

Identifying States' Responsibilities towards Refugees and Asylum Seekers

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Debates about which states should provide refugee protection and how they should do so are not new. Nevertheless, they have taken on a new dimension over the last few years as states are exploring elaborate proposals to “manage” refugee movements and/or “improve” refugee protection. At the heart of these discussions sometimes lies a confusion as to exactly what duties states owe to refugees and asylum-seekers under international law. The aim of this paper is thus to go back to some fundamental issues in international refugee law and identify what specific responsibilities states have towards refugees and asylum-seekers. Do states have a duty to admit a refugee and if so, for how long? Do states have a duty to process asylum applications lodged on their territory and if not, to whom can they transfer this responsibility? Are these duties dependent on the number of refugees concerned? Which states should protect which refugees? The questions that will be explored in this paper are relatively basic, but the answers are definitely not simple. One of the main reasons for this is that despite the 1951 Refugee Convention’s tremendous contribution to defining states’ responsibilities towards refugees,¹ important gaps in the protection regime still remain. To some extent, the aim of this paper is to explore the limits of the international refugee regime and reflect on the possible approaches to filling these gaps.

1. State Responsibilities to Admit Refugees and Process Asylum Requests

Part of the difficulties encountered by refugees lies in the obvious gap between the existence of a right to asylum and the lack of a corresponding state duty to grant asylum. The 1948 Universal Declaration of Human Rights famously provides that “everyone has the right to seek and enjoy in other countries asylum from persecution” (article 14).² However, this right to *seek* asylum has not been included in any legally binding instrument. Most notably, there is no mention of this right in the 1951 Refugee Convention. This suggests that states have been very reluctant to give to this “right” any substantive legal content.³ In any case, international law clearly does not provide for a duty to grant asylum. Again, the 1951 Refugee Convention does not make any mention of such a duty. Attempts to introduce any reference to asylum and admission were vigorously opposed during the negotiations leading to the adoption of the Convention.⁴ It is generally argued that

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¹ See *Convention Relating to the Status of Refugees*, 189 UNTS 150 (hereinafter the 1951 Refugee Convention), amended by the *Protocol Relating to the Status of Refugees*, 606 UNTS 267.

² See *Universal Declaration of Human Rights*, GA Res. 217 A (III), 10 December 1948.

³ One can note that the right to asylum is included in the EU Charter of Fundamental Rights which is part of the Treaty establishing a Constitution for Europe (article II-78). However, this right is only guaranteed in accordance with the 1951 Convention and its Protocol, and the Constitution itself.

⁴ See G. Goodwin-Gill, *The refugee in international law* (Oxford: Oxford University Press, 1996, 2nd ed.), 175.

states have a right, rather than a duty, to grant asylum, which follows from their sovereign right to control admission into their territory.⁵

There have been numerous attempts to establish a right of territorial asylum. Following the adoption of the UN Declaration on Territorial Asylum in 1967,⁶ the Carnegie Endowment Working Group proposed its first draft Convention on Territorial Asylum in 1972,⁷ which led to the United Nations Conference on Territorial Asylum in Geneva in 1977. The various texts under discussion only indicated that states shall use their ‘best endeavours’ to grant asylum. Even then, the 1977 Conference miserably failed to adopt the draft Convention, and no further attempt has since been made to develop a right of territorial asylum.⁸

While there is no obligation under international law to grant asylum to refugees, states are still bound by the principle of *non-refoulement* as defined in article 33 of the 1951 Convention. This principle provides that no refugee shall be returned to any country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This principle is now generally considered to be part of customary international law.⁹ It must be noted that the principle is not limited to those formally recognised as refugees.¹⁰ In other words, asylum-seekers should not be returned to any country where they would face persecution and they benefit from such a prohibition until they are declared not to be refugees.

There has been an on-going debate over the exact scope of the principle of *non-refoulement*. It is clear that the prohibition of *refoulement* applies to all refugees who are already on the territory. Whether it also applies to refugees who arrive at the border and seek admission into the territory has been the subject of disagreement. As mentioned earlier, international law does not contain any obligation to grant asylum. Nevertheless, states should not be free to reject refugees at the frontier and it has been argued that rejection at the frontier does amount to *refoulement*.¹¹ This interpretation can be partly based on the fact that article 33 is entitled “Prohibition of expulsion or return (‘refoulement’)” and that in French, the expression “refouler” refers to “faire reculer”. As a result, *refoulement*, in the refugee law context, means “à la fois l’éloignement du territoire et la non-admission à l’entrée.”¹² Not surprisingly, some states do not agree with this interpretation of the principle of non-refoulement.¹³ Most (in)famously, the US Supreme Court declared in 1993 that the principle applies only to refugees within state territory.¹⁴

⁵ *Ibid*, 172-173. See R. Sexton, “Political refugees, non-refoulement and state practice: a comparative study” (1985) 18 *Vanderbilt Journal of Transnational Law* 731, at 737-738.

⁶ See GA Res.1400 (XIV), 21 September 1959.

⁷ See A. Grahl-Madsen, *Territorial asylum* (Stockholm: Almqvist & Wiksell International, 1980), 174-176.

⁸ See Goodwin-Gill, *The refugee in international law*, 181-182.

⁹ See E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of non-refoulement: opinion”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee protection in international law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 87-177, at 149.

¹⁰ *Ibid*, 116-118.

¹¹ *Ibid*, 113-115.

¹² See D. Alland and C. Teitgen-Colly, *Traité du droit d’asile* (Paris: Presses Universitaires de France, 2002), 229.

¹³ See for instance DIMIA, *Interpreting the Refugees Convention - an Australian contribution* (2002), 46, <http://www.immi.gov.au/refugee/publications/convention2002/>

¹⁴ See *Sale, Acting Commissioner, INS v Haitian Centers Council* (1993) 113 S.Ct 2549.

It may be argued that rejection at the border does not necessarily result in return to a country where the refugee would fear persecution, and thus does not necessarily lead to *refoulement*. The difficulty with this argument is that it leads to an examination on a case-by-case basis of whether the rejection at the border of a refugee automatically leads to his return to a country where he would fear persecution. Where the refugee is situated at the border between his country of origin and a neighbouring country, it appears obvious that rejection at the frontier would amount to *refoulement*. There are many other situations in which it may not be so obvious that rejection at the border amounts to *refoulement*. The fundamental difficulty lies in the possibility of every state adopting the view that rejection at the border is lawful under international law. This would result in the refugee being denied admission to each state. This phenomenon is usually referred to as “the refugee in orbit”.

If we adopt the broader interpretation of the principle of *non-refoulement* which encompasses a prohibition of rejection at the frontier, it is not entirely clear where this leaves us. Do states have a duty to admit a refugee who presents himself at the frontier? One line of argument could be that treaty obligations must be performed by state parties in good faith (*pacta sunt servanda*).¹⁵ It follows that in order to perform their obligation under article 33 of the 1951 Refugee Convention, state parties may be required to grant temporary admission to those claiming to be refugees in order to determine whether they are indeed refugees and deserving of the protection granted under article 33. If states did not do so, they would be in effect unable to perform their treaty obligation not to reject refugees at the frontier. Consequently, it has been argued that “the peremptory norm of *non-refoulement* secures admission”.¹⁶ Similarly, UNHCR has declared that

A State presented with an asylum request, *at its borders* or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures (emphasis added).¹⁷

In practice, states have recognised some linkages between *non-refoulement* and admission. Indeed, some refugees are in fact granted temporary admission into the territory in order to lodge an asylum application: it was noted that “despite the reluctance of states to commit themselves formally, in practice states have generally admitted persons who arrive at their borders which claims to protection which are palpably without merit.”¹⁸

When an asylum-seeker has lodged an application, whether at the border or within the territory, the state in question has usually taken upon itself to examine that application. Where the asylum-seekers is recognised as a refugee, the state has almost invariably granted him permanent asylum, i.e. the right to remain in the country indefinitely. This has been the consistent practice of

¹⁵ See article 26 of the 1969 Vienna Convention on the Law of Treaties, 1155 ILM 331. This Convention applies only to treaties concludes after its entry into force, i.e. 1980, but the principle has always been considered to constitute a rule of customary international law.

¹⁶ See Goodwin-Gill, *The refugee in international law*, 202.

¹⁷ See *Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers*, FORUM/CG/SM/03, 11 March 2004, 7.

¹⁸ See T.J. Farer, “How the international system copes with involuntary migration: norms, institutions and state practice” (1995) 17 *Human Rights Quarterly* 72, at 79.

states, and more specifically Western states, and may have led to the belief that some international legal obligations could be deduced from such practice. In order to establish a rule of customary international law, the existence of state practice is insufficient: it must be accompanied by *opinion juris*. However, it is doubtful that those states have followed these practices out of a sense of legal duty.

Problems emerged when states started to deviate from these established practices. Firstly, since at least the early 1990s, an increasing number of states have transferred the responsibility to examine some asylum applications to “safe third countries”.¹⁹ This suggests that they felt under no legal obligation to examine in their territory the applications lodged there. For instance, the UK believes that “there is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application.”²⁰ Secondly, some states have become more reluctant to grant permanent asylum to refugees. This growing reluctance can be exemplified by the use of temporary protection schemes since the early 1990s.²¹ Australia was the first country to break ranks permanently by deciding to grant temporary protection visas to recognised refugees who entered the country in an unauthorised manner.²²

It is crucial to determine exactly by which duties states are bound with regard to these two issues. The first difficulty is that the 1951 Refugee Convention does not mention asylum procedures and makes no reference to which state is responsible for determining whether a person is a refugee or not. The assumption has always been that the state where the application was made is responsible for assessing the merits of the claim. As mentioned earlier, this had been the practice of states until the 1990s. To some extent, it could be argued that the transfer of responsibility to examine an asylum application to a ‘safe third country’ is not incompatible with the duties of the sending states, since the principle of *non-refoulement* is not violated. The crux of the matter obviously lies in the definition of ‘safety’. This should include at a minimum physical safety and protection of the refugee’s human rights as defined under international law. The idea of safety should also encompass a guarantee of access to fair asylum procedures. Transfers of responsibility for examining an asylum procedure have raised numerous problems for refugees. For one thing, the 1951 refugee definition has not been uniformly interpreted and it may happen that a person is recognised as a refugee in one country, but not in another.²³ In practice, states are not able to transfer responsibility to any ‘safe third country’: the receiving state usually accepts a transfer only where a link between the refugee and that state has been demonstrated, e.g. transit, family link, etc.

¹⁹ See R. Byrne and A. Shacknove, “The safe country notion in European asylum law” (1996) 9 *Harvard Human Rights Journal* 185.

²⁰ See UK paper, *New international approaches to asylum processing and protection*, 10 March 2003, 6.

²¹ See for instance see J. van Selm-Thorburn, *Refugee protection in Europe: lessons from the Yugoslav crisis* (The Hague: Martinus Nijhoff Publishers, 1998).

²² See http://www.dimia.gov.au/refugee/seeking_asylum.htm. This measure may constitute a violation of article 31 of the 1951 Convention as it amounts to penalty imposed on refugees unlawfully in the country of refuge.

²³ See for instance *R. v. Secretary of State for the Home Department, ex parte Adan*, *R. v. Secretary of State for the Home Department, ex parte Aitseguer* [2001] 1 All E.R. 593.

So far, transfers of responsibility have mainly taken place within a defined region and amongst states with equivalent refugee protection systems.²⁴ More recently, states have envisaged the setting up of transit processing centres.²⁵ These centres would be located in states whose protection capacities are much more difficult to assess. Transfer of responsibility to these states would be much more problematic. As a result, the sending state would retain the responsibility to process asylum applications, but on the territory of a third state. Such proposals have now been, seemingly, abandoned, but they have raised interesting legal questions.

Strictly speaking, the concept of ‘safe third country’ does not violate the letter of the 1951 Refugee Convention to the extent that the refugee is not sent to a country where he would face persecution. Nevertheless, the repeated application of this concept may produce chain deportations which could ultimately lead to *refoulement*. The refugee has no guarantee of access to protection in a safe country.²⁶ Paradoxically, the proposal of processing asylum applications in a transit processing centre may be less controversial because the recognised refugee will be resettled and is thus guaranteed protection at the end of the procedure. However, transit processing centres can be criticised on many other legal grounds.²⁷ They may involve the prolonged detention of the asylum-seekers. If the centres are set up by EU Member States collectively and human rights violations occur, it may be impossible to determine which state is responsible for the violations.

As far as state responsibility for processing asylum claims is concerned, it is difficult to identify the legal basis of a duty to process claims in the state where the application is lodged. It could, once again, be advanced that if states are to implement their duty of *non-refoulement* in good faith, they should process the asylum application themselves, rather than transfer that responsibility to a third state.

Turning to the issue of duration of protection, the 1951 Refugee Convention suggests that its provisions apply only for as long as there is a well-founded fear of persecution. It follows that once such a fear ceases to exist, the state of asylum is once again free to decide on the immigration status of the person concerned, i.e. to let him remain in the country or remove him. Indeed, if the person is no longer a refugee, the state is no longer bound by the provisions of the Convention. Refugee protection is, in essence, temporary. To that effect, the Convention even contains cessation provisions.²⁸ In practice, these have not been applied by all Western states

²⁴ See for instance *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*, 15 June 1990, 30 I.L.M. 425; now replaced by *Council Regulation No.343/2003 of 18 February 2003 establishing the criteria and mechanism determining the Member State responsible for examining an asylum application lodged in one of the Member State by a third country national*, OJ 2003 L 50/1.

²⁵ See UK paper, *New international approaches to asylum processing and protection*.

²⁶ For instance, the Dublin Regulation does not actually ensure that the asylum application will be examined in the European Union since “any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention” (article 3(3)).

²⁷ See G. Noll, ‘Visions of the exceptional: legal and theoretical issues raised by transit processing centers and protection zones’ (2003) 5 *European Journal of Migration and Law* 303.

²⁸ See article 1(c) of the 1951 Refugee Convention. See also J. Fitzpatrick and R. Bonoan, “Cessation of refugee protection”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee protection in international law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 491-544.

(apart, now, from Australia) which have granted permanent asylum to those recognised as refugees. It may be that Western states have not found it necessary to reassess every few years the need for protection of each refugee because of the costs involved in such periodical reassessments. However, this state practice is far from uniform since most developing countries have consistently denied refugees the right to remain permanently and integrate locally. Moreover, state practice has not been accompanied by expressions of *opinio juris*. It is thus doubtful that states feel bound by a rule of customary international law obliging them to grant indefinite leave to remain to refugees.

Identifying states' responsibilities towards refugees and asylum-seekers has, so far, proved to be a frustrating exercise. States have a duty of *non-refoulement*. They do not have a duty to grant asylum to refugees. Beyond that, it is not entirely clear that they have a duty to process asylum applications lodged in the country. Where refugee status is granted, states do not have a duty to grant permanent asylum to the refugee. To some extent, what is confusing is that for the last fifty years, state practice has gone beyond what was required by international law. One could argue that for practical reasons, states have decided to examine the asylum applications lodged on their territory themselves, and that the economic, social and political costs for doing so have not been perceived as a problem until recently. Unfortunately, it is difficult to formulate solid arguments in favour of the proposition that state practice has led to the establishment of a rule of customary international law requiring states to examine all asylum applications lodged on their territory.

2. Duty to Provide Protection and Refugee Numbers

States have a duty to provide protection to refugees. As demonstrated in the previous section, to identify what this duty exactly entails is no easy task. States may have refused to commit themselves to specific obligations towards refugees because of the unpredictability of refugee movements. The simple question which needs to be explored is whether states' responsibilities towards refugees may vary according to the number of persons requiring protection at any given time.

As a preliminary point, it must be noted that there have been numerous calls for treating the 1951 Refugee Convention as a human rights treaty.²⁹ It is undeniable that there are numerous linkages between refugee law and human rights law. Both bodies of law are aimed at the protection of the physical safety and human dignity of the individual. If the 1951 Refugee Convention was to be interpreted as a human rights treaty, it would seem to follow that the scope of states' duties under the Convention should thus not depend on the number of persons requiring protection. The duty to protect human rights is in many cases absolute (except where rights are derogable in times of emergency) and cannot be subject to considerations of numbers or resources. To take a simple example, the right to fair trial must be guaranteed to all, regardless of how many individuals exercise that right and of the costs involved in implementing this right. Even in the case of economic and social rights, although their progressive implementation may

²⁹ See for instance T. Clark in cooperation with F. Crépeau, "Mainstreaming refugee rights. The 1951 Refugee Convention and international human rights law" (1999) 17 *Netherlands Quarterly of Human Rights* 389.

depend on the resources available to the state concerned, states still have an immediate obligation to take steps towards the full realisation of these rights.³⁰

The 1951 Refugee Convention itself was drafted in such a manner that not all of its provisions apply immediately to all refugees. State parties' obligations increase with the passing of time and depend on various levels of attachment: some provisions of the Convention apply to all refugees, some to refugees who are "lawfully in", others to refugees 'lawfully staying'.³¹ The nature of the obligations arising from its provisions seems to suggest that it is substantially different from a human rights treaty.

Classifying or conceptualising the 1951 Refugee Convention as a human rights instrument may lead to the suggestion that states' obligations under the Convention should not in any way be subject to limitations arising from refugee numbers. This is of course highly debatable and does not reflect the reality of refugee protection. In situations of mass influx (also referred to as large-scale influx), large groups of refugees are often denied their rights under the 1951 Refugee Convention.³² The main reason for this is that while states do admit large numbers of refugees, they demand in exchange a "*de facto* suspension of all but the most immediate and compelling protections provided by the Convention."³³ It must be noted from the outset that there is no legal definition of a "mass influx".³⁴ In any case, none of the refugee movements into Western states can be sensibly described as "mass influxes".

Numbers do matter. Some states cannot be expected to grant the same level of protection to, on the one hand, a few thousands and, on the other, to several hundred thousands refugees who suddenly turn up at the border. There is increasing recognition that states' responsibilities towards refugees can be differentiated according to the scale and timeliness of the refugee movements states are confronted with. When faced with a sudden and mass influx of refugees, some states may be not just unwilling, but simply unable to comply with their Convention obligations. This has led to the proposal of inserting a derogation clause to the 1951 Refugee Convention which could be used in situations of mass influx.³⁵ Even if this derogation regime were to be put in place and some 'breathing space' was created for countries of first asylum during the emergency phase, it would still not eliminate the need for responsibility-sharing.

3. Allocating Responsibilities to Protect Refugees

The duty to protect refugees through the finding of durable solutions is a collective duty of states. Unfortunately, it is not regulated by the 1951 Refugee Convention. Fifty years on, there is no formal, or even informal, mechanism to allocate responsibilities to protect refugees. The only indirect reference to burden-sharing or responsibility-sharing contained in any international legal instrument can be found in the preamble of the 1951 Refugee Convention in which state parties

³⁰ See Committee on Economic, Social and Cultural Rights, "General Comment 3: The nature of State parties' obligations (Art.1, par.1)", 14 December 1990.

³¹ See Goodwin-Gill, *The refugee in international law*, 307-311.

³² See for instance ECRE/USCR, *Responding to the asylum and access challenge: an agenda for comprehensive engagement in protracted refugee situations*, April 2003.

³³ See J-F. Durieux and J. McAdam, "Non-refoulement through time: the case for a derogation clause to the Refugee Convention in mass influx emergencies" (2004) 16 *International Journal of Refugee Law* 4, at 13.

³⁴ *Ibid*, fn 6.

³⁵ *Ibid*. 19-23.

acknowledge that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem [...] cannot therefore be achieved without *international co-operation*” (emphasis added). Unfortunately, this means that the so-called principle of responsibility-sharing has a weak legal basis and unilateral state conduct can only be criticised on the basis that it violates the *spirit*, rather than the *letter* of the 1951 Refugee Convention. It must be noted from the outset that the expression ‘responsibility-sharing’ should be preferred to ‘burden-sharing’ which suggests that refugees are a burden on the community of states.

Ad hoc arrangements to share the responsibility to protect a particular caseload of refugees have been made. The most famous of such arrangements is the Comprehensive Plan of Action (CPA) for Indo-Chinese refugees.³⁶ One formal and permanent system of allocation of responsibilities was set up in the European Union under the Dublin Convention which has now been replaced by an EU Regulation.³⁷ Many resources and efforts have gone into implementing this instrument,³⁸ but it would be much more useful to establish a system of allocation of responsibilities between countries of first asylum and other countries further afield.

Until relatively recently, it was considered that states would assume responsibility for the refugees who reach their territory and make a claim for protection there. The ‘allocation’ of responsibilities is largely predicated on the nature of refugee movements and the intentions of the refugees. The only exceptions to this is resettlement and the transfer of responsibility to ‘safe third countries’. Resettlement involves the selection of refugees in a country of first asylum and their organised transfer to the resettlement country. In the case of ‘safe third countries’, the refugee may have transited there, but not lodged an asylum application.

The immediate problem raised by the lack of responsibility-sharing is that countries in regions of origin bear the overwhelming responsibility to protect the majority of the world’s refugees who cannot and may not want to seek protection in other countries. In this regard, it was even suggested that “the overall primary responsibility [should] in fact fall on the first country of refuge, but experience in South East Asia, Central America, Western Asia, Africa and Europe, where so many states declined to allow refugees to regularize their status or otherwise remain within their borders, has served to emphasize the international dimension to burden-sharing.”³⁹

The second problem raised by the current arrangement, or lack thereof, is that it does not ensure that protection will be provided to a refugee, when no state assumes responsibility for providing such protection to him. The present international refugee regime thus appears to be inefficient and inequitable. Nevertheless, while states may all agree on the importance of and the need to adopt measures for responsibility-sharing, they have so far failed to agree on the principles upon which the allocation of responsibilities should be based.

A clear system of allocation of responsibilities would be in the interests of both states and refugees. It would ensure that the international response to the protection needs of refugees is predictable and comprehensive. Countries which are situated in regions of origin are more likely to keep their borders open to refugees where they have a guarantee that other states will share the responsibility to protect these refugees. Countries which are further afield would also benefit from a clearer allocation of responsibilities to the extent that where improved protection is

³⁶ See UNHCR, *The state of the world’s refugees 2000 – fifty years of humanitarian action* (Geneva: UNHCR, 2000), 84-85.

³⁷ See *supra* note 24. Norway and Iceland also participate in the Dublin system.

³⁸ See for instance C. Faria, (ed.), *The Dublin Convention on asylum: between reality and aspirations* (Maastricht: EIPA, 2001).

³⁹ See Goodwin-Gill, *The refugee in international law*, 204.

afforded in countries of first asylum, refugees should be less likely to travel, often in an irregular manner, to countries outside the region of origin.

There have been many academic proposals as to how to allocate responsibilities among states. Amongst the most high-profile is Schuck's proposal to establish refugee quotas for states according to their 'protection' capacities.⁴⁰ More influential have been the proposals made by Hathaway and Neve who essentially suggest that the primary responsibility to provide physical protection to refugees should rest/remain with countries of first asylum, while industrialised countries should assume the financial responsibility to support and improve protection capacities in the former countries.⁴¹ In this regard, it should be noted that the proposals which have been recently suggested by the European Commission focus on the improvement of protection capacities in regions of origin.⁴²

Under the aegis of UNHCR, recent discussions about possible allocations of responsibilities have taken place in two specific contexts. Firstly, part of the 'third track' of the Global Consultations on International Protection organised by UNHCR was devoted to responsibility-sharing in situations of mass influx.⁴³ However, debates failed to lead to the adoption of practical measures for responsibility-sharing.⁴⁴ Secondly, responsibility-sharing is now being discussed in the 'Convention Plus' process the aim of which is to facilitate the resolution of refugee problems through multilateral special agreements. Three areas of cooperation in which such agreements could be reached were identified: resettlement, targeting development assistance, and irregular secondary movements of refugees and asylum-seekers. The objective of the discussions is to devise means to clarify the responsibilities of states in each area. It remains to be seen whether the debates will lead to the adoption of concrete measures on responsibility-sharing.

As part of the Convention Plus process, an issues paper on addressing irregular secondary movements of refugees and asylum-seekers was submitted by UNHCR.⁴⁵ The paper usefully distinguishes between different types of state responsibility, namely to receive and process asylum claims, to assess the merits of the claim, to provide protection pending durable solutions and to provide durable solutions.⁴⁶ With regard to each refugee, these responsibilities used to be assumed by the same state. This is no longer the case. UNHCR suggests that the state presented with an asylum claim retains at least the responsibility to receive and process the claim.⁴⁷ With

⁴⁰ See P.H. Schuck, 'Refugee burden-sharing: a modest proposal' (1997) 22 *Yale Journal of International Law* 243.

⁴¹ See J.C. Hathaway and R.A. Neve, 'Making international refugee law relevant again: a proposal for collectivised and solution-oriented protection' (1997) 10 *Harvard Human Rights Journal* 117.

⁴² See *Towards more accessible, equitable and managed asylum systems*, COM (2003) 315, 3 June 2003; and *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – 'Improving access to durable solutions'*, COM (2004) 410, 4 June 2004.

⁴³ See Global Consultations on International Protection, *Mechanisms of international cooperation to share responsibilities and burdens in mass influx situations*, EC/GC/01/7, 19 February 2001.

⁴⁴ See Global Consultations on International Protection, *Report of the First Meeting in the Third Track*, EC/GC/01/8/Rev.1, 28 June 2001.

⁴⁵ See *Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers*, FORUM/CG/SM/03, 11 March 2004.

⁴⁶ *Ibid*, 7-10.

⁴⁷ *Ibid*, 7.

regard to the responsibility to assess the merits of the claim, the state where the claim is made can decline to assume that responsibility where it is established that the refugee has already found 'effective protection' in the country of first asylum.⁴⁸ Moreover, the responsibility to assess the merits of the claim can be transferred to a third state provided that there is no risk of persecution in that state, that the asylum-seeker has access to fair and efficient procedures there and that he is treated according to international human rights standards.⁴⁹ Nevertheless, it is considered that responsibility to assess an asylum application cannot be transferred to *any* third state which fulfils these conditions: there must be some connection between the asylum-seeker and the state assuming responsibility to assess his claim, e.g. lawful residence, family ties and so on.⁵⁰

According to UNHCR, the state assuming the responsibility to assess the merits of the claim should assume the responsibility to provide protection pending durable solutions. Financial, human and technical support should be provided to the states assuming the responsibility to protect refugees at these two stages.⁵¹ Finally, the responsibility to provide durable solutions should also be a shared responsibility and emphasis is placed on the role of resettlement.⁵²

Responsibility-sharing seems to be primarily a matter to be decided upon by states. Nevertheless, one should ask whether there is any role for the refugee's intentions to be taken account in the allocation of responsibilities to protect him. Until recently, the state of application has assumed responsibility for protecting the refugee and the state of application is often the state where the refugee 'chooses' to seek protection. International refugee law does not make any reference to the role of the refugee's intentions: the refugee has no choice of the country of asylum, but neither is he obliged to seek the protection of the first safe country he enters. Be that as it may, subsequent integration on the host society is more likely to be successful where the refugee has chosen the country of asylum.

If responsibilities to protect refugees are to be allocated among states, how should such an allocation be made? From a practical point of view, there is no doubt that countries in regions of origin will continue to provide immediate physical protection to the majority of the world's refugees. Access to physical safety should be granted as close as possible to the country of origin and neighbouring countries should thus bear the primary responsibility to provide such access. In situations of mass influx, other countries in the region of origin should also be responsible for providing immediate physical protection to the refugees. Other states should be responsible for providing the practical means, i.e. technical and financial support, to ensure that countries in regions of origin provide good reception conditions, registration facilities, etc. Where required,

⁴⁸ On the concept of 'effective protection', see *Summary Conclusions on the concept of "effective protection" in the context of secondary movements of refugees and asylum-seekers*, Lisbon Expert Roundtable, 9 and 10 December 2002; S.H. Legomsky, *Secondary refugee movements and the return of asylum-seekers to third countries: the meaning of effective protection*, Legal and Protection Policy Research Series, PPLA/2003/01, February 2003 or (2003) 15 *International Journal of Refugee Law* 567; and *Statement by Ms. Erika Feller, Director, Department of International Protection, at the fifty-fifth session of the Executive Committee of the High Commissioner's Programme*, 7 October 2004.

⁴⁹ See *Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers*, 8.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 9.

⁵² *Ibid.*, 10.

support should also be provided to guarantee access to fair and efficient asylum determination procedures.

Countries in regions of origin cannot be expected to provide durable solutions to all refugees. The responsibility to create opportunities for local integration obviously rests upon them, but other states should again provide support in order to increase these opportunities. All states share the responsibility to create the conditions for voluntary repatriation. This is a broadly defined responsibility which should involve conflict-resolution efforts in the country of origin, peacekeeping and peacemaking initiatives, information campaigns among refugee populations, technical assistance for return, monitoring of return routes and areas, etc. UNHCR obviously plays a crucial role in assisting states in fulfilling these responsibilities.

Aside from local integration and repatriation, resettlement is the third durable solution. Until now, resettlement opportunities have remained fairly limited since they were offered to only 1% of the world's refugees. The number of resettlement programmes should clearly be expanded. In addition, resettlement should focus on the protection needs of refugees, rather than on selecting the most qualified refugees and/or those most likely to integrate successfully within the host society. Indeed, some refugees may have special protection needs: they may have a mental or physical disability, they may suffer from post-traumatic stress disorder, they may be unaccompanied minors, etc. Such protection needs can be addressed only in countries with the appropriate facilities and these refugees should be considered a priority for resettlement.⁵³

As can be seen from the above analysis, the allocation of responsibilities to protect refugees is a complex exercise. There are various stages which should be considered: the receipt and processing of claims, the assessment of the merits of the claims, the provision of protection pending durable solutions and the provision of durable solutions. At each stage, one state will assume primary responsibility to protect the refugee, but other states are also responsible for assisting that state in providing such protection and one needs to identify what contributions they can and should make.

4. Conclusion

The international refugee protection system, which is firmly based on the 1951 Refugee Convention, suffers from a fundamental problem highlighted in this paper, namely the lack of clear identification of the respective responsibilities of states towards refugees (and also towards other states). Under the Convention, states have a duty of *non-refoulement* (article 33) and the duty to grant to refugees who are on their territory a range of legal rights (articles 2 to 32). Beyond that, the Convention says nothing about which state should protect, at which stage, which refugee. Issues of state responsibility for protecting refugees go well beyond the granting of asylum/admission: even where a refugee has found physical safety in one state, other states are not exonerated from their responsibility to contribute to his legal and material security in the country of first asylum and to find durable solutions. In sum, state responsibility in the context of refugee protection is not just concerned with the geographical location of the refugee.

There is a clear link between the deficiencies of the international refugee regime to provide protection and the lack of a clear allocation of responsibilities among states. Some basic principles can be identified, but states have, as usual, been fairly reluctant to accept more specific responsibilities towards refugees (and other states). One must ask whether it is at all desirable and

⁵³ See High Commissioner's Forum, *Multilateral framework of understandings on resettlement*, FORUM/2004/6, 16 September 2004.

possible to adopt a universal model of allocation of responsibilities. Each refugee situation is different and may require a different strategy. In any case, it may still be useful to identify some general principles of responsibility-sharing which can then be used in each refugee situation.

The approach adopted by UNHCR's Convention Plus process is to produce agreements on clear principles of responsibility-sharing in specific areas of cooperation. It is hoped that such agreements will form the basis of more comprehensive plans of action to deal with a specific situation or caseload of refugees. Although the discussions on resettlement have led to the adoption of a multilateral framework of understandings, no such agreements have been reached with regard to irregular secondary movements and targeted development assistance. It remains to be seen whether the Convention Plus process will lead to the identification of concrete principles of responsibility-sharing.