 1998, Series C No. 37, para 136.

by the Court are definitive and binding upon those States. For that, its adjudicatory jurisdiction ought to be expressly accepted by the States. It is noteworthy that, of the states that have ratified the American Convention,<sup>77</sup> a robust majority have recognised the contentious jurisdiction of the IACtHR.<sup>78</sup>

The Court's advisory capacity is broader, encompassing the inter-American *corpus juris*. It is intended to 'assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field.'<sup>79</sup> Even devoid of binding force, the advisory opinions adopted by the Court have the status of authoritative interpretations. Responding to requests of both member States and OAS organs,<sup>80</sup> the IACtHR can interpret provisions of the American Convention as well as from other treaties concerning the protection of fundamental rights within the inter-American states. The Court can also provide opinions regarding the compatibility of any domestic laws with the abovementioned treaties – something close to a *judicial review*.<sup>81</sup> In this sense, the Court can interpret other instruments comprehended by the inter-American *corpus juris*. In its first advisory opinion, the Court have considered the meaning of the expression *other treaties*, contained in Article 64(1) of the American Convention. It was then decided that the Court can receive a request for an advisory opinion concerning a human rights treaty applicable to an American State, even if non-American States are also parties to this instrument and even if it was not adopted under the auspices of the inter-American system.<sup>82</sup>

## 4.2 Non-refoulement in the light of the inter-American *corpus juris*

Like other bodies of law already mentioned, the inter-American *corpus juris* provides several ways to protect an individual against *refoulement*. Both the American Declaration and the American Convention have provisions prohibiting – both implicitly and explicitly – the expulsion of migrants under certain conditions. *Non-refoulement* is explicitly prescribed as an essential part of the right to seek and receive asylum.<sup>83</sup> Under Article 22(8) of the American Convention, the obligation not to expel is broader in meaning and scope than the one prescribed in refugee law.<sup>84</sup> *Non-refoulement* can also be inferred as an obligation derived from the prohibitions comprehended by the domain of *jus cogens*, e.g., the prohibition of torture and other cruel, inhuman and degrading treatments.<sup>85</sup>

Alongside the substantive prohibition on *refoulement*, the principle also encounters strong support on the procedural guarantees inherent to the due process of law,<sup>86</sup> thus having a procedural dimension that shall be observed. In this sense, no one can be expelled without an adequate and individualised analysis of his request.<sup>87</sup>

### 4.2.1 Non-refoulement and the right to seek and receive asylum

Asylum was once considered as the protection provided by a State to an individual in its territory or some other places under the control of its organs,<sup>88</sup> a genuine expression of the principle of national sovereignty. In Latin America, asylum is a long-standing tradition – perhaps the only region in the world where asylum has been exhaustively codified. First prescribed in Articles 15 and 16 (territorial asylum) and Article 17 (diplomatic asylum) of the Montevideo Treaty on International Penal Law (1889), asylum was the central topic of a myriad of regional treaties, such as the Havana Convention on Asylum (1928), the Montevideo Convention on Political Asylum (1933), the Montevideo Treaty on Asylum and Political Refuge (1939), the Convention on Diplomatic Asylum (1954), and the Convention on Territorial Asylum (1954).

Differently from Europe – where asylum has a religious character – in Latin America both diplomatic and territorial<sup>89</sup> asylum evolved together, and they are two sides of the same coin, i.e., asylum.<sup>90</sup> As part of the process of *humanisation*

77 Ratified or adhered to the American Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, El Salvador, Ecuador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay. Trinidad and Tobago and Venezuela have denounced the Convention.

78 Only Dominica, Grenada and Jamaica did not recognise the adjudicatory jurisdiction of the IACtHR.

79 IACtHR, 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Peru, Advisory Opinion AO-01/82, 24 Sept. 1982, Series A No. 1, para 25.

80 Article 64(1) of the American Convention.

81 Article 64(2) of the American Convention.

82 IACtHR, *Other treaties*, above n 99, para 48.

83 Article XXVII of the American Declaration and Article 22(7) of the American Convention.

84 IACtHR, Rights and Guarantees of Children in The Context of Migration and/or in Need of International Protection, Argentine, Brazil, Paraguay and Uruguay, Advisory Opinion No. 21, 14 Aug. 2014, Series A No. 21, para 215.

85 Article 5 of the American Convention.

86 Article XVIII of the American Declaration, and Articles 8 and 25 of the American Convention.

87 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 210.

88 M.T. Gil-Bazo, 'Asylum as a General Principle of International Law', *International Journal of Refugee Law*, 27 (2015), p. 7.

89 In the region, territorial asylum is used interchangeably as refuge.

90 For a detailed study on the origins and development of asylum in Latin America, see H.G. Espiell, 'El Derecho Internacional Americano sobre Asilo Territorial y Extradición en sus Relaciones con la Convención de 1951 y el Protocolo de 1967 sobre Estatuto de los Refugiados', in *Asilo y Protección Internacional de Refugiados en América Latina* (1982), pp. 33–81.

of international law, alongside the elevation of the human person to the center of the international legal order – asylum emerged as a human right, the *right to seek and enjoy asylum*.<sup>91</sup>

The human right to asylum is expressly prescribed in Article XXVII of the American Declaration<sup>92</sup> and Article 22(7) of the American Convention.<sup>93</sup> However, the IACmHR notes that, to duly enjoy this right one shall fulfill two cumulative criteria: first, asylum must be in harmony with domestic law; secondly, it shall be in accordance with international law.<sup>94</sup>

It is unequivocal that the prohibition on *refoulement* under the IAHRs encounters strong support in the right to asylum, and *vice-versa*. The IACtHR has affirmed that the principle of *non-refoulement* is 'an effective measure to ensure the right to seek and receive asylum'.<sup>95</sup> In the case of the *Pacheco Tineo Family v. Bolivia*, the IACtHR had the occasion to recognise that the scope of *non-refoulement* under the IAHRs is broader than in other contexts, covering not just refugees but also asylees and asylum seekers. This unique dimension, stated the Court, is a consequence of the complementarity that exists between human rights law and refugee law. The Court went further to assume that the principle of *non-refoulement* 'is also a customary norm of International Law, and is enhanced in the inter-American system by the recognition of the right to seek and to receive asylum'.<sup>96</sup> This amelioration can be regarded in the very wording of the American Convention. Straight after prescribing the individual right to asylum, Article 22(8) of the American Convention expressly forbids *refoulement*, by establishing that:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.<sup>97</sup>

One shall perceive that Article 22(8) makes no distinction between refugees, asylees or asylum seekers. Furthermore, as already mentioned, *non-refoulement* covers *any* alien and not just a specific category of aliens.<sup>98</sup> In the Advisory Opinion of 24.08.2014 on the *Rights and Guarantees of Children in the Context of Migration*, the IACtHR reaffirmed this understatement, stating that the term *alien* should be understood as *any person*, therefore encompassing non-nationals and perhaps those not considered nationals on grounds of domestic law.<sup>99</sup> In this sense, any person under the aforementioned conditions shall enjoy the protection against *refoulement* under the IAHRs.

If the scope of the protection contained in Article 22(8) is broader *vis-à-vis* the passive pole (i.e., the *persons* protected against *refoulement*); other inter-American instruments also fortified the principle by enlarging its content regarding the situations from which one may *not* be submitted. The Cartagena Declaration is one of them.

Even devoid of binding force, the Cartagena Declaration operated an important process of amelioration of refugee protection across the continent, heavily influencing municipal law on the topic.<sup>100</sup> One of the greatest achievements of the Declaration was the expansion of the definition of refugee, encompassing – similarly to the OAU Convention – those fleeing wars, massive human rights violations and serious disturbances of public order.<sup>101</sup>

Considering this latter aspect of refugee protection in Latin America and bearing in mind the already mentioned scope *ratione personae* of the prohibition on *refoulement* under Article 22(8), the Court understood that:

States are bound not to return or expel a person – asylum seeker or refugee – to a State where her or his life or liberty may be threatened as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called indirect *refoulement*.<sup>102</sup>

91 The UNHCR Executive Committee once acknowledged that: 'the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights, is among the basic mechanisms for the international protection of refugees' (UNHCR, EXCOMM Conclusion on Safeguarding Asylum (XLVIII)(1997), para (b)).

92 Article XXVII of the American Declaration states that: '[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.'

93 Article 22(7) of the American Convention, on its turn, establishes that: '[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes.'

94 IACmHR, *Haitian Interdiction v. United States*, Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997), para 151.

95 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 209.

96 The idea that the individual right to asylum provokes a change on how one may regard the principle of *non-refoulement* under the IAHRs was stressed by the Court in the case of *Tineo Family v. Bolivia*: IACtHR, *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 25 Nov. 2013, Series C No. 272, para 151.

97 Article 22(8) of the American Convention.

98 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 215.

99 *Ibid.*, para 218.

100 Almost 15 countries have domestic laws broadening the refugee definition: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

101 Article III(3) of the Cartagena Declaration.

102 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 212.



In the abovementioned advisory opinion, the Court had the occasion to dwell upon the extraterritorial applicability of the principle, recognising that any alien over whom the State exercises authority or who is under its control can invoke the protection against *refoulement*, independently if he is on the land, rivers, sea or in the air space of the State,<sup>103</sup> same conclusion reached by the IACmHR in the case of the *Haitian Interdiction v. the United States*.<sup>104</sup>

Also comprehended by the inter-American *corpus juris*, the Inter-American Convention on Extradition has a specific provision on *non-refoulement*. Article 4(5) of the Convention states that extradition will not be granted once 'inferred that persecution for reasons of race, religion or nationality is involved'.<sup>105</sup>

#### 4.2.2 Non-refoulement as a component of the absolute prohibition of torture and other practices

After the International Criminal Tribunal for the former Yugoslavia (ICTY), the IACtHR is the international tribunal that most contributed to the expansion of the material content of *jus cogens* in the last decades.<sup>106</sup> Denying the alleged *exclusiveness* of the ICJ in the recognition and identification of peremptory norms, the inter-American Court arrogates to itself the competence to apply, within the inter-American jurisdiction, imperative norms of general international law.

The first stage of the abovementioned conceptual evolution of *jus cogens* in Latin America occurred through the reiterated affirmation, in the case law of the IACtHR, of the absolute prohibition on torture as well as other cruel, inhuman or degrading treatments or punishments.<sup>107</sup>

The right to integrity under the IAHRs is comprehended in a broader sense. The wording of Article 5 of the American Convention corroborates with this conclusion, stating that 'every person has the right to have his physical, mental, and moral integrity respected.' The provision goes on to state that 'no one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment'. One promptly finds that the right in question is a *right to personal integrity*, embracing not just physical but also moral and psychological integrity.

One shall notice that the abovementioned provision does not comport a precise definition of torture and of cruel, inhuman, or degrading treatments or punishments. To determine the content of these concepts, the IACtHR occasionally uses the Inter-American Convention on Torture as a parameter. In this regard, Article 2 of the Inter-American Convention defines torture as:

[A]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.<sup>108</sup>

Like the ICCPR, the Inter-American Convention makes no clear distinction between torture and cruel, inhuman and degrading treatments or punishments. Once the threshold between torture and other inhuman treatments is not tangible in practice, there was no other choice to the Court but to consider them as having the same degree of *punishability*, thus pertaining to the domain of *jus cogens*. In the case of *Tibi v. Ecuador*, the IACtHR recognised that:

There is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *jus cogens*. The prohibition of torture is complete and non derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.<sup>109</sup>

In the case of *Caesar v. Trinidad and Tobago*, while discussing the universality of the prohibition of torture and other cruel, inhuman and degrading treatments, the IACtHR reaffirmed the former *obiter dictum*, stating that:

There is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law (...) a State Party to the American Convention, in compliance with its obligations arising from Articles 1(1), 5(1) and 5(2) of that instrument, is under an obligation *erga omnes* to abstain from imposing corporal punishment, as well as to prevent its administration, for constituting, in any circumstance, a cruel, inhuman or degrading treatment or punishment.<sup>110</sup>

103 Ibid., para. 219.

104 IACmHR, *Haitian Interdiction v. United States*, paras 156–157.

105 Article 4(5) of the Inter-American Convention on Extradition.

106 A A C Trindade, 'Une Ere d'avances Jurisprudentielles et Institutionnelles: souvenirs de la Cour interamericaine des droits de l'homme', in L. Hennebel and H. Tigroudja (eds), *Le particularisme interamerican des droits de l'homme* (2009), pp. 7–73, at p. 37.

107 Ibid.

108 Article 2 of the Inter-American Convention against Torture.

109 IACtHR, *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 Sep. 2004, Series C No. 114, para 143.

110 IACtHR, *Caesar v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment of 11 Mar. 2005, Series C No. 123, para 70.

Thus, the absolute prohibition of torture, as well as other cruel inhuman and degrading treatments or punishments is well-crystallised in the inter-American *corpus juris*.<sup>111</sup>

Once recognised as a rule of *jus cogens* – from which no derogation is permitted – those practices are prohibited under *all* circumstances, irrespectively of the level of urgency of the situation. Notably, *jus cogens* is rather a matter of international responsibility, thus impelling erga omnes obligations upon the international community.<sup>112</sup>

In this regard, the Court had the occasion to acknowledge that one of the international obligations associated with the prohibition of torture is the principle of *non-refoulement*.<sup>113</sup> In this sense, one can infer that a State that expels, extradites or returns<sup>114</sup> a person to a territory where she may be submitted to torture or other cruel, inhuman or degrading treatments or punishments is, *par consequence*, violating a peremptory norm of International Law.<sup>115</sup>

An essential component of the absolute prohibition on torture, and other cruel, inhuman and degrading treatments or punishments, *non-refoulement* is, consequently, non derogable and even deemed as a peremptory norm of International Law.<sup>116</sup> In other words; the accessory obligation was infected by the peremptory nature of the norm.

The same reasoning applies to cases involving other prohibition of *jus cogens*, those from which no derogation is permitted. Thus, States are bound not to send a person to a territory where she may be submitted to slavery, apartheid, genocide, or other practice prohibited by imperative law. Therefore, the dimension of *non-refoulement* is intrinsically linked to the current process of expansion of the material content of *jus cogens*.

#### 4.2.3 Non-refoulement and the due process of law

Besides its material content, *non-refoulement* has a procedural dimension, based on the minimum guarantees of the due process of law. Thus, even if the individual is not covered by the protection of the abovementioned provisions he is still protected by basic procedural guarantees, prescribed in Article 8 of the American Convention,<sup>117</sup> i.e., he may not be expelled without due process. In this sense, in any administrative or judicial proceedings that may culminate with the expulsion of the individual, the State shall strictly observe the guarantees arising from the due process of law, judicial protection and respect for human dignity, regardless of the legal situation or migratory status of the migrant.<sup>118</sup>

In *Tineo Family v. Bolivia*, the IACtHR had the occasion to deal with the minimum guarantees permeating the procedures that may result in expulsion or deportation. In sum, the Court established that any proceeding relating to the expulsion of a person must be individualised, allowing personal circumstances to be assessed, and observing the following basic guarantees:

- a. The individual must be informed – expressly and formally – of the charges against him, if applicable, and the reasons for the expulsion or deportation. This notification must include information on his rights, among them, the possibility of requesting and receiving legal assistance, even by free public services if applicable and, if necessary, translation and interpretation, as well as consular assistance, when required;
- b. In the case of an unfavourable decision, he must have the right to submit the case to review before the competent authority, and appear or to be represented before the competent authorities for this purpose;
- c. The eventual deportation may only be carried out following a reasoned decision in keeping with the law, which has been duly notified.<sup>119</sup>

Therefore, if a State fails to observe those basic procedural guarantees, it will be violating the very principle of *non-refoulement*.<sup>120</sup>

111 IACtHR, *De la Cruz v. Peru*, Merits, Reparations and Costs, Judgment of 18 Nov. 2004, Series C No. 115, para 125. IACtHR, *Lori Berenson Mejia v. Peru*, Merits, Reparations and Costs, Judgment of 25 Nov. 2004, Series C No. 119, para 99. IACtHR, *Fermin Ramirez v. Guatemala*, Merits, Reparations and Costs, Judgment of 20 Jun. 2005, Series C No. 126, para 117. IACtHR, *Garcia Asto and Ramirez Rojas v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 25 Nov. 2005, Series C No. 137, para 22. IACtHR, *Baldeon Garcia v. Peru*, Merits, Reparations, and Costs, Judgment of 6 Apr. 2006, Series C No. 147, para 117. IACtHR, *Penal Miguel Castro Castro v. Peru*, Merits, Reparations and Costs, Judgment of 25 Nov. 2006, Series C No. 160, para 271. IACtHR, *Masacre de la Rochela v. Colombia*, Interpretation of the Judgment on the Merits, Reparations and Costs, Judgment of 28 Jan. 2008, Series C No. 163, para 132. IACtHR, *Buenos-Alves v. Argentina*, Merits, Reparations, and Costs, Judgment of 11 May 2007, Series C No. 164, para 76.

112 J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), pp. 378–90.

113 IACtHR, Advisory Opinion No. 21 on the *Rights and Guarantees of Children in the Context of Migration*, para 225.

114 Corroborating with this conclusion, Article 13(4) of the Inter-American Convention states that: '[e]xtradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.'

115 Article 41 and 42 of the Draft State Responsibility.

116 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 225.

117 Article 8(1) of the American Convention states as follows: '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'

118 IACtHR, *Familia Tineo Pacheco v. Bolivia*, para 129.

119 *Ibid.*, para 133.

120 IACtHR, *Rights and Guarantees of Children in the Context of Migration*, para 231.

## 5. Final remarks

As already mentioned, the principle of *non-refoulement* is plainly crystallised in International Law. Once respected the international minimum standard, the scope and content of the principle may be expanded depending on the interpretation given by international courts and local authorities to the *cas d'espèce*.

In this regard, the scope of *non-refoulement* under the IAHRs is particularly larger than the one prescribed on the universal plane and even broader comparing to other regional systems. First, in its dimension *ratione personae*; as article 22.8 of the American Convention covers *any person*. Secondly, in its dimension *ratione materiae*; once States are bound not to send a person back to persecution or to a territory where her life may be affected by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, or to another state where she may face indirect *refoulement*. Thirdly, in its dimension *ratione loci*; as any alien over whom the State exercises authority or who is under its control can invoke the protection against *refoulement*, independently if he is on the land, rivers, sea or in the air space of the State. Fourthly, in its procedural dimension, which imposes the observance of due process in any administrative or judicial proceedings that may culminate with the expulsion of the individual.

*Non-refoulement* under the IAHRs has not been exhausted. On the contrary, it is still expanding its scope and content. Thus, the dimension of the principle of *non-refoulement* under the IAHRs will be enlarged, *pari passu*, as the inter-American judge extends the meaning of key concepts or provisions as to contribute to the construction of an individual subjective right to asylum<sup>121</sup> or to the expansion of the material content of *jus cogens*.

The enlargement of the dimension of the principle under the IAHRs may also occur horizontally, through its '*positivisation*' in domestic law. One shall not forget the important role played by lawmakers in internalising International Law, and the work of the national judge in interpreting and enforcing international norms. They are responsible to enlarge the boundaries of the principle within their respective jurisdictions. It is, thus, comforting to perceive that a considerable portion of the inter-American republics have already considered it.<sup>122</sup> One may conclude that the inter-American jurisdiction is, therefore, a fertile terrain to erect a truly and broad *right not to be refouled*.

121 IACtHR, Juridical Condition and Rights of the Undocumented Migrants, Mexico, Advisory Opinion No. 18, 17 Sep. 2003. Series A No. 18, Concurring Opinion of Judge Cançado Trindade, paras 31–43.

122 From the States that have ratified the American Convention, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay have domestic laws prescribing – directly or indirectly – the principle of *non-refoulement*.

## Resettlement mission: under international law, can the Security Council issue resolutions obligating states to resettle displaced persons?

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### Abstract

This paper explores whether, under international law, the United Nations Security Council (UNSC) has the power to address massive flows of refugees by issuing resolutions obligating UN member states to resettle displaced persons – particularly since resettlement has no basis in international law and is, in part due to a lack of political will, the least utilised of the three durable solutions in UNHCR's mandate.

The legal viability of the UNSC to issue resolutions that obligate states to resettle displaced persons is explored under its UN Charter powers. The combined determination of a threat to peace and security of Articles 39 and utilisation of measures not involving the use of armed force of Article 41. This exploration shows that, a qualified power to issue such resolutions does exist. Specifically, while it is within the UNSC power to issue resolutions on resettlement, those resolutions would, at this stage, be purely exhortatory rather than obligatory. This finding is confirmed by a detailed analysis of around 55 UNSC resolutions on durable solutions and resettlement, showing that the UNSC has, in fact, begun to issue exhortatory resolutions regarding resettlement of displaced populations, although primarily focusing on local resettlement of internally displaced persons.

The lack of political will to implement the legally viable resolutions is addressed through three incentive-based suggestions: UNSC resolutions as a 'trigger' activating and deactivating multilateral and/or regional standing arrangements; a resettlement-focused mission; and specifying resettlement as an additional peacekeeping mandate.

### Keywords

Resettlement; Security Council Resolutions; Durable Solutions

# 1. Introduction

## 1.1 Introduction

One of the challenges of our time has been the plight of Syrian refugees and the world's inaction with respect to their protection. The situation has become quite dire, with nearly 12 million people displaced as a result of the conflict since 2011.<sup>1</sup> In April 2015, the United Nations High Commissioner for Refugee (UNHCR) Special Envoy for Refugee Issues, Angelina Jolie Pitt, admonished the United Nations (UN) Security Council (UNSC) for its lack of action regarding Syrian refugees, stating that '[t]he Security Council has powers to address these threats to international peace and security – but those powers lie unused' due to a 'lack of political will'.<sup>2</sup>

This statement raises several questions, particularly: what powers does the UNSC have with regards to refugees and the displaced, since this issue is the purview of UNHCR, which is subsidiary organ of the United Nations General Assembly (UNGA) and not the UNSC? In fact, no mention is made of the UNSC either in the Convention Relating to the Status of Refugees (Refugee Convention) or in the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute).<sup>3</sup> In fleshing out how the powers of the UNSC can be utilised for the benefit of, not only people displaced by the Syrian conflict, but in any situation of mass displacement of people, this paper is attempting to answer the following question: Under international law, can the UNSC issue resolutions obligating UN member states to resettle displaced persons in certain situations, such as that of mass influx?

## 1.2 What is resettlement?

UNHCR Resettlement Handbook states:

Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status...Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.<sup>4</sup>

This should not be confused with "resettlement" in another part of the country<sup>5</sup> (or local resettlement) of internally displaced persons (IDPs) that appears in the Guiding Principles on Internal Displacement.<sup>6</sup> While the latter is discussed in section 3.2.2 below, resettlement to a third state is the focus of this paper.

The paper focuses on resettlement to discover a way to overcome not only resettlement's lack of basis in international law, but also the associated lack of political will for resettlement. To this end, the paper will explore the ability of the UNSC to issue resolutions obligating states to resettle displaced people. Specifically, Part 2 will explore whether the limitations in the protection of displaced persons by member states can be addressed by the UNSC. Specifically, the Part attempts to answer the question of whether it is within the power of the UNSC to issue resolutions obligating states to resettle displaced persons. It is important to note that this part does not attempt to assess whether the UNSC *should* obligate states. The focus of the part is instead on the legal viability of the UNSC to issue such resolutions. This will be done through an analysis of the powers of the UNSC as they relate to the issue of refugees, particularly, Articles 39 (threat to international peace and security) and 41 (measures not involving the use of armed force) of the Charter of the United Nations (UN Charter).<sup>7</sup>

Having established the power of the UNSC under the UN Charter, Part 3 will explore the practice of the UNSC through an analysis of its resolutions pertaining to the issue of durable solutions and resettlement. This analysis will identify what has already been achieved with regards to displaced populations, finding that it is in line with, but does not go beyond, the UNSC powers identified in Part 2.

Finally, Part 4 attempts to combat the lack of political will through suggestions of incentivised implementation of UNSC resolutions. Without claiming to offer any comprehensive solutions, Part 4 commences a conversation of how implementing such resolutions may be made palatable to the international community. In doing so, it will explore three ways of 'sharing burdens and responsibilities more equitably and strengthening capacities to receive and protect refugees'.<sup>8</sup> The first method suggests that the UNSC resolutions can be used as a trigger for activating a prearranged system of international cooperation by member states, such as temporary protection. The second method suggests

1 UNHCR, 'Global Trends Forced Displacement in 2015', 2015, 6 (UNHCR 2015 Global Trends).

2 'Open Briefing on the Humanitarian Situation in Syria, Remarks by Angelina Jolie Pitt, UNHCR Special Envoy for Refugee Issues', 24 April 2015, United Nations Security Council (UNSC), 7433rd Meeting, New York, [www.unhcr.org/553a459d6.html](http://www.unhcr.org/553a459d6.html) (accessed 22 July 2015).

3 UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, Resolution 428 (V) (UNHCR Statute); see Christiane Ahlborn, *The Development of International Refugee Protection through the Practice of the UN Security Council* (The Graduate Institute, 2010), p. 14.

4 UNHCR, 'UNHCR Resettlement Handbook' (2011) [www.unhcr.org/4a2ccf4c6.html](http://www.unhcr.org/4a2ccf4c6.html) (accessed 22 January 2017) (hereafter UNHCR Resettlement Handbook), p. 3.

5 *Ibid.*, p. 26, note 33.

6 UN, *Guiding Principles on Internal Displacement*, (1998) E/CN.4/1998/53/Add.2.

7 *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (hereafter UN Charter).

8 UNGA, 'Agenda for Protection', October 2003, 3rd edn, [www.refworld.org/docid/4714a1bf2.html](http://www.refworld.org/docid/4714a1bf2.html) (accessed 22 July 2015), 55–61 (hereafter 2003 Agenda for Protection).

a resettlement-focused mission emulating a recent Ebola mission to West Africa. The third method suggests that resettlement through UNSC resolutions can be incorporated as one of the roles open to states in discharging their peacekeeping responsibilities.

### 1.3 Why resettlement?

The Refugee Convention and its definition of refugee has several limitations, the main one being territorial. Specifically, an obligation to determine a person's claim to asylum is only triggered once a person is about to or has already crossed into the territory of a contracting state. This can be seen in Article 31 of the Refugee Convention regarding not punishing 'illegal entry or presence'. This is further exacerbated by the fact that in 2014, a third of the world's refugees were hosted by states who are not parties to the Refugee Convention.<sup>9</sup> This is an important note when considering why resettlement is the durable solution being advocated.

Resettlement itself lies within the core mandates of UNHCR, specifically, providing persons under its competence with international protection, humanitarian protection as well as permanent (also called durable) solutions.<sup>10</sup> These solutions all have in common the fact that they give displaced persons either permanent residency or the protections of citizenship. There are three durable solutions that UNHCR seeks to attain: voluntary repatriation, local integration, and resettlement to a third country.<sup>11</sup>

Voluntary repatriation as a durable solution has a basis in international law. Specifically, '[v]oluntary repatriation hinges on the human right to return to one's country of origin – be it of nationality or habitual residence – and hence on the obligation of states (of origin) to accept their nationals and habitual residents.'<sup>12</sup> However, while the situation of armed conflict or human rights abuses continues within a country, this solution is not an option. This is especially the case because, as identified by the UN Secretary-General, '[c]ivilian populations are being specifically targeted and the forced displacement of civilian populations is now often a direct objective, rather than a by-product, of war.'<sup>13</sup> Consequently, according to UNHCR, in 2014, 'only 126,800 refugees were able to return to their country of origin during the year, the lowest annual level in three decades.'<sup>14</sup> The drop in returns has meant that more than 45 per cent of refugees are living in protracted situations, defined by UNHCR as being exiled in a country of asylum for five or more years.<sup>15</sup>

The second durable solution is local integration into communities of first asylum (usually of neighbour states in the region). This particular durable solution does not have an explicit basis in international law. Although Article 34 of the Refugee Convention does express an obligation to facilitate naturalisation for refugees by contracting states, it limits that requirement by the words 'as far as possible'. While it cannot be argued that a right to local integration exists, the practice of many (developed) states is to implement *ad hoc* naturalisation or regularisation programmes for certain groups of irregular or undocumented migrants or failed asylum seekers who are not able to be returned to their country of origin.<sup>16</sup>

According to UNHCR, for local integration 'to be a viable solution' in countries of first asylum, 'it requires (i) agreement by the host country concerned; and (ii) an enabling environment.'<sup>17</sup> However, when a conflict generates the enormous number of refugees that, for example, the Syrian conflict has, the mass influx of people into neighbouring countries destabilises the entire region, to the extent that it has been declared by the UNSC a threat to peace and security (see Part 2 for details). Of the nearly five million Syrian refugees displaced by the conflict, about 4.8 million are accommodated in the region, primarily by neighbouring countries.<sup>18</sup> In Lebanon, for example, the Syrian refugee population is nearly a fifth of the country's population.<sup>19</sup> This situation makes local integration a far from viable option.

When displaced persons are not able to return to their country of origin and the region is unable to absorb the number of persons that are displaced, resort must be had to the third durable solution, being resettlement to third countries. According to a 1991 Executive Committee of the High Commissioner's Programme (ExCom) Conclusion, resettlement was a solution of 'last resort'.<sup>20</sup> Until recently, resettlement was considered the 'least preferred option' of the three

9 UNHCR, 'World at War Global Trends Forced Displacement in 2014', 2014, 8–12 (hereafter UNHCR 2014 Global Trends).

10 UNHCR Statute, Art 1.

11 *Ibid.*, Arts 1, 9; UNHCR Resettlement Handbook, pp. 3–4.

12 Marjoleine Zieck, 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement', *Amsterdam Law Forum* (2013), pp. 45–63, at p. 47. The right to return to one's country is seen in fundamental human rights instruments such as UNGA, *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217A (III), Article 13(2) (UDHR) and UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Article 12(4) (ICCPR).

13 UNSC, *Report of the Secretary-General on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations*, 22 September 1998, S/1998/883, para 12 (hereafter 1998 Report of the Secretary-General).

14 UNHCR 2014 Global Trends, p. 8. This number rose marginally to 201,400 in 2015. See UNHCR 2015 Global Trends, p. 7.

15 UNHCR 2014 Global Trends, p. 11.

16 See, for example, International Centre for Migration Policy Development, 'Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU' January 2009, Vienna, Final Report Ref JLS/B4/2007/05.

17 UNHCR Resettlement Handbook, 34.

18 UNHCR, 'Syria Regional Refugee Response', <http://data.unhcr.org/syrianrefugees/regional.php> (accessed 14 August 2016).

19 UNHCR 2015 Global Trends, p. 21.

20 Executive Committee of the High Commissioner's Programme (ExCom), *Resettlement as an Instrument of Protection*, (1991) Conclusion No 67 (XLII), para (g).

durable solutions.<sup>21</sup> This is partly due to the fact that apart from being a mandate of UNHCR, resettlement has no basis in international law, being 'essentially based on the goodwill of states.'<sup>22</sup> Even in UNHCR's Resettlement Handbook, in addition to being a durable solution and a tool of international protection, the function of resettlement is identified as being 'a tangible expression of international solidarity and a responsibility sharing mechanism.'<sup>23</sup>

However, with the difficulties facing the implementation of the other two durable solutions, 'resettlement as both burden-sharing and a protection tool is increasingly gaining ground.'<sup>24</sup> In 2000, UNHCR, supported by the ExCom and the UNGA,<sup>25</sup> adopted an Agenda for Protection.<sup>26</sup> The Agenda for Protection identified six main goals, two of which related to the issue of resettlement. These two goals were 'redoubling the search for durable solutions' and 'sharing burdens and responsibilities more equitably and strengthening capacities to receive and protect refugees' of which one of the main objectives was using resettlement as a more effective tool of burden-sharing.<sup>27</sup>

The 2010 Review of the Agenda for Protection also identified not only a doubling of resettlement submissions, but also the 'upgrading of the resettlement function.'<sup>28</sup> Furthermore, UNHCR's Resettlement Handbook stipulates that:

[t]here is no formal hierarchy among the durable solutions. ... The three solutions are complementary in nature and, when applied together, can form a viable and comprehensive strategy for resolving a refugee situation.<sup>29</sup>

Resettlement as a durable solution is most useful in situations of mass influx of displacement as well as protracted refugee situations.<sup>30</sup>

Having established resettlement as a viable and useful durable solution, it must be noted that few people qualify for resettlement. A person must (1) be determined to be a refugee<sup>31</sup> and (2) resettlement – based on seven categories<sup>32</sup> – must be deemed the 'most appropriate solution.'<sup>33</sup> However, the figures show that one of the main limitations of resettlement is a lack of political will. In 2015, of the 142 signatories of the 1951 Refugee Convention and the 1967 Protocol, only 33 countries resettled refugees (an increase from 27 in 2014).<sup>34</sup> Of the millions of people that are displaced and under UNHCR mandate, only 107,100 were resettled in 2015.<sup>35</sup>

#### 1.4 The term 'displaced'

While the terms 'Convention refugees',<sup>36</sup> 'mandate refugees',<sup>37</sup> 'forcibly displaced persons'<sup>38</sup> and 'populations of concern to UNHCR'<sup>39</sup> refer to distinct categories of people, there is considerable overlap between them. For the purposes of this paper, the term 'displaced' persons will be used throughout. This term is intentionally broad, to encompass people are both covered and outside UNHCR mandate, but excludes those that have already found a durable solution. While not currently within the ambit of the UNCHR,<sup>40</sup> for the purposes of this paper, the term 'displaced' will also include people displaced due to environmental disasters<sup>41</sup> as well as man-made ones.

21 Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007), p. 498; Zieck, 'The 1956 Hungarian Refugee Emergency', p. 46.

22 Zieck, 'The 1956 Hungarian Refugee Emergency', p. 47.

23 UNHCR Resettlement Handbook, p. 45, referencing UNHCR, *Global Consultations on International Protection/Third Track: Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities*, 25 April 2002, EC/GC/02/7, para 5.

24 UNHCR 2014 Global Trends, p. 20.

25 UNHCR Resettlement Handbook, p. 15. For an overview of the implementation of the Agenda for Protection, see also UNGA, 'Agenda for Protection: Review and Way Forward', 48th Standing Committee, May 2010, EC/61/SC/INF.1 (2010 Agenda for Protection)

26 UNGA, 'Agenda for Protection', June 2002, A/AC.96/965/Add.1; 2003 Agenda for Protection.

27 2003 Agenda for Protection, pp. 61, 74–81.

28 2010 Agenda for Protection, para 13.

29 UNHCR Resettlement Handbook, para 1.3.2.

30 2010 Agenda for Protection, Annex, paras 7, 9.

31 UNHCR Resettlement Handbook, 9.

32 *Ibid.*, 75 para 3.1.

33 *Ibid.*, 37.

34 UNHCR 2015 Global Trends, 26.

35 *Ibid.*

36 UNHCR Resettlement Handbook, para 3.2.1.

37 Ahlborn, *The Development of International Refugee Protection*, p. 24 note 39.

38 UNHCR 2014 Global Trends, pp. 2, 8.

39 *Ibid.*

40 2003 Agenda for Protection.

41 Persons displaced by environmental disasters do not technically fall under the mandate of UNHCR: Antonio Guterres, UN High Commissioner for Refugees, 'Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective', [www.unhcr.org/4901e81a4.pdf](http://www.unhcr.org/4901e81a4.pdf) (accessed 22 July 2015), p. 5.

## 1.5 Methodology for analysis of UNSC Resolutions

Around 1420 resolutions were looked at since 1993 (soon after the link was made between refugee flows and a threat to peace and security) the latest being Resolution 2292 (2016) of 14 June 2016 on the situation in Libya. These resolutions were checked for whether they contained the terms 'refugee' or 'displaced', which narrowed the analysis to 444 resolutions. These resolutions were then further narrowed down based on the content of their provisions. Consequently, while it is significant that International Refugee Law (IRL) is mentioned in around 100 provisions and the Refugee Convention in a further 17 provisions, that information does not have a direct bearing on the question of this paper. Where they are relevant to the question, the provisions of the identified resolutions have been analysed in detail (see Part 3).

## 2. Security Council powers

In asking the question whether resettlement can be bolstered through UNSC resolutions, especially by way of obligating states to resettle displaced persons in certain situations, such as that of mass influx, it is important to note that the UNSC involvement in refugee issues is limited by the fact that there is no mention of the UNSC in either the Refugee Convention or UNHCR Statute.<sup>42</sup> Conversely, there is also no mention of International Humanitarian Law (IHL), International Human Rights Law (IHRL) or IRL in the UN Charter. In fact, '[t]he Security Council is the only organ of the United Nations which has no explicit authority to deal with human rights.'<sup>43</sup> Nonetheless, it will be shown that UNSC practice through resolutions as well as Article 39 determinations has brought certain areas of IRL under the umbrella of its peace and security mandate.

One of the main reasons for relying on the UNSC is that, while the UNGA is not powerless, the UN Charter permits the UNSC to create obligations for member states outside of the internal legal order of the UN.<sup>44</sup> The UNSC 'possesses decisional powers in the 'operational' realm of international peace and security'<sup>45</sup> and exercises this power in the form of resolutions, which have been described as unilateral instruments of an international organisation.<sup>46</sup> The UNSC acquires its powers from Article 24 of the UN Charter which entrusts it with primary responsibility for 'international peace and security' – an undefined phrase<sup>47</sup> – as well as specific powers provided in Chapters VI, VII, VIII and XII.

To exercise its specific powers on member states, especially under Chapter VII, the UNSC must first determine pursuant to Article 39 that a situation constitutes a threat to peace and security. Such a determination can then be followed by either a recommendation regarding what measures should be taken or a decision on measures that do not involve armed force, in accordance with Articles 41. This Part will therefore set out the legal framework that will be relied on with a view of the UNSC's ability to bind and obligate states, through the UN Charter Articles 24, 25, 39 and 41.

### 2.1 Binding nature of UNSC resolutions

In ascertaining whether UNSC resolutions can be used to obligate states to resettle displaced persons, the first issue is whether UNSC resolutions are binding.

It has been suggested that in an ideal situation, whether a resolution is binding can be ascertained by seeing if it includes:

a determination of the existence of a threat to international peace, a breach of the peace or an act of aggression in accordance with article 39; the chapeau 'acting under Chapter VII'; and the verb 'decides' in the resolution's relevant operative paragraphs.<sup>48</sup>

However, usually, a resolution will contain different elements and will, in its different provisions, 'respectively recommend, decide or declare'.<sup>49</sup> It must also be noted that UNSC resolutions do not carry 'overriding binding force' as that 'would give a secondary source of UN law (decisions) a greater normative value than many primary sources of international law (treaties)'.<sup>50</sup> Alternatively put, UNSC resolutions 'though binding, do not have any direct effect'.<sup>51</sup>

42 Ahlborn, *The Development of International Refugee Protection*, p. 14.

43 Gregor Schotten and Anke Biehler, 'The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights', in Noelle R. Quenivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, 2008), p. 310.

44 UN Charter, Articles 25, 48 and 49; Ahlborn, *The Development of International Refugee Protection*, p. 16; Michael C. Wood, 'The Interpretation of Security Council Resolutions', *Max Planck Yearbook of United Nations Law*, 2 (1998) pp. 73–95, at p. 79.

45 Marko D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', *European Journal of International Law*, 16 (2005), pp. 879–906, at p. 883.

46 *Ibid.*, p. 879.

47 Ahlborn, *The Development of International Refugee Protection*, p. 18.

48 *Ibid.*, p. 4; Wood, 'The Interpretation of Security Council Resolutions', p. 82.

49 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly', p. 880.

50 *Ibid.*, 884.

51 Anne Peters, 'Article 25', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds) and Wessendorf (assist ed), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press, 2012), para 46 and 49.



It is generally accepted that, unlike recommendations, which have been argued to be more authorising in nature<sup>52</sup> and do to an extent create 'some legal obligation' if only to require states to give the recommendation 'due consideration in good faith',<sup>53</sup> UNSC decisions are binding on member states pursuant to Article 25 (as well as Articles 48 and 49).<sup>54</sup>

The binding effect of Article 25 is dependent on the decision's compliance with the Purposes and Principles (as per Articles 1 and 2) of the UN Charter,<sup>55</sup> including Article 2(1) (state sovereignty). Furthermore, while binding on states to the extent that non-compliance can result in a declaration of a breach of peace and security and consequent imposition of measures. However, the decisions of a resolution still need to be implemented into domestic laws by each of the UN member states.<sup>56</sup> This means that while the powers of the UNSC in making binding decisions are indeed broad, neither they nor the powers conferred to effectuate them are unlimited.<sup>57</sup>

## 2.2 Article 39 determinations

An Article 39 determination of the threat to the peace by the UNSC usually appears at the end of the resolution preamble. The paragraph is usually formulated as '[d]etermining that the [current/present] situation [continues to] constitute[s] a threat to international peace and security'. The term 'international threat to peace and security' itself has not been defined. Consequently, determination of a threat to peace by the UNSC is:

more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the Purposes and Principles of the Charter.<sup>58</sup>

Nonetheless, during the 1990s it was acknowledged the definition of peace was expanded beyond the mere absence of war. The notion of positive peace was formulated in 1992 as follows:

the absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.<sup>59</sup>

Since that time, the UNSC has declared numerous non-war-like situations to be a threat to international peace and security. For example, terrorism,<sup>60</sup> proliferation and use of chemical weapons,<sup>61</sup> HIV/AIDS,<sup>62</sup> and the Ebola outbreak<sup>63</sup> have all been determined to be a threat to international peace and security. In the situation of Ebola, a UN Mission for Ebola Emergency Response (UNMEER), the first-ever UN emergency health mission was established to deal with the situation.<sup>64</sup> This mission will be discussed in more detail in Part 4.

### 2.2.1 Refugee flows as a threat to peace and security

It has been widely acknowledged<sup>65</sup> that the first UNSC Resolution creating the link between 'massive flow of refugees' and a threat to international peace and security is Resolution 688 (1991) on Iraq. In the preamble, the UNSC put forward that it was:

52 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly', p. 887 discussing the ICJ, *Certain Expenses of the United Nations (Article 17, para 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Rep 151 (*Certain Expenses Advisory Opinion*).

53 ICJ, *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion of 7 June 1955, ICJ Rep 23, Separate Opinion of Judge Lauterpacht, pp. 118–19.

54 ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Rep 403, para 85 (*Kosovo Advisory Opinion*). See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Rep 16, para 116 (*Namibia Advisory Opinion*).

55 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly', p. 885, referencing Namibia Advisory Op *Namibia Advisory Opinion*, paras 110, 122–125.

56 Ibid.

57 *Certain Expenses Advisory Opinion*, pp. 167–8.

58 ICTY, *Prosecutor v Dusko Tadic a/k/a 'DULE'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, IT-94–1–A-R72, para 29 (*Tadic*).

59 UNSC, Note by the President of the Security Council, S/23500 (1992), 31 January 1992, p. 3.

60 For example, UNSC, Resolutions 1636(2005); 2199(2015).

61 UNSC, Resolution 2118(2013).

62 UNSC, Resolution 1308(2000).

63 UNSC, Resolutions 2176(2014); 2177(2014); 2190(2014); 2215(2015).

64 UN, 'UN Mission for Ebola Emergency Response (UNMEER)', <http://ebolaresponse.un.org/un-mission-ebola-emergency-response-unmeer> (accessed 6 August 2015) (UNMEER Website). See UNSC, Resolution 2177(2014) and GA, *Measures to contain and combat the recent Ebola outbreak in West Africa*, 23 September 2014, A/RES/69/1; UNSC, Resolutions 2190(2014); 2215(2015).

65 See, for example, Stephanie Jaquet, 'Expanding Refugee Protection through International Humanitarian Law: Driving on a Highway or Walking near the Edge of the Abyss?', in David J. Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, International Refugee Law Series vol. 2 (Leiden: Brill Nijhoff, 2014), p. 89; Ahlborn, *The Development of International Refugee Protection*, p. 17.

*Gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region<sup>66</sup>

Thus, the UNSC brought the issue of mass displacement under its mandate and within its competency and power.<sup>67</sup>

This link has been a long time in the making and is a direct result of the UNSC's increasing role in the protection of civilians in armed conflict.<sup>68</sup> In the 1970s, the UNSC did, albeit inconsistently, start mentioning IHL and IHRL in passing in its resolutions,<sup>69</sup> as well as starting to refer to refugees, for example, the right of return of Cypriots.<sup>70</sup>

From the late 1980s the UNSC has increasingly called on states to ratify IHL, IHRL and IRL conventions, and to respect the contents of those conventions,<sup>71</sup> including containing specific rules such as those prohibiting directly targeting civilians,<sup>72</sup> forced disappearances,<sup>73</sup> as well as, at a later stage, the principle of *non-refoulement*.<sup>74</sup> The late 1980s was also the time when the link with refugee flows and international peace and security was made, albeit initially by the UNGA.<sup>75</sup>

After the Iraq resolution, the link between mass displacement and a threat to peace and security determination was reiterated in resolutions regarding Haiti,<sup>76</sup> Rwanda,<sup>77</sup> Kosovo,<sup>78</sup> Central African Republic<sup>79</sup> and most recently Syria.<sup>80</sup> As with the resolution on Iraq, the determinations that linked the flows of refugees to the threat of peace and security identified 'grave violations of human rights and international humanitarian law' as the cause.<sup>81</sup> These determinations were made 'even in the context of intra-State conflicts' and have triggered sanctions,<sup>82</sup> the utilisation of the use of force<sup>83</sup> and 'mandates for robust peace operations to protect humanitarian activities in countries of origin and complex peace-building missions with far-reaching administrative powers'.<sup>84</sup>

This is especially relevant as it has been shown that the UNSC has contributed to the strengthening of the protection of civilians in armed conflict regime<sup>85</sup> by 'enforcing, developing and even creating norms that place the individual at the center of the international security agenda'.<sup>86</sup> Furthermore, the UNSC has contributed to the development of a number of other IHL principles, such as protection of access to humanitarian assistance<sup>87</sup> and the safety of humanitarian personnel.<sup>88</sup> Similarly, regarding IRL, the UNSC, through its resolutions, is helping to endorse and strengthen the developing rights of IDPs<sup>89</sup> as well as the durable solution of the right to return.<sup>90</sup>

As can be seen, there are now many examples of the UNSC practice of determining that displacement and mass exodus of refugees due to conflict or serious IHRL and/or IHL violations as being a threat to international peace and security, which have been followed by enforcement action. This bodes well for the argument that the UNSC is a viable avenue to pursue the development of the durable solution of resettlement. It is therefore worth exploring whether it is within the UNSC's power to obligate member states to resettle displaced persons.

66 UNSC, Resolution 688(1991), Preamble.

67 Ahlborn, *The Development of International Refugee Protection*, p. 17.

68 Schotten and Biehler, 'The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights', pp. 310–12.

69 *Ibid.*, pp. 310 and 312.

70 Ahlborn, *The Development of International Refugee Protection*, pp.16 and 44 referring to UNSC, Resolution 31(1974), para 4.

71 UNSC, Resolution 1265(1999).

72 UNSC, Resolution 1674(2006).

73 UNSC, Resolution 1034(1995).

74 UNSC, Resolution 1624(2005); also see generally, Schotten and Biehler, 'The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights', pp. 313–16.

75 Ahlborn, *The Development of International Refugee Protection*, p. 16 referring to UNGA, *Expert Report of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees*, adopted by GA, Resolution A/RES/41/70, 3 December 1986.

76 UNSC, Resolution 841(1993).

77 UNSC, Resolution 918(1994).

78 UNSC, Resolution 1199(1998).

79 UNSC, Resolution 2149(2014).

80 UNSC, Resolution 2191(2014).

81 Ahlborn, *The Development of International Refugee Protection*, p. 8.

82 *Ibid.*

83 *Ibid.*; Helene Lambert and Theo Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence', *International Journal of Refugee Law*, 22 (2010), pp. 237–73, at p. 263.

84 Ahlborn, *The Development of International Refugee Protection*, p. 8.

85 *Ibid.*, 35–6.

86 *Ibid.*, 9.

87 *Ibid.*, 39–43.

88 *Ibid.*, 43.

89 *Ibid.*, 38–39.

90 *Ibid.*, 9, 43–46.

### 2.3 Obligations of UNSC resolutions

It has been stated that '[a] resolution is 'binding' when it is capable of creating obligations on its addressee(s).<sup>91</sup> While the UNSC often only states that it is '[a]cting under Chapter VII' without specifying which provision of the Chapter is being relied on,<sup>92</sup> it is important to identify those provision when discussing as yet unexplored obligations, such as resettling displaced persons to a third country, since it has been acknowledged that 'the Security Council is bound to act within legal limits.'<sup>93</sup>

#### 2.3.1 Article 41 measures not involving the use of armed force

Since the question of this paper pertains to binding obligations of resettlement, the most appropriate basis to investigate is therefore Article 41 of the UN Charter, which states the following:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

As with the link between refugee flows and an Article 39 determination, the Iraqi invasion of Kuwait was the marker of an increased use of Article 41 to impose economic sanctions.<sup>94</sup> Like the expansion of the applicability of Article 39 determinations, Article 41 applicability has also been expanded to a wide variety of uses.<sup>95</sup>

The UNSC has often been criticised for pushing the boundaries of what Article 41 was theoretically initially set up to achieve.<sup>96</sup> One of these uses has been the establishment of international criminal tribunals for the former Yugoslavia,<sup>97</sup> Rwanda<sup>98</sup> and Lebanon.<sup>99</sup> The establishment of these tribunals has been argued to be connected to the UNSC mandate of maintaining the peace even though they are not strictly enforcement measures.<sup>100</sup> Furthermore, the ICTY, determining that it was legally created, posited that:

the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.' It is a negative definition. ... nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.<sup>101</sup>

The breadth of possibilities envisaged by the ICTY has been reflected in UNSC practice. Other applications of Article 41 in UNSC resolutions have been settlement of compensation between Kuwait and Iraq, as well as quasi-judicial decisions regarding Iraq's annexation of Kuwait being 'null and void'.<sup>102</sup>

#### 2.3.2 Article 41 laws of general applicability

A notable example of the UNSC extending the use of Article 41 obligations is the setting up of terrorism-related sanctions committee that places and removes individuals to/from a sanctions list and that obligates states to enforce travel bans and asset freezes.<sup>103</sup> One response to the critique that the UNSC acted as a legislator<sup>104</sup> was that terrorism resolutions did not create new laws but merely stated existing ones.<sup>105</sup> This argument, however, does not address the issue of general applicability of the terrorism resolutions. The position is also undermined by the UNSC's subsequent resolutions on weapons of mass destruction, which 'goes significantly beyond...existing instruments on proliferation'.<sup>106</sup>

91 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly', p. 880 referring to *Certain Expenses Advisory Opinion*, 163.

92 Michael Bothe, 'Peacekeeping', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, (eds) and Wessendorf (assist ed), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford: Oxford University Press, 2012), p. 1186.

93 Peters, 'Article 25', p. 811.

94 Nico Krisch, 'Article 41', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds) and Wessendorf, *The Charter of the United Nations: A Commentary* (3rd edn, Oxford: Oxford University Press, 2012), p. 1308.

95 Ibid.

96 Ibid., p. 1320.

97 UNSC, Resolution 827(1993).

98 UNSC, Resolution 955(1994).

99 UNSC, Resolution 1757(2007).

100 Krisch, 'Article 41', p. 1320.

101 *Tadic*, para 35.

102 Krisch, 'Article 41', p. 1322.

103 UNSC, Resolutions 1267(1999) and 1373(2001).

104 Krisch, 'Article 41', p. 1324.

105 Ibid.

106 Ibid.

Finally, the reluctance of UNSC members to issue any more resolutions of this kind has undermined the arguable unanimity of their original passing.<sup>107</sup>

Although it would be ideal if resolutions that emulate legislation could be utilised to realise the paper's question, it is important to remember that with the lack of political will and the falling out of favour of resolutions of general applicability, it is unlikely that this kind of application of the Article could be relied upon.

### 2.3.3 Article 41 implementation mechanisms

Article 41 has been relied upon in relation to sanctions, especially to create 'effective implementation mechanisms' to manage those sanctions:

Such as capacity-building, broader market regulation, the development of best practices, and the establishment of subsidiary bodies to identify sanctions violators and tackle structural problems.<sup>108</sup>

A specific example is the setting up of a 'monitoring and reporting mechanism on children in armed conflict'.<sup>109</sup> While this does not in itself create obligations for states to resettle, it allows for the creation of the mechanism by which resettlement can take place once the obligation is created (see section 4.1 for a discussion of how these measures can assist with resettlement).

### 2.3.4 Article 41 enforcement of implementation

Article 41 is not without limits. It is the 'purpose of sanctions ... to modify the behaviour of a party that is threatening international peace and security'.<sup>110</sup> Therefore it is highly unlikely that Article 41 measures will be directed against unoffending member states specifically when, while:

the link made by the Security Council and the UN Secretary-General between grave breaches of IHL (and serious violations of human rights) and refugee outflows is clear, [it] may not be sufficient to create an obligation for the receiving state to accept the refugees. On rare occasions, the Security Council has expressed its concern at the withdrawal of refugee status by the country of refuge, but this was done in a language of regret rather than firm condemnation.<sup>111</sup>

Of note is that the inadequacy of this action was with regards to a state of first asylum.

The type of enforcement action the UNSC can and would take in the case of non-implementation if it were able to obligate member states to resettle is rather unclear: while member states are bound to implement sanctions, irrespective (within reason) of those sanctions having an adverse effect on the implementing state,<sup>112</sup> implementation is often, for a variety of reasons both ineffective<sup>113</sup> and mostly without repercussions for the non-implementing state.<sup>114</sup>

## 2.4 Conclusion

This part has been able to show that, while it is not legally impossible for UNSC resolutions to obligate member states to resettle displaced persons, the Article 41 measure would have to be of a legislative nature (in the vein of Resolutions 1267 (1999) and 1373 (2001)), imposing laws of general applicability. When considering the current lack of political will to resettle refugees, it is both improbable and unlikely that such resolutions would be issued. In the current political climate, resolutions on resettlement are more likely to exhort rather than obligate member states to resettle displaced persons to a third country. This conclusion is supported by UNSC practice, analysed in the next Part.

## 3. Analysis of Security Council Resolutions

Having set out the legal framework relied on by the UNSC, this Part conducts an analysis of selected UNSC resolutions to ascertain whether any measures have been taken with regards to the resettlement of refugees. To do so effectively, the Part will first look at the method of interpretation it is necessary to apply in order properly assess the legal effects of UNSC resolutions. As with the UNGA, UNSC resolutions can constitute emerging *opinio juris*, which in time and state practice can lead to CIL.<sup>115</sup> Finally, due to the numerous extracts from UNSC resolutions, a blanket 'emphasis added' (italics) is being relied on throughout this section.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., p. 1309.

<sup>109</sup> Ahlborn, *The Development of International Refugee Protection*, p. 37 referring to Resolution 1612(2005).

<sup>110</sup> Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', *Journal of Conflict and Security Law*, 8 (2003), p. 37.

<sup>111</sup> Jaquemet, 'Expanding Refugee Protection through International Humanitarian Law', p. 93 providing as an example President of the Security Council, *Croatia's withdrawal of refugee status from refugees from the Republic of Bosnia and Herzegovina*, 3 October 1995, S/PRST/1995/49.

<sup>112</sup> Krisch, 'Article 41', p. 1312.

<sup>113</sup> Ibid., 1324.

<sup>114</sup> Wellens, 'The UN Security Council and New Threats to the Peace', p. 38.

<sup>115</sup> Ibid., p. 19 referring to Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Volume I: Rules) (2005), for instance, at pp. 194–202; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Rep 3 (*North Sea Continental Shelf Judgment*), para 77.

### 3.1 Interpretation of UNSC Resolutions

#### 3.1.1 Method of interpretation

The general rules of treaty interpretation are contained in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT),<sup>116</sup> which are a codification of CIL.<sup>117</sup> In referring to the VCLT, it must be borne in mind that UNSC resolutions are not bi- or multilateral treaties, but are unilateral instruments of an international organisation, created in a different manner and serving a different role.<sup>118</sup> Consequently, it has been argued that the VCLT does not apply directly to UNSC resolutions, but should only be used as a general guideline.<sup>119</sup>

This argument is supported in the jurisdiction of the ICJ and the ICTY. Note, especially, the ICJ's *Namibia Advisory Opinion*<sup>120</sup> in which the ICJ discussed its method of interpretation of UNSC resolutions. Although it was not the first case to analyse UNSC resolutions, it was the first instance in which the ICJ 'explained its approach to interpretation.'<sup>121</sup> Uncharacteristically, the ICJ did not rely on the VCLT.<sup>122</sup> This can be partly explained by the fact that the ICJ was referring to a particular resolution rather than making a statement about resolution interpretation in general.<sup>123</sup> However, the lack of reference to the VCLT is also in line with later interpretations of UNSC resolutions by the ICJ<sup>124</sup> and other Tribunals, such as the ICTY in *Tadic*.<sup>125</sup> In the *Namibia Advisory Opinion*, laying out its interpretation of UNSC resolutions, the ICJ instructed that:

The *language of a resolution* of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the *terms of the resolution to be interpreted*, the *discussions leading to it*, the *Charter provisions invoked* and, in general, *all circumstances that might assist in determining the legal consequences of the resolution* of the Security Council.<sup>126</sup>

Additional guidelines can be found in the jurisprudence of the ICJ,<sup>127</sup> the work of Wood on the interpretation of Security Council resolutions,<sup>128</sup> as well as Security Council Action under Chapter VII paper.<sup>129</sup> Thus, the issues to consider when interpreting UNSC resolutions can be summarised as follows:

- a. Intent of the UNSC in drafting the resolution;
- b. the terms/language used in the resolution;
- c. the Charter provisions invoked;
- d. the discussions leading to the resolution<sup>130</sup> and following its adoption;<sup>131</sup>
- e. the overall context<sup>132</sup>/all circumstances<sup>133</sup> (including other resolutions in the series).<sup>134</sup>

By assessing these issues during the analysis of UNSC resolutions on resettlement, it will be possible to determine both who is bound by the resolution and what obligation they are bound by.<sup>135</sup>

116 Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, 1155 UNTS 331 (VCLT).

117 ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Rep 7, para 104 referring to the ICJ, *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)*, Judgment of 2 February 1973, ICJ Rep 1973, para 36s.

118 Wood, 'The Interpretation of Security Council Resolutions', pp. 85–86.

119 Ibid.

120 *Namibia Advisory Opinion*.

121 Wood, 'The Interpretation of Security Council Resolutions', pp. 75 and 76.

122 Ibid., p. 75.

123 Ibid., p. 75.

124 *Kosovo Advisory Opinion*.

125 Wood, 'The Interpretation of Security Council Resolutions', p. 76 referring to *Tadic*, para 419.

126 *Namibia Advisory Opinion*, para 114 (emphasis added).

127 In particular *Namibia Advisory Opinion*, paras 53; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, at 104, para 32; and *Kosovo Advisory Opinion*, para 117.

128 Wood, 'The Interpretation of Security Council Resolutions'.

129 UNSC, *Security Council Action under Chapter VII: Myths and Realities*, 23 June 2008, Security Council Special Research Report No 1, [www.securitycouncilreport.org/special-research-report/lookup-c-gIKWLeMTIsG-b-4202671.php](http://www.securitycouncilreport.org/special-research-report/lookup-c-gIKWLeMTIsG-b-4202671.php) (UNSC, Chapter VII), 1.

130 *Namibia Advisory Opinion*, para 114.

131 UNSC, Chapter VII, 1.

132 Ibid.

133 *Namibia Advisory Opinion*, para 114.

134 Wood, 'The Interpretation of Security Council Resolutions', pp. 86–7.

135 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly', p. 880 referring to 163.

### 3.1.2 Terms used in the resolution

There is little available guidance on ‘the ordinary meaning to be given to the terms’<sup>136</sup> used in UNSC resolutions and/or how they are to be understood. For the purposes of this paper, the following informed assumptions are made regarding these terms.<sup>137</sup>

Binding terms are:

- determining/determines<sup>138</sup>
- decides<sup>139</sup>
- demands<sup>140</sup>
- shall<sup>141</sup>
- requires<sup>142</sup>

Permissive but not binding term is:

- authorises<sup>143</sup>

Exhortatory but not binding terms are:

- requests<sup>144</sup>
- urges<sup>145</sup>
- calls for<sup>146</sup>
- recommends<sup>147</sup>
- invites<sup>148</sup>

The terms that are ambiguous and must be assigned the intent behind the content of the paragraph which they introduce are:

- calls upon<sup>149</sup>
- endorses<sup>150</sup>

### 3.2 Analysis of UNSC resolutions on resettlement

It has been acknowledged that there is a growing body of UNSC resolutions (strongly) condemning and expressing general concern regarding forced displacement,<sup>151</sup> with the UNSC indicating its ‘readiness to impose sanctions on persons designated by the Sanctions Committee as responsible for violations of applicable international law... including forced displacement’<sup>152</sup> and its ‘determination to ‘prevent’ the displacement of civilians.’<sup>153</sup>

This analysis of UNSC resolutions however, concerns itself with resolutions containing provisions on durable solutions, particularly resettlement as a durable solution. Of 444 UNSC resolutions that mentioned ‘refugee’ and ‘displaced’, 55 were identified as discussing resettlement and/or durable solutions. It is important to note that while the durable solution of return was mentioned for the first time in Resolution 361 (1974) on Cyprus and the durable solution of resettlement was first<sup>154</sup> mentioned in Resolution 872 (1993) on Rwanda, durable solutions as a concept was not itself mentioned until as recently as Resolution 1902 (2009) on Burundi.

136 VCLT, Article 31(1).

137 Where it is argued that the terms may mean something else, this will be made clear in the text.

138 Wood, ‘The Interpretation of Security Council Resolutions’, p. 82.

139 UNSC, Chapter VII, 9; Wood, ‘The Interpretation of Security Council Resolutions’, p. 82.

140 UNSC, Chapter VII, 11; Schotten and Biehler, ‘The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights’, p. 313.

141 Asia Pacific Centre for Military Law (APCML), *Rapporteur’s Report, Australian Cross-Sector Seminar on International Law (ACROSS): Interpreting United Nations Security Council Resolutions*, held 16 November 2012, 6 (APCML Rapporteur Report).

142 UNSC, Chapter VII, 11.

143 Wood, ‘The Interpretation of Security Council Resolutions’, p. 79; APCML Rapporteur Report, 8.

144 Schotten and Biehler, ‘The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights’, p. 313.

145 UNSC, Chapter VII, 9.

146 Schotten and Biehler, ‘The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights’, p. 313.

147 Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly’, p. 880.

148 UNSC, Chapter VII, 9.

149 Ibid.

150 Ibid., 9 and 11.

151 United Nations Office for Coordination of Humanitarian Affairs (OCHA), ‘Security Council Norms and Practice on the Protection of Civilians in Armed Conflict: Analysis of Normative Development in Security Council Resolutions 2009–2013’ (2014) 008 OCHA Policy and Studies Series, para 46.

152 Ibid., para 47.

153 Ibid. para 48.

154 Within the period of analysis, being from 1993 until June 2016 (Resolution 2292(2016)).

This analysis was approached systematically by asking whether the resolution (or a series of resolutions) contains a determination of a threat to peace and security; whether the key provisions themselves use binding language; what obligations are contained in these provisions; and who the addressees are of these provisions.

The resolutions in question concerned the situations in Afghanistan,<sup>155</sup> Angola,<sup>156</sup> Bosnia and Herzegovina,<sup>157</sup> Burundi,<sup>158</sup> Central African Republic,<sup>159</sup> Chad, the Central African Republic and the subregion,<sup>160</sup> Côte d'Ivoire,<sup>161</sup> Democratic Republic of the Congo,<sup>162</sup> Haiti,<sup>163</sup> Iraq,<sup>164</sup> Mali,<sup>165</sup> Liberia,<sup>166</sup> Libya,<sup>167</sup> Mozambique,<sup>168</sup> Rwanda,<sup>169</sup> Somalia,<sup>170</sup> Sudan and South Sudan,<sup>171</sup> Syria,<sup>172</sup> Timor-Leste/East Tajikistan,<sup>173</sup> The Great Lakes region,<sup>174</sup> Timor,<sup>175</sup> and themed resolutions regarding Maintenance of international peace and security,<sup>176</sup> Women and Peace and Security,<sup>177</sup> Children and armed conflict<sup>178</sup> and refugee camps in Africa.<sup>179</sup>

### 3.2.1 Binding terms 'decides' and 'demands'

Of the resolutions analysed in detail, two types of resolutions used binding language. The first were the UNSC resolutions that used the term 'decides' in their provisions (in addition to the determination of a threat to peace and security).<sup>180</sup> These provisions were addressing peacekeeping missions by outlining their mandates. Specifically, these resolutions addressed the missions to Mali (MINUSMA),<sup>181</sup> Democratic Republic of the Congo (MONUSCO),<sup>182</sup> Central African Republic (MINUSCA),<sup>183</sup> Rwanda (UNAMIR),<sup>184</sup> South Sudan (UNMISS)<sup>185</sup> and Côte d'Ivoire (UNOCI).<sup>186</sup>

In both MINUSMA resolutions, the UNSC decided that part of the mission's mandate was:

*In support of the Malian authorities, to contribute to the creation of a secure environment for ... the voluntary, safe and dignified return or local integration or resettlement of internally displaced persons and refugees in close coordination with humanitarian actors*<sup>187</sup>

Part of the MONUSCO mandate was decided to be, under the section on protection of civilians, to:

*Support the Government's efforts, along with international partners and neighbouring countries, to create an environment conducive to the voluntary, safe and dignified return of internally displaced*

155 UNSC, Resolutions 2274(2016); 2210(2015); 2145(2014); 2096(2013).

156 UNSC, Resolutions 1149(1998); 1135(1997); 1118(1997); 1087(1996); 1075(1996); 1064(1996).

157 UNSC, Resolution 1088(1996).

158 UNSC, Resolutions 1959(2010); 1902(2009); 2279(2016).

159 UNSC, Resolutions 1923(2010); 1861(2009).

160 UNSC, Resolution 2217(2015).

161 UNSC, Resolutions 2284(2016); 2285(2016); 2226(2015); 2162(2014); 1479(2003).

162 UNSC, Resolutions 2277(2016); 2211(2015); 1925(2010).

163 UNSC, Resolutions 2070(2012); 2012(2011); 1944(2010).

164 UNSC, Resolution 2233(2015).

165 UNSC, Resolutions 2227(2015); 2164(2014).

166 UNSC, Resolutions 2239(2015); 1020(1995).

167 UNSC, Resolutions 2292(2016); 2259(2015); 2238(2015).

168 UNSC, Resolutions 916(1994); 898(1994); 882(1993).

169 UNSC, Resolution 872(1993).

170 UNSC, Resolutions 897(1994); 2275(2016).

171 Sudan and South Sudan: UNSC, Resolutions 2265(2016); 2252(2015); 2241(2015); 2228(2015); 2223(2015); 2173(2014); South Sudan: UNSC, Resolutions 2287(2016); 2290(2016); 2113(2013); 2063(2012); 2003(2011); 1935(2010).

172 UNSC, Resolutions 2258(2015); 2191(2014).

173 UNSC, Resolution 1030(1995).

174 UNSC, Resolutions 1653(2006); 1078(1996).

175 UNSC, Resolutions 1480(2003); 1410(2002); 1319(2000); 1272(1999).

176 UNSC, Resolution 2240(2015).

177 UNSC, Resolutions 2242(2015); 1325(2000).

178 UNSC, Resolution 1261(1999).

179 UNSC, Resolution 1208(1998).

180 Except for the resolution on Rwanda, which established the peacekeeping operations prior to the determinations of a threat of peace and security in resolutions UNSC, Resolutions 929(1994) and 918(1994).

181 UNSC, Resolutions 2227(2015); 2164(2014).

182 UNSC, Resolutions 1925(2010).

183 UNSC, Resolution 2217(2015).

184 UNSC, Resolution 872(1993).

185 UNSC, Resolutions 2252(2015); 2241(2015).

186 UNSC, Resolution 2284(2016).

187 UNSC, Resolutions 2227(2015), para 14(f)(i); 2164(2014), para 13(c)(vii).

persons and refugees, or voluntary *local integration* or *resettlement*;<sup>188</sup>

Similarly, part of the MINUSCA mandate was to:

*improve coordination with humanitarian actors, to facilitate the creation of a secure environment for ... the voluntary safe, dignified and sustainable return or local integration or resettlement of internally displaced persons or refugees in close coordination with humanitarian actors;*<sup>189</sup>

Part of the UNAMIR mandate was:

*To monitor the process of repatriation of Rwandese refugees and resettlement of displaced persons to verify that it is carried out in a safe and orderly manner;*<sup>190</sup>

Finally, part of the UNOCI mandate was:

*To facilitate ... the provision of humanitarian assistance and to support the Ivorian authorities in preparing for the voluntary, safe and sustainable return of refugees and internally displaced persons in cooperation with relevant humanitarian organizations, and in creating security conditions conducive to it;*<sup>191</sup>

It is clear from the contents of these provisions that even though the language used to mandate the various peacekeeping operations is binding, the actual mandate with respect to durable solutions is to 'support',<sup>192</sup> 'improve coordination'<sup>193</sup> and 'monitor',<sup>194</sup> which suggests a lack of direct participation. Instead, the actors who are being supported, and are therefore impliedly identified by the UNSC as responsible for carrying out durable solutions are Malian authorities together with humanitarian actors,<sup>195</sup> DRC government 'along with international partners and neighbouring countries',<sup>196</sup> CAR and humanitarian actors<sup>197</sup> and 'Ivorian authorities ... in cooperation with relevant humanitarian organizations'<sup>198</sup> as well as presumably the displaced persons themselves.<sup>199</sup>

The second type of resolution concerned the situation in Sudan. The term 'demands', which denotes a mandatory action, was used. The term appeared in a standard set of phrases repeated throughout a series of resolutions. The phrases were:

*Stresses the importance of achieving dignified and durable solutions for refugees and internally displaced persons, and of ensuring their full participation in the planning and management of these solutions, demands that all parties to the conflict in Darfur create the conditions conducive to allowing the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons or their local integration;*<sup>200</sup>

Later resolutions merely added 'informed' to voluntary return;<sup>201</sup> and 'where appropriate' in front of 'their local integration'.<sup>202</sup>

Clearly, the demand on all parties to the conflict does not incorporate any obligations of resettlement, since the demand relates to the conditions conducive for durable solutions rather than those solutions themselves.

### 3.2.2 Use of the term 'resettlement'

UNHCR suggests that the term 'resettlement' means 'relocation to a third country'.<sup>203</sup> This Part conducts a detailed analysis of the 55 UNSC resolutions that have been identified as mentioning 'resettlement' to ascertain if any resolutions have been issued by the UNSC that obligate states to resettle displaced persons to a third country.

188 UNSC, Resolution 1925(2010), para 12(g).

189 UNSC, Resolution 2217(2015), para 32(c).

190 UNSC, Resolution 872(1993), para 3(f).

191 UNSC, Resolutions 2284(2016), para 15(e); 226(2015), para 19(h); 2162(2014), para 19(h); 2112(2013), para 5(g); 2000(2011), para 7(h).

192 UNSC, Resolutions 2284(2016), para 15(e); 2227(2015), para 14(f)(i); 2226(2015), para 19(h); 2164(2014), para 13(c)(vii); 2162(2014), para 19(h); 2112(2013), para 5(g); 2000(2011), para 7(h); 1925(2010), para 12(g).

193 UNSC, Resolution 2217(2015), para 32(c).

194 UNSC, Resolution 872(1993), para 3(f).

195 UNSC, Resolutions 2227(2015), para 14(f)(i); 2164(2014), para 13(c)(vii).

196 UNSC, Resolution 1925(2010), para 12(g).

197 UNSC, Resolution 2217(2015), para 32(c).

198 UNSC, Resolution 2284(2016), para 15(e).

199 UNSC, Resolution 872(1993), para 3(f).

200 UNSC, Resolutions 1935(2010), para 15; 2003(2011), para 18.

201 UNSC, Resolutions 2252(2015), para 23; 2241(2015), para 25; 2063(2012), para 18; 2113(2013), para 21.

202 UNSC, Resolutions 2228(2015), para 23; 2173(2014), para 23.

203 UNHCR Resettlement Handbook, 26, note 33.



It has been pointed out by Wood in his work on UNSC resolution interpretation that:

[i]n an ideal world, each resolution would be internally consistent, consistent with earlier Council action on the same matter, and consistent with Council action on other matters. ... [SC resolutions] are frequently not clear, simple, concise or unambiguous.<sup>204</sup>

This is indeed seen in resolutions mentioning resettlement. In those resolutions, the UNSC uses a variety of words interchangeably to mean the same thing, particularly 'return', 'resettlement', 'reintegration' and 'repatriation'. However, each of these words has its own meaning and connotation, and it is unclear whether the choice of a term over another has been made consciously. Conversely, resettlement has been used by the UNSC to carry several meanings (this analysis has identified four). Each of these four meanings will be discussed below to be able to isolate those resolutions that use the term in the sense intended by UNHCR to mean relocation to a third country.

### 3.2.2.1 Resettlement and ex-combatants

The first meaning, and one that has is not being considered by this paper, is often used for armed groups. Specifically, when referring to the 'Disarmament, Demobilization, Repatriation, Resettlement, and Reintegration (DDRRR)' of armed groups.<sup>205</sup> It is important to note, however, that the UNSC has previously been 'strongly criticized for making unwarranted links between refugee status and terrorism in its counter-terrorism resolutions ... which may have contributed to the erosion of established refugee protection standards.'<sup>206</sup> Although the UNSC often addresses a number of issues in one provision, care must be taken not to create 'unwarranted links', in particular between combatants and the civilian displaced population. Consequently, a provision that:

*Urges the international community to provide assistance to facilitate the demobilization and social reintegration of ex-combatants, demining, the resettlement of displaced persons and the rehabilitation and reconstruction of the Angolan economy in order to consolidate the gains in the peace process;*<sup>207</sup>

is clearly listing the steps that need to be taken in order to restore and maintain peace and security. However, a resolution that:

*Calls upon the countries of the region to continue in their efforts to create conducive conditions for voluntary repatriation, safe and durable integration of refugees and former combatants in their respective countries of origin. In this regard, calls for commensurate international support for refugees and reintegration and reinsertion of returnees, internally displaced persons and former combatants;*<sup>208</sup>

is unintentionally but recklessly creating a link between refugees, IDPs and former combatants. This is particularly important, since the terms 'repatriation', 'resettlement' and 'reintegration' are all used for both the displaced and ex-combatants, while the processes associated with these terms are different for each group of people and should not be intermixed at the risk of creating inappropriate standards and processes.<sup>209</sup>

### 3.2.2.2 Local resettlement of IDPs

The second meaning that is used in UNSC resolutions is the meaning of resettlement contemplated in the *Guiding Principles on Internal Displacement*,<sup>210</sup> as "resettlement" in another part of the country.<sup>211</sup> UNHCR criticised the use of this term, suggesting that:

[g]iven the specific meaning of 'resettlement' in the refugee context as *relocation to a third country*, UNHCR refers to, and would generally recommend, that in contexts of internal displacement, the IASC Framework for Durable Solutions for IDPs terms 'local settlement' and 'settlement elsewhere' be used instead.<sup>212</sup>

Nonetheless, UNSC resolutions use the term resettlement to apply to both local resettlement of IDPs and UNHCR-used resettlement to a third country (the latter is the obligation, the existence of which this paper is trying to identify).

204 Wood, 'The Interpretation of Security Council Resolutions', p. 82.

205 See, for example, UNSC, Resolution 1417(2002).

206 Ahlborn, *The Development of International Refugee Protection*, p. 8.

207 UNSC, Resolutions 1149(1998), para 10; 1135(1997), para 11; 1118(1997), para 15.

208 UNSC, Resolution 1653(2006), para 15.

209 See, for example, Vincenza Scherrer, 'The Democratic Republic of the Congo' in Alan Bryden and Vincenza Scherrer (eds), *Disarmament, Demobilization and Reintegration and Security Sector Reform: Insights from UN Experience in Afghanistan, Burundi, the Central African Republic and the Democratic Republic of the Congo*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2012, 146.

210 UN, *Guiding Principles on Internal Displacement*, (1998) E/CN.4/1998/53/Add.2.

211 UNHCR Resettlement Handbook, 26, note 33.

212 Ibid.

The use of the term to mean local resettlement is sometimes clearly specified, especially, in post 2011 resolutions regarding the Côte d'Ivoire and Afghanistan, where the Secretary-General's Policy Committee Decision on Durable Solutions<sup>213</sup> is currently being implemented.<sup>214</sup> Other cases are not as clear cut regarding whether UNHCR resettlement or local resettlement is intended. The meaning can usually be divined by the content of the provision. Specifically, local resettlement is likely intended where, as in the UNMIR mandate, the subjects of resettlement are IDPs (with no reference to refugees).<sup>215</sup>

Another way by which local resettlement can be identified is by looking at the target of the provision. This is particularly helpful when both IDPs and refugees are mentioned in the provision. For example, if a provision of the resolution is addressed at the county of origin of the displaced persons or, in some cases, the neighbouring countries in the region, it is likely that local resettlement is being contemplated by the resolution. This can be seen in resolutions on Sudan and South Sudan,<sup>216</sup> Côte d'Ivoire,<sup>217</sup> East Timor<sup>218</sup> and Mozambique.<sup>219</sup>

### 3.2.2.3 Local resettlement and environmental disaster IDPs

The third meaning is in fact identical to the second in referring to local resettlement. However, the use of this form of resettlement in this instance is not associated with displacement due to conflict, but also due to environmental disaster. This use of resettlement (to mean local resettlement) has been applied in UNSC resolutions post the Haiti earthquake of 2010. It is important to note that, while the determination of a threat of international peace and security for Haiti existed for many reasons, the UNSC supported the 'Government's resettlement strategy for displaced persons',<sup>220</sup> at the same time as *acknowledging* the dependency of Haiti's IDPs and (in the same preambular paragraph) their 'extreme vulnerability to natural disasters'.<sup>221</sup> The importance of Resolution 2012 (2011) in making the link to environmental disaster vulnerability, a determination of threat of peace and security and local resettlement is that the resolution is taking a step towards the protection of displaced persons as a result of environmental disasters. This is particularly important because, as mentioned previously, environmentally placed persons do not fall under UNHCR mandate.

### 3.2.2.4 Resettlement to a third country

The final meaning of resettlement is the one contemplated by UNHCR and the meaning of which is being explored by this paper; specifically, resettlement to a third state offering protection. As has been highlighted above, it is not always clear which resettlement is being referred to by the UNSC in their resolutions. This analysis puts forward that this definition of resettlement is explicitly contemplated by only three UNSC resolutions. Two of which being UNSC Resolutions 2191(2014) and UNSC Resolution 2258(2015) on Syria, that share the preambular paragraph:

*Noting with concern that the international response to the Syrian and regional crisis continues to fall short of meeting the needs as assessed by host governments and the United Nations, therefore urging once again all Member States, based on burden-sharing principles, to support the United Nations and the countries of the region, including by adopting medium and long-term responses to alleviate the impact on communities, providing increased, flexible and predictable funding as well as increasing resettlement efforts, and taking note in this regard of the Berlin Communiqué of 28 October 2014, ...*

There are several issues being given voice in this paragraph, which sits in a preamble to a determination that the 'humanitarian situation' in Syria constitutes a threat to peace and security in the region. Specifically, the resolutions use the exhortatory, but not binding, 'urging', and are part of only a few UNSC resolutions – and the only UNSC resolutions on resettlement – to address 'all Member States'.

Additionally, the refugee-focused burden sharing principle is mentioned in these resolutions. This is particularly relevant not only because UNHCR extols resettlement as a tool of burden-sharing, but also because it is a principle that has been restated in over a hundred ExCom conclusions<sup>222</sup> and nearly a hundred UNGA resolutions.<sup>223</sup> It is therefore a

213 UN Secretary-General, 'Policy Committee Decision on Durable Solutions', 4 October 2011, <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1265299949041/6766328-1265299960363/SG-Decision-Memo-Durable-Solutions.pdf> (accessed 10 August 2010).

214 Elizabeth Ferris, 'Transitions and Durable Solutions for Displaced Persons: 21 Reasons for Optimism', Transitions and Solutions Roundtable, organised by UNHCR and UNDP, Amsterdam, April 18–19 (2013), [www.brookings.edu/research/speeches/2013/04/18-durable-solutions-displacement-ferris](http://www.brookings.edu/research/speeches/2013/04/18-durable-solutions-displacement-ferris) (accessed 10 August 2010). See, eg, UNSC, Resolutions 2226(2015), Preamble; 2162(2014), Preamble; 2210(2015), Article 45; 2145(2014), Article 46; 2096(2013), Article 46.

215 UNSC, Resolutions 1923(2010), para 3(i); 1861(2009), para 25(a); 1020(1995), para 15.

216 UNSC, Resolution 2228(2015), Annex 1, Benchmark 2.

217 UNSC, Resolution 1479(2003), para 10.

218 UNSC, Resolutions 1480(2003), Preamble; 1410(2002), para 12; 1319(2000), paras 4, 11.

219 UNSC, Resolution 916(1994), para 18.

220 UNSC, Resolutions 2070(2012), para 5; 2012(2011), para 4; 1944(2010), Preamble and paras, 3, 7 and 22.

221 UNSC, Resolution 2012(2011), Preamble.

222 UNHCR, 'A Thematic Compilation of Executive Committee Conclusions', Seventh Edition, Division of International Protection, 2014, [www.unhcr.org/53b26db69.html](http://www.unhcr.org/53b26db69.html) (accessed 10 August 2015).

223 UNHCR, 'Thematic Compilation of General Assembly & Economic and Social Council Resolutions' (4th edn, Division of International Protection,

positive step to see the link between the principle of burden-sharing (also called responsibility sharing or international cooperation) and resettlement being made in a UNSC resolution.<sup>224</sup>

So far, no mention of resettlement in an operative part of any resolutions on Syria,<sup>225</sup> a development overshadowed by the by the more urgent need for all parties to the conflict to respect IHRL and IHL and provide humanitarian access to the civilian population.<sup>226</sup>

However, an operative part provision that implies third country resettlement does exist in the first thematic resolution on children and armed conflict.<sup>227</sup> Paragraph 17 of that resolution states that the UNSC:

*Reaffirms* its readiness when dealing with situations of armed conflict: (b) to continue to support the protection of displaced children including their resettlement by UNHCR and others as appropriate

One concern regarding this provision is that there are no linguistic markers to provide guidance on whether local resettlement or resettlement to a third country is being contemplated. However, the phrase 'by UNHCR and others as appropriate' could be used to argue that in this resolution both local and third country resettlement were contemplated to be applied as appropriate to the situation and the needs of the child.

Disappointingly, resettlement is not mentioned in any of the resolutions on children and armed conflict that follow,<sup>228</sup> which merely reaffirm Resolution 1261 (1999) as contributing 'to a comprehensive framework for addressing the protection of children affected by armed conflict'.

### 3.2.2.5 Assumptions on the use of resettlement in UNSC resolutions

Unlike most of the provisions containing the term resettlement discussed above, the contents of some provisions cannot be used to divine whether local or third country resettlement is intended by the UNSC. For example:

*Welcomes* the commitment of the parties to the right of all refugees and displaced persons freely to return to their homes of origin or to other places of their choice in Bosnia and Herzegovina in safety, *notes* the leading humanitarian role which has been given by the Peace Agreement to the United Nations High Commissioner for Refugees, in coordination with other agencies involved and under the authority of the Secretary-General, in assisting with the repatriation and relief of refugees and displaced persons, and *stresses* the importance of facilitating the *return or resettlement* of refugees and displaced persons

When considering such stipulations, it should be noted that, while the use of resettlement in UNSC resolutions is not consistent, a pattern of usage is nonetheless emerging.

It is important to remember that, as was pointed out earlier in the paper, IDPs are one of the most numerous groups of displaced people in need of protection and one of the groups with least protection under international law (through not falling into the definition of refugee under the Refugee Convention). However, what is also clear is that the UNSC has been instrumental in strengthening the rights of IDPs through their resolutions, by formally endorsing the Guiding Principles on International Displacement, in the face of unwillingness of states and prior even to the UNGA.<sup>229</sup> The above stipulate that IDPs also have access to durable solutions, however all within the territorial limits of their country. Part V of the Guiding Principles provides for the right of IDPs to resettle within their country. Consequently, based on this history and having analysed UNSC resolutions containing the provisions on resettlement as a durable solution, it could be safely argued that in cases of uncertainty as to the use of the term resettlement, it is most likely that the UNSC is using the local resettlement meaning of the term.

## 3.3 Conclusions

Even with the different uses of the term resettlement, certain conclusions can be reached based on the above analysis. The notion of local resettlement could, through the many mentions in UNSC resolutions, including as part of binding provisions and in the mandates of two of the most recent peacekeeping missions,<sup>230</sup> be argued to be an emerging *opinio juris* as accepted in international law. Local resettlement, however, was not the question that this paper was trying to answer.

2014), [www.unhcr.org/53b2c42c9.html](http://www.unhcr.org/53b2c42c9.html) (accessed 10 August 2010), 50–51.

224 UNHCR and International Criminal Tribunal for Rwanda, 'Summary Conclusions, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law', Arusha Tanzania, 11–13 April 2011, para 1.

225 See UNSC, Resolutions 2254(2015), para 14 and 2170(2014), para 2.

226 UNSC, Resolutions 2139(2014); 2165(2014).

227 UNSC, Resolution 1261(1999).

228 UNSC, Resolutions 2225(2015); 2143(2014); 2068(2012); 1998(2011); 1882(2009); 1612(2005); 1539(2004); 1460(2003); 1379(2001); 1314(2000).

229 Ahlborn, *The Development of International Refugee Protection*, p. 38.

230 United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA): UNSC, Resolution 2217(2015), para 32(c); United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA): UNSC, Resolutions 2227(2015), para 14(f)(i) and 2164, para 13(c)(vii).

Regarding resettlement to a third country, out of the numerous UNSC resolutions identified as condemning or showing concern at the mass displacements of people due to conflict and serious violations of IHL and IHRL (or even due to environmental disaster) to the point of determining these flows of the displaced to be a threat to the peace or security, only two recent resolutions on Syria urged all member states to increase their resettlement efforts, while an older resolution on children in armed conflict contemplated resettlement in an operative provision.

While not proof (yet) of an emerging *opinio juris*, these resolutions are evidence that the subject of resettlement to a third country is within the power of the UNSC to urge (if not impose on) all member states.

## 4. Application

The previous Part illustrated that it is legally possible for the UNSC to create exhortatory (though not obligatory) resolutions regarding resettling refugees to a third country. This Part intends to start the discussion about the different incentive-driven ways in which UNSC resolutions on resettlement may be implemented in a way that may overcome the lack of political will of member states to resettle refugees to third countries. Three ideas of implementation are proposed and discussed, namely, using UNSC resolutions to ‘trigger’ a standing arrangement of a burden-sharing regime, such as temporary protection, in influx situations; creating a UNMEER-like resettlement mission; and adding resettlement to a third country as a way of contributing to peacekeeping operations. It must be kept in mind that these suggestions are proposed merely as starting points for further investigation rather than a comprehensive exploration of the ideas.

### 4.1 Triggering standing arrangements of international cooperation

An option that could potentially be explored is to add UNSC resolutions into an already proposed system of standing arrangements of international cooperation. One such proposed system is temporary protection.

In fact, this system already exists in the EU, in the form of a Temporary Protection Directive.<sup>231</sup> This Directive is designed to lie dormant until it has been activated by a ‘Council Decision adopted by a qualified majority on a proposal from the Commission’ or a member state.<sup>232</sup> This Directive has not yet been acted upon, despite the perceived refugee crisis gripping Europe.

A similar system has been proposed for the international community by UNHCR in 2014 in the Guidelines on Temporary Protection or Stay Arrangements (Temporary Protection Guidelines),<sup>233</sup> which ‘call for ‘standing arrangements’ to be agreed on a multilateral/regional basis and to be activated in response to particular situations or events when they arise.’<sup>234</sup> The Guidelines suggest that the standing arrangements should be able to be brought to an end through a cooperative step in order to ensure not to undermine the responsibility sharing program and not to trigger secondary movements.<sup>235</sup>

This section proposes that the activation (and de-activation) of what the Temporary Protection Guidelines call the Temporary Protection or Stay Arrangements (TPSAs) can be achieved through UNSC Resolutions (which are capable of terminating earlier resolutions).<sup>236</sup> The Guidelines suggest the setting up of a central body such as a ‘steering committee’ which would ‘agree the categories, situations, or groups to whom the TPSA would apply, its basic parameters, modalities of implementation and, importantly, solutions and termination.’<sup>237</sup> UNHCR is the organisation best placed to ‘play a convening and advisory role’ in the implementation of these arrangements.<sup>238</sup>

Suffice to point out here that the UNSC, by way of its resolutions can play the same triggering role for temporary or other more permanent resettlement-based responses that are put in place by member states as arrangements of international protection through responsibility and burden sharing. Furthermore, the UNSC’s Article 41 powers can be utilised to institute the required implementing mechanisms (discussed in section 2.3.3).

231 Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing*, 7 August 2001, OJ L 212/12 (Temporary Protection Directive).

232 European Commission, Migration and Home Affairs, *Temporary Protection*, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm) (accessed 10 August 2015); Temporary Protection Directive, Article 5(1).

233 UNHCR, *Temporary Protection Guidelines* (2014), [www.refworld.org/docid/52fba2404.html](http://www.refworld.org/docid/52fba2404.html) (accessed 10 August 2015) (UNHCR Temporary Protection Guidelines).

234 Volker Türk, ‘Temporary Protection to Fill a Gap’, *Forced Migration Review*, 49 (2015), pp. 40–1, at p. 40; UNHCR Temporary Protection Guidelines, para 1.

235 UNHCR Temporary Protection Guidelines, para 22.

236 Marko D. Öberg, ‘The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion’, *American Journal of International Law*, 105 (2011), pp. 81–90, 86 referring to the *Kosovo Advisory Opinion* para 37.

237 UNHCR Temporary Protection Guidelines, para 24.

238 *Ibid.*, para 25.

## 4.2 Ebola Response template

Another way to approach resettlement is through a UN Emergency Response mission, pioneered by the global response to the Ebola crisis by way of UNMEER. This was the UN's first response to an emergency health situation and had as its objective the 'scaling up the response on the ground'.<sup>239</sup>

The mission was created by the Secretary-General, after a UNSC resolution '[d]etermining that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security',<sup>240</sup> and a unanimously adopted UNGA resolution, which requested the Secretary-General to establish UNMEER<sup>241</sup> at the behest of Liberia, Guinea and Sierra Leone,<sup>242</sup> the countries in the region affected by the crisis. Another unusual element of UNMEER is that the World Health Organization, an affiliated, but not even a subsidiary body of the UN,<sup>243</sup> was placed as the lead organisation of the Mission.<sup>244</sup> In Liberia, the United Nations Mission in Liberia (UNMIL) was not only not drawn down but remained to assist and cooperate with the newly established UNMEER.

The Ebola response sets an ideal template for a resettlement mission. As has been stated earlier, the UNSC has declared humanitarian situations such as refugee flows as a threat to peace and security. Using the Ebola template, an emergency response mission could be triggered by an UNSC and/or UNGA resolution at the request of,<sup>245</sup> and in cooperation with, neighbouring states who are feeling the effects of the mass displacement the most. Turkey, Lebanon, and Jordan are bearing the brunt of persons displaced from Syria. The mission's objective would be the 'scaling up the response on the resettlement to third countries' as a way of easing the burden borne by the countries in the region. UNHCR would lead this emergency response mission, working in collaboration with any other peacekeeping operations in the area.

## 4.3 Resettlement mandate in peacekeeping missions

The final and, potentially most viable, suggestion is to incorporate resettlement to a third country as one of the mandates of peacekeeping operations. As the analysis of UNSC resolutions has shown, local resettlement is increasingly being incorporated in 'protection of civilians' sections in peacekeeping operations' mandates.

Peacekeeping operations are created by the UNSC issuing a resolution determining a threat of peace and security and setting out the operation's mandate. The peacekeeping operation is then created as a subsidiary organ of the UNSC.<sup>246</sup> Simultaneously, the UNGA coordinates 'agreement between and/or with the parties to a conflict' and finances the operation through their Article 17 budget powers.<sup>247</sup> The Secretary-General heads the operation.<sup>248</sup> Peacekeeping operations are not based on any specific provision in the UN Charter, having evolved over time from state and institutional practice.<sup>249</sup> Current practice is to mandate peacekeeping operations under Chapter VII 'without specifying which provision'.<sup>250</sup>

A peacekeeping operation is made up of military and civilian elements. The civilian personnel are hired in their individual capacity for the operation. Member states contribute equipment and place military staff 'at the disposal of the United Nations' based on an agreement by between the UN and those member states.<sup>251</sup> This agreement is often based on a model agreement.<sup>252</sup> Similarly, a 'multi-dimensional integrated UN peacekeeping operation' is achieved by working closely with other UN agencies, such as the UNCHR.<sup>253</sup>

One of the benefits of peacekeeping operations is that they are to a large degree 'based on consent and cooperation'.<sup>254</sup> Consequently, peacekeeping operations are as much an exercise of the UN under the combined effect of the UN Charter

239 UNMEER Website.

240 UNSC, Resolution 2177(2014).

241 GA, 'Measures to contain and combat the recent Ebola outbreak in West Africa', 23 September 2014, A/RES/69/1.

242 Permanent Missions, 'UN Mission for Ebola Response Highlights New Type of UN Operation – Chef de Cabinet Tells UNMEER Staff', [www.un.int/news/un-mission-ebola-response-highlights-new-type-un-operation-chef-de-cabinet-tells-unmeer-staff](http://www.un.int/news/un-mission-ebola-response-highlights-new-type-un-operation-chef-de-cabinet-tells-unmeer-staff) (accessed 10 August 2010).

243 The World Health Organization is an autonomous organisation whose work is coordinated through ECOSOC (intergovernmental level) and CEB (inter-secretariat level): UN, UN, 'The United Nations System: UN Organizational Chart', [www.un.org/en/aboutun/structure/pdfs/UN\\_System\\_Chart\\_30June2015.pdf](http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf) (accessed 10 August 2015).

244 UNMEER Website.

245 See for example, UNSC, Resolution 2177(2014), Preamble.

246 UN Charter, Article 29.

247 Bothe, 'Peacekeeping', p. 1183.

248 UN Charter, Articles 97–99; Bothe, 'Peacekeeping', p. 1187.

249 *Ibid.*, pp. 1176–8.

250 *Ibid.*, p. 1186.

251 Bothe, 'Peacekeeping', pp. 1184, 1191.

252 UNGA, 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)', 20 January 2015, A/C.5/69/18, Chapter 9 Memorandum of Understanding.

253 UN, 'United Nations Peacekeeping: Partnerships', [www.un.org/en/peacekeeping/operations/partnerships.shtml](http://www.un.org/en/peacekeeping/operations/partnerships.shtml) (accessed 9 August 2015).

254 Bothe, 'Peacekeeping', pp. 1175, 1183.

as a contractual relationship between the UN and the host state,<sup>255</sup> and the UN and the contributing member states.<sup>256</sup> Because of this contract-like relationship, agreement regarding state contributions can be amended to incorporate the resettlement of displaced persons, as per, for example, Article 11 of the model agreement, which states that '[t]he parties may conclude written supplementary arrangements to the present [Memorandum Of Understanding]'.

#### 4.3.1 Budgetary discount incentive

Because the option of resettling displaced persons is not obligatory, for it to be attractive to states, it needs to be incentivised. This can be achieved through linking resettlement to the collection of moneys for peacekeeping operations. Peacekeeping fees are obligatory for member states and are added on top of their regular contributions to the UN as per the powers of the UNGA.<sup>257</sup> The budget for each member state is worked out by a formula, considering criteria, including the level of economic development of a country.<sup>258</sup>

One of the issues facing the UN is that, at the end of 2014, USD 653 million was owed, with only 31 member states having paid their allocated contribution.<sup>259</sup> It was put forward by South Africa that 'withholding funds for approved budgets created 'artificial' political leverage' that was being abused by states.<sup>260</sup> This so-called leverage could potentially be used for the benefit of resettlement. Specifically, member states' payments could be decreased or worked out based on a more favourable formula, should they choose to contribute to the peacekeeping mission by resettling displaced persons.

#### 4.4 Conclusion

As mentioned earlier, having showed that it is within the UNSC's power to issue resolutions urging states to resettle displaced persons, the above three suggestions provide a starting point as to how the UNSC is best placed to utilise these resolutions effectively. While all three suggestions could be explored further, introducing resettlement as one of the ways to contribute to peacekeeping missions allows resettlement to be incentivised through budgetary discounts. This is particularly useful in combatting the lack of political will that is stifling the increase in global resettlement efforts.

### 5. Conclusions

This paper set out to answer the following question: under international law, can the UNSC issue resolutions obligating states to resettle displaced persons in certain situations, such as that of mass influx? Having analysed the powers of the UNSC under the UN Charter as well as having conducted a detailed analysis on a selection of UNSC resolutions dealing with durable solutions and resettlement, the short answer to this question can be summarised as: not quite.

One of the main difficulties of obligating states to resettle the displaced is that the durable solution of resettlement, apart from UNHCR Statute, has no basis in international law. What is more difficult is that the protections available in the Refugee Convention are only applicable once an asylum seeker has crossed into the territory of a signatory of the Refugee Convention. However, currently, most of the countries of first asylum are not parties to the Convention.

The paper explored the question of the power of the UNSC to create binding obligations under the UN Charter. The issue of displaced people has been declared to be a threat to peace and security under Article 39 numerous times, since the early 1990s. Thus, the issue of displaced people, and the mass flows of refugees have been brought into the mandate of the UNSC. It is therefore within the UNSC's power to make binding non-use of force measures under Article 41.

While the powers of the UNSC are indeed broad, the measures are usually targeted at the state(s) responsible for the threat to peace and security. And while there is an obligation on member states to carry out sanctions aimed at the target states, UNSC resolutions rarely aim binding obligations at non-offending member states for fear of acting in the role of a global legislator through creating laws of general application. A notable exception to this general practice are the resolutions sanctioning terrorism and curbing the spread of weapons of mass destruction.

Nonetheless, it is likely that resettling refugees (an arguably positive obligation) would have to be done in an exhortatory way, requesting states, in line with the principles of international cooperation, responsibility and burden sharing, to assist in dealing with the determined threat to peace and security though, amongst other measures, resettling the displaced to third countries. This is in fact what has been done in two recent resolutions on Syria, thereby potentially paving the way for more resolutions with similar provisions in response to situations of mass influx. This is partly supported by a provision in the first thematic resolution on children and armed conflict, which contemplated resettlement of children where appropriate.

255 Bothe, 'Peacekeeping', p. 1187.

256 *Ibid.*, 1190–1.

257 UNGA, 'Background Resources: How Is UN Peacekeeping Financed?', [www.un.org/en/ga/fifth/pkofinancing.shtml](http://www.un.org/en/ga/fifth/pkofinancing.shtml) (accessed 9 August 2010); *Certain Expenses Advisory Opinion*, pp. 177–9.

258 *Ibid.*

259 UNGA, 'Meetings Coverage and Press Releases: Budget Committee Voices Concern over Late Payment of Assessments, Says United Nations Has 'Long Way to Go' to Financial Soundness', [www.un.org/press/en/2015/gaab4156.doc.htm](http://www.un.org/press/en/2015/gaab4156.doc.htm) (accessed 9 August 2015).

260 *Ibid.*

An analysis of all resolutions with provisions on resettlement between 1993 and June 2016<sup>261</sup> identified a growing promotion and development by the UNSC of durable solutions of IDPs, which not only includes the right to return, but increasingly integration and local resettlement. Durable solutions for IDPs are the same as those for refugees but are limited to the territory of their own country. This development is clearly of direct benefit to IDPs, which are the most numerous population of concern to UNHCR as well as the least protected by IRL. However, while not directly benefiting people who have crossed borders, nearly half of whom are in protracted urban and camp-like situations, the development and acceptance, through practice, of resettlement as a right and a state obligation over time is likely to give legal basis to the concept. This is especially the case as local resettlement is increasingly one of the mandates of peacekeeping operations.

Having acknowledged that, while the UNSC can issue resolutions on resettlement to a third country, those resolutions would be exhortatory, using languages such as 'urges', or 'requests', the paper considered ways in which such resolutions could be implemented. Three options are suggested.

The first option is that rather than creating binding obligations on member states, the UNSC can be part of multilateral and/or regional standing arrangements to resettle displaced persons by being the required 'trigger' in identifying when those standing arrangements are to be both activated and deactivated and helping run those standing arrangements through its Article 41 implementing mechanisms.

Alternatively, an emergency response mission could be set up in the same vein as the one created to address the Ebola crisis in some of the West African states. This emergency response mission is perfectly suited to the type of response needed by the mass influx of refugees into neighbouring states. The mission can be created at the request of the states in need of assistance and can be led by UNHCR, which is already on the ground in those countries.

The third, most viable, option is including resettlement to a third country into resolutions specifying peacekeeping mandates. The benefit of creating such a mission is linked to the contractual obligations of participating states, which can be extended to resettling displaced persons. It is proposed that this response could be incentivised through the UNGA budgetary power as a way of mitigating the peacekeeping mission debt accrued by member states.

Finally, it must be noted that while a positive answer to the paper's question was hoped for, the current answer of 'not quite' is nonetheless encouraging. Especially as it was found that steps are increasingly (albeit slowly) being taken in the right direction by the UNSC with respect of resettlement, even while member states are lacking in political will.

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# The European Union Temporary Protection Directive: an example of solidarity in law but not in practice – a review of temporary protection in the European Union (1990–2015)

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## Abstract

Temporary protection mechanisms emerged in Europe in the 1990s in response to mass influxes of asylum seekers. The influxes of asylum seekers from the former Yugoslavia, fleeing conflicts and violence resulting from the break-up of that country, have been closely associated with its emergence. In the light of the developments in that period, particularly responses of European states to influxes from the former Yugoslavia, the paper reviews the emergence of temporary protection. It reviews the convergence of European norms which lead EU states to agree the Temporary Protection Directive in 2001. The paper juxtaposes responses to the 1990s influxes with responses to the 2015 European refugee crisis. The latter responses have included arrangements to relocate asylum seekers from EU states under the most pressure, but have not included temporary protection. The omission of temporary protection is consistent with the findings in this paper, which show that EU states came to disfavour temporary protection as a response to asylum crises. The paper concludes that while EU states did commit to a set of standards for temporary protection, they did not commit to the implementation of temporary protection.

## Keywords

Temporary Protection, Yugoslavia, Temporary Protection Directive, burden sharing, return/repatriation, humanitarian, Syrian refugees

## Introduction

Asylum claims have been a major 'problem' for European states as their numbers have risen against domestic pressures to reduce immigration. In the 1990s, there were new asylum pressures as large numbers of people from eastern European nations arrived in European Union states, (EU), with the collapse of the Soviet block and European communism. The single largest group of asylum seekers was comprised of persons fleeing conflict after the breakup of Yugoslavia. A key objective of EU states was to contain the Yugoslavian refugee problem as much as possible outside the EU. Refuge under various national arrangements of temporary protection was given to those who reached the EU from Yugoslavia. While critics of temporary protection were concerned with the ad hoc approach and the precariousness of status and rights under temporary protection, in the main, they accepted the pragmatism of temporary protection arrangements because, whatever their exact forms, they ensured immediate protection.

Agreement for a common pan-EU temporary protection instrument was slow coming primarily due to a lack of consensus between states on an acceptable basis for sharing the burden of a mass influx, which was considered as a central part of an effective EU wide arrangement. Following change brought about by the Treaty of Amsterdam in 1999, which required the EU to have a temporary protection instrument by 2004, The Temporary Protection Directive 2001/55/EC (TPD or The Directive) was agreed in 2001.<sup>1</sup>

The Directive provides the EU with a mechanism to activate an EU-wide temporary protection arrangement in a situation of 'mass influx or imminent mass influx of displaced persons from third countries' into the EU.<sup>2</sup> Under TPD, displaced persons include persons who have fled areas of armed conflict or endemic violence.<sup>3</sup> The Directive provides temporary protection for one year initially, with the possibility of extension for a further two years.<sup>4</sup>

It has been claimed that TPD establishes 'the binding legal obligation of temporary asylum' providing more legal security,<sup>5</sup> and that TPD sets out a model temporary protection system which the EU can 'take off the shelf' and use in the event of a crisis.<sup>6</sup>

Fourteen years after the enactment of TPD, the EU experienced what has been acknowledged as the largest migration and humanitarian crisis in Europe for decades, with close to 1.3 million recorded asylum claims in 2015.<sup>7</sup> The vast majority of these migrants are considered by UNHCR to have fled war and persecution.<sup>8</sup> 363,000 asylum applications were submitted by Syrians, representing 29 per cent of all claims in 2015.<sup>9</sup> EU data shows that, since 2014 Syrians have had an average EU-wide asylum recognition rate equal to or higher than 75 per cent.<sup>10</sup> Not surprisingly, there have been calls to activate TPD to help address the crisis in the EU, and some calls to activate it to facilitate evacuation of Syrians to the EU.<sup>11</sup> Neither the Commission nor any EU state has responded to calls to activate TPD.<sup>12</sup> This seems remarkable for several reasons. First, the scale of the crisis seems to merit activation. Given the marathon efforts from the Commission and some EU states, notably Germany, to secure an EU wide temporary protection mechanism for a mass influx, it seems incongruous that there would be silence. Second, TPD secures a comprehensive set of obligations which addressed many of the criticisms of national temporary protection regimes in the 1990s.<sup>13</sup> The Directive has been acknowledged as a benchmark in temporary protection mechanisms.<sup>14</sup>

1 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12. (TPD).

2 Ibid. article 1.

3 Ibid. article 2(c).

4 Ibid. article 4.

5 Nuria Arenas, 'The Concept of «Mass Influx of Displaced Persons» in the European Directive Establishing the Temporary Protection System', *European Journal of Migration and Law*, 7 (2006), pp. 435, 437.

6 Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford: Oxford University Press, 2011), p. 300.

7 European Commission (Asylum Statistics 2016), [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics) (accessed 20 December 2016).

8 UNHCR (2015 News), [www.unhcr.org/5683d0b56.html](http://www.unhcr.org/5683d0b56.html) (accessed 1 June 2016).

9 European Commission (Asylum Statistics 2016)

10 European Commission Press Release (22 September 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm) (accessed 14 September 2016).

11 See e.g.: Cynthia Orchard and Dawn Chatty, 'High time for Europe to offer temporary protection to refugees from Syria?' (2014), [www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to](http://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to) (accessed 6 January 2017); Cynthia Orchard and Andrew Miller, 'Protection in Europe for Refugees from Syria', Refugees Studies Centre Forced Migration Policy Briefing 10 (2014), [www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf](http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf) (accessed 6 January 2017); European Parliament Motion (28 April 2015), [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2015-0367+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2015-0367+0+DOC+XML+V0//EN) (accessed 6 January 2016); Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe', *European Journal of Migration and Law*, 18 (2016), p. 1.

12 cf Hanne Beirens and others, Study on the Temporary Protection Directive Final report (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission 14, pp. 16–17, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf) (accessed 10 January 2017) (ICF Study on TPD).

13 Jean-François Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law', *Netherlands Yearbook of International Law*, 45 (2014), pp. 221, 242–243; ECRE (2001) Information Note on Council Directive 2001/55/EC of 20 July 2001 (1 September 2001).

14 Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime', *American Journal of International Law*, 94 (2000), pp. 279, 305; UNHCR (2014), 'Guidelines on Temporary Protection or Stay Arrangements' available at [www.unhcr.org/uk/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html](http://www.unhcr.org/uk/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html) (accessed 6 January 2017).

Given the ongoing crisis, the fact that no (political) calls are heard to activate the TPD requires exploration. As TPD was passed following experiences in Europe of mass influxes caused by the Yugoslavian wars, and as it records that the EU Commission and member states were exhorted to learn lessons from their responses, it is necessary to revisit that period and the responses to those influxes, to understand the expectations about what temporary protection would achieve for other mass influxes into the EU.<sup>15</sup>

## Structure of the paper

The paper provides, first, some broader contexts against which it considers the development of temporary protection. The paper then considers two Yugoslavian conflicts and the resulting refugee influxes which are associated with the emergence of temporary protection in Europe: the Bosnian war 1992–5 and the Kosovo crisis in 1999. The paper explores the early developments of the common European asylum system, (CEAS) which developed in parallel with the Yugoslavia influxes. It appraises the emergence of five elements of temporary protection as reflected in the TPD. Finally, consideration is given to the responses of the EU to the 2015 refugee crisis, noting the significance of the relocation mechanisms, which have been innovated in lieu of activation of TPD, to relocate asylum seekers from Greece and Italy. The paper concludes that following their experiences of the Yugoslavian influxes, EU states were committed to an instrument on temporary protection but were not committed to implementing temporary protection.

## 1990s – some contexts

Three general observations can be made about the character of European and international politics in the 1990s which are integral to an understanding of the emergence of temporary protection and the subsequent concerns about its putative benefits and purpose.

First, there was the rising migration numbers, and, from the perspective of EU states, this was dominated by an increasing asylum problem. In the 1970s the total number of asylum claims across Western Europe averaged no more than 13,000 annually.<sup>16</sup> In the early 1980s, across the fifteen western European states that came to constitute the EU15<sup>17</sup>, there was a total of 46,000 asylum claims. By the mid 1980s the numbers began to cause serious concern. By 1985, the number had risen to 157,000. By 1990, asylum seekers were arriving from Afghanistan, Angola, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka, Viet Nam and Zaire.<sup>18</sup> To resist the trend European states put up a ‘battery’ of non-entrée policies.<sup>19</sup> Hence not surprisingly the ‘Fortress Europe’ critique emerged.<sup>20</sup> These policies did not see a reduction in asylum numbers and it has been suggested that they contributed to the increase as some would-be economic migrants turned to asylum as an entry route to avoid them.<sup>21</sup> The 1990s became a decade of new record numbers of asylum claims as new groups of asylum seekers arrived from eastern Europe. In 1992, the EU15 received a high of 674,000 asylum claims.<sup>22</sup>

The second UNHCR context was the collapse of the Soviet Union at the beginning of the decade and the decline of its influence.<sup>23</sup> The impact of this was both a period of political uncertainty in the international arena, and, as noted above, an increasing numbers of asylum applications in EU states from east Europeans.

The third observation is how international affairs were increasingly viewed and legitimised from a humanitarian perspective.<sup>24</sup> The increasingly influential role of the media facilitated this.<sup>25</sup>

The first major international crisis of the 1990s was the first Gulf War, January – February 1991, where a UN-authorized, American-led coalition successfully removed Iraqi forces from Kuwait.<sup>26</sup> In the aftermath of this war a huge number of ethnic Kurds, estimated by some at two million, fled, most towards Turkey, after a failed coup attempt against the Iraqi

15 Above note 1, Recital 6; see also note 55.

16 Matthew J. Gibney, ‘Between Control and Humanitarianism: Temporary Protection in Contemporary Europe’, *Georgetown Immigration Law Journal*, 14 (2000), pp. 689, 693.

17 For a summary of states of EU in 1990s, see note 37.

18 UNCHR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), p. 156, available at [www.unhcr.org/3ebf9bb10.html](http://www.unhcr.org/3ebf9bb10.html) (accessed 9 January 2017).

19 Katy Long, *The Point of No Return: Refugees, Rights and Repatriation* (Oxford: Oxford University Press, 2013) 106; UNHCR, *The State of the World's Refugees 2000*, 155.

20 UNCHR, *The State of the World's Refugees 2000*, 161; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (3rd edn, Oxford: Oxford University Press, 2003), p. 752.

21 UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (1997 Chapter 5), p. 156, available at [www.unhcr.org/3eb7ba414.html](http://www.unhcr.org/3eb7ba414.html) (accessed 6 December 2016).

22 See note 37.

23 J.M. Roberts, *The New Penguin History of the World* (4th edn, Harmondsworth: Penguin, 2002), p. 1141.

24 The Independent International Commission on Kosovo, *The Kosovo Report – Conflict – International Response – Lessons Learned* (Oxford: Oxford University Press, 2000), p. 186 (The Independent Kosovo Report); Adam Roberts, ‘The Role of Humanitarian Issues in International Politics in the 1990s’, *International Review of the Red Cross*, 81 (1999), p. 19; UNHCR (Evaluation and Policy Analysis Unit), *The Kosovo Refugee crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response* (Pre-publication edition) (Geneva, 2000), p. vi (UNHCR Kosovo Report).

25 Roberts, ‘The Role of Humanitarian Issues in International Politics in the 1990s’; The Independent Kosovo Report, above note 24, 6.

26 Roberts, *The New Penguin History of the World*, pp. 1130–1.



regime. The Turkish government alarmed by the impending mass influx closed its border. A potential humanitarian disaster was averted by international intervention – an American-led operation to secure a ‘safe-haven’: a no-fly zone, to provide a protected space for the Iraqi Kurds. While there were incursions, the safe-haven was considered effective.<sup>27</sup>

The humanitarian cause was used to justify a new role for NATO<sup>28</sup> for its interventions in the Yugoslav conflicts.<sup>29</sup>

## 1990s – the Yugoslav conflicts

The break-up of the Socialist Federal Republic of Yugoslavia (SFRY) into separate independent states was a complex series of bloody conflicts representing the first wars in Europe since the end of World War Two. The re-emergence of deep historical divisions along national lines and ethnic groupings shaped the series of conflicts and resulting displacements of huge numbers of people linked to ethnic cleansing.<sup>30</sup> As one commentator has suggested, given the mix of ethnicities and nationalities, the conflicts ‘represented logical (if violent and brutal) steps towards coherent goals.’<sup>31</sup> For the seceding states the goals were independence from an increasingly dominant Serbia, and in the process, to secure territory and protection of their ethnic compatriots. While pursuing nationalistic aims, armies and militia from all sides sought to intimidate, ethnically cleanse and expel minorities from their territories.

Between 1991 and 1992, Croatia, Bosnia-Herzegovina, (Bosnia), Macedonia, and Slovenia declared themselves separate states, leaving Serbia, (with its two provinces, Vojvodina and Kosovo), and Montenegro, as the remainder of what was to be re-named the Federal Republic of Yugoslavia.<sup>32</sup> Slovenia seceded first. The first major Yugoslavian conflict was the Croatian civil war between 1991 and 1995. During the war a UN force, UNPROFOR, was deployed to facilitate demilitarisation and to monitor.<sup>33</sup>

The second and bloodiest conflict was the Bosnian civil war, 1992–5, with both Croatia and Serbia seeking to make gains from Bosnian territory at the expense of the majority Bosnian Muslims. As the conflict escalated UNPROFOR’s mandate was extended into Bosnia to create ‘safe areas’ to deter attacks on and to protect ethnic Muslims populations in several areas including Sarajevo and Srebrenica. UNPROFOR proved to be wholly inadequate in Bosnia as Bosnian ethnic Serb forces attacked these areas with little impunity, sieging and bombing Sarajevo for the duration of the war, and notoriously killing thousands of Muslim men and boys in Srebrenica.<sup>34</sup> After some hesitation, due to differences in the NATO alliance about strategy, but under pressure for a resolution to a worsening humanitarian crisis, NATO’s sustained and intense bombing of Serbian targets in 1995 was seen as instrumental in bringing the conflict to an end.<sup>35</sup> In late 1995 the Dayton Peace agreement was signed.<sup>36</sup>

These wars resulted in what were the largest refugee movements in Europe since World War Two. It has been suggested that the total number of displaced Bosnians was over three million.<sup>37</sup> In 1992, the year with the highest number of recorded asylum applications across the 15 EU states, 224,000 were from those fleeing the conflicts in Yugoslavia, notably Bosnia, representing 33 per cent of all applications.<sup>38</sup> EU states implemented temporary protection arrangements for these refugees.

In the late 1990s there was further disintegration and conflict as a Serbian-led government sought to put down protests and guerrilla style attacks from Albanian-ethnic Kosovars seeking the independence of the Kosovo region from Serbian rule.<sup>39</sup> In the spring of 1999, following increased intensity of the conflict and human rights abuses, there

27 For example, see comments by Morten Kjaerum, note 56.

28 Roberts, *The New Penguin History of the World*, p. 1148.

29 Roberts, ‘The Role of Humanitarian Issues in International Politics in the 1990s’; *The Independent Kosovo Report*, p. 6.

30 Roberts, *The New Penguin History of the World*, pp. 1142–3.

31 Steven W. Soward, ‘The Yugoslav Civil War: Lecture 25’ (1996), <http://staff.lib.msu.edu/sowards/balkan/lect25.htm> (accessed 19 December 2016).

32 UN International Criminal Tribunal for the Former Yugoslavia (ICTY) website at [www.icty.org/en/about/what-former-yugoslavia](http://www.icty.org/en/about/what-former-yugoslavia) (accessed 15 November 2016).

33 UN Department of Public Information (1996), [www.un.org/en/peacekeeping/missions/past/unprof\\_p.htm](http://www.un.org/en/peacekeeping/missions/past/unprof_p.htm) (accessed 6 January 2017).

34 Barbara Crossette, ‘U.N. Details Its Failure to Stop ‘95 Bosnia Massacre’, *The New York Times* (16 November 1999), [www.nytimes.com/1999/11/16/world/un-details-its-failure-to-stop-95-bosnia-massacre.html](http://www.nytimes.com/1999/11/16/world/un-details-its-failure-to-stop-95-bosnia-massacre.html) (accessed 6 January 2017); (ICTY) website ‘Facts about Srebrenica’, available at [www.icty.org/x/file/Outreach/view\\_from\\_hague/jit\\_srebrenica\\_en.pdf](http://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf) (note 31).

35 UNHCR (Evaluation and Policy Analysis Unit), para 96.

36 NATO website, ‘Peace support operations in Bosnia and Herzegovina’, [www.nato.int/cps/en/natohq/topics\\_52122.htm](http://www.nato.int/cps/en/natohq/topics_52122.htm) (accessed 15 November 2016).

37 Kirsten Young, ‘UNHCR and ICRC in the former Yugoslavia: Bosnia-Herzegovina’, *International Review of the Red Cross*, 83 (2001), pp. 782–3.

38 UNHCR data suggests that, the total number of all recorded asylum applications in the EU for 1992 was 674,000. The data for numbers of recorded claims in the EU in 1990s comes mostly from UNHCR sources, in particular, ‘Asylum Applications in Industrialized Countries: 1980–1999’ Tables III.28 and V.14, [www.unhcr.org/statistics/STATISTICS/3c3eb40f4.pdf](http://www.unhcr.org/statistics/STATISTICS/3c3eb40f4.pdf) (accessed 6 January 2017) (Figures extrapolated from these tables by author). (UNHCR 1980–99). The 1990s EU data corresponds to 15 states (EU15): 12 were full members at the beginning of the 1990s and three were candidate states attaining full membership in 1995. The 12 were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, UK; the three states which attained full membership in 1995 were Sweden, Finland and Austria. See page x of UNHCR statistics.

39 *The Independent Kosovo Report*, pp. 50–98.

was a sudden and massive increase to the refugee flows (quite possibly accelerated by NATO bombing).<sup>40</sup> In a very short period very large numbers of Albanian-ethnic Kosovars, estimated around 800,000, fled to Albania and Macedonia.<sup>41</sup> The Macedonian government closed the border and threatened to keep it closed unless there was an international agreement to share the burden. The response, at the initiative of the US, involving several countries, including most EU countries, was an evacuation programme, under which states agreed to take quotas of refugees from the Macedonian border. There were around 90,000 evacuees, with 14 EU states accepting a total of 53,000 of these.<sup>42</sup> EU states used temporary protection mechanisms for these evacuees. In June 1999 following NATO bombing, Serbian aggression in Kosovo ended when the Serbian parliament agreed to a peace plan for the withdrawal of Serb militarised forces, the deployment of UN personnel, the return of refugees and to respect substantial autonomy for Kosovo.<sup>43</sup>

## 1990s – developing an EU asylum system

During the 1990s the EU started developing its common European asylum system (CEAS): a system of harmonised law applicable across all EU states.<sup>44</sup> While there were sound humanitarian reasons to develop common obligations and standards, it was the case, for reasons already noted, that this development was to address the growing asylum 'problem'.<sup>45</sup>

A common approach to the 'problem' was also intended to protect the EU's internal market, designed to enable free movement for EU citizens, which, with the EU Schengen rules, required states to remove border controls between themselves.<sup>46</sup> There was a particular risk to the functioning of the internal market of multiple asylum claims by the same person: an asylum claim denied in one state could be made in another state if nothing was done to deny this possibility and to reduce secondary movements between states. It made sense then to develop a common EU wide set of asylum rules to manage, reduce and eliminate multiple claims.

A key innovation was the so-called Dublin transfer rules. The principle of these rules was, and remains, that an asylum seeker can make one claim only for asylum within the EU.<sup>47</sup> The rules are to discourage and prevent multiple applications which as noted were recognised as contributing to increasing numbers of asylum claims.<sup>48</sup> The Dublin rules determine which one state is responsible for the claim.<sup>49</sup> Under the rules it might not be the state in which the claim is made as an asylum seeker could have travelled through a number of EU states to reach a preferred state. The criterion more often applicable for determining responsibility is the state through which the asylum seeker first entered the EU. Given that entry is overwhelmingly through eastern and southern states, as seen in both the 1990s and 2015 influxes, the system places severe burdens on frontline states.<sup>50</sup>

In 1997, EU states agreed the Treaty of Amsterdam, which was intended to provide a firm and coherent legal base to build the common asylum system.<sup>51</sup> Amsterdam incorporated formally into EU law the Dublin transfer rules and the Schengen rules abolishing border controls, (both of which had been developed by EU states but outside mainstream EU

40 UNHCR Kosovo Report, pp. vi, 88: for a discussion about the extent to which NATO bombing accentuated or even caused displacement as well discussion on the legality of NATO intervention.

41 UNHCR Kosovo Report, para 74; The Independent Kosovo Report, pp. 304–5.

42 Greece did not receive any evacuees: UNHCR Kosovo Report, para 454; Joanne Van Selme (ed), *Kosovo's Refugees in the European Union* (Pinter, 2000), Appendix 2: 224.

43 The Independent Kosovo Report, pp. 95–7.

44 Under the EU Treaties, Denmark, Ireland and UK have various forms of 'opt-outs' from obligations under EU asylum law. While there are some differences between them in general they allow these states to choose, subject to consent by other EU states, which EU asylum laws they wish to adopt and which they do not. TPD does not apply to Denmark, while Ireland and UK have both opted in and accept its obligations; see Peers, *EU Justice and Home Affairs Law*, pp. 312–14.

45 Home Office UK (Research, Development and Statistics Directorate), 'An Assessment of the Impact of Asylum Policies in Europe 1990–2000', Research Study 259 (June 2003), pp. 3–4, available at [www.temaasyl.se/Documents/Artiklar/hors259.pdf](http://www.temaasyl.se/Documents/Artiklar/hors259.pdf) (accessed 6 December 2016) (Home Office Research Study 259); UNHCR, *The State of the World's Refugees: A Humanitarian Agenda*.

46 Though not all states are bound by the Schengen rules. Ireland and UK are permitted to maintain border control, (Protocols 19, 20 to the EU Treaties); newly acceded states phase in abolition of border controls, according to the accession agreement with the EU. EU Treaties and Protocols [2016] OJ C202/1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC> (accessed 14 January 2017).

47 The current transfer rules are in a 2013 EU Regulation, 604/2013: European Parliament and Council Regulation 604/2013 of 29 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/1.

48 Nicholas Blake, 'The Dublin Convention and Rights of Asylum Seekers in the European Union', in Elspeth Guild and Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing, 2001), p. 104.

49 There have been several adjustments to the rules and further proposals for revision, some of which are considered in this paper – see at section below, 2015 Refugee crisis: responses and temporary relocation; but the main principles of responsibility have been long standing, controversial and subject to extensive criticism, eg: Home Office Research Study 259, pp. 29–30; Blake, 'The Dublin Convention and Rights of Asylum Seekers in the European Union', p. 104; Minos Mouzourakis, 'We Need to Talk about Dublin: Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union' Refugees Study Centre, University of Oxford, Working Paper Series 105, available at [www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf](http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf) (accessed 8 December 2016).

50 Blake, 'The Dublin Convention and Rights of Asylum Seekers in the European Union', pp. 95, 104, 166.

51 Karoline Kerber, 'Temporary Protection in The European Union: A Chronology', *Georgetown Immigration Law Journal*, 14 (1999), pp. 35, 44, 49.

law).<sup>52</sup> In addition, Amsterdam committed the EU institutions to develop a pan-EU temporary protection mechanism.<sup>53</sup> On 1 May 1999, day 39 of the NATO bombing in Serbia, the Treaty of Amsterdam changes came into force.<sup>54</sup> The first post Treaty of Amsterdam instrument was TPD.<sup>55</sup>

## Yugoslav crises – emergence of European Temporary Protection

As recitals 3 and 6 of TPD acknowledge, the experiences of the refugee influxes caused by the breakup of Yugoslavia, and their responses to them, contextualised the discussions and development of temporary protection. Note recital 6:

On 27 May 1999, the Council adopted conclusions on displaced persons from Kosovo. These conclusions call on the Commission and the Member States to learn the lessons of their responses to the Kosovo crisis in order to establish the measures in accordance with the Treaty.<sup>56</sup>

Before looking at TPD, it is right to emphasise that the emergence of temporary protection was not separated from the politics about how to address and resist increasing migration into the EU particularly from asylum seekers. The maintenance of non-entrée policies, including by some states visa, requirements for Bosnian nationals at the height of the Bosnian conflict,<sup>57</sup> the promotion of ‘safe areas’ despite the risks, and the motivation for supporting the evacuation programmes in response to the Kosovo crisis, are indicative of clear policies to keep the crises and asylum seekers outside the EU as much as possible. Temporary protection emerged because not all refugees could be kept out: a response to spontaneous arrivals. It was not an admission of defeat.<sup>58</sup> Temporary protection was a part of the control policies vis à vis the influxes.

The emergence of temporary protection was controversial. On the one hand, it had the support of UNHCR as an innovative response to the Yugoslavian refugee crises.<sup>59</sup> On the positive side, by applying temporary protection, EU states accepted a humanitarian obligation to protect those fleeing war and conflict. On the other hand, there were concerns: UNHCR support for temporary protection did not insist that displaced people be treated as regular Convention refugees.<sup>60</sup> There was no common set of EU obligations on the form and extent of protection – each state implemented its own arrangements.<sup>61</sup> There were concerns that some states used temporary protection to avoid or water down obligations under the 1951 Convention.<sup>62</sup>

Despite the varied approaches, it became accepted wisdom that temporary protection could be an appropriate response to mass influxes and so states moved towards converging on the key elements.<sup>63</sup> TPD is the result of a decade long journey to an agreement.<sup>64</sup> Using Joan Fitzpatrick’s nomenclature, this paper analyses the ‘elements’ of temporary protection through their formalisation in TPD.<sup>65</sup>

52 Johannes Van Der Klaauw, ‘Towards a Common Asylum Procedure’, in Elspeth Guild and Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing, 2001).

53 Under art 63(2) EC Treaty (as amended by the Treaty of Amsterdam), the Council adopt measures on refugees and displaced persons within the following areas: minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons. Following the Treaty of Lisbon changes in 2009, Art 63 EC was replaced by art 78 Treaty on the Functioning of the European Union (TFEU), above note 42,

54 Van Selm (ed), *Kosovo’s Refugees in the European Union*, p. 7.

55 See above note 1.

56 Recital 6 alludes to the Treaty of Amsterdam changes, ‘in accordance with the Treaty’, under which it was incumbent on the Council (of EU migration ministers) to enact measures in the area of temporary protection by 2004.

57 Morten Kjaerum, ‘Temporary Protection in Europe in the 1990s’, *International Journal of Refugee Law*, 6 (1994), pp. 444, 448.

58 James C. Hathaway (ed), *Reconceiving International Refugee Law* (Kluwer Law International, 1997), p. 32.

59 Home Office Research Study 259, 34.

60 Gibney, ‘Between Control and Humanitarianism’.

61 Council of European Union, ‘Responses to Questionnaire on Temporary Protection and Solidarity – National Measures Taken Regarding Kosovars’ 11808/99 (21 October 1999); Council Proposal (Com (2000) 303 Final) for a Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2000] OJ C311 E/251 (31 October 2000) para 2.4; Kerber, ‘Temporary Protection in The European Union: A Chronology’, pp. 36–7; European Commission Press Release (5 March 1997) – table summary of different arrangements across the EU states, available at [http://europa.eu/rapid/press-release\\_IP-97-178\\_en.htm](http://europa.eu/rapid/press-release_IP-97-178_en.htm) (accessed 10 January 2017).

62 Fitzpatrick, ‘Temporary Protection of Refugees’, pp. 279, 280.

63 Home Office Research Study 259, p. 12.

64 Kerber, ‘Temporary Protection in The European Union: A Chronology’.

65 Fitzpatrick, ‘Temporary Protection of Refugees’, pp. 295, 305.

## Elements of EU Temporary Protection

Elements of EU temporary protection	Related provisions of TPD
The purpose: a response providing immediate protection to a mass influx of displaced persons	Recitals 2 and 8 Article 1: purpose of directive in relation to mass influx of 'displaced persons' Article 2(a): an exceptional procedure Article 2(a): particularly to protect asylum system from being overwhelmed
Protection for a group fleeing conflict, war or violations of human rights	Article 2(c): defines 'displaced persons' Article 2(d): group(s) of displaced persons which benefit from TPD
A mechanism enabling protection which does not undermine protection obligations, notably under 1951 Convention <sup>1</sup>	Recitals 10, 15, 16 and 18 Article 5 and 25: procedure to activate Articles 8–15: protections and rights for beneficiaries of TPD Articles 17–19: right to access to regular asylum
Solidarity: promotion of sharing the burden between EU states <sup>2</sup>	Recital 20 Article 24: activation of TPD gives access to EU refugee funding Article 25: states to indicate capacity to share the burden Article 26: process for transferring displaced persons between states including need for consent of such persons.
End of temporary protection	Recitals 13 and 19 Article 4: length of temporary protection and extensions Article 6: ending of temporary protection Article 21: facilitating voluntary return Article 22: circumstances for enforced return Article 23: circumstances when return may have to be delayed

<sup>1</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by the New York Protocol of 31 January 1967.

<sup>2</sup> TPD does not apply to Denmark, see above note 44.

### The purpose: a response providing immediate protection to a mass influx of displaced persons

Recital 2 acknowledges that TPD was created to provide an 'exceptional' arrangement for 'immediate temporary protection' to 'displaced persons' arriving in the EU as part of a mass influx 'who cannot return to the country of origin'.<sup>66</sup> According to Article 2(d), the required characteristic of 'mass influx' is 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided ...'<sup>67</sup>

There is no specified number or formula to determine precisely a 'large number' threshold.<sup>68</sup> Under article 2(a) risk to the functioning of the 'asylum system' is identified as a particular indicator that the influx is large so TPD applies.<sup>69</sup> Avoiding failures in states asylum systems because of the pressure from large numbers was a clear factor in UNHCR's support for temporary protection in Europe in the 1990s.<sup>70</sup> Interestingly, Fitzpatrick considered that there were not many EU states whose asylum systems were at risk of failure even at the height of the influxes in 1992 and 1993.<sup>71</sup> During the Kosovo crisis in 1999 the number of asylum claims across EU15 was 40 per cent lower than the 1992 high,

<sup>66</sup> Recital 2: Cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years. In these cases, it may be necessary to set up exceptional schemes to offer them immediate temporary protection.

<sup>67</sup> 'Community' ie European Community, which since the Treaty of Lisbon changes in 2009, has been re-named as the 'European Union' (EU).

<sup>68</sup> For further consideration of this point see Arenas, 'The Concept of "Mass Influx of Displaced Persons"'.

<sup>69</sup> Article 2(a) 'temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

<sup>70</sup> Kerber, 'Temporary Protection in The European Union: A Chronology': [I]n the European context in the 1990s the United Nations High Commissioner for Refugees ('UNHCR') described temporary protection as a 'flexible and pragmatic means of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict in their country of origin, who might otherwise have overwhelmed asylum procedures.'

<sup>71</sup> Fitzpatrick, 'Temporary Protection of Refugees', p. 286: 'The procedures of refugee status determination were hardly overwhelmed in the majority of states responding to the Bosnian crisis. The number of refugees receiving temporary protection during the mid-1990s was quite modest in many European states. Only Germany and Austria (as well as the states that emerged from the breakup of Yugoslavia) could fairly plead that they had experienced a mass influx.'

with no state under the level of pressure that was experienced by some in 1992–3; so it is even less likely that an EU state's asylum system was overwhelmed.<sup>72</sup>

No formula was applied in 1990s to determine a mass influx threshold and none applies for TPD. To activate TPD, the UNHCR criterion to avoid risk to the functioning of the asylum system, is a relevant but not contingent factor. Ultimately the decision to activate is, as it was in the 1990s, a matter of political choice (though temporary protection requires a majority vote in favour and, unlike in the 1990s, a state cannot now implement such arrangements on its own.<sup>73</sup>) The Commission has acknowledged the political rather than legal character of the activation trigger in its 2000 memorandum when proposing the first draft of the Directive, 'Finally, except that the number of people must be substantial, it is impossible to quantify in advance precisely what constitutes a mass influx. The decision establishing the existence of a mass influx will rest with the Council.'<sup>74</sup>

The numbers of asylum seekers arriving in the EU in 2015 were unprecedented.<sup>75</sup> It was universally acknowledged as the largest migration and humanitarian crisis in Europe for decades. Across the EU15, 1,044,000 applications were received during 2015.<sup>76</sup> The previous high for these 15 states, in 1992 during the Bosnian conflict, was 674,000.<sup>77</sup> It is beyond dispute that the majority of the 2015 migrants were considered to be fleeing war and persecution with at least 363,000 fleeing Syria alone.<sup>78</sup> Data shows that from 2014, Syrians had an EU-wide asylum recognition rate equal to or higher than 75 per cent.<sup>79</sup> The pressures on asylum systems caused by these numbers were real, acknowledged by the EU, and were a key reason why the EU decided to act.<sup>80</sup>

While there is a lack of precision and clarity around the notion of 'mass influx' it is implausible to suggest that the scale of the crisis in 2015 could not be considered as having met the mass influx threshold of 'arrival in the [EU] of a large number of displaced persons'.<sup>81</sup> The 2015 numbers climbed and exceed the scale of 1990 influxes, the pressures on asylum systems in 2015 were at least as severe and widespread, if not more so, than 1990s. The unprecedented scale and pressures have been acknowledged universally. An understanding of the political calculations for leaving TPD on the shelf needs exploring.

## Protection for a group fleeing conflict, war or violations of human rights

Temporary protection is associated with protection of a group of displaced persons. Fitzpatrick explained temporary protection in 1990s Europe as expanding the protection of forced migrants who could not satisfy the criteria under the 1951 Convention by giving group-based protection.<sup>82</sup> Though, it is contested that the 1951 Convention is limited to individualised protection and correspondingly does not provide protection to a group.<sup>83</sup> Group recognition avoids this controversy and provides immediate protection. Temporary protection is then pragmatic, in providing refuge, avoiding delays (benefitting too those claiming asylum out-with the ambit of the temporary protection mechanism), and avoiding an over legalistic or arguably an erroneous narrow interpretation of the protection obligation.

TPD avoids the narrow interpretation of obligations. Under article 2(c) the 'displaced persons' beneficiaries are,

third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other

72 In 1999 the EU state with the highest number of total recorded applications, 95,000 applications, was Germany (60% down on its 1992 number) of which 31,000 were from Yugoslavians; second was UK with 71,000 applications, of which 14,000 were from Yugoslavia.

73 See above note 1, article 5. See also Peers, *EU Justice and Home Affairs Law*, pp. 342, 345.

74 Council Proposal (Com (2000) 303 Final); cf Arenas, 'The Concept of «Mass Influx of Displaced Persons»'.

75 European Commission Press release (14 August 2015) Dimitris Avramopoulos Migration and Home Affairs Commissioner: 'You have all seen the news headlines – you are the ones writing the reports – you know why I am here... Today the world finds itself facing the worst refugee crisis since the Second World War. And Europe finds itself struggling to deal with the high influxes of people seeking refuge within our borders... There is no simple, nor single, answer to the challenges posed by migration. And nor can any Member State effectively address migration alone. It is clear that we need this new, more European approach. We need the collective courage to follow through on our commitments – even when they are not easy; even when they are not popular', available at [http://europa.eu/rapid/press-release\\_SPEECH-15-5498\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm) (accessed 9 January 2017).

76 See above note 38.

77 Comparison data taken from EU Eurostat source available at <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/> (accessed 14 December 2016).

78 See above notes 9–10.

79 European Commission Fact Sheet 'Refugee Crisis – Q & A on Emergency Relocation' (22 September 2015), available at [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm) (accessed 14 September 2016).

80 Ibid.

81 European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)) para 42, available at [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0102&language=EN&ring=A8-2016-0066](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0102&language=EN&ring=A8-2016-0066) (accessed 10 January 2017); cf 2016 ICF Study on TPD.

82 Fitzpatrick, 'Temporary Protection of Refugees', p. 280.

83 Jean-François Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', *International Journal of Refugee Law*, 16 (2004), pp. 4, 10; UNHCR, Guidelines on Temporary Protection or Stay Arrangements (2014).

international or national instruments giving international protection, in particular:

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

The application of protection to a group is clear. Article 2(d) requires that the character of 'mass influx' is 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided ...'. Article 5 requires that both the proposal for activation and the final Decision to activate the temporary protection mechanism must include 'a description of the specific groups of persons to whom the temporary protection applies'.<sup>84</sup>

One final point which can be touched upon, but not developed here, is whether there was an assumption that temporary protection was only intended for a crisis involving displaced Europeans. There are pointers that some commentators and possibly the EU Commission at one time had this in mind.<sup>85</sup> That said, it is clear from Article 2(c) that TPD applies to a group arriving from any region in the world as TPD explicitly protects 'third country nationals or stateless persons'.

It follows that TPD could have been activated to address en masse the protection needs of Syrians arriving in the EU in 2015.

## A mechanism enabling protection, which does not undermine obligations to protect notably under 1951 Geneva Convention

Temporary protection was promoted by UNHCR for its pragmatism to address immediately a large-scale refugee influx. It has been noted that there were concerns though. These included the lack of a clear status for asylum seekers on temporary protection arrangements, the lack of welfare and social rights, and in some EU states, a denial of the right to regular asylum processes.<sup>86</sup> One commentator opined that 'Temporary protection introduces a qualitatively different approach, which negates the premise of the Geneva Convention'.<sup>87</sup>

It was incumbent on the EU to address these concerns and it made sense to ensure a harmonised protection system to reduce risks of secondary movements within the EU caused by protection differentials between states.<sup>88</sup>

According to Article 2(a), TPD activation is described as a "procedure" to offer 'immediate and temporary protection' to displaced persons. TPD does not create an alternative form of protection to regular asylum.<sup>89</sup> As has been noted, the process follows the political decision to activate. According to Article 5, the process commences with the Commission submitting a proposal, which may have been requested by a Member State, to the Council for temporary protection for a prescribed group or groups of displaced persons, giving an estimation of the scale of the mass influx. According to Article 25, EU states are then required to indicate, 'in figures or in general terms' their capacity to receive such persons. The Council, assessing the circumstances and the scale of the movements of displaced persons, votes on the proposal. Under article 5 activation is secured by qualified majority vote.

It has been suggested that the procedure itself is a considerable blocker to activation.<sup>90</sup> However the activation process described above is straightforward. It does not, say, require complicated inter-institution processes, notably it does not require negotiation to secure the consent of the European Parliament, instead only that the latter be informed of activation. But, it cannot be denied there would have been hurdles to overcome and fixes to be made. TPD should have

84 Emphasis added.

85 Fitzpatrick, 'Temporary Protection of Refugees', pp. 297–9; Joanne van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Kluwer Law International, 1998).

Asha Hans and Astri Suhrke, 'Responsibility Sharing' in Hathaway (ed.), *Reconceiving International Refugee Law*, pp. 104–7, 8;

Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis [1995] OJ C 262 (38) 1–3: sixth recital.

86 Fitzpatrick, 'Temporary Protection of Refugees', p. 286; '[EU states] responded by favoring temporary protection and avoiding grants of durable asylum; additional interim measures of protection were introduced in national law and practice ...'; Home Office Research Study 259, p. 34: 'in general there were fewer rights for temporary protection compared to those with 1951 Convention status'; European Commission Press Release of 5 March 1997.

87 Joly, 'A new asylum regime in Europe', quoted in Home Office Research Study 259, p. 35.

88 Recital 9 TPD states 'Those standards and measures are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. They should therefore be enacted in a single legal instrument'.

89 Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (31 October 2000) OJ C 311 251–258, para 1.4: 'Temporary protection in the event of a mass influx as proposed by the Commission is not a third form of protection, alongside refugee status on the basis of the Geneva Convention and subsidiary protection, the consequence of which would be to undermine the Member States' international obligations or to prejudice efforts to harmonise and consolidate forms of subsidiary protection in Europe. On the contrary, minimum standards for giving temporary protection in the event of a mass influx and measures promoting a balance of efforts between the Member States on a basis of solidarity are a component of the system, and more specifically a tool enabling the system to operate smoothly and not collapse under a mass influx. It is accordingly a tool in the service of a common European asylum system and of the full operation of the Geneva Convention'.

90 ICF Study on TPD, pp. 19–23.

been transposed into the domestic law of all the MSs by the end of 2002.<sup>91</sup> It has been reported that not all states have done this as required.<sup>92</sup> The mechanics for operating the burden sharing transfer mechanism under Articles 26 and 27 are untested, and the requirement to achieve convergence between the consent of the proposed asylum seekers for transfer under Article 26.1, with the available places across EU states would have been challenging.<sup>93</sup> Valid concern has been raised about how temporary protection status under TPD impacts on the operation of regular Dublin transfer rules as this is articulated poorly in Article 18.<sup>94</sup> Achieving political solidarity for enough votes to pass may not have been straightforward of course – resistance by some states to the relocation Decisions, which are considered below, suggests this.<sup>95</sup> But, these hurdles would have been overcome if the political will had been present. And this is the key point.

TPD has harmonised a sound minimum set of rights.<sup>96</sup> It addresses the key criticisms of national temporary protection arrangements it replaced.<sup>97</sup> The rights include a right to a resident permit and access to necessary visas, right to work (but not necessarily equal priority with EU citizens), access to accommodation, welfare, healthcare and means of subsistence, access to education, rules on family reunification, and measures for unaccompanied minors.<sup>98</sup> Crucially, under Article 17, it secures access to regular asylum processes, though processing of the claim can be suspended during the period of operation of TPD. Therefore, activation would not have negated the premise of protection under the Geneva Convention.<sup>99</sup> It is also pertinent to note that these rights are no more generous than equivalent rights under regular asylum processes, so the argument that activation would have acted as pull due to the perceived generosity of the rights is less tenable.<sup>100</sup>

Therefore, there would have been some fixing to do to activate TPD effectively and as it is the case that as it has never been activated it is untested with some unclear elements notably in relation to the burden sharing transfer rules and the fit with the Dublin transfer rules under Article 18. If the political will was in favour, it is suggested though, TPD would have been activated with the necessary fixes and guidelines. Advocates of refugee rights would not have been concerned in the way they were in the 1990s. In short, TPD addresses the earlier criticisms in providing an appropriate level of rights and protections.

## Solidarity: promotion of sharing the burden between EU states

The physical sharing of the burden between states on some objective and fair basis is strongly associated with an effective response to a mass influx.<sup>101</sup> It may be surprising to consider then there was no such burden sharing between EU states during the Yugoslavian crises.<sup>102</sup>

During the Bosnian influx, the reception of asylum seekers was uneven between states. Germany received far more than any other state because of geography: its proximity to Yugoslavia, its cultural and historical connections, and because it was more open to applications for protection.<sup>103</sup> So, unsurprisingly Germany lead proposals for an EU wide burden sharing instrument. But there was no agreement<sup>104</sup> as burden sharing became the most disputed element and block to reaching an agreement.<sup>105</sup> It is for this reason that temporary protection became less attractive during the

91 Article 32 TPD.

92 ICF Study on TPD, pp. 12–13.

93 Article 26.1 TPD. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.

94 Article 18, 'The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory'. cf ECRE September 2001 Information Note, 4.

95 See notes 144 and 146.

96 Durieux, 'Temporary Protection', pp. 242–3.

97 Ibid; Proposal for a Council Directive: Explanatory Memorandum para 4.3, 'The UNHCR described the 1997 proposal as balanced and as providing a constructive basis for action. ... The 1998 revised proposal was welcomed by the UNHCR, which observed that there had been many improvements over the 1997 proposal.'

98 Articles 8–16.

99 Cf above note 89.

100 Cf ICF Study on TPD, pp. 15, 35.

101 Fitzpatrick, 'Temporary Protection of Refugees', pp. 287, 289.

102 Kerber, 'Temporary Protection in The European Union: A Chronology', p. 49; Gregor Noll and Jens Vedsted-Hansen, 'Temporary Protection and Burden Sharing', in Elspeth Guild and Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing, 2001), p. 198; Proposal for a Council Directive: Explanatory Memorandum para 3.2.

103 Ibid.; Noll and Vedsted-Hansen, 'Temporary Protection and Burden Sharing'; Home Office Research Study 259, pp. xvii, 8, 60; Khalid Koser, 'Germany: Protection for Refugees or Protection from Refugees?' in Van Selm (ed), *Kosovo's Refugees in the European Union*, pp. 18, 24; UNCHR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (2000), 158.

104 European Union Commission Press Release (5 March 1997) (n 60) 'Commission proposal on Joint Action for Temporary Protection of Displaced Persons' Commissioner Anita Gradin, 'There was no real co-operation between Member States when the mass influx from Bosnia have occurred. We must build on these experiences. Next time we are faced with such a situation, we have to make sure that a fair and dignified reception can be offered in all our Member States.'

105 Proposal for a Council Directive: Explanatory Memorandum para 6.1; Noll and Vedsted-Hansen, 'Temporary Protection and Burden Sharing', pp. 204–10; UNCHR, *The State of the World's Refugees 2000*, p. 165.

1990s. After having used temporary protection for the Bosnian influx, there was reluctance and hesitation to use it again to address the Kosovo crisis:

When open conflict erupted in Kosovo in both 1998 and 1999, European governments were at first reluctant to repeat the temporary protection experiment. They continued to channel asylum seekers from Kosovo into regular status determination procedures, as had been the case throughout the 1990s.<sup>106</sup>

Germany's experience of carrying the burden of Bosnian refugees had a direct influence of its reluctance to participate in the Kosovar evacuation programmes.<sup>107</sup> Germany did reluctantly participate, like most EU states, but these programmes were not based on any EU agreement for a division and sharing of numbers, instead each state admitted, (or did not), according to its own reception capacity and political will.<sup>108</sup>

These experiences are reflected in the burden sharing provision in TPD. While, as has been noted, the Amsterdam Treaty changes required EU states to settle a common position on burden sharing, the obligation did not settle the divisions over burden sharing. Instead TPD reflects the existence of the divisions.<sup>109</sup> As unanimity was required to secure a burden sharing mechanism there was little chance of agreeing something radically different.

Under TPD, following a proposal from the Commission, Article 25 requires that states,

'shall receive [displaced persons] in a spirit of Community solidarity. They shall indicate – in figures or in general terms – their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5.'

The obligation to act in a 'spirit of Community solidarity' lacks juridical force beyond a requirement to consider burden sharing. This is a weak obligation. This is clear, as there is no obligation to declare a minimum capacity vis à vis criteria. The obligation does not require even a statement of reasons. At best, it amounts to a 'pledging' mechanism but one under which a state can pledge a lack of capacity. This weakness, and a corresponding pessimism in its effectiveness, is clear in the title of TPD as 'a measure promoting a balance of efforts between Member States in receiving persons and the consequences thereof'.<sup>110</sup>

TPD does not change the status quo evident in the 1990s: states were not then, and are not now under TPD, committed to accepting any burden. TPD is thus no paradigm shift.<sup>111</sup> As Durieux has commented, '[i]t appears that no member state was more willing in 2001 than in 1992 to commit to a predictable formula for the distribution of responsibilities and costs'.<sup>112</sup>

Burden sharing would have obviously benefitted frontline states such as Germany, Hungary, Italy and Greece since the 2015. Yet it is telling there is no indication that any of these states sought to start the activation process. It is suggested that given the Yugoslavian experiences and the failure to secure a radical shift to an effective and legally binding burden sharing mechanism, the TPD inherited the divisions on solidarity.<sup>113</sup>

## The end of temporary protection

The defining element of temporary protection is plainly the notion of temporary. What is temporary though in this context: the duration of the mechanism or the duration of the protection, or both? How does temporary fit with obligations to refugees under international law, notably not to return persons in need of protection when the cause of flight is still prevailing – the principle of *non-refoulement*? In short, when does temporary protection end and what are the consequences following the end?

There are two competing conceptions about what happens after temporary protection ends. While both conceptions have the same beginning: a pragmatic arrangement to cast a safety net to secure immediate protection of a group, they differ on what then follows. On one view, temporary protection is an exception to regular international refugee law, and there should be ultimately a return of the asylum seekers to the country of origin. The alternative view is

106 UNCHR, *The State of the World's Refugees 2000*, p. 168.

107 Khalid Koser, 'Germany: Protection for Refugees or Protection from Refugees?' in Van Selm (ed.), *Kosovo's Refugees in the European Union*, pp. 24, 28–9, 34.

108 UNHCR Kosovo Report, above note 24, vi; Hathaway (ed.), *Reconceiving International Refugee Law*, p. 32; Kerber, 'Temporary Protection in The European Union: A Chronology', pp. 48–9.

109 Kerber, 'Temporary Protection in The European Union: A Chronology', p. 46.

110 Ibid.

111 cf Kjaerum, 'Temporary Protection in Europe in the 1990s', p. 448.

112 Durieux, 'Temporary Protection', p. 241.

113 ECRE interview with Volker Türk (15 October 2015): 'If one looks at the numbers of people arriving, one could be led to think that if Europe faces a large scale influx, it would perhaps be the right moment to look very actively into whether or not to activate this directive. I think a number of the conditions are present. Some of the solidarity measures included in the TPD could be advantageous, although they are not binding enough. If the EU were to go down the line of activating the TPD, this measure would have to be accompanied by a more permanent solidarity and distribution mechanism within the EU. So I think the directive is a beginning of perhaps a more permanent emergency mechanism dealing with large scale influxes, but it is not going to be sufficient.' (available at [www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now](http://www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now) (accessed 2 December 2016)).



that, return of asylum seekers to the country of origin is but one possible solution. These competing conceptions are considered in turn.

The return view is driven by the politics of the receiving state and specifically its control agenda. At the end of the period of protection there is an expectation of a return to the state or region of origin. Temporary protection functions as 'a bar to the possibility of permanent resettlement being considered as a durable solution to flight: "solution" is understood in terms of repatriation alone.'<sup>114</sup>

The attraction to states of this conception is clear. It means that a state can seemingly fulfil its international humanitarian obligations to protect while maintaining ultimate control over immigration numbers.<sup>115</sup> Put another way, if states are prepared to widen the protection net at a time when they are subject to high levels of asylum, then there needs to be a plausible rationale that can also assure the public at large – this is temporary protection.<sup>116</sup>

Under this control and return model the length of the protection 'lasts only for the duration of the risk that forces them to seek refuge.'<sup>117</sup> However, as Kjaerum and others have correctly identified, the return conception operates on an assumption 'that the refugees will only be living in [the state of asylum] for a relatively short period, and certainly shorter than what is normally anticipated in a refugee situation.'<sup>118</sup>

Which basis could such an assumption be maintained on? It will be recalled that with end of the Cold War and extensive media interest in humanitarian causes, there was a cycle of humanitarian interventions leading to expectations for more:

The temporary nature of refugee status may in time come to be more extensively explored following the desire of the international community to provide resources for the speedy ending of violent conflicts, and to act upon its unwillingness to accept gross violations of human rights in a particular country or region. The international community will concentrate its efforts on ensuring that civil wars and wars last as short a time as possible; witness the situation in Northern Iraq, Somalia and to some extent also Croatia and Bosnia ... As far as refugees are concerned this political development will result in expectations of their return within a foreseeable period of time, a possibility which was not considered for most refugees during the Cold War....<sup>119</sup>

At that time, there was a degree of confidence in the will of the international community to act.<sup>120</sup> Commentators could point to evidence for speedier resolutions to conflicts.<sup>121</sup> The ending of the Yugoslavian wars, were, as noted by Kjaerum, part of the proof that there was a post-Cold War international resolve. The Bosnian war was effectively ended by NATO bombing with repatriation a key outcome of the peace agreement.<sup>122</sup> The 1999 Kosovo displacement crisis was over within weeks, again following NATO bombing, with immediate mass returns. As Fitzpatrick noted, '[t]he Kosovo experience, by restoring faith that some mass influxes are genuinely temporary, may reinvigorate enthusiasm for temporary protection, which had flagged during the endgame to the Bosnian refugee crisis.'<sup>123</sup>

In this context the UNHCR could not but consider the link with temporary protection arrangements, '[o]ne of the principal reasons for applying the term 'temporary' to protection given to persons fleeing conflicts or acute crises in their country of origin is the expectation – or at least the hope – that international efforts to resolve the crisis will, within a fairly short period, produce results that will enable the refugees to exercise their right to return home in safety.'<sup>124</sup> Temporary protection arrangements for asylum seekers escaping Yugoslavia were tried in the 'the expectation – or at least the hope' that efforts of the international community to address the root causes of the conflicts would lead to an ending of the causes of flight.<sup>125</sup>

114 Gibney, 'Between Control and Humanitarianism', p. 690; Hathaway (ed.), *Reconceiving International Refugee Law*, p. 3; Long, *The Point of No Return*, p. 116.

115 Randell Hansen, 'Asylum Policy in the EU', *Georgetown Immigration Law Journal*, 14 (2000), pp. 779, 784; van Selm-Thorburn, *Refugee Protection in Europe*, p. 168: 'The concept and practice of temporary protection could satisfy the major requirements of all sides, offering protection but not full membership, permitting the individuals to seek and receive protection, without hastily or unacceptably transgressing the boundaries of state sovereignty'.

116 Fitzpatrick, 'Temporary Protection of Refugees', p. 280: 'States, especially those under pressure from domestic constituencies preoccupied with migration, hope that temporary protection will help them save costs on status determination, reduce social and economic benefits to asylum seekers, resist full integration of those who are granted asylum, and prioritise their rapid repatriation. Temporary protection may assist democratic states in mediating competing public demands that asylum not be a back door to immigration but that humanitarian ideals be sustained'.

117 Gibney, 'Between Control and Humanitarianism', p. 689.

118 Kjaerum, 'Temporary Protection in Europe in the 1990s', pp. 447, 450–1.

119 *Ibid.*, pp. 446–7.

120 Roberts, 'The Role of Humanitarian Issues in International Politics in the 1990s'; Michael Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden Sharing', *Journal of Refugee Studies*, 14 (2001), pp. 95, 7; cf The Independent Kosovo Report above note 24, 19–20.

121 Hathaway (ed.), *Reconceiving International Refugee Law*, p. 17 notes studies which show that a significant proportion of refugee-producing crises are resolved within 5 years; with one UN study suggesting that around half of the crises looked at were resolved in this time frame.

122 Anne Hammerstad, *The Rise and Decline of a Global Security Actor: UNHCR, Refugee Protection and Security* (Oxford: Oxford University Press, 2014), pp. 111–12.

123 Fitzpatrick, 'Temporary Protection of Refugees', p. 279.

124 Quoted in Durieux, 'Temporary Protection', p. 235.

125 International Commission on Intervention and State Sovereignty, (ICISS) Report 2001 Responsibility to Protect para 1.4, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 1 November 2016).

However, there is another view about what temporary protection can achieve. While Fitzpatrick noted the mood change in the international environment, her position on temporary protection was more circumspect.<sup>126</sup> Her description of the competing conception was 'as a short-term strategy to secure the immediate physical safety of refugees and a way station to more durable protection.'<sup>127</sup> There is no fixation on an end result with this conception. Indeed the 'way station' 'may well be a prelude to permanent settlement.'<sup>128</sup>

EU states enthusiasm for temporary protection 'had flagged during the endgame to the Bosnian refugee crisis.'<sup>129</sup> This was because their own experiences of temporary protection showed that the expectation of return was not necessarily the outcome. While Germany, which hosted the majority of refugees from the Bosnian conflict, repatriated most, perhaps around 250,000 of approximately 350,000 Bosnian refugees, that is, over 70 per cent, the repatriation programme was subject to severe and widespread criticisms on the basis that many were forced to return to circumstances where it was not safe.<sup>130</sup> Given the difficulties of forced return and the fragile peace, research has shown that most states did not force return and that in the majority of EU states Bosnians asylum seekers stayed.<sup>131</sup> The view that temporary protection cannot be fixed on return is borne out by these facts. As Gibney commented in the 1990s, 'states gambled on the fact that the conflict from which they took refugees would be short in duration.'<sup>132</sup>

Given the need to reach agreement across all EU states perhaps it should not be a surprise that both conceptions of temporary protection, control and return and way station are provided for in TPD.

Recitals 13 and 19 emphasise the expectation of return:

Recital 13: 'Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection should be of limited duration.'

Recital 19: Provision should be made for principles and measures governing the return to the country of origin and the measures to be taken by Member States in respect of persons whose temporary protection has ended.<sup>133</sup>

Article 20 states that at the end of the temporary protection period the 'general laws on protection apply'. Article 21 requires states to take measures to enable voluntary return. Article 22 states,

1. The Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity.
2. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

Article 22.1 permits forced returns.<sup>134</sup> However, this cannot be assured as TPD does not predicate the end of protection on an assumption about an end of the cause of displacement. At the end of the temporary protection period article 22.2 clearly precludes a state from forcing a return when it would violate its international humanitarian obligations. Further, as noted earlier, article 17 grants access to the regular asylum process, which, while it can be delayed, cannot be denied.

Turning to the 2015 crisis, it became clear that the complexity of the Syrian war and the very different mood in the international community made any assumptions or expectations about the end impossible. The most certain prediction could only be that Syrian refugees in the EU would need to be given refugee status for an indefinite period. Since the arrival of Syrian refugees, EU statements and actions have pointed to this. The EU Commission has acknowledged that the end to the refugee crisis in Europe is directly linked to the end of the root causes but conspicuously (but also understandably), makes no reference to any indicators of how and when it sees an end to the war.<sup>135</sup> The Commission has even suggested linkage between the influx and the longer-term demographic challenge of an aging EU population.<sup>136</sup>

126 Fitzpatrick, 'Temporary Protection of Refugees', p. 305.

127 Ibid., p. 280.

128 Home Office Research Study 259, p. 34.

129 Fitzpatrick, 'Temporary Protection of Refugees'.

130 Anne Hammerstad above note 124, 112; Gibney, 'Between Control and Humanitarianism', pp. 694, 701; Long, *The Point of No Return*, pp. 113, 116; Van Selm (ed), *Kosovo's Refugees in the European Union*, pp. 29–30; van Selm-Thorburn, *Refugee Protection in Europe*, p. 153–4.

131 Khalid Koser, Martha Walsh and Richard Black, 'Temporary Protection and the Assisted Return of Refugees from the European Union', *International Journal of Refugee Law*, 10 (1998), pp. 444, 459–60; Koser, 'Germany: Protection for Refugees or Protection from Refugees?'

132 Gibney, 'Between Control and Humanitarianism', pp. 698–9.

133 Emphasis added.

134 Subject to article 23 which precludes return for reasons of poor health and gives states a discretion to allow children to finish schooling.

135 Commission Communication of 10 February 2016 'On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration': 'there should be no illusions that the refugee crisis will end before its root causes – instability, war and terror in Europe's immediate neighbourhood, notably continued war and atrocities in Syria – are addressed in a definite manner. The only responsible course of action is to face this reality and to explaining it openly and honestly to citizens...'; available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF> (accessed 12 January 2017).

136 Commission Communication of 13 May 2015, 'A European Agenda on Migration', available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf) (accessed 12 January 2017).

If repatriation is the reason for states to consider temporary protection, then their experiences from the 1990s show that expecting this is a gamble. As Gibney commented aptly, 'States have no reason to support temporary protection if it proves simply to be an extended pathway to permanent immigration.'<sup>137</sup> In the final analysis, TPD is a way station to possible outcomes; one might be return but another could be permanent residence as was the outcome for Bosnians in most EU states in the 1990s.

## The 2015 refugee crisis: responses and temporary relocation

In this final section consideration is given to the steps the EU has taken and proposed to address the 2015 refugee crisis. An outline of the key actions is provided as they relate to the issues in this paper. It has been suggested that if there was the political will TPD would have been activated. The reasons why it has not been activated and why there has been no support for activation from either the Commission or the frontline states find their origins in EU states long history of failure in solidarity which TPD does not fix, and, that temporary protection would have represented a clear risk to the setting of expectations of control and return.

Throughout the 2015 crisis TPD remained on the shelf.<sup>138</sup> A raft of proposals and measures were however passed.<sup>139</sup> The May 2015 European Agenda on Migration set out seven key actions to address the immediate crisis.<sup>140</sup> These included EU resources to help frontline states process asylum claims and proposals for temporary and permanent mechanisms to relocate asylum seekers from states under the most pressure to other states.<sup>141</sup> The temporary relocations proposals have been implemented through two EU instruments. The first instrument was an EU Decision passed in May 2015.<sup>142</sup> This Decision seeks to relocate up to 40,000 Syrian, Iraqi and Eritrean asylum seekers from Greece and Italy.<sup>143</sup> The second instrument increased the quotas by another 120,000 to a total of 160,000 relocations.<sup>144</sup> Both Decisions are 'provisional' meaning that the period for relocations is time-limited to September 2017.<sup>145</sup> These Decisions constitute a temporary derogation from the normal Dublin transfer rules for determining the responsible state for asylum claims from Syrians, Iraqis and Eritreans, by diverting responsibility for up to 160,000 asylum seekers from Greece and Italy to other states.<sup>146</sup> Both decisions acknowledge that the EU acted to address the 'unprecedented' flows of migrants in clear need of protection putting 'significant pressure of asylum systems.'<sup>147</sup>

These Decisions are novel in that, for the first time, burden sharing is secured as a legal obligation. The Treaty basis for these decisions is Article 78.3, which states:

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.<sup>148</sup>

That enough EU states considered that this provision applied to the crisis there can be no doubt. It has been shown that TPD could have applied too. While not worded identically, the scope of article 78.3 of the Treaty and TPD overlap extensively. The 2015 crisis can be interpreted as both a 'mass influx of displaced persons' and as an 'emergency situation characterised by a sudden inflow' of nationals of third countries.<sup>149</sup> The EU Commission is proposing to make further

137 Gibney, 'Between Control and Humanitarianism', p. 692.

138 Cf Peers, *EU Justice and Home Affairs Law*.

139 Summarised in Ineli-Ciger 'Time to Activate the Temporary Protection Directive', pp. 6–12.

140 Commission Communication of 13 May 2015, 'A European Agenda on Migration'.

141 Denmark, Ireland and UK are not bound by the Decisions and do not participate in them following their opt-outs permitted under EU law: recitals 39 and 40 May Decision 2015/1523 (n 144); recitals 46, 47 and 59 of the September Decision 2015/1601 above note 146; see also above note 44.

142 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146 (May Relocation Decision).

143 Despite being a frontline state under severe pressure Hungary refused to support the relocation mechanisms.

144 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80 (September Relocation Decision).

145 *Ibid.*, article 13.

146 See above note 47.

147 September Relocation Decision above note 146, recital 10: Among the Member States witnessing situations of considerable pressure and in light of the recent tragic events in the Mediterranean, Italy and Greece in particular have experienced unprecedented flows of migrants, including applicants for international protection who are in clear need of international protection, arriving on their territories, generating significant pressure on their migration and asylum systems; also May Relocation Decision, recital 9.

148 EU Treaties and Protocols [2016] OJ C202/1. The original value of article 78.3, introduced by the Treaty of Amsterdam, may relate to the fact that measures under it can be taken by qualified majority voting whereas back in 1999 temporary protection measures could only be passed under the Treaty by unanimity: Kerber, 'Temporary Protection in The European Union: A Chronology', p. 46: 'The new Article 64(2) contains a very important innovation. By qualified majority, the Council may, upon proposal by the Commission and without prejudice to paragraph 1 adopt measures valid for no more than six months for the benefit of a Member State that is confronted with an emergency situation of mass influx. In such cases, the Council may use a simplified voting procedure that is more likely to lead to a quick decision'. Cf above note 53.

149 *Ibid.*; 2015 European Parliament Motion (28 April 2015) (n 10) para 6: European Parliament 'Calls on the Member States to make full use of the existing possibilities for issuing humanitarian visas at their embassies and consular offices; points out, in this connection, that the Council should seriously consider the possibility of triggering the 2001 Temporary Protection Directive or Article 78(3) of the TFEU, both of which foresee a solidarity mechanism in the case of mass and sudden inflows of displaced persons...'

amendments to the Dublin transfer rules by adding a trigger for a permanent relocation mechanism based upon a 'corrective' formula which would automatically apply to redistribute asylum claims in 'situations of disproportionate pressure on Member States' asylum systems'.<sup>150</sup>

Perhaps the most significant response will prove to be the November 2015 Joint Action Plan with Turkey. Under this Plan, Turkey, which has been one of the major places of departure to the EU, agrees, for a substantial EU pay-out, to act to deter and prevent irregular migrants and asylum seekers leaving its territory for the EU.<sup>151</sup>

As in 1990s the EU seeks to keep the asylum problem as much as possible outside the EU borders, this time in Turkey. However, for spontaneous arrivals this time, there has been almost complete silence on temporary protection, because the preferred approach has become relocations within the EU.<sup>152</sup>

## Conclusion

The interventions in Yugoslavia and the responses to the refugee influxes served a humanitarian purpose. However, these interventions and the responses to the influxes were predicated on the need to control refugee numbers, and as far as possible, to keep the problem outside the EU. EU support for the risky, and tragically ill-fittingly named, 'safe areas', maintenance of visa restrictions, and resistance to burden sharing are all evidence of this. The (valid) narrative of keeping refugees close to their homes to counter ethnic cleansing, helped served this purpose.

Temporary protection did emerge in Europe during the Yugoslavian wars as a response to large influxes into the EU, despite the EU's efforts to keep asylum seekers away. Temporary protection was for most, if not all states, part of their battery of policies to deflect mass influxes and minimise the impact of asylum immigration. There was at first some enthusiasm for it as it seemingly offered a way of balancing international humanitarian obligations with controlling numbers. But it proved to be a gamble.

Any view that temporary protection proved to be a preferred or an effective solution is not borne out by the evidence. Temporary protection could not support the balancing of obligations to refugees and controlling admission numbers. While there were mass returns of Bosnians following the end of the Bosnian war, these were from one state, Germany, because of the disproportionate burden borne by it due to a failure to secure an agreement to share the load. The manner and timing of the repatriations attracted wide criticism. The difficulties Germany experienced informed responses of Germany and other EU states to the Kosovo crisis in 1999. Following the experiences of spontaneous arrivals from Bosnia, temporary protection was not in the main preferred for the spontaneous arrivals during the Kosovo crisis. Temporary protection was mainly for those who arrived through the evacuation programmes, but even then, EU states were prepared to accept only very modest numbers, or, in the case of one state, none.

TPD was passed because the Amsterdam Treaty made it a binding obligation to pass an EU-wide instrument. The characteristic of the 2015 crisis was within the framework of the TPD. There have been calls to activate TPD but in truth they have been limited. Significantly the support for activation has been lukewarm from UNHCR, a key influence on the emergence of temporary protection in 1990s.<sup>153</sup> It is also telling that neither the EU Commission nor any EU state has called for activation of TPD.

The shelving of TPD in the face of the 2015 crisis cannot be explained by technical or interpretative ambiguities or problems associated with the TPD. These are excuses. The fact is TPD is no game changer. It was constructed on the same politics of immigration control, and by the end of the 1990s, temporary protection showed its limits to support this. TPD has no answer to the lack of solidarity around burden sharing.<sup>154</sup> Temporary protection would have served no beneficial purpose for EU states, (or for Syrian asylum seekers), and would have been a way station to regular asylum within the EU.

<sup>150</sup> European Commission Proposal of 4 May 2016 for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM (2016) 270 final: 4, 17–18, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin\\_reform\\_proposal\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf) (accessed 12 January 2017).

<sup>151</sup> European Commission Infographic: Managing The Refugee Crisis EU-Turkey Joint Action Plan: Implementation Report, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing\\_the\\_refugee\\_crisis\\_-\\_eu-turkey\\_join\\_action\\_plan\\_implementation\\_report\\_20160210\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing_the_refugee_crisis_-_eu-turkey_join_action_plan_implementation_report_20160210_en.pdf) (accessed 12 January 2017).

<sup>152</sup> Cf ICF Study on TPD, 38, a passing reference to temporary protection in a proposed revision of art 2 of the Dublin Regulation.

<sup>153</sup> For example, UNHCR communication (10 September 2015) 'UNHCR's proposals in light of the EU response to the refugee crisis and the EU package of 9 September 2015': 'UNHCR recalls that the EU Temporary Protection Directive 2001/55/EC (TPD), which has never been activated, was designed to ensure a uniform status rights across the EU and would allow for fast and simplified processing, resulting in efficiency gains and cost reductions for national asylum systems. The TPD foresees the activation of a solidarity relocation mechanism, financial support and a reception element. With or without the activation of this directive it is important that these objectives are pursued', available at [www.unhcr.org/55f28c4c9.html](http://www.unhcr.org/55f28c4c9.html) (accessed 2 December 2016); ECRE interview with Volker Türk 23 October 2015 available at [www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now](http://www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now) (accessed 6 January 2017).

<sup>154</sup> Nor do the January 2017 relocations figures give reason to believe the binding relocation quotas will significantly enhance fair and effective burden sharing: a little over 10,000 transfers have taken place since 2015 out of the 160,000 quota; data available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf) (accessed 13 January 2017).

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