Responsibility Sharing in International Refugee Law: Towards Differentiated Legal Obligations

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ABSTRACT

This Thesis is a study on the law and practice of international cooperation and responsibility sharing for refugees, both as it is and as it should be, with a strong focus on the latter. Despite the existence of a general duty of states to cooperate to protect refugees in international law, there is no subsequent positive obligation of responsibility sharing, namely any assistance to overwhelmed refugee host countries remains at the discretion of states. This has been widely acknowledged to constitute a normative gap of the Refugee Convention. In practice, this gap has been responsible for the arbitrary allocation of refugee protection responsibilities between states on the basis of accidents of geography. This arbitrary allocation is further exacerbated by the existence of a virtual 'Great Wall' built of sophisticated non-entrée measures and interstate arrangements that seek to deter refugees and confine protection in the Global South, where the majority of refugees originate and is hosted.

The thesis argues that the normative gap of the Refugee Convention cannot be satisfactorily addressed without a codified responsibility sharing obligation in international law. In moving towards responsibility sharing obligations, the thesis takes guidance from recent global refugee policy instruments that implicitly engage with the language of 'common but differentiated responsibilities and respective capabilities' (CBDRRC), a concept and a principle of international environmental law.

As a way of unlocking the true potential of a CBDRRC-guided framework, the thesis studies the principle and the logic of differentiated responsibilities in international environmental law, in order to understand the concept and draw insights from its operationalisation in the international climate change law regime. The parallel study of international environmental law is illuminating. On a

theoretical level, international environmental law has gone the furthest in relation to a fairness debate and has sought to balance conflicting interests and existing inequities between states within legal arrangements. On a technical-legal design level, these multilateral responsibility sharing regimes are facilitative and flexible, reducing the sovereignty costs of entering into a binding agreement and therefore appealing to states. Crucially, the study of the international legal regime on climate change has revealed that the heterogenous interests of states can be accommodated in international law under the right architecture. To this end, fairness considerations have a structural role to play in the legal design process.

In light of these findings, the thesis proposes the adoption of a protocol on responsibility sharing that would put in place a principled yet pragmatic legal framework that would codify a light package of minimalist and differentiated, responsibility sharing obligations implemented bottom up. Focusing on questions of legal design, the thesis explores in detail the nature of the legal obligations that would best suit responsibility sharing in international refugee law.

All this is done through adopting an 'enlightened positivist' methodology to the study of international refugee law. This softer form of legal positivism claims that the protection of refugees reflects a community interest in international law which is served by the Refugee Convention. Enlightened positivism provides the international lawyer with the methodological tools to put forward *de lege ferenda* arguments for the development of international refugee law without however losing sight of the international system of sovereign but unequal states in which the international refugee regime operates. Finally, since international law can only be part to the solution of the refugee challenge, the study concludes with ways to build the necessary sustained political will required, towards a challenging but worthwhile undertaking.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRRF	Comprehensive Refugee Response Framework
	International Development Association
CBDRRC	Common But Differentiated Responsibilities and Respective Capabilities
CEAS	Common European Asylum System
CIREFCA	Conferencia Internacional sobre Refugiados, Desplazados y Repatriados de Centro América (International Conference on Central American Refugees)
CJEU	Court of Justice of the European union
COE	Council of Europe
COP	Conference of the Parties
CPA	Comprehensive Plan of Action
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECTHR	European Court of Human Rights

EU	European Union
EXCOM	Executive Committee of the High Commissioner's Programme
ICARA	International Conference on Assistance to Refugees in Africa
ICCP	Intergovernmental Panel on Climate Change
ICJ	International Court of Justice
IDA	International Development Association
IOM	International Organisation of Migration
JHA	Justice and Home Affairs
MEA	Multilateral Environmental Agreement
MOP	Meeting of the Parties
MOU	Memorandum of Understanding
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCA	Permanent Court of Arbitration
PNG	Papua New Guinea
Refugee Convention	Convention Relating to the Status of Refugees of 1951. References to the Refugee Convention, unless stated otherwise include the 1967 Protocol Relating to the Status of Refugees
SAR Convention	International Convention on Maritime Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
TFEU	Treaty Functioning of the European Union
TPD	Temporary Protection Directive
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

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As any doctoral researcher would confirm, a PhD journey can have the highest highs and the lowest lows. I was lucky not to experience the lowest lows and only

the highest highs of this learning process. This study has been for me a happy place to turn to, in times of great need. And for this, I have been truly blessed.

Surrey, 24 September 2020

Author's Declaration

I, hereby, declare that all the material contained in this thesis is my own work.

Elizabeth Mavropoulou

For Renaldo

"As the earth is formed as a globe, its inhabitants cannot disperse infinitely, but are compelled to meet sooner or later".

Emmanuel Kant, To Perpetual Peace, A Philosophical Sketch (1795)

Part I

1 Responsibility Sharing for Refugees, The Challenge, the Debate and the Study[1]

1.1. The gap in the international refugee law regime

The international refugee law regime is predicated upon the idea that states have a collective responsibility to protect refugees.[2] Indeed, since the establishment of the United Nations in 1945, shortly after the Second World War, the management of refugees acquired salience and the refugee problem was recognised by the General Assembly as international in scope and nature.[3] The brutal excesses of a war that left Europe with millions of refugees, led to the establishment of a temporary, at the time, UN body, the United Nations High Commissioner for Refugees (UNHCR).[4] It was not too long after the international community came to realize that the refugee problem was not going to be a temporary one.[5]

The international law regime on refugee protection consists of two main legal instruments; the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees (together the Refugee Convention), which removed the geographical and temporal limitations of the

[1] As a matter of note, any law, policy and relevant events referred to in this thesis will be current as up to 20 September 2020.

[2] Agnès Hurwitz 'Norm Making in International Refugee Law' (2012) 106 American Society of International law Proceedings 430, 431. The term 'refugee' is used in the thesis as defined in Article 1A (2) of the 1951 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. (Refugee Convention).

[3] UNGA Res (8) I (1946) Question of refugees GAOR First Session.

[4] UNGA Res 428 (V) of 1950 Statute of the Office of the United Nations High Commissioner for Refugees. (UNHCR Statute).

[5] Laura Barnett 'Global Governance and The Evolution of the International Refugee Regime' New Issues in Refugee Research (2002) Working Paper No. 54, 6.

Convention.[6] These two are further supplemented by regional refugee and human rights instruments[7] and, together with the Office of the UN High Commissioner for Refugees (UNHCR), complete the architecture of the so-called international refugee law regime.

On one hand, the international refugee law regime has been praised for its enduring relevance and resilience throughout the years.[8] It has indeed been a unique human rights protection framework for individuals around the world fleeing persecution and has managed to stay relevant today, where new causes of flight have been added to the complex nature of forced displacement. On the other hand, it has also been heavily criticised for the gap in relation to responsibility sharing. The collective responsibility to protect refugees that the very regime is predicated upon, is met with neither a concomitant legal obligation nor a formal structure that ensures that protection responsibilities are fairly shared among states.[9]

The premise of this thesis is that the widely acknowledged[10] gap of the international refugee law regime in relation to responsibility sharing is

[6] Refugee Convention. Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol). Together in the thesis (Refugee Convention).

[7] Supranational refugee instruments include the Organisation of African Unity Convention Regulating the Specific Aspects of Refugee Problems in Africa (adopted 14 September 1969) (entered into force 20 June 1974) UNTS 14691, (OAU Convention). The 1984 Declaration Cartagena Declaration on Refugees adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama held at Cartagena, Colombia from 19-22 November 1984. (Cartagena Declaration)

[8] Jane McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29 International Journal of Refugee Law Editorial 1. Volker Türk, Madeline Garlick, 'Prospects for Responsibility Sharing in the Refugee Context' (2016) 43 Journal on Migration and Human Security 45, 47.

[9] James C Hathaway, 'The Global Co-Op Out on Refugees' (2018) 30 International Journal of Refugee Law 591.

[10] Indicatively only, Guy S Goodwin Gill, 'International refugee law – yesterday, today but tomorrow?' Working Paper No. 16 (2016) Refugee Law Initiative Working Papers 16 – 22. Terje Einarsen and Marthe Engedahl, 'The universal asylum system and the 2016 New York

normative.[11] It is normative because the Refugee Convention does not provide for a codified obligation of responsibility sharing, whereby states are bound to provide assistance and solutions to refugees in the territories of other states.[12] In the absence of a codified obligation of responsibility sharing, the distribution of the collective responsibility to protect refugees between states is determined by 'accidents of geography',[13] or by proximity.[14] What is more, Northern states have strategically deployed deterrence measures that seek to confine the *locus* of refugee protection and refugees predominantly within the Global South.[15] As a result, Southern countries in close proximity to refugee producing regions, are the ones which receive the refugees first, and which assume the *prima facie* responsibility for asylum, namely protection from *non-refoulement*.[16] David Owen has eloquently put this:

Declaration: towards an improved 'global compact' on refugees?' Working Paper No. 17 (2016) Refugee Law Initiative Working Papers 16 – 22. Claire Inder, 'The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime' (2018) 29 International Journal of Refugee Law 523-554. McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' 4. Volker Türk, 66th Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme, Geneva, 21-24 June 2016. Agenda item 2: International Protection. Statement by Volker Türk, Assistant High Commissioner (Protection) available at http://www.unhcr.org/uk/admin/dipstatements/576d41877/66th-meeting-standing-committee-executive-committee-high-commissioners.html .

[11] Volker Türk and Rebecca Dowd, 'Protection Gaps' in Elena Fiddian - Qasmiyeh and others (eds) *The Oxford Handbook for Refugees and Forced Migration Studies* (Oxford University Press 2014), 283-284. Meltem Ineli-Giger, 'The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?' (2019) 38 Refugee Survey Quarterly 115.

[12] Alexander Betts *Protection by Persuasion, International Cooperation in the Refugee Regime* (Cornell University Press 2009) 2, 3.

[13] Hathaway, 'The Global Co-Op Out on Refugees', 596.

[14] Mathew J Gibney, *The Ethics and Politics of Asylum Liberal Democracy and the Response to Refugees* (Cambridge University 2004), 240. Betts, *Protection By Persuasion*, 34.

[15] Mathew J Gibney, 'Refugees and Justice Between States' (2015) 14 European Journal of Political Theory 448, 452.

[16] Refugee Convention, Article 33.

> It is worth recalling that the lack of fair apportionment of refugee protection is a key contributor to the reluctance of states to admit refugees for whom, in virtue of the principle of non-refoulement, they thereby bear sole responsibility for what often amounts to indefinite protection.[17]

In effect, the powerful normative dominance of the principle of *non-refoulement* over the principle of responsibility sharing, given that *non refoulement* is a well-established legal duty in international refugee law, negatively impacts on the quality of international protection and durable solutions.[18]

With respect, to the terms 'Global North' and' Global South', these emanate from the concept of a gap between states, in terms of levels of development and wealth. At the risk of appearing oversimplistic, countries of the Global North are mainly found in the Northern hemisphere, with the exception of Australia and New Zealand. Causes for the disparities between countries vary and include natural resources, different levels of health and education, levels of industrialisation and even a country's vulnerability to natural hazards and climate change.[19] Having said this, the two terms are not accurately capturing realities on the ground, as they obfuscate important differences between countries seemingly part of the North and South groups.[20] Mindful of this caveat, and given that refugee scholarship has popularise the use of the terms,[21] this thesis uses the terms

[17] David Owen, 'Refugees and Responsibilities of Justice' (2018) 11 Global Justice: Theory Practice Rhetoric 23.
[18] Gibney, *The Ethics and Politics of Asylum*, 240.
[19] Royal Geographical Society A 60 Second Guide to the Global North/Global South Divide, available at https://www.rgs.org/CMSPages/GetFile.aspx?nodeguid=9c1ce781-9117-4741-af0a-a6a8b75f32b4&lang=en-GB
[20] Dimiter Toshkov, 'The 'Global South' is a terrible term. Don't use it!' Research Design Matters (November 6 2018). Available at http://re-design.dimiter.eu/?p=969
[21] Bhupinder S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350. Alexander Betts, 'North-South Cooperation in the Refugee Regime: The Role of Linkages' (2008) 14 Global Governance 157.

to frame the challenge of international cooperation and responsibility sharing along a North-South divide. The next section includes some key figures that contextualise and enhance the argument that the responsibility sharing gap negatively impacts upon the quality of refugee protection.

1.2. Facts and figures

Arguably, the most-cited percentage in refugee scholarship in recent years is the one published every year by the UNHCR on the number of refugees hosted in developing countries. Although statistics do not always reflect the qualitative differences between refugee situations - and can occasionally cause 'statistics fatigue'- the fact that 85% of the world's refugees in 2019 are hosted in developing countries speaks for itself.[22] Of these 85%, 27% are hosted by the least developed countries.[23] Turkey hosts the largest number of Syrian refugees worldwide, the second being Colombia, hosting the majority of the Venezuelans displaced.[24] To contextualise the accidents of geography argument further, in 2019, 73% of refugees fled to neighbouring countries and only 27% to countries further afield.

It has been a decade of protracted refugee situations UNHCR reports[25] and complex refugee emergencies with only a fraction of them having any prospects for solutions.[26] In response to the global health crisis of COVID-19, which suddenly hit the world in late 2019 and early 2020, and which at the time of writing, has impacted the lives of millions, border closures and travel restrictions

[22] UNHCR Global Trends Forced Displacement in 2019.

[23] Defined by the United Nations as low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets. https://www.un.org/development/desa/dpad/least-developed-country-category.html

[24] UNHCR Global Trends Forced Displacement in 2019.

[25] UNHCR defines a protracted refugee situation as one in which 25,000 or more refugees from the same nationality have been in exile for five consecutive years or more in a given asylum country. UNHCR Global Trends Forced Displacement in 2019.

[26] UNHCR Global Trends Forced Displacement in 2019, 12.

have been imposed by states. According to IOM's global mobility restriction report of June 2020[27], 219 countries imposed 'a total of 64,571 movement restriction measures', with reports stating that many of these measures did not make any exception for refugees and asylum-seekers.[28] UNHCR reports that hundred countries closed borders without making an exception for those seeking asylum, crippling the right to seek international protection.[29] A direct result of the pandemic has also been the temporary suspension of refugee departures for the purposes of resettlement in March 2020,[30] a first in UNHCR's history.[31] At the time of writing this thesis, travel for refugee resettlement purposes has been resumed but resettlement places have significantly dropped.[32] Even before the coronavirus pandemic the scale of resettlement was profoundly insufficient against global refugee needs.

According to the World Bank's income classification index, the Global North in 2019 hosted only 17% of refugees.[33] Taking heed of the fact that the

[27] DTM COVID-19 Global Mobility Restriction Overview (04 June 2020) available at https://reliefweb.int/report/world/dtm-covid-19-global-mobility-restriction-overview-04-june-2020

[28] UNHCR, 'Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response', (March 2020). See also Kaldor Centre Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into the implications of the COVID-19 pandemic for Australia's foreign policy, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/Inquiry_into_implications_COVID-19_pandemic_Australia_foreign_affairs_trade.pdf

[29] Remarks by Ms. Gillian Triggs, Assistant High Commissioner for Protection during the 8th Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme (7 July 2020).

[30] 'IOM, UNHCR announce temporary suspension of resettlement travel for refugees' UNHCR Press Release, (17 March 2020).

[31] Remarks by Ms. Gillian Triggs, Assistant High Commissioner for Protection during the 8th Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme (7 July 2020).

[32] UNHCR ExCom 'Resettlement and Complementary Pathways', Standing Committee 78th Meeting EC/71/SC/CRP.10 (3 July 2020), paragraph 3.

[33] UNHCR Global Trends Forced Displacement in 2019, 25.

European Union and western countries[34] provide 89%[35] of UNHCR's budget through voluntary donations, it becomes clear that the preference of the North is to fund refugee assistance programmes rather than hosting refugees in its territories.[36] When it comes to hosting refugees, the statistics are declaratory of the inequities between the Global South and the Global North. The hosting of refugees carries with it important social and economic capital for Southern host countries, which adds to the developing countries' existing developmental challenges. The fact that these countries assume a disproportionate to their capabilities share of refugee protection, negatively impacts on the wider North-South relations, creating what Betts has described as 'North-South impasse' which is addressed next.[37]

1.3. The international refugee law regime and interstate relations

It has been argued that the normative dominance of *non-refoulement* over responsibility sharing is a by-product of the weak institutionalisation of the responsibility sharing norm.[38] Contrary to the norm of asylum, where the Refugee Convention institutionalises it under an international legal regime of rights and duties of states vis-à-vis the refugees, responsibility sharing is viewed by states as inherently political, and therefore, as largely discretionary.[39]

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[34] The top nine donor countries to UNHCR for 2019 was the U.S., the European Union, Germany, Sweden Japan, the UK, Norway, Spain, Denmark and the Netherlands. https://www.unhcr.org/donors.html

[35] UNHCR Global Appeal 2020-2021.

[36] Türk and Garlick 'Prospects for Responsibility Sharing in the Refugee Context', 46.

[37] Betts, *Protection By Persua*sion, 13.

[38] Alexander Betts, 'The Global Compact on Refugees: Towards a Theory of Change' (2018) 30 International Journal of Refugee Law 623.

[39] Alexander Betts, Cathryn Costello, Natascha Zaun, 'A Fair Share; Refugees and Responsibility Sharing' Delmi (The Migration Studies Delegation) Report 2017:10, Available at https://www.delmi.se/en/news/text . (Delmi Report, A Fair Share).

The negotiating history of the Refugee Convention highlights how states at the time viewed responsibility sharing as a matter of domestic policy that had consequently no place in a treaty on the rights and duties of states with respect to refugees in their territories.[40] Nonetheless, the drafters had envisaged that some states, at times, would be disproportionately affected by refugee flows more than others, due to their geographic proximity to refugee producing regions.[41] The then Secretary General and the French delegation sought to remedy this imbalance, that would be caused in situation of large numbers of refugees, by suggesting a provision on responsibility sharing in the operative part of the draft Convention. Draft Article 3 proposed by the Secretary General read:

> [T]he High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries (..). They shall do so, inter alia, by agreeing to receive a certain number of refugees in their territories. [42]

In the commentary that followed the draft provision, the rationale was fleshed out further:

> Owing to their geographical position and liberal traditions, some States are destined to become the initial reception countries for refugees. It is but just that other countries should not allow these to bear the whole burden and by agreeing to admit a certain number of refugees to their territory should assume their equitable share.

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[40] UNHCR The Refugee Convention 1951: *The Travaux Preparatoires Analysed with a Commentary by Dr. Paul Weis* (1990). (*Travaux Préparatoires & Commentary* by *Dr. Paul Weis)*

[41] Ibid.

[42] UN Secretary General: *Ad Hoc Committee on Statelessness and Related Problems, 'Status of Refugees and Stateless Persons*: Memorandum by the Secretary-General (3 January 1950) UN Doc E/AC.32/2, Chapter II Admission, Article 3 para (2).

Interestingly, the Secretary General added:

> Clearly 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 deliberately vague form of words: 'a certain number of refugees'. [43]

The provision was, however, not welcomed by the negotiating parties, which made clear that the Refugee Convention was about the rights and the duties of states *vis-à-vis* the refugees.[44] France insisted that the words 'international cooperation' should remain in the Preamble of the Convention, as it did, because 'the protection of refugees', when a state is faced with a mass influx 'becomes a problem of assistance and if there is no international cooperation, the refugee problem cannot be solved'.[45] Yet again, the French delegate was cautious to stress that the factual acknowledgement of the challenge the refugee problem places upon certain countries could not translate into a legal obligation for the international community to provide assistance.[46] China openly objected to the proposed provision that 'it was not in the position to accept refugees from other countries'.[47] The Canadian representative submitted that the distribution of

[43] UN Secretary General: *Ad Hoc Committee on Statelessness and Related Problems, 'Status of Refugees and Stateless Persons:* Memorandum by the Secretary-General (3 January 1950) UN Doc E/AC.32/2 Chapter II Admission, Article 3 para (2) and following commentary.
[44] *Travaux Préparatoires & Commentary* by *Dr. Paul Weis,* 15.
[45] *Travaux Préparatoires & Commentary* by *Dr. Paul Weis,* 30.
[46] France's advocacy on the inclusion of a refugee redistribution clause in times of crisis had as a purpose to safeguard its own liberal asylum policies at the time and the smooth application of the Convention in practice. Due to its geographical position, France had been historically a haven for many refugees at the time. *Travaux Preparatoires & Commentary,* by Dr. Paul Weis, *19.*
[47] *Travaux Préparatoires & Commentary* by Dr. Paul Weis, 18.

refugees should not even be in the Preamble, as the draft Convention provides for legal obligations towards refugees and thus 'an acceptance of a decision on high policy was therefore unsuited to form part of a preamble to a convention conferring specified rights on specified categories of refugees'.[48] The U.S representative agreed with France that there should be in principle some sort of international cooperation for overwhelmed asylum countries, however, such a provision should not be included in the preamble of a legally binding instrument.[49]

These extracts from the *Travaux Preparatoires* of the Refugee Convention demonstrate the then state of affairs -very much the same today- where responsibility sharing for refugees, in particular the admission of refugees into territories, is to be left at the discretion of each state and should not become a matter of international regulation.

In addition, responsibility sharing faces practical challenges similar to other areas of global governance. Betts uses the 'suasion game' analogy, an analytical tool from game theory to further exemplify the cooperation challenge between states. The current power asymmetries between the Global South that hosts the refugees and the Global North that is relatively insulated from large refugee flows due to geography and the *non-entrée* measures *mise en place* reduces the incentives of the latter for increased participation in responsibility sharing.[50] In addition, the absence of an obligation of responsibility sharing, allows the main financial contributors to refugee protection, i.e. the Northern states, to under-contribute to protection and overcontribute towards border control.[51] The challenge is further aggravated by the increasing earmarking of any financial or

[48] *Travaux Préparatoires & Commentary* by Dr. Paul Weis, 18.
[49] *Travaux Préparatoires & Commentary* by Dr. Paul Weis,26.
[50] Betts, *Protection by Persuasion*, 14. Delmi Report, 'A Fair Share' 31.
[51] Jeff Crisp, 'A New Asylum Paradigm? Globalisation, Migration and the Uncertain Future of the International Refugee Regime' (2003) New Issues in Refugee Research Working Paper No. 100 (Geneva UNHCR).

development assistance given to the Global South in accordance to donor states' priorities and interests.[52]

As a matter of international refugee law, developing host states have a strong obligation to provide protection to refugees in their territory, whilst assistance from the other parties of the refugee regime remains entirely discretionary. [53]

In light of this, it can be argued that the international refugee law regime is characterised by a structural unfairness on the way refugee responsibilities are shared between states. This further exemplifies the existing inequities between the Global North and the South, and negatively impacts on the quality of refugee protection. Hurwitz has also stressed the interdependence between fairness in interstate relations and the quality of refugee protection.

> Because refugees do not, by definition, enjoy the protection of their state of origin, their protection falls upon the international community. The issue is not only important in terms of inter-state relationships and ensuring greater fairness in terms of the costs of hosting refugees, it is also crucial in order to preserve and enhance the level and quality of protection afforded to refugees.[54]

[52] Betts, *Protection by Persuasion*, 14.

[53] Alexander T Aleinikoff, Steven Poellot, 'The Responsibility to Solve: The International Community and Protracted Refugee Situations' (2014) 54 Virginia Journal of International Law 195, 213.

[54] Agnes Hurwitz 'Norm-making in international refugee law', (2012) 106 American Society of International Law Proceedings 430, 431.

1.4. Fairness ideas and the emergence of 'common but differentiated responsibilities and respective capabilities' in recent global refugee policy instruments

Facts and figures on the state of refugee protection outlined above, reveal how interstate relations and the quality of refugee protection are negatively impacted by having only a handful of states physically protecting the majority of the world's refugees, without meaningful and equitable assistance by the international community.

The implicit engagement of the New York Declaration in 2016[55] with ideas of fairness[56] and the language of international environmental law's principle of 'common but differentiated responsibilities and respective capabilities', sparked the idea of this doctoral research, which started as an apory on the concept's origins as well as an opportunity to address the perennial responsibility sharing gap of the international refugee law regime.

In 2016, the international community of states adopted the New York Declaration for Refugees and Migrants, which sought *inter alia* to identify ways to balance inequities in the way refugee protection responsibilities are shared and to meet the increasing assistance needs of the Southern host states.[57] The adoption of the Declaration was hailed as a key moment in the recent history of global refugee protection,[58] negotiated and endorsed by 196 States, setting *inter alia* the direction for global refugee policy in relation to responsibility sharing.

[55] UNGA Resolution 'New York Declaration for Refugees and Migrants' UNGA A/RES/71/1 71st session (19 September 2016). (New York Declaration on Refugees and Migrants).
[56] David J Cantor, 'Fairness Failure and the Refugee Regime' (2019) International Journal of Refugee Law 627.
[57] New York Declaration on Refugees and Migrants.
[58] UN Summit for Refugees and Migrants 19 September 2016, UN Headquarters. https://refugeesmigrants.un.org/summit

The Global Compact on Refugees followed and was adopted in 2018.[59] Interestingly, the Compact was originally intended to be titled 'Global Compact on Responsibility Sharing for Refugees', but in order to secure the widest consensus and, hence, adoption, the words 'responsibility sharing' were dropped from the title.[60] Although non-binding,[61] the Compact establishes certain political commitments with an objective to *inter alia* achieve 'a more equitable and predictable burden and responsibility sharing with host countries and communities.'[62]

Crucially for this thesis, the New York Declaration brought to the forefront of global refugee *policy* debates at the UN level, for the first time,[63] the concept of 'common but differentiated responsibilities and respective capabilities' (CBDRRC). Although the Declaration does not explicitly pronounce it, paragraph 68 reads:

> We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of

[59] UNGA Report of the United Nations High Commissioner on Refugees, Part II Global Compact on Refugees (2 August 2018) RES A/73/12. (Global Compact on Refugees).
[60] See Zero Draft of the Global Compact on Responsibility Sharing for Refugees, 30 June 2016, http://www.unhcr.org/events/conferences/578369114/zero-draft- global-compact-responsibility-sharing-refugees.html. The Compact was adopted with two objections by the United States and Hungary and two abstentions by Eritrea and Libya. Filippo Grandi, 'The Global Compact on Refugees: A Historic Achievement' (2019) 57 International Migration UN IOM, 23.
[61] Global Compact on Refugees, paragraph 4.
[62] Global Compacts on Refugees, paragraph 4 and 15.
[63] The link to the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) of international environmental law in the language of New York Declaration and the Global Compact on Refugees has also been noted by Rebecca Dowd and Jane McAdam. Rebecca Dowd, Jane McAdam, 'International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How' (2017) 66 International and Comparatively Law Quarterly 863, 885. Rebecca Dowd and Jane McAdam, 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons from International Climate Change Law' (2017) 18 Melbourne Journal of International Law 180.

> refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we 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*.[64]

The language of CBDRRC made it into the Global Compact on Refugees. In its opening statement the Compact reads:

> There is an urgent need for 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. Refugees and host communities should not be left behind.[65]

The Compact is further operationalised by voluntary contributions to protection and solutions which they will be further determined:

> by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities.[66]

CBDRRC is a concept and principle of international environmental law, which guides and frames the responsibility sharing arrangements within multilateral

[64] New York Declaration on Refugees and Migrants, para 68. Emphasis added.
[65] Global Compact on Refugees, para 1.
[66] Global Compact on Refugees, para 1 and 4.

environmental agreements.[67] It is said to be an application of fairness in international law,[68] exemplified in the context of resource and benefit allocation between states of the Global North and the Global South as well as a tool that brings states together to cooperate in solving international problems in solidarity.[69] It draws from the logic of differentiated commitments towards a common goal and objective.

It is too early to assess the normative impact of the Global Compact on Refugees as a of soft law instrument on the development of international refugee law with respect to responsibility sharing.[70] With the coronavirus pandemic having negatively impacted every phase of refugee protection, - from early assistance to asylum and solutions[71] - the normative impact of the Compact will take considerably longer to assess.

What can be said, however, is that there is sufficient evidence to suggest that CBDRRC is an inchoate concept of international refugee law and policy debate in the Global Compact era,[72] despite refugee scholars' experimentation and engagement with the concept for the past thirty years.[73] Even in light of the

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[67] CBDRRC was first formulated as Principle 7 in the 1992 Rio Declaration on Environment and Development. Report of the United Nations Conference on the Environment and Development, Annex I Rio Declaration on Environment and Development, UNGA A/CONF.151/26 (Vol. I) (August 1992). See Chapter 4.

[68] Philippe Sands, Jacqueline Peel, Andriana Fabra, Ruth Mackenzie *Principles of International Environmental Law* (Cambridge University Press 2018)

[69] Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations' (1999) 10 European Journal of International Law 549, 578.

[70] Thomas Gammeltoft-Hansen 'The Normative Impact of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 605.

[71] World Economic Forum Message on 2020 World Refugee Day, A look at how COVID-19 is affecting refugees and asylum seekers. Available at https://www.weforum.org/agenda/2020/06/world-refugee-day-refugees-asylum-seekers-coronavirus-covid-19-pandemic-response/

[72] Dowd and McAdam, 'International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How', 888.

[73] James Hathaway and Alex Neve first introduced the idea of 'common but differentiated responsibility' in refugee law scholarship in the 1990's in their proposal for reforming the

Global Compact's adoption and the laudable effort to operationalise responsibility sharing under new modalities, the central challenge of responsibility sharing remains unaddressed: this is the lack of a global responsibility sharing strategy and structure, as Aleinikoff describes it,[74] and the absence of a codified obligation of responsibility sharing in international law.

Despite the weaknesses, it will be argued in this Thesis that the Global Compact on Refugees can indeed be seen as a step closer towards legal obligations on responsibility sharing. It can be seen as a stepping stone towards the *de lege ferenda* development of international refugee law to ultimately address the responsibility sharing gap. This is for two reasons. Firstly, ideas of fairness are prominently present in the global refugee policy instruments and debates for the first time.[75] Secondly, the implicit engagement with the concept of CBDRRC both in the New York Declaration and the Global Compact cannot be overlooked.

The concept thus warrants explicit discussion and conceptualisation in terms of what it entails for responsibility sharing. Further clarification as to the precise nature of differentiation in states' responsibilities is thus required.[76] As argued by Gibney, fairness between states is an important normative goal of the international refugee protection regime.[77] A nexus between the need for fairness in responsibility sharing and the logic of CBDRRC has been made, albeit implicitly,

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international refugee law regime. James C Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection' (1997) 10 Harvard Human Rights Journal 115. See Literature Review 1.6. below.

[74] Alexander T Aleinikoff, 'The Unfinished Work of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 611, 613.

[75] Cantor, 'Fairness Failure and the Refugee Regime' (2019) International Journal of Refugee Law 627.

[76] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?', 888.

[77] Gibney, 'Refugees and Justice Between States' 461. It is be noted that Gibney uses the word justice instead of fairness. For a discussion on justice, fairness and equity and and their synonymous meaning international law, See Chapter 4, Section 4.3.

in the Global Compact on Refugees. The thesis takes the challenge of making this nexus explicit by fleshing out an idea of fairness between states in the sharing the responsibility to protect refugees and by exploring how the principle of CBDRRC, adapted to the refugee context, can structure the long resisted responsibility sharing obligation in international law.

1.5. Research Questions and Methodology

Two main questions frame the research, which are further underpinned by sub-questions.

1. To what extent does international refugee law provide for a duty of states to cooperate to protect refugees? (Part I)
    a. How can the methodology of enlightened positivism inform the study of international cooperation and responsibility sharing in international refugee law?

2. How can international refugee law expand and institutionalise a legal regime on refugee responsibility sharing? (Part II)
    a. What is the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) in international environmental law, and what does it mean for the global responsibility sharing regime on climate change?
    b. How can the principle of CBDRRC be adapted to international refugee law?
    c. What legal design and what obligations would best suit an instrument on responsibility sharing?

1.5.1. Theorising Refugee Law

This study adopts an enlightened positivist approach to the study of responsibility sharing in international refugee law. Before laying out the details of what adopting an enlightened positivism methodology entails, it is considered important to begin with some preliminary remarks on refugee law scholarship and the various approaches to the study of refugee law.

The way in which refugee scholars 'theorise refugee *law*'[78] is a first step before making a conscious choice on methodology. Methodology is crucial too, as it lays bare, to quote Klabbers, 'the set of assumptions each international lawyer has on what the world is like, and more specifically, what international law is like'.[79]

A number of methodologies were considered for this research. Some of them failed to convince, while some others were harder to dismiss.[80] Starting from the less convincing and moving on to the ones that could have potentially addressed the research questions, I will explain why enlightened positivism is the chosen methodology for this study.

Traditionally, refugee law scholarship, like international law scholarship, has been dominated by the jurisprudence of legal positivism.[81] Under legal positivism, international refugee law is a self-contained regime of rules, objectively identified and applied by states and international organisations.[82] In

[78] Helene Lambert, 'Dominant and Emerging Approaches in International Refugee Law' in Armstrong, D. (ed.) *Routledge handbook of international law* (London Routledge 2009) 344-354. Emphasis in the original. Harvey also observes that '[i]t is surprising that there has not been more thought given to the *law* in refugee law'. Colin J Harvey, 'Talking about Refugee Law' (1999) 12 Journal of Refugee Studies 101, 108. Emphasis added in the original.
[79] Jan Klabbers *International Law* (Cambridge University Press 2017, second edition) 3.
[80] For an extensive overview of the various methodological approaches to international law more generally, See Anne-Marie Slaughter, Steven Ratner, 'Symposium on Method in International Law, Appraising the Methods of International Law, A Prospectus for the Readers' (1999) 93 The American Journal of International Law 291-302.
[81] Chimni, 'The Geopolitics of Refugee Studies, a View from the South', 352.
[82] Lambert, 'Dominant and Emerging Approaches in International Refugee Law', 344.

fact, legal positivism combined with a human rights approach to refugee law - with human rights denoting that the focus is on sources, and the content of rules and their enforceability[83] - has been the dominant approach to the study of refugee law; at least the kind of scholarship undertaken by the majority of refugee lawyers.[84] Under the human rights paradigm, international human rights law reinforces refugee protection providing a rights-based framework, thus giving full meaning to the 'right to seek and enjoy asylum' in international law.[85]

Unsurprisingly, the positivist tradition to refugee law has not gone unchallenged by scholars of the critical legal studies.[86] Amongst the critics, Chimni a proponent of the Third World Approaches (TWAIL) school of thought has criticised legal positivism for its 'over reliance on the sources of law to validate a claim' and its state-centered focus, 'which eschews any engagement with politics'.[87] TWAIL scholars contend that international law has developed to serve a 'neo-liberal western vision of the world' and, therefore, it is 'playing a crucial role in helping legitimize and sustain the unequal structures and processes'.[88] Specifically to the refugee context, it has also failed to articulate a

[83] Ibid.

[84] Legal positivism remains the main theoretical approach in the practice of international law taken by international lawyers. Robert Cryer, Tamara Harvey, Bal Sohki-Bulley, Alexandra Bohm, *Research Methodologies in European and International Law* (Hart Publishing 2011) 38.

[85] Lambert 'Dominant and Emerging Approaches in International Refugee Law, 348. The right to seek and enjoy asylum is explicitly provided in Article 14 of the 1948 Universal Declaration of Human Rights. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III).

[86] The term 'critical legal studies' is used here rather loosely. I do not distinguish between the various schools of critical studies, namely 'post modernism', 'new stream' and 'Critical' scholarship. For a detailed appraisal of the critical legal studies in international law, See Slaughter, Ratner, 'Appraising the Methods of International Law' 291 and Andreas L Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law? (2001) 14 Leiden Journal of International Law 727.

[87] Chimni, 'The Geopolitics of Refugee Studies: A View from the South' 353.

[88] Chimni, 'The Geopolitics of Refugee Studies: A View from the South', 369.

more comprehensive and humane response to the contemporary refugee problem through dialogue with the Third World.[89] What is more, the positivist tradition to refugee law has been complicit to the justification of strategies of non-entrée measures and asylum restriction.[90] From the vantage point of critical legal studies, international law is not equipped to address the normative gap of responsibility sharing because positive international law 'does not possess the means to respond to the tension between the right of the sovereign states to specify admission rules and the needs of people whose life and freedom are at risk'.[91]

It is indeed true that legal positivist scholarship has contributed to a narrower conception of protection that does not recognise a right to be granted asylum.[92] It is also true that the refugee regime faces various challenges in today's forced displacement context; one of them being the reluctance of Northern states to welcome refugees in their territories in the first place. No doubt, the critiques are essential and constructive. Don't they, however, reflect a rather pessimistic view on the project of international refugee law?[93] Against a genuine disbelief of the potential of international law,[94] critical approaches place 'too much emphasis on the flaws of the status quo and the inability of the law to address it.[95] Ratner has

[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Guy S Goodwin-Gill, Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007), 414.
[93] Rosalyn Higgins poses the same question in the wider context of international law. Rosalyn Higgins, *Problems and Process International Law and How We Use It* (Clarendon Press 1995), 9.
[94] Paulus poses the following question: 'Is the postmodern critique of any help 'in a world grappling with terrorism, religious intolerance, social injustice, numerous human rights violations, (..)?' Paulus, 'International Law After Postmodernism', 747.
[95] Harvey, 'Talking about Refugee Law', 104.

summarized this eloquently: 'They are all far better at identifying what is wrong in international law than providing a theoretical grounding for the way forward'.[96]

Moving on, there is another discerning methodology, known as the policy-oriented approach or the New Haven School.[97] The policy-oriented approach was also considered a potential lens to approach the responsibility sharing gap, particularly because it makes explicit in its conception of law the existence of values,[98] offering a prescriptive lens to the study of international refugee law.[99] Classic positivism has always dispensed with the social context and has insisted on the 'separability thesis', according to which, values and morals are irrelevant to law and to legal analysis.[100] In response to 'hard' positivism, the policy-oriented approach to international law, rooted in liberal political science that is normatively driven,[101] places value considerations within the international legal process.[102] It is committed to an analysis of international *law* as 'an authoritative decision-making process, a system harnessed to the achievement of common values' that as Rosalyn Higgins writes, 'speak to us all' unlike a body of objectively identified rules. [103]

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[96] Steven Ratner, 'Ethics and International Law: Integrating the Global Justice Project(s)' (2013) 5 International Theory 1, 9.

[97] Established by Harold Laswell and Myres McDougal in New Haven, Yale around the 1940s. For a defence of this approach see, Lasswell & McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Martinus Nijhoff 1992).

[98] Higgins, *Problems and Process*, 9.

[99] Lambert, 'Dominant and Emerging Approaches in International Refugee Law', 345

[100] This thesis is expressed in Austin's doctrine under which 'the existence of law is one thing; the merit and demerit is another'. John Austin, *The Province of Jurisprudence Determined* (1832) Ed. W.E. Rumble (Cambridge University Press 1995),135.

[101] Onuf commented on the New Haven policy-oriented school of thought that '[b]y definition of course the critical movement is normatively driven. So too was the New Haven School and openly so.' Nicholas Onuf, 'International Legal Theory Where We Stand', (1995) International Legal Theory 2, 3.

[102] Higgins, *Problems and Process,* 5.

[103] Higgins, *Problems and Process,* 9.

Certain risks identified with a policy-oriented approach to the study of refugee law were, however, hard to dismiss. Firstly, if the purpose of refugee law is to serve and be driven by certain values as per the policy approach, then it begs the question of what values should be granted priority and guide the law and decision-making process in the refugee context? What values should dominate the decision-making process in international law, where there is ample evidence of competing values and interests between states? To use Koskenniemi's argument, a policy-driven approach turns international law 'into an uncritical instrument for the foreign policy choices of those whose power and privilege has put into decision making positions'.[104] As Hathaway contends, the policy–oriented school of thought depletes international refugee law of the certainty required for 'minimum at least accountability' and 'equates law with whatever norms are of value to the dominant states'.[105] Rosalyn Higgins, draws her support and commitment to the policy-based school through legal positivism's failure and inability to 'respond in situations when there is a question of *lacunae* in law'.[106]

International legal positivism has, over the years, softened significantly. To use a vivid quote, legal positivism is not anymore equated with 'old fashioned, conservative, continental European nineteenth century views - naïve ideas of dead white males on the objectivity of law and morals'.[107] The next section introduces

[104] Martti Koskenniemi, 'The Lady Doth Protests too Much Kosovo and the Return to Ethics in International Law', (2002) 54 The Modern Law Review 159.
[105] James Hathaway, *The Rights of Refugees in international Law* (Cambridge University Press 2005), 20.
[106] Higgins, *Problems and Process,*10.
[107] This fascinating answer was given in the introductory paper co-authored by Bruno Simma and Andrea Paulus when invited to present their own positivist view at the Symposium on Method in International Law. Bruno Simma, Andreas L Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist's View (2004) 36 Studies of Transnational Legal Policy 23.

'enlightened' positivism, a modern and softer version of legal positivism, developed by Bruno Simma and Andrea Paulus.[108]

1.5.2. Enlightened positivism

Positivism like, any other epistemological method, has undergone considerable development since 19th century, when it first emerged and established itself as the dominant jurisprudential school.[109] Having to respond to the rapid developments of international law in 20th century, legal positivists reinvented their approach to international law.[110] Modern versions of legal positivism espouse a more progressive view of the role of international law, *whilst* eschewing the deficiencies of the classic legal positivism highlighted by its very critics. They all share the premise that 'contemporary international law cannot any more claim' or, better afford, to be value free.'[111] This is evident in the role of international human rights law and, in particular, the issue of the extraterritorial application of human rights, where positivists view the state as a 'guardian' of cosmopolitan

[108] Simma and Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist's View', 25.

[109] Cristian J Tams, Antonios Tzanakopoulos, 'Use of Force' in Jean D'Aspremont, Jorg Kammerhofer (eds) *International Legal Positivism in a Post-Modern World* (CUP 2014), 507.

[110] Tams & Tzanakopoulos, 'Use of Force' 512. My intention is not to trace the evolution of positivism from classical to more contemporary, softer versions of legal positivism. Rather I seek to defend that legal positivism, despite its criticisms for being state centric and rigid has evolved to a dynamic methodology relevant to frame contemporary international law and global justice issues. For a detailed discussion on all the various jurisprudential issues of the methodology of legal positivism today, See Kammerhofer & Jean D'Aspremont, *International Legal Positivism in a Post-Modern World*.

[111] Paulus, 'International Law After Postmodernism', 752.

values.[112] Over the years, modern positivists began to engage, even if implicitly, with certain aspects of morality.[113]

In the scholarship of Bruno Simma and Andreas Paulus, one comes across a discernible version of modern positivism, which reflects the thesis that international law, is not, and cannot be independent of the political and social context in which it operates.[114] Throughout his scholarship, Simma has put forward and defended the argument that an international community of states exists with shared values and interests and that community 'comprises not only States, but in the last instance of all human beings'.[115] He argues that it is this awareness of *community interests* 'has begun to change the nature of international law profoundly'.[116] This argument can be said to reflect a cosmopolitan thinking in international law, even if fortified behind the veil of legal positivism.[117] Hart for instance, a proponent of legal positivism, recognises that determining the actual state of the law, the moral views of states are a relevant consideration.[118] It is this enlightened, softer form of positivism, that that offers the refugee law

[112] Steven Ratner, 'From Enlightened Positivism to Cosmopolitan Justice Obstacles and Opportunities' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, (Oxford University Press 2011) 164.
[113] Ratner, 'From Enlightened Positivism to Cosmopolitan Justice Obstacles and Opportunities', 156.
[114] Simma & Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist's View', 29.
[115] Bruno Simma, 'From bilateralism to community interest in international law' Volume 250' in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law 229, 234.
[116] Simma, 'From bilateralism to community interest in international law', 234. Emphassis added.
[117] Ratner, 'From Enlightened Positivism to Cosmopolitan Justice Obstacles and Opportunities', 162.
[118] Herbert L A Hart, *Concept of Law* (Oxford University Press Clarendon Law Series1961), 199-200.

scholar with both a descriptive and prescriptive lens to the study of the law - the latter particularly useful to the study.

1.5.3. The use of enlightened positivism in this thesis – From *lex lata* to *lex ferenda*

The realisation of the existence of community interests in international law prompts to consider whether refugee protection, and as a result international refugee law, indeed reflect a community interest. Simma has defined community interests as

> 'a consensus according to which respect for certain fundamental values is not to be left at the free disposition of States individually or inter se but is recognised and sanctioned by international law as a matter of concern to all States'.[119]

If refugee law reflects and serves, and this is a claim that will be pursued in the thesis, a community interest, then responsibility sharing is one pathway of realising the effective protection of this community interest. As mentioned earlier, responsibility sharing has been predominantly viewed by states as an issue of exclusive discretion, particularly with respect to physical sharing that entails physical relocation and admission of refugees. The inherent political nature of responsibility sharing as it has been rightly described,[120] therefore shapes and dictates responses. A direct result of this acknowledgment is that the hard lines between international law and international politics begin to blur. If fairness between states constitutes a critical element of international refugee law and a normative goal of the Refugee Convention as Gibney argues, responsibility

[119] Simma, 'From bilateralism to community interest in international law', 236 -237.
[120] Delmi Report ,'A Fair Share', 18.

sharing is thus essentially a process of marshalling states' competing interests[121] against an idea of fairness, however elemental.

The enlightened positivist is comfortable, if not eager, to explore the extent to which the protection of refugees manifests the existence of a community interest as well as engage with an idea of fairness for responsibility sharing, that will ultimately shape the rules or principles that can realise the community interest.[122] This is where the prescriptive lens of the enlightened positivist toolkit becomes useful. To be sure, the enlightened positivist distinguishes in the analysis of the law between what the law is (*lex lata*) and what the law should be (*lex ferenda*). The 'enlightened positivist' approach to the study of responsibility sharing does not, however, end with the description of what the law is. Having said this, identifying the state of international refugee law with regard to responsibility sharing is the first logical step. When faced with a *lacuna*, in this case the normative gap on responsibility sharing, the enlightened positivist goes further, into *lex ferenda* undertakings, studying how the law should be like and how it could look like. As one international environmental lawyer writes:

> The day has passed, however, when any lawyer seriously thinks that his or her task is simply to describe the law as it is. Domestic lawyers play an important role in developing new legislation, and international environmental lawyers play a comparable role in negotiating treaties. Questions of legal design are prescriptive rather than doctrinal in character but are of central concern to international lawyers.[123]

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[121] Eleni Karageorgiou *Rethinking Solidarity in European Asylum Law A Critical reading of the key concept in contemporary refugee policy* (PhD thesis 2018) Published by Lund University Faculty of Law, 18. On file with the author.

[122] Ratner 'From Enlightened Positivism to Cosmopolitan Justice Obstacles and Opportunities', 156.

[123] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011), 7.

To this end, this study consciously switches from the descriptive lens in Part I that identifies and rigorously discusses the current state of international refugee law on responsibility sharing, to the prescriptive lens of exploring *de lege ferenda,* a CBDRRC framework and a legal design that can effectively structure the missing responsibility sharing partnership between states.

The de *lege ferenda* part of the thesis begins with a detailed study of the principle of CBDRRC in environmental law. In the words of Thomas Franck, international environmental law 'is a field of much normative and institutional creativity, making it an enlightening illustration of the fairness *problematique* in contemporary international law'.[124] In addition to illustrating the fairness *problematique* in contemporary international law, the study of international environmental law is an integral part of the thesis' methodology and serves towards the *de lege ferenda* development of international refugee law. International environmental law is a prominent area of international law where community interests are manifested in its legal regimes. Its parallel study serves to gain a well-rounded understanding of the CBDRRC principle's rationale, conceptual elements and limitations. It serves also an understanding as to why and how fairness considerations between states are inherent to responsibility sharing and instrumental to the realisation of the community interests international law reflects.

1.5.4. Sources

The primary international law sources used in the study are international conventions, international custom and general principles of law.[125] Further

[124] Thomas Franck *Fairness in International Law and Institutions,* (Oxford University Press 1995), 355. Footnote omitted.

[125] Statute of the International Court of Justice (26 June 1945), Article 38. (ICJ Statute)

pursuant to Article 38 of the Statute of the International Court of Justice, secondary sources such as judicial decisions and the teaching of publicists are also relied upon to supplement the legal analysis.[126]

The interpretation of all the relevant legal provisions faithfully abides by the rules enshrined in Article 31 of the Vienna Convention on the Law of Treaties.[127] A textual approach is adopted, where a good faith interpretation of all relevant provisions is made in accordance with the ordinary meaning to be given to terms in light of the instrument's object and purpose.[128]

The study also draws upon soft law principles as an aid to the interpretation of certain legal provisions. Soft law principles, for example, the principle of responsibility sharing or the principle of solidarity in international refugee law, in contrast to rules that prescribe certain conduct, are open-textured in their formulation.[129] However, they are capable of producing certain legal effects in international law,[130] deriving their authority from the continuous endorsement of states before various fora.[131] International environmental law has an abundance of soft law principles, which progressively, either became part of customary

[126] ICJ Statute, Article 38.

[127] Vienna Convention Law of Treaties (3 May 1969) (Entered into force on 27 January 1980) UNTS 1155, p. 331, Article 31. (VCLT).

[128] VCLT, Article 31.

[129] Alan Boyle 'Soft Law in International Law Making' in Michael Evans (ed) *International Law* (Oxford University Press 5th edition), 120.

[130] Gunther Handl, Michael Reisman, Bruno Simma, Pierre Marie Dupuy and Christine Chinkin 'A Hard Look on Soft Law' (1990) 82 American Society of International Law, 371.

[131] Alan Boyle, Christine Chinkin, *The Making of International Law* (Oxford University Press 2007), 211.

international environmental law,[132] or were codified in legally binding instruments.[133]

Soft-law instruments are also used in the legal analysis. Despite their non-legally binding form, they can affect legal perception.[134] The 1992 Rio Declaration on Environment and Development not only codified existing international law, but sought to provide new law.[135] For example, at the time of writing, the Global Compact on Refugees plays a norm-preserving role within the international refugee regime, which might turn into a norm-creating role in future.[136] For instance, if general state practice followed by opinio juris is crystallized.[137] Soft law instruments like UN General Assembly Declarations and Resolutions, the ECOSOC resolutions[138] and the UN Security Council Resolutions interpret and amplify the UN Charter,[139] and can represent reflections of states' *collective opinio juris* over certain matters. In international refugee law, the UNHCR's Guidelines on International Protection and the Conclusions of its Executive Committee are all relevant to the identifying and interpreting the law

[132] The International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on *Responsibilities and Obligations of States and Sponsoring Persons and Entities with Respect to the Activities in the Area,* held that the precautionary principle could be considered today as part of customary international law. *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion* Order of 1 February 2001) page 41, para 135.

[133] For example, the multilateral environmental agreements on climate change concluded after the 1992 Rio Declaration. See further Chapter 4.

[134] Simma & Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist's View', 31-32.

[135] Jorge Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (2015 Oxford University Press).

[136] Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 605, 610.

[137] *Nicaragua v USA ICJ Reports 1986,* p.14. *Nuclear Weapons Advisory Opinion, ICJ Reports 1996* p. 226.

[138] Guy S Goodwin-Gill, 'The Language of Protection' Editorial (1989) 1 International Journal of Refugee Law 1, 17.

[139] Boyle 'Soft Law in International Law Making', 120.

as they reflect states' *collective opinio juris* over matters of international protection. Broadening the scope of the legal analysis to include soft-law instruments and norms does not automatically turn these into international law *per se*. It rather accepts these documents as either, reflecting existing law or being capable of developing into law, depending on the case.

1.6. Literature review and contribution to knowledge

The responsibility sharing gap has been very well-documented in refugee law scholarship. Goodwin-Gill and McAdam refer to it as a 'responsibility deficit' of the Refugee Convention,[140] Hathaway sees it as an 'implementation or operational gap' of the international refugee law regime,[141] and Betts as a 'systemic and longstanding gap'.[142] Scholarship from International Relations (IR) on forced migration has also contributed to the better understanding of the challenges faced in responsibility sharing, particularly when these are viewed within the wider North – South relations. Hans, Suhrke and Einarsen for instance, have put forward accounts for refugee responsibility sharing in the likes of a collective insurance scheme.[143] Meanwhile, Suhrke, Betts and Noll have applied game theory and accounts of global public goods in their analysis

[140] Guy S Goodwin-Gill, 'The Movements of People Between States in the 21st Century: An Agenda for Urgent Institutional Change' (2016) 28 International Journal of Refugee Law 679, 688. McAdam 'The Enduring Relevance of the 1951 Refugee Convention',1.

[141] Hathaway and Neve, 'Making International Refugee Law Relevant Again',141. Hathaway 'The Global Co-Op Out on Refugees', 591.

[142] Betts, *Protection by Persuasion*, 3.

[143] Astri Surhke, 'Burden Sharing During Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11 Journal of Refugee Studies 396. Terje Einarsen 'Mass Flight The Case of International Asylum' (1995) 7 International Journal of Refugee Law 551. Asha Hans, Astri Surhke, 'Responsibility Sharing' in James Hathaway (ed) *Reconceiving International Refugee Law* (Martinus Nijhof Publishers 1997) 83.

of the challenges inherent in international cooperation and responsibility sharing, such as the problem of free riders and non-compliance.[144]

The focus of this review is on the major scholarly works on responsibility sharing that have sought to fill the responsibility sharing gap by proposing either implicitly or explicitly the idea of differentiated responsibilities to refugee protection as contributions to responsibility sharing. These proposals range from formal to informal and propose legal and non-legal ways for improving responsibility sharing in refugee matters. Importantly, the objective of the review is not to present all academic work on responsibility sharing – such a task would need a study of its own - but rather to identify the shortcomings in the knowledge of refugee law scholars in relation to proposals on CBDRRC and position the thesis within the wider academic responsibility sharing debate in the new 'Global Compact era'.

Scholarly proposals to remedy the responsibility sharing gap date back to the 1960's. The preeminent international refugee law scholar Grahl-Madsen who also served as a Special Consultant in the Office of the High Commissioner for Refugees in 1962-63, was the first to focus on responsibility sharing and to suggest his own model in the form of a plan for the redistribution of refugees.[145] His thesis was that the Refugee Convention should not be amended to accommodate provisions on the sharing of refugees, as such effort would lead to

[144] Alexander Betts, 'International Relations and Forced Migration' in Elena Fiddian-Qismeyeh, Gill Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014), 66. Surhke, 'Burden Sharing During Refugee Emergencies The Logic of Collective versus National Action' 396. Gregor Noll, 'Risky games? A Theoretical Approach to Burden Sharing in the Asylum Field' (2003) 16 Journal of Refugee Studies 236. Gregor Noll, ' "Prisoners" Dilemma in Fortress Europe: On the Prospects for Equitable Burden Sharing in the European Union' (1997) 40 German Yearbook of International Law 405.

[145] A Grahl-Madsen, 'Further Development of International Refugee Law', (1965) 35 Nordic Journal of International Law 159, 165.

unintended and undesirable outcomes.[146] For the problem of the overburdened first asylum countries in Europe at the time, he called for enhanced solidarity from Western European states, achieved via a regional agreement between the Member States of the Council of Europe that would commit them to accept pre-determined national quotas of asylum seekers for each calendar year.[147] In his 'Plan for Distribution of Refugees', aiming at relieving the unduly heavy burden upon countries of first asylum, Grahl-Madsen suggested a distributive key for the national quotas of the Member States parties to the Plan. The suggested key was the gross national product (GNP), which according to him was indicative of a country's size and absorptive capacity.[148] He encouraged states to adopt liberal policies on admissions for resettlement purposes in the form of agreements that would define the proportional basis for a regional distribution.[149] Grahl-Madsen's thesis was that predetermined binding refugee quotas at the regional level would be the best way to tackle disproportionate refugee distribution.[150]

BS Chimni also proposed pre-allocated quotas on the basis of objective criteria such as total land mass and population density.[151] Gibney too in his account on how to realise justice between states in the way protection refugee responsibilities are allocated suggested the adoption of criteria such as a state's integrative capabilities that can measure a fair share against objective metrics of GDP and population size.[152] All three proposals, while advocating the use of

[146] Ibid.,163.
[147] Ibid.,165.
[148] A Grahl-Madsen, 'Further Development of International Refugee Law', (1965) 35 Nordic Journal of International Law, 165.
[149] Ibid., 168.
[150] Ibid, 172.
[151] BS Chimni 'The Operational Mechanism: International Burden Sharing' in Reconceiving Refugee Law as Human Rights Protection' Background Paper for the Meeting of the Legal Working Group. Unpublished manuscript. Cited in Hathaway and Neve 'Making International Refugee Law Relevant Again', 204.
[152] Gibney, 'Refugees and Justice Between States', 456.

different criteria, essentially embrace the logic of differentiation that would result in states' differentiated contributions to refugee protection.

Hathaway has published a series of articles on responsibility sharing since 1991 - one of them co-authored with Alexander Neve - in which the authors submitted a detailed proposal for a holistic reform of the international refugee law regime.[153] The 1997 proposal was the result of almost six years of research, that culminated from prominent international refugee scholars, social and political scientists, policy makers, and international conferences.[154] Hathaway still today reiterates and defends his thesis, which remains unchanged in its major themes. For this reason, this study discusses it holistically.

Hathaway and Neve were the first scholars to explicitly introduce a framework of 'common but differentiated responsibility'[155] to guide the responsibility sharing effort in international refugee law. The major failing of the Convention, according to the authors, had been 'the absence of a common operational mechanism, in particular one that would ensure that protection burdens and responsibilities are fairly shared among states.'[156]

The core thesis is a legally binding UN administered allocational system developed upon a notion of 'common but differentiated responsibility'.[157] The authors argue that this much needed operational mechanism would ensure that protection burdens and responsibilities are fairly shared among states.[158] Under

[153] James C Hathaway 'Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 Harvard Journal of International Law 120. James C Hathaway, 'Reconceiving Refuge Law as Human Rights Protection' (1991) 4 Journal of Refugee Studies 113. Hathaway and Neve, 'Making International Refugee Law Relevant Again', 115.

[154] Hathaway published the broad - range thinking of the project's participants in an edited volume: James Hathaway, *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers 1997).

[155] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 118.

[156] Hathaway, 'The Global Co-Op Out on Refugees', 591.

[157] Hathaway 'Reconsideration of the Underlying Premise of Refugee Law', 126.

[158] Hathaway, 'The Global Co-Op Out on Refugees' 591.

their proposal, states in refugee regions of origin would provide asylum for the duration of risk, whilst northern states outside the region, would be legally bound to support the system through funding and development assistance.[159] Beyond funding, northern states would additionally provide resettlement for those refugees, who after five years in the country of asylum cannot be repatriated or locally integrated.[160] The main responsibility sharing task of the Northern states would therefore be resettlement only – 'a common, but differentiated, responsibility'. Hathaway and Neve explained that their framework caters for *prima facie* inequities in responsibility sharing allocations,[161] striking a balance between meeting the responsibility to protect and shouldering the costs of protection.[162]

In their proposal, the authors do not engage with an idea of fairness nor do they flesh out a normative rationale for such differentiation, despite their proposed framework seeking to allocate responsibilities between states in a fair manner. They also do not engage with questions of legal design, namely what would be the nature of the legal obligations codified and what legal architecture would better suit the operational mechanism proposed. Hathaway only, in a recent critique of the Global Compact on Refugees in 2019, explained that his proposal would entail the conclusion of a binding legal instrument, in the likes of an optional protocol, 'that would come into force as soon as a critical mass of 20 or 30 States were on board'.[163]

Hathaway's proposal despite its fond critics,[164] was innovative at the time and remains relevant too to current responsibility sharing debates given that an

[159] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 145.
[160] Hathaway 'The Global Co-Op Out on Refugees', 599-560.
[161] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 118, 204.
[162] Ibid., 144 -145.
[163] Hathaway 'The Global Co-Op Out on Refugees', 599.
[164] The proposal has been criticised for a number of reasons directly linked to its ethical premise, for the rhetoric of 'crisis' it promotes, for commodifying refugee protection and

idea of CBDRRC is found in the language of the Global Compact on Refugees. Interestingly, Hathaway does not seem to detect the language of international environmental law's concept in the Global Compact on Refugees. This is, perhaps directly linked to the premise of Hathaway's 'common but differentiated responsibility' theory, which is distinct to the principle of CBDRRC of international environmental law. As a result, he does not engage with the sophisticated fairness debates surrounding CBDRRC and the way it frames environmental protections as a matter of Global North and South responsibility sharing.

Another detailed proposal on refugee responsibility sharing that implicitly calls for a logic of differentiated responsibilities to refugee protection belongs to Schuck. Schuck suggested a regional or subregional, consent-based scheme of responsibility sharing that would seek to institutionalise and strengthen 'the manifestly weak responsibility sharing norm'.[165] An international agency would calculate a worldwide total sum of refugees who require protection and permanent resettlement and then allocate those totals to participating states by assigning binding quotas to each of them.[166] States receiving the quotas on the basis of their national wealth would either implement them and provide protection or resettlement, or if wanted, transfer them to another state willing to assume them in exchange for compensation and other commodities.[167] Shuck does not explicitly pronounce on the language of CBDRRC either, although his proposal

ghettoizing refugees in the regions of origin. See Deborah Anker, Joan Fitzpatrick, Andrew Schacknove, 'Crisis and Cure: A Reply to Hathaway, Neve and Schuck' (1998) 11 Harvard Human Rights Journal 295, 299. Satvinder Juss, 'Towards a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence' (1998) 11 Harvard Human Rights Journal 311. Chimni, 'The Geopolitics of Refugee Studies, a View from the South', 362-363.

[165] Peter Schuck, 'Refugee Burden Sharing: A Modest Proposal' (1997) 22 Yale Journal of International Law 243, 272.

[166] Schuck, 'Refugee Burden Sharing: A Modest Proposal', 277.

[167] Schuck, 'Refugee Burden Sharing: A Modest Proposal', 287.

essentially advocates for differentiated contributions on the basis of each state's national wealth and capabilities.

Naturally, the interests of refugee scholars and policy makers in responsibility sharing ebbs and flows. A renewed interest on the subject matter emerged after the Syrian exodus that resulted in large numbers of Syrian refugees in immediate need of international protection and assistance. The interest in responsibility sharing responses was strengthened during the large-scale arrivals of migrants and refugees from Africa to Europe in 2015-2016. In 2015 and 2016, refugees arrived at European shores, so the need for allocating responsibility for those arriving became a priority to European national and supranational agendas. These events, combined with the fact that attention turned to the negotiations for the conclusion of the New York Declaration on Refugees and Migrants at UN level, had as a result, responsibility sharing to become even more politicised.

As a result of the need for urgent policy and planning at the UN level, academic interest grew following the adoption of the New York Declaration on Migrants and Refugees. The Declaration, as already mentioned, aimed *inter alia* at addressing the responsibility sharing gap of the Refugee Convention.

Catalan-Flores, building on Hathaway's reformulation proposal explores the theoretical and practical reformulation of the notion of responsibility sharing throughout the years using the doctrine of CBDRRC as the lens for assessing past responsibility sharing arrangements.[168] His conclusion is that CBDRRC due to its focus on contextual differentiation is a well-suited tool to address the practical issues raised by responsibility sharing schemes of the past.[169]

Dowd and McAdam, in two journal articles have turned to international environmental law and the legal regime on climate change for lessons and insights

[168] Alex Catalan-Flores, 'Reconceiving Burden Sharing in International Refugee Law', (2016) 7 The King's Student Law Review 40.

[169] Ibid., 51. The thesis discusses the two responsibility sharing arrangements in Chapter 3, section 3.5.

for international cooperation to protect refugees. The authors compare and contrast the concepts of international cooperation and responsibility sharing in the two fields of law through the perception of individual states .[170] Their objective is to provide a unique insight into the meaning of these two terms 'from the perspective of individual states, which cannot be gleaned from collective statements or formal instruments' at the UN or regional fora.[171] As a result, they do not put forward a concrete proposal for filling in the responsibility sharing gap. Rather, they caution refugee law scholars to fully explore the principle of CBDRRC and encourage its further conceptualisation and adaptation in international refugee law.[172] In their view:

> It is fair to say that the concept of CBDRRC is far more nuanced than some international refugee lawyers may appreciate, and its intricacies have not yet been explored in the protection context. Indeed, it tends to be invoked in a very rudimentary and literal way - namely, that because states' capacities vary, so, too, should their contributions to global refugee protection. Precisely what this might look like, and how it would (or would not) reflect the much more sophisticated iterations of the principle in the climate change context, is a long way from being debated, let alone determined.

This thesis takes up this challenge of adapting CBDRRC to the specificities of refugee protection and suggests how it might be formulated and implemented in international refugee law.

For the sake of completeness, the proposals of two scholars whose research has been contemporaneous to the thesis are worth mentioning in the review.

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[170] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law',186.
[171] Ibid.
[172] Ibid., 199.

Harley has proposed moving towards legal commitments with regard to resettlement and refugee financing.[173] This would gradually replace the current *ad hoc* and voluntary nature of the current contributions to responsibility sharing. In terms of refugee finance, he recommends a binding arrangement that would secure humanitarian funding for refugees through the amendment of UNHCR's Statute, or through the creation of a global refugee fund where states would contribute in accordance with their capacities to pay.[174] With regard to resettlement, Harley submits that an obligation to resettle would be best reflected in an additional protocol on resettlement or another instrument on resettlement that would allocate quotas to states based on agreed fairness indicators.[175] He suggests addressing the financial and physical components of responsibility sharing separately, as there is a relatively clear normative understanding between states on the scope and meaning of resettlement in contrast to other forms of physical responsibility sharing.[176]

Wall has developed an innovative proposal on addressing the responsibility sharing gap of the Refugee Convention through the adoption of a 'Framework Convention on Responsibility Sharing'.[177] In his proposed Convention, the responsibility sharing norm would be expressed through a redrafting of international environmental law's CBDRRC principle as the latter is posited in the United Nations Framework Convention on Climate Change (UNFCCC).[178] Wall proposes the following wording:

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[173] Tristan Harley, 'Innovation in Responsibility Sharing for Refugees', World Refugee Council Research Paper No. 14 (May 2019), 1.
[174] Ibid., 12.
[175] Ibid., 13.
[176] Ibid., 13.
[177] Patrick Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?' (2017) 2 International Journal of Refugee Law 201, 220.
[178] United Nations Framework Convention on Climate Change (adopted May 1992, entered into force March 1994) UNTS 1771. Article 4.

> States should share the responsibility for providing adequate protection to and durable solutions for the world's refugees, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[179]

Wall's proposal was contemporaneous to the negotiations of a Global Compact on Refugees, and in the same spirit of voluntarist framework, he refrains from suggesting the codification of legal obligations of responsibility sharing. Although he heavily draws, like this thesis, on international environmental law and the legal regime on climate change, he does so from a different angle. His focus is on the framework convention as a model architecture and as a legal design for incremental regime building. Wall's proposed Framework Convention does not codify any legal obligation for the parties offering very low barriers to entry.[180] Indeed, the only obligation of the parties -which does not appears to a legal one- would be 'to participate in good faith in the meetings of the conferences of the parties, including by indicating the contribution that they are willing to make and reporting on the action they had taken to fulfil that commitment'.[181] A framework convention would provide a formal institutional structure for responsibility sharing and a permanent forum of discussion.[182] While I do share the need for a formal institutional structure and a bottom-up approach to responsibility sharing, as the only realistically feasible way of bringing responsibility sharing within international law, I do also believe that a treaty on responsibility sharing should codify a light package of minimum legal obligations. Alternatively, the structure

[179] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 220.
[180] Ibid, 230.
[181] Ibid,230.
[182] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 220.

that the international refugee law regime vitally and urgently needs, something that Wall rightly stresses, risks being left without substance. [183]

1.6.1. Contribution to knowledge

To summarise, academic proposals on the responsibility sharing gap have proposed various legal and non-legal mechanisms, formal and informal structures and have either, implicitly or explicitly engaged, with the logic of differentiated commitments to refugee protection and solutions.

What seems to be missing from academic proposals that put forward *de lege ferenda* arguments, is an explicit engagement with a notion of fairness between states which is integral to responsibility sharing as well as a concrete way of demonstrating practically how a CBDRRC framework might look like. International environmental law's principle of CBDRRC is normatively rooted on fairness and carries within a sophisticated distributive justice *problematique* that regrettably has not made it to refugee *law* scholarship.[184]

In their majority, scholars trace CBDRRC in international climate change law, overlooking the fact that the logic of differentiated legal obligation permeates many international law regimes from international trade to human rights law.[185] Furthermore, with the exception of Wall's proposal, the study on CBDRRC in international environmental law opens up various innovative ways to institutionalise responsibility sharing in international law. Here too, questions of legal design have not been sufficiently explored. Even when scholars advocate or imply legal obligations of responsibility sharing, they do not sufficiently engage with how these obligations would be best designed and structured. What

[183] Wall's proposal is further discussed in Chapter 5.

[184] I emphasize on the refugee law as there are scholarly accounts on justice and refugee protection in the Ethics, Political Science and International Relations scholarship and which are discussed in the thesis. We Lawyers, however, tend to engage only incidentally with concepts of fairness.

[185] See further Chapter 4.

would the nature of these obligation be in order to secure consensus? Equally important, would implementation of responsibility sharing obligations be bottom-up, inducing flexibility, or top-down, opting for prescription? From a methodological point of view, questions of legal design are prescriptive but equally doctrinal and of central importance to *de lege ferenda* proposals.

Beyond normative considerations of fairness, practical considerations as to whether there can be a universal agreement between states on the fairness indicators, such as for example macroeconomic metrics remains an open challenge.

This study aims to remedy the afore-identified shortcomings. The thesis' contribution to the discourse is an explicit discussion and adaptation of the principle of CBDRRC to international refugee law, and a proposal for its operationalisation under a hybrid legal architecture that best suits the nature of responsibility sharing as an inherently political and complex matter. It is also an attempt to introduce enlightened positivism to the study of international refugee law and frame refugee protection as a community interest as well as explore what the implication of that framing are.

Finally, the study contributes with offering a proposal on how to address these compelling fairness considerations within questions of legal design and through the medium of international law. Lastly, I would say that this study is part of an emerging trend in refugee law scholarship that experiments and cross-fertilises with international environmental law since the adoption of the New York Declaration on Migrants and Refugees.

1.7. Outline

Part I (Chapters 2 and 3) is a doctrinal exploration of the international and regional instruments on international cooperation and responsibility sharing for refugees. Chapter 2 identifies and discusses the primary international law sources relevant to refugee protection, so as to explore to what extent international refugee law provides for a legal duty of states to cooperate in order to share responsibility for refugees. Chapter 2 also discusses key regional refugee protection instruments that have institutionalised responsibility sharing, in legal and non-legal ways because they shed light on the nature of responsibility sharing in refugee protection. The regional international protection frameworks of Africa, Latin America and the European Union complement, and have contributed to the progressive development of international refugee law, and therefore to the legal nature of responsibility sharing in refugee matters.

Chapter 3 examines responsibility sharing in the practices of states to assess to what extent the legal duty of cooperation in international law has been implemented in good faith. To this end, it discusses the Dublin Regulation under the Common European Asylum System (CEAS), the EU cooperative arrangement with Turkey, the bilateral arrangement between Italy and Libya, Australia's offshore processing arrangements with Papua New Guinea and Nauru respectively, and finally, the US - Canada Safe Third Country Agreement. The said arrangements are assessed in light of the deterrence and protection elsewhere paradigms, implemented under the legal device of 'safe third country'. The protection elsewhere paradigm provides a critical lens when examining the various regional sharing arrangements from the perspective of responsibility sharing. This Chapter completes the analysis with the discussion of two past responsibility sharing arrangements, the Comprehensive Plan of Action for Indochinese Refugees (CPA) and the International Conference on Central

American Refugees (CIREFCA). The aim is to pull the threads that contributed to the overall success of these two arrangements together and draw a somewhat 'universal' lesson for the future of responsibility sharing.

Part II (Chapters 4 and 5) of the thesis embarks on a *de lege ferenda* exploration of how international refugee law ought to develop to fill in the gap of the Refugee Convention under a formal structure of responsibility sharing that codifies a responsibility sharing obligation in international law. Chapter 4 is a study of international environmental law's responsibility sharing arrangements, where the doctrine CBDRRC has been a fundamental building block in facilitating regime building in areas of common concern. This Chapter discusses various instances of differential treatment between states in international law, it fleshes out the normative rationales for differentiation which are ideas of fairness in international law and examines how the logic of CBDRRC has been used and implemented in key multilateral environmental agreements (MEAs). It then turns to international climate change law and discusses in detail the origins and trajectory CBDRRC took in the legal regime. This Chapter concludes with a study of the legal architecture of the Paris Agreement on Climate Change, as a model example of architectural legal design and a binding multilateral instrument on responsibility sharing that unfolds true potential for the *de lege ferenda* development of international refugee law.

Chapter 5 builds upon and completes what has been supported in the previous chapters, that the normative gap of the Refugee Convention cannot be satisfactorily and comprehensively addressed without a formal legal structure that codifies a minimum of responsibility sharing obligations. To this end, it explicitly discusses and adapts the principle of CBDRRC to international refugee law, and suggests its operationalisation under a protocol of flexibly implemented bottom-up responsibility sharing obligations tamed against a lightweight implementation and review framework. This Chapter explores what legal design best suits the

nature of responsibility sharing - as an inherently political and complex matter- and what key obligations need to be codified. In the process, it explicitly engages with a modest idea of fairness for the purposes of responsibility sharing, limited to what international law can do and *realpolitik* allows. Finally, with the view that a protocol on responsibility sharing can only be part of the solution towards a better refugee protection regime, the Chapter concludes with ways to build the necessary political will required to fill in what has long been the Achilles heel of the international refugee law regime; the gap on responsibility sharing.

2 The international and regional framework on international cooperation and responsibility sharing for refugees

2.1. Introduction

This Chapter begins with a note on terminology and definitional challenges before moving on to identifying and discussing the international legal framework of international cooperation and responsibility sharing in refugee matters. Through a doctrinal analysis of the primary international law sources relevant to refugee protection, it explores the extent to which international refugee law serves a community interest and provides for a duty of states to cooperate in order to share refugee protection responsibilities. To further shed light into the nature of the duty to cooperate in refugee matters, the Chapter discusses key regional refugee protection instruments that have institutionalised into various degrees responsibility sharing in legal and non-legal ways. The regional asylum frameworks for Africa,[186] Latin America and the European Union complement the progressive development of international refugee law,[187] operating altogether under the international refugee law regime.

[186] 'The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees. OAU Convention, Article VIII para 2.
[187] This has been acknowledged explicitly in the context of Latin America. See 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, Mexico City, (16 November 2004) and 2014 Brazil Declaration on 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean', Brasilia, (3 December 2014).

2.2. Terminology and definitional challenges in the discourse of international cooperation for refugees

Defining terms is an important starting point for a productive discussion of most issues.[188] In the context of international cooperation and responsibility sharing for refugees, there are various terms, which are used interchangeably by states, UNHCR, academics and policy makers in the wider discourse of international cooperation in refugee matters.[189]

The terms 'international cooperation', 'solidarity', 'burden sharing', and 'responsibility sharing' are not always employed by the various actors under a shared conceptual understanding. Indeed, international refugee law does not define any of these terms. Hence, clarifying the existing terminology is not without challenge. The mere fact that there is a varied terminology deployed with respect to international cooperation in refugee matters, is indicative of the complexity and, particularly the inherent political nature of the subject matter.

A significant part of the debate surrounding these terms revolves around the connotations of each term. 'Burden sharing' for instance has been criticised for the negative and prejudicial connotation of the word 'burden' in the context of refugees.[190] Some commentators however have insisted that the term 'burden sharing' is terminologically more appropriate. Noll wrote back in 1997, that despite the negative connotation of the word 'burden', which implies that refugee protection is necessarily burdensome, burden sharing is preferred, since '[o]ther, better terminological alternatives, have failed to gain entry into the language used

[188] Benjamin Cook, 'Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden Sharing and a Proposed Refugee Market', (2004) 19 Georgetown Immigration Law Journal 333, 335.

[189] Inder, 'The Origins of "Burden Sharing" in the Contemporary Refugee Protection Regime' 528. Sukrhe 'Burden Sharing during Refugee Emergencies: The Logic of Collective versus National Action', 399. Alexander Betts, Jean-Francois Durieux, 'Convention Plus as a Norm Setting Exercise' (2007) 20 Journal of Refugee Studies 509, 533.

[190] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 664.

by the actors of international law'.[191] Likewise, Inder, in a study on the origins of burden sharing through the *Travaux Préparatoires* of the 1951 Refugee Convention, opts for the term 'burden-sharing' for the purposes of avoiding further terminological confusion.[192]

The drafters of the 1951 Convention did not refer to 'burden sharing' but explicitly referred to 'international cooperation' and 'solidarity'.[193] The principle of solidarity permeates all areas of international law[194] and specifically with respect to refugees, the term appears in tandem with international cooperation in the Preamble to the Refugee Convention, underpinning thus the international refugee protection regime since its very beginning.

A principle of 'burden sharing' only began to emerge and crystallized in the 1970's with the onset of the Indochinese exodus.[195] 'Responsibility sharing' on the other hand, enters the refugee protection discourse in the late 1990's.[196] Some commentators have seen this shift in terminology as 'ill-advised' and responsible for 'obfuscating a better understanding of the normative content of burden sharing in practice'.[197] Yet, UNHCR, one of the biggest proponents of the term 'responsibility sharing' deemed the inclusion of the term in the broader context of international cooperation for refugees in a positive light. In one of its meetings

[191] Noll, ' "Prisoners Dilemma" in Fortress Europe: On the Prospects for Equitable Burden Sharing in the European Union', 405, footnote 2.
[192] Inder, 'The Origins of "Burden Sharing" in the Contemporary Refugee Protection Regime', 530.
[193] *Travaux Préparatoires & Commentary* by Dr. Paul Weis.
[194] R McDonald, 'Solidarity in Practice and the Discourse of Public International Law', (1996) 8 Pace International Law Review 259.
[195] UNHCR Executive Committee Conclusion No.15 'Refugees Without an Asylum Country' (1979), para f 'the principle of equitable burden sharing'.
[196] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 664.
[197] Inder, 'The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime', 530.

during the Global Consultations on International Protection in 2001, UNHCR commented:

> 'The inclusion of "responsibility" along with "burden" sharing reflects a more positive image of refugees and a stronger framework for international cooperation [..]'.[198]

Türk and Garlick further explain why 'responsibility sharing' is a more appropriate term in the refugee context. Such wording contains an inherently positive value, '[a]s it casts refugees in a more favourable light as potential contributors and assets for their host societies and as the holder of rights that create correlating responsibilities for states'. Further, ' "responsibility" can be seen to imply legal obligations and a requirement to take positive actions.'[199]

On the other hand, UNHCR has flagged the risk that extensive analysis on terminology, in light of the definitional imprecision,[200] if given too much linguistic attention, can eventually distract from substantive efforts on international cooperation in practice.

> [I]t was felt that lengthy discussions on terminology (especially on the merits of "burden" versus "responsibility") at the expense of making concrete

[198] UNHCR, Global Consultations on International Protection 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', 1st Meeting, EC/GC/01/7 (19 February 2001), para 1.
[199] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 665.
[200] Cook, 'Method in its Madness, The Endowment Effect in an Analysis of Refugee Burden Sharing and a Proposed Refugee Market', 338.

progress on enhancing international cooperation in practice needs to be avoided.[201]

States also have their preferences over what term they use. Ireland's Ambassador to the UN, David Donoghue, has shed light into how states made use of the various terms, during the New York Declaration and the Global Compact on Refugees.

'The concept of responsibility sharing is acceptable in effect to the Global North, it is not acceptable to states such as Russia, China, Egypt and other developing countries, they insist on burden sharing'.[202]

Canada has even made use of the arguably more generous and symbolic term 'opportunity sharing'.[203] In practice, states and UNHCR - the latter so as to appeal to the former - make use of the single term 'responsibility and burden sharing' before various fora,[204] often for reasons of political and rhetorical expediency.[205]

The recently adopted Global Compact on Refugees make use of all the known terms together. As its guiding principles, the Global Compact states:

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[201] UNHCR 'International Cooperation to Share the Burdens and Responsibilities: Summary Conclusions' (Expert Meeting, Amman, Jordan, 27-28 June 2011) Summary Conclusions Part A.

[202] David Donoghue, Closing Keynote Address at Annual Kaldor Conference 'The Global Compacts on Refugees and Migration', November 2017, available on YouTube. https://www.youtube.com/watch?v=bCwEMmqNQHM, 8:14.

[203] Antonio Guterres, 'Closing Remarks at the Session of the 66th Executive Committee of the High Commissioner's Programme' speech delivered on the 9th October 2015, available at https://www.unhcr.org/en-au/excom/speeches/562f4a5415/closing%20remarks-%2066th-session-executive-committee-high-commissioners-programme.html

[204] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?', 871.

[205] Inder, 'The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime', 530.

> The global compact emanates from fundamental principles of humanity and international solidarity and seeks to operationalize the principles of burden - and responsibility-sharing to better protect and assist refugees and support host countries and communities. [206]

With respect to the term 'international cooperation' no widely accepted agreement on its content in international law exists. Although variously used and deeply embedded in the UN edifice and language across all areas of UN interest, the term and its scope remains undefined.[207] Wolfrum, in his authoritative article on the Law of International Cooperation, defined international cooperation as 'the voluntary coordinated action of two or more states under a legal regime to accomplish a specific objective by joint action'.[208]

Given the vast spectrum of activities than can arguably fall within the scope of 'international cooperation' and given that as a concept it has been rightly described as 'inherently opaque',[209] a single universal definition could prove difficult to agree upon. That said, some conceptual clarity can be offered if 'international cooperation' is seen as a broader concept than 'responsibility or burden sharing', the former which can also encompass cooperative action that results in shifting rather than sharing of the responsibility.[210] Against this background, 'responsibility sharing' or 'burden sharing' can be conceptually understood as a specific objective, one goal of international cooperation in refugee matters.

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[206] Global Compact on Refugees, paragraph 5.

[207] 'The term cooperation has never been defined by an international treaty or a resolution of an international organization'. Rüdiger Wolfrum *Max Plank Encyclopaedia of Public International Law*, Cooperation, International law of available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427

[208] Ibid.

[209] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law', 216.

[210] Delmi Report, 'A Fair Share', 20.

As explained above, in terms of relevance, both 'responsibility sharing' and 'burden sharing' are equally accepted and used by states and other actors in international refugee law and policy. Against this background, the thesis opts for the term 'responsibility sharing' first and foremost because of the positive value it casts on refugees. Secondly, for it denotes, most emphatically and succinctly, that states have responsibilities towards refugees, responsibilities that as Garlick and Turk assert, 'imply legal obligations and positive actions'.[211] Thirdly, because the Global Compact on Refugees, even if non-binding, frames the predicament of refugees as the 'common concern of humannkind.[212] In light of this framing, the thesis opts for responsibility sharing,[213] understood as an objective of international cooperation in refugee matters, the scope of which will be fleshed out in the subsequent Chapters.

2.3. The duty of states to cooperate under the international refugee law regime

2.3.1. The UN Charter

A general duty of states to cooperate is firmly rooted in the United Nations Charter. The Charter, concluded in 1946, five years before the conclusion of the Refugee Convention, is the primary source on multilateralism, harmonisation and international cooperation between states.[214] The UN Charter is the closest the international community has ever come to 'a written constitutional document'.[215] It brings the aspirational concept of the international community from 'an abstract notion to something approaching an institutional reality.'[216] Simma and Paulus

[211] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 665.
[212] Global Compact on Refugees, paragraph 1.
[213] Having identified the terminology use, the Thesis proceeds with the use of responsibility sharing without the hyphen.
[214] *Charter of the United Nations* 24 October 1945, 1 UNTS XVI. Article 1(4). (UN Charter)
[215] Bruno Simma & Andreas L Paulus, 'The International Community Facing the Challenge of Globalization', (1998) 9 European Journal of International Law 266, 274.
[216] Ibid., 274.

view the Charter as a reflection of community interests in international law and as a manifestation of Kantian cosmopolitan elements.

> The UN has an important impact on the shaping of common values, be it in the General Assembly or in convoking international conferences on a vast array of topics, which bring together non-governmental actors as well as governments. With its human rights regime, the UN also provides an institutional framework for the 'Kantian' elements in the inter-state system.[217]

Under Article 1 (4) of the Charter, the United Nations is the centre for harmonising the actions of nations in the attainment of common ends.[218] The provision captures therefore the essence of multilateralism. Further, a positive duty of states to cooperate is expressed in the provision of Article 1 paragraph 3 of the UN Charter, which prescribes that, among the purposes of the Charter, is to 'achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character'. [219] Such is the necessity of international cooperation to the United Nations that the Charter has a dedicated Chapter on International Economic and Social Cooperation.[220]

The Charter in Article 56 explicitly prescribes to its Members 'to pledge themselves to take joint and separate action in cooperation with the Organization' for the achievement of the purposes set forth in Article 55.[221] The members of the UN ought to cooperate with the UN as an institution, as well as between themselves, in a constructive way and in compliance with the good faith duty of implementation.[222] This good faith duty arguably precludes the development of

[217] Ibid.
[218] UN Charter, Article 1 (4).
[219] UN Charter, Article 1 (3).
[220] UN Charter, Articles 55-60.
[221] UN Charter, Article 56.
[222] VCLT, Article 26.

obstructive policies.[223] Joint action shall be taken, *inter alia*, for the higher standards of living, full employment and conditions for social progress and development; for solutions of international economic, social, health and related problems and for universal respect for and observance of human rights and fundamental freedoms without distinction as to race, sex and religion.[224] The provision of Article 55 legally obligates, not only the UN as an institution 'but also the member states to respect and protect human rights'.[225] It is this international concern for human rights that have made the relationships of states vis a vis its citizens and aliens on their territories and abroad the subject of community interests.[226]

The general duty of states to cooperate with each other and with the United Nations in the realisation of community interests is thus firmly rooted in the UN Charter. Yet the formulation of Article 55 is rather made in programmatic terms. '[I]t describes purposes and not substantive obligations to be achieved by means of cooperation'.[227] Having said this, these provisions constitute the point for sketching the subsequent legal frameworks on international cooperation and responsibility sharing in the various areas of joint action under UN Charter.[228]

The United Nations General Assembly Declaration of Friendly Relations and Co-operation among States,[229] while non-legally binding, reaffirms 'the duty of

[223] Bruno Simma (ed) *Charter of the United Nations: A Commentary, Vol II*, 'Chapter IX: International Economic and Social Co-operation', Article 56, at 942. (Simma, UN Charter Commentary)
[224] UN Charter, Article 55 (a), (b), (c).
[225] Simma, UN Charter Commentary, Article 55, at 920.
[226] Simma, From Bilateralism to Community Interests, 243.
[227] Simma, UN Charter Commentary, Article 56, at 943.
[228] Tally Kritzman-Amir, 'Not in My Backyard, On the Morality of Responsibility Sharing in Refugee Law' (2009) 34 Brooklyn Journal of International Law 355, 376.
[229] UNGA *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, 4 October 1970, UNGA A/RES/2625(XXV).

states to co-operate with one another in accordance with the Charter'.[230] The Declaration also states that 'the principles embodied in this Declaration constitute basic principles of international law' that guide states' international conduct in their mutual relations.[231] Although the Declaration is a soft law instrument, it is arguably the most authoritative statement made by the General Assembly on the UN Charter - and thus it is endowed with added normativity, if not constitutional status similar to the Charter.[232]

2.3.2. The 2030 Agenda for Sustainable Development

A duty of states to cooperate in the wider context of forced displacement is recalled in the 2030 Agenda for Development.[233] The Agenda consists of a Declaration, 17 sustainable development goals (SDGs) and 169 associated targets. Goal 1, on eradicating poverty and building the resilience of the poor and the most vulnerable, is of interest to the refugee context. Paragraph 23 of the Agenda reads:

> People who are vulnerable must be empowered. Those whose needs are reflected in the Agenda include all children, youth, persons with disabilities (…) refugees and internally displaced persons and migrants (..).

Paragraph 29 reads:

[230] Ibid., Annex, Principle d.
[231] Ibid, 3.
[232] Ronald ST McDonald, 'The Charter of the United Nations as a World Constitution' 'The Charter of the United Nations as a World Constitution' in Schmitt MN (eds), 'International Law Across the Spectrum of Conflict Essays in Honour of Professor L.C. Green On the Occasion of his Eightieth Birthday' (2000) 75 International Law Studies 263, 280.
[233] UNGA A/RES/70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', (21 October 2015). (2030 Agenda for Sustainable Development).

> We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons. Such cooperation should also strengthen the resilience of communities hosting refugees particularly in developing countries.[234]

The Declaration is non-binding in international law and hence does not impose any legal obligation, nor sets any concrete normative expectations. It merely establishes a programme for action, strengthening the narrative of international cooperation in areas of UN joint action, including in the management and resolution of forced displacement. In this sense, the Declaration of Sustainable Development is very much an enlightened positivist project where joint action towards protection of community interests is manifested in a set of goals and indicators.[235]

2.3.3. The duty to cooperate in the realization of community interests

To this point, the reading of the relevant UN Charter provisions and UN GA Declarations establishes that international law provides for a general, albeit vaguely worded, duty of states to cooperate in the various areas of joint action under UN, whose more specific dimensions are further exemplified in the various treaty-based legal regimes. [236]

The provisions of the UN Charter in relation to international cooperation on human rights represent a universal consensus on the existence of community interests in international law. Wolfrum elaborates on this further:

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[234] 2030 Agenda for Sustainable Development.

[235] Eyal Benvenisti, G Nolte (eds) *Community Interests across International Law* (OUP 2018) 6.

[236] Rüdiger Wolfrum *Max Plank Encyclopaedia of Public International Law*, 'Cooperation, International Law of '. (Last updated April 2010).

> ‘It can hardly be disputed that the protection of human rights is a community interest, and this entails corresponding obligations. The basis for this statement is the reference to human rights in the UN Charter, and the near universality of membership in the human rights treaties’.[237]

It can then be observed that the identification of an issue as a reflection of community interest in international law requires an important element. A ‘quasi-legislative decision of the international community’ as Wolfrum defined it, to construct a legal regime that serves the community interest. [238] Wolfrum adds a further qualification to this element, which is that the multilateral legal regime enacted must have widespread participation and crucially must be ratified by ‘those states which are meant to carry the burden of implementing the obligations’. [239]

2.4. International refugee law as a reflection of community interest

In light of the foregoing discussion, it is possible or even warranted to speak of community interests in the context of international law on refugee protection. An argument can be made that the Refugee Convention reflects a community interest, as human rights treaties arguably do,[240] that is specially identified and served under a multilateral legal regime with near universal participation. Moreover, refugee protection can even be said to fall under ‘international peace and security’, the primary community interest served by international law and the United

[237] Rudinger Wolfrum, ‘Identifying Community Interests in International Law: Common Spaces and Beyond’, in E Benvenisti and G Nolte (eds) *Community Interests across International Law* (OUP 2018), 29.
[238] Ibid., 20-21.
[239] Ibid., 20-21.
[240] Simma, ‘From Bilateralism to Community Interests’ 243.

Nations.[241] Simma refers to the mass movements of refugees as one issue of wider security concerns that can destabilise neighbouring states or even entire regions.[242] The argument on the community interest nature of refugee protection is further strengthened by the fact that such international protection has been entrusted to a specialized UN body, tasked as 'the representative of the international community'.[243] In the words of UNHCR:

> 'International protection provides the basic raison d'être for the creation of UNHCR. It is this international protection role which gives UNHCR its distinctive position among the agencies of the United Nations'. [244]

The link between UNHCR and states therefore is 'an institutional link that joins states and UNHCR in the common pursuit of solutions and the protection of refugee rights'.[245] This institutional link is further derived and strengthened from the UN Charter, regional refugee instruments, UNGA Declarations, including UNHCR's Executive Committee Conclusions, state practice and adjudication of refugee rights before judicial fora.[246]

The international protection regime is predicated upon the idea that states have a collective responsibility to protect refugees.[247] If the responsibility to protect refugees is thus a collective one as it has been argued[248] then it needs to

[241] Simma, 'From Bilateralism to Community Interests', 236
[242] Ibid.
[243] Goodwin Gill McAdam, 1
[244] UNHCR Note on International Solidarity and Refugee Protection EC/SCP/50 (1988), para 16.
[245] UNHCR Note on International Solidarity and Refugee Protection EC/SCP/50 (1988), para 20.
[246] Kritzman Amir Community Interests in International Migration and Refugee Law,352
[247] Hurwitz ,'Norm Making in International Refugee Law' 2012 106 American Society of International law Proceedings 430, 431.
[248] A Hurwitz 'Norm Making in International Refugee Law' 2012 106 American Society of International law Proceedings 430, 431.

be somehow shouldered and shared by the international community.[249] The next section will explore to what extent, if at all, the Refugee Convention, a multilateral treaty on the responsibilities of states vis-à-vis the refugees with widespread participation can be said to have been constructed so as to serve a community interest. It will explore in detail the nature of the duty of states parties under the regime to cooperate in matters of refugee protection as well as to what extent this duty further crystallises into an obligation of responsibility sharing.

2.4.1. The Refugee Convention

The international dimension of refugee protection was explicitly recognised under the auspices of the United Nations during the negotiations for the establishment of the UNHCR.[250] That said, the international nature of refugee flows has been recognised as early as the 1920's, under the League of Nations and the Nansen International Office for Refugees.[251] Under the auspices of the League of Nations, various group-based categories of refugees were recognised and subsequent interstate arrangements were concluded. Initially established to provide legal and political protection to Russian refugees, the Nansen Office in the years to come extended its mandate to include Armenians, Assyrians, refugees from the Greco-Turkish wars and, later, the Jews fleeing Germany.[252]

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[249] T Kritzman Amir Community Interests in International Migration and Refugee Law,352

[250] The UNGA Resolution establishing UNHCR recognized that international protection of refugees is the responsibility of the United Nations and that 'the problem of refugees is international in scope and nature'. UNG A/Res/319 (IV) 'Refugees and Stateless Persons' (3 December 1949).

[251] Goodwin-Gill and McAdam, *The Refugee in International Law*, 16.

[252] *Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees* League of Nations, Treaty Series Vol. LXXXIX, No. 2004. *Convention of 28 October 1933 relating to the International Status of Refugees*, League of Nations, Treaty Series Vol. CLIX No. 3663. P*rovisional Arrangement of 4th 1936 concerning the Status of Refugees coming from Germany* 171 League of Nations Treaty Series No 3952.

The challenge the refugee problem poses upon the countries that provide asylum was explicitly recognised and acknowledged in the Refugee Convention. The need for international cooperation and solidarity is explicitly provided in the Preamble to the Convention, which further provides that the solution to an inherent international problem, such as the refugee requires international cooperation between the parties. If therefore international cooperation between states is one element of the identification of community interests in international law, then the Preamble to the Refugee Convention serves as a manifestation of refugee protection as a community interest.

> 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.[253]

The Preamble calls for international cooperation in two respects. Firstly, as means to ease pressure upon refugee hosting states in the spirit of solidarity, namely as means for responsibility sharing, and secondly, as means for the resolution of the refugee problem as a whole.

A more indirect call for responsibility sharing, that has received considerably less attention is the one found in recital 5 of the Preamble. Paragraph 5 contains a political commitment on the part of the parties 'to do everything in their power to prevent the refugee problem from becoming a cause of tension' between them, given its social and economic dimensions.[254] Thus, from the reading of the Preamble, it can be inferred positive cooperative action is required, so as interstate relations are not negatively impacted.

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[253] Refugee Convention Preamble, Recital. 4.

[254] Refugee Convention, Preamble, paragraph 5.

The Preamble of a treaty is not without normative significance; it guides the interpretation of the treaty's substantive provisions.[255] Pursuant to a textual interpretation as per Article 31 of the Vienna Convention on the Law of Treaties, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[256] The Preamble of a treaty is also reflective of the drafter's purposes and considerations,[257] but it may be additionally relevant for the treaty's interpretation shedding further light on its object and purpose.[258] Feller argues that the Preamble to the Refugee Convention explicitly relies upon international cooperation in order to fulfil the very aim of the Convention, namely 'to ensure that human beings shall enjoy fundamental rights and freedoms without discrimination, as well as to assure refugees the widest possible exercise of fundamental rights and freedoms'.[259] It can also be added that the Refugee Convention relies on international cooperation, equally to ensure states parties' relations under the Convention remain friendly.

Within the operative part of the Refugee Convention, international cooperation in refugee matters is provided under the duty of the state parties to the Convention to cooperate with the UNHCR, enshrined in Article 35.

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[255] VCLT, Article 31 (2). Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 659.

[256] VCLT, Article 31.

[257] 'A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty'. 'Preambles are thus *indicia* of the intention of the parties to a treaty'. Makane Moïse Mbengue 'Preamble' Max Plank Encyclopaedia of Public International Law. (Last updated September 2006).

[258] Dispute between Argentina and Chile concerning the Beagle Channel, Volume XXI Reports of International Arbitral (18 February 1977) 53, 89, at para 19.

[259] Challenges to the 1951 Convention in its 50th Anniversary Year: Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the Seminar on 'International Protection within one single asylum procedure'(April 2001) available at https://www.unhcr.org/admin/dipstatements/429d74282/challenges-1951-convention-its-50th-anniversary-year-statement-ms-erika.html.

> Contracting states undertake to cooperate with the office of the UNHCR, or any other agency that may succeed it, in the exercise of its functions and in particular facilitate its duty of supervising the application of the provisions of this Convention.[260]

The same duty is reiterated verbatim in Article II (1) of the 1967 Protocol. The Protocol removed the geographical and temporal limitation of the Refugee Convention and made the refugee regime applicable to all future refugees.

In his Commentary of the Refugee Convention, Grahl-Madsen noted that the Convention itself falls within the scope of Article 55 of the UN Charter, which promotes international cooperation for the solution of social and economic problems.[261] More specifically, the provision of Article 35 of the Refugee Convention 'gives effect to the obligation, which Member States have entered into by virtue of Article 56 of the UN Charter', bringing within the vested interests of the UN the material provisions of the Refugee Convention.[262] This is further evidence to the community interest served by the Refugee Convention.

The general duty of the states to cooperate with the UNHCR in the exercise of its protection and supervising mandate is further exemplified in the High Commissioner's Statute. States are called to cooperate *inter alia* by:

> admitting refugees to their territories, not excluding those in the most destitute categories, assisting the High Commissioner in his efforts to

[260] Refugee Convention, Article 35 (1).

[261] Atle Grahl-Madsen, Commentary of the Refugee Convention 1951, Articles 2-11, 13-37, 1997 UNHCR Division of International Protection at 149. Available at https://www.unhcr.org/3d4ab5fb9.pdf

[262] Ibid.

> promote the voluntary repatriation of refugees; Promoting the assimilation of refugees, especially by facilitating their naturalization.[263]

In relation to naturalisation, a qualified duty is imposed on states to facilitate the naturalisation of refugees in their territories to the extent feasible in Article 34 of the Refugee Convention.[264]

From the combined letter of the provisions of Articles 34, 35 and the UNHCR Statute, the duty of states to cooperate with the High Commissioner extends through all the phases of refugee protection and is only exhausted when a solution for each individual refugee is achieved. In support of such a duty of states to solve refugee situations are Aleinikoff and Poelott.[265] The Conference of the Plenipotentiaries which completed the Convention recommends in its Final Act that:

> [G]overnments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.[266]

The Final Act of the Plenipotentiaries sheds light to the ordinary meaning of the provisions of Articles 34 and 35. Under Article 31 (2) of the Vienna Convention on the Law of Treaties, the ordinary meaning principle extends to the treaty as a whole – namely, the text, the Preamble and Annexes, and any agreement or

[263] UNHCR Statute, Article 8 (d).
[264] Grahl-Madsen *Commentary of the Refugee Convention*, Article 34.
[265] Aleinikoff and Poellot 'The Responsibility to Solve: The International Community and Protracted Refugee Situations', 215-217.
[266] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, UNTS Vol. 189, p. 137.

instrument related to the treaty and drawn up in connection with its conclusion.[267] In accordance with this so-called principle of integration, [268] a textual interpretation of all the above provisions supports a general duty of states in international law to cooperate in the provision of refugee protection and to find solutions.

Outside the Refugee Convention, UN Member states are also expected to support and participate in good faith by virtue of their obligations under the International Economic and Social Cooperation Chapter of the Charter.[269] Given that UNHCR is a subsidiary organ of the United Nations General Assembly, [270] a duty to cooperate with the High Commissioner applies not only to the states-parties to the Refugee Convention, but to all 193 members of the UN.

Sixteen years after the conclusion of the Refugee Convention, the General Assembly adopted the Declaration on Territorial Asylum.[271] Taking a step further the call for international cooperation in the Refugee Convention, the Declaration on Territorial Asylum reflected on the need of states and the UN to positively support refugee host states. Article 2 of the Declaration notes:

> where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.[272]

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[267] James Crawford *Brownlie's Principles of Public International Law* (Oxford University Press 2019), 381.
[268] Ibid.
[269] Jean-Pierre L Fonteyne, 'Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1978-1980) 8 Australian Yearbook of International Law 161, 180.
[270] UN Charter, Article 22.
[271] UNGA Declaration on Territorial Asylum (1967) UNTS 189 (2545).
[272] Ibid., Article 2.

Should have been negotiated and concluded as a Convention, the Declaration on Territorial Asylum would have codified a legal obligation to positively participate in responsibility sharing.[273] That said, the principles reflected in the 1967 Declaration on Territorial Asylum form an integral part of the contemporary international legal framework.[274]

2.4.2. The Executive Committee of the UNHCR

The UNHCR has on numerous occasions affirmed and stressed the quintessential importance of international cooperation and responsibility sharing in refugee matters, in particular in cases of mass influx of refugees.[275] Several conclusions of the UNHCR's Executive Committee and the High Commissioner's governing body have stressed the importance of international cooperation and responsibility sharing.[276] As early as 1981, the UNHCR, in its Executive Committee Conclusion No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx, stated:

> A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation. States shall, within the framework of international solidarity and burden sharing, take all necessary

[273] Paul Weis, 'The Draft United Nations Convention on Territorial Asylum' (1979) 50 British Yearbook of International Law 151.

[274] Guy S Goodwin-Gill 'The 1967 Declaration on Territorial Asylum' United Nations Audio-visual Library of International Law, available in pdf at https://legal.un.org/avl/ha/dta/dta.html

[275] It shall be noted that no definition of a mass influx situation exists however in international law.

[276] There are various UNHCR Executive Committee Conclusions that refer to and stress the importance of cooperation and responsibility sharing in refugee matters. See indicatively only: UNHCR Executive Committee Conclusions: No. 11, 22, 52, 77, 79, 80, 85, 89, 100, 102. UN High Commissioner for Refugees (UNHCR), A Thematic Compilation of Executive Committee Conclusions, (7th edition June 2014).

measures to assist at their request, States which have admitted asylum seekers in mass influx.[277]

The Executive Committee in Conclusion No. 100 emphasised the global dimension of refugee protection in the context of mass influx and called states to cooperate in a spirit of solidarity and responsibility sharing to address refugee situations.[278]

The enlightened positivist sees the relevance and the value inherent in these soft-law instruments in the assessment of the current state of the law. The Executive Committee of the High Commissioner's Programme was established by the Economic and Social Council of the UN (ECOSOC) in 1958.[279] The UNHCR is an international organisation and, as such, a subject of international law in itself.[280] The Executive Committee Resolutions such as the Notes and Guidelines on International Protection complement the international refugee regime, as they contribute to the process of refugee law's formation, interpretation and direction.[281] Therefore, despite their soft law-character,[282] the Conclusions of the Executive Committee that reinforce states' duty to cooperate with one another, and with the UNHCR, in the provision of protection have some normative

[277] UNHCR Executive Committee Conclusion No. 22 'The Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) Executive Committee, 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1).

[278] UNHCR, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV) – 2004 Executive Committee 55th session. Contained in United Nations General Assembly Document A/AC.96/1003.

[279] UN Economic and Social Council (ECOSOC), E/ RES/672 (XXV), 1958 Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees.

[280] Goodwin-Gill & McAdam, *The Refugee in International Law*, 430

[281] Goodwin-Gill & McAdam, *The Refugee in International Law*, 429 - 430.

[282] In this context, soft law is used to denote the non-legally binding character of the instrument. In general, soft law is a multi-faceted concept. For the various conceptions of it, See Boyle 'Soft Law in International Law Making', 119.

weight.[283] This argument can be further supported if one notes the composition of the Executive Committee of the UNHCR. It consists also of states that have not ratified the Refugee Convention, thus expressing the *opinio juris* of a wider group of states, including crucially refugee host states. Given the specialist knowledge of the Committee of Experts and the fact that the conclusions are taken by consensus, the Committee's Conclusions shall be treated as having normative weight.[284]

2.4.3. The Global Compact on Refugees reflecting a community interest

The latest addition to global refugee policy is the Global Compact on Refugees. The Compact, which, as already mentioned frames the problem of refugees as the 'common concern of humankind', which in turn ultimately relies on successful international cooperation between states,[285] seeks to provide 'a basis for predictable and equitable burden - and responsibility-sharing among all United Nations Member States ..' as a specific objective of the duty to cooperate in refugee matters in pursuance with the UN Charter.[286]

Cast in this light, the adoption of the Global Compact on Refugees by the General Assembly of the United Nations is the latest evidence to the claim that refugee protection and hence international refugee law serves a community interest which can only be advanced through international cooperation and responsibility sharing. The Global Compact can be also said to represent a '

[283] Soft law can also refer to 'international prescriptions that are deemed to lack requisite characteristics of international normativity' but that nonetheless 'are capable of producing certain legal effects'. WM Reisman et al, 'A Hard Look at Soft Law' (1988) 82 American Society of International Law Proceedings, Remarks by G Handl 371.

[284] Vincent Chetail, *International Migration Law* (Oxford University Press 2019), 385.

[285] Global Compact on Refugees, para 2.

[286] Global Compact on Refugees, para 2 and 3.

"quasi-lesiglative" endeavour that states are positively working together' in the international level to address or solve the refugee problem.[287]

2.5. The lack of a legal obligation of responsibility sharing

To conclude, an enlightened positivist reading of the relevant sources of international law support that there exists a duty of states to cooperate in the provision of refugee protection firmly rooted in international refugee law.

More specifically, such a duty stems from the reading of the UN Charter, the Refugee Convention, the UNHCR Statute, but also from soft law UNGA Resolutions on refugees, UNHCR Executive Committee Conclusions and Notes on International Protection and the Global Compact on Refugees that seeks to operationalise international responsibility sharing for refugees.

Despite the soft-law character of some of these instruments, they exercise considerable normative weight to the extent that they supplement the contemporary international refugee protection regime and contribute to the process of refugee law's formation, interpretation and development.[288]

The numerous explicit references to responsibility sharing in the various UNHCR Conclusions and UNGA Resolutions in particular, supports the view put forward earlier; that responsibility sharing can be seen as a normative corollary of the duty of states to cooperate in refugee protection. Türk and Garlick explain the specific *telos* of international cooperation in refugee matters:

> One of the purposes of international cooperation(..), as widely acknowledged in political discussions and academic writing, is to ensure a fairer distribution

[287] Wolfrum, 'Identifying Community Interests in International Law', 20.

[288] Goodwin-Gill & McAdam *The Refugee in International Law*, 429 - 430.

among states of the costs and disadvantages – as well as the potential benefits - of hosting refugees on their territory.[289]

Even if responsibility sharing is seen as a normative corollary of the duty to cooperate, it falls however short of codifying a positive obligation of each state to achieve or even contribute to the responsibility sharing effort. Under international refugee law, the state to which the refugees arrive bears sole legal responsibility for their protection and its associated costs.[290] As a result, the duty to cooperate to protect refugees can be at best described as a vaguely worded legal duty of *means*, which in light of the absence of subsequent positive obligations, cannot itself solely turn responsibility sharing into a legal obligation. [291]

2.6. Regional frameworks on refugee protection [292]

The discussion has so far accommodated international law and international refugee law instruments, both hard and soft law so as to determine the existence

[289] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 664.
[290] Hathaway & Neve, 117.
[291] Chetail argues this in the context of UNHCR Executive Committee Guidelines on International Protection, noting that the duty of cooperation under Article 35 of the Refugee Convention is at best an obligation of means, unable to translate soft law into hard law. Chetail, *International Migration Law*, 385.
[292] The discussion of the regional refugee instruments is by no means comprehensive. There are numerous scholarly detailed accounts dedicated on the regional asylum instruments in the context of Latin America, Africa and the European Union. Indicatively only David J Cantor, Nicolás Rodriguez Serna (eds) 'The New Refugees: Organised Crime and Displacement in Latin America' (ILAS Publications, University of London 2016). Liliana Jubilut, *Refugee Protection in Brazil and Latin America – Selected Essays (Transnational London Press 2018).* Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018). Tamara Wood*, 'The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa',* in Satvinder Juss *(ed), Research Handbook on Refugees (Edward Elgar Publishing, 2019).* George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2000) 8 African Yearbook of International Law 3.

of a legal duty of states to cooperate in order to share responsibilities for refugee protection. In addition to the international legal framework at UN level, there are important regional institutional frameworks on international protection, that advance the community interest served by the Refugee Convention at the regional level. Regional instruments explicitly complement[293] the international refugee law regime and contribute to the progressive development of international refugee law,[294] altogether operating within the international legal regime.[295]

2.6.1. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is a progressive regional instrument that expands the refugee definition[296] and brings under a single refugee instrument 'normative concepts of solidarity and responsibility sharing. [297]

[293] OAU Convention, Article VIII, para 2.

[294] Mexico Declaration and Plan of Action and Brazil Declaration.

[295] Tristan Harley concluded from his analysis on the Latin American refugee context that the 'progress that Latin American states have made towards meeting the protection needs of refugees highlights the potential for regional protection frameworks to operate within the international refugee law regime'. Tristan Harley, 'Regional Cooperation and Refugee Protection in Latin America: A 'South-South' Approach' (2014) 26 International Journal of Refugee Law 22, 45.

[296] The 1969 OAU refugee definition covers "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. OAU Convention, Article I (2).

[297] Nik Marple, 'Rights at Risk: A thematic investigation into how states restrict the freedom of movement of refugees on the African Continent' UNHCR New Issues in Refugee Research, Research Paper No. 281 (October 2016), 17.

In the area of responsibility sharing, it establishes joint responsibility of all the African Union's Member states[298] and codifies an obligation for responsibility sharing. Article II, paragraph 4, stipulates:

> [w]here a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum. [299]

Commentators of African refugee law and policy note that the responsibility sharing measures envisaged to lighten refugee host states have rarely been taken.[300] In particular, only four African states have enacted national legislation to reflect the provision of Article II (4) of the OAU Convention as an obligation in their respective national asylum laws.[301]

Despite the 'positivisation' of an inter-African responsibility sharing obligation within a regional treaty on asylum, African states have failed to establish the necessary institutional arrangements for responsibility-sharing that would effectively implement Article II (4).[302]

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[298] Guy Martin, 'International Solidarity and Co-Operation in Assistance to African Refugees: Burden-Sharing or Burden-Shifting (1995) 7 International Journal of Refugee Law 250, 259.
[299] Bill Rutinwa 'The end of asylum? The changing nature of refugee policies in Africa' (2002) 21 Refugee Survey Quarterly 12, 18.
[300] Marina Sharpe, 'The Global Compact on Refugees and Conflict Prevention in Africa: "Root Causes" and Yet Another Divide', International Journal of Refugee Law 707, 708.
[301] David J Cantor, Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 International Journal of Refugee Law 182, 212.
[302] Tamara Wood, 'The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa', in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019), 24.

The legal anchor of the Africa's open-door policy was always premised upon assistance, both from within and outside, the continent.[303] The UNHCR, during a regional intergovernmental conference in Benin in 2004, acknowledged that refugee protection challenges in Africa have to do with the limited capacities of host States, as well as the absence of meaningful international responsibility sharing at international level.[304] The failure Rutinwa notes might not be the continent's fault alone, as assistance from the North is a necessary condition for operationalizing responsibility sharing and providing international protection within the region.[305] The absence of a legal obligation and a formal structure in for responsibility sharing in international law can be said to determine the success or failure of regional responsibility sharing arrangements.

2.6.2. Latin America's soft law instruments

The earliest key regional instrument for refugee protection in Latin America was the Cartagena Declaration of 1984.[306] States in the region, although joined the international refugee regime at a later stage had already longstanding experience with political asylum.[307] The Cartagena Declaration expanded the refugee definition to include:

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[303] Rutinwa 'The End of Asylum? The Changing Nature of Refugee Policies in Africa', 18.
[304] José Riera and Demian Casey, (principal eds), Regional Parliamentary Conference on Refugees in Africa, 'The Challenges of Protection and Solutions' Outcome of the June 2004 regional parliamentary conference co - organized by the African Parliamentary Union and UNHCR, in association with the Inter-Parliamentary Union and the ICRC' (Cotonou Benin 1-3 June 2004), 34. Available at https://www.refworld.org/pdfid/427224a44.pdf
[305] Rutinwa 'The end of asylum? The changing nature of refugee policies in Africa', 34.
[306] Cartagena Declaration on Refugees. The CIREFCA process which in 1987 sought to integrate refugees within the regional peace process is discussed as an example of a comprehensive approach to responsibility sharing in the next Chapter that addresses responsibility sharing in the practices of states.
[307] Cantor, 'Responsibility-sharing in the refugee field: lessons from Latin America', 1.

> generalized violence, foreign aggression, internal conflicts and massive human rights violations or other circumstances which have seriously disturbed public order' but additionally and crucially linked refugee protection in the region with the search for durable solutions.[308]

The Latin American refugee protection framework is built upon the so-called 'Cartagena Spirit' - a spirit of regional solidarity between states and joint responsibilities for refugees.[309] Interestingly, the regional framework has progressively developed over the years under a series of soft law instruments. The characterisation, 'soft', in this context, refers to the form, namely the non-binding nature of the various instruments concluded as declarations and action plans.

The Mexico Declaration and Plan of Action[310] was adopted in 2004 - by 20 Latin American states in commemoration of the 20 years since the adoption of the Cartagena Declaration- and established a new guiding framework reflecting commitments to regional solidarity and responsibility sharing.[311] Like the Cartagena Declaration, the Mexican Plan of Action linked refugee protection with the search for durable solutions.[312] In 2014, 30 years since the Cartagena Declaration, the Latin American states and the states of the Caribbean concluded another instrument, the Brazil Declaration and Plan of Action.[313] The 2014 Brazil Declaration integrated the previous lessons learned and renewed the commitments of states to existing programmes on regional protection and solutions.

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[308] Cartagena Declaration, Conclusion 3.
[309] Stefania E Barichello, 'Responsibility Sharing in Latin America', in Satvinder Juss (ed) *Research Handbook of International Refugee Law*, 111.
[310] Mexico Declaration and Plan of Action.
[311] Harley, 'Regional Cooperation and Refugee Protection in Latin America: A 'South-South' Approach', 22.
[312] Mexico Declaration and Plan of Action, Chapter 3, Solidarity Cities Programme for Self Sufficiency and Local Integration, Solidarity Resettlement Programme.
[313] Brazil Declaration.

From an international law point of view, the various Declarations and Plans of Actions adopted in the context of Latin America, from the 1980's to now, are non-binding soft law instruments. The form of an instrument, however, does not preclude its normative impact. Indeed, the above soft law instruments have had a normative impact on states conduct and asylum in the region, which is seen in the various asylum legislations enacted at the national level.[314]

2.6.3. Responsibility sharing under the Common European Asylum System (CEAS)

The Common European Asylum System (CEAS) is rooted in Articles 78 and 80 of the Treaty on the Functioning of the European Union (TFEU).[315] Article 80 TFEU reads:

> [T]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

It is widely acknowledged that the CEAS is founded upon principles of solidarity and fair responsibility sharing.[316] However, the strong formulation of Article 80 additionally suggests that the provision of asylum to third country nationals is the common responsibility of the EU, as an institution as well as of its Member

[314] Mexico Declaration and Plan of Action, Chapter 1 para 6.
[315] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[316] Evaluation of the Dublin III Regulation, DG Migration and Home Affairs Final Report December 2015, 3.

States.[317] It is therefore possible to argue that there is a community interest at the EU level with respect to providing asylum to third country nationals.

The provision of Article 80 TFEU has been criticised for being overtly vague in its legal construction so that can hardly impose any subsequent legal obligations upon Member States.[318] Tsourdi argues that because the provision is couched in mandatory terms within the treaty it imposes a legally binding obligation of result on the part of Member states as well as the EU.[319] Specifically, the 'asylum policy and its implementation should be conducted in such a manner so as to ensure that responsibilities are shared fairly and equitably among the Member States.'[320] Those who object to the afore interpretation of the provision as establishing an obligation of result, do not, nonetheless, disregard the otherwise normative requirement entailed thereunder.[321]

Having said this, Article 80 TFEU falls short of providing concrete modalities on how to achieve fair sharing. In this sense, commentators view the legal effect of the provision as the general obligation of the EU and Member States

[317] Evangelia Tsourdi, 'Solidarity at Work? The Prevalence of Emergency Driven Solidarity in the administrative governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667,674.

[318] Gregor Noll, 'Failure by Design? On the Constitution of EU Solidarity', Odysseus Network Searching for Solidarity in the EU Asylum and Border Policies, A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference, 26-27 February 2016, 3, available at http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf .
Gregor Noll, 'Why the EU gets in the way of refugee solidarity? Open Democracy (22 September 2015). Eleni Karageorgiou, 'The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its Added Value' 2016 European Policy Analysis,5.

[319] Tsourdi, 'Solidarity at Work? The Prevalence of Emergency Driven Solidarity in the administrative governance of the Common European Asylum System', 673.

[320] Ibid.

[321] Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?'(2016) 22 European Law Journal 449.

'to adopt measures, which to a certain degree – depending on the circumstances – optimize a system of fair responsibility sharing between the Member States'.[322]

What is uncontested from the reading of the provisions, is that the CEAS takes the duty to cooperate in refugee protection a step further, by requiring each Member state to undertake its fair share.[323] In search of what constitutes a fair share, the relative capacities of the Member states have been suggested as a criterion.[324] Be that as it may, even in the relatively harmonised context of the European Union, Member states have not agreed to a single methodology for measuring relative protection capacities, and this is telling particularly for one reason. The use of macroeconomics criteria such as GDP or population size 'involves complex economic and social calculations that necessarily entail the exercise of a certain degree of discretion, for example, as to the methodology used'. [325] In other words, macroeconomics indicators are perceived as objective indicators of fairness, although they too are constructed out of a certain sets of assumptions and prejudices.[326] The Dublin Regulation, the legal framework that the EU has legislated in implementing Article 80 and 78 of the TFEU[327] is examined in the next chapter, which discusses responsibility sharing arrangements in the practices of states.

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[322] Karageorgiou, 'The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its Added Value', 4, 10.

[323] Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?', 468.

[324] Tsourdi, 'Solidarity at Work? The Prevalence of Emergency Driven Solidarity in the administrative governance of the Common European Asylum System', 674. Karageorgiou *Rethinking Solidarity in European Asylum Law A Critical reading of the key concept in contemporary refugee policy* ,78.

[325] Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?', 457.

[326] Rutger Bregman, *Utopia for Realists* (Bloomsbury 2017), 123.

[327] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 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 (recast) 2013 L.180/31. (Dublin Regulation).

2.7. Conclusions

Having read and discussed the international law provisions on international cooperation and responsibility sharing for refugee protection, it is clear that a general duty of states to cooperate in refugee matters exists and is firmly rooted in international refugee law. The combined reading of all the relevant international and regional protection frameworks supports that the scope of the duty to cooperate covers the whole spectrum of international protection, from the initial phase of protection from *refoulement,* to the provision of asylum and the progressive and effective guarantee of the socioeconomic rights enshrined in the Refugee Convention, to the provision of durable solutions.

Yet the challenge remains that this general duty does not further crystallise to subsequent legal obligations of responsibility sharing, leaving further positive action at the discretion of states. Within the regional refugee law instruments too, one comes across various degrees of institutionalisation of international cooperation and responsibility sharing, some more positivized than others, depending on the specificities and the history of each region.

Finally, an enlightened positivist's claim put forward in the Thesis, is that it is possible, if not warranted, to view the international refugee law regime as a whole, including the Refugee Convention, - a multilateral treaty with near universal participation and the UNHCR - as evidence of the existence of a community interest in international refugee law. The framing of refugee protection as community interest has important implications for responsibility sharing. Since the problem of refugees is framed in the recent Global Compact on Refugees as 'a common concern of humankind',[328] the protection of refugees and the provision of solutions can and indeed should be understood as a common

[328] Global Compact on Refugees, opening statement, para 1.

or ‘collective’ [329] responsibility of the international community. This common responsibility needs to be somehow shouldered and shared fairly between states and this is why responsibility sharing can be seen as an ‘expression of a community obligation’,[330] not yet codified in international law.

[329] A Hurwitz ‘Norm Making in International Refugee Law’ 2012 106 American Society of International law Proceedings 430, 431.

[330] T Kritzman Amir, ‘Community Interests in International Migration and Refugee Law’, in Benvenisti and Nolte (eds) *Community Interests Across International Law* (CUP 2018), 352

3 Responsibility sharing arrangements in the practices of states

3.1. Introduction

This Chapter examines responsibility sharing in the practice of states so as to examine, how and to what extent states sought to implement the duty to cooperate under the international refugee law regime in good faith, through legal and non-legal structures. It does so by discussing the Dublin Regulation under the Common European Asylum System (CEAS), the EU cooperative arrangement with Turkey, the bilateral arrangement between Italy and Libya, Australia's offshore processing arrangements with Papua New Guinea and Nauru respectively, and finally, the US-Canada Safe Third Country Agreement.

The study is concerned with the responsibility sharing arrangements states have concluded in the name of international cooperation. Importantly, it does not seek to assess the compliance of the said arrangements under international refugee and human rights law. Moreover, the arrangements are assessed in light of the dominant paradigm of deterrence and protection elsewhere, reflected in the much-used concept of Safe Third Country. In addition to the above arrangements, the Chapter discusses the Comprehensive Plan of Action for Indochinese Refugees (CPA) and the International Conference on Central American Refugees (CIREFCA). The two historical examples that represent positive and overall successful instances of responsibility sharing in the practices of states have been partnerships between states of the Global North and the Global South for the benefit of refugees.

The Chapter concludes with a brief discussion of the UNHCR's Convention Plus Initiative, an unsuccessful attempt by UNHCR to fill the gap of the Refugee Convention and conclude a normative framework for fair responsibility sharing at UN level, and a discussion of the Global Compact on Refugees as the latest

addition of comprehensive responsibility sharing efforts at the UN level. The aim of looking into the CPA and CIREFCA examples, is to identify the various factors that contributed relative success of the ad hoc partnerships, whilst the discussion of Convention Plus Initiatives showcases what went wrong in the process. The discussion of the Global Compact on Refugees discusses how the Compact envisages responsibility sharing and canvasses the latest advances in relation to the operationalisation of responsibility sharing under the Compact.

3.2. Financial and physical responsibility sharing in light of the deterrence Paradigm[331]

To begin with, responsibility sharing in practice is generally categorised to two main forms - financial responsibility sharing and physical responsibility sharing.[332] Noll identifies a third form of responsibility sharing in the context of the European Union the asylum policy harmonisation.[333]

With respect to harmonisation of policies, the EU serves an important example. There has been specific supranational legislation under the CEAS aiming at the harmonisation of asylum procedures across all EU Member states, namely on status determination and reception standards.[334] The results of the

[331] There is a rich scholarship on the deterrence paradigm in international refugee law. See indicatively only Thomas Gammeltoft-Hansen 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 Journal for Refugee Studies 574, Thomas Gammeltoft Hansen, Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Security 28, Thomas Gammeltoft-Hansen, Jens Vedsten-Hansen (eds) *Human Rights and The Dark Side of Globalisation (Routledge 2016)* James C Hathaway, Thomas Gammeltoft - Hansen 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235. The Chapter draws from the literature on deterrence to shed light into how states implement their duty to cooperate for refugees in practice.

[332] Hathaway, 'The Global Co-Op Out on Refugees', 3.

[333] Noll, 'Risky games? A theoretical Approach to Burden Sharing in the Asylum Field', 236

[334] EU Council Directive 2013/32 on Common Procedures for Granting and Withdrawing International protection (recast).

sharing of policies within the context of CEAS have however demonstrated the risk of 'creating a race to the bottom between the EU Member States in order to deter asylum seekers from choosing one country over the other',[335] which ultimately undermines the normative objective of fair sharing of responsibilities.[336]

Insofar as financial responsibility sharing is concerned, it is the primary form of responsibility sharing and the component most preferred by the Global North. It entails - what the name suggests - the financing of refugee protection associated costs. Financial responsibility sharing at UN level is facilitated, primarily, by voluntary donations of western countries to the UNHCR's humanitarian assistance programmes.[337] Under financial responsibility sharing, comes also the provision of development aid, technical assistance or capacity building in host countries.[338] UNHCR has stressed the normative expectation of wealthier states to contribute to responsibility sharing in accordance with their capacities.

> From the perspective of international burden-sharing, those regions that host the smallest number of refugees relative to their wealth can be expected to

[335] Martin Wagner, Paul Baumgartner (Principal Authors) 'The Implementation of the Common European Asylum System' Directorate General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs, Civil Liberties Justice and Home Affairs (LIBE May 2016), 101.

[336] Eiko Thielemann 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) 6 European Journal of Migration and Law 47, 64.

[337] In regional contexts there are also regional mechanisms of financial responsibility sharing. In the European Union, there was the European Refugee Fund, an intra-EU financial compensation mechanism for refugee receiving Member States. The ERF was succeeded by the Asylum, Migration and Integration Fund (AMIF) (2014-2020), which cannot, however, be considered as pure refugee responsibility sharing tool as it covers a wide range of issues including, border control. https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en

[338] Global Compact on Refugees, para 32.

assist those with the highest number of refugees in relation to their economies.[339]

The challenge in relation to the voluntary nature of the financial donations in the context of North-South cooperation in refugee matters is that any development assistance is increasingly earmarked,[340] without additional development aid for the refugee host countries.

Insofar as physical responsibility sharing is concerned, it has traditionally been linked to resettlement. The UNHCR's Resettlement Handbook defines resettlement as 'the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual citizenship'.[341] Resettlement has a two-fold role; a durable solution in itself and a tangible form of physical responsibility sharing.[342] The numbers of resettlement offered on an annual basis indicates however that resettlement is a solution only for a minority of refugees.

The longstanding preference of the Global North to finance refugee protection in the Global South, rather than admitting refugees, is better explained when viewed in light of the deterrence paradigm that seeks to contain the *locus* of refugee protection to the Global South. The underlying rationale for the deterrence paradigm has been described as, the belief by the developed states that they 'can successfully insulate themselves from taking on a substantive and proportional responsibility in regard to refugee protection by speculating on the

[339] UNHCR, 'Convention Plus Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers' FORUM/CG/SM/03, 11 March 2004 (hereafter, UNHCR Issues Paper)

[340] Hurwitz, *The Collective Responsibilities of States to Protect Refugees*, 147.

[341] UNHCR Resettlement Handbook (Revised edition, July 2011), 36.

[342] Global Compact on Refugees, para 90

way that migration control is designed vis-à-vis international refugee and human rights law'.[343]

As early as the 1980's, refugee law policies developed by the Global North sought to contain the *locus* of refugee protection predominantly within countries of the Global South .[344] These deterrence measures coined by Hathaway in the 1990's as *non-entrée,*[345] have been defined as comprising of efforts by powerful states 'to prevent refugees from ever reaching their jurisdiction at which point they become entitled to the benefit of protection from *non-refoulement* and other rights set forth in the Refugee Convention'.[346] Deterrence measures of non-arrival seek to prevent access to the territory through migration control, and deterrence measures of non-admission seek to retroactively exclude refugees who have already arrived at the territory from the 'procedural door'.[347] A typology of *non-entrée* measures put forward by Hathaway and Gammeltoft-Hansen, shapes the overall picture. Non-entrée measures can be unilateral, bilateral and multilateral. They can range from carrier sanctions, visa controls, international zones, to more sophisticated cooperation-based measures, such as interception on the high seas, provision of equipment, machinery and training, deployment of immigration officials, joint or shared law enforcement, direct migration control, and the use of international agencies to intercept refugees.[348] Such measures can be said to serve a very specific objective of the Northern countries:

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[343] Gammeltoft-Hansen and Feith-Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', 31.
[344] Hathaway, *Reconceiving International Refugee Law,* xxi.
[345] James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.
[346] Hathaway and Gammeltoft - Hansen 'Non-Refoulement in a World of Cooperative Deterrence, 244.
[347] Gammeltoft-Hansen and Feith-Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', 34. Jens Vedsted-Hansen, 'Europe's Response to the Arrival of Asylum Seekers: Refugee Protection and Immigration Control' UNHCR New Issues in Refugee Research, Working Paper No. 6 (May 1999), 4.
[348] Hathaway and Gammeltoft - Hansen 'Non-Refoulement in a World of Cooperative Deterrence, 251-256.

> Non-entrée allows wealthier states to insist upon the importance of refugee protection as a matter of international legal obligation, knowing full well that they themselves will largely be spared its burdens. It enables a pattern of minimalist engagement under which the formal commitment to refugee law can be proclaimed as a matter of principle without risk that the wealthier world will actually be compelled to live up to that regime's burdens and responsibilities to any serious extent.[349]

Such practices have created what Gibney describes as a '*cordon sanitaire'* around the world's richest countries, keeping most of the world's refugees confined to the South.[350]

Historically, the rise of *non-entrée* has been attributed to the demise, of what Hathaway explains, as an interest-convergence between receiving states and refugees existing until then.[351] The acute need for labour post-World War II, that had made the stock of European refugees and their cultural assimilation at the time a domestic interest for some developed countries, gradually disappeared.[352] Later, the strong Cold War sentiment had refugees fleeing the Soviet Union, being welcomed in the West.[353] The African decolonization process that resulted in large scale refugee movements in the 1960's and 1970's,[354] was seen as putting an end to the pattern of generous admission policies at the time and gave rise to restrictive ones in the 1990's.[355]

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[349] Hathaway, Gammeltoft - Hansen 'Non-Refoulement in a World of Cooperative Deterrence', 242.
[350] Gibney, 'Refugees and Justice Between States', 452.
[351] Hathaway, *Reconceiving International Refugee,* xviii
[352] Ibid., xix.
[353] Hans and Suhrke 'Responsibility Sharing', 87.
[354] Ibid., 88.
[355] Hathaway, *Reconceiving International Refugee*, xix.

Today, with immigration being portrayed as the 'global celery that nobody desires',[356] states of the Global North have become even more reluctant to admit large numbers of refugees in their territories and in an attempt to circumvent or limit their responsibility in international law, they have multiplied the efforts and doubled the budgets on border control and deterrence.[357] In addition to the measures of non-arrival and non-admission, deterrence includes offshore asylum processing onto third countries, criminalisation of irregular migration, and more sophisticated and indirect policies that seek to pose the asylum country in an unattractive light.[358]

3.3. Protection elsewhere and the Safe Third Country concept

Restrictive asylum policies have traditionally been facilitated by the idea of 'protection elsewhere' and the concept of Safe Third Country (STC).[359] The proliferation of STC arrangements can be attributed to the responsibility gap of the Refugee Convention which offers a fertile ground.[360]

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[356] Yuval Noah Harari, *21st Lessons for the 21st Century* (Vintage 2019), 23.

[357] In a Report issued in 2014, Amnesty International claimed that the EU allocated 1,820 million for activities, equipment and technological infrastructure focusing on control of the external borders of the Schengen area and only 17% , (700 million), were allocated to support asylum procedures, reception services and the resettlement and integration of refugees. Amnesty International, 'The Human Cost of Fortress Europe, Human Rights Violations Against Migrants and Refugees at Europe's Borders' (9 July 2014), 9.

[358] Gammeltoft-Hansen and Feith-Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', 34.

[359] Rosemary Byrne, Andrew Schacknove 'The Safe Country Notion in European Asylum Law' (1996) Harvard Human Rights Journal 185.

[360] Julian M Lehmann 'Outsourcing Protection and the Transnational Relevance of Protection Elsewhere, The Case of UNHCR' in *Human Rights and the Dark Side of Globalisation*, Gammeltoft-Hansen and Jens Vedsted-Hansen (eds) (Routledge Studies in Human Rights 2017), 333.

The last 40 years have witnessed various arrangements in relation to responsibility premised upon protection elsewhere.[361] The notion of protection elsewhere, is essentially, a departure from the rule of territorial asylum through the use of legal fictions.[362] Under the rule of territorial asylum, responsibility for the processing of the asylum claim arises when the individual enters the territory or comes under the jurisdiction of a state.[363] Such legal fictions include the distinct rules of 'first country of asylum', the 'safe host country' and 'safe third country'. Despite their conceptual differences, they are all premised on the availability of protection in another country.[364] For this reason, this thesis uses the term 'safe third country' to enclose the underlying basis of these various rules, which according to Legomsky, occupy in actual practice two points of the same continuum.[365]

The STC notion has been the legal device upon which various regional arrangements on refugee protection have been structured.[366] The idea originated

[361] Swerissen, 'Shared Responsibility in International Refugee Law' SHARES Expert Seminar Report (2011), 6.
[362] Gammeltoft-Hansen 'The Extraterritorialisation of Asylum and the Advent of "Protection Lite' Danish Institute of International Studies Working Paper No. 2007/2, 15.
[363] Goodwin Gill and McAdam, *The Refugee in International Law*, 39.
[364] UNHCR Executive Committee 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' No. 58 (XL) – 1989.
[365] Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 International Journal of Refugee Law 567, 570.
[366] María-Teresa Gil-Bazo,'The Safe Third Country Concept in International Agreements on Refugee Protection. Assessing State Practice' (2015) 33 Netherlands Quarterly of Human Rights 42, 43.

in Europe around the 1990's,[367] in response to the then perceived forum shopping and irregular movement of asylum applicants.[368]

As a legal device, it serves a twofold function in law; a procedural one - as a rule of admissibility of an asylum claim - and a substantive one - as an exclusion clause from refugee status during the merits phase.[369] The rationale behind the notion, is that an asylum seeker 'is coming from a country in which he or she was safe from persecution and to which safe return is possible'.[370] The STC notion has also been used to justify maritime interceptions and transfer of asylum seekers to a third transit country and summary returns.[371] From a responsibility sharing perspective, the STC is an attempt by states, in some sort of cooperative context, to limit physical responsibility sharing by shifting the responsibility for asylum to another country.[372]

As a matter of international refugee law, the legality of the STC practices is deeply contested. To begin with, the notion is not explicitly anchored in international refugee law. The Convention does not explicitly authorise a transfer of a refugee or an applicant for asylum from one state party to another. Crucially, it does not prohibit it either. To add to this, Article 31 (1) of the Convention forbid states from imposing penalties to refugees who, coming *directly* from a territory where their life or freedom was threatened, enter their territory without

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[367] European Union: Council of the European Union, Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution") 30 November 1992.

[368] Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* - The Hague Academy of International Law Centre for Research (Martinus Nijhoff, 2015) 665.

[369] Ibid.

[370] Byrne and Schacknove, 'The Safe Country Notion in European Asylum Law', 186.

[371] This practice was the case before the ECtHR of *Hirsi Jamma and Others v Italy,* App No 277665/09 ECHR (23 Feb 2012).

[372] Michelle Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25 Refuge: Canada's Journal on Refugees 64, 65.

authorisation.[373] In addition, international law does not impose a duty on the asylum seeker to seek refuge in the first state she finds herself.[374] In fact, there is sufficient support in international law that some limited choice can be legitimately exercised, in particular where family members already reside in one country.[375]

In light of the above, states are not forbidden in principle from returning or transferring the refugee to a territory of a state that is deemed otherwise safe, even if that country is not party to the Refugee Convention.[376] Nonetheless, the safety of one country, as the House of Lords has cautioned, cannot rest on blanket designations and thus needs to be assessed on an individual basis.[377]

3.4. Responsibility sharing arrangements premised on STC

This section discusses some of the most popular instances of STC arrangements on refugees, including the Dublin Regulation under the Common European Asylum System (CEAS), the EU cooperative arrangement with Turkey, the bilateral arrangement between Italy and Libya, Australia's offshore processing arrangements with Papua New Guinea and Nauru, respectively, and finally the US-Canada Safe Third Country Agreement. In the case of the EU, it should be noted that Libya and Turkey are not the only countries in the region with which the EU, or Member states individually, have entered into migration control

[373] Refugee Convention, Article 31 (1). Emphasis added.
[374] UNHCR Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, (May 2013) para 3 (i).
[375] EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iii), (iv).
[376] Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', 226.
[377] House of Lords, European Union Committee 11th Report of Session 2003-04 'Handling EU asylum claims: new approaches examined Report with Evidence House of Lords', para 66. Goodwin-Gill and McAdam *The Refugee in International Law,* 392.

arrangements.[378] The reason the discussion focuses on the Italy-Libya and EU-Turkey arrangements is because each one is representative of the Central and Eastern Mediterranean migratory routes respectively used by refugees. As noted in the introduction, the purpose is not to assess whether the arrangements comply with international refugee and human rights law, although such assessment becomes incidental in the legal analysis.[379] The objective is to look into these cooperative arrangements from the perspective of whether they truly aim at responsibility sharing.

3.4.1. The Common European Asylum System (CEAS) and the Dublin Regulation

As discussed in the previous Chapter, the EU as an institution, and the Member states individually, have an obligation of solidarity and fair responsibility sharing under the CEAS. Among the legal measures devised to implement Articles 80 and 78 of the TFEU has been the Dublin Regulation.[380] The Dublin Regulation allocates responsibility for the processing of an international protection claim made by a third country national among Member States according to a series of

[378] For an overview of current and potential partners in regions that face different migratory challenges, See Elizabeth Collet, Aliya Ahad, 'EU Migration Partnerships: A Work in Progress Report' (2017) European Migration Policy Institute) available at https://www.migrationpolicy.org/research/eu-migration-partnerships-work-progress

[379] On the compliance of safe third country arrangements with international law, See indicatively, Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' 223. Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Contested, Insights from the Law of Treaties' 665. Gill-Bazo 'The Safe Third Country Concept in International Agreements on Refugee Protection, Assessing State Practice' 42. Cathryn Costello 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection' (2005) 7 European Journal of Migration and Law 35.

[380] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 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 (recast) 2013 L.180/31. (Dublin Regulation).

rules. The most popular allocation rule in use, is the rule of 'first country of entry'. According to this rule, the Member state responsible for an asylum claim is the one which the third country national irregularly crossed its border by land, sea or air having come from a third country.[381]

The STC rule is enshrined in Article 38 (1) of the Asylum Procedures Directive too.[382] The provision lays down the legal safeguards when a Member State may apply the safe third country rule. These are the guarantees that: i) the asylum seeker's life and liberty is not threatened on account of one of the Refugee Conventions reasons ii) the principle of *non-refoulement* will be respected iii) no removal will violate the right to freedom from torture and cruel, inhuman or degrading treatment and iv) there exists a possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.[383]

Although the Dublin Regulation was never meant to be a responsibility sharing instrument,[384] it has de facto functioned as one. The implementation of the first country of entry rule under the Dublin Regulation has, as a result, unilaterally shifted responsibility for asylum towards the EU's frontline Member states.[385] The Mediterranean South, comprising of Italy, Greece, Spain and to a lesser extent Malta, has felt over the years that the Dublin Regulation has placed

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[381] Dublin Regulation, Article 13.

[382] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (Recast). (Asylum Procedures Directive).

[383] Indicative cases before the ECtHR on the possibility to apply for asylum before removal are, *Sharifi and Others v Italy and Greece* (Application No. 16643/09), 21 October 2014, *Khlaifia and Others v Italy (*Application No. 16483/12), 15 December 2016, *Hirsi Jamaa and Others v Italy,* (Application No. 27765/09), 23 February 2012.

[384] Sheila Maas, Elena Jurado, Mathieu Capdevila, Maylis Labayle, Laura Hayward, 'Evaluation of the Dublin III Regulation DG Migration and Home Affairs Final Report' (4 December 2015), 4.

[385] Paul McDonough, Magdalena Kmak, and Joanne van Selm 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' European Council on Refugees and Exiles (ECRE), (March 2008), 13.

a somewhat arbitrary responsibility upon them because of their geographic location, as first countries of entry into the EU.[386] If seen from the legal obligation for solidarity and fair sharing enshrined in Article 80 of the TFEU, the 'first country of entry rule' goes squarely against such obligation. In fact, the Dublin Regulation preserves inequalities in the sharing of asylum responsibilities between Member states and has legitimized the practice of burden-shifting practice.[387] Essentially, it obstructs the normative objective of Article 80 TFEU *to deliver fairness* among Member states in the allocation of resources and responsibilities within the CEAS.[388] Finally, the fact that the Member state that 'lets' an asylum seeker enter irregularly is apportioned the responsibility for her international protection claim, serves the logic of a blame-based regime that obstructs distributive justice between the Member states.[389]

The unfairness and unsustainability of the Dublin regime was starkly manifested during the so-called refugee crisis in 2015-2016, when the Council of the European Union had to take emergency solidarity measures with Greece and Italy under Article 78 (3) of the TFEU. The provision reads:

> 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

[386] Maria- Teresa Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union Justice and Home Affairs External Dimension.; The Safe Third Country Concept Revisited' (2006) International Journal of Refugee Law, 571, 578. Emphasis in the original.

[387] Eiko Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 Journal of Security and Migration Studies 63, 79.

[388] Violeta Moreno Lax, 'Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24 Maastricht Journal of European and Comparative Law 740, 751.

[389] Ibid., 753.

provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Two emergency Relocation Decisions were put in place in 2015 as relief measures to Greece and Italy respectively which witnessed increasing large-scale arrivals of third country nationals from Turkey and Libya. The two Council Decisions ordered the relocation of 160 000 asylum seekers from Italy and Greece over the course of two years.[390] The first Council Decision ordered the relocation of 24000 asylum seekers from Italy and 16 000 from Greece[391] and the second of 120 000 asylum seekers in total.[392] The Second Relocation Decision also included a sophisticated distribution formula that allocated a quota of asylum seekers between Member States on the basis of population size, GDP, unemployment rate as well as on previous efforts of Member states in resettlement.[393] The Relocation Decisions proved however hard to enforce.

Despite the efforts of the Commission to distribute asylum seekers against an idea of differentiation in accordance with a formula of integrated relative capabilities, Member states pledged and relocated only a small percentage of their

[390] 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 L.239/80. 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 L. 248/80.
[391] Council Decision (EU) 2015/1523, Article 4.
[392] Council Decision (EU) 2015/1601, Article 4.
[393] The distributive key is found in ANNEX, European schemes for relocation and resettlement, 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_annex_en.pdf

allocated shares.[394] Some Member states, like Hungary, Poland and Austria, did not relocate any asylum seekers.[395]

In April 2020, the Court of Justice of the European Union delivered its judgment on the applications of the European Commission against Poland, Hungary and the Czech Republic. The Court found that these three countries had been in violation of European Union law by not complying with the Relocation Decisions. It ruled that the Member states falsely relied on the maintenance of law and order and the safeguarding of internal security pursuant to Article 72 TFEU,[396] as well as on the alleged malfunctioning of the relocation mechanism, which was Czech Republic's plea for avoiding compliance.[397] Part of the broader semi-compliance with the allocated shares under the Relocation Decisions was the result of insufficient pledging by Member states. Lack of sufficient pledging was further attributed to the wider rejection of EU's authority over Member states in such matters and a concomitant projected rejection of the EU rule of law and European values. [398]

During the past four years, the Dublin Regulation has been in the process of Reform. The systemic unfairness of the Dublin system towards the frontline Member states, as well as the third country nationals,[399] led the EU Commission

[394] Elspeth Guild, Cathryn Costello, Violeta Moreno Lax, 'Study on Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece' (March 2017) Study for the LIBE Committee, 27.
[395] European Commission 'Relocation and Resettlement: Commission calls on all Member States to deliver and meet obligations' Press Release (16 May 2017).
[396] CJEU (Third Chamber) Joined Cases C-715/17, C-718/17 and C-719/17, Commission v Poland, Hungary and the Czech Republic (2 April 2020), paras 145-147.
[397] Ibid., paras 180-183.
[398] Guild, Costello, Moreno Lax, 'Study on Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece', 42.
[399] Küçük 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?', 463.

to submit a Proposal for Reform of the Dublin Regulation (The Dublin IV) in 2016. [400] At the time of writing, the proposal is still under consideration, although there has been media reporting that the Commission might withdraw the proposal.[401]

On the area of responsibility sharing, the Dublin IV introduces a 'corrective fairness mechanism', an allocation mechanism that is activated automatically in cases where Member states deal with a disproportionate number of asylum seekers.[402] In contrast with the temporary nature of the Relocation Decisions, this is supposed to be a standing mechanism, activated as follows: The disproportionate share is reached when the applications of a Member state exceed 150% of its share, which is further calculated on the basis of its population and GDP with both criteria having equal weight.[403] Member states that do not wish to undertake their fair share of responsibility by means of admitting asylum seekers into their territory are given the option to opt-out from the system for twelve months and instead, make a 'financial solidarity contribution of EUR 250 000'.[404] This opt-out clause provides strong incentives to countries that already shy away from physical responsibility sharing, to continue to do so.

Some preliminary comments are due with respect to the operationalisation of responsibility sharing under the proposed Regulation. Firstly, the Dublin IV does not discharge with the old Dublin rules. The regulation maintains the patently flawed 'first country of entry' rule and sustains the concentration of excessive costs and responsibilities in the Member states adjacent to the EU's

[400] Commission Proposal 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). (Dublin IV).

[401] Nikolaj Nielsen 'Commission bins 'Dublin' asylum-reform proposal' (20 February 2020) available at https://euobserver.com/migration/147511

[402]Dublin IV, Articles 23, 24

[403] Ibid.

[404] Dublin IV, Article 37 (3).

external borders.[405] As Maiani contends, the corrective fairness mechanism places extensive responsibilities on the overburdened frontline Member States turning them into the 'gatekeepers' of CEAS.[406] Secondly, insofar as the aim of the system remains the prevention of secondary movements and 'abuse' of the system by asylum seekers, and not responsibility sharing *proper* between Member states as per Article 80 TFEU, it is highly unlikely that it can deliver fairness between Member states. Lastly, there ought to be a public and permanent discourse between Member states on fairness and how best it can be optimised under the CEAS. One lesson learned from the Emergency Relocation Decisions experiment, is that even a highly institutionalised and relatively harmonised asylum context, as is the European Union, cannot support an automated allocation of binding quotas. This sends a very strong message for what can realistically be expected for responsibility sharing at UN level.

3.4.2. The EU's cooperative arrangements with third countries

In the peak of the refugee crisis in 2015 -2016, the European Union launched the New Migration Partnership Framework with regional countries outside the European Union.[407] Against a background of 'containment strategy,'[408] coupled with the logic of protection elsewhere, the EU concluded the EU-Turkey

[405] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of 'Sharing People' (2017) 24 Maastricht Journal of European and Comparative Law 622, 632, 633.
[406] Francesco Maiani, 'The Reform of the Dublin III Regulation', Study for the LIBE Committee of the European Parliament (2016), 36.
[407] Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration, European Commission, (Press Release, 7 June 2016).
[408] Mariagiulia Giuffré, 'From Turkey to Libya, the EU Migration Partnership from Bad to Worse' Eurojus (20 March 2017).

Statement in 2016[409] and re-established its cooperation with Libya, through Italy's bilateral MoU's with the former.[410]

3.4.2.1. Italy – Libya

Europe's cooperation with Libya has attracted widespread criticism, in particular for the implicit aim to outsource migration management and to prevent migrants, including refugees, from arriving at European shores.[411] It has been rightly characterised as the 'most well-known example of international deterrence'.[412]

Libya has a long-standing cooperation history with the European Union, and particularly, with Italy in the context of combatting illegal migration.[413] With Italy being the first point of entry via the Central Mediterranean route, Italy's cooperation with Libya stretches long back in the Gadaffi years. Following the fall of the Gadaffi regime, Italy resumed cooperation with Libya, despite the dire human rights situation that emerged in the country. In 2017, Italy concluded a

[409] 'EU-Turkey Statement' Council of the European Union Press Release (March 18, 2016).
[410] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route. (February 3 2017). It is noted that there exist additional cooperative arrangements between countries of the EU and neighbouring countries in the context of the wider EU Migration Partnership Framework based on the STC such as Spain's extended cooperative arrangements with North African countries that are not discussed in the section. For a rich analysis of Spain's practices see Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection, Assessing State Practice', 55-59. Nikolas Feith-Tan *International Cooperation on Refugees: Between Protection and Deterrence*, PhD thesis, University Department of Law (2018), 58-62. On file with the author.
[411] Amnesty International, 'Libya: Shameful EU Policies Fuel Surge in Detention of Migrants and Refugees' (16 May 2018).
[412] Feith-Tan, *International Cooperation on Refugees: Between Protection and Deterrence* ,57.
[413] Accordo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista per la Collaborazione nella Lotta al Terrorismo, alla Criminalità Organizzata, al Traffico Illegale di Stupefacenti e Sostanze Psicotrope e All'Immigrazione Clandestina (Rome, 13 Dec 2000). For an overview on Libya's and Italy's bilateral cooperation history, See Giuffre, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya? (2012) 24 International Journal of Refugee Law 692, 701-703.

Memorandum of Understanding with Libya's Government of National Accord.[414] Under the MoU, the Libyan Coast Guard autonomously intercepts and returns back to EU-funded reception centres in Libya, migrants and refugees who make the crossing of the Mediterranean.

The purpose of the cooperation is according to the MoU to combat illegal immigration.[415] Implicitly, the MoU is based on the presumed 'safety' of Libya. UNHCR's position on Libya as a safe country remains the same since 2011, when the High Commissioner intervened in the proceedings of *Hirsi and others v Italy* before the European Court of Human Rights.[416] The landmark case of Hirsi refers to the interception and collective expulsion by the Italian authorities of 24 Eritreans and Somali refugees from Libya, without the opportunity to apply for asylum or to obtain an effective remedy. The Strasbourg Court asserted that Italy did exercise extraterritorial jurisdiction and had effective control over the intercepted, who faced a serious risk of *refoulment* in Libya.[417] As a result, it found Italy in violation of Article 3, Article 4, Protocol No. 4 and Article 13 of the European Convention on Human Rights. UNHCR intervened in the proceedings with the following statement:

> The lack of an asylum system in Libya means that there are not sufficient safeguards to ensure that persons in need of international protection will be recognized as such and accorded legal status and associated entitlements that could ensure their rights, including to protection against *refoulement*, are not

[414] 2017 *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra Io Stato della Libia e la Repubblica Italiana*. (May 2 2017). (Italy -Libya Memorandum of Understanding).
[415] Italy-Libya Memorandum of Understanding, Article 1 (b).
[416] UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v Italy Application no. 27765/09 (March 2010). Available at https://www.refworld.org/docid/4b97778d2.html
[417] *Hirsi and Others v Italy*.

violated. The risk of chain refoulement denying international protection, especially to Eritrea, cannot be excluded.[418]

In 2018, following investigations and reports from Amnesty International[419] and Human Rights Watch,[420] UNHCR restated that it does not consider it appropriate for states to apply in practice a designation of Libya as 'safe third country'.[421] The High Commissioner stressed in a statement that Libya is not even to be considered 'a place of safety' for disembarkation of rescued individuals, irrespective of status pursuant to the IMO Guidelines on the Treatment of Persons Rescued at Sea.[422] The Statement reads:

> In light of the volatile security situation in general and the particular protection risks for third-country nationals (including detention in substandard conditions, and reports of serious abuses against asylum-seekers, refugees and migrants) UNHCR does not consider that Libya meets

[418] UNHCR Intervention before the European Court of Human Rights in the Case of *Hirsi and Others v. Italy.* (March 2010), 10.

[419] M De Bellis, Europe's shameful failure to end the torture and abuse of refugees and migrants in Libya https://www.amnesty.org/en/latest/news/2019/03/europes-shameful-failure-to-end-the-torture-and-abuse-of-refugees-and-migrants-in-libya/

[420] Human Rights Watch Report 'No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya'(March 2019).

[421] UNHCR Position on Returns to Libya (Update II) (2018), 10. https://www.refworld.org/pdfid/5b8d02314.pdf

[422] A 'Place of safety' as defined in the IMO Guidelines, para 6.17 (and as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) 'is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea'. Resolution MSC.167(78) (adopted on 20 May 2004) MSC 78/26/Add.2 Guidelines on the Treatment of Persons Rescued at Sea.

the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea.[423]

As a response to the outcry of the international civil society on the human rights violations committed against migrants and refugees in Libya, the High Commissioner signed a Memorandum of Understanding with Rwanda and the African Union in September 2019 for the purposes of evacuating refugees from Libya's detention centres.[424] According to UNHCR, the rescued individuals have been given 'asylum-seeker status' in Rwanda and while their cases are being assessed' and further solutions are pursued, 'including resettlement, voluntary return to countries of previous asylum, voluntary return to countries of origin where safe to do so and local integration in Rwanda'.[425]

Despite this progress, at the time of writing, the Libyan Coast Guard continues its maritime interceptions of refugees and migrants who when returned to Libya are held in detention centres where they are further subject to inhumane and degrading treatment with no guarantee against *refoulement*.[426] This led UNHCR to issue another update position on Libya as a safe third country in September 2020, where it stresses that states should not continue to designate Libya as a safe third country with the concomitant rejection of an asylum claim as inadmissible before it is considered on the merits.[427]

[423] UNHCR Position on Returns to Libya (Update II) (September 2018), para 40-42.
[424] Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya (Press Release 2019).
[425] UNHCR Third group of refugees evacuated to Rwanda from Libya with UNHCR support Press Release (25 November 2019).
[426] UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea (UNHCR September 2020).
[427] Ibid.

3.4.2.2. EU-Turkey

In 2016, the European Union a deal with Turkey in the form of a Statement and communicated as press release, known as the 'EU–Turkey Statement'.[428] Despite its dubious legal status,[429] Turkey under the Statement is designated as a safe third country for the return of all irregular migrants and asylum seekers whose asylum applications have been declared inadmissible by Greece and who entered Greece irregularly through Turkey. The legal basis for the returns to Turkey is the safe third country notion that functions as an admissibility rule under the EU's Asylum Procedures Directive.[430]

As with Libya, although to a much lesser extent, the presumption of Turkey as safe for returns of asylum seekers has been strongly challenged by NGOs and scholars.[431] The reasons behind this are twofold. Firstly, Turkey has reserved to the Refugee Convention with a geographical limitation that grants refugee protection only to refugees coming from Europe.[432] Therefore, asylum seekers subject to returns under the EU Turkey Statement, and who in their majority are from Syria and other non-European nationalities, are granted under Turkish law some 'conditional refugee status' and are allowed to reside in Turkey only temporarily until they are resettled.[433] Secondly, the overall human rights

[428] EU-Turkey Statement.

[429] Steven Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?, http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html

[430] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[431] Emanuela Roman and Steve Peers, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?', EU Law Analysis (5 February 2016). at: http://eulawanalysis.blogspot.co.uk/2016/02/the-eu-turkey-and-refugee-crisis-what.html . Elizabeth Collet 'The Paradox of the EU-Turkey Refugee Deal' Migration Policy Institute (March 2016).

[432] Law No. 6458 of 2013 on Foreigners and International Protection, Article 61. Unofficial translation can be found at https://www.refworld.org/cgibin/texis/vtx/rwmain?docid=5a1d828f4

[433] Law No. 6458 of 2013 on Foreigners and International Protection, Article 62.

situation in the country has deteriorated, following the attempted Turkish military coup. The coup triggered a state of emergency in Turkey in 2016 and a derogation from the European Convention on Human Rights (ECHR).[434] The lack of international protection to non-EU nationals under Turkish law and the general human rights situation in the country suffice to challenge the characterisation of Turkey as 'safe third country' for all returnees without individual assessment.

The Greek Council of State, the supreme administrative court of Greece had, however, a different view, where in a comforting for the EU-Turkey Statement decision, ruled on the application of two Syrians that Turkey qualifies as a safe third country under the Refugee Convention and thus the two individuals can be returned there and claim adequate protection.[435] The problem with this reasoning is that Turkey provides only protection from *refoulement* to non-European nationals and not the full gamut of the socioeconomic rights, which the Reufgee Convention afford to recognised refugees. As the dissenting Greek Judge noted 'what is critical for a decision to be made is not just the protective legislative framework, but rather its de facto implementation in the country concerned'.[436]

Four years into its implementation, the agreement has turned Greece into a buffer zone for the European Union's migration and refugee policy, or as the President of the Commission Ursula von der Leyen prefers, the European 'aspida'

[434] 'Measures taken under the state of emergency in Turkey' Statement by Mr Nils Muižnieks, the Council of Europe's Commissioner for Human Rights (27 July 2016).

[435] The Decision is only accessible in Greek. (Συμβούλιο της Επικρατείας ΣΤΕ/Ολομέλεια 2348/2017). For an overview of the case, reasoning and the dissenting opinion in English, See Angeliki Tsiliou, 'When Greek judges decide whether Turkey is a Safe Third Country without caring too much for EU law' EU Immigration and Asylum Law and Policy (29 May 2018).

[436] The Decision is only accessible in Greek. (Συμβούλιο της Επικρατείας ΣΤΕ/Ολομέλεια 2348/2017). For an overview of the case, reasoning and the dissenting opinion in English, See Angeliki Tsiliou, 'When Greek judges decide whether Turkey is a Safe Third Country without caring too much for EU law' EU Immigration and Asylum Law and Policy (29 May 2018).

the Greek word for shield.[437] The rest of the Member States are increasingly closing their borders and impose restrictions of movement.[438]

The Greek state lacking asylum capacity, buttressed from EU-imposed austerity measures, has been left alone to cope with the mass influx, whilst arrivals from Turkey continue.[439] This unilateral shift of the responsibility onto Greece and the lack of meaningful solidarity and responsibility sharing by the rest of the EU Member states, as required by Article 80 TFEU, had as a result a deteriorating quality of refugee protection in the Greek state.[440]

The deal's ramifications and the inherent problems of the CEAS have been primarily and negatively felt by the refugees. Asylum seekers and other migrants in Greece are detained in camps, deprived of adequate living standards, enduring the cold winters for four years now.[441] The continuous escalation of the Syrian conflict and the active participation of Turkey in the region, led the latter into a blunt effort to bargain for geopolitical support in Syria in March 2020, to halt the implementation of the deal with the EU actively leading thousands of migrants and refugees to Greece's north-eastern land borders.

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[437] Alastair Jamieson, 'Greece is 'Europe's shield' in migrant crisis, says EU chief von der Leyen on visit to Turkey border' (Euronews March 4 2020), available at https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria

[438] Since 2015, Hungary has its borders closed to refugees and asylum seekers and has put in place razor-wired fences to its borders with Serbia. https://www.bbc.co.uk/news/world-europe-34556682.

[439] According to official statistics 66.000 applications for asylum were lodged in Greece in 2018. https://www.asylumineurope.org/reports/country/greece/statistics. As Dimitriadi notes, 'Amidst the worst economic crisis of recent years, none of the services could hire personnel. Only existing civil servants could request a transfer, and few chose to do so. For the First Reception Service, interpreters, psychologists, medical staff, all had to be subcontracted through NGOs, thereby making the service dependent on external resources'. Angeliki Dimitriadi 'The Impact of the EU-Turkey Statement on Protection and Reception: The Case of Greece' *Global Turkey in Europe*, Working Paper 15 (October 2016), 6.

[440] Ibid.

[441] Kumi Naidoo, 'A scar on the conscience of Europe: Letter to Greek Prime Minister on conditions facing refugees in Greece' (23 November 2018).

There are many problems with the EU-Turkey Statement. At the heart of the deal has been 'a one for one' offer - for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN vulnerability criteria.[442] Crucially for the present analysis, the true purpose of the deal has been migration management, border control and responsibility shifting.[443] As a result of this, refugees have been confined in border regions leading to unnecessary human suffering and the whole situation as experienced on the ground by local populations have naturally made the latter 'to lose confidence to European and national institutions to maintain social cohesion'.[444]

The EU-Turkey deal showcases the fragility of STC arrangements and ripple effects responsibility shifting arrangements have on the refugees as well as on interstate relationships in the region. At the time of writing, the relations of Greece and Turkey are further strained, given a reincarnated interest by Turkey in drilling in the Eastern Mediterranean, where there has been a longstanding territorial dispute with Greece over the limits of the two countries' respective Exclusive Economic Zones. The above discussion reveals the wider geopolitical interests at play in the region and Turkey's strategy to use the Deal as bargaining chip against the European Union's wider migration control interests.[445]

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[442] EU-Turkey Statement.

[443] Michelle McEwen, 'Refugee Resettlement in Crisis: The Failure of the EU-Turkey Deal and the Case for Burden-Sharing' (Spring 2017) Issue 2 Swarthmore International Relations Journal.

[444] Eleni Karageorgiou, 'The impact of the new EU Pact on Europe's external borders: The case of Greece' Asile Project (28 September 2020) available at https://www.asileproject.eu/the-impact-of-the-new-eu-pact-on-europes-external-borders-the-case-of-greece/

[445] According to Kathimerini reports, the meeting of the EU leaders on the matter in the end of September will discuss a package of issues including migration. (4 September 2020. https://www.kathimerini.gr/politics/561066541/sarl-misel-karoto-kai-mastigio-gia-tin-toyrkia/

3.4.2.3. Australia's offshore processing regime

If there is one country that has been pioneering the outsourcing of international protection responsibilities to third countries, that is Australia. Australia has operated a systematic offshore processing regime for asylum claims in partnerships with third countries in the Pacific region, such as Nauru and Papua New Guinea (PNG).[446] Nauru and PNG are not the only countries in the region with which Australia has built a sophisticated cooperative regime. Indonesia cooperates with Australia in the form of stopping asylum seekers from leaving for Australia by boat. Cooperation, in this case, takes the form of funding, equipping and training that comes at the expense of asylum seeker's ability to seek protection in the region.[447] Australia also cooperates with Sri Lanka, a refugee producing country, as well as Malaysia.[448] The discussion focuses on Australia's offshore processing arrangements with Nauru and Papua New Guinea (PNG) because they have been notoriously questionable practices - not only in respect of their legality under international law- but also with their true objective to shift responsibility for refugees to third countries in the region.

Australia's offshore processing regime in cooperation with Nauru and PNG developed in the early 2000's and can be divided for the purposes of the analysis into two periods. The 'Pacific Solution' operationalised between 2001-2007 and the 'Operation Sovereign Borders', the offshore processing resumed by Australia

[446] Jane McAdam, 'Extraterritorial Processing in Europe Is 'regional protection' the answer, and if not, what is?' Policy Brief 1 (2015) Andrew & Renata Kaldor Centre for International Refugee Law 9.

[447] On Australia – Indonesia cooperation See, Antje Missbach 'Doors and fences: Controlling Indonesia's porous borders and policing asylum seekers' (2014) 35 The Singapore's Journal of Geography, 228-244. Savitri Taylor, 'Exporting Detention: Australia-funded Immigration Detention in Indonesia' (2012) 87 Journal of Refugee Studies 88. Nikolas Feith Tan 'The Status of Asylum Seekers in Indonesia' (2016) 28 International Journal of Refugee Law 365.

[448] Prime Minister of Australia, 'People smuggling cooperation with Sri Lanka' (Press Release, 17 November 2013) http://www.pm.gov.au/media/2013-11-17/peoplesmuggling-cooperation-sri-lanka . Emily Howie, 'Asia–Pacific: Australian border control in Sri Lanka' (2014) 39 Alternative Law Journal 52.

in 2013.[449] The policy in both instances is about the maritime interception and transfer of asylum seekers bound for Australia to Nauru and PNG for the purposes of asylum processing and protection.

Australia's bilateral arrangements have been framed by regional power asymmetries in the Asian-Pacific region. Power asymmetries are a useful lens that explains why PNG and a micro-state like Nauru, accepted to become processing centres for Australia, with the concomitant mass influx in aliens as well as the social and political cost of hosting the asylum seekers. It is observed that, in this context, the two host states were countries dependent on Australia's aid, a fact that makes them willing to consent to deals that offer financial assistance, even if the arrangements are bound to raise serious legal concerns. The selection of these two states was strategic due to historical relationships.

Both Nauru, one of the world's smallest countries, and PNG, before gaining full independence, were trusteeships under the Administration of Australia.[450] This hierarchical power relationship allowed Australia to use its ' extremely poor, politically unstable and socially vulnerable neighbours' so as to transfer asylum seekers, in exchange for money, preventing Nauru and PNG from bargaining on equal terms.[451] To offset the onus of essentially warehousing intercepted asylum seekers, Australia offered in exchange to both countries free medical care, educational opportunities and sports ovals.[452] What illustrates this more is that

[449] Australia government, Operation Sovereign Borders https://osb.homeaffairs.gov.au

[450] For a discussion on Australia's historic ties to Papua New Guinea and Nauru, See Taylor 'The Pacific Solution or Pacific Nightmare; The Difference between Burden Shifting and Responsibility Sharing', 19-31.

[451] Taylor 'The Pacific Solution or Pacific Nightmare; The Difference between Burden Shifting and Responsibility Sharing', 32.

[452] Tara Magner 'The less than Pacific Solution for Asylum Seekers in Australia' (2004) 16 International Journal of Refugee Law 53.

'Nauru's half of GDP comes directly and indirectly from the regional processing centre'.[453]

Australia's model of offshore processing kicked-off after the Tampa incident in 2001, involving a Norwegian freighter. The MV Tampa, having rescued 443 asylum seekers, was denied entry and disembarkation on Australia's Christmas Island, the closest port of safety at the time.[454] The passengers were transferred to a navy vessel and were forcibly removed to detention camps in Nauru.[455] The incident marked the beginning of Australia's offshore processing policy development, championed as the 'Pacific Solution'.[456] In an amendment to the Migration Act of 2001,[457] the Minister of Immigration unilaterally designated that the countries of PNG and Nauru are deemed incontestably safe for the processing of asylum claims, and that all asylum seekers bound to Australia would be, going forwards, transferred to these two countries.[458]

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[453] Feith-Tan, *International Cooperation on Refugees: Between Protection and Deterrence*, citing an article from the Interpreter at 50. Footnote omitted.

[454] Maureen Richees,' Remembering the Tampa Affair,18 years on' The Courier Australia, (24 August 2019) https://www.thecourier.com.au/story/6342730/remembering-the-tampa-affair-18-years-on/

[455] Ibid.

[456] Janet Philips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island' Background Note, (September 2012) Australian Parliament available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution#_Toc334509636

[457] 198 A of the Migration Act, as inserted by the Migration Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001.

[458] 2012 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues. https://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx 2012 Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues. https://dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.pdf

From 2001 to 2017, a series of Memorandum of Understandings have been signed between Australia and the two countries.[459] Although the offshore processing stopped in 2007, an increase in boat arrivals and deaths at sea in 2012 had Australia resume the transfer of asylum seekers intercepted by Australian officers, to Nauru and Manus Island in PNG from 2012-2017.[460]

The bilateral STC arrangements have been widely criticised and condemned for resulting in serious human rights violations of the detainees in Nauru and Manus Island. The detainees have been subject to an unjust and prolonged detention, and degrading treatment in direct violation of international human rights law.[461] For those detained in the processing facilities, UNHCR has reported on serious levels of abuse, self-harm and neglect.[462] The international media, such as The Guardian, have been continuously reporting on the dire situation and ill-treatment of asylum seekers in Nauru and Manus Island that have resulted in serious mental health problems, including suicide attempts by children.[463] The

[459] Press Release, Australian Minister for Foreign Affairs, MoU on Asylum Seekers Signed With Nauru (Dec.10, 2002), available at http://www.foreignminister.gov.au/releases/2002/fa181_02.html. Press Release, Australian Minister For Foreign Affairs, New Memorandum of Understanding Signed with Nauru (Mar. 5, 2004).

[460] Alison Rourke, 'Australia to deport boat asylum seekers to Pacific islands' (August 2012) https://www.theguardian.com/world/2012/aug/13/australia-asylum-seekers-pacific-islands

[461] Human Rights Council, Twenty-eighth Session 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Juan E. Méndez' A/HRC/28/68/Add.1 (6 March 2015), paras 16-31.

[462] UN High Commissioner for Refugees (UNHCR), Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee, 12 November 2016.

[463] Oxfham Media Release, 'Oxfam calls for urgent action to get Kids Off Nauru' (23 October 2018). P Farrell, N Evershed and H Davidson, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Offshore Detention', The Guardian (Australia), (online edition), 10 August 2016.

transfer of the asylum seekers offshore Australia was even characterised as a 'discriminatory and arbitrary punishment for seeking asylum'.[464]

Australia has denied any legal responsibility for the state of the asylum seekers in Nauru and on Manus Island. The UNHCR on the contrary supports that Australia remains responsible under international law for those who have sought its protection - *a fortiori* because it is Australia that 'designed, financed and managed the system in which these two developing and under-resourced countries participate'.[465] The legality of Australia's offshore processing regime, in light of the extended human rights violations occurred has been scrupulously assessed against international human rights law standards by scholars.[466] Literature has also explored Australia's responsibility in international law for internationally wrongful acts, applying the rules of attribution of conduct under the law of state responsibility.[467]

In April 2016, the Papua New Guinea's Supreme Court ruled that the detention of asylum seekers under the bilateral agreement breached the right to liberty under PNG's constitutional order.[468] The landmark decision found that the

[464] Jared L Lacertosa, 'Unfriendly Shores: An Examination of Australia's "Pacific Solution" under International Law' (2014) 40 Brooklyn Journal of International Law 321, 356.

[465] UNHCR Urges Australia to evacuate off-shore facilities as health situation deteriorates (12 October 2018).

[466] Indicatively, Amy Nethery, Rosa Holman, 'Secrecy and human rights abuse in Australia's offshore immigration detention centres' (2016) 20 The International Journal of Human Rights 177. Sergio Carrera, Elspeth Guild, 'Offshore processing of asylum applications Out of sight, out of mind?' CEPS Commentary (Brussels: CEPS, 27 January 2017).

[467] See Hathaway and Gameltoft-Hansen 'Non Refoulement in A World of Cooperative Deterrence' 2014. Taylor, 'Australian Funded Care and Maintain ace of Asylum Seekers in Indonesia and Papua New Guinea, All care but no Responsibility?' 337. Tan, 'State Responsibility and Migration Control: Australia's international deterrence model' in T Gammeltoft Hansen and Jens-Vedsted Hansen (eds) H*uman Rights and the Dark Side of Globalisation* (Routledge 2017), 225. Azadeh Dastyari, Asher Hirsch, 'The ring of steel : extraterritorial migration controls in Indonesia and Libya and the complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435.

[468] Supreme Court of Papua New Guinea, *Namah v Pato* (Minister for Foreign Affairs and Immigrations), para 74.

persons on Manus Island Regional Processing Centre were forcefully brought into PNG, held against their will and that the administrative arrangements between the two sovereign countries were in breach of PNG's constitutional guarantee of liberty of all persons.[469] Following this ruling, the processing centre on Manus Island formally closed in October 2017.

In 2018, the Migration Act was amended and a legislation on the urgent medical evacuation and transfer of refugees and asylum seekers in mainland Australia passed in 2019, known as the Medevac Bill.[470] As positive as this move is, in response to the new Law, the Prime Minister of Australia Scott Morrison announced the reopening of Christmas Island's detention centre, declaring that refugees and asylum seekers who are found to need a medical transfer will not be sent to mainland Australia, but will first go to Christmas Island, where they will be further assessed.[471]

The Pacific Solution and the Operation Sovereign Borders were Australia's response to large scale arrivals of asylum seekers in the region. The arrangements purported to have been concluded in the name of cooperation and responsibility sharing.[472] The overtly stated purpose of the Operation Sovereign Borders was, as its name suggested, border control of illegal migration as a sovereign act. The cooperation of Nauru and PNG was easily bought at a price, given the countries' existing power asymmetries and financial dependence on Australia.[473] Australia's

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[469] Ibid.

[470] Migration Amendment (Urgent Medical Treatment) Bill 2018 A Bill for an Act to amend the Migration Act 1958, and for related purposes.

[471] 'Tropical location' used to lure doctors to Christmas Island for refugee medical transfers https://reliefweb.int/report/christmas-island-australia/tropical-location-used-lure-doctors-christmas-island-refugee

[472] Taylor 'The Pacific Solution or Pacific Nightmare; The Difference between Burden Shifting and Responsibility Sharing', 31.

[473] Alexander Betts, 'The Political Economy of Extraterritorial Processing: Separating "Purchaser" from "Provider" in Asylum Policy' New Issues in Refugee Research (2003) UNHCR Working Paper No. 91, 2003.

bilateral offshore processing arrangements were therefore an example of the language of responsibility sharing being used as 'a deceptive rhetorical veil,' whilst, in reality, they had been tantamount to responsibility shifting.[474] More generally, it can be observed that partner states knew that their cooperation was a valuable commodity, which they were willing to trade, even when agreements might have been presented before them as *a fait accompli*.[475]

3.4.2.4. The United States and Canada Safe Third Country Agreement

In 2004, Canada entered into a bilateral safe third country agreement with the United States (STC Agreement). [476] For a long period of time, Canada had been hailed as a leader in refugee protection standards worldwide. [477] It has traditionally been seen as a destination country - and a particularly welcoming one-[478] with high rates of approval of asylum applications.[479] In contrast, the United States, also a traditional destination country for many years, has always had more restrictive asylum policies in place, in particular for refugees coming from Central America.[480]

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[474] Taylor 'The Pacific Solution or a Pacific Nightmare? The Difference between Burden shifting and Responsibility Sharing', 36.

[475] Alexander Betts, James Milner, 'The Externalisation of EU Asylum Policy: The Position of African States Centre on Migration, Policy and Society Working Paper No. 36, (University of Oxford 2006).

[476] Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (December 5, 2002) (US - Canada STC Agreement).

[477] Efrat Arbel, Alletta Brenner, 'Bordering on Failure Canada - US Border Policy and the Politics of Refugee Exclusion' Harvard Immigration and Law Clinic, Harvard Law School (November 2014), 104.

[478] The Peoples of Canada won in 1986 the Nansen Medal Award for their work on the causes of refugees. https://www.latimes.com/archives/la-xpm-1986-10-07-mn-5066-story.html

[479] Andrew F Moore, 'Unsafe in America: A Review of the US Safe Third Country Agreement' (2007) 47 Santa Clara Law Review 201, 208.

[480] Arbel and Brenner, 'Bordering on Failure Canada - US Border Policy and the Politics of Refugee Exclusion', 105.

Following the landmark case of Singh[481] before the Supreme Court, Canada revitalised its national asylum system and established a tribunal process that gave every asylum seeker the opportunity to have their claim assessed on its merits.[482] Since the conclusion of the STC Agreement, however, there has been a shift towards increasingly restrictive and exclusionary policies on asylum.[483]

The US-Canada STC Agreement is a bilateral agreement which constitutes an arrangement for sharing and determining responsibility for asylum between the two neighbouring countries and which, for the purposes of the agreement, have designated each other as safe. In theory therefore, it can be said to be the framework for bilateral responsibility sharing for asylum between the two countries.

Under the agreement, '[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border, port of entry […] and makes a refugee status claim'. [484] It shall be noted that the Agreement applies only to those individuals entering from the US at official ports of entry, and borders, hence many asylum seekers have resorted to irregular crossings to Canada, particularly dangerous in winter.

Over the years, the STC agreement has been challenged on the grounds that it acts as deterrent,[485] which has resulted in the irregular crossing of borders and

[481] Singh v Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177

[482] Arbel and Brenner, 'Bordering on Failure Canada - US Border Policy and the Politics of Refugee Exclusion',104.

[483] E Arbel, ABrenner, 'Bordering on Failure Canada - US Border Policy and the Politics of Refugee Exclusion' Harvard Immigration and Law Clinic, Harvard Law School (November 2014), 105.

[484] US-Canada STC Agreement, Article 4 (1).

[485] Ben Proctor, 'Fleeing to Canada on Foot: Reviewing the Canada-U.S. Safe Third Country Agreement' Wilson Centre, Canada Institute (4 April 2017) , 8. Available at https://www.wilsoncenter.org/sites/default/files/media/documents/article/fleeing_to_canada_on_foot_stca_final_04-04-2017.pdf

more specifically, on the grounds that the US, cannot be considered a safe country at least for a certain category of refugees.[486]

In 2007, the Canadian Council for Refugees, Amnesty International and the Canadian Council for Churches, challenged the designation of the US as a safe third country under the Agreement.[487] The Federal Court, having granted the coalition of organisations legal standing in the proceedings, found that the US does not comply with its *non-refoulement* obligations under the Refugee Convention and the Convention against Torture,[488] and that the application of the safe third country rule, in the context of this bilateral STC Agreement, violates refugees rights under the Canadian Charter.[489] Although the decision was later overturned by Canada's Federal Court of Appeal on technical grounds, what is important, is that in the first instance, the Court did challenge the legality of the agreement determining that the US is not a safe country for all refugees arguing that the agreement violates refugees rights under international law.[490]

Under the Trump Administration, the new anti-refugee and anti-Muslim policies that have been adopted have had a negative impact on protection seekers in the region. The 2017 Executive Order on Immigration under the Zero Tolerance Policy of the Trump Administration, included a travel ban for several

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[486] Canadian Council for Refugees 'Why we are challenging the USA as a "safe third country" in the Federal Court of Canada' Explanation (December 2017), available at https://ccrweb.ca/en/safe-third-country-challenge-explanation

[487] Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe (Applicants) v. Her Majesty the Queen (Respondent) *Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583, 2007 FC 1262.

[488] Article 3 (1) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) UNTS Vol 1465, 85.

[489] *Canadian Council for Refugees v. Canada*, para 239-240.

[490] *Canadian Council for Refugees v. Canad*a, para 338. For an in-depth scholarly analysis on the legality of the US-Canada STC Agreement under international law See Moore, 'Unsafe in America: A Review of the US Safe Third Country Agreement' 201.

Muslim-majority countries, under which refugees are punished for illegal entry[491] -contrary to the Refugee Convention- [492] with either expedited removal, or detention in substandard conditions and with no access to counsel.[493] Because of the bilateral STC Agreement, these refugees have no prospect of applying for asylum in Canada, unless they attempt an illegal crossing.[494] These changes in the US asylum policy have rendered the US, according to commentators and legal advocates, no longer safe within the meaning of the bilateral STC Agreement.[495]

A challenge of the STC Agreement was recently lodged before the Federal Court of Canada in 2017, by the Canadian Council for Refugees and Amnesty International and other applicants seeking to have the STC Agreement declared unconstitutional under Canadian law.[496] The case is about refugee claimants who reached Canada from the US and filed a claim for asylum but were returned to the US on the basis of the STC Agreement. Upon return they were detained by US Immigration officials. The applicants asked the Court, *inter alia,* to declare that

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[491] Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry

[492] Refugee Convention, Article 31.

[493] Why we are challenging the USA as a "safe third country" in the Federal Court of Canada, Canadian Council for Refugees Explanation (December 2017), available at https://ccrweb.ca/en/safe-third-country-challenge-explanation

[494] Refugees crossing into Canada from US on foot despite freezing temperatures (The Guardian, online 7 February 2017) available at, https://www.theguardian.com/world/2017/feb/07/us-refugees-canada-border-trump-travel-ban

[495] Amnesty International, 'Canada must strip USA of 'safe third country' designation for refugee claimants', 30 January 2017.

[496] *The Canadian Council for Refugees Amnesty International, the Canadian Council of Churches v. The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness,* and *Nedira Jemal Mustefa v. The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness* and *Mohammad Majd Maher, Homsi Hala Maher Homsi Karam Maher Homsi Reda Yassin Al Nahass v The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness*. Federal Court of Canada 2020 FC 770 22 July 2020 Available at https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/482757/1/document.do

Canada needs to consider rescinding the STC Agreement with the US and, as an interim measure, to immediately suspend the agreement.

The Court ruled its decision in July 2020. It found that 'ineligible STCA claimants are returned to the US by Canadian officials where they are immediately imprisoned by US authorities.[497] The Court also held that the ' "sharing of responsibility" objective of the STCA should entail some guarantee of access to a fair refugee process' and that, in this case it hasn't, as applicants were removed to the US because of the STC Agreement without any assessment of their risks or the substance of their refugee claim.[498] Finally, the Court held that 'Canada cannot turn a blind eye to the consequences that befell' applicants who are removed to the US because of the operation of the STC Agreement,[499] and given that the provisions enacting the agreement infringe upon constitutional guarantees under the Canadian Charter of Rights and Peoples, the Court invalidates the STC Agreement.[500]

Because of the Agreement, the number of international protection claims for Canada has been drastically reduced. It was the disproportionate number of asylum applications that led Canada to negotiate a STC arrangement with the US in the first place.[501] A report claims that the effects of the STC agreement have been felt unevenly, as the implementation of the agreement has resulted in large numbers of asylum seekers being kept in the United States and out of Canada.[502] The same report sheds light into the different motivations behind the conclusion of the Agreement between the two countries:

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[497] Ibid., para 103.
[498] Ibid., para 128.
[499] Ibid.
[500] Ibid, Conclusion. In response to the ruling, the government of Canada has appealed the decision.
[501] Moore, 'Unsafe in America: A Review of the US Safe Third Country Agreement',210.
[502] Arbel, Brenner, 'Bordering on Failure Canada - US Border Policy and the Politics of Refugee Exclusion', 66.

> While the Agreement was designed as a "burden sharing mechanism" (..) the United States (..) entered the agreement primarily to fortify the border, whilst Canada entered into the Agreement to deter asylum seekers from making refugee claims in Canada.[503]

Thus, Canada through the STC Agreement has insulated itself from extensive responsibilities that it would otherwise have towards refugees. Additionally, since the two parties to the Agreement do not have comparatively similar systems of refugee status determination in place - with Canada having way more generous asylum policies and legal and procedural safeguards than the US -[504] this bilateral arrangement challenges even a theoretical scenario of fair and equitable allocation of protection responsibilities between the two states.[505]

3.5. Comprehensive approaches to responsibility sharing

Up to this point, the discussion accommodated those safe third country arrangements, formal and informal, between states that primarily have served the logic of 'protection elsewhere' in order to prove that contrary to their purported responsibility sharing objectives, they have resulted in the shifting of responsibility, undermining fair sharing between the parties to these arrangements and the quality of refugee protection.[506]

During the life of the refugee regime, there have been however examples of responsibility sharing arrangements that brought states together to effectively

[503] Ibid, 7.

[504] For a comparative analysis of the two domestic systems, Moore, 'Unsafe in America: A Review of the US Safe Third Country Agreement' 201.

[505] Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' 65.

[506] Hurwitz, The *Collective Responsibility of States to Protect Refugees*, 285.

protect refugees and solve refugee situations. The next section discusses two past responsibility sharing arrangements - the Comprehensive Plan of Action for Indochinese Refugees (CPA) and the International Conference on Central American Refugees (CIREFCA) - [507] as examples of overall successful partnerships between states of the Global North and the Global South. It also discusses UNHCR's Convention Plus Initiative,[508] an attempt by UNHCR to fill in the gap of the Refugee Convention and bring states together to conclude a normative framework for fair responsibility sharing at UN level. The section concludes with a discussion and assessment of the Global Compact on Refugees, the most recent collective effort of UNHCR and states to address the need for fair and equitable responsibility sharing comprehensively through a wide range of modalities.

There has been a lot of research and analysis from scholars on how and why the CPA and CIREFCA 'appealed' to states that subsequently devised ad hoc and comprehensive responses to the two refugee emergencies. [509] The objective of the present analysis is to identify the various factors that contributed to the overall

[507] Another international responsibility sharing experience from the past was the two International Conferences on Assistance to Refugees in Africa (ICARA I & II). Although ICARA II was the first arrangement that made the nexus between refugees and development aid explicit, it did not have any positive impact on responsibility sharing between the global North and African states. Camps were built, whilst western states did not response to the African plea for equitable responsibility sharing and the spontaneous or coerced repatriation of African refugees in many occasions became the norm. Finally, the security of refugees was compromised by the nexus between refugee camps and African military conflicts. For a detailed assessment of ICARA I and II see Hans and Shurke, 'Responsibility Sharing', 88-82.

[508] UNHCR, Convention Plus, At A Glance, available at, https://www.unhcr.org/uk/protection/convention/403b30684/convention-plus-glance-june-2005.html

[509] Indicatively, Hans and Shurke, 'Responsibility Sharing' 88-102. Suhrke, 'Burden Sharing During Refugee Emergencies: The Logic of Collective versus National Action', 396. Alexander Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' UNHCR New Issues in Refugee Research, Working Paper 120, (January 2006), 27.

success of the two arrangements, outside the unique political junctures and regional specificities of each one of them, so as to draw a somewhat 'universal' lesson. On the other hand, the discussion of the UNHCR's Convention Plus Initiative serves another purpose; to flesh out and understand the reasons why the process failed to conclude a normative framework. What could have been done differently in the negotiating process back then and what lessons learned, if any, were implemented in the Global Compact on Refugees.

3.5.1. The Comprehensive Plan of Action for the Indochinese refugees

A 'textbook' example of meaningful international cooperation and responsibility sharing took place between 1979 and 1993. The process involved the cooperation of countries of origin, countries in the region – assuming a first asylum role - and countries outside the region, assuming a resettlement role.[510]

From the very beginning, the Vietnamese exodus became the business and foreign policy consideration of all anti-communist states of the West, and particularly of the US, which responded to the flight of the labelled 'boat people' with liberal admission policies.[511] The Indochinese refugees were individuals who fled Vietnam, Cambodia and Laos. A conference in Geneva was convened in 1979[512] to come up with, what has been characterised as a model of 'universal' responsibility sharing.[513] Under this model of responsibility sharing, states assumed different protection roles; states in the region assumed first asylum responsibilities and states further afar in the global North undertook explicit

[510] Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA', 27.

[511] Suhrke, 'Burden Sharing During Refugee Emergencies The Logic of Collective versus National Action', 405.

[512] UN General Assembly, Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General, 7 November 1979, A/34/627, available at https://www.refworld.org/docid/3ae68f420.html

[513] Hans and Surhrke 'Responsibility Sharing', 100.

commitments to resettle[514] with an exception of Japan, which responded to responsibility sharing demands only through increased financial contributions.[515]

Asylum in the region became contingent, however, upon resettlement elsewhere. Although as a matter of international law, the provision of international protection is not contingent upon responsibility sharing, in the context of the Vietnamese exodus, the neighbouring countries, namely Malaysia, Thailand and Indonesia, offered temporary protection only due to explicit resettlement quotas committed by western states.[516] Western countries, such as the US, Australia, Canada and France, committed to the responsibility sharing effort with resettlement quotas that were a result of a market-based model consisting of both immigration and humanitarian criteria.[517]

As new flows of Indochinese refugees continued to emerge, western countries became sceptical about the genuine refugee status of the Indochinese, as well as the openness of their resettlement policies. All the while, neighbouring countries responded with excessive use of deterrence measures and *refoulement.*[518] A second Geneva Conference was called in 1989 by the UN Secretary General at the time, to respond to the new waves of Indochinese refugees.[519] The Comprehensive Plan of Action (CPA) agreed during the Conference was premised upon individual refugee status determination, whereby the Vietnamese had to prove their refugee status after an agreed cut-off date.[520]

[514] Ibid.
[515] Suhrke, 'Burden Sharing During Refugee Emergencies The Logic of Collective versus National Action', 405.
[516] Ibid.
[517] Hans and Surhrke 'Responsibility Sharing', 100.
[518] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities; The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 667.
[519] Declaration and Comprehensive Plan of Action of the International Conference on Indochinese Refugees, Report of the Secretary General A/44/523 (1989).
[520] Hans, Surhrke 'Responsibility Sharing', 101.

The cut-off date varied across the neighbouring countries.[521] This meant that from the date of the cut-off, the Vietnamese were not considered de facto refugees, but rather economic migrants who had to prove their refugee status. Those who fell short of the refugee status were voluntarily repatriated to Vietnam with the help and monitoring of UNHCR,[522] under what has been described as a controversial process from a human rights perspective.[523] The failure of the human rights mandate of the CPA was strongly observed in the phase of the individual determination process, which did not offer the individual asylum seeker the benefit of the doubt.[524] UNHCR essentially became a 'broker' between the countries of first asylum and the countries of origin and resettlement in an effort to afford durable solutions.[525]

The Steering Committee of the International Conference on Indochinese Refugees,[526] chaired by UNHCR and comprising of government representatives worked towards identifying resettlement quotas. Countries outside the region pledged their commitments under a three-year target timeline.[527] UNHCR provided statistics on past contributions, helping states to identify their targets.

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[521] Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' , 34.

[522] Türk and Garlick, 'From Burdens and Responsibilities to Opportunities; The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 668.

[523] W. Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees 1989-1997 Sharing the Burden and Passing the Buck' (2004) 17 Journal of Refugee Studies 319.

[524] Arthur C Helton, 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment' (1993) 5 International Journal of Refugee 544, 557. JC Hathaway 'Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees' (1993) 15 Human Rights Quarterly 686.

[525] Ibid.

[526] International Conference on Indo-Chinese Refugees: resolution / adopted by the General Assembly International Conference on Indo-Chinese Refugees: resolution / adopted by the General Assembly A/RES/44/138 para 6.

[527] Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA', 40.

For the purposes of implementing the CPA, the High Commissioner circulated a responsibility sharing distribution formula, identifying the proportion of resettlement quotas for each state of the resettlement states. This, Betts notes,

> is illustrative of the way in which UNHCR managed to credibly convey to states that without each contributing their 'fair share' the whole process would fail. In other words, free riding was not an option if states hoped to meet their individual or collective interests.[528]

Certain criteria informed the resettlement process beyond the pledged quotas. The caseload of refugees with social ties to third countries would be resettled there and the caseload of refugees lacking such ties would be equitably shared between the rest of the states.[529] The US' significant leadership role in this large-scale resettlement and the sense of responsibility they felt towards its erstwhile allies was another important geopolitical factor to highlight.[530]

However, the CPA was far from a flawless responsibility sharing arrangement. Arthur Helton was a significant player in the CPA's implementation who concluded in his own overview and assessment that, in the end, humanitarian considerations were overridden by migration control objectives.[531]

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[528] Ibid.

[529] Ibid.

[530] Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection', 193.

[531] Helton 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment', 558. Hathaway has also criticized the human rights situation under the CPA as falling short of complying with international human rights standards. Hathaway 'Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees', 686.

When thinking of the universal lessons that can be drawn from the CPA process, these are limited by the fact that it was a product of a certain political juncture.[532] That said, the CPA combined two important characteristics that are not context or region-specific and are illustrative of forging collective action and structuring responsibility sharing against an idea of fairness.

Firstly, the whole process linked refugee protection to a durable solution. The essence of protection is realised in securing the full gamut of socioeconomic rights to the individual refugee as well as a permanent solution. Under the CPA, responsibility sharing went beyond mere financial assistance, during the emergency and initial stage of protection from non-refoulement, to securing the rights enshrined in the Convention and to providing for long-term solutions to most refugees. At the time, resettlement outside the region, onto Western states was for a majority of refugees the preferred solution. In other words, the Global North did commit and did actively participate in physical responsibility sharing taking its fair share. Among the determinative criteria for the refugees to be resettled, existing social ties of refugees to third states were crucially considered.

Secondly, the Plan of Action provided for different roles for different states laying down interlocking, interdependent and *differentiated* commitments, voluntarily pledged by states before the Steering Committee of the Conference. In the context of CPA, states came to recognise for all sort of reasons, including geopolitical, that the plight of the Indochinese was an international, common concern, a community interest, and countries of both the Global North and South would only benefit if they were to cooperate. Free riding, therefore, was not an option, because of existing issue linkages in the community interest. For these reasons, the CPA was a positive example of an effort to collectivize the common

[532] Suhrke, 'Burden Sharing During Refugee Emergencies The Logic of Collective versus National Action', 408.

responsibility to protect refugees,[533] even if ad hoc against the basis of differentiated commitments.

3.5.2. The International Conference on Central American Refugees (CIREFCA)

In the Central American context, CIREFCA was a process that arose out of the Esquipulas Peace Agreement of 1987. The Agreement marked the end of longstanding conflicts in Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua.[534] The Conference on Central American Refugees,[535] like the CPA, focused on providing solutions at a regional level for the two million people displaced by the conflicts, as part of a *process*.[536]

Unlike the CPA, which worked around the migration-asylum nexus, CIREFCA aimed to bridge the gap between humanitarian relief and development.[537] The Central American Peace and Development Process was a process of long-term assistance to the displaced and post-conflict development in the region. The protection of refugees and the forcibly displaced was positively linked to issues of peace and development, making the case for an integrated developmental approach to forced displacement.[538]

The Conference, under the auspices of UNHCR and UNDP, took place in Guatemala City in 1989 and resulted in a Declaration and a Concerted Plan of

[533] Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection',143.
[534] UNGA Annex, Procedure for the Establishment of a Firm and Lasting Peace in Central America (Esquipulas II) A/RES/42/521 (31 August 1987).
[535] International Conference on Central American Refugees: resolution / adopted by the General Assembly International Conference on Central American Refugees: resolution / adopted by the General Assembly. UNGA A/RES/47/103. (6 December 1992)
[536] Türk and Garlick, 'From Burdens and Responsibilities to The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 668. Emphasis added.
[537] Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA', 50.
[538] Ibid.

Action,[539] explicitly conceived as a follow-up process to the 1984 Cartagena Declaration.[540] The Plan focused on voluntary repatriation, local integration of refugees and their contribution to economic development.[541] The integrated developmental approach dynamically adapted from country to country, depending on whether the state was a source of refugees or a country of asylum, offering self–reliance to the refugees, development opportunities to the host communities and securing stability in the region.[542] Further, the CIREFCA process played an important normative role in the region by contributing to the development and dissemination of international protection norms, strengthening regional solidarity between states and joint responsibilities for refugees.

Responsibility sharing in the region did not end with the CIREFCA process. The Brazil and Mexico Declarations and Plans of Action discussed earlier,[543] frame responsibility sharing in the region over what Cantor describes as 'an ostensibly south-south principle of 'common but differentiated responsibility'.[544] States of origin, transit and destination within one region assume distinct roles to refugee situations. In light of this, responsibility sharing in Latin America links refugee protection to comprehensive solutions by expanding labour mobility programmes where refugees can freely move to third countries and have access to gainful employment promoting economic self-sufficiency.[545] This is the well-known 'Cartagena Spirit' of regional solidarity between states that builds on regional shared values and joint responsibilities for refugees.[546]

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[539] Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, (CIREFCA) 30 May 1989, A 89/13/Rev.1.
[540] Cartagena Declaration.
[541] CIREFCA, para 19.
[542] Alexander Betts, Paul Collier, *Refuge Transforming a Broken Refugee System (Allen Lane Penguin 2017,* 150.
[543] Brazil Declaration and Plan of Action. See Section 2.4.2.
[544] Cantor, 'Responsibility-sharing in the refugee field: lessons from Latin America', 5.
[545] 2014 Brazil Plan of Action, Chapter 3.
[546] Barichello, 'Responsibility Sharing in Latin America', 111.

3.5.3. Pulling the threads together: The three ‘c’s.

The CPA and the CIREFCA processes were products of a strongly influenced Cold War-sentiment in refugee protection that had the UN and states assume priority for the refugees for various interests, including humanitarian. There, are however, three common threads evident in both the CPA and the CIREFCA processes. Betts has summarised the success of examples in what I further identify as the three ‘c’s. Both processes were *cooperative* because they involved a wide range of countries, including countries of origin, asylum, resettlement and/or donor countries. They were *comprehensive* because they adopted a range of durable solutions simultaneously, and they were *collaborative* in terms of working across UN agencies and civil society organisations.[547] Perhaps, the word collaborative may today be replaced by UNHCR’s ‘multi-stakeholder’ or ‘whole of society’ approach to refugee situations.[548]

Interestingly, there is a fourth common thread that permeates both processes, also beginning with a ‘c’. A *common but differentiated responsibilities* logic framed both partnerships and brought states of origin, asylum and destination together, from the initial emergency phase to the provision of durable solutions allowing each state to pledge commitments to physical and financial responsibility sharing, assuming its fair share.

3.5.4. UNHCR Convention Plus Initiative

The Convention Plus Initiative (2002-2005) was a three year, UNHCR-led project, which brought states together to negotiate a normative framework on

[547] Betts, ‘Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA’, 5.

[548] Türk, ‘The Promise and Potential of the Global Compact on Refugees’ (2019) 30 International Journal of Refugee Law, 575.

international responsibility sharing for refugees.[549] The "Plus" intended to be a number of generic and special 'soft law' agreements based on three priority strands: the strategic use of resettlement; more effective targeting of development assistance to support durable solutions for refugees; clarification of the responsibilities of states in the event of irregular secondary movements.[550] These generic agreements would then be applied to specific protracted refugee situations.

The Convention Plus, although failing to complement the Refugee Convention with a normative framework for responsibility sharing,[551] enriched states' and UNHCR's experience. Two distinct tools were used to bring states together to agree on differentiated commitments to refugee protection; an idea of 'common but differentiated responsibility sharing' that would leave every actor better off and the use of issue linkages, namely linking refugee protection to other interests such as migration control and development.[552]

In the Convention Plus, responsibility sharing was framed as a North-South dialogue from the outset. There was a clear division of labour between donor states of the North that would finance protection (financial responsibility sharing) and Southern states that would provide protection (physical responsibility sharing). The issue of linkages in the Convention Plus initiative was played as follows: the High Commissioner appealed to Northern states to commit to responsibility sharing on the basis of their strong interests in halting irregular secondary movements, and to the Southern states by persuading them that

[549] UNHCR,Convention Plus At a Glance.

[550] Ibid.

[551] The only tangible output of Convention Plus was the Multilateral Framework of Understandings on Resettlement. UNHCR Multilateral Framework of Understandings on Resettlement (21 June 2004).

[552] Betts, *Protection by Persuasion*, 150.

development assistance from the North would benefit their local populations, so they should make local integration and self-sufficiency for refugees viable. [553]

The shortcomings of the Convention Plus have been highlighted in literature.[554] Out of all the reasons identified in scholarship, I would like to focus on two in particular; the lack of transparency in negotiations and the conditionality of the targeted development assistance. Firstly, the negotiations on targeted development assistance by the Northern donor countries were conducted behind closed doors. Essentially, the Southern refugee hosting states, the would-be recipients of the development assistance, felt and, indeed were excluded, from the negotiations.[555] Secondly, and again related to development assistance, Southern host states requested that any targeted assistance for refugee protection be *additional* to that of poverty eradication and other needs, so that aid does not become conditioned, or as South Africa put it in a meeting during the Convention Plus, 'linked to readmission agreements'.[556] The request was not met by donor states. They made clear that no additional funding for refugee self-reliance would be allocated and any targeted development assistance would come from already allocated and earmarked budgets.[557]

The absence of additional development assistance to refugee hosting states, in particular given their already overstretched capacities and developmental needs, were not perceived by the former as fair. To the contrary, conditioning aid upon readmission agreements further polarised states across the North-South divide,

[553] Betts, *Protection by Persuasion,* 151.
[554] Marjoleine, Zeick, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' (2009) 21 International Journal of Refugee Law 387, 394.
[555] Betts, *Protection by Persuasion,* 153.
[556] 'UNHCR Summary of Second Forum Meeting' (2004), Statement of South Africa quoted and cited in Betts, *Protection by Persuasion*, 170.
[557] Betts *Protection By Persuasion,* 171.

thereby aggravating the North-South relations, ultimately hindering the conclusion of a normative framework. [558]

One lesson learned from the Convention Plus Initiative is that refugee targeted assistance is that refugee targeted assistance to developing host states should not be linked to streamlined development aid. A notion of fairness between states would require separate and additional financial arrangements and resources to host states.

Secondly, the division of labour between Northern donor states and Southern hosts, that framed the Convention Plus and continues to frame contemporary responsibility sharing debates, does not cater for fair sharing. This is for the simple reason that fair sharing requires a structural adjustment. In a critique of the Convention Plus, Zeick wrote:

> A structural adjustment, as it were, that would entail a reapportioning of the responsibilities of states, and would go beyond a mere palliative, voluntary, and ad hoc form of assistance to unduly heavily burdened states.[559]

The need for this structural adjustment in the international refugee law regime is still pertinent today. Before unpacking and elaborating further on this argument, it is considered appropriate to look into how the Global Compact on Refugees, envisages the operationalising of responsibility sharing between states and explain why this structural adjustment has not yet been made.

[558] Zeick, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 404.

[559] Ibid., 403.

3.5.5. The Global Compact on Refugees as a comprehensive framework towards a more equitable and fair responsibility sharing

The Global Compact on Refugees was adopted on 17 December 2018, by a large majority of 181 votes before the United Nations General Assembly, with the US and Hungary opposing and with Dominican Republic, Eritrea and Libya absenting.[560] It was a result of two years intense negotiations chaired by UNHCR, who also led the drafting the Compact.

Despite being non-binding, the Compact is rooted in international refugee law and policy,[561] situated within and under the Refugee Convention and builds on 'operational practice developed since the earliest days of the UN'.[562] Its primary purpose as stated in the document is to provide a basis for 'predictable and equitable burden and responsibility sharing among all United Nations Member States, together with relevant stakeholders, as appropriate..'.[563]

As already put forward in the thesis, the adoption of the Global Compact on Refugees by the General Assembly of the United Nations represents for the enlightened positivist the latest evidence to the claim that the protection of refugees, including the provision of solutions, reflects a community interest in international law which is primary served by the Refugee Convention and which can only be advanced through international cooperation and responsibility sharing. This is why the Compact frames the contemporary refugee challenge as the 'common concern of humankind', stressing thus the common responsibility of the international community, whilst emphasizing that refugee protection runs parallel with and depends on fair responsibility-sharing.[564] Another objective of the Global Compact is to support the refugee hosting states, by easing pressure,

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[560] UN News, 'UN affirms 'historic' global compact to support world's refugees' (18 December 2018) https://news.un.org/en/story/2018/12/1028791 .

[561] Global Compact, para 5.

[562] Turk, The Promise and the Potential of the Global Compact on Refugees, 3.

[563] Global Compact on Refugees para 3.

[564] Geoff Gilbert, 'Not Bound but Committed' (2019) 59 International Migration IOM 28.

for the latter provide a global public good on behalf of the international community.[565] In practical terms, the Compact envisages responsibility sharing as a partnership of states of origin, asylum, transit and destination against a framework of common responsibilities differentiated on each states' capacities and resources.[566]

The Compact puts in place a series of voluntary participatory pledging conferences. A periodic Global Refugee Forum is established at a ministerial level, to be convened every four years during which states, and other relevant stakeholders, announce their pledges and contributions to the objectives of Compact.[567] Pledges are then recorded and tracked in a public registry operated by UNHCR. The Compact provides for follow-up and review processes such as a stocktaking of progress and a mechanism that tracks and reviews the implementation of the contributions.[568]

When it comes to what responsibility sharing entails under the Global Compact, there is a non-exhaustive list of modalities, 'areas for support' that states can choose to pledge for in line with their capacities.[569] In this sense, the scope of responsibility sharing under the Global Compact on Refugees is considerably broader than what has traditionally been understood to mean financial and physical sharing. It extends to supporting host countries and communities with infrastructure, expertise and resources to all identified areas of support, to prevention of root causes and political support to countries origin.[570]

In relation to prevention of the root causes of forced displacement, this is a laudable effort supported at the UN level through the UN Secretary General's

[565] Turk, The Promise and the Potential of the Global Compact on Refugees, 3.
[566] Global Compact para 1 and 4.
[567] Global Compact, para 17.
[568] Global Compact para 101-105.
[569] Global Compact, Part II.B serves as such non exhaustive list.
[570] Global Compact, para 50.

Agenda on Prevention.[571] However, broadening the scope of responsibility sharing in refugee law to include root causes or post conflict prevention raises certain concerns. Addressing the root causes, - namely prevention of refugee flows has been facilitated through the provision of aid, peace talks and peacekeeping missions, as well as post-conflict reconstruction and diplomacy.[572] In a seminal article on the geopolitics of refugee studies, Chimni argued that the root causes strategy that has been hailed as the appropriate response to refugees coming from the Third World has been responsible for the turn to protection in the region, through humanitarian and development assistance.[573] This strategy has in turn been conceptually facilitated by the proclamation of 'the right to remain', which has had as a consequence the right to seek asylum to be de-emphasized.[574] It has been thus supported that the right to remain, precisely because it is conditioned upon some sort of intervention to prevent flight in the first place,[575] ultimately negates the palliative character of the refugee protection regime.[576]

Taking these concerns to the implementation of the Global Compact, pledges made by states to address root causes and capacity building in countries of origin can be used as tokens of their commitments to responsibility sharing.[577] It is submitted, however, that contributions to root causes should remain outside the context of responsibility sharing for the purposes of international protection.

In light of the wider externalisation and contentment practices discussed in this Chapter, a narrower conception of responsibility sharing that aligns with the

[571] Global Compact, para 8-9, 52.
[572] A Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 153.
[573] BS Chimni, The Geopolitics of Refugee Studies, 351-352
[574] Hathaway & Neve, 133.
[575] Hathaway& Neve, 134.
[576] Hathaway & Neve ,140.
[577] The risks of considerably broadening the scope of responsibility sharing are also stressed by Hurwitz. Hurwitz, *The Collective Responsibility of States to Protect Refugees',* 154.

Refugee Convention's objective to ensure protection to refugees is limited to the two components of financial and physical sharing. Financial sharing, understood as assistance to refugee host countries to meet the rights of refugees guaranteed by the Refugee Convention and physical sharing as relocating refugees to third countries, when such rights cannot be guaranteed by the host country. To use the words of the Brazilian representative at the UN, physical sharing becomes necessary so 'a proportion of refugees currently in overloaded (developing) countries can seek protection elsewhere'.[578] This physical sharing can be facilitated either through the institution of asylum, or resettlement or through complementary pathways to protection.[579]

The Global Compact has endorsed a 'whole of society approach', expanding the stakeholders to protection and responsibility sharing beyond states, to individuals, academics and researchers, cities, municipalities and local authorities, faith-based organisations, NGOs, parliaments, private sector organisations, refugees and diaspora and sports organisations – that can also pledge material, financial and other support to protection and solutions contributing to the responsibility sharing effort.[580]

As already mentioned, it is too early in the Compact's implementation to assess any normative impact on the nature of responsibility sharing in international refugee law. Indeed, many of the responsibility sharing modalities envisaged in the Compact can be said to be promising. In particular, what stands

[578] Brazil High Level Meeting on Addressing Large Movements of Refugees and Migrants Roundtable 4, Statement by HE Alexandre de Moraes, Minister of Justice and Citizenship (19 September 2016 New York), available at https://www.un.org/en/development/desa/population/migration/events/ga/documents/2016/roundtable4/brazil.pdf

[579] Global Compact, para 95.

[580] Global Compact, para 3.

out is that the Compact promotes responsibility by capacity, by calling states to contribute on the basis of their capacities, resources and levels of development.[581]

Despite these positive advances, the thesis argues that the Compact is unlikely to fill in the normative gap of the Refugee Convention with respect to responsibility sharing. This is primarily because the Compact solely rests on what has been described as the conundrum of 'no new obligations but with a political commitment'. [582] The pledges and contributions to protection and solutions remain entirely discretionary for states, as does the participation to the Global Refugee Forums. There is no formal structure,[583] outside the ad hoc Global Refugee Forums, nor an explicit responsibility sharing partnership between states based *in international law*.[584] The whole edifice of the Compact rests in the good will of states that choose to participate in the Forums every four years.

Lastly, the Global Compact has in many respects drawn and cherry picked from a combination of climate change law instruments but missed important opportunities in the process of doing so. One such missed opportunity is not explicitly adopting a framework of CBDRRC[585] and expressly pronouncing on the *common responsibility* to protect refugees and resolve refugee situations and what that entails with respect to states' *differentiated* contributions to protection and solutions.

[581] Global Compact, para 5.
[582]Gilbert 'Not Bound but Committed', 29.
[583] Aleinikoff, The Unfinished Work of the Global Compact on Refugees', 613.
[584] Geoff Gilbert 'Not Bound but Committed' (2019) 59 International Migration IOM 28, 30. Emphasis added.
[585] Global Compact on Refugees, para 1 and 4.

3.6. Conclusions

As a matter of international law, the STC arrangements discussed in this Chapter, constitute a bad faith implementation of the duty to cooperate in the provision of refugee protection and solutions, going squarely against fair responsibility sharing. The only exception to such practices can be currently seen in the context of responsibility sharing in Latin America.

The increasing focus of the Global North on migration management and border control has thus had a direct impact upon the provision of international protection by defining approaches to asylum.[586] Western states' efforts to move refugees away from their borders and contain them in third countries are challenging the very foundations of the international refugee regime. [587]

The STC arrangements discussed in the Chapter have enhanced the risk of direct or indirect *refoulement*, contributed to indefinite prolonged detention, family separation, as well as other numerous violations of refugees' human rights.[588] This is because the true objective of the Dublin Regulation, Australia's offshore processing regime and the other bilateral agreements discussed in the context of responsibility sharing in the practices of states, has been border control, combatting people smuggling, and control of irregular or secondary migration movements.[589]

What is more, these practices directly challenge the vision of a cosmopolitan idea of hospitality towards refugees. According to Shacknove and Byrne, the STC concept in particular, has normative implications, to the extent that it, 'stresses the random geographic proximity of host States to the country of origin, runs counter

[586] Crisp, 'A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime' UNHCR New Issues on Refugee Research, Working Paper No 100. (December 2003).

[587] Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 171.

[588] Moreno Lax, 'The Legality of Safe Third Country Notion Contested: Insights from the Law of Treaties', 668.

[589] Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 164.

to the intended universal scope of the Refugee Convention (..) and undermines the principle of burden sharing'.[590]

A further result of the STC arrangements is the negative impact they have on interstate relations. As evidenced in the context of the EU, frontline Member states were disproportionately encumbered because of the Dublin's operation and left without support from their fellow central and northern Member States creating tensions in the region.

In the context of the wider North-South relations, Northern countries have generally endorsed, in one way or another, the STC concept and have expressed the view that 'earlier passage or stay in another country' engages the responsibility of that state for the processing of the claim.[591] Refugee-hosting developing states, on the other hand, have at various opportunities expressed their concern on STC practices and the view that such practices undermine fairness between states. In 1993, Brazil stated before the UNHCR Executive Committee:

> Recourse to the concept of "protection elsewhere" also posed serious problems, since it placed increased pressure on less developed countries or those not sufficiently prepared to provide protection and assistance to refugees. [592]

In a similar vein, the Bulgarian representative commented:

> Some countries were applying the concepts of first country of asylum and safe country of origin in a manner that caused his Government great concern

[590] Byrnie and Shacknove 'The Safe Country Notion in European Asylum Law,' 227.
[591] Moreno-Lax, 'The Legality of Safe Third Country Notion Contested, : Insights from the Law of Treaties', 707.
[592] UNHCR Executive Committee, Forty-fourth session, A/AC.96/SR. 485, October 1993, Summary Record of the 485th / Statement of Brazil para 2.

> (..) The problem was one of the utmost importance for Bulgaria, a major transit country for refugees from Africa, Asia and the Middle East.[593]

In light of the above, the STC arrangements result in a glaring imbalance of protection responsibilities between states by stressing responsibility by proximity, rather than responsibility by capacity. [594]

To conclude, throughout the life of the international refugee law regime life, the need for greater fairness in the way refugee protection responsibilities are shared between states has been acknowledged by host states, donor states and UNHCR before multiple fora and most recently within the Global Compact on Refugees.

To return to the lessons learnt from the UNHCR Convention Plus Initiative identified earlier in the discussion, and Zeick's observation of a structural adjustment that was missing at the time,[595] it is argued that a structural adjustment is still missing today from international refugee law. The structural adjustment necessary to fill in the gap of responsibility sharing consists of a responsibility sharing structure that will permanently institutionalise responsibility sharing in international law and put in place a partnership framework, whereby states of origin, transit and destination come together and contribute to protection according to their capacities and resources.

To this end, a conception of responsibility sharing put forward in the thesis is considerably narrower than the one reflected in the Global Compact on Refugees. It is limited to a common baseline commitment to financial and physical responsibility sharing. Financial sharing is understood as humanitarian

[593] UNHCR Executive Committee, Forty-fourth session, A/AC.96/SR. 485, October 1993, Summary Record of the 485th / Statement of Bulgaria, para. 47.
[594] M W Doyle, 'Responsibility Sharing: From Principle to Policy' (2018) 30 International Journal of Refugee Law 618, 619.
[595] Zeick, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 404.

and development assistance to refugee host countries to meet the rights of refugees guaranteed by the Refugee Convention and physical sharing is understood as the need for physical relocation through the institution of asylum, resettlement and other complementary pathways to protection when refugee host countries are severely encumbered. These two essential components symbolize the common baseline commitment each state should make to refugee protection. Other refugee related action such as policy harmonisation in regional contexts, political support in countries of origin, root causes prevention, resources, research and expertise to host countries are important insofar as they complement and not substitute the baseline commitment.

Part II

4 Common But Differentiated Responsibilities and Respective Capabilities and Responsibility Sharing in International Environmental Law

4.1. Introduction

This part of the thesis embarks on a *de lege ferenda* exploration of how international refugee law can develop to fill in the gap of the Refugee Convention, under a formal structure of responsibility sharing that codifies a responsibility sharing obligation in international law. In pursuing this, the parallel study of international environmental law is instrumental.

This Chapter begins with a brief discussion of the logic of differential treatment in other areas of international law reflecting of community interests, including the law of development and international trade law, the law of the sea and international human rights law. The discussion provides context and historical background on the various rationales for differentiation between states in various legal regimes, evidencing that contextual, non-reciprocal commitments have long been a key feature of international law making. It continues with a discussion that sheds light on the normative rationale of the principle of CBDRRC, which reflects an idea of fairness in international law, exemplified in the context of resource and benefit allocation between states of the Global North and the Global South. Further, it examines how the logic of CBDRRC has been implemented in key multilateral environmental agreements (MEAs), before embarking on a detailed journey into the role and evolution of the principle in the international climate change regime. It concludes with a detailed analysis of the legal architecture of

the 2015 Paris Agreement on climate change, as one recent example of how international law can accommodate the competing and often conflicting interests of states under a legal framework in pursuit of community interests.

4.2. Differential treatment in international law

Common but differentiated responsibilities and respective capabilities[596] captures the essence of differential treatment in international environmental law.[597] Although the doctrine of CBDRRC originated and was explicitly articulated in international environmental law, the wider practice of differentiated legal obligations between states can be traced back to the Treaty of Versailles.[598]

Historically, differential treatment emerged as a way of balancing the inherent inequalities and competing interests among states - something that had been previously largely ignored in international law making.[599] At a more theoretical level, differentiation in law stems from an idea of substantive equality between states.[600] This is in contrast to the legal equality of sovereign states that requires their strict and uniform legal treatment.[601] In practice, it has also been a tool for forging collective action and ensuring broader participation in multilateral treaty

[596] The principle of 'common but differentiated responsibilities and respective capabilities' was first expressed as 'common but differentiated responsibilities' in the 1992 Rio Declaration on Environment and Development as Principle 7.

[597] Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', (1999) 10 European Journal of International Law 549, 577.

[598] Cristopher D Stone, 'Common But Differentiated Responsibilities in International Law' (2004) 98 American Journal of International Law 276, 278. referring to the 1919 Constitution of the International Labour Organisation. Footnote omitted.

[599] Antonio Cassese, *International Law in a Divided World* (Oxford Clarendon Press 1986), 351.

[600] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', (1999) 10 European Journal of International Law 549, 553.

[601] Dinah Shelton, 'Equity', in D Bodansky, J Brunnée & E Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007), 646.

regimes.[602] In summary, the role of differential treatment is generally understood as twofold; a distributive one, insofar as states are not substantively equals and a facilitating one, insofar as it strengthens multilateralism and cooperative action.[603]

4.2.1. Differential treatment in international trade and international development law [604]

When the international community acquired a more heterogeneous composition little after decolonisation in the 1960's, it became clear that formal legal equality, as legal corollary of sovereign equality, could not be upheld at all times.[605] Developing states had different social and economic priorities to developed states and therefore, the central challenge was to accommodate such diverse priorities and realities in a context-specific legal regime on international cooperation and responsibility sharing in the various areas of common concern to the United Nations in the pursuit of community interests.

The developing countries started to voice their concerns about the control over economic resources of their territories and to argue that political independence had not brought with it economic independence.[606] The states of

[602] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 550.
[603] Ibid. 558.
[604] The expression 'international law of development' (or 'international development law') is attributed to the economist A Philip who during the United Nations Conference on Trade and Development called developed states to establish such law. The legal school of international development law has appealed to French Jurists who shaped originally the debate and it was emerged in connection to the international development strategy put forwards by the UN in the 1960s. See Ahmed Mahiou, 'Development, International Law' Max Plank Encyclopaedia of Public International Law (2013).
[605] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 564.
[606] Ibid, 565.

Asia, Africa and Latin America had as their central preoccupation and mission their economic development.[607]

In 1964, a negotiating block of developing countries, the G-77/China, under the auspices of United Nations Conference on Trade and Development (UNCTAD) started putting before international for the demand to remedy economic stagnation during the colonial rule and to assist the less economically advanced states to become economically independent.[608] At the same time, alternative normative prescriptions for a new international legal system, that would respect and promote the interests of the global South, appeared in the academic discourse.[609] The birth of the law of development signified a nascent approach to international law, with the developing countries calling for a regime of positive discrimination, unilateral and non-reciprocal preferences, and for a new set of principles and rules on the international order.[610]

It was the 1970's when demands for a new set of international principles and rules culminated in the establishment of the movement of the New International Economic Order (NIEO).[611] The three fundamentals of the NIEO were the protection of the economies of developing countries, positive discrimination and non-reciprocity by means of application of the principle of preferential

[607] Lavanya Rajamani *Differential Treatment in International Environmental Law* (Oxford University Press 2006), 4.

[608] The Group of 77 at the United Nations http://www.g77.org/doc/

[609] The appearance of TWAIL (Third World Approaches to International Law) is an academic, intellectual movement that begun to confront colonialism and question the foundations of international law, as a system that legitimizes, produces and sustains the subordination of the Third World by the West. See Makau Mutua, 'What is TWAIL' (2000) 94 Proceedings of America Society of International Law, 31-38.

[610] Maurice Flory, 'Adapting International Law to the Development of the Third World' (1982) 26 Journal of African Law 12, 15.

[611] Daniel Magraw, 'Legal Treatment of the Developing Countries, Differential, Contextual and Absolute Norms' (1990) 1 Colorado Journal International Environmental Law and Policy 69, 74.

treatment.[612] Despite the short life of the NIEO movement, the dialogue between the North and the South was shaped by the NIEO rhetoric.[613] The year of 1974 was dedicated at the United Nations to the establishment of a NIEO. The adoption of the UN General Assembly Declaration on the Establishment of a New International Economic Order, [614] the Programme of Action on the NIEO,[615] and the Adoption of the Charter of Economic Rights and Duties of States[616] were the three instruments and outcomes of the NIEO movement. The UNGA Declaration on the Establishment of a New International Economic Order was founded in respect for the principles of *inter alia*, 'the broadest co-operation of all the States members of the international community based on equity' and 'preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible'.[617]

All three NIEO resolutions repeatedly affirmed the importance of equity, the latter dictating that the individual characteristics of developing countries need to be taken into account.[618] Shelton has noted that references to equity throughout the texts of the NIEO instruments, such as 'equitable sharing, equitable prices and equitable terms of trade' reflected a concerted effort 'to apply the principle of distributive justice to construct new legal and political arrangements to allow

[612] Wil D Verwey, 'The Principles of a New International Economic Order and the Law on General Agreement on Trade and Tariffs' (1990) 3 Leiden Journal of International Law 117,123.
[613] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 566. Rajamani, *Differential Treatment in International Environmental Law*, 19.
[614] Declaration on the Establishment of New International Economic Order UNGA A/Res/S-63201 (S-VI) (1974) Sixth Special Session.
[615] Ibid.
[616] Charter of Economic Rights and Duties of States', UNGA Resolution 'A/Res/29/3281 December 1974.
[617] Declaration on the Establishment of New International Economic Order, paragraph 4 (b), (n). 1974 Charter of Economic Rights and Duties of States, Article 25.
[618] Magraw, 'Legal Treatment of the Developing Countries, Differential, Contextual and Absolute Norms',78.

developing countries to overcome the inheritance of their colonial past'.[619] Equity or fairness thus understood, emanate from a conception of distributive justice that militates that the relevant dissimilarities, - pervasive inequalities 'of economic capacity or lack of development to tackle a given problem' among the subjects of law - [620] warrant special attention or special treatment in international law.[621]

Within international trade law, the claim for distributive justice was pursued by developing countries through an insistence on preferential treatment. Preferential treatment in trade agreements, namely granting special rights and privileges to the developing countries only, was one of the earliest instances of differential treatment within international law in favour of the developing countries. [622]

During the life of the NIEO movement, the General Agreement on Tariffs and Trade (GATT) tried to accommodate some of the demands of developing countries for non-reciprocity and preferential treatment. In 1964, the GATT was revised to include special provisions for developing countries.[623] In 1979, the GATT established a permanent legal basis for preferential treatment of the developing countries, commonly known as the 'Enabling Clause. This provided for derogation from 'the most favoured nation clause', namely GATT's Article 1 non-discrimination provision.[624] The contracting states adopted the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation

[619] Dinah Shelton, 'Equity', in D Bodansky, J Brunnée & E Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007), 650.
[620] Ibid. 647.
[621] Tuula Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreeme*nts (2009 Kluwer Law International), 40-41.
[622] Verwey 'The Principles of a New International Economic Order and The Law on General Agreement on Tariffs and Trade (GATT)', 123.
[623] 1948 General Agreement on Tariffs and Trade (GATT) Part IV Goods, Article XXXVI (8) recognized for the first time the principle of non-reciprocity in tariff negotiations or renegotiations.
[624]GATT, Decision of 28 November 1979 (L/4903).

of Developing Countries', which granted preferential tariffs to the developing countries.[625]

Notwithstanding the changes to GATT, the economic and social discrepancies between the developed and developing countries were not reduced and the profits of the vast majority of developing countries were very limited.[626] Even if the NIEO rhetoric managed to influence, in principle, the regulatory framework on international trade, in practice, trade concessions by means of preferential treatment of the developing countries were merely discretionary, 'an entitlement whose implementability is not guaranteed by a corresponding obligation to the extent necessary to make it a substantive right'.[627]

The claims of the developing countries on preferential treatment did not flourish because the developed states were not prepared to commit to legally binding, non–reciprocal preferential standards, nor to any form of wealth redistribution. The NIEO rhetoric did not make it beyond the early 1980's when a *laissez faire* approach to the global regulatory market was introduced.[628] The early 1990's witnessed the demise of preferential treatment of the developing countries in the global trade arena, especially since the establishment of the World Trade Organisation (WTO).[629] In light of the new pressing global concern in relation to environmental issues, the need for economic development resurfaced and differential treatment took the form of 'mutually accepted non-reciprocity'.[630]

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[625] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' 28 November 1979, GATT BISD 1980, 203-205.

[626] Verwey 'The Principles of a New International Economic Order and The Law on General Agreement on Tariffs and Trade (GATT)', 140.

[627] Ibid.,141.

[628] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 568.

[629] GATT Multilateral Trade Negotiations (the Uruguay Round): Marrakesh Agreement Establishing the Multilateral Trade Organization (World Trade Organization), 15 December 1993.

[630] Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 556. Shelton, 'Equity', 650.

4.2.2. Differential treatment in the Law of the Sea

The negotiations on the United Nations Convention on the Law of the Sea (UNCLOS),[631] were influenced by the NIEO rhetoric and relevant debates before the UNGA. [632] The Law of the Sea Convention recognises in various provisions the special needs of the developing countries.[633]

The need for differential treatment under the UNCLOS was somewhat different to that of the international trade regime. It was used as a means to ensure access to participation and benefit-sharing under the international seabed legal regime. The UNCLOS of 1982 established that the mineral resources of the deep seabed, what is termed 'the Area' are the 'common heritage of mankind' [634] and all activities in the Area, shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or land-locked, and taking particular consideration of the interests and needs of developing states.[635]

The concept of the 'common heritage of mankind' is the most well-known expression of community interest in international law with regard to the use of natural resources beyond national jurisdiction. [636] The institutionalisation of the principle in UNCLOS and the legal regime of the deep seabed establishes a regime of benefits-sharing between states that ensures an equitable sharing of financial,

[631] United Nations Convention on the Law of the Sea (adopted Montego Bay, 10 December 198 and entered into force 16 November 1994) 1833 UNTS 397.
[632] Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements*, 48.
[633] See indicatively, Article 202, 203 266, 267 268. Section 5 and 7 of the Annex to the 1994 Agreement provide for transfer of technology and economic assistance. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 1994.
[634] UNCLOS, Article 136.
[635] UNCLOS, Article 140.
[636] Simma, 'From Bilateralism to Community Interests', 240.

and other economic benefits derived from activities in the Area.[637] A community obligation in the pursuit of the community interest in the deep sea bed regime is the obligation of states to cooperate with each other and with the International Seabed Authority (ISA),[638] the latter acting as a trustee on behalf of mankind as a whole.[639] The UNCLOS thus fosters community interests and 'instantiates its vision of 'common but differentiated responsibilities'[640] by acknowledging the disadvantaged geographic location of some of the developing landlocked states[641] and by ensuring broad participation to the seabed regime and a fair distribution of its financial benefits.

In the context of prevention, reduction and control of marine pollution, the UNCLOS includes two provisions on preferential treatment of developing countries, prescribing that developing states shall be granted preference by international organisations in the allocation of funds and technical assistance to enable them to meet their marine environmental protection requirements. [642] To conclude, this type of differentiation in the area of marine pollution and technology transfer is different to the one advocated under the early years of GATT and the NIEO movement. It is an acknowledgment of the fact that developing countries have limited technical capacities and resources and thus require assistance from the developed countries. It is not, hence, based on some idea of redistribution of wealth.

[637] UNCLOS, Article 140, paragraph 2.
[638] UNCLOS, Article 153.
[639] Wolfrum, Identifying Community Interests in International Law, 26.
[640] Volker Roeben, 'Responsibility in International Law' (2012) 16 Max Planck Yearbook of United Nations Law, 99.
[641] UNCLOS, Article 148.
[642] UNCLOS, Articles 202-203.

4.2.3. Differential treatment in International Human Rights Law

As it has already been noted an idea of community interests is not reserved for spaces beyond national jurisdiction but extends to other areas of international law such as the protection of human rights.

It is not therefore surprising that an element of contextual differentiation therefore in favour of the developing countries, at the implementation level, structurally permeates international human rights instruments. The term 'contextual' is taken from Magraw's distinction of norms into 'differential, contextual and absolute'. [643] A contextual norm provides, on the face of it, identical treatment to all states-parties, but the implementation of it requires or permits consideration of characteristics that may vary from country to country.[644]

In the first instance, permitting states to differentiate in the implementation of their human rights obligations might seem problematic, but in practice international human rights instruments include provisions that cater for the needs of developing countries, particularly when it comes to the implementation and realisation of the rights prescribed .[645]

One such instance is the 1966 International Covenant on Economic, Social and Cultural Rights[646] (ICESCR) that offers a certain degree of flexibility to countries in the implementation of the rights of the Covenant.[647] Article 2 (1) of the ICESCR recognizes the particular socio-economic level of each state and requires states to take steps:

[643] Magraw, 'Legal Treatment of the Developing Countries, Differential, Contextual and Absolute Norms', 74.
[644] Ibid.
[645] Rajamani, *Differential Treatment in International Environmental Law*, 23.
[646] International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted in 16 December 1966, entered into force 3 January 1976) UNTS Vol 993.
[647] Rajamani, *Differential Treatment in International Environmental Law*, 21.

> [I]ndividually and through international cooperation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[648]

Recognition of the fact that states have different resources and capacities when it comes to the full realisation of the community interests enshrined in the Covenant does not mean that the rights protected thereunder are not universal, or that they can be subject to unfettered restrictions and abuse.[649] It simply stresses the fact that developing countries have lower levels of economic development and that the full realisation of the economic and social rights of its people, as well as of the aliens hosted in their territory, depend to a great extent on international cooperation.

As the Committee on Economic, Social and Cultural Rights explains in its General Comment on the nature of the obligation of Article 2:

> the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligations on socio-economic rights differ significantly from the obligation contained in Article 2 of the International Covenant on Civil and Political Rights, which 'embodies an immediate obligation to respect and ensure all of the relevant rights. [650]

[648] ICESCR, Article 2 (1).
[649] Ibid. 22.
[650] UN Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 9, of the Covenant).

The ‘progressive realisation’ concept infuses thus flexibility and represents a contextual form of differentiation between subjects of law, ‘reflects the realities of the real world’[651] and gives states a margin of appreciation when it comes to implementation of the Covenant.[652] Differential treatment in human rights law does not therefore alter the core of the legal obligations undertaken in the treaty by allowing for discrimination, rather it provides context and frames implementation in a way that acknowledges the limited capacities of the developing states.

Since securing the full gamut of the socio-economic rights requires resources and international cooperation, by analogy the full gamut of socio-economic rights envisaged in the Refugee Convention cannot be realistically guaranteed to the refugees, without assistance from the international community.

A cautionary note on this parallel however is that compliance with the Refugee Convention is not and shall not become conditional upon receipt of international assistance.[653] That said, the structural adjustment necessary to fill in the responsibility sharing gap of the international refugee law regime would require provisions that recognise the limited capacities of refugee host states whilst calling for meaningful assistance from the better resourced and capable states.

4.3. The normative rationale for differentiation in international law

The underlying thread for differentiation highlighted so far is the acknowledgement of the vast differences and the pervasive inequalities between states in an effort to redress them ‘in the service of some notion of fairness,

[651] Ibid.

[652] Magraw, Legal Treatment of the Developing Countries, Differential, Contextual and Absolute Norms’, 81.

[653] Dowd and McAdam, ‘International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law’, 198.

however elemental'.[654] Fairness considerations have equally underpinned the refugee responsibility sharing discourse with respect contributions. Reflections thus on the wider role of fairness in international law, particularly for multilateral law-making in areas of community interests are illuminating.

One of the most famous conceptions of justice in contemporary political theory, particularly relevant to our debate on responsibility sharing and allocation challenges, is found in John Rawls's Theory of Justice.[655] Rawls's conception of justice can be achieved only if the actors are placed in an 'original position' and behind the 'veil of ignorance', where actors behave rationally, as if they are equals not knowing whether they are advantaged or disadvantaged by social or natural contingencies.[656] In the said conception of justice, social and economic inequalities are tolerated on the basis of a 'difference principle', according to which social and economic inequalities are acceptable, insofar as they result in compensating benefits for everyone, and in particular for the least advantaged in society.[657] Although Rawls did not develop his theory of justice for international law,[658] by analogy, a Rawlsian conception of justice as fairness at the international level warrants that the inequalities of states are taken into account within the law's distributive aspects.[659] Rawls's theory of justice, although ideal theory, can have hermeneutic importance for international law. Indeed, as one scholar argues, the principle of CBDRRC in international environmental law reflects Rawlsian understandings of justice as fairness.

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[654] Rajamani, *Differential Treatment in International Environmental Law*, 47.
[655] John Rawls, *A Theory of Justice* (Harvard University 1999).
[656] Rawls defines original position as 'the appropriate initial status quo which ensures that the fundamental agreements reached in it are fair'. Rawls, *A Theory of Justice,* 15.
[657] Rawls, *A Theory of Justice* 13, and 65-70.
[658] Rawls expressed the view that the 'conditions for the law of nations may require different principles arrived at in a somewhat different way'. Rawls, *A Theory of Justice* , 7.
[659] For Rawlsian theories at the international level, Thomas Pogge, *Realizing Rawls* (1989) (Cornell University Press, Ithaca, NY).

> Reciprocity under cooperation governed by the principles of justice can be seen as a corresponding idea to common responsibility, and the 'everyone doing his/her fair share' as referring both to the requirement to participate in common action and to differentiated obligations when justice would require that.[660]

Another notable account of fairness developed, particularly for international law, is that of Thomas Franck.[661] When we speak of fairness, Franck contends, 'we allude to claims of justice.[662] Franck's account of fairness in international law and institutions is pertinent to the responsibility sharing debates in all areas of collective action and community interest, irrespective of the nature of the resource or the burden to be distributed.

Franck's analytical framework begins with a working definition of his conception of fairness, which encompasses two aspects; a procedural one which is legitimacy – i.e. decisions arrived under the right process by those who are duly authorised – which he terms *procedural fairness,* and a substantive one, which is the distributive effect of the international legal system, namely *distributive justice*.[663] As already noted, differential treatment serves a pragmatic rationale too, namely to secure effectiveness and wide participation in multilateral legal arrangements such as the GATT, UNCLOS and human rights regimes. Wider participation and voluntary compliance are very much dependent at the international level on the perception of the rule or a system of rules as 'distributively fair'.[664]

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[660] Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements,* 85.

[661] Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995).

[662] Franck, *Fairness in International Law and Institutions,* 477.

[663] Ibid., 7. Emphasis added.

[664] Franck, *Fairness in International Law and Institutions,* 7-8.

Franck offers a compelling argument on why matters of distributive justice should be a matter of international law, which this thesis endorses and builds on consistently with an enlightened positivist methodology. Normative considerations of fairness should be central to the assessment and development of the law, 'for the law must create solutions and systems which take into account society's answers to these moral issues of distributive justice, for we are moral as well as social beings.'[665]

Today's international law accommodates normative considerations of fairness in the wider fairness discourse, even if they are not explicitly articulated as such:

> Bilateral and multilateral aid programs, concessionary lending, commodity stabilization, trade preferences [for poorer trading partners], resource transfers and sharing, and the creation, and equal or equitable distribution, of new resources: these are the new entitlements which mark a global awareness that distributive justice .... is never off the agenda, whether the subject is manganese nodules on the ocean floor, geostationary orbits in outer space, or penguins and the Antarctic's icecap. [666]

The concept and meaning of equity in international law is somewhat distinct to common law jurisdictions.[667] Equity in international law has come to reflect the considerations of substantive differences between states when distributing

[665] Ibid., 8.

[666] Ibid., 436.

[667] In common law jurisdictions, equity represents the corrective function in the application of the law in an individual case. Therefore, international law commentators from common law jurisdictions are cautious in using the term equity in public international law. A well-rehearsed debate on the nature of equity in international law is found in the Proceedings of the American Society of International Law (1988) 277- 291 as well as in Francesco Francioni, 'Equity in International Law' *Max Plank Encyclopaedia of International Law.*

burdens and benefits.[668] Thus, equity in international law becomes synonymous with fairness.[669] Batruch elucidates this point, by contending that 'what in moral terms is called fairness, in law is termed equity. [670] Soltau argues:

> The language of sharing responsibilities for collective problems, of taking account of the relative position and capacities of developed and developing countries in the establishment and implementation of international regimes is the idiom of fairness in relations between states.[671]

It is precisely this synonymous relationship of the two terms that manifests itself in the interchangeable use of both in the context of refugee protection and the relevant debate on responsibility-sharing that also revolves around an idea of fairness.

More than any other area of international law, international environmental law has been the most progressive legal arena, where fairness and equity concerns have been structurally integrated within the various environmental protection regimes through the doctrine of CBDRRC. [672] CBDRRC is environmental law's tool for structurally integrating considerations of fairness, either at the level of norms or at the level of implementation of norms. Like the 'common heritage of

[668] On this use of the term equity, Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements*, 99.
[669] Henry Shue writes that what diplomats and lawyers call equity incorporates important aspects of what ordinary people everywhere call fairness. Henry Shue, 'Global Environment and International Inequality' (1999) 75 International Affairs 531.
[670] Christine Batruch, 'Hot Air as Precedent for Developing Countries? Equity Considerations' (1999) 17 UCLA Journal of Environmental Law Policy 45, 48.
[671] Fridrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University Press 2009) 189.
[672] To be sure, equity in international environmental law has further two distinct iterations; intergenerational and intragenerational equity. See for a discussion Shelton, 'Equity'.

mankind' principle, CBDRRC is a norm that expresses community interests in the protection of the environment.[673]

The following section discusses in detail how a logic of CBDRRC developed and framed the conclusion of multilateral environmental agreements (MEAs). The discussion offers the foundations for a well-rounded understanding of the trajectory and role CBDRRC took in the climate change regime.

4.4. Common But Differentiated Responsibilities and Respective Capabilities (CBDRRC) in multilateral environmental agreements (MEAs)

The need to differentiate between states of the Global North and the Global South emerged over a 'dialogue of dissonance'[674] over international cooperation for the protection of the environment. Understanding this dissonance can be helpful to the refugee responsibility sharing debate.

The dissonance emerged over two conflicting community interests, both arguably in dire need for international regulation and international cooperation at the time; the protection of the environment and the economic development of some countries. One of the early global environmental dialogues took place in Stockholm, during an international conference convened under the auspices of the UN in 1972.[675]

The Report on the UN Conference on Human Environment stressed the need to balance environmental protection with economic development bringing, within its ideological terrain, the protection of basic human rights and fundamental freedoms as part of the human environment.[676] The Stockholm Declaration proclaimed that all non-renewable resources of the Earth must be managed in a

[673] Brunnée, 'International Environmental Law and Community Interests', 151.
[674] Rajamani, *Differential Treatment in International Environmental* Law, 54.
[675] Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, at 2 and Corr.1.
[676] 1972 Stockholm Declaration on the Human Environment, Principle 1.

way that ensures that benefits are shared by all mankind.[677] The special developmental needs of the developing countries were to be catered for through the transfer of substantial quantities of financial and technological assistance.[678]

Some of the key MEAs that advance the protection of community interests implement a CBDRRC logic. The first multilateral environmental agreement, premised upon differential treatment in favour of the developing countries, was the international legal regime on the protection of the ozone layer.

The depletion of the ozone layer was initially a problem predominantly impacting the Northern hemisphere.[679] Uncoordinated, unilateral action from specific countries resulted in a 'free rider' effect[680] that urgently needed the conclusion of a cooperative framework that would address it. The Vienna Convention on the Protection of the Ozone Layer[681] did not contain any substantive obligations for the states - parties. Rather concluded as a framework convention, it sketched a general framework on the causes and effects of the ozone depletion through international cooperation and responsibility sharing.[682] In accordance with the provisions of the Convention, and given the gradual global consensus on the gravity of the problem, developed and developing countries concluded a second legal instrument, the 1987 Montreal Protocol on Substances

[677] Ibid., Principle 5.
[678] Ibid., Principle 9.
[679] Initial scientific evidence of the impact of industrially produced chlorofluorocarbons (CFC) interacting with the stratosphere and destroying the ozone layer – a gas that absorbs ultra - violet radiation from the sun, protecting thus the earth was disturbing for the countries of the North America, Western Europe, Japan, China, Soviet Union. Louis P Oliva, 'The International Struggle to Save the Ozone Layer' (1989) 7 Pace Environmental Law Review 213, 219.
[680] Franck, *Fairness in International Law and Institutions*, 382.
[681] Vienna Convention on the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) UNTS 1513.
[682] Catherine Redgwell 'International Environmental Law' in M Evans (ed) *International Law*, 694.

that Deplete the Ozone Layer.[683] The Montreal Protocol is considered to be a success story in terms of cooperative responsibility sharing framework within a treaty regime .[684] Franck characterized the ozone legal regime as the culmination of the fairness discourse and fairness-related claims on equitable distribution of environmental burdens, 'informed by economic and scientific information and aided by creative lawyering'.[685]

Specific targets for the reduction of ozone-depleting substances were explicitly introduced based on differentiation between developed and developing countries under the Protocol. Developing countries were granted longer implementation periods,[686] such as delayed compliance schedules[687] and permission to adopt different base years.[688] Financial and technological assistance were also conditions for the developing countries' compliance with the Protocol.[689]

Within such a flexible responsibility sharing structure, states accommodated the special claims of the least developing countries for economic development through the controlled use of chlorofluorocarbons (CFCs), enabled resource transfer from the North to the South in the form of financial and technological assistance, crafting a legal regime on costs and benefits allocation against efficiency and fairness. Franck observes that the developed countries secured the much-needed cooperation of the least developing countries in the regime because the fairness discourse 'played an openly acknowledged part' in the

[683] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) UNTS 1522.
[684] Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental law' (2012) 88 International Affairs 605, 608.
[685] Franck, *Fairness in International Law and Institutions*, 380-381.
[686] Montreal Protocol, Preamble.
[687] Montreal Protocol, Article 5.
[688] Montreal Protocol, Article 5 (3) (a).
[689] Ibid. Article (5).

negotiations.[690] As seen earlier, such fairness discourse between states of the Global North and developing refugee host states of the South was manifestly absent from the UNHCR Convention Plus Initiative and the lack of transparency was one of the reasons that the initiative failed. The Global Compact's fairness will also depend on matters of procedural fairness, namely to what extent states contribute to protection and solutions in accordance with their capacities as well as on the impact of those pledges and contributions on refugee protection, namely on fairness vis-a-vis the refugees.

The rationale for differentiating in favour of the developing and least developing countries in the ozone layer regime, is not to exclude the developing countries from legal commitments, but rather to ensure that all states take action and help them meet such commitments under the relevant regime progressively.[691] It is only through the transfer of finance and technology that developing parties can meet their obligations under the Montreal Protocol.[692]

A question that has arisen here is in relation to the legal conditionality, if any, for developing countries' compliance with their obligations under the Protocol. In other words, is compliance with the treaty conditioned on funding and resource transfer from the developed countries? In the absence of such transfer, should developing states be relieved of their obligations?

If one were to draw a parallel here to the refugee protection context, it is without doubt that developing refugee host countries, local communities and essentially refugees are dependent on developmental aid and support. This is

[690] Franck, *Fairness in International Law and Institutions*, 386.

[691] Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental law', 608.

[692] Montreal Protocol, Articles 5 (5) and Article 6. 'Developing the capacity to fulfil the obligations of the Parties operating under paragraph 1 of this Article to comply with the control measures (…) will depend upon the effective implementation of the financial co-operation as provided by Article 10 and the transfer of technology as provided by Article 10A.

where a CBDRRC guided framework can flesh out the responsibility of the Global North countries to contribute in some sort of proportion to its economic and social capacities to protection and solutions.

Another environmental matter which qualified in the 1990s as an area of common concern and therefore as a reflection of community interest was the continuing loss of biodiversity and the urgent need for its conservation. The 1992 Convention on Biodiversity[693] establishes differentiated responsibilities between the developed and developing states. Developing countries are tasked with the protection of their biodiversity, while their social and economic priorities are taken into consideration.[694] Effective protection of the biodiversity in the Global South depends on finance and bio-technology transfer from the developed countries.[695] Here too, developing countries' obligations to the Biodiversity Convention stand irrespective of whether resources from the developed countries are eventually transferred, although the Convention acknowledges that the level of implementation by the developing countries 'will depend on the effective implementation by developed country Parties of their commitments'.[696] It is important for the perceived fairness and effectiveness of the regime, that the limited resources and capacities of the developing countries are acknowledged.[697] Although the Biodiversity Convention does not explicitly pronounce on CBDRRC, the underlying logic is found in Articles 6 and 20 that provide for each party's particular conditions and capabilities when meeting its contractual obligations, as well as in the provisions on financial and technology resource transfer to the developing countries.

[693] The Convention on Biological Diversity (5 June 1992) (1760 U.N.T.S. 69); Hereinafter, Biodiversity Convention. Preamble, recital 2.
[694] Biodiversity Convention, Article 20 (4).
[695] Ibid., Article 16 (2) & Article 20 (1).
[696] Ibid., Article 20 (4).
[697] Ibid., Article 16 & Article 20.

Finally, another instance where the limited capabilities and resources of the developing countries are acknowledged and catered for within the legal framework, is the 1989 Basel Convention on Hazardous Waste.[698] The legal regime of the Basel Convention is however different to that of the Ozone Lawyer and Biodiversity. It differs because it is not a legal regime that establishes a general framework for the protection of an area reflecting a common concern. The concept of 'common concern' in international environmental law is targeted at specific environmental processes or protective actions, arising beyond the jurisdiction of states and within the jurisdiction of individual states, mostly identified as such in treaty regimes.[699]

The Basel Convention, although it does not explicitly frames hazardous waste management as an area of common concern, it seeks to control the outsourcing of hazardous waste to developing countries that are ill-equipped financially, as well as technologically, to manage the waste in an environmentally sound way.[700] The Basel Convention provides, therefore, for different rights and obligations between states of import (developing) and states of export (developed). As one commentator noted, the Basel Convention, in Article 6 'codifies procedural justice' by providing the developing countries with an absolute right to refuse any import of hazardous waste, unless they expressly consent to it.[701] In this way, the Basel Convention seeks to alleviate the pressure

[698] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, (adopted in 1989 and it came into force in 1992), UNTS 1673. (Basel Convention).

[699] Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée & Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press 2009), 565.

[700] The Basel Convention, Preamble, & Article 14 (2). The Convention provides that transboundary movements can only take place, if certain conditions are met and if they are in accordance with certain procedures.

[701] Basel Convention, Article 6. Lisa Widawsky, 'In my Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice' (2008) 38 Environmental Law 577, 595.

developing countries are often faced with and reduce the environmental burdens borne by these financially and technologically ill-equipped countries to manage them.[702]

4.5. The international climate change law regime – The 1992 Rio Declaration

The dissonance over economic development and environmental protection continued during the second 1992 United Nations Conference on Environment and Development (UNCED), which took place in Rio.[703] Developing countries sought access to the global market, trade, technology and development assistance whilst the developed countries sought progress on climate change, biodiversity, fisheries issues and forest loss.[704] The delicate balance of competing interests was achieved through the 'inchoate' at the time, 'concept of sustainable development',[705] first articulated in the 1987 Brundtland Report.[706]

The Rio Declaration incorporates international environmental law's key guiding principles: The polluter pays,[707] the precautionary principle,[708] and the principle of common but differentiated responsibilities.

Principle 7 reads:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have

[702] Ibid.

[703] United Nations Conference on Environment and Development (UNCED), Earth Summit Rio de Janeiro, Brazil 3-14 June 1992.

[704] Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental law', 609

[705] Ibid.

[706] UN Report on the World Commission on Environment and Development Our Common Future (1987) United Nations.

[707] Rio Declaration, Principle 16.

[708] Rio Declaration, Principle 15.

> common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[709]

Effectively, Principle 7 guides international cooperation and responsibility sharing on the environment.[710] All states have a common responsibility to protect the environment from degradation, but the subsequent responsibilities - understood as commitments to take action - are further differentiated in accordance with Principle 7, on the basis of different contributions to environmental degradation.

During the negotiations of the United Nations Framework Convention for Climate Change (UNFCCC),[711] which began in 1991, the incorporation of the principle of CBDRRC within the treaty and what this would entail in practice became a matter of contention between developed and developing countries.

4.5.1. Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) in the United Nations Framework Convention for Climate Change (UNFCCC)

Climate change, also known as global warming, refers to the phenomenon of the extraordinary warming of the earth's atmosphere by increased concentrations of trapped Greenhouse Gas (GHG) emissions. It is therefore predominantly a

[709] Rio Declaration, Principle 7.

[710] Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press 2nd edition 2003) 231.

[711] United Nations Framework Convention on Climate Change (adopted May 1992, entered into force March 1994) UNTS 1771. (UNFCCC)

human-induced environmental phenomenon that requires immediate collective action. [712]

The Preamble to the UNFCCC frames the problem of climate. Change as of common concern by acknowledging its global nature and 'calls for the wider possible cooperation by all countries… in accordance with their common but differentiated responsibilities and respective capabilities' (CBDRRC). CBDRRC has framed climate change as a global problem, under a common responsibility framework, - a partnership between states emitters of greenhouse gases and states that contribute the least to the problem – with its differentiation element to have been instrumental in the legal regime's evolution. [713]

Action to combat climate change is guided by four pillars, namely: (1) mitigation – actions to limit or prevent the rising of the earth's temperature through the reduction of GHG emissions, (2) adaptation - actions to limit the harmful effects of climate change by adjusting ecological, social, or economic systems in response to actual or expected climatic stimuli[714] (3) financial support and technology transfer to developing countries for both mitigation and adaptation actions, and (4) transparency and compliance. The focus of this section is on the pillar of mitigation, as well as on the pillar of financial support and technology transfer because of the parallels and useful lessons that can be drawn for refugee responsibility sharing.

As mentioned above, Principle 7 of the Rio Declaration enunciated CBDRRC as the guiding principle for international cooperation and burden

[712] 97% Scientific consensus supports that global warming is mostly man-made – largely down to burning fossil fuels and deforestation on a mass-scale. https://www.wwf.org.uk/climate-change-and-global-warming

[713] Brunnée, 'International Environmental Law and Community Interests Procedural Aspects',166

[714] An adaption measure would be for instance the building of flood defences, and the setting up early warning systems for cyclones. https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean

sharing in the area of environmental protection. The principle of CBDRRC was further *legalised* when it was included in the UNFCCC.[715] Article 3 of the UNFCCC is titled 'Principles' and includes the precautionary principle, sustainable development, equity, and the principle of CBDRRC. Much has been said about their legal character, but it is widely acknowledged that their function qua principles in the operative part of the treaty is to guide the parties in their actions to achieve the Convention's objective and to implement its provisions.[716]

Comparing Rio Principle 7 to UNFCCC Article 3, one notes that the formulation of CBDRRC is somewhat different. Article 3 of the UNFFCC reads:

> The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

The principle's original formulation is thus extended to additionally include states' capabilities to respond to climate change. Commentators explain that this was made following the developed countries' insistence on the projected and expected rapid economic development of some of the developing countries, which would warrant a more dynamic differentiation in relation to mitigation commitments.[717]

CBDRRC in the UNFCCC assigns greater responsibility to those countries which have contributed more to the climate's degradation because of their emissions as well as to those countries that have more resources and capacities to

[715] UNFCCC, Preamble & Article 3.
[716] Daniel Bodansky, Jutta Brunnée , Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2018), 127.
[717] Ibid., 128.

deal with the situation.[718] Under the Convention, Annex I parties have an individual legal obligation to adopt national mitigation policies and measures to limit their GHG emissions, as well as to report on it.[719] In relation to the individual commitments to mitigation, the UNFCCC does not provide for emission reduction targets. Concluded as Framework Convention,[720] it sought to establish a skeletal framework of general principles and set the context, rather than concretise states' commitments. With its Annex–based differentiation of states, the UNFCCC offered a flexible framework for future action and solidified at the time, the rigid categorization of countries in Annex I and Non-Annex I parties. [721]

The principle of CBDRRC has been key to the subsequent development and the operationalisation of responsibility sharing under the climate change regime. This was evident in the negotiations of the Kyoto Protocol, an instrument that supplemented the UNFFCC, and which sought to operationalise CBDRRC through internationally negotiated, legally-binding, quantitative emissions targets only for the developed countries.

[718] Michael Weisslitz, 'Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' (2002) 13 Colorado Journal of International Environmental Law and Policy 473, 476.

[719] UNFCCC, Article 4 (2) (b).

[720] Framework convention are international environmental law's toolkit in forging collective action and participation to multilateral legal regimes. They establish the general principles and objectives and leave the details and the specific obligations towards the implementation of the objectives to be determined at a later stage and in subsequent legal instruments. On Framework Convention See Lawrence E. Susskind, Saleem H. Ali, *Environmental Diplomacy* (OUP 1994), 34.

[721] It shall be noted that there are provisions on review of the Annexes that could lead in amendments by a three-quarter majority. See UNFCCC, Articles 15, 16, 17.

4.5.2. Operationalizing CBDRRC under the UNFCCC

4.5.2.1. Responsibility sharing in the Kyoto Protocol – A sharp differentiation in mitigation targets between the parties

The Kyoto Protocol[722] was launched by the Berlin Mandate.[723] It was concluded in 1997 by the parties to the UNFCCC as a supplementary instrument to the Convention, focusing almost entirely on strengthening mitigation commitments of Annex I parties under Article 4.2 of the UNFCC.

The Kyoto Protocol is a legal instrument that establishes internationally negotiated, legally-binding, quantitative emission reduction targets and timetables for Annex I developed countries parties[724] whilst excluding the developing countries from any mitigation commitments.[725] A suggestion was made in the course of the Kyoto negotiations by some of the developed countries, and in particular the US, that the major economies among the developing countries should also voluntarily assume country-specific emission reductions commitments.[726] The US refused to reach its Kyoto targets and ratify the Protocol, unless major developing countries emitters such as China, India and

[722] Kyoto Protocol to the United Nations Framework Convention on Climate Change UNTS 2303,162.

[723] The UNFCCC required the Conference of the Parties to review whether the commitment of the developed countries to take measures by the year 2000 was adequate. Decision 1/CP.1, The Berlin Mandate FCCC/CP/1995/7/Add.1 (1995). The Parties agreed that new commitments were indeed needed for the post-2000 period and they established the Ad Hoc Group on the Berlin Mandate (AGBM) to draft a protocol or another legal instrument for adoption at COP-3 in December 1997 in Kyoto.

[724] Kyoto Protocol, Article 3.

[725] Annex I Parties to the UNFCC, as a result of their 150 years of their industrial activity. https://unfccc.int/kyoto_protocol The CBDRRC principle explicitly appears in Article 10 of the Kyoto Protocol.

[726] This was based on a Resolution that passed in the US Senate that forbid the US from signing any subsequent legal agreement additional to the UNFFCC. US Senate Resolution 98, 25 July 1997 105th Cong., 143 Congress Records. S8138-39 (Byrd-Hagel Resolution).

Mexico, also undertook mitigation action on a voluntary basis.[727] The China G7 strongly opposed such a scenario as going squarely against the Berlin Mandate and CBDRRC.[728] The US openly rejected the Protocol in 2001, when President Bush came into office.

Kyoto's legal commitments for Annex I parties are found in Article 3, which establishes an individual binding obligation of result for each developed country party to achieve its target.[729] The Kyoto targets are found in Annex B of the Protocol[730] and are not uniform for all Annex I parties. Although the targets were negotiated during the Kyoto international conference, they had been, by and large, sketched at the national level.[731] Commentators note that the differentiated Kyoto targets were as much a result of politics, as well as of a lack of agreement on objective criteria for an equitable differentiation.[732] This, in turn, led to a pledged-based process that reflected each state's national interests.[733] If one were to draw an analogy, a similar Kyoto-style approach to refugee protection would entail, what has been proposed by some scholars as the allocation of pre-determined binding refugee quotas.

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[727] Paul G Harris, 'Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy' (1999) 7 NYU Environmental Law Journal 27, 42.

[728] Ibid., 35.

[729] Although some initial targets did change during the diplomatic negotiations to reflect greater commitments. Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 172.

[730] Annex B quantified emission limitation or reduction commitment (percentage of base year or period), Kyoto Protocol.

[731] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 172.

[732] Among the proposed criteria for differentiation were CO2 emissions per capita, GDP per capita or CO2 emissions per unit of GDP. On whether all these 'objective' burden sharing rules serve fairness, See Lasse Ringius, Asbjorn Torvanger and Bjart Holtsmark 'Can multi-criteria rules fairly distribute climate burdens OECD results from three burden sharing rules' (1998) 26 Energy Policy 777.

[733] Honkonen, *The Common But Differentiated Responsibility Principle in Multilateral Environmental Agreements*,130.

Deeply controversial in many ways and overtly ambitious, some commentators note it is the most ambitious environmental agreement ever negotiated,[734] the Kyoto Protocol legalised the carbon market[735] and contributed to the future development of the climate change regime. Most crucially, it accidentally defined CBDRRC's trajectory. The sharp division of countries into Annexes was not going to be sustainable in the long term and was increasingly seen to not reflect existing realities. The fact that, under the Kyoto Protocol, China and countries with high GHG emissions were under no obligation to reduce them made many developed states gradually depart from the Kyoto regime and this bifurcated approach to mitigation commitments. Although the Kyoto Protocol is still a treaty in force, the political momentum for its extension has long disappeared. Instead, the recently concluded Paris Agreement, with its unique approach to CBDRRC, has taken over momentum.[736]

4.5.2.2. Responsibility sharing post-Kyoto: CBDRRC revisited

In the years that followed the conclusion and the entry into force of the Kyoto Protocol, the Parties to the UNFCCC had to review the future of the climate change regime. This was due to the unwillingness of many of the developed states to undertake new targets, unless major developing countries emitters also took action. In response to this, the Bali Road Map was adopted at the 13th Conference of the Parties (COP) in December 2007 in Bali.[737] The Bali Action Plan launched a *process*, a dialogue that would enable 'the full, effective and sustained

[734] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 161.
[735] The Protocol also includes provisions on emissions trading. Kyoto Protocol, Article 17.
[736] D Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 207.
[737] Report of the Conference of the Parties on its Thirteenth session, held in Bali from 3 to 15 December 2007. Addendum. Part Two: Action taken by the Conference of the Parties at its thirteenth session. Available at https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf

implementation of the Convention through long-term cooperative action' up to and beyond 2012, 'in order to reach an agreed outcome and adopt a decision'. [738]

The Bali Action Plan opted for a process towards an outcome and not for a legally binding instrument. [739] It required, for the first time, that the developing countries, take 'nationally appropriate mitigation actions in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner'.[740] This gradual departure from the Kyoto paradigm, towards a new approach to differentiation in mitigation, that had the developing countries contributing *equivalently* to global mitigation action with the support of the developed ones, enabled wider country participation, including crucially the US reengagement with the climate change regime.[741]

In 2009, the Conference of the Parties took 'note' of a political accord reached in Copenhagen. [742] The Copenhagen Accord, albeit a soft law instrument - similar to the Global Compact on Refugees- significantly influenced the bottom-up approach to mitigation. It introduced the idea of pledge and review for national mitigations commitments. More specifically, the Copenhagen Accord altered the way in which commitments under the UNFCCC are balanced and as a corollary, the way CBDRRC is interpreted. The political commitments thereunder represented a departure from the one-sided operationalisation of CBDRRC à la

[738] Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007. Addendum. Part Two: Action taken by the Conference of the Parties at its thirteenth session.

[739] According to a commentator the 'legal form that the outcome of the Bali Action could take, however, was left deliberately open'. It could be a legally binding instrument, a soft law instrument or a decision of the Conference of the Parties. Lavanya Rajamani, 'From Berlin to Bali, Killing Protocol Softly?' (2008) International and Comparatively Law Quarterly 918.

[740] Bali Action Plan 1 (b) ii.

[741] Rajamani, 'From Berlin to Bali and Beyond, Killing Kyoto Softly?', 910.

[742] Report of the Conference of the Parties on its 15th Session held in Copenhagen from 7 to 19 December 2009, Addendum UN Doc FCCC/CP/2009/11. (Copenhagen Accord). The COP took note of the Copenhagen Accord rather than endorsed in as a COP decision.

Kyoto-style, to a bottom-up process of pledge and review.[743] Under the Copenhagen Accord, all states parties to the UNFCCC, irrespective of their development status, committed to undertake mitigation commitments and submit them to some form of international scrutiny towards the ambitious objective of limiting the global average temperature to 2 degrees Celsius.[744] The emphasis, with respect to the principle of CBDRRC, is on the common responsibility, rather than the differentiated commitments, as was in Kyoto.[745] Developed countries under the Copenhagen Accord committed to undertake economy-wide emissions reduction targets subject to international monitoring review and verification.[746] Meanwhile, developing countries committed to undertake national mitigation actions, and if financed by a developed country, also be subject to international monitoring review and verification process.[747] The ideological dissonance between developed and developing countries over the financial assistance to the developing countries persisted in Copenhagen. Developed states saw the provision of assistance as 'an implicit quid pro quo' for developing states' mitigation commitments, whilst the latter saw it as payment by the developed countries for their historical carbon emissions.[748]

The changing character of CBDRRC was reiterated and endorsed in the subsequent COP Decisions arising out of the Ad Hoc Working Group's work post- Copenhagen.[749] In the 2014 Lima Call for Climate Action, towards a new

[743] Copenhagen Accord, para 4.
[744] Copenhagen Accord, para 1.
[745] Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104 The American Journal of International Law 230, 240.
[746] Copenhagen Accord, para 4.
[747] Copenhagen Accord, Para 6.
[748] Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem', 237.
[749] Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session Outcome of the work of the Ad Hoc Working Group on Long Term Cooperative Action under the Convention of 2010 Decision 1/CP.16/UNFCCC/CP/2010/7. (The Cancun Agreements).

agreement on climate change, the CBDRRC principle acquired an additional qualifier: Paragraph 3 of the Lima Call for Climate Action Decision reads:

> An ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances. [750]

The discussion thus manifests the dynamic evolution of CBDRRC in the international climate change law regime. The principle changed over the years to adapt to the ever-changing social and economic realities of states. The next section discussed whether the dynamic qualifier, introduced in Lima, was the necessary compromise for the survival of the CBDRRC in the future of the legal regime.

4.5.2.3. Responsibility Sharing in the Paris Agreement – CBDRRC *sur-mesure*:

The CBDRRC dynamics were put to the test during the negotiations of a post-2020 climate change law regime in Paris in 2015. The Paris Agreement[751] re-introduced CBDRRC in the context of a multilateral treaty of universal obligations and re-established the concept, both as a legal device and as an application of elemental fairness in a legal regime, defined by prevalent asymmetries, vulnerabilities and different levels of socio-economic realities.[752]

The Paris Agreement has a very ambitious objective; to hold the increase in global temperature to well-below 2 degrees Celsius above pre-industrial levels,

[750] The Lima Call for Climate Action 2014, Decision -1/CP.20/UNFCCC/CP/2014 Add. Para 3.

[751] UNFCCC, Decision 1/CP/.21 'Adoption of the Paris Agreement' (entered into force 29 January 2016) FCCC/CP/2015/10/Add.1, Annex. (Paris Agreement).

[752] Mariama Williams, Manuel F Montes, 'Common But Differentiated Responsibilities: Which way Forwards?' (2016) 59 Dialogue, 114.

and to pursue efforts to limit the temperature increase towards 1.5 degrees Celsius.[753] The Agreement contains a distinct version of CBDRRC from previous instruments. The basis for differentiation in states' legal commitments is no longer the contribution to environmental harm rationale, but the respective capabilities and national circumstances. [754] One can see that this new version of CBDRRC is a conscious nod to practical international politics.[755]

The responsibility sharing arrangement in the Paris Agreement is still normatively premised on CBDRRC, but it now entails an innovative, self-differentiation model, tailored to each state's national circumstances and respective capabilities. With respect to mitigation commitments, each party can self-differentiate its commitments from its fellow parties when communicating its Nationally Determined Circumstances (NDCs). Furthermore, whilst developed countries are normatively expected to continue to take the lead in climate action because of their greater capacities,[756] the text of the agreement 'leaves little room for tailoring commitments to differentiated responsibilities for environmental harm'.[757]

The version of CBDRRC incorporated in the Paris Agreement is of particular relevance to responsibility sharing in international refugee law. A closer study of the version and how it structures the responsibility sharing arrangements reveals the cross fertilisation of the Global Compact on Refugees with this specific climate change instrument. The Paris Agreement opens up differentiation across all pillars of responsibility sharing for climate change from mitigation, to

[753] Paris Agreement, Art 2 (1).
[754] Paris Agreement, Article 2 (2). Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 45 International and Comparative Law Quarterly 493, 511.
[755] Ibid.,514
[756] Paris Agreement, Article 4 (4).
[757] Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying, 511.

adaptation, finance and technology transfer, capacity building and transparency.[758]

An important objective of the UNFCCC and the Paris Agreement which builds on the UNFCCC, has been a notion of fairness. CBDRRC in the Paris Agreement promotes a new conception of fairness that frames the responsibility sharing arrangement.[759] The fairness of each NDC is self-assessed by the submitting state party and ought to be explicitly justified in light of CBDRRC. For example, the Parties when submitting their first rounds of NDCs in 2015 and 2016, included a narrative on why their NDC's are proportional to their 'common but differentiated responsibilities and respective capabilities in light of their national circumstances'.

A Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions of the Parties prepared by the UNFCC Secretariat in 2016, claimed that: '[s]ome Parties noted that no single indicator can reflect fairness or a globally equitable distribution of efforts'.[760] The parties justified their submitted NDC's in light of their particular, 'social, economic and geographical factors' or in light of more specific criteria, such as 'responsibility, capability and historical responsibility, based on climate justice, share of emissions, development and/or technological capacity, mitigation potential, cost of mitigation actions etc.[761]

In the first instance, the conception of fairness promoted in the Paris Agreement is endowed with a great degree of subjectivity determined by national

[758] Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 American Journal of International Law 288, 300.
[759] Nicholas Chan, 'Contributions and the Paris Agreement: Fairness and Equity in a Bottom-Up Architecture' (2016) 39 Ethics and International Affairs 291-301.
[760] Conference of the Parties Twenty-second session Marrakech, 7–18 November 2016 Aggregate effect of the intended nationally determined contributions: an update Synthesis report by the secretariat FCCC/CP/2016/2 para 25.
[761] Ibid.

self-interest. That said, the very fact that all parties' have a procedural obligation to submit their NDC's which are further publicly recorded, [762] ensures transparency. As one commentator argues, the subjectivity is, however, mitigated by further endowing fairness with 'a social character' which turns the submitted NDC's to '*public claims of fairne*ss'.[763] This is where the Global Compact on Refugees missed the opportunity to introduce a procedural obligation of states to participate at least in responsibility sharing with non-binding pledges ensuring a common baseline procedural commitment.

4.6. Financial assistance to the developing countries

Financial assistance to the developing countries has been an important element in the conclusion and implementation of multilateral environmental agreements. This section focuses on the financial obligations of the developed states to the developing countries under the UNFCCC and, specifically, under the Paris Agreement. The provision of financial support to the developing countries is very relevant to refugee protection, where the majority of refugees are hosted in the developing countries, and where humanitarian and development assistance from the developed states remains under the status quo discretionary and increasingly earmarked within existing developmental budgets.[764]

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[762] The NDCs communicated by Parties shall be recorded in a public registry maintained by the secretariat pursuant with Article 4, paragraph 12 of the Paris Agreement. https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx The UNFCCC, the Kyoto Protocol and most recently the Paris Agreement all had provisions exclusively dedicated to climate finance.

[763] Emphasis in the original. Chan 'Climate Contributions and the Paris Agreement: Fairness and Equity in a Bottom-Up Architecture', 298. Sandrine Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime? (2016) 25 Review of European, Comparative and International Environmental Law 151, 155.

[764] Dowd and McAdam, 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law', 208.

The developing countries have always sought to secure the necessary financial, technology and capacity building resources that would help them meet their mitigation and adaptation commitments under the climate change regime. Indeed, financial commitments on the part of the developed states have been the *quid pro quo* for the developing countries' cooperation and participation to the legal development of the climate change regime.[765]

All climate change law instruments, including the Paris Agreement, provide for developed states' financial commitments to the developing countries.[766] The UNFCCC, for example, notes that the effective implementation of the developing countries' commitments:

> will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties. [767]

Article 11 of the UNFCCC provides that 'a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology, is hereby defined.' It is important to highlight that the UNFCCC stresses the importance of resource transfer on a grant making, or at least concessional, basis. Without delving too much into climate finance detail, Article 11 did not specify whether the grant or concessional funding could be used to fund

[765] Bodansky, Brunnée , Rajamani, *International Climate Change Law* (Oxford University Press 2018) 138.
[766] UNFCCC, Article 4 (3) 4 (4) 11. Kyoto Protocol, Article 11. Paris Agreement, Article 9, 10, 11.
[767] UNFCCC, Article 4 (7).

adaptation measures in the developing countries, given the local, rather than global, benefit it would offer.[768]

Article 9 (1) of the Paris Agreement provides that developed countries *shall* provide financial resources to assist developing country parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention[769]. This provision establishes *a collective* legal obligation on the part of the developed parties as a whole to provide assistance to the developing countries.[770] The weakness of such wording, is that it is couched in rather passive terms, blurring further what each party is individually responsible for in terms of financial support.[771] The only mention of grant-based climate finance in the Paris Agreement is found in paragraph 4 and is made with regard to the adaptation needs of the least developed and small island countries. It reads:

> The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.[772]

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[768] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 147.
[769] Meaning the UNFCCC.
[770] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 Journal of Environmental Law 337, 353. Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European Comparative and International Environmental Law 142, 145-146.
[771] Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non Obligations', 353.
[772] Paris Agreement, Article 9 (4).

Acknowledging that the effective implementation of the mitigation and adaptation commitments of the developing countries depends on financial assistance, including technology transfer and capacity building,[773] is a statement of fact, that does not affect the obligation of the developing and least developed countries to mitigate and adapt. In other words, the obligations of the developing countries under the Paris Agreement are not legally contingent on receipt of support.[774] That said, the provision offers context to the effective implementation of the Agreement.

In practice however, many of the developing countries' pledged NDCs have been made partly or wholly conditional upon international support.[775] Therefore, despite the lack of legal conditionality between compliance and provision of assistance, developing countries have explicitly based their mitigation and adaptation commitments on receipt of support from the international community. Some commentators have highlighted the risk that the conditionality of the NDCs

[773] Provisions on technology transfer and capacity building in the Paris Agreement are found in Articles 10, 11 respectively.

[774] Bodansky, Brunnée, Rajamani, *International Climate Change Law*,131.

[775] As an example. Dominica's NDC under the Paris Agreement reads: 'This contribution is conditional upon receiving timely access to international climate change financing, technology development and transfer, and capacity building support for priority adaptation and mitigation measures. Dominica's INDC will remain provisional pending confirmation of timely access to international climate change financing, technology development and transfer, and capacity building support for priority adaptation and mitigation measures detailed in this INDC. Dependent upon COP21 outcomes, Dominica reserves the right to revise the INDC'. Dominica's NDC 2020 available at https://www4.unfccc.int/sites/submissions/indc/Submission%20Pages/submissions.aspx Zambia's NDC Zambia states that 'This emission reduction is conditional and subject to the availability of international support in form of finance, technology and capacity building. The total budget for implementing both components is estimated at US$ 50 billion by the year 2030, out of this USD 35 billion is expected to come from external sources while $15 billion will be mobilized from domestic sources'. Zambia's NDC available at https://www4.unfccc.int/sites/submissions/indc/Submission%20Pages/submissions.aspx

- though justified by fairness concerns - could eventually become the Paris Agreement's Achilles heel. [776]

What is important to take from the Paris provisions on financial assistance is that the limited capacities of the developing countries are recognised and catered for in the legal arrangement through the mobilisation of climate change funding, particularly for adaptation. Additional funding mobilisation is also envisaged in the Global Compact on Refugees for refugee hosting states and their communities[777] as one key component of effective responsibility sharing but it remains to be seen whether such funding will be additional to, namely above and beyond streamlined development funding.

4.7. The Paris Agreement: A model legal architecture

Much of the Paris Agreement provisions would not have been agreed on without the innovative legal design and creative lawyering that took place, which ultimately facilitated the conclusion of a multilateral treaty. This section of the thesis zooms into the legal architecture of the Paris Agreement as a model example of a multilateral instrument on responsibility sharing whose legal design, namely the 'art and craft' of its provisions, contributed at least partly in overcoming political unwillingness and collective action problems.[778] The term 'art and craft' is used in the title of a book written by the prominent American environmental lawyer, Daniel Bodansky, who has participated in all multilateral negotiations on climate change for the past ten years. In the author's words:

[776] W P Pauw, P Castro, J Pickering, S Bhasin 'Conditional nationally determined contributions in the Paris Agreement: foothold for equity or Achilles heel? (2020) 20 Climate Policy 468, 481.

[777] Global Compact para 32.

[778] Daniel Bodanksy, *The Art and Craft of International Environmental Law* (Harvard University Press 2011), 271.

> international environmental law, like politics is the art of the possible – and seeks to find the "sweet pot", which goes as far as possible but not beyond. Above all, it sees the discipline of the international environmental law, not as a panacea, but rather as an art and craft.

International refugee law has also been described, and rightly so, 'as a balancing act between the interests of different states as well as a gesture of solidarity towards persons in need of protection'.[779] To bring therefore responsibility sharing within international refugee law, would require a skilful compromise that would bridge the gap between competing positions and advance the ball, even if a little.[780] To this end, the study of the provisions on mitigation, transparency and implementation and compliance unfold true potential for the *de lege ferenda* development of international refugee law in light of the Global Compact advances.

The Paris Agreement is built upon a so-called hybrid legal architecture of bottom-up and top-down obligations to the global effort to tackle climate change. During the Paris Agreement negotiations, the issue of the legal nature of the instrument *per se*, the differentiation in states' mitigation, adaption, finance and transparency commitments, as well as the legal bindingness of each of the provisions, were central and highly vexed maters among the negotiators.[781] The treaty includes a wide range of provisions that span the spectrum of legalisation,

[779] Karageorgiou, *Rethinking Solidarity in European Asylum Law A Critical reading of the key concept in contemporary refugee policy, 18.*

[780] Bodanksy, *The Art and Craft of International Environmental Law*, 171.

[781] Lavanya Rajamani, Jacob Werksman, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal' (2018) 376 Philosophical Transactions of The Royal Society 1, 13.

from hard-law, to soft-law, and as some commentators have argued, to even 'non-law'.[782]

The Durban platform for Enhanced Action, that launched the mandate on the negotiations for what came to be the Paris Agreement, provided for the conclusion of either a 'protocol, another legal instrument or an agreed outcome with legal force under the Convention'.[783] The fact that the Paris Agreement was not concluded as 'protocol' was in deference to the American political sensitivities withstanding from the Kyoto Protocol nomenclature.[784] The Paris Agreement is a multilateral treaty under the definition of Article 2 (1) (a) of the VCLT.[785] As the VCLT specifies, the particular designation of an instrument does not affect its legal status.[786] The delicate balance of bottom-up and top-down commitments is examined further below.

4.7.1. Bottom up- NDC's

The nationally determined contributions (NDCs) are a fundamental building block of the Paris Agreement. The provision of Article 4 subjects each party to an obligation ('shall') to 'prepare, communicate and maintain successive

[782] As 'Non-law' obligations have been characterised by commentators those provisions in relation to adaptation that set mere aspirations and provide context prescribe parties to act in a certain way or achieve something. Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 213. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 356. Daniel Bodansky, 'The Legal Character of the Paris Agreement'(2016) 25 Review of European, Comparative and International Environmental Law 142, 147.

[783] UNFCCC 2012 Decision 1/CP.17 Establishing of an ad hoc Working Group on a Durban Platform for enhanced action.

[784] In addition to the US domestic legislative process before the Senate for concluding international treaties. An Agreement was an easier way for the Obama administration to commit at the executive level. Lavanya Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations' (2015) 78 Modern Law Review 826.

[785] VCLT, Article 2 (1) (a).

[786] Ibid.

nationally determined contributions that it intends to achieve'.[787] In relation to the legal character of this provision, it establishes an 'individual procedural obligation of conduct' for each party to the Agreement.[788] Crafted as an obligation of conduct, the provision does not obligate the parties to achieve their NDCs, intentionally falling short of creating an obligation of result.[789] Commentators agree that Article 4, does nonetheless, impose a good faith expectation on the parties, that they will take the necessary measures to implement their submitted NDC's.[790]

The way NDC's are constructed in Paris offers flexibility and latitude to each party to choose the content of their responsibility sharing commitments to climate change mitigation. The lesson learned from Kyoto was that states would never accept to be bound by pre-determined emission targets, hence only a more flexible, bottom-up approach to mitigation would be able to secure agreement. This is a useful insight to note for bringing the voluntary pledges and contributions of the Global Compact within international refugee law.

The Paris Agreement, as already stated, differentiates between the parties by setting different normative expectations between developed and developing countries, as well as amongst developing countries. For example, Article 4 (4) reinstates the practice that developed counties are encouraged *but not obligated* ('should') to continue taking the lead by undertaking economy-wide absolute emission reduction targets' and developing countries are encouraged to do the same over time, 'in light of different national circumstances'.[791] Commentators

[787] Paris Agreement, Article 4.
[788] Rajamani and Werksman, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal', 6.
[789] For content, during the negotiations, the US, China and India opposed any legally binding obligation of result that would require the Parties to achieve the NDC's. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 353.
[790] Rajamani and Werksman, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal', 6.
[791] Paris Agreement, Article 4 (4).

have highlighted that it was because the provision of Article 4 does not create any new obligations for the developed countries, other than the ones already voluntarily assumed, that the powerful states such as the US 'bought in' to the Agreement.[792]

Article 4 (3) sets a normative expectation for each party to progress its NDCs to reflect the highest possible ambition, in accordance with CBDRRC.[793] Developed countries, are therefore, normatively expected to be more ambitious with their emission reduction targets, as they have objectively more resources, and hence, more capabilities.[794] The level of ambition in the submitted NDCs will ultimately vary between the developing countries, as they too differ in national circumstances.[795]

At first, the latitude the parties are offered in relation to mitigation commitments might seem counterproductive and unsatisfactory from a strict legal point of view. After all, the NDCs in themselves are not binding and the parties are merely expected to achieve their pledges, instead of being legally obligated to do so. In this sense those with great legal expectations are let down. In order to be able to assess whether a legal obligation to pledge commitments, coupled with a good faith expectation to implement the pledges is sufficient to achieve the ambitious objective of the Paris Agreement, one needs to look at the greater picture. The Paris Agreement is a treaty under international law providing a solid structure of procedural obligations, and as Brunnée remarks procedure can promote the protection of community interests in a solid way by serving its own important function.[796] While the legal obligations are admittedly 'softened', the

[792] Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 355.
[793] Paris Agreement, Article 4 (3).
[794] This can be inferred from a combined reading of Article 4 (3), (4) and (5).
[795] Paris Agreement, Article 4 (4).
[796] Brunnée, 'International Environmental Law and Community Interests, Procedural Aspects', 155.

Paris Agreement provides for a unique oversight system in the areas of transparency, review and implementation that tames the parties' increased flexibility by placing a strong emphasis on procedure.

4.7.2. Top-down oversight system

To ensure effective implementation, the Paris Agreement sketches a relatively rigorous oversight system that completes the legal architecture. The way the oversight system is structured stems from the rationale that 'peer and public pressure can be as effective as legal obligation in influencing behaviour'. [797] The legal obligations on mitigation and financial support are further bolstered by respective legal obligations on transparency and accountability. [798]

4.7.2.1. Transparency framework

The purpose of the transparency framework is the tracking of progress and to ensure clarity on both mitigation and adaption. The Paris Agreement subjects the parties to individual obligations of information sharing. [799] In relation to mitigation, each party *shall* provide a national inventory report of anthropogenic emissions by sources and removals by sinks, as well as inform on its progress towards achieving its NDCs.[800] In contrast to reporting on adaptation measures, which allows for a certain discretion – 'each party should also provide information related to climate change impacts and adaptation, as appropriate' - there is no such margin on reporting in relation to mitigation action .[801]

[797] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 242.
[798] Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 353.
[799] Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics', 503.
[800] Paris Agreement, Article 13 (7) (a) (b).
[801] Paris Agreement, Article 13 (8).

Developed countries are also required to provide information on financial, technology transfer and capacity building support provided to the developing countries. [802] This requirement bolsters the obligation of developed countries to provide financial resources to assist developing country parties with mitigation and adaptation under Article 9, adding an extra layer of transparency in climate finance.

When it comes to information-sharing and transparency on refugee responsibility sharing contributions, international refugee law is considerably underdeveloped, given that there is no international or national information repository, outside the Global Compact's Dashboard that tracks the pledges and contributions, nor there are any procedural obligations upon states to report on their contributions to protections. In particular, transparency through the communication of reports would be key to a legal instrument on responsibility sharing. Apart from the informational role reporting primarily serves, when states join an agreement in good faith, 'national reporting can perform a policy function by encouraging self-examination.[803] Self-reporting can also contribute to norm making, as it allows for an assessment of the overall performance of a regime in achieving its objectives.[804]

Under the Paris Agreement, each party is required to report how it considers that its NDCs are fair and ambitious, in light of CBDRRC and how it contributes towards achieving the objective of the Agreement, as set out in Article 2.[805] An important lesson drawn from the negotiations of the Paris Agreement, as reported by participants, is that there are no agreed benchmarks for assessing fairness under

[802] Under the Paris Agreement the developed states have legal financial obligations towards the developing countries. Articles 13 (9), (10) and (11).
[803] Bodansky, *The Art and Craft of International Environmental Law*, 239.
[804] Ibid.
[805] Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21, FCCC/CP/2018/L.22. Annex I. para 6 and para 7.

the UNFCCC. This is because consensus on indicators has proved impossible.[806] However, if one conceptualises the value of self-reported NDCs as 'public claims of fairness', [807]against states' capabilities then international scrutiny and peer pressure can be a true gain. These are valuable lessons to tease out from the comparative study of the Paris Agreement that can provide room for improvement on the Compact's follow up and review process but crucially also serve as the fundamental building blocks of a future legal instrument on responsibility sharing.

4.7.2.2. A global stocktake

As information obligations track the progress on the substantive obligations of the Agreement, so does the exercise of a global stocktake. To this end, Article 14 provides a global stocktake of the collective progress and implementation of the Agreement every five years, 'in light of equity and the best available science'.[808] It is yet unclear how equity will inform the global stocktake in the absence of a definition in the climate change regime.[809] The ambition cycle, namely the five-yearly global stocktake, intends to enhance and strengthen the parties' NDCs, which are required to be more ambitious than the previous ones.[810] The assessment on the implementation is limited to the collective progress, insulating the parties from an assessment of the adequacy of their individual mitigation efforts.[811] Lastly, an integral part of the enhanced transparency framework under the Agreement, is a technical expert review of each party's submitted

[806] Lavanya Rajamani, Daniel Bodansky, 'The Paris Rulebook: Balancing international prescriptiveness with national discretion' (2019) 68 International and Comparative Law Quarterly 1023, 1031.
[807] Emphasis in the original. Chan 'Climate Contributions and the Paris Agreement: Fairness and Equity in a Bottom-Up Architecture', 298. Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?', 155.
[808] Paris Agreement, Article 14.
[809] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 245.
[810] Paris Agreement, Article 14 in combination with Article 4 (3).
[811] The first global stocktake is to take place in 2023.

transparency report.[812] According to the modalities and procedures agreed during the latest meeting of the Conference of the Parties in Katowice, technical experts will be able to review *inter alia* the implementation and achievement of a party's NDCs, identify areas for improvement, and review the adequacy or appropriateness of a Party's NDC under Article 4 of the Paris Agreement in order to enhance transparency and ambition. [813]

4.7.2.3. Implementation and Compliance Mechanism

Completing the oversight system, the Paris Agreement provides a mechanism on implementation and compliance. [814] Article 15 provides for a facilitative implementation and compliance mechanism, in the form of a standing committee of experts, that will operate in a non-adversarial and non-punitive way. The concrete modalities and procedures were only agreed on in 2018.[815] The rigor of the Committee's oversight role, at least in principle, can be inferred from the Paris Rulebook - the decisions adopted by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement- that flesh out the top-down elements with respect to the procedures and mechanisms envisaged in the treaty, including the Committee's modus operandi.[816]

In brief, the Committee of Experts can initiate proceedings, regarding non-compliance, with several binding procedural obligations that would otherwise

[812] Paris Agreement, Article 14 paras 11 and 12.

[813] Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December. Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement FCCC/PA/CMA/2018/3/Add.2. See section VII, Technical expert review, in particular para 146 and 149.

[814] Paris Agreement, Article 15 (2).

[815] Ibid., Article 15 (3).

[816] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018. Decision 20/CMA.1 FCCC/PA/CMA/2018/3/Add.2

escape review.[817] More importantly, the Committee may not address the 'content of the contributions, communications, information and reports' of the Parties.[818] The compliance procedure may only consider the breach of the procedural obligation of conduct *per s*e, namely the omission to submit an NDC or a national inventory report.[819] The compliance measures the Committee can take are 'soft' in nature and they include inter alia, opening a dialogue with the Party concerned, in order to make recommendations for the development of an action plan, or assist the concerned party, if necessary ,or issue findings in relation to matters of implementation and compliance.[820] The oversight system is as soft as political necessity required. It does preserve considerable autonomy, flexibility and discretion for states, [821] but it does structure the responsibility sharing arrangements with procedural obligations and guarantees.

To conclude, the Paris Agreement represents a unique legal architecture. It expands on the climate change responsibility sharing arrangement under the UNFCCC, adopting a pragmatic yet principled approach. The Paris Agreement creates few legal obligations of procedure softened against precision and the rest of the provisions set expectations and frame narratives.[822] The legal form of the NDCs were instrumental in reducing the perceived costs of sovereignty that would arise from the conclusion of a binding legal instrument on responsibility

[817] Rajamani, Bodansky, 'The Paris Rulebook: Balancing international prescriptiveness with national discretion', 1039.
[818] Decision 20/CMA.1 FCCC/PA/CMA/2018/3/Add.2, para 23.
[819] Ibid.
[820] Ibid., para 28-31.
[821] Rajamani, Bodansky, 'The Paris Rulebook: Balancing international prescriptiveness with national discretion', 1039. It will be interesting to see how the Committee will operate in practice. It was scheduled to adopt its rules of procedure by the CMA3 in 2020 due to take place in November in Glasgow before the outbreak of the COVID-19 pandemic.
[822] Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 337. Bodansky 'The Legal Character of the Paris Agreement'(2016) 25 Review of European, Comparative and International Environmental Law 155.

sharing.[823] The 'shallow, self-determined mitigation contributions,' as they have recently been characterised[824] were the *quid pro quo* for a binding instrument on responsibility sharing.

To be sure, the Paris Agreement is far from perfect. The Agreement is still in its early days of implementation, so there is no guarantee that it will work successfully. As the three prominent international climate change law commentators conclude, 'the issue of burden sharing will likely persist given the disparities among countries in wealth, historical and per capita emissions and circumstances'.[825] Another commentator has argued that the Paris Agreement 'does not clarify what is equitable at a given time, nor what the CBDRRC principle means in a given situation'.[826] In addition, many developing countries' agendas prioritise poverty eradication and basic needs over climate change mitigation.[827] The full potential of the oversight system will be assessed once the first global stocktake takes place in 2023, although experts already know that the submitted NDCs are insufficient against the magnitude of the climate challenge.[828]

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[823] Bodansky, Brunnée, Rajamani, *International Climate Change Law* , 212.

[824] Rajamani, Bodansky, 'The Paris Rulebook: Balancing international prescriptiveness with national discretion', 1025.

[825] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 361.

[826] Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?', 155.

[827] India's interpretative declaration to the Paris Agreement: Declaration: "The Government of India declares its understanding that, as per its national laws; keeping in view its development agenda, particularly the eradication of poverty and provision of basic needs for all its citizens, coupled with its commitment to following the low carbon path to progress, and on the assumption of unencumbered availability of cleaner sources of energy and technologies and financial resources from around the world; and based on a fair and ambitious assessment of global commitment to combating climate change, it is ratifying the Paris Agreement." Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27

[828] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 249.

What, however, makes the Paris Agreement a model framework for responsibility sharing? The answer is down to three elements. Firstly, it is a legally binding instrument that represents the formal partnership of developed and developing states, emitters and least emitters states in international law on the fight against climate change. Precisely what is currently missing from the international refugee law regime, a partnership and a structure in international law.

Secondly, it has a unique institutional legal design of bottom-up implemented obligations and a top-down oversight framework that is mainly facilitative in nature. It is carefully and intentionally crafted with procedural obligations of conduct, which in turn ensure states' much-wanted flexibility against a very ambitious, if not aspirational, goal. The Paris Agreement 'was successful, in large part, because of its carefully calibrated, hybrid solutions to the issues of bindingness, prescriptiveness, and differentiation'.[829]

Thirdly and lastly, it has an even more unique transparency and reporting framework which is key in building trust between the parties and in satisfying elemental considerations of procedural fairness, as all parties are obliged to participate in the legal regime and all stakeholders, including civil society organisations can publicly apply pressure on states to achieve more in line with their CBDRRC.

4.8. Conclusions

The international legal regime on climate change has been shaped by conflicting ideologies and competing interests between developed and developing countries- over economic development on the one hand and environmental protection on the other. Developed states initially fought hard to bring the developing countries on

[829] Daniel Bodansky, Lavanya Rajamani 'The Issues that Never Die'(2018) 12 Carbon and Climate Law Review 184, 190.

board with the climate change regime and to elevate environmental protection in the 1990s as a matter requiring international cooperation and international regulation. Developing countries were at the time, more preoccupied with their own developmental priorities. In many ways, they still are today. Economic development and environmental protection were delicately coupled and balanced under the doctrine of common but differentiated responsibilities and respective capabilities. CBDRRC reflects community interests in international environmental law and is the tool that progressively brought developing countries onboard multilateral environmental agreements, even when the protection of the environment was not in among their national priorities.

In international climate change law CBDRRC had its own trajectory, partly because of the uniqueness and complexity of the climate change phenomenon. The principle dynamically evolved over the years following scientific advancements, adapting to the social and economic realities of the states-parties to the UNFCCC. At times, it was the subject of intense controversy between states. In some ways it continues to be so today. Yet, it remains the chosen framework, the bedrock for the global responsibility sharing arrangement under the UNFCCC.[830]

CBDRRC is a sophisticated concept rooted in ideas of fairness in international law with two interlocking components. In the case of the legal regime on climate change, it is premised upon the common and shared responsibility of states to protect the earth's climate, as part of the global commons from excessive warming. This common responsibility to protect the climate reflects a community interest, which in international environmental law

[830] Jutta Brunnée, 'International Environmental Law and Community Interests Procedural Aspects', in Eyal Benvenisti & Georg Nolte (eds) *Community Interests Across International Environmental Law* (Oxford University Press), 166.

is also reflected in the concepts of 'global commons' and 'common concern of humankind'.[831]

Secondly, this common responsibility to protect the environment ought to somehow be shared between states, so as to serve an elemental idea of fairness. Not all states can and should contribute equally to climate change action. They can however contribute e*quivalently*. CBDRRC reflects a conception of fairness as distributive justice, 'in that it seeks to fairly distribute the burden of addressing climate change with the goal of improving conditions for all humankind'.[832] Two of the most widely accepted principles of fairness are obliquely embedded within the doctrine of CBDRRC; the *contribution to the problem* principle and *the capacity or capability to respond* and take measures.[833] What is more, distributive fairness under the CBDRRC extends to the developed countries' responsibilities to continue taking the lead by firstly doing more and secondly by assisting less developed countries in meeting their own comments.[834]

Under the most recent version of CBDRRC as posited in the Paris Agreement, the focus is on responsibility by capability and capacity in light of their national circumstances.[835] The conception of fairness reflected in the Paris version of CBDRRC is a nod to pragmatism and international politics but also a departure from responsibility by culpability. CBDRRC frames and guides the parties' NDCs, becoming thus a normative tool for assessing states' mitigation

[831] Paris Agreement, Preamble, recital 11. Birnie, Boyle, and Redgwell's *International Law and the Environment*, (Oxford University Press Fourth Edition 2009), 132.
[832] Cinammon P Carlane, JD Colavecchio, 'Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law' (2019) 27 N.Y.U. Environmental Law Journal 108, 117.
[833] Soltau, *Fairness in International Climate Change Law and Policy*, 133.
[834] Paris Agreement, Article 4 (4).
[835] Paris Agreement, Article 2 (2).

actions against their capacities,[836] promoting transparency. According to two commentators:

> The invitation to engage in a more intentional, collective institutional discussion about how parties perceive fairness (and, thus, to some extent equity) represents a significant change from past practice. This level of participatory inclusiveness and transparency in the debate about the normative foundations for addressing climate change re-configures the parameters of the equity and fairness conversation.[837]

On the downside, CBDRRC qua principle cannot dictate quantifiable shares of the global mitigation action needed.[838] The UNFCCC never formally adopted criteria to measure fairness.[839] The Paris Agreement sought to overcome this by opting for *sur - mesure* differentiation, allowing for states to determine their own fair share and their own indicators. Some scholarly concerns have already been raised in respect of the 'fine grained operationalisation' of CBDRRC in the Paris Agreement:

> At the same time, this more inclusive model creates fairness and equity challenges by allowing the industrialized countries to continue to bear less than their fair share of the climate burden, while many developing countries have committed out of sheer necessity, desperation, or an effort to motivate

[836] Carlane and Colavecchio, 'Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law',130.
[837] Ibid., 131.
[838] Werner Scholtz 'Equity as the basis for a future international climate change agreement: between pragmatic panacea and idealistic impediment. The optimisation of the CBDR principle via realism' (2009) 42 The Comparative and International Law Journal of Southern Africa 166, 167.
[839] Pauw, Castro, Pickering, Bhasin 'Conditional nationally determined contributions in the Paris Agreement: foothold for equity or Achilles heel', 468.

their more industrialized counterparts, to take on more than their fair share of the burden.[840]

Summing up the lessons drawn from the parallel study of the logic of differentiation in international law and particularly the CBDRCC in international environmental law, it becomes evident that community interests are not only manifested in areas beyond national territories and jurisdiction, such as the deep seabed, Antarctica or outer space. Equally they are advanced within seemingly territorial activities, such as the protection of biodiversity, climate change and crucially the protection of human rights.

At the same time, it is important to note that not all community interests manifest themselves with the same degree of intensity. In some areas the existence of community interests and thus the common responsibility is more expressly acknowledged than in others. Responsibility sharing for climate change is one such example where the potential ramifications of not sharing the responsibility could be detrimental to all states and to the entire planet. Even in that case however, the intensity of the community interests may vary depending on states' geographical positions.[841] The climate change impact in some countries is far worse than others. A stark example of this imbalance is the rising sea level in small island states that threatens the very existence of these countries.

Having said this, the common responsibility of all states to protect the climate has been codified and acknowledged as such in international law through inter alia the principle of CBDRRC. In contrast, under international refugee law, the state to which the refugees arrive bears sole legal responsibility for their protection and its associated costs.[842] One thus could wonder whether beyond the

[840] Carlane and Colavecchio, 'Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law', 180.
[841] Simma, 'From Bilateralism to Community Interests', 242.
[842] Hathaway & Neve, 117.

general duty of states to cooperate in refugee matters and in the absence of a positive responsibility sharing obligation, there is a truly common responsibility to protect refugees. After all, not sharing responsibilities for refugees will not severely affect all countries particularly those that are geographically insulated.[843]

There seems to be today a strong international consensus that the protection of the world's refugees and the resolution of protracted refugee situations is 'a common concern of humankind' and thus a responsibility of the international community as a whole. The Global Compact on Refugees, even if non-binding, is the latest compelling evidence to this claim as it expressly acknowledges that the refugee challenge cannot be managed let alone be resolved without meaningful participation from all states. Nevertheless, it fails to explicitly pronounce upon this common responsibility as well as define what this common responsibility entails in terms of individual state commitments.

In sum, the normative gap of the RC remains insofar this common responsibility to protect refugees is not codified in international law along with a responsibility sharing obligation and structure. As already argued, the Refugee Convention reflects and serves for the enlightened positivist a special category of community interests in international law these being the protection of refugees and the provision of durable solutions. In light of this, the call for responsibility sharing in the Convention and the principle of responsibility sharing in itself reflects a notion of a community obligation,[844] albeit not one yet codified in international law. This is where the CBDRRC principle adapted for the refugee law can be beneficial in rooting refugee protection not only as a global common concern but as a common and shared responsibility of states,[845] concretising the individual differentiated contributions.

[843] Dowd & McAdam, 'Lessons From Climate Change' 198.
[844] Kritzman-Amir, Community Interests in International Migration and Refugee Law, 352.
[845] Dowd & McAdam, 'Lessons From Climate Change', 217.

5 Towards differentiated legal obligations; A protocol on responsibility sharing

5.1. Introduction

This Chapter is the culmination of what has been suggested thus far in the thesis, namely that the normative gap of the Refugee Convention cannot be satisfactorily and comprehensively addressed without a structural adjustment that will permanently institutionalise responsibility sharing in international law. The duty of states to cooperate in international refugee law is vaguely worded, and despite numerous calls for enhanced and meaningful international cooperation, it has not concretised into subsequent positive obligations of responsibility sharing. What is more, the current practice and policies of states aims at responsibility shifting rather than responsibility sharing, and most, international cooperation on refugees, is framed in light of externalisation, deterrence and protection elsewhere paradigms.

Despite the laudable effort and the advances in the Global Compact to put together responsibility sharing modalities and to frame refugee protection as a common responsibility, the Compact fails to bring responsibility sharing within international law. Contributions to protection and solutions and even the participation to the Global Refugee Forums remains entirely discretionary.

This thesis argues that a light package of responsibility sharing obligations is the ideal means to fill in the normative gap of the Refugee Convention that has had a negative impact on the quality of international protection and on interstate relations. This Chapter explores *de lege ferenda* how the CBDRRC principle can be adapted to international refugee law and how a light package of responsibility sharing obligations could look like in international refugee law by drawing inspiration from the international climate change law regime. It proposes the

adoption of a protocol on refugee responsibility sharing that would supplement the Refugee Convention and institutionalise the missing responsibility sharing partnership between states of origins, asylum and destination in international law. Crucially, this *de lege ferenda* proposal takes the Global Compact on Refugees as its departure point demonstrating how the advances of the Compact can be further incorporated in a binding protocol.

It is noted that the originality of this proposal is not in suggesting a binding instrument on responsibility sharing, as this has over the course of refugee protection regime been proposed or alluded to in different ways by scholars and hinted by policy makers when large scale refugee arrivals have put pressure on the existing international refugee law edifice.[846]

This thesis' contribution is an explicit discussion and adaptation of the principle of CBDRRC to international refugee law and its operationalisation under a treaty that would codify a light package of responsibility sharing obligations so as to enable agreement. To put it differently, my proposal is on the 'art and craft' of responsibility sharing, on finding the "sweet pot", which goes as far as possible, but not beyond'. [847] It is submitted that the chances of states agreeing on a binding protocol would very much depend on its legal design and construction. The focus therefore of the proposal is on questions of legal design and the structure of the legal obligations.

Further, since fairness concerns have been integral to responsibility sharing CBDRRC normative nexus to notions of fairness necessitates a better understanding of what fairness entails in international refugee law. Limiting the

[846] Türk and Garlick, 'Prospects for Responsibility Sharing in the Refugee Context', 45. Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfill the Promise of the 1967 Protocol?', 201. Hathaway, 'The Global Co-Op Out on Refugees', 591. UNHCR Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR (2004) EC/54/SC/CRP. (11 June 2004).

[847] Bodansky, *The Art and Craft of International Environmental Law*, 271.

scope of responsibility sharing to physical and financial sharing, the light package of obligations reflects this baseline commitment responsibility sharing. The quest for fairness however even in an enlightened positivist project such as the present one is limited to what international law can do and international politics allow. The goal is to strike a skilful compromise between the depth of the legal commitments and the breadth of participation that a responsibility sharing protocol requires.

Against this background, this Chapter offers a concrete proposal on a protocol on responsibility sharing that explores in detail the legal design and the subsequent levels of obligation, prescription and delegation of each of the suggested provisions. The concept of soft legalisation from International Relations is employed so as to explore what legal obligations suit the nature of responsibility sharing as an inherently political matter. Finally, since international law can only be *part* of the solution to the refugee challenge, this Chapter concludes with ways to build the necessary sustained political will required towards legal obligations of responsibility sharing.

5.2. Why a protocol on responsibility sharing?

It is anticipated that a proposal on a legal instrument that codifies obligations of responsibility sharing will be *prima facie* challenged on feasibility grounds, given the unwillingness of states to codify anything related to responsibility sharing in international law. Arguments on feasibility are now made *a fortiori* in light of the current populist and somewhat hostile climate against refugees and migrants in general. It has been supported by scholars that 'new binding obligations on international cooperation are not politically palatable in the refugee context at present', [848] that 'states are generally unwilling to relinquish discretion in

[848] Dowd and McAdam, 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law', 216.

determining the extent to which they wish to support refugees',[849] and that the main obstacle behind the conclusion and adoption of a protocol on responsibility sharing 'is today's political reality.'[850] That said, a protocol on responsibility sharing has always been the ideal means to fill in the responsibility sharing gap.

Volker Türk, former Assistant High Commissioner who led the Global Compact negotiations revealed in an interview before the adoption of the final draft of the Refugee Compact that UNHCR would like to see more resettlement of refugees or better family reunification but 'at the end of the day we will need to present a consensus document. It is a question of strategy..', [851] obliquely admitting that if it weren't for consensus, concrete commitments to protection and solutions would be the suggested right way forwards. Two years earlier, Türk, in an article co-authored with Garlick acknowledged that that while an additional protocol to the Refugee Convention would be the ideal means to fill the gap, there was limited scope to such a step at the time and the then proposed Global Compact was the feasible intermediary step.[852]

Even as early as 2004, UNHCR had acknowledged the need of a second protocol to the Refugee Convention. A study on enhancing cooperation for mass influx situation, commissioned by the High Commissioner in 2004, suggested:

> [I]t may be worth considering an instrument on this issue, for instance, in the form of a Second Protocol to the 1951 Convention. As with the 1967 Protocol, such a Protocol could be open to accession by non-Convention

[849] Harley, 'Innovations in Responsibility Sharing for Refugees', 14.
[850] Meltem Ineli-Giger, 'The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?' (2019) 38 Refugee Survey Quarterly 115, 129.
[851] Volker Türk quoted in Charlotte Alfred 'UN Official Refugee Compact Will Meat Fear and Ignorance with Facts' Refugees Deeply (March 2018).
[852] Turk and Garlick 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 678.

> States, a number of which already host large numbers of refugees and would arguably stand to benefit from better governance of mass influxes across the globe. The focus of a new instrument would be on putting in place practical guidelines for better management of asylum demands and problems in mass influx situations within a burden-sharing framework.[853]

Among the guiding parameters of such protocol, would be the 'specific recognition of the differing capacities of States to contribute to assistance and solutions, and the need for an equitable distribution of burdens and responsibilities.[854]

The former High Commissioner for Refugees, Antonio Guterres ominously said in one of his speeches, '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'.[855]

Certainly, the contemporary refugee debates are highly politicised and, hence, not conducive to proposals requiring multilateral law-making, in times where even multilateralism per se seems to be losing ground and its appeal to states.[856] Having said this, even if multilateralism's life cycle in the protection of community interests might be approaching its end as some scholars caution,[857] the response to multilateralism' decline as Hathaway laments is not to retreat but to

[853] Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR (2004) (2004) EC/54/SC/CRP. (11 June 2004), para 12.
[854] Ibid.
[855] Opening Remarks at the 66th Session of the Executive Committee of the High Commissioner's Programme. António Guterres, United Nations High Commissioner for Refugees (Geneva, 5 October 2015).
[856] Harlan G Cohen, 'Multilateralism's Life-Cycle' (2018) 112 American Journal of International Law 47, 48.
[857] Ibid.

show how a multilateral responsibility sharing instrument can keep the costs of the agreement low and the benefits high.[858]

The feasibility of a treaty on responsibility sharing lies within what is at stake for states in terms of legal obligations. Secondly, it equally depends on whether states would be ultimately persuaded that the adoption of a binding instrument on responsibility sharing would be beneficial to their wider interests. The focus of this contribution is on showing how international law can codify a light package of responsibility sharing obligations under a hybrid architecture that caters for the much-desired flexibility in the construct and implementation of its obligations.

Arguments against a legal instrument on responsibility sharing have also been made from the perspective of effectiveness. Betts, Costello and Zaun argue that effective responsibility sharing is unlikely to be achieved through a single legal mechanism or centralised allocation system.[859] They add, that there have to be 'complementary, - political, analytical, and operational – mechanisms' in place that will also provide for situation specific responses.[860] It goes without saying that political, analytical and operational mechanisms are, indeed necessary, to the global responsibility effort but their existence can be and should be complementary to that of a legal arrangement at UN level. As one commentator stresses:

> while it makes sense to negotiate situation-specific agreements in the short-term where the political will clearly exists, doing so should not be a substitute for the long-term goal of negotiating a non-situation specific multilateral agreement on responsibility-sharing. [861]

[858] Hathaway, 'The Global-Cop Out on Refugees', 596.
[859] Delmi Report, 'A Fair Share', 6.
[860] Ibid., 6.
[861] Taylor 'The Pacific Solution or Pacific Nightmare; The Difference between Burden Shifting and Responsibility Sharing', 39.

Outside the current political climate and considerations about effectiveness, most objections to a legal instrument on responsibility sharing have been made in response to previous academic proposals that have been either overtly prescriptive, going too far as to suggest binding pre-determined quotas on the basis of various metrics - for example, GDP, land mass, population[862] - or that have been lacking in thinking on the formal structure and the legal design.[863] A legal instrument on responsibility sharing does not have to be equated with a central allocation mechanism or with pre-determined quotas.[864] Experience from international environmental law suggests that pre-determined binding quotas do not suit what is politically feasible,[865] nor do they guarantee compliance, let alone interstate fairness, as the Relocation experience under the CEAS revealed.[866]

Crucially, an important distinction often neglected in *de lege ferenda* proposals is the one between the legal form of an instrument, i.e. a treaty, and the legal character of its constituent provisions.[867] This distinction is manifestly evident in the architecture of the Paris Agreement on climate change, where although a treaty under the definition of the VCLT, each of the Paris Agreement's provisions has different normative force.[868] It is submitted that a similar

[862] See the proposals of Grahl-Madsen, Chimni, Gibney and Schuck, discussed in the Literature Review, Section 1.6.
[863] Ibid.
[864] 'The failed European experiment with mandatory burden sharing quotas demonstrates that the adoption of a new convention or a protocol on burden sharing providing clear and predetermined quotas seems unlikely and unrealistic in the near future'. Ineli-Giger 'The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?', 129.
[865] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfill the Promise of the 1967 Protocol?', 216.
[866] See Chapter 3, Section 3.4.1.
[867] Abbott and Snidal 'Hard and Soft Law in International Governance', 426.
[868] Rajamani, Bodansky, 'The Issues That Never Die' (2018) 12 Carbon and Climate Law Review 184.

distinction between the legal design and the subsequent levels of prescription, delegation and obligation thereunder[869] would be key to appealing to states for a protocol on responsibility sharing.

In light of this, a protocol on responsibility sharing for refugees may also be structured on provisions with different normative force: some that would establish hard obligations, some that would set normative expectations and some that would encourage or recommend a course of action or construct a narrative. Most importantly, the protocol would and should not go too far beyond what is already part of global refugee policy and practice. To this end, the Global Compact on Refugees is the point of departure. The Compact as already mentioned is non-binding,[870] yet establishes certain political commitments,[871] which could become the key provisions of a protocol on responsibility sharing. This is a different way to approaching the Global Compact, as the starting point for a *de lege ferenda* exploration and incremental law making, rather than view it as a failed attempt or a missed opportunity. A final reason why a legal instrument on responsibility sharing is necessary, is the risk that the Refugee Compact might lose the momentum and drive for implementation, in light of the coronavirus pandemic, ending up being yet another instrument just exhorting good practice.

5.3. The quest for fairness in responsibility sharing: Determining a fair share

5.3.1. Fairness between states

Fairness considerations have perennially underpinned the debates on refugee responsibility sharing. It has been the 'urgent need' for fairness [872], or the lack thereof, that have brought states to the negotiating table to discuss ways for sharing the collective responsibility to protect refugees more equitably and more

[869] Abbot and Snidal, 'Hard and Soft Law' in International Governance', 421.
[870] Global Compact on Refugees, paragraph 4.
[871] Gilbert, 'Not Bound But Committed', 28.
[872] Global Compact on Refugees, para 1.

predictably. Fairness considerations were prominent to the refugee responsibility sharing debate during the UNHCR Convention Plus Initiative, which framed responsibility sharing as a matter of North-South cooperation.[873] More recently, 'the fundamental unfairness and inequity of the international refugee regime for hosts states and their communities'[874] was the main reasons that led to the adoption of the New York Declaration on Refugees and Migrants, and the subsequent conclusion of the Global Compact on Refugees.

Fairness and equity, as explained in the previous Chapter, have become synonymous in the context of North-South international cooperation for responsibility sharing.[875] It is precisely this synonymous relationship of the two terms that manifests itself in the interchangeable use of the terms 'fair' and 'equitable' responsibility sharing in refugee law and policy. What is often, however, not made explicit when states debate and discuss responsibility sharing before international fora, is that they allude to claims of justice or, in other words, to conceptions of fairness.[876] One may argue that the use of such words by states are mere perfunctory statements and correspond thus, at best, to a factual acknowledgement that some states host a disproportionate number of refugees compared to others. Particularly with regard to responsibility sharing, an idea of fairness acquires salience. As two commentators write:

[873] See Chapter 3, Section 3.5.4.

[874] Harley 'Innovations in Responsibility Sharing for Refugees' 1.

[875] Pieter Pauw, Steffen Bauer, Carmen Richerzhagen, Clara Brandi, Hanna Schmole 'Different Perspectives on Differentiated Responsibilities; A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations',(German Development Institute Discussion Paper 6/2014), 6.

[876] Franck, *Fairness in International Law and Institutions*, 477.

> ‘justice would argue for no one state to be disproportionately affected by refugee flows because it is likely that the burdened state was not the cause of the flow and it is burdened simply because of propinquity’.[877]

A notion of fairness, therefore, is not only conceptually inherent to responsibility sharing debates. What does fairness entail? To begin with, fairness can be said to be a contested concept,[878] in the sense that multiple, and at times competing conceptions of fairness can derive from the broader concept.[879] This is *a fortiori* the case in international law, where the international community consists of hundreds of sovereign states, each with its own plausible conception of fairness, informed and shaped by the countries’ particular economic and social circumstances.

Political theorists have battled at abstract levels with different and often competing conceptions of fairness and have developed subsequent distributive principles that can resolve issues of resource or burden allocation in the provision of global public goods.[880] Amongst the most popular are the egalitarian principle of per capita distribution, the needs-based principle - reflecting the conception that the distribution of benefits should accord priority to the poorest or most at risk -, the contribution to the harm/problem principle, - evident in ‘the polluter pays’ principle of international environmental law - and finally, the capabilities-

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[877] Aleinikoff and Poellot, ‘The Responsibility to Solve: The International Community and Protracted Refugee Situations’, 213.

[878] Gallie first introduced the term ‘essentially contested concepts’ as conceptual tool to explore the multiple understandings and interpretations certain abstract evaluative notions can take. WB Gallie, ‘Essentially Contested Concepts’ (1955 - 1956) 56 Proceedings of the Aristotelian Society 167. Since Gallie, the concept/conception distinction has been a popular one, in Political Science and International Relations. Rawls for example in his Theory of Justice employs this distinction when advancing his own conception of justice as fairness. Rawls, A *Theory of Justice,* 5.

[879] Soltau, *Fairness in International Climate Change Law and Policy*,144.

[880] Ibid.

based principle - prescribing that the greater the ability to pay/or to act, the greater the burden.[881]

Another crucial distinction that adds more conceptual clarity to the challenge of institutionalising responsibility sharing in international refugee law is that between *fairness principles* and *burden sharing formulae.* Fairness principles are the ones mentioned above which embody different conceptions of fairness. *Burden sharing formulae,* on the other hand, are methodologies or indicators that measure fairness against 'objective metrics',[882] such as GDP, landmass and population size.[883] Schematically, on top of the pyramid sits the abstract and contested concept of fairness, under it sit the principles reflecting the various conceptions and at the bottom sit the specific burden sharing formulae or indicators that measure or assess a fair share.

In international refugee law, the challenge of responsibility sharing extends to agreeing on the scope of what fair sharing entails and on the burden sharing formulae that could measure a fair share. Here again, the study of climate change is illuminating. The UNFCCC, for example, has not adopted criteria to measure the submitted NDC's of the state parties against fairness because there could be no such agreement on a single indicator that can reflect a globally equitable distribution of efforts.[884] The Intergovernmental Panel on Climate Change, the

[881] These principles are summarized in Soltau *Fairness in International Climate Change Law and Policy,* 153. See also Ringius et al, 'Can multi-criteria rules fairly distribute climate burdens', 781.

[882] Caution should be drawn to the presumed neutrality of economic metrics. According to Bregman, 'there is no such thing as a neutral metric. Behind every statistic is a certain set of assumptions and prejudices.' Rutger Bregman, *Utopia for Realists* (Bloomsbury 2017), 123.

[883] Soltau, *Fairness in International Climate Change Law and Policy,* 163.

[884] The Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions of the Parties prepared by the UNFCC Secretariat '[s]ome Parties noted that no single indicator can reflect fairness or a globally equitable distribution of efforts'. FCCC/CP/2016/, para 25.

body responsible for assessing the science related to climate change, highlighted in one of its Reports:

> there is no absolute standard of equity, countries (like people) will tend to favour interpretations which will favour their interests' and that perhaps 'a basic set of shared ethical principles could limit the plausible interpretations in the burden sharing context by establishing expectation on what may be reasonably required from different actors.[885]

This basic set of shared ethical principles that would limit plausible interpretations has not yet been agreed under the UNFCCC. To overcome therefore the challenge, the Paris Agreement left the parties to choose their own indicators and methodologies when communicating their mitigation actions in light of their CBDRRC.

This experience from climate change, reinforces the contested nature of fairness and the argument that there can be various plausible burden sharing formulae. Thomas Franck also adverted to the subjective character of fairness, which can be best reflected and fulfilled in the reality of international law limited by international politics in a process of public discourse. He writes:

> fairness is relative and subjective…a human, subjective contingent quality which merely captures in one word a process of discourse, reasoning and negotiation leading, if successful to an agreed formula located at a conceptual intersection between various plausible formulas for allocation.[886]

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[885] Marc Fleurbaey, Siban Kartha (Coordinating Lead Authors) 'Sustainable Development and Equity' Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, 317.

[886] Franck, *Fairness in International Law and Institutions*, 14.

The same sort of disagreement over fairness indicators is present in the refugee responsibility sharing debates. Miller notes that states 'can reasonably disagree' on what indicators shall be used to determine a fair share of refugee protection.[887] Likewise, Owen finds that the lack of uniform agreement among states on what should be the criteria for a fair distribution is yet another challenge to face.[888] Gibney, on the other hand, contends that this disagreement is overrated and that three indicators used in UNHCR reports to appeal to states, namely GDP, population size and the total numbers of refugees are widely accepted by states and UNHCR.[889] Grahl-Madsen had proposed to allocate refugee quotas in the European Union on the basis of the absorptive capacities of Member states.[890] Yet, capacity can be also said to be an abstract concept,[891] measurable against different macro-economic and socio-economic criteria, and heavily influenced by the politicisation of the refugee challenge.

Hathaway is also in favour of predetermined criteria for responsibility sharing whereby an international organisation would administer binding quotas. He, in contrast to other scholars, has suggested that different criteria ought to define a fair share for the purposes of physical - what he terms 'human sharing'- and financial responsibility sharing.[892] In Hathaway's proposal, physical

[887] David Miller, 'David Owen on Global Justice, National Responsibility and Transnational Power: A reply (2011) 37 Review of International Studies 2029, 2033. Cf, Gibney who argues that GDP and population size have been the most relevant indicators to measure a fair share since UNHCR publishes its statistics reports on the basis of these indicators and against total refugee numbers. Gibney, 'Refugees and Justice Between States', 457.

[888] David Owen 'Refugees, fairness and taking up the slack: On justice and the International Refugee Regime' (2016) 3 Moral Philosophy and Politics, 141.

[889]Gibney 'Refugee and Justice Between States' 457.

[890] Grahl-Madsen , 'Further Development of International Refugee Law', 165.

[891] Tally Kritzman Amir, 'Not in My Backyard, On the Morality of Responsibility Sharing in Refugee Law' (2009) 34 Brooklyn Journal of International Law 355, 375.

[892] On financial sharing, he suggests the use of the UN funding model. Hathaway and Neve, 'Making International Refugee Law Relevant Again', 207-209.

responsibility sharing, namely the hosting of refugees would be primarily provided in regions of origins. In light of this, criteria such as physical security, functional compatibility, cultural harmony and geographical proximity are the ones suggested to share refugees among the asylum states.[893] Meanwhile, extra-regional states, mainly the Northern states, would be legally bound to contribute to the fiscal costs of protection on the basis of an agreed burden sharing formula as well as to cover residual resettlement.[894] Leaving the ethical challenges with respect to potential commodification and the ghettoising of refugees aside, experience suggests that agreement on such sharing formulae would be hard, if not impossible, to reach.

Interestingly, the Global Compact on Refugees does not establish a predetermined burden sharing formula or quotas. *Realpolitik* and expediency dictated a bottom-up, flexible approach responsibility sharing that leaves each state to determine its own contributions to refugee protection and solutions. The Compact does, nonetheless, acknowledge the need for indicators and an Indicators Framework has already been developed by UNHCR.[895] The indicators, and this is telling, are not however macroeconomic metrics of economic growth such as GDP, but reflect expected outcomes, each one reflecting a key area of focus, in need of support.[896]

Sarnata Reynolds and Juan Pablo Vacatello recently developed the first global model that measures the capacity of the 193 governments - the number of states who voted in favour of the Compact - to physically protect and financially

[893] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 204 - 205. Hathaway, 'The Global Co-Op Out on Refugees', 597. The authors also address some of the ethical objections to their proposal. See Literature Review.
[894] Hathaway, 'The Global Co-Op Out on Refugees', 597.
[895] Global Compact on Refugees: Indicator Framework 2019 (UNHCR) available at https://www.unhcr.org/5cf907854.pdf. In total, there are 15 Indicators.
[896] Ibid.

support refugees and host communities.[897] This model was developed with an aim to provide the Global Compact with a concrete model for equitable and predictable responsibility sharing based on each nation's capacity to receive and/or care for refugees.[898] Their methodology starts with data collected from GDP and population density, which offer a preliminary baseline number of fair share to each state. This is subsequently adjusted twice, once to reflect rankings on the Human Development Index and the second time to reflect data from the Fragile States Index.[899] Some states are removed altogether from receiving any share due to their fragility levels. In the end, these percentages are converted to refugee quotas against the number of refugees in need of international protection provided in UNHCR statistics.[900] The proposed model draws on a methodology of macro-economic metrics, which can be said to reflect a principle of fairness as proportionality. Interestingly, under the status quo, among the G20 states, Turkey accounts for almost 40% of all the refugees hosted in G20 nations whilst the rest perform less than 15% of their fair share.[901]

Having said this, the authors acknowledge that such a model cannot measure the quality of protection. The challenge even with this model is securing the agreement of 193 states, or even a handful, to accept these quotas as authoritative and legitimate. Although the authors do not explicitly advocate the use of their Index as a binding quota generator, they do suggest that 'countries will need to agree on an equitable and predictable mechanism for sharing

[897] Sarnata Reynolds, Juan Pablo Vacatello, 'Building a Lifeline: A Proposed Global Platform and Responsibility Sharing Model for the Global Compact on Refugees' (2019) 21 The Scholar: St. Mary's Law Review on Race and Social Justice 325.
[898] Reynolds and Vacatello, 'Building a Lifeline: A Proposed Global Platform and Responsibility Sharing Model for the Global Compact on Refugees', 374.
[899] Ibid., 342.
[900] Ibid., 344.
[901] Ibid., 346. (Figure 1).

responsibility and a new and independent body dedicated to supporting countries in the delivery of these responsibilities'.[902]

Experience from past responsibility sharing arrangements suggests that if states were to conclude a protocol on responsibility sharing, they would favour a certain discretion on how to contribute to the responsibility sharing efforts. This is why a bottom-up approach to responsibility sharing, and hence to fairness, like the one taken in the Global Compact could be replicated in a protocol on responsibility sharing.

In light of what has been discussed so far, it is argued that a protocol on responsibility sharing should endorse and build upon the current bottom-up approach to responsibility sharing, where states are free to choose the content of their contributions to protection and solutions by pledging according to their 'national realities, capacities and levels of development, and respective national policies and priorities'.[903] Such bottom-up approach would endow the protocol with the necessary flexibility whereby states develop and determine their own criteria and burden sharing formulae, if wish to make use of such, rather than having them imposed on by mathematics.[904]

That said, fairness would also warrant that every single state participates to the responsibility sharing effort equivalently, in some sort of proportion to its capabilities. This would be crucial to ensure fairness between states as a normative goal of the international refugee law regime as well as fairness vis-a-vis the refugees, the beneficiaries of international protection.

The discussion on responsibility sharing in the practices of states highlighted that when refugee-hosting states feel that they are not supported by the international community and faced with the structural unfairness of the refugee regime, they turn their back to refugees by adopting restrictive asylum

[902] Ibid., 374.
[903] Global Compact on Refugees, paragraph 4.
[904] Kritzman-Amir, 'Not In My Backyard', 376.

policies.[905] Peter Shuck's 'Modest Proposal for Reform' attracted the most comments for its market-based approach to refugee protection because he introduced the trading of refugee quotas for the purposes of responsibility sharing.[906] He sought however to structure his proposed sharing scheme on a conception of fairness. He ascribed three elements to the responsibility sharing norm, which appear to endorse a bottom-up approach fair responsibility sharing. Schuck argues that the responsibility sharing norm:

> should express a principle of fairness in the distribution of refugee protection burdens. Specifically, it should satisfy three criteria of fairness: consent, broad participation, and proportionality. Proportionality demands that a state's share of the burden be limited to its burden bearing capacity, relative to that of all other states in the international community.[907]

This is where an explicit adaptation of CBDRRC in international refugee law would be beneficial in strengthening the responsibility sharing principle in international law. Taking Schuck's argument, a step further, a CBDRRC-guided protocol would satisfy all three elements. Firstly, consent would be necessary for states to be bound by the protocol. Secondly, broad participation would be secured since the protocol would have low barriers to entry by allowing states to determine their own contributions to refugee protection and solutions. Thirdly, proportionality can be said to be reflected in CBDRRC's rationale for different

[905] Gibney, 'Refugees and Justice Between States', 449.

[906] Roland Smith finds such an idea of trading refugees 'simply repugnant', while Anker et al. reject it as morally troubling. Roland Smith, 'Outsourcing Refugee Protection Responsibilities: the second life of an unconscionable idea', (2004-2005) 14 Journal of Transnational Law and Policy 137,149. Deborah Anker, Joan Fitzpatrick, Andrew Schacknove, 'Crisis and Cure: A Reply to Hathaway, Neve and Schuck' (1998) 11 Harvard Human Rights Journal 295, 306.

[907] Schuck, 'Refugee Burden Sharing: A Modest Proposal' (1997) 22 Yale Journal of International Law, 276.

contributions to protection on the basis of capabilities that would be measured by each state individually.

5.3.2. Fairness to refugees

If one objective of responsibility sharing in international refugee law is to ease pressure on host states, serving thus an idea of fairness between states, however elemental, it should crucially also serve community interest by ensuring access to international protection and increasing the prospects for solutions.[908] This is the fairness of the international protection regime vis a vis the beneficiaries of the community interest, the refugees.

Noll argues that it is axiomatic, that 'an equitable distribution of costs and responsibilities in protection will generate not only a maximum of fairness among states, but also a maximum of openness towards protection seekers'.[909] Having said this, certain challenges do arise and relate to the morality of a responsibility sharing arrangement principally designed to cater for fairness between states. The morality of responsibility sharing arrangements, subject to minor exceptions,[910] has not received a great deal of attention from legal positivist scholars.

Gibney's account of justice and refugee responsibility sharing defends that the preferences of refugees - with respect to the country of asylum for example - can be ignored in favour of the overriding goal of distributive justice between states which is a normative goal of the Refugee Convention.[911] However, he cautions that states have a moral duty to send refugees to places where they are likely to flourish.[912] Ferracioli contends in a similar spirit that:

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[908] Delmi Report, 'A Fair Share', 54.
[909] Noll, 'Risky games? A theoretical approach to burden sharing in the asylum field', 249.
[910] Kritzman-Amir, 'Not in My Backyard', 363-772. Hathaway and Schuck incidentally only engage with the anticipated moral objections to their respective proposals.
[911] Gibney, 'Refugees and Justice Between States' 457. Laura Ferracioli 'The Appeal and danger of a new Refugee Convention' (2014) 40 Social Theory and Practice 123.
[912] Gibney 'Refugees and Justice between States', 459- 460.

> While certainly not ideal, I believe it to be morally permissible to deny refugees the right to choose the country of final destination given the importance of creating a regime that fares better in terms of distributive and procedural fairness. If states stick to the current arrangement, those refugees with enough resources will in fact decide where to receive protection, but then the consequence of this is that fewer refugees will actually receive any sort of protection in the future.[913]

Kuosmanen, arguing in the context of trading refugee quotas, contends that if a refugee's preference for a particular country is not based in fundamental desires, such as for example, family reunification, then it is reasonable to override their choice.[914] Owen submits that any sharing of people between states should accommodate the legitimate preferences of refugees in order to be morally defensible.[915] A whole different discussion is on what preferences can be said to be legitimate which Owen captures in great detail.[916]

Hathaway, whose proposal has been fondly criticised for its risk of commodifying of refugees,[917] and for treating refugee protection as an object for bargaining between states,[918] acknowledges the ethical concern of transferring refugees between states but invokes in his defence a utilitarian argument:

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[913] Ferracioli 'The Appeal and danger of a new Refugee Convention', 123.
[914] Jacob Kuosmanen, 'What (If Anything) is Wrong with Trading Refugee Quotas?' (2013) 19 Res Publica 103, 109.
[915] David Owen 'Refugees and Responsibilities of Justice' (2018) 11 Global Justice: Theory and Practice Rhetoric 23, 37.
[916] Ibid.
[917] Juss, 'Towards a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence', 311. Chimni, 'The Geopolitics of Refugee Studies, a View from the South', 362-363.
[918] Anker, Fitzpatrick, Schacknove, 'Crisis and Cure: A Reply to Hathaway, Neve and Schuck', 300.

> ‘massive resources are now expended on the 15 per cent of refugees able to reach the developed world – disproportionately young, male, and mobile – while comparatively derisory resources are made available to the 85 per cent of refugees who remain closer to home.’[919]

He has nonetheless recently stressed that there is a moral obligation to design a responsibility sharing regime that maximises refugees’ agency.[920]

As a matter of international law, the Refugee Convention is silent as to whether the refugee has any choice with respect to the country of asylum. States and scholars have interpreted this silence in various ways. Goodwin-Gill and McAdam argue that international law appears to recognise a right to at least some choice about where asylum is sought, in particularly when family members reside in another state.[921] They find support for such argument in UNHCR Executive Committee Conclusion No.15, which states that ‘the intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account.’[922] In the context of effective protection in secondary movements, UNHCR concluded that refugees do not have an unfettered right to choose the country that will determine their asylum claim but their intentions ought to be taken into account.[923]

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[919] Hathaway, ‘The Global Co-Op Out on Refugees’, 603. A similar answer to the commodification objection has been given by Schuck, ‘Refugee Burden Sharing: A Modest Proposal’, 276.

[920] Hathaway ‘The Global Co Op Out on Refugees’, 603.

[921] Goodwin-Gill, McAdam *The Refugee in International Law*, 392.

[922] UNHCR ExCom Conclusion No. 15, para iii.

[923] UNHCR ‘Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers’ (Lisbon Expert Roundtable, 9-10 December 2002), para 11.

Hathaway seems to recognise an individual right to choose the country of asylum,[924] but he does not base it in international law.[925] Indeed, in the context of assigning responsibilities between states, he contends that governments can move refugees without their consent.

> Until a refugee is actually admitted to a state's status determination procedure - at which point he or she becomes, in the language of the treaty, lawfully present governments may lawfully assign their protection responsibilities to another country, even without the refugee's consent. [926]

From the above, it appears that there is no absolute right as a matter of international law for the refugee to choose her country of asylum. However, taking into account the refugee's preferences can be said to be a strong recommendation as well as a moral duty. To this end, when refugees are transferred for the purposes of asylum, resettlement or complementary protection, a defensible moral standpoint would be to ask for their stronger preferences or give them a limited choice of countries.[927]

A compromise between states and refugee preferences is possible as we are technologically equipped to be able to factor in refugees' preferences as well as refugees voices more widely within states' interests. There have been various proposals in scholarship on how this can be facilitated through the use of

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[924] James C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press 2005), 324.

[925] Disagreeing with the existence of a legal right to choose the asylum country in international law are Jens Vedsted-Hansen 'Non-Admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?' in Frances Nicholson, Patrick Twomey, (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999), 287.

[926] Provided that it is a rights-regarding allocation of responsibility. Hathaway 'Why Refugee Law Matters', 101.

[927] Gibney 'Refugees and Justice between States' 461.

sophisticated algorithms for refugees and states' preference matching.[928] For example, Will Jones and Alexander Teytelboym's algorithm integrates the diverse preferences of refugees and states in relation to inclusion and integration against global resettlement capacity.[929] Caution, however, would have to be drawn to the implicit moral assumptions that algorithms in general are built upon. In the words of Owen, 'there is no moral algorithm for combining contribution, benefit or capacity'.[930]

In a policy study for the European Commission, Guild, Costello and Moreno-Lax found that the voice and agency of asylum seekers could have been factored into the Relocation process in the context of intra-EU responsibility sharing, should Member states have been pledging places simultaneously so that effective preference matching had been possible. [931]

To sum up, the challenge of synching fairness between states and fairness to refugees is a difficult one.[932] Gibney stresses that there is 'a profound tension between doing justice to refugees and achieving justice between states'.[933]

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[928] Tristan Harley, Harry Hobbs, 'The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy' (2020) International Journal of Refugee Law (advanced copy). Kirk Bansak, Jeremy Ferwenda, Andrea Dillon, Dominik Hangartner, Duncan Lawrence, Jeremy Weinstein 'Improving Refugee Integration through Data Driven Algorithmic Assignment' (2018) 359 Science 325.

[929] On a UK developed algorithm see W Jones and A Teytelboym, 'Choices, Preferences and Priorities in a Matching System for Refugees' (2016) 51 Forced Migration Review 80, 80 - 82.

[930] David Owen, *What do we owe to Refugees?* (Polity 2020) 92

[931] Elspeth Guild, Cathryn Costello, Violeta Moreno-Lax, 'Study on Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece' Study for the LIBE Committee (March 2017), 8.

[932] On a comprehensive discussion on the ethical challenges, See Owen 'Refugees and Responsibilities of Justice', 23.

[933] MJ Gibney 'Political Theory, Ethics and Forced Migration' in Elena Fiddian - Qasmiyeh and others (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014), 54.

The quest for fairness pursued here is however a modest one, as it is limited to sketching the basic architecture and the key provisions of a protocol on responsibility sharing in international law. The proposed protocol would seek to operationalise responsibility sharing understood through adapting the principle of CBDRRC to refugee protection. In other words, focusing on procedural fairness through procedural obligations it is aimed that the international refugee regime will ensure distributive fairness by ensuring better protection to the refugees.

5.4. A Protocol on responsibility sharing for refugees – A basic architecture and some key provisions

5.4.1. A compromise: *softening* the legal arrangement

As already alluded to, the adoption of a protocol on responsibility sharing would require from the outset an important compromise over great legal expectations. This compromise is not only a necessity of the political climate surrounding refugee protection, but it is dictated by the 'inherently political' as it has been described nature of responsibility sharing, as a process of balancing heterogenous and competing interests of states.[934]

This is *a fortiori* the case in relation to physical responsibility sharing, a sensitive and sovereign matter for states since it entails the admission of refugees into their territories. Given the distributional costs responsibility sharing entails, and the risk of losing authority over decision making, states have been naturally reluctant to commit to binding pre-determined refugee quotas or delegate authority to an international organisation that would administer such quotas.

The study of international environmental law elucidates however that opting for a softer form of legalisation can facilitate agreement over matters perceived as highly political. Legalisation as has been developed in International Relations refers to 'a particular form of institutionalisation characterised by three elements:

[934] Delmi Report, 'A Fair Share',18.

obligation, precision, and delegation'.[935] Obligation means that states are legally bound by rules; precision that the rules authorise or prescribe concrete conduct; delegation 'that third parties have been granted authority to implement, interpret, and apply the rules', for example, to resolve disputes.[936] Each element of the definition can, nonetheless, vary across a spectrum of high to low legalisation.[937]

The Paris Agreement is an example of a treaty where its provisions are softened or hardened against the various levels of obligation, precision and delegation. This has made commentators to argue that not every provision of the Paris Agreement create legal obligations.[938] To the contrary, few are legal obligations, namely those that relate to mitigation action and transparency, and even these are intentionally softened and crafted as procedural obligations of conduct rather than result.[939] Other provisions of the Paris Agreement perform a somewhat different role of setting expectations, guiding behaviour or constructing a narrative, and therefore are couched in recommendatory or hortatory language.[940] Each element of obligation, prescription or delegation can thus be softened or hardened according to context and objectives. This is why the Paris Agreement is a model treaty of finetuned legalisation for the purposes of securing consent and broad participation to a legally binding regime that advances a community interest.

[935] Kenneth W Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal 'The Concept of Legalization' (2000) 54 International Organization 401–419.
[936] Ibid., 401.
[937] Ibid., 401– 404.
[938] Daniel Bodansky, 'The Legal Character of the Paris Agreement', (2016) 25 Review of European Comparative and International Environmental Law 142, 155.
[939] These are the provisions relating to mitigation reflected in Article 4 of the Paris Agreement.
[940] Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 337.

Bringing responsibility sharing within international law would benefit from a form of soft legalisation and a focus on procedure.[941] As mentioned earlier, there is a useful distinction to be made between the form of the instrument, a treaty on responsibility sharing in this case -which off course would be binding on its signatories- and the normative force of each of its provisions. Although the VCLT provides for the contractual clause of *pacta sunt servanda*,[942] not every provision in a treaty creates precise obligations for individual parties.[943] In this sense, certain provisions of some treaties like for example the UNFCCC and the Paris Agreement have been characterised by some commentators as soft-law in character. The distinction for these scholars lies 'in the formulation of the provision which is decisive in determining whether it is hard or soft law'.[944] That said, these provisions, qua treaty provisions, are still binding on the parties and therefore require performance in good faith, as per Article 26 of the VCLT. It is the generality, imprecision or the use of qualifying language that softens the obligation at the level of implementation.

Human rights treaties too, like for instance the ICESCR, are also structured on qualifying language. The Permanent Court of Arbitration, in a dispute over the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) between Northern Ireland and the UK referred to the concept

[941] Cf Ineli-Ciger who suggests that different models on how to distribute the burdens in a large-scale influx or any other complex situation can be introduced to as an Annex to the Global Compact on Refugees, arguing that soft law is easier to agree on. Ineli-Ciger, 'The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing', 130.

[942] Article 26 stipulates that every treaty in force its binding upon the parties to it and must be performed by them in good faith. VCLT, Article 26.

[943] Bodansky, 'The Legal Character of the Paris Agreement', 150.

[944] Boyle, 'Soft Law in International Law Making' in Michael Evans (ed) *International Law Making*, 131.

of cascading standards of expression and levels of treaty provisions. [945] According to the Court, the drafters of a treaty often make strategic use of 'differential language to provide for stipulated levels of engagement of treaty obligation' to achieve the treaty objectives.[946] There is, the Court continues, 'a cascading standard of expression providing for the particular obligations imposed on a Contracting Party'. [947] In other words, some provisions of a treaty can prescribe conduct with high precision, aiming thus at a high level of engagement of obligation, while others aiming at a lesser level of engagement, *recommend* a course of action or *contextualize* at the level of implementation. An example of this use of cascading standards of expression is found in the International Covenant on Economic Social and Cultural Rights (ICESCR), which uses qualifying or contextual language to differentiate between the parties at the level of implementation of the obligations.[948] Likewise, the provisions of the UN Charter relating to international cooperation in various areas of UN concern are couched in programmatic terms, hardly imposing any concrete obligations to be achieved by means of cooperation.[949]

This type of soft legalisation, namely legal obligations that are softened against prescription and delegation is the one that would suit better a protocol on responsibility sharing. The protocol would codify few procedural obligations, softened against prescription and delegation towards the objective of securing consent and broad participation to the treaty. The benefits of soft legalisation as have been noted by Abbot and Snidal are that it facilitates compromise between weak and powerful states, whilst significantly limits the sovereignty costs of

[945] Permanent Court of Arbitration, Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom) Final Award (22 July 2013), para 129.
[946] Ibid. para 129.
[947] Ibid.
[948] ICESCR, Article 2 (3). See also Chapter 4, section 4.3.2.
[949] Simma, UN Charter Commentary, Article 56, at 943.

entering into an agreement.[950] It can also be particularly beneficial for international cooperation and responsibility sharing in areas where actors have diverse interests and different powers.[951] The downside to it, is that legal commitments are weakened in exchange for flexibility, watering-down the instrument as a whole, and hence the law. That said, there are ways in which states' tendency to shirk further their already softened commitments can be mitigated for example by having in place a framework for international reporting and review, as seen in the Paris Agreement.

Soft legalisation at the level of implementation represents the compromise that would have to be made in order to bring responsibility sharing from the exclusive realm of international politics, as it is currently under the Global Compact on Refugees, within international law. Against this background, the next section fleshes out the key provisions of a protocol on responsibility sharing, which if adopted would constitute the missing formal partnership in international refugee law.

5.4.2. Common but differentiated responsibilities and respective capabilities

It is suggested that CBDRRC becomes the explicit guiding framework for responsibility sharing in international refugee law. As already explained, the principle consists of two elements. Adapting the principle to international refugee law would entail an explicit acknowledgment of the common responsibility of states to protect the refugees and provide solutions. Today there is stronger consensus that the refugee challenge is the 'common concern of humankind' and that refugee protection ought to be the common and shared responsibility of states, of which the principle of responsibility sharing is the expression.[952] Translating

[950] Abbot and Snidal 'Hard and Soft Law' in International Governance', 447.
[951] Ibid. 423.
[952] Global Compact on Refugees, paragraph 1, opening statement. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 285.

this common concern for refugees into a common responsibility through the use of CBDRRC would solidify the idea of shared responsibility by concretising the need for differentiation in the way this common responsibility is shared.

The second element of differentiated responsibilities would certainly raise controversies in its negotiation. As seen in international environmental law, differentiation manifests itself in two rationales serving two distinct fairness principles. One rationale is the contribution to problem - i.e. to what extent a state has contributed via its conduct or omission to a common environmental problem - and the other is the capacity and capability to respond and take measures towards solving that problem.[953] In the Paris Agreement, CBDRRC was recalibrated to focus particularly on responsibility by capability and the ever-changing national realities of states.[954] Yet, even in this Paris version of CBDRRC, the developed states are normatively expected to continue to take the lead in the fight against climate change, due to their greater resources that determine their capacities. Developed countries' greater resources also warrant the provision of support to the developing countries in meeting their own commitments.[955] This is in simple terms the deal at least in international law between the Global North and the Global South in protecting the climate change.

A similar agreement on responsibility sharing for refugees would need to be reached. Adapting however the principle of CBDRRC to international refugee law raises a number of questions. For example, should whether wealthier states of the Global North assume greater responsibilities in law because of their greater resources. Under the current state of affairs, the Global North not only does not undertake responsibilities proportional to its resources, but it has put in place

[953] UNFCCC, Articles 3 and 4. Philippe Sands, Jacqueline Peel, Andriana Fabra, Ruth Mackenzie *Principles of International Environmental Law,* (Cambridge University Press 2018 fourth edition) 244.

[954] Paris Agreement, Article 2 (2).

[955] Paris Agreement, Article 3 and in particular Article 9.

sophisticated mechanisms to further circumscribe responsibility for refugees in international refugee law.

Another question the adaptation of the principle of CBDRRC would raise is on whether refugee producing countries, namely countries of origin, but also countries that have indirectly contributed to refugee flows through their foreign policies for example, should be responsible to compensate asylum states. Finally, would developing states of the Global South, the hosts of the majority of the refugees, be entitled to receive additional development aid from the Global North, given that they are acting for the international res publica? These questions are addressed next.

5.4.2.1. Contribution to the refugee flows

Refugee law scholars have argued that an adaptation of CBDRRC in international refugee law should only reflect the differences in capacities and resources and not any causal responsibility direct or indirect for the creation of refugee flows.

Wall, who also suggests that the principle of CBDRRC should guide responsibility sharing in international refugee law argues that international refugee law ought to dispense with the 'contribution to the problem' rationale, as 'the apportionment of blame for refugee flows is neither necessary, nor appropriate' to the refugee context.[956] It is rather the capacities rationale, responsibility by capability, that ought to determine commitments and which would assign special responsibilities to the developed countries.[957]

Dowd and McAdam support that responsibility sharing in the international refugee law regime, 'is not linked to states' role in creating refugee movements, but rather on their capacity to provide protection and resources to alleviate the

[956] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfill the Promise of the 1967 Protocol?', 226, footnote 147.
[957] Ibid.

pressures on (mainly developing) states that host large numbers of refugees'.[958] They caution however that the adaptation of CBDRRC to international refugee law should not make existing refugee law obligations conditioned upon international assistance.[959]

The Global Compact on Refugees appears to emphasise on responsibility by capability by stressing 'the relative capacities of states, their levels of development and their respecting national priorities',[960] ascribing arguably to a more pragmatic and dynamic, *à la Paris Agreement* version of CBDRRC.

Arguments on the direct and indirect contribution to refugee flows have been present in the discourse for some time and are worth rehearsing here, so as to assess whether they are firstly relevant, and secondly, fruitful to the conclusion of a protocol on responsibility sharing.

With regard to refugee producing countries, Owen claims that they have a general *moral* responsibility to contribute to the responsibility sharing efforts, as well as a special one to compensate other states for their unjust conduct or omission.[961] He explains further:

> States that engage in unjust conduct to another state - conduct that foreseeably generates refugees – should be held responsible for the protection of these refugees, and discharging this responsibility should not be seen as a contribution to their share of general responsibility.[962]

[958] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law', 182.
[959] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law', 217.
[960] Global Compact on Refugees, para 4.
[961] Owen, *What do we Owe to Refugees?*, 86. Emphasis added.
[962] Owen, *What do we Owe to Refugees?*, 92.

Similarly but from a legal point of view, Goodwin-Gill and Sazak have suggested that refugee-creating states have as a matter of international law a legal responsibility to compensate asylum countries that face sometimes devastating financial demands.[963] They suggest this can be done by UNHCR, which can make effective use of the UN sanctions regime and the freezing of assets , a measure that would ultimately generate funds, even if symbolically, for the refugee assistance programmes.[964] Apart from a compensatory logic, these arguments also serve a flight prevention logic. Schuck has noted:

> The possibility that some first asylum states are complicit in refugee flows should surely be taken into account in designing and administering a reformed system of refugee protection. Indeed, imposing some obligations to bear some of the burdens that such a state causes might reduce its propensity to instigate refugee crises in the first place.[965]

The legal arguments draw from the law of state responsibility and seek to establish that states responsible for creating refugee flows, have committed an internationally wrongful act, as defined in the International Law Commissions' Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). [966] According to ARSIWA, such act must be attributable to that state, in accordance with the rules of attribution, as provided thereunder, and as a result

[963] Guy S Goodwin-Gill, 'The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change' (2016) 28 International Journal of Refugee Law 669, 684. Guy S Goodwin-Gill, Selim Can Sazak, 'Footing the Bill Refugee-Creating States' Responsibility to Pay' Foreign Affairs (29 July 2015).
[964] Goodwin-Gill, Sazak, 'Footing the Bill Refugee-Creating States' Responsibility to Pay'.
[965] Schuck, 'Refugee Burden Sharing: A Modest Proposal', 273.
[966] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, (ARSIWA), Article 2.

the state should be held accountable for reparation towards other states injured,[967] namely those that host the refugees.[968]

It is suggested that the law on state responsibility and legal action to ensure accountability, even for the purposes of compensating asylum states, should remain outside a partnership for distributing responsibilities in international refugee law. The use of the law of state responsibility for the purposes of attributing responsibility in the context of extra-territorial refugee policies or in the context of establishing responsibility for the cause of refugee flows is certainly critical and beneficial -both for clarifying the state of the law in relation to these practices,[969] but also for the purposes of establishing accountability.[970]

The Refugee Convention neither deals with the causes for flight nor provides for prevention,[971] essentially delimiting the scope of international refugee law to palliative protection.[972] Sticking to the spirit of the Refugee Convention and in light of the objective to create a much-needed sense of partnership between

[967] ARSIWA, Article 31.

[968] Compensation as one means for reparation for injury is provided in, Article 36 of ARSIWA that reads: 'The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established'.

[969] As already discussed in Chapter 3, in recent years there has been a rich scholarship developing in relation to the law of state responsibility for the purposes of identifying the limits international law places on the extraterritorial practices of states. For a comprehensive summary of these issues, See Isabelle Swerissen, 'Shared Responsibility in International Refugee Law' SHARES Expert Seminar Report (2011).

[970] Indicatively, jurisprudence from the European Court of Human Rights includes *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989); Chahal v the United Kingdom App no 22414/93 (ECtHR, 15 November 1996); Hirsi Jamaa and Others v Italy [GC] Application no 27765/09, (ECtHR, 23 February 2012).

[971] Guy S Goodwin-Gill, 'International Law of Refugee Protection' in Elena Fiddian - Qasmiyeh and others (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014), 45.

[972] Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection', 202

countries of origin, transit, asylum and destination for the benefit of refugees in international law, I would concur with Wall that CBDRRC in international refugee law should dispense with the rationale for responsibility for harm.[973] The use by UNHCR of the UN sanctions regime, although an interesting proposal, should likewise remain outside the scope of CBDRRC and a protocol on responsibility sharing.

The Global Compact appears to emphasise on the need for partnership, since it includes in the modalities the provision of support to countries of origin through resources and expertise.[974] Therefore, a true partnership in law between states, reflected within the principle of CBDRRC is only likely to be fruitful, if rationale for differentiation is delimited to states' *positive* contributions to protection and solutions in accordance with their capacities.

5.4.2.2 Contribution according to capacities

Scholars have also supported the view that there is a moral responsibility of the Global North to contribute to refugee protection because of its greater resources, but also because of its foreign policy objectives. Zolberg et al, hold the view that the Global North has a moral obligation to share asylum responsibilities because of its 'enormous resource capabilities relative to those of the South,' as well as its 'co-responsibility' for upheavals and social conflicts in the Global South.[975] Schacknove and Byrne share this view and support that the Global North has, in its colonial past, historically contributed to refugee flows and continues to do so indirectly through its foreign policy.[976]

[973] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfill the Promise of the 1967 Protocol?', 226.
[974] Global Compact paragraphs 87-89.
[975] Aristide R Zolberg, Astri Surkhe, Sergio Aguayo *Escape from Violence, Conflict and The Refugee Crisis in the Developing World,* (Oxford University Press1993), 279.
[976] Byrne and A Shacknove, 'The Safe Country Notion in European Asylum Law', 212- 213.

Whilst the rationale for direct or indirect contributions to refugee flows should fall outside the CBDRRC contours for the reasons explained above, the view that holds that the Global North's greater capacities should entail special responsibilities[977] reflects a conception of fairness at the interstate level. The Global North's responsibility to contribute to refugee protection, in accordance with its greater resources, is a requirement of fairness towards the developing countries that host the majority of the refugees. It should thus be reflected in the CBDRRC principle and its operationalisation under a protocol on responsibility sharing.

This argument can be made *a fortiori*, in light of the *non-entrée mise en place* by the global North that arbitrarily seek to confine the locus of protection to the global South. The Global Compact on Refugees stresses the need to support particularly the developing host countries and envisages the provision of funding to them - including technology and capacity building- as key areas for effective responsibility sharing.[978]

To conclude, I suggest that adapting CBDRRC to international refugee law would primarily solidify refugee protection as the common and shared responsibility of states. This indeed would be the most valuable asset of bringing the principle of CBDRRC in international refugee law. This realisation would thus in turn require a baseline commitment of all states to refugee protection and solutions differentiated under a rationale of responsibility by capability, namely capacities and socioeconomic realities, including the greater capacities of the developed countries, would define contributions to protection and solutions. This baseline commitment would truly set in motion a process fair and equitable

[977] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfill the Promise of the 1967 Protocol?', 226.
[978] Global Compact on Refugees, para 32.

responsibility sharing at the international plane characterised 'by the formal equality of states and their inequality of material capability'.[979]

Building on the language of the Global Compact for Refugees, I suggest that a protocol on responsibility sharing codifies the CBDRRC principle as follows:

> *States should share the responsibility for protecting and providing solutions to refugees in accordance with their common but differentiated responsibilities and respective capabilities, and in light of their national realities, capacities, levels of development and respecting national policies and priorities.*

5.4.3. An obligation to participate in responsibility sharing crafted as an obligation of conduct

In this section, I discuss and explore, in detail, the nature of the legal obligation that could be codified in the protocol, so as to operationalise the principle of CBDRRC as suggested above. I propose crafting the legal obligation as bottom-up. Bottom-up obligations minimise the real and perceived sovereignty costs of joining a legally binding instrument.[980] Crucially, key to the appeal of a protocol on responsibility sharing to states, would be the trade-offs between the breadth of participation and the depth of the legal commitments. It is thus suggested that the obligation of each individual state party to participate in responsibility sharing is crafted as *a procedural obligation of conduct*. A proposed wording, inspired by the Paris Agreement provision on mitigation is as follows:

[979] Mlada Bukovansky, Ian Clark, Robyn Eckersley, Richard Price, Christian Reus-Smit, Nicholas J Wheeler, *Special Responsibilities: Global Problems and American Power (*Cambridge University Press 2012), 213.

[980] Abbot and Snidal, 'Hard and Soft Law' in International Governance', 426.

Each State party shall prepare and communicate its contributions to refugee protection and solutions in line with its common but differentiated responsibilities and respective capabilities, in light of its national realities, capacities, levels of development and respecting national policies and priorities.

Each party should pledge its contributions to complementary admission pathways, solutions as well as to financing protection costs, to the best of its capabilities.

Paragraph 1 codifies an obligation to contribute to responsibility sharing as one of *conduct* rather than *result*. The parties to the protocol would be therefore obligated to participate in the responsibility sharing effort and communicate their contributions. Under the status quo, participating to responsibility sharing through the Global Refugee Forums remains entirely discretionary, whilst under the suggested protocol, the state parties would be legally bound to participate in responsibility sharing by pledging their commitments. Crucially, the parties would not be legally required to achieve their pledges. In other words, failing to achieve the pledges would not incur the violation of the obligation. The rationale that a treaty on responsibility sharing should have low barriers to entry to ensure broad participation and ratification is the correct one. [981] To this end, the breadth of participation trumps the depth of the legal commitments.

Despite the low level of precision and the absence of a delegation of authority to a third party under the protocol, each state party would have a legal obligation to participate in the responsibility sharing effort that would be additionally bolstered by the good faith requirement to achieve the pledges under

[981] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 227 and 230.

Article 26 of the VCLT. The emphasis of the obligation on a procedural requirement to participate in responsibility should not be underestimated. As seen in MEAs reflecting community interests, procedural obligations serve important functions. Brunnée explains the facilitating role of procedural requirements in contexts where agreement on substantive obligations is nearly impossible, if not undesirable.[982]

5.4.3.1. A normative expectation to contribute to both physical and financial responsibility sharing

Paragraph 2 of the proposed provision builds on paragraph 1 and sets a normative expectation - hence the recommendatory use of 'should' instead of the mandatory 'shall' - on the part of each individual state party to contribute to *both* components of responsibility sharing, physical and financial.

In line of the conception of responsibility sharing put forward in the thesis physical relocation of refugees through the institution of asylum, resettlement and other complementary pathways to protection, particularly when refugee host countries are severely encumbered and cannot guarantee refugee rights is an essential component of responsibility sharing. It is the most controversial component as the Global North has intentionally and cautiously refrained from openly committing to it.[983]

Betts and Collier recognise the need for a 'baseline common commitment' that symbolises participation.[984] Symbolic participation, according to the authors, would require that every state commits to admitting at least a certain number of

[982] Brunnée, 'International Environmental Law and Community Interests Procedural Aspects', 175.

[983] Dowd and McAdam 'International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?', 892. Delmi Report, 'A Fair Share Refugees and Responsibility-Sharing', 44.

[984] Alexander Betts, Paul Collier, *Refuge Transforming A Broken Refugee System* (Allen Lane), 208.

refugees into its territory and, similarly, makes a minimum token of financial contribution.[985] It is therefore crucial that such common baseline commitment is enshrined in a protocol and the use of qualifying language in the construct of the provision plays an important role. The phrase 'as well as' - qualified by the phrase 'to the best of its capabilities'- sets a normative expectation of each state party to pledge not only financial contributions but also complementary admission pathways and solutions.

Provisions that recommend rather than obligate lack the 'characteristics of international normativity', but nonetheless can produce 'certain legal effects'.[986] Thus codified, the provision aims at a lesser level of engagement of obligation, since it recommends rather than prescribes action. Under the proposed protocol, state parties, including Global North countries, would be normatively expected to pledge for refugee admission fulfilling the baseline commitment, but failing to do so, would not incur the violation. The use of softer language here aims to secure agreement by states by going not too far beyond what is realistically possible. The fact however that such normative expectation would be found in a legally binding instrument would have direct normative impact on states' conduct and should be interpreted as such.

Contributions to physical responsibility sharing would entail refugee admission for the purposes of access to protection and resettlement. States would be free to choose from offering asylum places or using complementary admission pathways, such as humanitarian visas and corridors, labour mobility schemes or education opportunities for refugees such as academic scholarships and student visas. These are all tokens of physical responsibility sharing that have already

[985] Ibid.

[986] WM Reisman et al, 'A Hard Look at Soft Law' (1988) 82 American Society of International Law Proceedings, Remarks by G Handl 371. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', 352.

been agreed by states in the Global Compact. [987] Henceforth, it should not require extensive renegotiation and agreement.

Most importantly, the state parties would be normatively expected to contribute to solutions as well. Resettlement, in particular, although long recognised as a core protection tool and a durable solution,[988] it still remains, today, critically underprovided.[989] With an exception to the OAU Convention, there is currently no hard law on durable solutions.[990] A normative expectation on the part of the state parties to the protocol to contribute to solutions would strengthen international refugee law with respect to solutions.

Hathaway and Neve have identified a timeframe of five years after which 'the psychosocial need for permanence compels a durable solution'.[991] Findings based on empirical and phycological research, such as this one, are important. Attention therefore should be paid to them as they can resolve protracted refugee stations that require active participation from the international community.

With respect to financial responsibility sharing, each state party would choose whether to fund refugee assistance programmes in specific refugee situations, in cooperation with other humanitarian or developmental actors or directly establish private-public partnerships with the refugee host states. The Global Compact on Refugees envisages the establishment of public-private

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[987] Global Compact on Refugees, para 95.

[988] UNHCR Resettlement Handbook, (UNHCR 2011 revised edition), 136.

[989] In 2019 UNHCR submitted nearly 82,000 refugees to 29 States for consideration, and some 64,000 refugees were resettled. This represented a modest increase from 2018 and surpassed the strategy's target of 60,000 for the year. Nevertheless, it constitutes less than 5 per cent of the 1.4 million refugees determined to be in need of resettlement in 2019. Resettlement and complementary pathways, Standing Committee 78th Meeting, EC/71/SC/CRP.10 30 July 2020.

[990] Türk and Dowd 'Protection Gaps', 284.

[991] Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' ,182–84. Domanski, 'Insights from Experience: A Background Paper on Temporary Protection' in Hathaway (ed) *Reconceiving International Refugee Law,* 22.

partnerships, whereunder the private sector can invest in refugees and host communities through labour mobility schemes for instance. [992]

5.4.3.2. Bottom-Up Implementation

Provided that states agree to codify a common baseline obligation of responsibility sharing, the implementation of this commitment would not differ too much from what the Global Compact envisages.

One option would be to use the existing 'machinery' of the Refugee Compact, the Global Refugee Forums, namely pledging conferences convened every four years, where states would be legally bound to communicate their commitments. Another option would be to create a body under the protocol, a Conference of the Parties during the meetings of which each state would communicate its individual contributions.[993] Wall argues that whilst the holding of pledging conferences are merely *events*, the Conference of the Parties would be the treaty's governing body that would 'set a process in motion.'[994] The pledges and contributions would then be made available by UNHCR on a public registry. This is a process already in motion under the Global Compact on Refugees and therefore its institutionalisation under a protocol would not encumber the High Commissioner's office further.

5.4.5. Developed countries' obligation to provide financial assistance to refugee hosting developing states

The operationalisation of the principle of CBDRRC in international refugee law would warrant that refugee hosting states, developing or least developed receive the necessary resources for protecting refugees, without significantly overbearing

[992] Global Compact on Refugees, para 42.
[993] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 230.
[994] Ibid. Emphasis in the original.

their own resources and communities. To this end, developed states should have special responsibilities under the protocol. The Global Compact stresses the need for supporting the developing and least developed refugee hosting countries through effective and efficient funding that maximises private sector contributions and enhances developmental assistance.[995]

It is suggested that the protocol codifies an obligation for developed states to commit to refugee financing, including technology transfer and capacity building. The obligation could be structured as a *collective o*bligation of the developed countries as a whole. A suggested drafting is as follows:

> *Given their greater capacities and resources, developed country parties shall provide financial resources to the developing refugee hosting countries, through mobilising humanitarian and development assistance, including technology and capacity-building in support of refugees and host communities.*
>
> *Developed country parties are encouraged to commit to multiyear, unearmarked funding and mobilise additional development resources, over and above regular development assistance. Such funding should be considered on a grant basis.*

Paragraph 1 of the suggested provision codifies a collective obligation on the part of the developed states only - being the major donors of humanitarian and developmental aid - to provide financial assistance including, technology transfer and capacity building, to the refugee hosting countries for the benefit of the refugees and host communities. The collective nature of the obligation further softens the levels of prescription for it does not specify what each individual

[995] Global Compact on Refugees, para 32.

developed party is required to do. This could be seen as a weakness of the provision, which paragraph 2 seeks to modestly remedy.

Paragraph 2, addressing again the developed parties, is couched in recommendatory terms and essentially encourages the major donor countries of the Global North to commit to unearmarked development funding to host states for the benefit of the refugees and the local communities. Furthermore, the provision also encourages the developed country parties to consider providing funding on a grant making basis.

Refugee targeted development aid is a key tool towards fair and effective responsibility sharing. As it became evident in the context of the UNHCR Convention Plus Initiative, developing host countries sought commitments by the developed states on refugee targeted assistance that would be *additional* to that for poverty eradication and other developmental needs. Leah Zamore convincingly argues that development grants and debt cancellation should replace concessionary lending to developing countries for hosting refugees:

> Additional support to host countries should be "untied" and should come in the form of grants, not loans. Just a handful of host governments are home to a majority of the world's refugees. Support for them should therefore be seen chiefly as compensation for a global public good and as a step toward global economic justice. It should not be a secret subsidy for donors or their banks. It should not leave host countries more indebted than they already are.[996]

An example is Tanzania. Tanzania, one of the largest refugee hosting countries in Africa, withdrew from the Comprehensive Refugee Response Framework of

[996] Leah Zamore, 'Refugees, Development, Debt, Austerity: A Selected History' (2018) 6 Journal on Migration and Human Security 26, 48-49.

the Global Compact (GRRF), when under the International Development Association (IDA), the World Bank's fund for the poorest,[997] it was offered $100 million, split between a loan and a grant'.[998] Betts explains that 'the idea that a country like Tanzania should have to borrow, even at preferential rates, to host refugees on behalf of the international community,' was what made President Magufuli withdraw from the CRRF.[999]

The CBDRRC principle adapted to the refugee law context would seek to adjust the current unfairness by taking cognizance of the socio-economic realities of states, in particular, the refugee hosts developmental priorities. Their efforts to refugee protection and to the community interests would thus be acknowledged in the legal arrangement. Lending, as it has been rightly pointed out, even if concessionary, has the proclivity to encourage austerity in countries with already limited capacities.[1000] Additional development aid given to refugee host countries specifically to low-income developing countries would truly reflect a sense of partnership between the Global North and the Global South that would ensure tangible benefits at the national level for both refugees and the local population.

Regrettably, it would be unrealistic to think that such a leap of faith towards grant based development aid could be taken by donor states and development banks like the World Bank, as a matter of legal obligation. There is already tension between developed and developing countries on the broader question of

[997] On IDA 18 and its Regional Sub-Window for Refugees and Host Communities, See https://ida.worldbank.org/replenishments/ida-18replenishments/ida18-regional-sub-window-for-refugees-host-communities.

[998] Alexander Betts, 'Don't Make African Nations Borrow Money to Support Refugees' Foreign Affairs (February 21, 2018).

[999] Ibid.

[1000] Alexander T Aleinikoff, Leah Zamore 'The Arc of Protection: Toward a New International Refugee Regime', 60. Public Seminar Books, Available at http://www.publicseminar.org/wp-content/uploads/2018/06/Click-here-to-download-the-Arc-of-Protection.pdf .

development aid, [1001] including debt cancellation and its real impact on development.[1002] The legal design therefore would be key to balance the need for aid against realistic expectations. This is why paragraph 2 on mobilizing additional development aid to be considered on the basis of grants is couched in programmatic terms, encouraging a course of action, aiming at a minimalist level of suggested conduct and course of action. This is how the concept of cascading standards of expression and levels of engagement of obligations would play in a treaty that seeks to have low barriers to entry and codify a minimum of obligations.

Before proceeding, a caveat is in order. What I have suggested in terms of an obligation for financial assistance to the developing countries might *prima facie* oversimplify matters, by categorising the countries into developed and developing. To be sure, this is not an absolute categorisation, nor a legal categorisation. There are many structural differences within each category of developed and developing states, and this is acknowledged within the principle of CBDRRC that takes cognizance of the socioeconomic realties *of each state* individually. Not all developed states, are equally wealthy and not all developing countries are all least developed. The European Union and Latin America is one such context, where some states in the region are much wealthier than others. The distinction therefore under the protocol into developed and developing is not a rigid one. It is made solely as an acknowledgment of the fact that the majority of refugees are found in the Global South or in middle income countries, such as Turkey and Lebanon.

[1001] Hurwitz, *The Collective Responsibility of States to Protect Refugee*s, 285.

[1002] In the context of Africa, it has been argued that 'although debt relief offers some prospects for development, there is little or no evidence to suggest that such an outcome is automatic.' J Shola Omotolaa and Hassan Saliub, 'Foreign Aid, Debt Relief and Africa's Development: Problems and Prospects' (2009) 16 South African Journal of International Affairs 87.

That said, under the protocol all parties, irrespective of their development levels, would be bound to contribute to refugee protection and solutions, in line with their CBDRRC. Crucially, compliance with core protection obligations under the Refugee Convention would not be conditioned upon receipt of financial assistance under the Protocol.

5.4.6. Implementation and review

5.4.6.1. A transparency obligation to report

When it comes to transparency and information sharing, international refugee law is considerably underdeveloped. This is because there is no official reporting and information repository on countries' responsibility sharing contributions. [1003] The Global Refugee Forum's digital platform and dashboard,[1004] which tracks the pledges and their implementation progress, is a laudable effort by UNHCR to keep the ongoing global responsibility sharing effort transparent.

At the time of writing, the dashboard has tracked pledges and contributions made by states and other pledging entities at the 2019 High Level Segment on Statelessness and the 2019 Global Refugee Forum.[1005] UNHCR has stressed however that the dashboard 'is not a financial tracking or reporting tool', as updates are based on voluntary reporting by pledging and recipient entities.[1006] This is where a procedural obligation of reporting on the contributions to

[1003] The only exception to this is found in the Refugee Convention and the Protocol requiring states to communicate to the UN Secretary General the laws and the regulations that may adopt to ensure the application of the two instruments. Refugee Convention, Article 36. Protocol Related to the Status of Refugees, Article III.

[1004] Online Tracking Dashboard on Pledges and Contributions, https://globalcompactrefugees.org/channel/pledges-contributions

[1005] UNHCR Global Refugee Forum, Concept Note Global Refugee Forum – Online Tracking Dashboard on Pledges and Contributions.

[1006] Ibid., 4.

responsibility sharing can build mutual trust between the parties, boost self-assessment and peer review and ensure transparency.

To this end, the protocol would codify an individual obligation for each state party to provide an annual report on its contributions to protection and solutions, as well as any other information needed to track the status of their implementation.[1007] In the case where contributions to responsibility sharing take the form of joint pledges with partner organisations, be that private sector, or NGOs, the primary reporting obligation shall rest with the state party. Reporting in the case of jointly undertaken pledges with the private sector, shall require detailed information on the roles and responsibilities between the partners as well as a guarantee that arrangements are in full respect of humanitarian and human rights principles.[1008] The state's obligation to report under the protocol would not, however, deprive non-state pledging entities from voluntarily reporting on their pledges and progress. In fact, reporting from different sources could enhance the quality of information and data verification.

The value of self-reporting should not be underestimated, even in the case where parties are not legally bound to achieve their pledged contributions. The focus on procedure serves its own crucial role and self-reporting comes with important benefits. Individual reporting obligations are ubiquitous in multilateral environmental agreements and form an integral part of their oversight frameworks.[1009] Where reporting is an integral part of the treaty's framework, it

[1007] Some reporting is also suggested by Wall in his Framework Convention but again it does not appear to be proposed as a matter of legal obligation. Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 230.

[1008] Global Compact on Refugees, paragraph 42. Harley additionally flags that [P]rivate sector engagement is consistent with international human rights standards and that relationships are entered into transparently and with a clear understanding of respective roles and responsibilities. Harley, 'Innovations in Responsibility Sharing',10.

[1009] Bodansky, *The Art and Craft of International Environmental Law*, 239.

performs an additional self-examination function, serving procedural fairness by enhancing transparency between the parties.[1010]

In the proposed architecture, the individual transparency obligation will bolster each party's substantive obligation under the protocol to participate in the common baseline commitment functioning as a review mechanism.[1011] Even when states are less than sincere, self-reporting has benefits as 'the formal presentation of a report to an international organisation', in this case the UNHCR, 'presents NGOs and other critics with a convenient target'.[1012] It facilitates evaluation of a country' performance by providing a focal point for others to assess and criticize the information provided'.[1013] Finally, reporting on responsibility sharing can also identify protection gaps, highlight progress against the global refugee needs and finally promote the sharing of good practices between the parties.

5.4.6.2. A Global Stocktake

Part of the protocol's implementation and review framework would be a global stocktake. A soft legalisation of responsibility sharing equally requires a departure from traditional enforcement and sanctioned-based treaty mechanisms towards mechanisms of facilitating compliance and dialogue.[1014] The Global Compact on Refugees for example envisages a stocktake exercise. The

[1010] Ibid.

[1011] Bodansky, Brunnée , Rajamani, *International Climate Change*, 242.

[1012] Bodansky, *The Art and Craft of International Environmental Law*, 239.

[1013] Ibid.

[1014] The enforcement model can be seen in multilateral human rights treaties whereby treaty-bodies are established, usually through an optional protocol, to interpret human rights provisions and hear individual complaints. A similar model can also be seen in regional human rights instruments that establish human rights courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, both established under the European Convention of Human Rights and American Convention on Human Rights respectively. Finally, the Refugee Convention itself has a dispute resolution clause in Article 38.

stocktaking of progress is to take place during the Global Refugee Forums, during which stakeholders will assess progress against the objectives of the Compact.[1015] Specifically:

> [T]he stocktaking at the Forums will be informed by the results of the process coordinated by UNHCR to measure the impact arising from hosting, protecting and assisting refugees and a mechanism for tracking implementation of pledged and contributions, as well as measuring the impact of the global compact established by UNHCR in close consultation with States and other relevant stakeholders.

The next Global Refugee Forum is to take place in 2023. The modalities and methodologies that will inform the stocktaking are, still at the time of writing, being developed by states and UNHCR with the technical assistance of the World Bank.[1016]

It is suggested that such global stocktaking of progress becomes the protocol's review mechanism. In the Paris Agreement, the global stocktake is envisaged to take place every five years with an aim to raise ambition in the NDCs and assess the collective progress of the parties towards achieving the goal of the Agreement.[1017] Not entirely dissimilar, a global stocktake under the protocol would take place during the Global Refugee Forums and would assess the *collective* progress of the parties against UNHCR's international protection needs.

[1015] Global Compact on Refugees, paragraph 103.
[1016] UNHCR Progress Report Measuring the Impact of Hosting, Protecting and Assisting Refugees (July 2020).
[1017] Paris Agreement, Article 14.

During the stocktake exercise, the parties would be required to participate to this 'collective learning process'.[1018] As it has been observed by scholars in other areas of global governance, stocktaking functions as 'a communicative process of constructing shared meanings around new concepts, including normative expectations and identities'.[1019] To this end, the protocol could explicitly provide for the participation of all stakeholders to the stocktaking exercise including non-state entities. The transparency obligation on self-reporting and the stocktaking of progress could together be seen as the permanent public discourse on the fairness as well as effectiveness of the global responsibility sharing effort against projected international protection needs.

5.5. Why we need a protocol with a light package of responsibility sharing obligations

One could question how this model of bottom-up contributions to responsibility sharing communicated during pledging conferences would differ from the current state of affairs.

A quick search on the global compact's dashboard that tracks the pledges under the Global Compact paints a somewhat disheartening picture and reveals partly the answer. As already said, the dashboard shows pledges and contributions made by states and other pledging entities at the 2019 High Level Segment on Statelessness and at the 2019 Global Refugee Forum.

Most states' pledges thus far have been made with regard to harmonisation of policy,[1020] ascension to international legal instruments and withdrawal of

[1018] Manjana Milkoreit, Kate Haapala, 'Designing the Global Stocktake: A Global Governance Innovation' The Centre for Climate and Energy Solutions (C2ES) (November 2017), 7.
[1019] Ibid.
[1020] Noll 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field', 243.

reservations. The sharing of policies is seen by some states as falling with the scope of responsibility sharing. In the EU context in particular, there has been extensive supranational legislation aiming at the harmonisation of asylum procedures across the Member states with respect to status determination and reception standards.[1021] As already explained, harmonisation of policies can be a laudable effort insofar it complements and does not seek to substitute the common baseline commitment to physical and financial responsibility sharing.

Very few pledges by states, as appear on the Dashboard, are made on complementary admission pathways, and even less on local integration or on state-sponsored resettlement.[1022]

Another issue that has been flagged by UNHCR in relation to complementary pathways, is the lack of comprehensive data showing how many refugees benefitted in 2019.[1023] This is why procedural obligations on reporting and information sharing are crucial to measure and review progress in the protection of the community interest.

Non-state entities, such as the private sector and NGOS appear to have pledged more to complementary admission pathways than states.[1024] For

[1021] EU Council Directive 2013/32 on Common Procedures for Granting and Withdrawing International protection (recast).

[1022] An exception is Denmark that explicitly pledged to resume its resettlement programme in 2019 starting with prioritising refugees in need of medical treatment and with annual quotas to follow for 2020.

[1023] UNHCR 'Resettlement and Complementary Pathways' Standing Committee 78th Meeting. EC/71/SC/CRP.10 (30 July 2020).

[1024] UNHCR makes this point obvious when in a recent publication in the Journal of International Refugee Law, Assistant High Commissioner for International Protection Gillian Triggs and Associate Policy Officer Patrick Wall, extensively list all the pledges made by the private sector, in an effort to show progress on the Global Compact, whilst summarizing states pledges with a relatively brief comment. 'A broad range of States – more than two-thirds of the membership of the UN – participated in more than half of all pledges, but there was also very active participation in the pledging process by a wide range of other stakeholders'. Gillian D Triggs, Patrick Wall, 'The Makings of a Success': The Global

example, the Tent Partnership for Refugees, a coalition of 44 private sector companies including Airbnb, Adidas, H&M Group, IKEA and other conglomerates have pledged to hire and place more than refugees into jobs, support refugee-owned businesses and improve access to banking services for refugees.[1025] Interestingly, Myanmar has pledged to facilitate voluntary returns of refugees, previously based in Thailand, without reporting further on what that entails.[1026] This pledge lacks crucial information, in particular with respect to the 'voluntary' nature of the repatriations, that should be made transparent to the international community. Other pledges are constructively vague in their description and missing important information on their implementation as well.[1027]

One positive contribution is the UK's 2020 New Resettlement Scheme, under which the UK government has pledged the resettlement of 23 000 refugees, launching a community sponsorship programme, additional to the commitments of the UK government.[1028] The progress and implementation of the contributions is, however, likely to further delay as a knock-on effect of the global coronavirus pandemic. Indicatively, the High Commissioner remarked in the meeting of the Standing Committee in July 2020:

Compact on Refugees and the Inaugural Global Refugee Forum' (2020) International Journal of Refugee Law, (advanced copy), 45.

[1025] The Tent Partnership pledge can be found in the Dashboard. More on the Tent coalition, https://www.tent.org/members/

[1026] Myanmar's pledge available at https://globalcompactrefugees.org/index.php/channel/pledges-contributions

[1027] China for example has pledged to continue to provide humanitarian support to multiple countries without further specifying details.

[1028]UK Resettlement Scheme Note for Local Authorities August 2019 available at https://www.local.gov.uk/sites/default/files/documents/UK%20Resettlement%20Scheme%20Briefing%20Note%20for%20Local%20Authorities%20WEB.pdf

> Compounding the decline in respect for the legal regime underpinning refugee protection are the social and economic impacts of COVID-19 upon the most vulnerable in our communities, especially the 26 million asylum-seekers and refugees, the 47 million people displaced in their own country and unknown millions of those who are stateless.[1029]

In light of the above, the proposed protocol, if agreed, would significantly change the current state of affairs. It would be a treaty as defined in the Vienna Convention on the Law of Treaties.[1030] Responsibility sharing for refugees would come within international refugee law as well as under a permanent institutional structure. The protocol would be *additional* to the Refugee Convention and the 1967 Protocol, open to accession by all countries, even those that have not ratified the Convention. For the reasons explained above, it is highly unlikely that states would join a treaty that provides for financial and physical responsibility sharing obligations of *result* or any targets. In light of this, pre-determined quotas would not be conducive to states' agreement nor would secure compliance by states.

Under the protocol, each state party would have a legal obligation of conduct to pledge its contributions according to its 'common but differentiated responsibilities and respective capabilities in light of their national realities, capacities, levels of development and respecting national policies and priorities' (CBDRRC), turning the current policy trend into a principled legal framework.

In addition to their individual obligation to participate in the responsibility sharing effort, developed states would have *a collective* obligation to support the developing host countries, by providing targeted development assistance that would benefit refugees and the host communities. Further, states parties would

[1029] Remarks by Assistant High Commissioner for Protection Gillian Triggs at the 78th meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme (7 July 2020).
[1030] VCLT, Article 2 (1) (a).

be normatively expected to contribute to both physical and financial responsibility as a baseline common commitment. The softening of the obligation in this respect entails that states would, however, be free to choose the content of their financial and refugee admission contributions i.e. financing UNHCR or refugee assistance programmes in the host states as well as choose between complementary pathways or offering resettlement places. Nevertheless, failing to meet this common baseline commitment would not incur the violation of the provision, ensuring a certain degree of autonomy.

Finally, over the issue of development aid - that causes tension between developing and developed countries - the protocol would set a course of action, towards targeted development assistance. This provision would hardly impose any concrete conduct on behalf of the developed countries but would still provide context and construct a narrative that would at least signal solidarity in addressing the problem.

In terms of implementation and review, the protocol would provide for a light oversight framework premised on transparency, self-reporting and stocktaking that would seek to facilitate implementation. Each state would have a legal obligation to communicate its contributions and to report annually on their progress and implementation. In cases of joint pledges and public-private partnerships, which should be explicitly provided in a protocol on responsibility sharing, reporting on the division of labour between the parties would be a mandatory requirement of the state party to the protocol. The parties' pledges and reports would be subsequently published onto the public registry established by the protocol and operated by UNHCR, therefore ensuring open access to all stakeholders. Self-reporting under the protocol would perform a policy function of self-assessment for the parties and peer and public pressure for the rest of the stakeholders. Finally, the global stocktake would assess the collective progress

against protection needs and strengthen the public discourse on the fairness as well as effectiveness of the global responsibility sharing effort.

5.6. Building and expanding on the protocol's edifice

It goes without saying, that what I have proposed only constitutes - as was the objective - a basic legal architecture and some key provisions of a protocol on responsibility sharing. In my view the proposed provisions are vital so as to institutionalise responsibility sharing in international refugee law and move away from the current voluntarist framework. Therefore, what I have included in the protocol's basic architecture by no means excludes further provisions and additional mechanisms that could be established thereunder, if states would require.

The creation of a secretariat, for example, has been proposed by Hathaway and Neve who have suggested that UNHCR could serve as secretariat in a scheme of responsibility sharing to which states will agree to report on their responsibility sharing contributions.[1031] Wall has likewise proposed a small secretariat that would be hosted within UNHCR and would be part of a binding instrument on responsibility sharing.[1032] Admittedly, UNHCR is already performing a secretariat function under the Compact as His Office is tasked with maintaining dashboard of contributions from the Global Refugee Forums and already provides, under its mandate, administrative support during international conferences.

Harley has recently proposed the creation of a global refugee fund, where states would contribute to in accordance with their capacities to pay.[1033] The creation of a fund could open the door to new financing models and diverse

[1031] Hathaway and Neve, 'Making International Refugee Law Relevant Again', 197
[1032] Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?' 225.
[1033] Harley 'Innovations in Responsibility Sharing', 11.

funding that has been identified and used for instance in the climate change regime, improving the quality and quantity of refugee finance.[1034] Such funding institution could be formally established within the architecture of the protocol.

A responsibility sharing Index, such as the one designed by Reynolds and Vacatello discussed in this Chapter, could have an auxiliary function as an operational tool of the protocol that would guide states contributions, infusing more ambition and influencing state behaviour. Betts Costello and Zaun support that Indexes not only offer a means to measure a states' contributions, but can also be a source of normative influence over state behaviour.[1035] The authors argue that the development of an authoritative public index on responsibility sharing would be extremely worthwhile, 'both in contributing to a shared understanding of what responsibility-sharing means but also in creating incentives upon states to increase their own contributions.'[1036] One challenge with regard to putting together a public Index, has been identified as the following:

> It would need to have legitimacy in order to have the authority to influence state behaviour. It would therefore need to be based on criteria that states found to be valid and managed by a body or a coalition of actors regarded as objective, rigorous and non-political, such as a university or an autonomous NGO regarded as beyond political influence.[1037]

The protocol as mentioned above should further explicitly recognise the value of the current multi-stakeholder approach and the important contributions to

[1034] Betts, Collier, *Refuge Transforming A Broken Refugee System,* 60. A paper commissioned by OECD proposes seven principles that can improve the quality and quantity of financing for refugee situations, combining humanitarian and development aid. OECD Financing for Refugee Situations, Development Policy Papers (December 2019 No. 24).
[1035] Delmi Report, 'A Fair Share', 94-95.
[1036] Ibid.
[1037] Ibid.

protection that non-state actors make. The Global Compact has endorsed a 'whole of society approach', expanding the stakeholders of responsibility sharing beyond states to academics and researchers, cities, municipalities and local authorities, faith-based organisations, NGOs, parliaments, private sector organisations, refugees and diaspora and sports organisations – that can also pledge material, financial and other support to protection and solutions contributing to the responsibility sharing effort.[1038]

It has been noted that NGOs can often deliver more cost-effectively to refugees than governmental and intergovernmental bureaucracies and that are more attuned to refugee needs.[1039] Refugee communities and constituencies in particular should be advised on pledges and contributions and on where development aid is given, as they know better than anyone else what works.[1040]

In light of the above, a multi-stakeholder approach to refugee protection could be well accommodated within the protocol. The protocol would however explicitly stipulate, and this is fundamental, that the contributions of non-state actors are *supplemental* and do not substitute states' primary responsibility for the refugees in international law.[1041] As it has been rightly cautioned by commentators, increasing private sector engagement in refugee matters runs the risk of an incremental privatisation of the international refugee regime.[1042] This is another compelling reason why states' primary responsibility to protect and provide for the refugees needs to be solidified in international refugee law.

[1038] https://globalcompactrefugees.org/index.php/channel/pledges-contributions

[1039] It has been noted that NGOs can often times deliver to refugees more cost-effectively than governmental and intergovernmental bureaucracies but also are more attuned to the need of refugees. Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection', 197.

[1040] Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press1993), 177.

[1041] The Global Compact recognizes the primary responsibility and the sovereignty of states above all other stakeholders. Global Compact para 33-34.

[1042] Harley, Innovations in Responsibility Sharing, 11.

Finally, the conclusion of a protocol on responsibility sharing would not replace or be superior to regional responsibility sharing structures. These serve a context-specific purpose and operate within regional specificities and interests. One of the findings of this study is that when it comes to responsibility sharing one size does not fit all. The protocol would not be and should not be seen as a one-size-fits-all answer. Rather, it should be seen as the missing partnership between states of origin, asylum, destination and essentially of the international community of states as whole *in international law* that will institutionalise responsibility sharing, fill in the normative gap of the Refugee Convention and guide the responsibility sharing efforts at UN level.

5.6.1. Less is more and sticking to the international refugee law nomenclature

As mentioned earlier, Wall has put forward a proposal on a framework convention on responsibility sharing for refugees. The proposed framework convention, based on six building blocks would not codify any legal obligations for the parties but would have a lean architecture, clearly stated principles and objectives and would set in motion a process towards improved responsibility sharing.

Wall has also proposed the creation of three institutions under the proposed treaty. A conference of the parties; a primary governing body that would meet every two to three years and to which states would indicate during the conference the contributions they would be willing to make, [1043] and two subsidiary bodies; one for advice in matters relating to protection and solutions and the other to monitor implementation.[1044]

Wall's focus is on the framework convention as a treaty model that allows for dynamic and incremental law making. Framework Conventions, like the

[1043] Wall, A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?', 226

[1044] Ibid., 226-227.

UNFCCC, do not codify concrete obligations but frame the problem and create the main skeletal legal and institutional framework, which then becomes the basis for future regulatory action through the development of subsequent protocols and standard setting processes.[1045]

I do not disagree with Wall's argument on the need for an institutional structure, namely a treaty that has low barriers to entry and accommodates the necessary flexibility and latitude that states require with regard to responsibility sharing. I have sought to provide a principled but minimalist legal framework that provide such flexibility and latitude. I share his view also of a bottom-up approach to responsibility sharing, although I do significantly depart by suggesting the codification of procedural obligations, as the only way to move away from the current voluntarist framework. My objection to a framework convention would be down to positioning within the existing nomenclature of international refugee law that has the 1951 Convention and the 1967 Protocol. In addition, framework conventions as the study of international environmental law revealed, go hand in hand with institutionalisation at a number of levels, in terms of bodies and processes.[1046] Without passing a judgement on whether such institutionalisation is currently required, given UNHCR's extensive mandate under the international refugee law regime, a protocol sits better with the 'protocol tradition' in the progressive legal development of international refugee law.

[1045] Bodansky, Brunnée, Rajamani, *International Climate Change Law*, 57.

[1046] Ibid. The UNFCCC established for example the permanent Subsidiary Body for Scientific and Technological Advice (SBSTA), the Subsidiary Body for Implementation (SBI) as well as supreme plenary bodies such as the Conference of the Parties (COP) under the UNFCCC, and the COP serving as the Meeting to the Parties to the Kyoto Protocol (CMP) and the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA).

5.7. The way towards legal obligations: Building political will

The feasibility of the proposal, as argued in the beginning of this Chapter, depends as much on what is at stake for states in terms of legal obligations and the balance between the depth and stringency of the commitments as well as on the necessary political will for change.

In relation to what is at stake, the legal design that I have proposed, arguably and intentionally caters primarily for the sovereignty of states over decision making and lowers the sovereignty costs by codifying a package of minimalist procedural obligations of conduct, softened further against prescription and delegation.

That said, the feasibility of any such proposal cannot rest solely, on creative law making. Rather, it would require active political facilitation. Scholars have aptly summarized this:

> responsibility sharing is inherently political. It requires that regional and international organisations have the capacity for political engagement, including through brokering principled but pragmatic bargains between states and other actors. It is at least as much about leadership, analysis, and political engagement, as about rules and binding agreements.[1047]

Betts and Collier argue that law and humanitarian assistance offer only part of the solution and a new overarching vision for refugee protection is urgently needed. [1048] I would concur with the authors, but I would also add that international law can be *part*, even if a small, of the overarching vision towards successful protection of the community interest. That is why this thesis sought to sketch the

[1047] Delmi Report, 'A Fair Share',18.

[1048] Betts, Collier, *Refuge Transforming a Broken Refugee System*, 202.

an international law architecture that could provide a permanent structure, - a foundation - for a principled, yet pragmatic, responsibility sharing arrangement.

Political facilitation and strategic advocacy would also be required. This is where the scholarship of international relations could prove fruitful to the endeavour, for it offers some very useful insights on the way states engage with one another in the context of international cooperation. The use of issue linkages and cross-issue persuasion, the latter featuring seminally in Alexander Betts work on refugee protection, are bargaining tools that can facilitate international cooperation along the North-South divide.[1049]

Cross-issue persuasion has been used by Betts so as to show that 'persuading Northern and Southern states that refugee protection is contractually or causally related to their wider interests in other issue areas,' such as, for example, in managing migration, security, development and the environment (which is also termed as substantive linkages in International Relations scholarship) are key to overcoming the North - South impasse. [1050] Regional responsibility sharing arrangements are an example of the effective use of issue linkages in practice. Let us take, for example, refugee protection in the context of Latin America, already discussed as an example of a comprehensive responsibility sharing policy. The discussion revealed that refugee protection was once tied with the wider peace process in the region and today continues to be linked with regional developmental interests and values. Northern states have various geopolitical, trade and cultural interests,[1051] and *thus linkages* to southern countries that host large numbers of refugees. Marshalling these existing linkages would be conducive to persuade Northern states, in particular to agree to a protocol on responsibility sharing.

[1049] Betts *Protection by Persuasion*, 187.
[1050] Ibid, 194.
[1051] Hathaway and Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection', 193-194.

The political facilitation of a protocol on responsibility sharing would need 'a champion', a coalition of the willing as it has been described.[1052] This could be a small team of developed states or individual leaders who champion themselves as refugee advocates, and who would strategically promote the idea of a protocol on responsibility sharing in various fora by dedicating time and resources.

Owen observes that certain Northern countries, such as the Netherlands, or the Nordics, self-perceive themselves as 'good citizens' in the international order of states and this 'good citizen mode' could be the benefit from their active participation in refugee responsibility sharing.[1053] I would caution that the self-perception of some countries as human rights champions does not necessarily correspond to how these countries act in the refugee protection context. The current state of affairs and hope would mostly point towards France or Germany in Europe, as the two countries mostly active in responding to emergency humanitarian issues in the region. Across the pond, Canada could also be a friendly ally, taking heed of its past championship role in refugees.[1054]

Another option for political facilitation is the formation of a negotiating block by the developing host countries[1055] that are the most affected. The block could put forward the proposal for a protocol before the UN General Assembly using their majority seats to their advantage. In doing so, the southern block can make use of the existing issue linkages and engage the Northern states interests in refugee protection, by making their cooperation conditional in other areas such as security or development.[1056]

[1052] Hathaway, 'The Global Co-Op Out on Refugees', 12.
[1053] Owen, *What do We Owe to Refugees?*, 100-101.
[1054] It is reminded that in 1986 the people of Canada's won the Nansen Medal for their aid to refugees. https://www.latimes.com/archives/la-xpm-1986-10-07-mn-5066-story.html
[1055] Aleinikoff, Zamore, 'The Arc of Protection: Toward A New International Refugee Regime', 68.
[1056] Owen, *What do We Owe to Refugees?*, 101.

Another option would be to put the request before the UNHCR Executive Committee. Whatever the choice for the negotiating forum, the High Commissioner, would most likely assume a facilitating role in the negotiations of a protocol on responsibility sharing as it did in the drafting of the Global Compact on Refugees.

Finally, political facilitation should be pursued by campaigning and lobbying at the domestic level. Particularly, normative and domestic political factors also shape how states behave, 'influencing them to join agreements even when they might seem better off staying out'.[1057] Although international law tends to see the state as one unitary actor, actors at the national and local level may have different views on a protocol on responsibility sharing with some pushing the narrative that they have a moral responsibility toward refugees. Generating support from individuals, communities, constituencies, civil society and refugee circles would be crucial to drive this positive narrative on refugees in national and local constituencies. NGOs have a big role to play in this regard through the use of strategic advocacy and education materials.

There is no guarantee that despite all that has been argued to this point states, particularly of the Global North, will see the benefits of joining a protocol on responsibility sharing and give away a small part of their sovereignty in order to fill in what has been the Achilles heel of the international refugee law regime. Under the status quo, states are free to continue to pursue their refugee deterrence and externalisation policies whilst contributing well-below their resources and capacities.

As with any proposal that advocates for multilateral law-making in an era of blatant multilateral fatigue, there would be prima facie objections on feasibility. The likelihood or unlikelihood of something materialising in the near future, as long as it is realistic, shall not, however, stop one from exploring ways to bring

[1057] Bodansky, *The Art and Craft of International Environmental Law*, 164

about change when it is so needed. To quote a commentator, for this would mean, 'to throw the role of moral and political agency out of the window'.[1058] In the end, we are individually morally charged with the duty to reframe the narrative of refugees as 'the needy others; into 'fellow contributors' to our society's progress.

5.8. Conclusions

In this Chapter, I have sought to flesh out some of the key provisions and a basic architecture of a protocol on responsibility sharing. Using the prescriptive lens of enlightened positivism, this Chapter has explored *de lege ferenda* a road towards common but differentiated legal obligations for responsibility sharing in international refugee law.

The principle of CBDRRC as adapted to international refugee law warrants that every state participates to the responsibility sharing effort with a common baseline commitment to both physical and financial responsibility sharing that is further equivalent to its capacities and capabilities. Fairness consideration encapsulated in the suggested version of CBDRRC also yield that developed states have special responsibilities towards the developing host countries because of their greater resources. Most importantly, the principle of CBDRRC would solidify and strengthen the common responsibility of states to protect refugees and provide for solutions, reinforcing the community interest.

Realpolitik however dictates a bottom-up implementation of CBDRRC that gives each state the flexibility to determine its own contributions to refugee protection and solutions, in light, of its CBDRRC.

I have sought to highlight and make use of an important distinction between the binding nature of the instrument and the subsequent normative force of its constituent provisions. The proposed legal design, with its cascading treaty provisions balanced against obligation, prescription and delegation represents a

[1058] Ferracioli, 'The Appeal and Anger of a New Refugee Convention', 143.

softer form of legalisation suitable to frame and institutionalise responsibility sharing in international law. It reflects the 'sweet pot', which goes as far as possible, but not beyond what is politically palatable. This can be seen as a strength as well as a weakness. If seen as a weakness, this softer form of legalisation arguably waters down legal obligations and hence the law. If seen as a strength, it offers the necessary flexibility, keeps the costs of treaty participation low, and brings responsibility sharing within international refugee law.

There is certainly more to be said on a protocol's basic edifice and provisions. I hope that my contribution will spark further academic and, why not, policy research in 'the art and craft' of a protocol on responsibility sharing .

6. Concluding Remarks; Responsibility Sharing, The Alpha and Omega for refugee protection

The future is already here –
it's just not evenly distributed.
William Gibson

This Thesis is an enlightened positivist study on the law of international cooperation and responsibility sharing for refugees both as it is and as it should be with a strong focus on the latter. The essence of 'enlightenment' in this softer form of legal positivism is two-fold; Firstly, international law cannot afford to be value free or disassociated with the social and political context in which it operates. As a result of this position, fairness considerations are integral to international law. Secondly, certain issue-areas go beyond the bilateral interests of states and thus reflect community interests in international law. International environmental law is a prominent area where community interests have been advanced within multilateral legal arrangements. The parallel study of international environmental law is instrumental to the thesis and an integral part to its methodology. It serves to gain a well-rounded understanding of the principle of CBDRRC, which is said to be an emerging concept in refugee law and policy at the UN level.

The doctrinal part of the study began by examining the current state of the law on international cooperation and responsibility sharing. It found that there is a general duty of states to cooperate to protect refugees and to manage the refugee problem. This duty is firmly rooted in international law. The general duty to cooperate does not however further crystallise to an obligation of responsibility sharing; namely sharing the costs of international protection and easing pressure

on hosts states when necessary, through the physical relocation of refugees remains a voluntary undertaking. In light of the absence of a responsibility sharing obligation, the legal responsibility for refugee protection and as a result the funding of the associated costs lie almost exclusively with the state in which the refugee arrives.

A discussion of the main refugee law protection instruments at the regional level, both hard and soft law has shown that there are various degrees of institutionalisation of the principle of responsibility sharing, with some more positivised than others. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Common European Asylum System codifies a responsibility sharing obligation within binding instruments, whilst in Latin America responsibility sharing in the region is promoted through the Cartagena framework, a series of soft law instruments and processes.

Looking into international cooperation and responsibility sharing in the practices of states one finds that it has been framed against the paradigms of externalisation and deterrence. The safe third country arrangements discussed in the thesis constitute a bad faith implementation of the duty to cooperate to protect refugees and resolve refugee situations in international law going squarely against responsibility sharing. Safe third country arrangements have also enhanced the risk of direct or indirect *refoulement*, contributed to indefinite prolonged detention, family separation, as well as other refugee rights violations. This is because the true objective of the Dublin Regulation, Australia's offshore processing regime, EU-Turkey Statement and the other agreements discussed in the context of responsibility sharing in the practices of states has been border control, combatting people smuggling, and control of irregular or secondary mixed migration movements.

The increasing focus of the Global North on migration management and border control has thus had a direct impact upon the provision of international

protection by defining approaches to asylum. Western states' efforts to move refugees away from their borders and contain them in third countries are challenging the very foundations of the international refugee law regime. An exception to such practice is currently seen in the context of responsibility sharing in Latin America.

A further result of the STC arrangements that the thesis has stressed is the negative impact they have had on interstate relations. As exemplified in the context of the EU, frontline Member states are disproportionately encumbered in times of mass influx because of the Dublin's operation and left without support from their fellow central and northern Member States creating tensions in the region. The STC arrangements have contributed to a glaring imbalance of refugee protection responsibilities between states by stressing further responsibility by proximity, rather than responsibility by capacity.

The adoption of the Global Compact on Refugees represents for the enlightened positivist the latest evidence to the claim that the protection of refugees reflects a community interest in international law which is primarily served by the Refugee Convention and which can only be advanced through responsibility sharing. This is why the Compact frames the contemporary refugee challenge as the 'common concern of humankind', whilst it emphasizes that refugee protection runs parallel with and depends on fair responsibility-sharing. Despite some positive advances of the Compact, the thesis has argued that it is unlikely that the Compact can fill in the normative gap of the Refugee Convention in relation to responsibility sharing. This is primarily because the Compact solely rests on political commitments. Contributions to protection and solutions remain entirely discretionary for states as does the participation to the Global Refugee Forums. There is no formal structure nor an explicit responsibility sharing partnership between states in international law.

Against this background, the thesis has argued that a structural adjustment[1059] is needed to fill in the responsibility sharing gap of the Refugee Convention. This structural adjustment requires a responsibility sharing structure that will permanently institutionalise responsibility sharing in international law and put in place a partnership framework, whereby states of origin, transit and destination come together and contribute to protection according to their capacities and resources.

To this end, the thesis has put forward a conception of responsibility sharing that is considerably narrower than the one currently reflected in the Global Compact on Refugees. Its scope is limited to a baseline commitment to financial and physical responsibility sharing. Financial sharing is understood as humanitarian and development assistance to refugee host countries to meet the rights of refugees guaranteed by the Refugee Convention and physical sharing is understood as the need for physical relocation of refugees through the institution of asylum, resettlement and other complementary pathways to protection when refugee host countries are severely encumbered. These are the two modalities of responsibility sharing that together symbolize a baseline commitment to refugee protection.

Part II of the thesis embarked on a *de lege ferenda* exploration of how international refugee law can develop to fill in the responsibility sharing gap of the Refugee Convention with a formal structure that codifies a light package of responsibility sharing obligations in international law guided by the principle of common but differentiated responsibilities and respective capabilities (CBDRRC). It became apparent that a logic of differentiated obligations in other areas of community interests in international law provided context and historical background of the various rationales for differentiation between states in different

[1059] Zeick, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 404.

legal regimes, evidencing that contextual, non-reciprocal commitments have long been a key feature of international law making. In international environmental law, an idea of CBDRRC became the tool that progressively brought more and more developing countries onboard multilateral environmental regulatory agreements even when the environment was not in their top national priorities. CBDRRC can be seen as an application of fairness in international law, whereby states contribute to the protection of community interests in line with their contributions to a common problem and/or in line with their capacities and resources to address and resolve it.

Looking in detail into international climate change law, the study identified key lessons on international cooperation and responsibility sharing for international refugee law. It was in the climate change legal regime where the principle of CBDRRC was explicitly formulated and codified in treaty law for the first time. Under the UNFCCC, CBDRRC is premised upon a common and shared responsibility of all states to protect the earth's climate on one hand and the need to differentiate the individual state commitments on the basis of contributions to harm as well as on the basis of capacities to take remedial action. Two of the most widely accepted principles of fairness are obliquely embedded within the doctrine of CBDRRC; the contribution to the problem principle and the capacity or capability to respond and take measures. An important element of the CBDRC's rationale for differentiation in the climate change regime stems directly from notions of distributive justice across the North-South divide which thus endows developed states with special responsibilities of assistance owed to the developing states because of their greater wealth and capacities.

Despite having been the subject of controversial and endless debates, CBDRRC has recalibrated and adapted over the years to reflect the ever-changing social and economic realities of states. Tracing its unique trajectory from its top-down implementation to Kyoto Protocol in 1997 to the bottom-up self-

differentiated implementation in the 2015 Paris Agreement, the thesis has chartered how CBRRC has framed the North-South responsibility sharing partnership and dialogue between states on climate change.

The 2015 Paris Agreement stands out as a model legal design for responsibility sharing in three ways. Firstly, it is a legally binding instrument that represents the formal partnership of developed and developing states, emitters and least emitters states in international law on the fight against climate change. The Paris Agreement is a treaty under international law providing a solid structure of procedural obligations that promote the protection of community interests in a solid way. While its legal obligations are admittedly 'softened', the Paris Agreement provides for a unique oversight system in the areas of transparency, review and implementation that tames the parties' increased flexibility by placing a strong emphasis on procedure.

Secondly, it has a unique institutional legal design of bottom-up implemented obligations and a top-down oversight framework that is mainly facilitative in nature. It is carefully and intentionally crafted with procedural obligations of conduct, which in turn ensure states' much-wanted flexibility against a very ambitious, if not aspirational, goal.

Thirdly, it has an even more unique transparency and reporting framework which is key in building trust between the parties and in satisfying elemental considerations of procedural fairness, as all parties are obliged to participate in the legal regime and all stakeholders, including civil society organisations can publicly apply pressure on states to achieve more in line with their CBDRRC.

Last but not least, a yet important lesson drawn from the parallel study of CBDRRC in international environmental law is that community interests can exist not only in areas beyond national territories and jurisdiction, such as the deep seabed, Antarctica or outer space but are equally present within seemingly territorial activities, for example the protection of biodiversity, climate change , -

to the extent that actions are taken at the national and local level - and crucially the protection of human rights. For the enlightened positivist these are all areas reflecting community interests in international law.

In light of this, the thesis has argued that international refugee law can also be seen as a manifestation of community interests in international law that has as an objective to restore justice towards a certain category of individuals. The Refugee Convention thus reflects and serves a special category of community interests in international law, this being the protection of refugees. Meanwhile, international refugee law perhaps more than any other human rights protection framework, embodies a cosmopolitan vision of hospitality towards the individual who has essentially lost her state's protection, has crossed an international border and is now left at the good will of the international community of states. The call for responsibility sharing in the Refugee Convention and the principle of responsibility sharing reflect a notion of a community obligation, albeit not one yet codified in international law.

Importantly, not all community interests manifest themselves with the same degree of intensity. In some areas the existence of community interests and thus the common responsibility is more expressly acknowledged than in others. Responsibility sharing for climate change is one such example where the potential ramifications of not sharing the responsibility could be detrimental to all states and to the entire planet. Even in that case however, the intensity of the community interests and thus the impact on some countries is far worse than others. This is why adaptation is also very important for states, particularly to those affected the most. Having said this, the common responsibility of all states to protect the climate has been codified and acknowledged as such in international law through *inter alia* the principle of CBDRRC.

In contrast, under international refugee law, the state to which the refugees arrive bears sole legal responsibility for their protection and its associated costs.

There is, however, today a strong international consensus on the part of states that the protection of refugees and the resolution of protracted refugee situations given the magnitude of the challenge, is 'a common concern of humankind' and as such a responsibility of the international community as a whole. The Global Compact on Refugees is the latest compelling evidence of such consensus. Nevertheless, it fails to explicitly pronounce upon this common responsibility as well as define what this common responsibility entails in terms of individual state commitments. This is where the CBDRRC principle adapted for the refugee law can be beneficial in rooting refugee protection not only as a global common concern but as a common and shared responsibility of state concretising the individual differentiated contributions.

Against this background, the thesis has put forward a proposal for the further development of international refugee law through a protocol on responsibility sharing that would explicitly codify the principle of CBDRRC to international refugee law. Building on the need for a true partnership between states as reflected in the language of the Global Compact for Refugees, the principle of CBDRRC if adapted to international refugee law would primarily reflect and solidify a common and shared responsibility of states to protect refugees and resolve refugee situations. This would be the greatest asset of adapting CBDRRC to international refugee law.

A responsibility sharing protocol premised on CBDRRC would necessitate nonetheless a baseline commitment of all state parties to both protection and solutions, differentiated under the rationale of responsibility by capability. The protocol would endorse and build upon the current bottom-up approach to responsibility sharing, where states are free to choose the content of their contributions to protection and solutions by pledging according to their 'national

realities, capacities and levels of development, and respective national policies and priorities'.[1060]

The proposed protocol offers a basic architecture and some key provisions on responsibility sharing that would be vital in order to institutionalise responsibility sharing in international refugee law, gradually moving away from the current voluntarist framework. An important distinction that has been highlighted and drawn in the thesis is the one between the legal form of an instrument i.e., a treaty and the legal character of its constituent provisions. Crucially, key to the appeal of a protocol on responsibility sharing to states, would be the trade-offs between the breadth of participation and the depth of the legal commitments. Under the status quo, participation to responsibility sharing through the Global Refugee Forums remains entirely discretionary, whilst under the suggested protocol, the state parties would be legally bound to participate in responsibility sharing by pledging their commitments.

Based on the aforementioned distinction, the proposed protocol would codify few procedural obligations, softened against prescription and delegation. More specifically, each party would have a legal obligation of *conduct* to pledge its contributions, according to its CBDRRC to both physical and financial responsibility sharing. This would at least ensure procedural fairness between states as all parties would be bound to contribute to refugee protection.

For the purposes of securing consent however and given the controversial nature of physical responsibility sharing, states would only be normatively expected to contribute to both physical and financial responsibility, as a baseline common commitment. The softening of the obligation, in the suggested wording, entails that states would, however, be free to choose the content of their financial and refugee admission contributions.

[1060] Global Compact on Refugees, para 4.

Contributions to physical responsibility sharing could entail refugee admission for the purposes of access to protection and resettlement. States would be free to choose from offering asylum places or using complementary admission pathways, such as humanitarian visas and corridors, labour mobility schemes or education opportunities for refugees such as academic scholarships and student visas. These are all tokens of physical responsibility sharing that have already been agreed by states in the Global Compact. Most importantly, the state parties would be normatively expected to contribute to solutions as well. Resettlement, in particular, although long recognised as a core protection tool and a durable solution, it still remains, today, critically underprovided.

With respect to financial responsibility sharing, each state party would choose whether to fund refugee assistance programmes in specific refugee situations, in cooperation with other humanitarian or developmental actors or directly establish private-public partnerships with the refugee host states. The Global Compact on Refugees already envisages the establishment of public-private partnerships, whereunder the private sector can invest in refugees and host communities through labour mobility schemes for instance.

The operationalisation of the principle of CBDRRC in international refugee law would warrant that refugee hosting states, developing or least developed receive the necessary resources for protecting refugees, without significantly overbearing their own resources and communities. To this end, the protocol, in addition to the individual obligation of each party to participate in the responsibility sharing effort, would codify *a collective* obligation of the developed state parties to support the developing host countries, by providing targeted development assistance that would benefit refugees and the host communities. Given that development aid is a vexed matter between developed and developing states and one that can cause tension, the proposed protocol would set *a course of action* towards refugee targeted development assistance that would benefit

refugees and host communities. The suggested wording of such provision aims at a minimalist level of engagement of obligation that would hardly impose any concrete conduct on behalf of the developed countries as a whole. Having said this, it would nonetheless provide context and construct a narrative that signals solidarity and fairness in collectively addressing the refugee challenge.

In terms of implementation and review, the protocol would provide for a light oversight framework premised on transparency, self-reporting and stocktaking, that would seek to facilitate rather than enforce implementation.

When it comes to transparency and information sharing, international refugee law is considerably underdeveloped. This is because there is no official reporting and information repository on countries' responsibility sharing contributions. The protocol would thus codify an individual obligation for each state party to communicate its contributions and to report annually on their progress and implementation. Self-reporting, under the protocol, would perform a policy function of self-assessment for the parties, and peer and public pressure for the rest of the stakeholders. In cases of joint pledges and public-private partnerships, which should be explicitly provided in a protocol on responsibility sharing, reporting on the division of labour between the parties would be a mandatory requirement of the state party to the protocol.

Finally, the global stocktake would assess the collective progress against protection needs and strengthen the public discourse on the fairness as well as effectiveness of the global responsibility sharing effort. The transparency obligation and the stocktaking exercise would together institutionalise a public discourse on the fairness as well as effectiveness of the global responsibility sharing effort against projected international protection needs.

The legal design of the proposed provisions, arguably and intentionally, caters primarily for sovereignty, given the inherently political nature of the subject matter they would regulate. The structure of the provisions seeks to lower the

sovereignty costs with minimalist obligations of conduct, softened against prescription and delegation, allowing states to retain their autonomy over decision making. That said, the suggested protocol departs from the current state of affairs since if adopted, it would codify a light package of responsibility sharing obligations in international law, supplement the Refugee Convention and fill in what has been the Achilles heel of the international refugee law regime, the gap on responsibility sharing.

The *de lege ferenda* undertaking has concluded with some thoughts on what additional measures and actions, outside international law, would be required to make the proposal appealing to states. It has been argued that the feasibility of the proposal and the vision on responsibility sharing it encapsulates, cannot rest solely on law making and flexible legal structures, creative no less.

Despite the enlightened positivist's vision to see international law 'as a beacon of hope',[1061] and as a tool to deliver justice to the refugees, whilst serving fairness between states, it is acknowledged that international law cannot resolve the refugee problem on its own. Building the necessary sustained political will across international, national and local constituencies, changing the narrative on refugees, as 'future contributors', would be crucial not only to securing consensus for a multilateral treaty on responsibility sharing, but also to securing the future of the refugee regime as a whole. After all, refugee protection is offered at the national level. In light of these findings, the parallel use of complementary political, analytical, and operational mechanisms on responsibility sharing would be key to address refugee specific situations and to strengthen the international refugee law regime as a whole.

I would like to conclude this thesis with an observation. The emerging fairness discourse in the refugee policy debates would only prove significant, if seen under the bigger picture and the wider fairness discourse that has been taking

[1061] Klabbers, *International Law, 4.*

place in international law. In the words of Thomas Franck, 'distributive justice is never off the agenda, whether the subject is manganese nodules on the ocean floor, geostationary orbits in outer space, or penguins and the Antarctic's icecap.'[1062] If one then looks into the Sustainable Development Goals, one can see that all areas of concern somehow connect or meet. Poverty, hunger, lack of water and sanitation, gender inequality, climate change to name a few goals, are also well recognised drivers of forced displacement. Each single driver, on its own, may not always satisfy the refugee definition on a given case, but it makes a compelling argument that the refugee regime cannot be insulated from the wider socio-economic inequities of the international system.[1063]

The journey towards differentiated legal obligations of responsibility sharing is going to be a long one, particularly in an era of apparent multilateral fatigue and distrust of institutions. The global coronavirus pandemic is the latest addition to the challenges that threaten the international refugee law regime's foundations. It is hoped, however, that the Refugee Convention, which has stood the test of time for the past 70 years, will survive and continue to offer refuge to people around the world for many years to come.

[1062] Franck, *Fairness in International Law and Institutions, 436.*

[1063] Responding to David Cantor who poses the question on the significance of a concept of fairness in the refugee regime and on whether the refugee regime can be insulated from the wider political, geographic, economic inequities in the international system. Cantor, 'Fairness Failure and Future in the Refugee Regime', 628.

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