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RECONCEIVING 'BURDEN-SHARING' IN INTERNATIONAL REFUGEE LAW

Alex Catalán Flores

The state of malaise in which international refugee law is ensnared has created a crisis of confidence for both state and non-state actors with regards to the relevance of the discipline. As a cardinal principle of the regime, global concerns are focused on the issue of effective burden-sharing as a mechanism towards humanitarian outcomes. International environmental law has notably approached this problem by invoking the doctrine of Common But Differentiated Responsibilities, thereby providing a functional mechanism wherein states recognise the commonness of their responsibilities and differences in their obligations. In light of the tumultuous state of affairs at the time, in 1997 Hathaway and Neve proposed the introduction of the doctrine into the international refugee law regime, arguing for the reformulation of burden-sharing as perceived by state actors. This paper argues that such a reformulation remains justified, given the political-legal environment in which international refugee law exists. Whilst the aim is not to propose a revolutionary reconceptualisation of burden-sharing or international refugee law more generally, this paper advances the claim that past burden-sharing schemes in which regional groups of states tackled ad hoc refugee crises raise crucial questions of legality, morality and practicality which need to be addressed before the global community directs its attention towards a more comprehensive reformulation of burden-sharing. These issues require resolution and consensus in order to secure the success of future burden-sharing schemes.

1. INTRODUCTION

The state of malaise in which international refugee law is ensnared has created a crisis of confidence for both state and non-state actors with regards to the relevance of the discipline in the current state of affairs. With the United Nations High Commissioner for Refugees ('UNHCR') registering the largest number of people of concern since the end of World War II,¹ the global discourse has started to acquire a sense of urgent pragmatism. Naturally, the world's attention turns to attributing responsibility and determining a methodology through which to address the situation. Key actors are looking to burden-sharing, as a functional means of achieving a humanitarian resolution. As one of the foundational pillars of the 1951 Convention Relating to the Status of Refugees (the 'Refugee Convention'),² there has been ample academic discourse seeking to provide the concept with some concrete parameters, giving rise to a variety of multilateral programs aimed at addressing *ad hoc* crises.

This paper will explore the notion of burden-sharing as it applies to international refugee law, with emphasis on the theoretical and practical reformulations of the concept throughout the years. In particular, this paper will examine burden-sharing through the lens of the doctrine of Common But Differentiated Responsibilities ('CBDR'), so as to formulate a critical appraisal of past burden-sharing schemes and indicate the areas which future schemes need to address.

¹ United Nations High Commissioner for Refugees, *World Refugee Day: Global forced displacements tops 50 million for first time in post-World War II era* (20 June 2014) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/53a155bc6.html>>

² *Convention Relating to the Status of Refugees*, signed 28 July 1961, 189 UNTS 2545 (entered into force 22 April 1954)

2. BURDEN-SHARING AND INTERNATIONAL REFUGEE LAW

The discourse surrounding burden-sharing is not unique to international refugee law, with its first prominent usage arising in the early 1950s in the context of contributions to the North Atlantic Treaty Organization.³ At its core, the concept of burden-sharing derives from the overarching norm of international cooperation. Article 1(3) of the UN Charter stipulates the achievement of international cooperation in resolving problems of, *inter alia*, a humanitarian character as one of the central purposes of the UN.⁴ Article 2 extends this as a duty of all UN Member States.⁵ This general duty to cooperate in international law is reflected in the preamble of the Refugee Convention, as a means towards alleviating the 'unduly heavy burdens' placed on certain states.⁶ The Convention's preamble, however, does not in itself create a binding obligation on its signatories. Instead, it serves to illuminate the context in which the Convention is to be interpreted.⁷

In saying that, the Executive Committee of the High Commissioner's Programme ('ExCom') has in several of its conclusions alluded to the underlying importance of the principle of burden-sharing. In 1978 in Conclusion No. 11, it reaffirmed the primacy of 'the principle of international solidarity,'⁸ and later in Conclusion No. 22, it noted that 'the international community should conform with the principles of international solidarity and burden-sharing.'⁹ In 1998, in Conclusion No. 85, ExCom recognised that 'international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles,'¹⁰ and in Conclusion No. 102 in 2005, ExCom underlined the 'importance of burden and responsibility sharing at all stages of a refugee situation.'¹¹ The progressive change in rhetoric and emphasis is palpable, as is the effect of these conclusions on states' international obligations. Hathaway and Foster comment on the status of ExCom conclusions as sources of international law, viewing them through the lens of Article 31(3)(a) of the Vienna Convention on the Law of Treaties¹² as interpretative aids in elucidating the object and purpose of the Refugee Convention.¹³ Given the number of ExCom members and the high correlation between ExCom members and parties to the Refugee Convention, Hathaway and Foster's conclusion reads as an exercise of logic.¹⁴ In other words, an ExCom Conclusion, agreed to by ExCom members, would necessarily have to be agreed to by the signatories to the Refugee Convention. This subsequent agreement represents an authentic interpretation by the parties that must be read into the treaty for the purposes of its interpretation.¹⁵

As an interpretative criterion, burden-sharing has given rise to an extensive array of questions, including uncertainty regarding what, why and how the burdens should be shared.¹⁶ However, through the doctrine of CDBR, the international community addresses what burdens are to be shared and how.

³ Eiko R Thielemann, 'Editorial Introduction' (2003) 16 *Journal of Refugee Studies* 225, 225

⁴ *Charter of the United Nations* Art 1(3)

⁵ *Charter of the United Nations* Art 2

⁶ *Convention Relating to the Status of Refugees*, signed 28 July 1951, 189 UNTS 2545 (entered into force 22 April 1954) Preamble para 4

⁷ *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 31(2)

⁸ United Nations High Commissioner for Refugees, *A Thematic Compilation of Executive Committee Conclusions*, 6th edition (June 2011) Refworld < <http://www.refworld.org/docid/4f50cfbb2.html> > 42

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid* 43

¹² *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 31(3)(a)

¹³ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed Cambridge University Press, 2014) 54-5

¹⁴ *ibid*

¹⁵ 'Draft Articles on the Law of Treaties with commentaries' (1996) 2 *Yearbook of the International Law Commission* 187, 221

¹⁶ Thielemann, (no 3), 227

3. THE DOCTRINE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES

A. INTERNATIONAL ENVIRONMENTAL LAW

With its roots in international environmental law, CBDR has become an important factor in the legal discourse surrounding the issue of compliance with international multilateral regimes. The underlying objective of CBDR is to provide states with a principled framework to guide the collective determination of obligations, in the spirit of common partnership.¹⁷ It was first articulated in the text of Principle 7 of the 1992 Rio Declaration:

*In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the global 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.*¹⁸

CBDR can be seen as a practical by-product from the notion of 'common heritage of mankind' - a legal construct created to determine sovereign rights for the international seabed,¹⁹ as well as outer space and the moon.²⁰ One of the primary pillars of the CBDR doctrine is the fact that it serves as a channel for states to recognise the commonness of responsibility for certain matters of international concern,²¹ and focuses on the pragmatic fulfilment of obligations in relation to this commonality of interests. In this regard, the second pillar of CBDR creates the notion that, whilst all states share the same responsibility, not all states are required to fulfil the same obligations to the same degree in pursuit of their common objective.²² CBDR recognises not only the contextual constraints on states to fulfil the same obligations (such as economic power), but also the historical inequity that exists in terms of states' contributions to the issue of concern.²³

These principles appear either implicitly or explicitly in the text of various multilateral environmental conventions. By way of example, differentiated obligations are present in the preamble and Article 5 of the Montreal Protocol on Substances that Deplete the Ozone Layer,²⁴ as well as Article 2 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.²⁵ Additionally, the language of CBDR is expressly employed in Article 3(1) of the UN Framework Convention on Climate Change (FCCC) and Article 10 of the 1997 Kyoto Protocol to the FCCC.²⁶ This notion of differentiated obligations to achieve a common target is also present in non-environmental agreements, such as the preamble to the United Nations Convention on the Law of the Sea,²⁷ as well as

¹⁷ United Nations Educational, Scientific and Cultural Organization, *Rio Declaration on Environment and Development* (1992) UNESCO <http://www.unesco.org/education/nfsunesco/pdf/RIO_E.PDF> 2

¹⁸ *ibid*

¹⁹ *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Art 136

²⁰ *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, signed 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) Art 11(1)

²¹ Edith Brown Weiss, 'Common but Differentiated Responsibilities in Perspective' (2002) 96 *American Society of International Law* 366, 366

²² *ibid*

²³ *ibid* 366-7

²⁴ *Montreal Protocol on Substances that Deplete the Ozone Layer*, signed 16 September 1987, 1522 UNTS 28 (entered into force 1 January 1989) Art 5

²⁵ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, signed 29 December 1972, 1046 UNTS 138 (entered into force 30 August 1975) Art 2

²⁶ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) Art 3(1); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) Art 10

²⁷ *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Preamble para 5

the 1979 'Enabling Clause' to the General Agreement on Tariffs and Trade.²⁸ With an effect that extends beyond international environmental law, it is only natural that the principles of CBDR have been invoked in an attempt to create a revitalised functional approach to international refugee law.

B. INTERNATIONAL REFUGEE LAW

In their 1997 paper, Hathaway and Neve propose the introduction of the doctrine of CBDR to the regime of international refugee law, arguing for a long overdue paradigm shift to address what they perceive to be the current state of crisis of refugee law.²⁹ In addition to their proposed reinvigoration of the manner in which states approach refugee protection, Hathaway and Neve advocate for a reformulation of the 'rules of the game' to be in accordance with CBDR.³⁰ They view states' individuated attitudes towards their own responsibility in the refugee regime as a primary cause of the crisis,³¹ describing the current situation as 'chaotic' in that:

*[The] distribution of the responsibility [...] is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need.*³²

Hathaway and Neve elaborate on their proposal in line with the two principal pillars of CBDR. They advocate that states within a specific region recognise a common commitment to contributing to refugee protection, analogising to individuals' participation in an insurance scheme.³³ This common recognition of protection as a matter of international concern would be matched with differentiated contributions in accordance with 'allocational principles that take account of real differences in the relative abilities and circumstances of states.'³⁴ It should be noted that their insurance scheme analogy is in line with the principles of CBDR in the sense that states would collectively recognise the common need to tackle refugee situations and make differentiated contributions towards that common objective. Consequently, this would minimise their individual risk levels as an insurance scheme would.

A natural conclusion of such a scheme would be Schuck's market-based quota trading system, which has been described as the synthesis of two distinct constitutive schemes.³⁵ The first of these is the physical burden-sharing scheme, in which refugee quotas are assigned to states for further re-accommodation, ultimately amounting to a collectivised status-determination process.³⁶ The second is the compensatory scheme, involving the distribution of resources as compensation for overburdened states in an effort to ensure compliance with Article 33 of the Refugee Convention.³⁷ Both schemes are characterised by a common recognition of responsibility as well as an allocation of differentiated duties, creating concrete consequences in accurately identifying the burdens to be shared.

²⁸ *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc L/4903 (28 November 1979) (Decision) paras 1, 6, 8

²⁹ James C Hathaway and R Alexander Neve, 'Making Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115

³⁰ *ibid* 201

³¹ *ibid* 141

³² *ibid* 141

³³ *ibid* 145

³⁴ *ibid* 145

³⁵ Jaakko Kuosmanen, 'What (If Anything) Is Wrong with Trading Refugee Quotas?' (2013) 19 *Res Publica* 103, 105

³⁶ *ibid*

³⁷ *ibid* 106

4. REASONS FOR RECONCEIVING BURDEN-SHARING

Hathaway and Neve point to the tumultuous state of refugee affairs at the time as justification for a reformed system.³⁸ Whilst there have been significant changes in circumstances since then, the current state of asylum remains in distress. In 1997, UNHCR reported nearly 23 million people as being of concern, of which 13.2 million were refugees.³⁹ Seven years later in 2004, the refugee population had fallen to 9.2 million,⁴⁰ only to return to 14.4 million in 2014.⁴¹ Facing a similarly sized refugee population as that registered today, the Director of UNHCR's Division of International Protection in 1997, Dennis McNamara, stated that:

*It is not new that the violators of refugee rights in one region invoke the violations by other—better resourced—regions, as one justification for their actions. ... It appears that non-compliance with international treaty obligations for refugees is becoming something of a global norm.*⁴²

If the invocation of the approaches taken by Northern states is distinguished as one of the causes of non-compliance in the South, then the matter has only worsened over the years. The end of the Cold War brought about what Hathaway and Neve term as the demise of 'interest-convergence' - namely the cessation of states' perception of refugees as beneficial for reasons of cultural assimilation, labour force shortages, and capitalist-communist ideological competition.⁴³ This has led to a generalised constriction of state asylum systems, with lower recognition rates and restricted rights and benefits awarded to refugees.⁴⁴ In addition, the rise of deterrence as the approach of choice for national policy-makers, with concrete examples being sea interdiction and detention facilities, have effectively led to an excision of the North from the international refugee regime, placing a disproportionate and prohibitive burden on Southern states.⁴⁵ As an illustration of this reality, the ratio of a state's hosted refugee population to its average income level is used by UNHCR to provide a proxy measure for the burden sustained by that state.⁴⁶ In 2013:

*[T]he 40 countries with the highest number of refugees per 1 USD GDP (PPP) per capita were all members of developing regions, and included 22 Least Developed Countries. More than 5.4 million refugees, representing 46 per cent of the world's refugees, resided in countries whose GDP (PPP) per capita was below USD 5,000.*⁴⁷

Furthermore, as was the case for Hathaway and Neve,⁴⁸ the fact remains that the principle of burden-sharing is yet to be operationalised in the Refugee Convention. Instead, one needs to have recourse to the sort of legal gymnastics demonstrated in Section II above to establish burden-sharing as, at most, an interpretative criterion. With a case made as to why it is necessary to reconceive the notion of burden-sharing, the next issue becomes how such burdens ought to be redistributed in a reformed system. This

³⁸ Hathaway and Neve, (n 29)

³⁹ United Nations High Commissioner for Refugees, *The State of the World's Refugees: A Humanitarian Agenda* (January 1997) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/3eb7bb534.html>>

⁴⁰ United Nations High Commissioner for Refugees, *UNCHR Global Report 2004* (2004) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/42ad4da47.html>> 14

⁴¹ United Nations High Commissioner for Refugees, *UNCHR Global Report 2004* (2004) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/5575a7840.html>> 6

⁴² Dennis McNamara 'Statement by Dennis McNamara, Director of International Protection, to the Forty-Eighth Session of the Executive Committee of the High Commissioner's Programme' (1997) 16 *Refugee Survey Quarterly* 56, 57

⁴³ Hathaway and Neve, (n 29), 119

⁴⁴ Thomas Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 *Journal of Refugee Studies* 574, 576

⁴⁵ Gil Loescher and James Milner, 'UNHCR and the Global Governance of Refugees' in Alexander Betts (eds), *Global Migration Governance* (Oxford University Press, 2011) 189, 196

⁴⁶ United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2013, 13th edition* (2013) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/54cf99b69.html>> 34

⁴⁷ *ibid*

⁴⁸ Hathaway and Neve, (n 29), 141

paper does not aim to provide an innovative approach, but rather proposes crucial questions to consider that have arisen from past burden-sharing mechanisms.

5. LESSONS FROM THE PAST

A reformulation of burden-sharing can only be adequately conceived with reference to past asylum schemes of collective action and the challenges they faced. As it was noted before in section III, when distilled down to first principles, the CBDR doctrine consists of two underlying ideas: acknowledgement of responsibility in achieving a common goal, and differentiated duties allocated to each participant. When viewed through this schematic lens, several international initiatives appear to reflect aspects of CBDR. Such initiatives include the 1989 Comprehensive Plan of Action for Indochinese Refugees ('CPA'), the Humanitarian Evacuation Programme ('HEP') and Humanitarian Transfer Programme ('HTP') in response to the 1999 Kosovo Crisis, the European Refugee Fund ('ERF') that was recently replaced by the Asylum, Migration and Integration Fund ('AMIF'), and the 2004 Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America ('MPA'). These initiatives gave rise to questions of legality, morality, and practicality, which ought to be taken into account when constructing any system of international burden-sharing.

A. LEGALITY

With the purpose of refugee law being the extension of protection to those fleeing persecution, there is concern that rigid burden-sharing obligations, when unfulfilled, will have the reciprocal effect of repudiating states' protection obligations.⁴⁹ As an issue that emerges often in situations of mass influx, this was precisely the legal question that arose during the Kosovo Crisis - namely whether states' asylum obligations are contingent upon receiving international assistance. In reference to the crisis, UNHCR expressed that:

[T]he evaluation suggests that UNHCR should have given more and earlier attention to the probability that the refugees would not be admitted to a potential country of asylum. UNHCR is concerned that contingency planning which assumes that states will not comply with their responsibilities to receive and host new arrivals, particularly in mass influx situations, runs the risk of becoming a self-fulfilling prophecy.⁵⁰

The issue during the Kosovo Crisis stemmed from Macedonia's unfettered reluctance to expand its refugee intake in the face of a mass influx from neighbouring Kosovo, on grounds of national security concerns.⁵¹ This denial came from the fact that, in the eyes of the Macedonian government, they could not assume any more of the burden involved in increased refugee inflows, leaving it to the international community to share the responsibility.⁵² This was in defiance of UNHCR standard policy as determined in ExCom's Conclusions No. 22 and 85,⁵³ which respectively called for asylum seekers to be 'admitted to the State in which they first seek refuge ... at least on a temporary basis,'⁵⁴ and that access to asylum

⁴⁹ Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1998) 11 Harvard Human Rights Journal 295, 305

⁵⁰ United Nations High Commissioner for Refugees, *The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response* (9 February 2000) UNHCR: The UN Refugee Agency <<http://www.unhcr.org/3ae68d19c.html>> para 15

⁵¹ Michaela Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing' (2001) 14 Journal of Refugee Studies 95, 96-7

⁵² *ibid* 96

⁵³ *ibid* 97

⁵⁴ United Nations High Commissioner for Refugees, *A Thematic Compilation of Executive Committee Conclusions, 6th edition* (June 2011) Refworld <<http://www.refworld.org/docid/4f50cfbb2.html>> 159

be independent of 'burden-sharing arrangements first being in place.'⁵⁵ It becomes apparent, at this point, that the contention lies in whether there exists any scope for states to derogate from Article 33 of the Refugee Convention.

Whilst Hathaway and Foster recognise the apparent conflict that exists between Conclusions No. 22 and No. 85, they prefer the interpretation that:

*Derogation from respect for non-refoulement is justified in the case of mass influx only where it is the sole realistic option for a state that might otherwise be overwhelmed and unable to protect its most basic national interests.*⁵⁶

They do, however, view this as an *in extremis* exception, and endorse UNHCR's call for 'greater clarity concerning the scope of international protection in mass influx situations.' It is clear that, for as long as there remains uncertainty regarding the circumstances in which *non-refoulement* obligations are suspended in the sight of the national security concerns enshrined in Article 33(2) and Article 9 of the Refugee Convention, a reformulated burden-sharing scheme based on differentiated responsibilities would be open to the manipulation of states.

B. MORALITY

The concept of burden-sharing carries with it the regrettable attribute - whether it be inherent or purely a linguistic misfortune - that it refers to refugee flows as burdensome or problematic to states; a classification that flows from the language in the Refugee Convention itself.⁵⁷ In the context of the insurance scheme, states would in effect be partaking in assurances of often monetary compensation when faced with burdensome asylum obligations, such as in the case of mass influx. The matter that ought to be resolved is whether such a mentality would effectively amount to a commodification of refugees,⁵⁸ in that they are being negatively valued in price terms as if they were exchangeable for an alternative.⁵⁹

Kuosmanen addresses this issue from the standpoint of a German Constitutional Court decision.⁶⁰ He interprets the court's decision as illuminating the fact that human dignity, in the context of Kantian 'dignity,'⁶¹ excludes the possibility of a utilitarian calculus being used to set prices on persons for the purposes of trading them against each other.⁶² "Kuosmanen goes on to contrast that decision in the context of the refugee plight, arguing that their human dignity is not being violated as they are not being traded against each other."⁶³ All refugees, by virtue of their status, have a claim to the same level of protection, and this fact cannot be curtailed as a consequence of quota-trading.⁶⁴

Kuosmanen's conclusion appears sound, but it collapses when considered against the reality of burden-sharing schemes. The CPA is an example in which non-uniform refugee status determination ('RSD') policy led to morally questionable differential treatment of refugees across participating states.⁶⁵ The CPA provided a multilateral commitment from the participating states to accept the refugees who had

⁵⁵ *ibid* 42

⁵⁶ Hathaway and Foster, (n 13), 360

⁵⁷ Fleur E Johns, 'The Madness of Migration: Disquiet in the International Law Relating to Refugees' (2004) 27 *International Journal of Law and Psychiatry* 587, 588

⁵⁸ Anker, Fitzpatrick and Shacknove, (n 49), 306

⁵⁹ Kuosmanen, (n 35), 112

⁶⁰ *ibid* 113

⁶¹ *ibid*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ Richard Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?' (2006) 18 *International Journal of Refugee Law* 537, 542

arrived on their shores prior to their individually set cut-off dates,⁶⁶ namely 14 March 1989 for Malaysia and Thailand, 21 March 1989 for the Philippines, 17 March 1989 for Indonesia, and 16 June 1988 for Hong Kong.⁶⁷ This mechanism in the CPA effectively created a quota for an initial intake of refugees, with subsequent numbers to be assessed in accordance with states' RSD procedures. For asylum-seekers awaiting in camps, the seeming arbitrariness of the cut-off dates created a sense of disenchantment and resentment,⁶⁸ which was only exacerbated by the inconsistent RSD processes to which they were subject. As a consequence of inexperience or conceptual uncertainty, national RSD authorities faced a considerable struggle in applying the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, as well as integrating humanitarian considerations into the process, which ultimately fell victim to the political objectives and 'mood' of resettlement states.⁶⁹ The inconsistency of the RSD process led to often wide variations in quality,⁷⁰ but such undignified results for the plight of asylum-seekers are a consequence of a practicality issue in burden-sharing schemes.

C. PRACTICALITY

1. Policy Harmonisation

In order to ensure the effectiveness of burden-sharing as a mechanism for granting protection, the bureaucratic means by which this protection is granted need to be consistent amongst all participating states to ensure compliance with international standards. One of the primary obstacles that arose in the Kosovo Crisis and the CPA was the inconsistency in RSD policy across the participants.

In the case of the CPA, the matter became one of balancing efficiency and accuracy, as the entire regime rested on compliance from the participating states who viewed the situation as one in need of pragmatic solutions.⁷¹ The vagueness of the CPA guidelines in elucidating the meaning of 'persecution', the necessary procedural criteria, as well as the prescribed periods of individual assessment meant that - for the most part - the issues required *ad hoc* resolution by UNHCR, who acted both as an arms-length arbiter and as an active decision-maker.⁷² This resulted in an overall high recognition rate for the region at 27.9 per cent, but disparate national rates for Hong Kong (18.8 per cent), Indonesia (43.3 per cent), Malaysia (39 per cent), the Philippines (53.4 per cent), Thailand (22.5 per cent) and Japan (15.4 per cent).⁷³ In a burden-sharing scheme with differentiated responsibilities, one would expect the recognition rates to vary, as one would with resettlement rates. However, the variation cannot be linked to procedural incoherence and incompetence, and rather should be determined in accordance with a state's structural constraints. To this end, the doctrine of CBDR can provide assistance in light of its focus on states' contextual constraints in the advancement of common obligations. A situation whereby differentiated burdens are determined as a consequence of ineffective status determination creates a risk that burdens will ultimately be disproportionately shared, thereby defeating the purpose of the scheme.

The programs put in place during the Kosovo Crisis, namely the HEP and HTP, differed significantly not only in their objective but also in the criteria utilised for selection. While it began as a temporary protection scheme, HEP quickly became an avenue of resettlement in Western nations.⁷⁴ HTP, on the other hand, was a Macedonian initiative to transfer refugees from its border to camps in Albania and Turkey for further resettlement. The disparity between the two programmes, as well as UNHCR's intermittent endorsement of HTP, created a perception of HEP as 'a rapid way of obtaining tickets to

⁶⁶ *ibid* 554; *Report of the Secretary-General*, UN GAOR, 44th sess, UN Doc A/44/523 (22 September 1989) annex ('*Declaration and Comprehensive Plan of Action*') section E para 9

⁶⁷ Towle, (n 65), 539-40

⁶⁸ *ibid* 544

⁶⁹ *ibid* 544-5

⁷⁰ *ibid* 570

⁷¹ *ibid* 538

⁷² *ibid* 549

⁷³ *ibid*

⁷⁴ Barutciski and Suhrke, (n 51), 102

the West,' ultimately leading to its abuse.⁷⁵ With reports of refugees transacting their HEP places, UNHCR described HEP as:

*Originally conceived as a rapid evacuation programme, it has turned into a cumbersome process with distinct criteria per country of destination. At the same time, with increased quotas having been activated by a number of countries, refugees are choosing their country of evacuation. This has reportedly resulted in high no-show rates, both for interviews and, worse, at the time of embarkation.*⁷⁶

In the broader context of burden-sharing, this “forum-shopping” would not only result in a loss of confidence from member states, as it did in the Kosovo Crisis,⁷⁷ but it would also undermine the purpose of the scheme. When refugees engage in “forum-shopping”, the scheme loses relevance for participating states, as refugee flows would remain unchanged and individuated state action remains a necessity. This lack of consistency and certainty between the HEP and HTP, as well as within the CPA, demonstrates the need for a streamlined policy framework that allows for protection to be granted to refugees in an efficient and effective manner.

2. State Incentives

It must be emphasised that any reformulation of burden-sharing, whether it be in terms of CBDR or not, needs to be based on the *realpolitik* assumption that states require incentives that go beyond legal obligations and humanitarian considerations.⁷⁸ In this regard, the CPA and the MPA cast some light on the factors involved.

There is a pre-conceived idea within the literature that overburdened Southern states stand to gain a considerable advantage from participating in a burden-sharing scheme, whilst Northern states lack a reason to commit.⁷⁹ Acharya and Dewitt posit that this can be explained by viewing the current refugee regime as bifurcated into two dimensions: control and distance.⁸⁰ They argue that the securitisation rhetoric used when tackling refugee crises has given rise to this dichotomous state mentality, dictating to various degrees their level of participation in multilateral schemes.⁸¹ Nevertheless, there is merit in the proposition that state interests can extend beyond the national security agenda.

One of the principal factors leading to the qualified success of the CPA was the active level of US involvement in the entire process. Described as a hegemonic pressure factor, the US influence on other states to retain high quotas and relax their asylum channels was linked not to humanitarian or pragmatic motivations, but to a matter of optics.⁸² The humiliating defeat the US suffered in Vietnam — a defeat which caused the mass human exodus that the CPA attempted to contain — is cited as a primary motivator for US participation in the CPA.⁸³ This sense of duty the US felt towards its South Vietnamese allies, which if unfulfilled would have had a detrimental effect on its international image, drove the

⁷⁵ *ibid* 104

⁷⁶ United Nations High Commissioner for Refugees, *Updated UNHCR Guidelines for the Humanitarian Evacuation Programme of Kosovar Refugee in the Former Yugoslav Republic of Macedonia* (11 May 1999) <<http://www.refworld.org/docid/3ae6b31b7b.html>>

⁷⁷ Barutciski and Suhrke, (n 51), 104

⁷⁸ Asha Hans and Astri Suhrke, ‘Responsibility Sharing’ in James C Hathaway (eds), *Reconceiving International Refugee Law* (Kluwer Law International, 1997) 83, 102

⁷⁹ Eiko R Thielemann, ‘Editorial Introduction’ (2003) 16 *Journal of Refugee Studies* 225, 228; Astri Suhrke, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 *Journal of Refugee Studies* 396, 397-9

⁸⁰ Amitav Acharya and David B Dewitt, ‘Fiscal Burden Sharing’ in James C Hathaway (eds), *Reconceiving International Refugee Law* (Kluwer Law International, 1997) 111, 122

⁸¹ *ibid*

⁸² Astri Suhrke, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 *Journal of Refugee Studies* 396, 406

⁸³ *ibid*

establishment of the scheme.⁸⁴ Such an incentive is also referred to in the case of the MPA,⁸⁵ as well as the Kosovo Crisis albeit to a lesser extent.⁸⁶ In the case of the MPA, Harley refers to solidarity in the protection of refugees as being connected to the mobilisation of national opinion in the name of regional values.⁸⁷ Particularly, Harley proposes that this solidarity:

[C]reates a contest for national identity whereby nations raise the level of protection they offer refugees in order to be able to say "we welcome you because we are people who are inclusive and caring."⁸⁸

Such a 'contest for national identity,' in which the protection of refugees is collaterally beneficial to a state's image nationally and internationally, presents similar characteristics to the Cold War interest-convergence alluded to by Hathaway and Neve.⁸⁹ Specifically, it is possible to see the similarity between interest-convergence based on the capitalist-communist ideological competition of the Cold War, and interest-convergence based on current national identity contests or international reputation enhancement. Therefore, there is a case to be made that the conceptualisation of state interests, in the context of burden-sharing schemes, requires expansion.

3. Fiscal Distribution

Intrinsic to the concept of differentiated responsibilities is the notion that such responsibilities are to be measured with reference to contextual constraints and historical legacy.⁹⁰ In terms of the second criterion, there is an assumption that commitments to addressing the problem should be related to the degree to which the state contributed to it.⁹¹ On face value, such a consideration presents problems for the refugee law regime, in that the states often at fault for refugee flows are those from which refugees are fleeing, due to an unwillingness or inability to effectively respond.⁹² Consequently, the only viable criterion that can be used to determine differentiated responsibilities is that of contextual constraint. In looking to define this, guidance can be sought from the developments advanced by the ERF.

With its underlying objective being the proportionate redistribution of resources in line with the burdens borne by EU states,⁹³ the arrangement under the ERF consisted in a fixed stipend of between €300,000 and €500,000 along with a proportional element determined by the absolute number of recognised refugees and pending asylum applications.⁹⁴ Both elements, it is argued, did not adequately address the issue of disproportionate burdens, for two significant reasons. Firstly, the underlying insurance rationale behind the ERF seemed undermined by the fact that a state's potential risk to facing refugee flows, due to its particular pull factors, was not a consideration in the fund allocation.⁹⁵ Secondly, the fact that resources were allocated on an absolute rather than a relative basis (such as asylum applications relative to national population or GDP) was evidence of a misconception regarding a state's burden. It erroneously assumed that 'the same amount of effort is required for a particular number of protection-

⁸⁴ *ibid*

⁸⁵ Tristan Harley, 'Regional Cooperation and Refugee Protection in Latin America: A 'South-South' Approach' (2014) 26 *International Journal of Refugee Law* 22, 45

⁸⁶ Barutciski and Suhrke, (n 51), 104-5

⁸⁷ Harley, (n 85), 45

⁸⁸ Harley, (n 85), 45 citing J Goodman, 'Refugee Solidarity: Between National Shame and Global Outrage' in D Hopkins, J Kleres, H Flam and H Kuzmics (eds), *Theorizing Emotions: Sociological Explorations and Applications* (Chicago University Press, 2009) 269, 271

⁸⁹ Hathaway and Neve, (n 29), 119

⁹⁰ Brown Weiss, (n 21), 366

⁹¹ *ibid* 368

⁹² Hathaway and Foster, (n 13), 293

⁹³ Eiko R Thielemann, 'Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund' (2005) 43 *Journal of Common Market Studies* 807, 816

⁹⁴ *ibid* 818

⁹⁵ *ibid* 819

seekers received, no matter whether the receiving state is small or large, rich or poor, etc.⁹⁶ A burden-sharing scheme that looks to differentiated responsibilities and obligations must adequately account for potential risks and actual burdens, in order to have a concrete effect on overburdened states and ultimately the refugee community.

On 16 April 2014, the ERF was amalgamated with the European Fund for the Integration of third-country nationals ('EFI') and the European Return Fund ('RF').⁹⁷ The resulting conglomerate, the AMIF,⁹⁸ aims to advance the efficient management of migration flows as well as the development of common asylum and migration policy in the region.⁹⁹ Drawing an implicit parallel to the doctrine of CBDR, the AMIF acknowledges the disparity in responsibility borne by each participating state, and that financial resources should be distributed proportionately to these differences as well as states' specific situations and needs.¹⁰⁰ In this regard, the established financial arrangement under the AMIF consists of minimum fixed stipends, which are doubled for Cyprus and Malta due to being "insular societies who face disproportional migration challenges."¹⁰¹ In addition to this, states receive an amount calculated on the basis of the average of 2011, 2012 and 2013 allocations for each participating state under the ERF, the EFI and the RF.¹⁰² In effect, allocations from the AMIF are based on the same criteria used to make allocations from 2011 to 2013 from the ERF, the EFI and the RF, which are altogether not disparate. Both the EFI and RF initially provide for fixed annual allocations for each participating state,¹⁰³ with the remainder of funds to be distributed amongst them proportionately to the relevant number of third-country nationals for either the EFI¹⁰⁴ or the RF.¹⁰⁵ Both can be compared to the ERF in that all three make pecuniary allocations based on absolute numbers of individuals with which participating states are faced, as opposed to their relative capacity to accommodate and engage with these individuals. With the new fund simply being a fusion of these three schemes, rather than a structural reformulation of the manner in which these schemes conceptualise and redistribute burdens, the AMIF is unlikely to change states' burden-sharing prospects for the period for which it has been established.

6. CONCLUSION

The notion of burden-sharing constitutes a fundamental bastion towards achieving a functional approach to international refugee law. However, with refugee figures higher than those in 1997 and a disparate and inequitable distribution of these populations, there needs to be a reconceptualisation of burden-sharing so as to equip the international law regime for the modern challenges it faces. There is merit in the current climate to advocate for such a reconceptualisation in the terms of the central channel

⁹⁶ *ibid* 820

⁹⁷ Council Regulation (EU) 516/2014 of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ 150/168

⁹⁸ *ibid* Art 1(1)

⁹⁹ *ibid* Art 3(1)

¹⁰⁰ *ibid* paras 6, 36

¹⁰¹ *ibid* para 37, Art 15(1)(a)

¹⁰² *ibid*

¹⁰³ Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' [2007] OJ L168/18, Art 12(1) and Council Decision 575/2007/EC of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows' [2007] OJ 144/45, Art 14(1)

¹⁰⁴ Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' [2007] OJ L168/18, Art 12(2)

¹⁰⁵ Council Decision 575/2007/EC of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows' [2007] OJ 144/45, Art 14(2)

of state action in several international environmental law instruments: the doctrine of Common But Differentiated Responsibilities.

In order to avoid the mistakes of the past, this reformulation must be done in light of the issues raised by past regional burden-sharing schemes. Firstly, there are legal questions surrounding the degree to which asylum obligations are contingent on operational burden-sharing schemes, and whether a default on one end would entitle a repudiation of obligations on the other. Secondly, the moral basis for such a scheme remains debatable and dependent on the particulars of the scheme itself. Thirdly, there are pending practical concerns in the areas of RSD policy harmonisation, accurate conceptualisation of state interests, as well as adequate partition of fiscal responsibilities.

Whilst the legal and moral questions are matters that will require resolution by the international community, the pragmatic focus of the doctrine of Common But Differentiated Responsibilities makes it well suited to adequately address the practical issues raised by past burden-sharing schemes, ultimately advancing the efficacy of the international refugee law regime by a significant degree.