

**WHY DO STATES SHARE THE BURDEN DURING
REFUGEE EMERGENCIES?**

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ABSTRACT

Burden sharing, which is sometimes referred to as responsibility sharing, deals with how costs of common initiatives or the provision of public goods should be shared between states. Burden sharing in mass influx situations implies sharing the costs and responsibilities associated with the displacement. The principal instrument for the protection of refugees worldwide, the Convention Relating to the Status of Refugees does not create a duty for its signatories to share the asylum related burdens of another state in mass influx situations. Except Article 80 of the Treaty on the Functioning of the European Union there are no enforceable international or regional treaties that oblige states to share the asylum related burdens of another state. In the light of the absence of a legal framework obliging states to participate in burden sharing arrangements, this article addresses the question: What does motivate states to share the burden in mass influx situations? To address this question, this article reviews various literature on burden sharing including past proposals by James C. Hathaway and Peter Schuck and analyses two burden sharing practices namely, the

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Comprehensive Plan of Action and the Humanitarian Evacuation Programme which played crucial roles in solving the Vietnamese and Kosovar refugee crises. Following this analysis, the article identifies different elements that motivate states to share the burden in mass influx situations and examines whether these elements can be integrated to a generic burden sharing proposal.

Key words: *Burden sharing, asylum, mass influx situations, solidarity, Humanitarian Evacuation Programme, the Comprehensive Plan of Action, international cooperation, solidarity*

NEDEN DEVLETLER KİTLESEL MÜLTECİ AKINLARINDA KÜLFET PAYLAŞIMINDA BULUNURLAR?

ÖZET

Sorumluluk paylaşımı olarak da adlandırılan külfet paylaşımı, kamu mallarının ve ortak girişimlerin maliyetinin devletler arasında nasıl paylaşılması gerektiği ile ilgilidir. Kitlesel mülteci akınlarında külfet paylaşımı bu akın ile ilgili maliyet ve sorumlulukların paylaşımı anlamına gelir. Külfet paylaşımı mülteci akınlarının daha iyi bir şekilde yönetilmesi ve sağlanan korumanın daha çok kişiye ulaştırılabilmesi için vazgeçilmezdir. Buna rağmen Mültecilerin Hukuki Statüsüne İlişkin Cenevre Sözleşmesi kapsamında sözleşme taraflarının diğer devletlerin mültecilere ilişkin yükümlülüklerini paylaşma zorunluluğu bulunmamaktadır. Avrupa Birliği'nin İşleyişine Dair Antlaşma'nın 80. Maddesi dışında devletlerin başka devletlerin mültecilere ilişkin külfetlerini paylaşmak zorunluluğunu barındıran ve bu zorunluluğu yaptırıma bağlayan uluslararası ve bölgesel bir anlaşma da bulunmamaktadır. Külfet paylaşımını düzenleyen uluslararası hukuki bir çerçevenin yokluğunu göz önünde bulundurarak bu makale, devletleri kitlesel akınlarda külfet paylaşımına sevk eden nedenleri araştırmaktadır. Bu nedenleri belirlemek için, külfet paylaşımının kitlesel akınlarda sağladığı yararlar ortaya konulacak, külfet paylaşımı ile ilgili mevcut literatür incelenecek ve James Hathaway ile Peter Schuck tarafından geliştirilen külfet paylaşımı önerileri analiz edilecektir. Bununla birlikte Kosova ve Vietnam'da yaşanmış olan mülteci krizlerini

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çözmede önemli rol oynayan iki külfet paylaşımı uygulaması incelenecektir. Bu konuların incelenmesi sonucu mülteci akınlarının devletleri işbirliği ve külfet paylaşımına iten nedenler belirlenecektir. Makalenin son bölümünde bu nedenlerin belirlenmesinden yola çıkılarak tüm mülteci akınlarında uygulanabilen bir külfet paylaşımı önerisi getirilebilir mi sorusu tartışılacaktır.

Anahtar Kelimeler: *Külfet paylaşımı, Kitlemel mülteci akını, Mülteci akınlarında devletlerarası yardımlaşma, Kosova Mülteci krizi, Vietnamlı Mülteciler, Devletlerarası işbirliğinin şartları*

I INTRODUCTION

Burden sharing, which is sometimes referred to as responsibility sharing, deals with “how costs of common initiatives or the provision of public goods should be shared between states.”¹ Burden sharing in humanitarian emergencies and mass influx situations implies sharing the costs and responsibilities associated with the displacement.² States usually participate in the burden sharing by making financial contributions or providing refuge or resettlement to persons who need protection.³ United Nations High Commissioner for Refugees (UNHCR) Roundtable Conclusions provide that, “international cooperation and burden sharing can take many forms including material, technical or financial assistance, as well as the physical relocation of people through humanitarian evacuation or resettlement.”⁴

The principal instrument for the protection of refugees worldwide, the Convention Relating to the Status of Refugees⁵ (the 1951 Convention) does not oblige its signatories to share the burden

¹ THIELEMANN, Eiko R., ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’ (2003) 16(3) *Journal of Refugee Studies* p. 235.

² VAN SELM, Joanne, *Refugee Protection in Europe: Lessons from the Yugoslavian Crisis* (Martinus Nijhoff Publishers, Leiden 1998) p. 125; HANS, Asha, SURKHE, Astri, ‘Responsibility Sharing’ in James C. Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers, Leiden 1997) p.103.

³ THORBURN, Joanne, ‘Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe’ (1995) 7(3) *International Journal of Refugee Law* p. 469.

⁴ UNHCR, ‘Roundtable on Temporary Protection: 19-20 July 2012’ *International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection* 20 July 2012, p. 6.

⁵ UNGA, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

of asylum or participate in burden sharing schemes.⁶ The preamble of the 1951 Convention recommends that “Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.”⁷ Hence, the 1951 Convention urges states to act according to the true spirit of international cooperation. However, this provision is only advisory and does not oblige states to participate in burden sharing arrangements. Similarly, except Article 80 of the Treaty on the Functioning of the European Union⁸ there are no enforceable international and regional treaties that oblige states to share the asylum related burdens of another state.⁹ This is also true in mass

⁶ HATHAWAY, James C., NEVE Alexander R., ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 Harvard Human Rights Journal p. 169; ALBORZI, Mohammed R., *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (Martinus Nijhoff Publishers, Leiden 2006) p. 248.

⁷ Paragraph D Preamble of the 1951 Refugee Convention.

⁸ Article 80 of the Treaty on the Functioning of the European Union states that “The 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 Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.” Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012. This article “applies to all matters falling within the policy area of border checks, asylum and immigration.” VANHEULE, Dirk, VAN SELM, Joanne, BOSWELL Christina, ‘The Implementation of Article 80 TFEU - on the Principle of Solidarity and Fair Sharing of Responsibility, Including its Financial Implications, between the Member States in the Field of Border Checks, Asylum and Immigration (European Parliament Study 2011) p. 36.

⁹ Article 2(4) of the African Unity Convention OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45. and Article 2(2) of the UNGA, Declaration of Territorial Asylum, 14 December 1967, UN doc A/RES/2312 (XXII) are on burden sharing however they are both declaratory in nature. SCHUCK, Peter H., ‘Refugee Burden-Sharing: A Modest Proposal’ (1997) 22 Yale Journal of International Law p. 253, 254; NOLL, Gregor,

influx situations. In the light of the absence of legal principles obliging states to participate to the burden sharing arrangements, this article seeks to clarify the reason why states participate to the burden sharing arrangements in mass influx situations. In line with this objective, the main research question of the article is: What motivates states to share the burden in mass influx situations? To address this question, this article explores existing academic literature on burden sharing as well as past proposals on burden sharing by prominent scholars including James Hathaway¹⁰ and Peter Schuck¹¹. It also reviews two significant burden sharing practices which played a key role in solving the Kosovar and Vietnamese refugee crisis.

The article has a structure of three Parts. The first Part explores why burden sharing plays a key in responding to mass influx situations, whereas the second Part reviews burden sharing throughout the Kosovar and Vietnamese refugee crisis with a view to identifying which elements contributed to the willingness of states to participate to the burden sharing schemes. Building on this discussion, the third part reviews existing literature on burden sharing and clarifies what motivates states to participate to the burden sharing schemes in mass influx situations.

Negotiating Asylum: The EU Acquis, Extraterritorial Protection and The Common Market Of Deflection (Vol 6, 2000 Martinus Nijhoff Publishers, Leiden) p. 279.

¹⁰ HATHAWAY and NEVE, p. 169.

¹¹ SCHUCK, p. 279.

II WHY DOES BURDEN SHARING MATTER?

To begin with, it is necessary to clarify the meaning of a mass influx situation. There is no absolute definition of a mass influx situation as Edwards notes, stating “There is neither a minimum number, nor speed of arrival, for a ‘mass influx’ ”.¹² The Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection defines mass influx situations as “arrival in the community of a large number of displaced persons, who came from a specific country or geographical area.”¹³ An analysis of the relevant literature reveals the following indicators of mass influx situations: Large scale arrival of persons seeking refuge¹⁴, “a rapid rate of arrival”¹⁵, an overwhelmed reception capacity of the host states¹⁶ and inability of the national asylum systems to absorb the

¹² EDWARDS, Alice, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13 Melbourne Journal of International Law p. 603, 604.

¹³ Article 2(d) of the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, OJ L.212/12, 7 August 2001.

¹⁴ ExCom Conclusion No 100 (LV) ‘Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations’ (2004); DURIEUX, Jean-François, MCADAM, Jane, ‘Non-refoulement Through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 (1) International Journal of Refugee Law p. 17; UNHCR, ‘Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR’ (2005) 24(1) Refugee Survey Quarterly p. 118.

¹⁵ UNHCR, ‘Ensuring International’ p. 118.

¹⁶ UNHCR, ‘Ensuring International’ p. 118; EGGLI, Vibeke A., *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers, Leiden 2002) p. 23; ExCom Conclusion No 100; GOODWIN-GILL, Guy S., MCADAM, Jane, *The Refugee in International Law* (3rd edn, OUP Oxford 2007) p. 335.

arrival of persons seeking refuge.¹⁷ With the help of these indicators, each situation can be examined on a case by case basis and a decision can be reached whether a situation can be defined as a mass influx situation or not.

Mass influx situations create many challenges for host states. The vast number of persons seeking refuge usually overwhelms the asylum and reception capacities of host states.¹⁸ Protecting the mass flows is costly. It creates a heavy financial burden on host states especially there is no burden sharing mechanism to distribute the costs and burdens. The following figures show the financial burden of protecting mass flows. It is declared in October 2015 that the financial cost of Syrians refugees in Turkey has exceeded \$7.5 billion.¹⁹ Similar to Turkey, “Jordan has spent about \$6.6 billion since the Syrian refugee crisis began in March 2011.”²⁰ Related to the financial burden, mass influx situations may negatively affect income, livelihoods, health care and education in the host states.²¹

Mass influx situations also create problems with regard to security. In many instances a mass influx situation has been identified

¹⁷ UNHCR, ‘Ensuring International’ p. 118; ExCom Conclusion No 100; EGGLI, p. 23; EDWARDS, p. 603; GOODWIN-GILL and MCADAM, p. 335.

¹⁸ COLES, p. 202.

¹⁹ CETINGULEC, Mehmet, ‘At a Cost of \$500 Million Each Month, Turkey Staggered under Growing Refugee Burden’ Al Monitor, 20 October 2015 <<http://www.al-monitor.com/pulse/originals/2015/10/turkey-syria-refugees-spent-billion-in-three-months.html#>> accessed 1 December 2015.

²⁰ KAPLAN, Michael, ‘Syrian Refugee Crisis and Jordan Budget Deficit: Amid Economic Slowdown, Asylum Seekers Cost Country \$6.6B’ International Business Times, 19 October 2015 < <http://www.ibtimes.com/syrian-refugee-crisis-jordan-budget-deficit-amid-economic-slowdown-asylum-seekers-2146203>> accessed 1 December 2015.

²¹ See for these negative impacts in the case of Lebanon, International Labour Association (ILO), and ‘Assessment of the Impact of Syrian Refugees in Lebanon and their Employment Profile’ (ILO 2013).

as a national security threat.²² The national security problems arise especially when there are armed groups among those who are seeking refuge.²³ Besides creating national security problems, mass influx situations can also create tensions between the local community and the protected groups,²⁴ especially when the local community and the persons who are protected in the host states have different ethnic backgrounds and follow different religions.²⁵ In addition to this, tensions can arise in cases “when the protected persons compete with local communities for resources, jobs, social care, health care, education and housing.”²⁶ Owing to these reasons, states especially first asylum states, their legal, humanitarian and moral obligations aside, might have valid reasons to be reluctant to open their borders in mass influx situations and give access of their territories to all persons seeking refuge. Despite the identified challenges that mass influx situations create, admission of persons fleeing persecution, torture and inhuman or degrading treatment to the territories of host states and their return to the country of origin are clearly governed by the treaty and customary law principles.

The principle of non-refoulement is one of the most important safeguards that the 1951 Convention offers to refugees and the principle is established by Article 33 of the 1951 Convention as follows “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,

²² COLES, p. 201; GOODWIN-GILL and MCADAM, p. 336.

²³ VOLKER, Türk, ‘Forced Migration and Security’ (2003) 15 International Journal of Refugee Law p. 123-124; LOESCHER, Gil, MILNER, James, *Protracted Refugee Situations: Domestic and International Security Implications* (Routledge, London 2005) p. 8-11.

²⁴ LOESCHER and MILNER, p. 32, 33.

²⁵ LOESCHER and MILNER, p. 32.

²⁶ LOESCHER and MILNER, p. 32.

religion, nationality, membership of a particular social group or political opinion.”²⁷ Besides the 1951 Convention, the principle of non-refoulement has also developed through human rights mechanisms.²⁸ States have certain refoulement related obligations that stem from widely ratified human rights treaties including the Convention against torture²⁹ (CAT) the International Covenant on Civil, Political and Rights³⁰ (ICCPR) and European Convention for the Protection of Human Rights and Fundamental Freedoms³¹ (ECHR).³² While Article 3 of the CAT prohibits states to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, Article 7 of the ICCPR when read in the light of General Comment no 20 issued in 1992, prohibits states to expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment

²⁷ Article 33 of the 1951 Refugee Convention.

²⁸ HURWITZ, Agnes, *The Collective Responsibility of States to Protect Refugees* (OUP, Oxford 2009) 187; GOODWIN-GILL and MCADAM, p. 285.

²⁹ UNGA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

³⁰ UNGA, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

³¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

³² HATHAWAY, James C., *The Right of Refugees under International Law* (CUP 2005) p. 119,120; SKORDAS, Achilles, ‘Article 7 1951 Convention’ in A. Zimmermann, F. Machts, J. Dorschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, Oxford 2011) p. 754; GOODWIN-GILL and MCADAM, p. 285, 286.

upon return to another country by way of their extradition, expulsion or refoulement.³³

Article 3 of the ECHR provides “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” ECtHR’s case-law under Article 3 of the ECHR has become key for the protection of asylum seekers, refugees, irregular migrants and persons fleeing armed conflict in Europe. In various judgments, the ECtHR has noted that: “Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens.”³⁴ *Soering v UK*³⁵ was the first case where the non-refoulement character of Article 3 of the ECHR was established.³⁶ Beginning from the *Soering* case, the Court established that “Article 3 of the ECHR is applicable where substantial grounds have been shown for believing that a person, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.”³⁷ One of the landmark judgments with regard to protection of asylum seekers and irregular migrants under Article 3 was *Hirsi and Others v. Italy*³⁸ adopted in 2012. *Hirsi and Others v.*

³³ UNHCR, ‘UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence’ January 2008, < <http://www.refworld.org/pdfid/479df7472.pdf> > accessed 1 December 2015, para 9.

³⁴ *Chahal v UK* (1997) 23 EHRR 413, para 73; *Vilvarajah and Others v. UK* App No 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECHR, 30 October 1991) para 102; *Hirsi Jamaa and Others v Italy*, Application No 27765/09 (ECHR, 23 February 2012) para 113.

³⁵ *Soering v. UK* (1989) 11 EHRR 439.

³⁶ LAUTERPACHT, Elihu, BETHLEHEM, Daniel, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in E. Feller, V. Türk, F. Nicholson (eds), *Refugee Protection in International Law UNHCR’s Global Consultations on International Protection* (CUP 2003) p. 155.

³⁷ *Soering v. UK*, para 91; *Chahal v UK*, para 114.

³⁸ *Hirsi Jamaa and Others v Italy*.

Italy established that interception at high seas of potential asylum seekers and their return to states where they would be in a risk of torture or cruel, inhuman or degrading treatment or punishment can indeed violate Article 3 of the ECHR. The Judgment also obliged states to consider the consequences of their removal or pushback practices before engaging in any act that has the potential to constitute breaches of the ECHR. Aside from being part of these human rights treaties, the prevailing academic opinion is that the principle of non-refoulement has become part of customary law.³⁹ It is widely accepted that the customary norm of refoulement protects refugees as defined by the 1951 Convention and asylum seekers until their asylum claims are processed and rejected.⁴⁰ It is also widely accepted that the customary norm of non-refoulement also protects people from being returned to the territories of a state where they would be subjected to torture.⁴¹

It is clear that the principle of non-refoulement creates a duty for states especially first asylum states to provide refuge to persons fleeing persecution, torture, inhuman and degrading treatment. This means, states neighbouring the country of origin usually bear a disproportionate burden compared to states that do not share a border with the country of origin. In such cases, burden sharing plays a key role in mass influx situations: Burden sharing motivates host states to keep their borders open and not to implement non-entrée policies by

³⁹ Non-refoulement is acknowledged as a customary law principle by LAUTERPACHT and BETHLEHEM, p. 149; KJAERUM, Morten, 'Temporary Protection in Europe in the 1990's' (1994) 6 International Journal of Refugee Law 444; GOODWIN-GILL and MCADAM, p. 347, 354.

⁴⁰ LAUTERPACHT and BETHLEHEM, p. 149-155; GOODWIN-GILL and MCADAM, p. 348.

⁴¹ GOODWIN-GILL and MCADAM, p. 348; LAUTERPACHT and BETHLEHEM, p. 150-155.

lightening their asylum burden.⁴² It also improves the protection standards of the protected persons and overall leads to better responses to mass influx situations.⁴³ In view of this and considering that the 1951 Convention does not oblige its parties to participate to burden sharing arrangements, an equitable burden sharing mechanism contributes to the willingness of states to admit persons seeking refuge to their territories and enable effective and equitable distribution of the asylum burden in mass influx situations.⁴⁴ Having established this, next Part reviews two important burden sharing practices and examines the reason why states have participated to those burden sharing schemes.

III BURDEN SHARING DURING THE KOSOVAR AND VIETNAMESE REFUGEE CRISES

Arrangements implemented throughout the Kosovar and the Vietnamese refugee crisis can be identified as successful examples of burden sharing. Thus, they provide good case studies for examining the preconditions of successful burden sharing and factors affecting willingness of states to participate to the burden sharing schemes.

1 Kosovar Refugee Crisis and Burden Sharing

With Kosovo's status loss as an autonomous province of Former Republic of Yugoslavia (FRY) in 1989, "the discrimination and human rights abuses against the Albanian ethnic community in

⁴² See Part III.

⁴³ ExCom Conclusion No 100; ILA, 'Report of the Committee on Refugee Procedures of the ILA (Delhi Conference, 2002). Final Report and Draft Guidelines on Temporary Protection' (2002) p. 7.

⁴⁴ THORBURN, p. 460-480; UNHCR, 'Ensuring International' p. 120.

Kosovo increased.”⁴⁵ In 1998, as the Serbian security forces intensified operations against the Kosovo Liberation Army⁴⁶, “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army caused numerous civilian casualties”⁴⁷ and forced 230,000 Kosovars⁴⁸ to flee their homes.⁴⁹ The root causes of the flight of Kosovars included ethnic cleansing, rape, torture, and imprisonment for false reasons, mortal threats, severe beatings and killings by the Serbian military and paramilitary forces.⁵⁰ The UNHCR, as well as many other commentators, were of the opinion that many ethnic Albanians who fled Kosovo would, at the time, qualify as refugees.⁵¹ By April 1999, the number of persons who had fled Kosovo reached 450,000.⁵²

The Kosovars seeking refuge outside Kosovo initially fled to Albania, Croatia and the Former Yugoslav Republic of Macedonia

⁴⁵ AMBROSO Guido, ‘The Balkans at a Crossroads: Progress and Challenges in Finding Durable Solutions for Refugees and Displaced Persons from the Wars in the Former Yugoslavia’ (UNHCR 2006) p. 6, 7.

⁴⁶ AMBROSO, p. 6, 7.

⁴⁷ WHITMAN, Jim, ‘Nato’s Humanitarianism versus Human Rights’ (2000) 4(3) *International Journal of Human Rights* p. 167-172.

⁴⁸ The term ‘Kosovars’ refers to all persons who were displaced by the armed conflict in Kosovo.

⁴⁹ UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199; AMBROSO, p. 7.

⁵⁰ FUNDO, Christian A., ‘Toward a More Individualized Assessment of Changed Country Conditions for Kosovar Asylum Seekers’ (2010) 43 *Cornell International Law Journal* p. 625.

⁵¹ UNHCR, ‘UNHCR Position Paper on the Treatment of Refugees and Asylum-Seekers from Kosovo’, 18 November 1998; Amnesty International (AI), ‘The protection of Kosovo Albanian Refugees’, 19 May 1999, EUR 65/03/99, p. 11; ALBORZI, p. 229; KJAERUM, Morten, ‘Human Rights, State Security and Burden-Sharing: People or States First’ (2001) 14 *Journal of Refugee Studies* p. 117; FUNDO, p. 626-627.

⁵² KUSHNER, p. 74.

(hereinafter Macedonia).⁵³ In contrast to Albania that admitted all Kosovars seeking refuge in its territories, Macedonia closed its borders.⁵⁴ In a meeting assembled by UNHCR, the US, Sweden, Norway, Austria, Turkey and other states declared their willingness to evacuate Kosovar refugees from neighbouring states and protect them.⁵⁵ As a result, the Humanitarian Evacuation Programme (HEP) and the Humanitarian Transfer Programme (HTP) were introduced and implemented in collaboration with UNHCR and IOM.⁵⁶ Under the HEP nearly 96,000 Kosovars were evacuated from Macedonia and transferred to 28 states.⁵⁷ The HTP was another programme under which Kosovars were transferred to Albany and Turkey from Macedonia, though, unlike the HEP, HTP evacuees travelled by

⁵³ UNSC ‘Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council’ 17 March 1999, S/1999/293, p. 2; BARUTCISKI Micheal, SUHRKE Astri, ‘Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing’ (2001) 14(2) *Journal of Refugee Studies* p. 98.

⁵⁴ ICG Report noted that “Although it is observed that that the border was not actually closed but rather the entering and processing of refugees are slowed down drastically, Macedonia also exercised some short term border closures in later dates to compel European states to share the burden of refugees.” International Crisis Group (ICG), ‘Macedonia: Towards Destabilisation? The Kosovo Crisis Takes its Toll on Macedonia’, 21 May 1999, p. 1-3; Amnesty International (AI), ‘Bosnia-Herzegovina: “Who’s Living in My House?”: Obstacles to the Safe Return of Refugees and Displaced People’ 19 March 1997, EUR 63/001/1997, p. 1-4.

⁵⁵ BARUTCISKI and SUHRKE, p. 96, 97.

⁵⁶ AI ‘The protection of Kosovo Albanian Refugees’ p. 9; SKORDAS, Achilles, ‘Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof’ in K. Hailbronner (ed), *EU Immigration and Asylum Law Commentary on EU Regulations and Directives* (Hart Publishing 2010) p. 822.

⁵⁷ AI ‘The protection of Kosovo Albanian Refugees’ p. 10; BARUTCISKI and SUHRKE, p. 101.

land.⁵⁸ The HEP is considered unprecedented in terms of its speed and the number of persons that it managed to evacuate.⁵⁹ The evacuation programmes proved to be an efficient and quick way to lighten the burden of Macedonia and enabled the Macedonian government to keep its borders open.⁶⁰

A considerable number of states, together with the World Bank, supported Macedonia financially throughout the Kosovo refugee crisis and shared the costs related to reception of the Kosovars.⁶¹ Through the evacuation programmes, many states also shared the material burden of the Kosovar mass influx.⁶² Although some states contributed to the protection of Kosovars more than others, the burden of the Kosovar mass influx was distributed between states through an *ad hoc* mechanism.⁶³ This begs the question: ‘What was the reason for the materialization of burden sharing?’ A number of scholars argue that political factors were decisive as the members of NATO were exceptionally willing to share the burden due to their military engagement in the Kosovar conflict.⁶⁴ This can be an indicator that states that are militarily involved in the armed conflict which is related to the displacement may be more willing to contribute to the burden sharing arrangements.⁶⁵ It can also be argued that many states participated in the burden sharing for the Kosovars because the

⁵⁸ BARUTCISKI and SUHRKE, p. 105.

⁵⁹ BARUTCISKI and SUHRKE, p. 101.

⁶⁰ EINARSEN, Terje, ‘Refugee Protection beyond Kosovo: Quo Vadis?’ (2001) 14(2) *Journal of Refugee Studies* p. 125.

⁶¹ BARUTCISKI and SUHRKE, p. 98.

⁶² BARUTCISKI and SUHRKE, p. 98.

⁶³ FITZPATRICK, Joan, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ 92 (2000) (2) *American Journal of International Law* p. 290.

⁶⁴ BOSWELL, Christina, ‘Burden- Sharing in European Union: Lessons from the German and UK experience’ (2003) 16(3) *Journal of Refugee Studies* p. 331.

⁶⁵ BOSWELL, p. 331.

humanitarian aspects of the crisis were clear, in particular the atrocities which created displacement were clear; therefore, public opinion in many host states supported protection of the Kosovars.⁶⁶

Another reason might be related to the *ad hoc* nature of the burden sharing arrangements introduced during protection of the Kosovar refugees. As Boswell notes, in the case of protection of Kosovars, burden sharing materialized based on ‘double voluntarism’ unlike the formalized burden sharing regime once proposed by Germany during the Bosnian refugee crisis.⁶⁷ Therefore, although European states rejected being bound by a formalized burden sharing regime, when the necessity was apparent, they nevertheless willingly introduced the evacuation programmes and shared the burden of the Kosovar mass influx.

2 Vietnamese Refugee Crisis and Burden Sharing

The Vietnam War ended in 1975 with the fall of Saigon, in other words, “the invasion of the capital of South Vietnam by the People's Army of Vietnam and the National Liberation Front of South Vietnam.”⁶⁸ Indo-Chinese flight under the Comprehensive Plan of Action (CPA) context began with the fall of Saigon and unification of Vietnam.⁶⁹ Between 1975 and 1980 more than one million people fled Vietnam, Kampuchea and Laos and sought refuge in Indonesia, Hong

⁶⁶ European Commission, Directorate-General Home Affairs, ‘Study on the Feasibility of Establishing a Mechanism for the Relocation of Beneficiaries of International Protection’, July 2010, JLX/2009/ERFX/PR/1005 <http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/final_report_relocation_of_refugees_en.pdf> accessed 1 December 2015, p. 6.

⁶⁷ BOSWELL, p. 331; See for Germany’s proposal footnote 162 and 163.

⁶⁸ UNHCR, *The State of World Refugees 2000: Fifty Years of Humanitarian Action* (OUP, Oxford 2000) 81.

⁶⁹ BRONÉE, Sten A., ‘The History of Comprehensive Plan of Action’ (1993) 5(4) *International Journal of Refugee Law* p. 539.

Kong, the Philippines, Thailand, Malaysia, among other states.⁷⁰ The Indo-Chinese asylum-seekers⁷¹ who sought refuge in different South East-Asian states included different ethnic groups and various social statuses, with each group having different reasons for leaving the country of origin.⁷² People were forced to flee Vietnam and Kampuchea during the 1970's because of "harsh treatment and re-education of those who had connections with the old regime and the US; deterioration of living conditions; and discriminative policies against people with ethnic Chinese origin."⁷³ In addition to this, forced resettlement of the aforementioned groups in remote areas and their political exclusion, government repression and violation of human rights increased the number of individuals seeking asylum.⁷⁴

The first countries of asylum, such as Thailand, Malaysia and Hong Kong, initially admitted boats carrying Indo-Chinese asylum-seekers.⁷⁵ However, once the number of individuals seeking refuge

⁷⁰ BRONÉE, p. 529; DAVIES, Sarah E., *Legitimising Rejection International Refugee Law in Southeast Asia* (Martinus Nijhoff Publishers, Leiden 2008) p. 86-88; HATHAWAY and NEVE, p. 124.

⁷¹ The term 'Indo-Chinese asylum-seekers' refers to persons who were forced to flee Vietnam, Cambodia and Laos between 1975 and 1996.

⁷² HELTON, Arthur C., 'Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control' (1990) 8 *New York Law School Journal of Human Rights* p. 112; TRAN, Yen, 'Closing of the Saga of the Vietnamese Asylum-seekers: The Implications on International Refugees and Human Rights Laws' (1994) 17 *Houston Journal of International Law* p. 467; COURTLAND ROBINSON, William, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998) p. 10-58.

⁷³ TRAN, p. 465, 466; UNHCR *The State of World Refugees*, p. 81-82; COURTLAND ROBINSON *Terms of Refuge* p. 26-33.

⁷⁴ TRAN, p. 467.

⁷⁵ COURTLAND ROBINSON, William, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 7(3) *Journal of Refugee Studies* 319; Courtland Robinson *Terms of Refuge* p. 39-65.

increased, they began implementing non-entrée policies.⁷⁶ To find a solution to the ‘Vietnamese boat people’ problem, an international conference was convened by the UN Secretary-General in 1979 with the participation of 65 States.⁷⁷ As a result of the conference, a number of European states, the US, Canada and Australia pledged to resettle more than 135,000 people.⁷⁸ Although in the conference states did not make any formal commitments, the first countries of asylum agreed to provide temporary refuge to the Indo-Chinese asylum-seekers until they were resettled.⁷⁹ Indo-Chinese asylum-seekers were granted *prima facie* refugee status and became automatically eligible for resettlement following their arrival to these states.⁸⁰ Implementation of these arrangements reduced the number of boat arrivals and stopped pushback policies arising in first countries of asylum for a few years.⁸¹ The number of Indo-Chinese boat arrivals significantly increased in 1988.⁸² As the number of boat arrivals increased⁸³, the resettlement quotas became insufficient.⁸⁴ Overwhelmed with continuous arrivals, Thailand and Indonesia implemented non-entrée policies⁸⁵ whereas Hong-Kong used mandatory detention policies to deter new arrivals.⁸⁶

⁷⁶ Courtland Robinson ‘The Comprehensive Plan of Action for Indochinese Refugees’ p. 319.

⁷⁷ UNHCR *The State of World Refugees* p. 84.

⁷⁸ BRONÉE, p. 535.

⁷⁹ UNHCR *The State of World Refugees* p. 84.

⁸⁰ BRONÉE, p. 536; UNHCR *The State of World Refugees* p. 84.

⁸¹ UNHCR *The State of World Refugees* p. 84.

⁸² UNHCR *The State of World Refugees* p. 84; BRONÉE, p. 534.

⁸³ HELTON, p. 113.

⁸⁴ TRAN, p. 474, 475.

⁸⁵ DAVIES, p. 191; HELTON, p. 113.

⁸⁶ DAVIES, p. 192; HELTON, p. 115; BARCHER, Ann C., ‘First Asylum Southeast Asia: Customary Norm or Ephemeral Concept?’ (1991-1992) 24 *NYU Journal of International Law and Politics* p. 1253-1287.

To find a solution to the problem of the second influx of Indo-Chinese people, an international conference was convened in 1989 with the participation of 70 States including the Vietnamese government. This conference adopted the Declaration and Comprehensive Plan of Action (the CPA Declaration).⁸⁷ According to the CPA Declaration, Indo-Chinese asylum-seekers would not be granted *prima facie* refugee status upon their arrival to first countries of asylum but would, instead, be required to go through individual RSD based on the refugee definition provided in the 1951 Convention.⁸⁸ To comply with this agreement, first countries of asylum had to establish their own refugee status determination mechanisms.⁸⁹ A cut-off date was introduced in each host state and, after the particular cut-off date, an asylum seeker had to successfully claim asylum to be eligible for resettlement.⁹⁰ Following the status determination, Indo-Chinese asylum-seekers that were proved to be refugees were resettled in third states.⁹¹ The UNHCR, one of the key actors of the CPA, summarizes the achievements of the CPA as follows:

[...] providing temporary refuge for some 112,000 asylum-seekers from Vietnam and the Lao People's Democratic Republic, reducing clandestine departures, expanding legal departure

⁸⁷ UNGA, Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (A/44/523), 22 September 1989, UN doc A/44/523 (the CPA Declaration); Courtland Robinson 'The Comprehensive Plan of Action for Indochinese Refugees' p. 320.

⁸⁸ The CPA Declaration.

⁸⁹ Section II/D of CPA Declaration.

⁹⁰ Section II/A of CPA Declaration.

⁹¹ Section II/E of CPA Declaration.

possibilities and introducing region-wide refugee status determination procedures.⁹²

The CPA represents a unique policy that facilitates cooperation between country of origin, countries of first asylum and resettlement states, so as to solve a major humanitarian crisis. In terms of burden sharing, the CPA can be defined as a successful precedent.⁹³ An important factor that contributed to this success was the generous resettlement quotas provided by third states.⁹⁴ The CPA would not have been introduced in the first place if the third states were not willing to offer resettlement. This begs the question: ‘Why did third States agreed to provide resettlement throughout the Indo-Chinese flight?’ It is generally acknowledged that politics played a major role on the introduction and implementation of the CPA. First, there was the US defeat in Vietnam and its willingness to rescue its South Vietnamese allies fleeing the Communist regime.⁹⁵ The US pressure on its allies to grant resettlement was decisive in the participation of the third states to the burden sharing arrangements.⁹⁶ The biggest contribution to the burden sharing came from the US; Betts notes that the US committed to take approximately 40% of both the pre- and post- cut-off date asylum-seekers from Vietnam.⁹⁷ Hein suggests that Indo-Chinese asylum-seekers were allied aliens as a result of the

⁹² UNHCR, Executive Committee of the EC//46/SC/CRP.44 UNHCR’s Programme 19 August 1996, Standing Committee, 4th Meeting, Update on Regional Developments in Asia and Oceania < <http://www.unhcr.org/3ae68cf94.pdf>> accessed 1 December 2015.

⁹³ TRAN, p. 479; BETTS, Alexander, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009) p. 112-142.

⁹⁴ TRAN, p. 474.

⁹⁵ SUHRKE, Astri, ‘Burden Sharing During Refugee Emergencies: The Logic of Collective Versus National Action’ (1988) 11(4) *International Journal of Refugee Law* p. 406.

⁹⁶ SUHRKE, p. 406.

⁹⁷ BETTS *Protection by Persuasion* p. 124, 125.

failed American military intervention and this explains why the US granted resettlement.⁹⁸ Although the European states were initially not enthusiastic to provide resettlement⁹⁹, the influence of the US on its allies and the collective concern for the growing dangers that Indo-Chinese asylum-seekers faced, were among the key reasons for European states offering resettlement.¹⁰⁰ Second, aside from the US, France and China resettled many Indo-Chinese asylum-seekers; political and historical factors played an important role in their decision of states to offer resettlement.¹⁰¹ Third, there were also compelling humanitarian reasons for offering resettlement as the severity of the situation in terms of human suffering was clear.¹⁰² It was estimated that “between twenty and thirty per cent of the asylum-seekers who departed Vietnam by boat did not reach land.”¹⁰³ Another source estimated that “six out of ten people who attempted to flee did not survive.”¹⁰⁴

There are different arguments put forward to explain the logic behind the burden sharing throughout the CPA. Betts argues that Northern states do not participate in refugee burden sharing for altruistic reasons.¹⁰⁵ He notes that, under the CPA arrangements, all

⁹⁸ HEIN, Jeremy, *From Vietnam, Laos, and Cambodia: a Refugee Experience in the United States* (Twayne Publishers 1995) p. 19.

⁹⁹ DAVIES, p. 94.

¹⁰⁰ DAVIES, p. 94.

¹⁰¹ DAVIES, p. 2, 3.

¹⁰² SAAR, John, ‘Boat People Backlash’, *Newsweek*, 25 June 1979, p. 55.

¹⁰³ SAAR, p. 55.

¹⁰⁴ Nguyen Cong Hoan, a former member of the Vietnamese National Assembly did this estimation. See *Vietnam: Under Two Regimes*, DEP'T ST. BULL., Sept. 1985, 6 cited in TRAN, p. 467.

¹⁰⁵ Betts explains the logic of cooperation in burden sharing with reference to Suasion Game Theory. See BETTS, Alexander, ‘International Cooperation in the Global Refugee Regime’ (November 2008) GEG Working Papers 2008/44, p. 4.

three groups fulfilled their commitments and, in return, they fulfilled their wider policy interests by participating in burden sharing and the UNHCR enabled states to recognise these interests.¹⁰⁶ He also notes that the US participated to the burden sharing because US regional and global security interests required it to do so.¹⁰⁷ It was beneficial for the US to cooperate with ASEAN countries at the time.¹⁰⁸

According to Suhrke, collective burden sharing in a specific region which is likely to experience mass influx situations bears some resemblance to a good insurance policy.¹⁰⁹ Equitable and fair burden sharing is beneficial for all participants.¹¹⁰ Collective action also implies that no state will be alone to handle the asylum burden in a mass influx situation.¹¹¹ Suhrke asserts that the collective action in mass influx situations serves the interests of all states.¹¹² It strengthens international order and stability and protects the rights of refugees.¹¹³ She explains the success of inter-regional burden sharing throughout the CPA with the “informal responsibility sharing guided by hegemonic pressure on individual actors to do more, but leaving each actor to define that share according to its own selection procedures.”¹¹⁴ In conclusion, she argues that, without the participation of the US in the burden sharing and the impact this had on its allies, “humanitarian imperatives alone would not have sufficed to sustain the CPA.”¹¹⁵ Following Suhrke’s argument, Betts notes that

¹⁰⁶ BETTS ‘International Cooperation in the Global Refugee Regime’ p. 4.

¹⁰⁷ BETTS *Protection by Persuasion* p. 71.

¹⁰⁸ BETTS *Protection by Persuasion* p. 71.

¹⁰⁹ SUHRKE, p. 398.

¹¹⁰ SUHRKE, p. 398.

¹¹¹ SUHRKE, p. 412.

¹¹² SUHRKE, p. 412.

¹¹³ SUHRKE, p. 412.

¹¹⁴ SUHRKE, p. 406.

¹¹⁵ SUHRKE, p. 406.

considering the US engagement without taking into account the role of UNHCR will result in an incomplete picture since the US, at times, waived in its commitment to the CPA.¹¹⁶ Similarly, Schuck notes that, without the US and UNHCR's contribution to the CPA, the consensus to share the burdens may not have materialized.¹¹⁷

There is more than one factor which can be accounted for to explain the success of the burden sharing and the cooperation of states under the CPA. UNHCR's active role in implementation of the CPA is one of these factors.¹¹⁸ UNHCR led the international discussion through the drafting process of the CPA Declaration and fully supported the operational phase of the CPA.¹¹⁹ In view of the outlined points, it can be concluded that inclusion of the UNHCR to the protection process increased the chances for improved cooperation and more viable burden sharing.¹²⁰

Building on this analysis, next Part discusses the reason that states participate to the burden sharing arrangements.

IV WHY DO STATES PARTICIPATE TO THE BURDEN SHARING ARRANGEMENTS DURING REFUGEE EMERGENCIES?

¹¹⁶ Betts *Protection by Persuasion* p. 125.

¹¹⁷ SCHUCK, p. 257.

¹¹⁸ Betts argues that the dynamic of the burden sharing can be explained with the theory of cross issue persuasion. BETTS *Protection by Persuasion* p. 112-142.

¹¹⁹ SCHUCK, p. 257; COURTLAND ROBINSON 'The Comprehensive Plan of Action for Indochinese Refugees' p. 327.

¹²⁰ KNEEBONE, Susan, MCDOWELL, Christopher, MORRELL, Gareth, 'A Mediterranean Solution? Chances of Success' (2006) 18 *International Journal of Refugee Law* p. 495-503.

It is previously established that there is no structured legal regime regulating burden-sharing in mass influx situations. Since the 1951 Convention does not oblige its parties to participate in the burden-sharing arrangements, Part II argued that a response to mass influx situations which incorporates an equitable burden-sharing mechanism would contribute to the willingness of states to admit persons seeking refuge and enable effective and equitable distribution of the asylum burden in mass influx situations.¹²¹ Building on this argument, the question ‘what motivates states to participate to the burden-sharing arrangements?’¹²² is discussed below in the light of a literature review and the conclusions reached in Part III.

Hathaway and Neve raise a valid point in noting “Not all states will be equally drawn to cooperate in the provision of refuge protection, nor will they be willing to commit themselves to other governments with equivalent intensity.”¹²³ I agree with their view; expecting each state to participate equally in the burden-sharing arrangements is unreasonable, since each state has a different level of interest in any particular displacement. Having established this, the literature on burden-sharing, especially the academic proposals by Hathaway, Schuck, Suhrke, Noll and other authors, provides important insights into what motivates states to participate in burden-sharing arrangements in mass influx situations.¹²⁴

¹²¹ THORBURN, p. 460-480.

¹²² The same question is also posed by SCHUCK, p. 273 and THIELEMANN, Eiko R., ARMSTRONG, Carolyn, ‘Understanding European Asylum Cooperation under the Schengen/Dublin System: A Public Goods Framework’ (2013) 22(2) European Security p. 148.

¹²³ HATHAWAY and NEVE, p. 189, 190.

¹²⁴ SUHRKE, p. 398-414 explains burden-sharing with reference to the prisoner’s dilemma and game theory; NOLL Gregor, ‘Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field’ (2003) 16(3) Journal of Refugee Studies p. 236-252 also explains burden-sharing with reference to game theory. BETTS

Hathaway and Neve propose burden-sharing based on collectivised responsibility shared by interest-convergence groups.¹²⁵ They claim that the proposed scheme will work like an insurance scheme.¹²⁶ Under their proposed scheme, states can participate in the burden-sharing by providing temporary protection, resettlement, or by funding the protection system.¹²⁷ They argue that four main considerations may motivate third states to participate to the burden-sharing scheme.¹²⁸ First, burden-sharing might “provide them with a less absolute, but more sustainable, mechanism to promote their migration control objectives”.¹²⁹ Second, this could “serve to relevant interests or concerns related to conflict and first countries of asylum.”¹³⁰ And third, this could “serve immediate strategic or economic interests at stake or looser bonds such as cultural or religious similarities”¹³¹ Fourth, states would be willing to be part of such a scheme because “they have a good-faith, principled commitment to the advancement of refugee protection and development issues”.¹³²

Different from Hathaway and Neve, Schuck proposes a market system for distributing the burden of refugees with the

Protection by Persuasion p. 54, 61-64 argues that the dynamic of the burden-sharing can be explained with the theory of cross issue persuasion and suasion theory. THIELEMANN and ARMSTRONG, p. 148-164 explain it with pure public good theory.

¹²⁵ HATHAWAY and NEVE, p. 145-151, 189.

¹²⁶ HATHAWAY and NEVE, p. 145-151, 189.

¹²⁷ HATHAWAY and NEVE, p. 145.

¹²⁸ HATHAWAY and NEVE, p. 192.

¹²⁹ HATHAWAY and NEVE, p. 192.

¹³⁰ HATHAWAY and NEVE, p. 193,194.

¹³¹ HATHAWAY and NEVE, p. 194.

¹³² HATHAWAY and NEVE, p. d 194-196.

facilitation of an international agency.¹³³ First step in his proposal is to define and determine number of persons who need international protection.¹³⁴ Next, it foresees allocation of the whole population in need of protection to each state and the criteria for the distribution would be states' capacity to provide the most minimal safeguards and amenities to refugees under the 1951 Convention, national wealth, population density and land mass.¹³⁵ Once state quotas are established, states would be expected to either actually protect these refugees themselves or pay another state in exchange of providing temporary refuge or resettlement.¹³⁶ Schuck claims that the possibility of states which receive fewer refugees now to become popular destination states in the future may motivate states to share the asylum burdens.¹³⁷ Schuck also notes that powerful states can persuade other states to participate burden-sharing by manipulating the carrot and sticks by using concessions, technical assistance, financial support, political pressure, negotiation, resource transfers.¹³⁸

Similar to Hathaway and Schuck, scholars have tried to explain the logic behind states' decision to participate to the burden-sharing arrangements with reference to a number of theories including game theory, public goods theory, insurance logic, suasion game, prisoner's dilemma and others.¹³⁹ Although these theories provide important insights on what motivates states to participate to burden-sharing schemes in general, they fall short of introducing criteria which would make sure burden-sharing is materialized in all mass

¹³³ SCHUCK, p. 288.

¹³⁴ SCHUCK, p. 277.

¹³⁵ SCHUCK, p. 278-281.

¹³⁶ SCHUCK, p. 283.

¹³⁷ SCHUCK, p. 274.

¹³⁸ SCHUCK, p. 274, 276.

¹³⁹ See footnote 129.

influx situations. For example, Suhrke argues that, collective burden-sharing in a specific region which is likely to experience mass influx situations bears resemblance to good insurance.¹⁴⁰ Thus, an equitable and fair burden-sharing benefits all of the participators of the burden-sharing by reducing the instability and risks associated with large scale movements of forced migrants.¹⁴¹ Collective action also implies that no state will be alone to handle the asylum burden in a mass influx situation.¹⁴² She asserts that collective action in mass influx situations serves for the interests of all states; “it strengthens international order and stability and protects the rights of refugees.”¹⁴³ Although Suhrke’s insurance logic suggests a sound approach and explains why states may choose to cooperate in mass influx situations, it does not explain why this insurance logic has not worked in a number of instances including arrival of mixed flows by sea through Mediterranean to the European shores in past few years. Similar to this example, although Betts explains burden-sharing through cross issue persuasion by barrowing elements from the CPA, he argues that it is difficult to adopt this model in the context of displacements in the Mediterranean.¹⁴⁴

Reviewed proposals and literature illustrate that there is not one clear answer to the question what motivates states to participate to the burden-sharing schemes that would apply in all mass influx situations: mainly because the political, humanitarian, economic and legal issues surrounding each mass influx situation are different in

¹⁴⁰ SUHRKE, p. 398

¹⁴¹ SUHRKE, p. 398.

¹⁴² SUHRKE, p. 412.

¹⁴³ SUHRKE, p. 412.

¹⁴⁴ BETTS, Alexander, ‘Towards a Mediterranean Solution? Implications for the Region of Origin’ (2006) 18 *International Journal of Refugee Law* p. 665-670.

each case. Despite this difference however, still the review of the proposals above and conclusions drawn in Part 2 lead to following conclusions:

A state may more likely to participate to the burden-sharing schemes, if:

- this participation and cooperation serves its political, financial and other interests and contributes to its prestige and reputation in international arena¹⁴⁵,
- this cooperation is linked to cooperation in other areas such as economy, trade etc.¹⁴⁶,
- if the state is engaged in military activity related to the armed conflict that triggered the flight¹⁴⁷,
- this means greater stability for a particular region or a state¹⁴⁸,
- there is a strong public opinion to act this way¹⁴⁹,
- the state has historical, ethnic, cultural, linguistic and religious ties with the displaced community¹⁵⁰,
- a powerful state is involved in the scheme and urging other states to follow its lead¹⁵¹,

¹⁴⁵ HANS and SUHRKE, p. 105; JACOBSEN, Karen, 'Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes' (1996) 15(3) International Migration Review p. 660-666; SCHUCK, p. 274, 276; HATHAWAY and NEVE, p. 189-191.

¹⁴⁶ BETTS, Alexander, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' (UNHCR 2006) < <http://www.unhcr.org/43eb6a152.pdf> > accessed 1 December 2015; HATHAWAY and NEVE, p. 186.

¹⁴⁷ BOSWELL, p. 173.

¹⁴⁸ HATHAWAY and NEVE, p. 191.

¹⁴⁹ *ibid* 195; JACOBSEN, p. 658.

¹⁵⁰ HANS and SUHRKE, p. 105; JACOBSEN, p. 664, 668; HATHAWAY and NEVE, p. 195.

¹⁵¹ SCHUCK, p. 274; BETTS 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' p. 65.

- there are clear humanitarian and moral reasons to protect the displaced groups¹⁵²,
- participation to the burden-sharing arrangements conforms with international, supranational, regional or domestic legal norms¹⁵³,
- If UNHCR or any other international agency or organisation facilitates and supports the burden-sharing process¹⁵⁴,
- If the burden-sharing schemes are implemented in an *ad hoc* manner rather than formalized regimes¹⁵⁵,

Fulfilment of these criteria may increase the probability of states participating in burden-sharing arrangements. However; it is very difficult to incorporate these elements into a burden-sharing proposal because the majority of the suggested criteria cannot be controlled externally. For example; a state may be more willing to contribute to a burden-sharing scheme because it has links with the displaced community, but this link cannot be established artificially. Similarly, when a powerful state leads the burden-sharing process, participation rate may increase, but it is not possible to make sure a powerful state such as the US is part of the burden-sharing process. Many of these criteria cannot be integrated into a burden-sharing proposal. Recognising this difficulty, I conclude that it is not feasible to make a universal burden-sharing proposal that would apply in every mass influx situation. Two major proposals on burden-sharing which

¹⁵² HANS and SUHRKE, p. 105; THIELEMANN and ARMSTRONG, p. 156, 157; ROSENBLUM, Marc R., SALEHYAN, Idean, 'Norms and Interests in US Asylum Enforcement' (2004) 41(6) Journal of Peace Research p. 677.

¹⁵³ HANS and SUHRKE, p. 105; THIELEMANN and ARMSTRONG, p. 157; THIELEMANN p. 267, 268.

¹⁵⁴ BETTS 'Towards a Mediterranean Solution? Implications for the Region of Origin' p. 662; HATHAWAY and NEVE, p. 196, 197.

¹⁵⁵ Part III.

belong to Hathaway and Neve, and Schuck have never been implemented in practice, seeming to prove this point. Moreover, the two proposals have received severe criticisms with respect to their conformity with international law and human rights, feasibility and political viability.¹⁵⁶

These proposals are not the only failed attempts to formalize burden-sharing. The German presidency in 1994 proposed a burden sharing scheme which foresaw distribution of refugees among European States according to three criteria: population, size of country and Gross Domestic Product (GDP).¹⁵⁷ Although the proposal was welcomed by a few States which were also overwhelmed by the Bosnian influx, most states, including the UK, rejected this proposal since they were less affected by the influx.¹⁵⁸ Yet, as Part III illustrated, when the necessity arose European States willingly introduced the evacuation programmes and shared the burden of the Kosovar mass influx. The burden-sharing practices throughout the Kosovo refugee crisis and the CPA suggest that states prefer *ad hoc* burden-sharing arrangements rather than formalized regimes. According to Noll, an *ad hoc* burden-sharing allows member states to carry out case by case negotiations and this leaves room for situation adapted behaviour which increases the odds for cooperation.¹⁵⁹ Similarly, Suhrke links the success of burden-sharing to informal responsibility sharing.¹⁶⁰

¹⁵⁶ ANKER Deborah, FITZPATRICK, Joan, SHACKNOVE Andrew, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1998) 11 Harvard Human Rights Journal p. 295.

¹⁵⁷ German Presidency Draft Council Resolution on Burden-sharing, July 1994 (Council Document 7773/94 ASIM 124); BOSWELL, p. 328, 329; THORBURN, p. 476.

¹⁵⁸ BOSWELL, p. 329.

¹⁵⁹ NOLL, p. 246, 247.

¹⁶⁰ SUHRKE, p. 406.

An *ad hoc* burden-sharing mechanism suggests a more flexible and practical alternative, allowing the states themselves to decide on the burden-sharing measures that they actually wish to implement. Such a mechanism also allows states to decide on their own contribution to the burden-sharing by endorsing a system based on voluntariness. In the light of this, it is affirmed here that *ad hoc* burden-sharing arrangements rather than formalized regimes might be preferable. Thus, viable responses to future mass influx situations should include *ad hoc* burden-sharing arrangements based on voluntariness.

V CONCLUSION

The recent refugee crisis in the Mediterranean demonstrated that individual state responses without any collective action are usually inadequate to cope with mass influx situations. This article argued that a response to mass influx situations which incorporates an equitable burden-sharing mechanism contributes to the willingness of states to admit persons seeking refuge, increases level of the protection afforded to the persons seeking refuge in the host states and enables effective and equitable distribution of the asylum burden. Despite this significance, the 1951 Refugee Convention or any other international legal instrument does not oblige states to share the asylum related burden of another state in mass influx situations. In the light of the absence of such a legal framework, this article examined the factors that affect decision of states to participate to the burden sharing schemes in mass influx situations.

Through a review of literature on burden sharing and an analysis of state practice on burden sharing during the Kosovar and

Vietnamese influxes, this article concluded that there is not one clear answer to the question what motivates states to participate to the burden-sharing schemes that would apply in all mass influx situations: mainly because the political, humanitarian, economic and legal issues surrounding mass influx situations are different in each case. Despite this however, a state may more likely to participate to the burden-sharing schemes, if this participation and cooperation serves its political, financial and other interests or if the state is engaged in military activity related to the armed conflict that triggered the flight. States might also be willing to share the burden in mass influx situations if there are clear humanitarian and moral reasons to protect the displaced groups or there is a strong public opinion to act this way. Similarly, historical, ethnic, cultural, linguistic and religious ties with the displaced community and involvement of a powerful state in such a burden sharing affect the willingness of states to share the burden in refugee emergencies. Having said that, in every mass influx situation, the variables which affect the decision of states in terms of whether to participate in the burden-sharing are different. It is also extremely difficult to control these variables and incorporate them into a legally binding formalized burden-sharing regime. Taking into account this difficulty, the absence of motivation for states to be part of such regimes in the past and recognising the benefits of *ad hoc* consultations between states while introducing burden-sharing arrangements, this article concluded that an *ad hoc* burden-sharing mechanism, instead of a legally binding formalized burden-sharing regime is preferable.

BIBLIOGRAPHY/ KAYNAKÇA

ALBORZI Mohammed R., *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (Martinus Nijhoff Publishers 2006).

ALLAIN Jean, ‘The Jus Cogens Nature of Non-refoulement’ (2001) 13 IJRL 533.

AMBROSO Guido, ‘The Balkans at a Crossroads: Progress and Challenges in Finding Durable Solutions for Refugees and Displaced Persons from the Wars in the Former Yugoslavia’ (UNHCR 2006).

Amnesty International, ‘Bosnia-Herzegovina: “Who's Living in My House?”: Obstacles to the Safe Return of Refugees and Displaced People’ 19 March 1997, EUR 63/001/1997, < http://www.refworld.org/docid/45b5067_e2.html> accessed 1 December 2015.

Amnesty International, ‘The Protection of Kosovo Albanian Refugees’ 19 May 1999, EUR 65/03/99 < <http://www.unhcr.org/refworld/docid/3e6a9c914.html>> accessed 1 December 2015.

ANKER Deborah, FITZPATRICK Joan, SHACKNOVE Andrew, ‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ (1998) 11 Harvard Human Rights Journal 295.

BARCHER Ann C., 'First Asylum Southeast Asia: Customary Norm or Ephemeral Concept?' (1991-1992) 24 NYU Journal of International Law and Politics 1253.

BARUTCISKI Micheal, SUHRKE Astri, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing' (2001) 14(2) Journal of Refugee Studies 95.

BETTS Alexander, 'International Cooperation in the Global Refugee Regime' (November 2008) GEG Working Papers 2008/44.

BETTS Alexander, 'Towards a Mediterranean Solution? Implications for the Region of Origin' (2006) 18 IJRL 652.

BETTS Alexander, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009).

BETTS Alexander, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' (UNHCR 2006) <<http://www.unhcr.org/43eb6a152.pdf>> accessed 1 December 2015

BOSWELL Christina, 'Burden- Sharing in European Union: Lessons from the German and UK experience' (2003) 16(3) Journal of Refugee Studies 316.

BRONÉE Sten A., 'The History of Comprehensive Plan of Action' (1993) 5(4) IJRL 534.

ÇETİNGÜLEÇ M., 'At a Cost of \$500 Million Each Month, Turkey Staggars under Growing Refugee Burden' Al Monitor, 20

October 2015 <<http://www.al-monitor.com/pulse/originals/2015/10/turkey-syria-refugees-spent-billion-in-three-months.html#>>
accessed 1 December 2015.

COLES G. J. L., 'Temporary Refuge and the Large Scale Influx of Refugees' (1978) 8 Australia YBIL 189.

Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, OJ L212/12, 7 August 2001.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

COURTLAND ROBINSON William, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 7(3) Journal of Refugee Studies 319.

COURTLAND ROBINSON William, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1998).

DAVIES Sarah E., *Legitimising Rejection International Refugee Law in Southeast Asia* (Martinus Nijhoff Publishers 2008).

DURIEUX Jean-Francois, MCADAM Jane, 'Non-refoulement Through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16(1) IJRL 17.

EDWARDS Alice, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 Melbourne Journal of International Law 595.

EGGLI Vibeke A., *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers 2002)

EINARSEN Terje, 'Refugee Protection beyond Kosovo: Quo Vadis?' (2001) 14(2) Journal of Refugee Studies 119.

European Commission, Directorate-General Home Affairs, 'Study on the Feasibility of Establishing a Mechanism for the Relocation of Beneficiaries of International Protection', July 2010, JLX/2009/ERFX/PR/1005 < http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/final_report_relocation_of_refugees_en.pdf> accessed 1 December 2015.

ExCom Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004).

FITZPATRICK Joan, 'Temporary Protection of Refugees: Elements of a Formalized Regime' 92 (2000) (2) AJIL 279.

FUNDO Christian A., 'Toward a More Individualized Assessment of Changed Country Conditions for Kosovar Asylum Seekers' (2010) 43 Cornell International Law Journal 625.

German Presidency Draft Council Resolution on Burden-sharing, July 1994 (Council Document 7773/94 ASIM 124).

GOODWIN-GILL Guy S., MCADAM Jane, *The Refugee in International Law* (3rd edn, OUP 2007).

HANS Asha, SURKHE Astri, 'Responsibility Sharing' in James C. Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers 1997) 83.

HATHAWAY James C., NEVE Alexander R., 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115.

HATHAWAY James C., *The Right of Refugees under International Law* (CUP 2005).

HEIN Jeremy, *From Vietnam, Laos, and Cambodia: a Refugee Experience in the United States* (Twayne Publishers 1995).

HELTON Arthur C., 'Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control' (1990) 8 NYL Sch. J. Hum. Rts. 111.

HURWITZ Agnes, *The Collective Responsibility of States to Protect Refugees* (OUP 2009).

ILO, 'Assessment of the Impact of Syrian Refugees in Lebanon and their Employment Profile' (ILO 2013).

International Crisis Group (ICG), 'Macedonia: Towards Destabilisation? The Kosovo Crisis Takes its Toll on Macedonia', 21 May 1999.

International Law Association, 'Report of the Committee on Refugee Procedures of the ILA (Delhi Conference, 2002). Final Report and Draft Guidelines on Temporary Protection' (2002).

JACOBSEN Karen, 'Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes' (1996) 15(3) International Migration Review 655.

KAPLAN M. 'Syrian Refugee Crisis and Jordan Budget Deficit: Amid Economic Slowdown, Asylum Seekers Cost Country \$6.6B' International Business Times, 19 October 2015 <<http://www.ibtimes.com/syrian-refugee-crisis-jordan-budget-deficit-amid-economic-slowdown-asylum-seekers-2146203>> accessed 1 December 2015.

KJAERUM Morten, 'Human Rights, State Security and Burden-Sharing: People or States First' (2001) 14 *Journal of Refugee Studies* 116.

KJAERUM Morten, 'Temporary Protection in Europe in the 1990's' (1994) 6 *IJRL* 444.

KNEEBONE Susan, MCDOWELL Christopher, MORRELL Gareth, 'A Mediterranean Solution? Chances of Success' (2006) 18 *IJRL* 492.

KUSHNER Tony, 'Kosovo and the Refugee Crisis, 1999: The Search for Patterns amidst the Prejudice' (1999) 33 (3) *Patterns of Prejudice* 73.

LAUTERPACHT Elihu, BETHLEHEM Daniel, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E. Feller, V. Türk, F. Nicholson (eds), *Refugee Protection in International Law UNHCR's Global Consultations on International Protection* (CUP 2003) 78.

LOESCHER Gil, MILNER James, *Protracted Refugee Situations: Domestic and International Security Implications* (Routledge 2005).

LONG Katy, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP 2013).

NOLL Gregor, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field' (2003) 16(3) *Journal of Refugee Studies* 236.

NOLL Gregor, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Vol 6, 2000 Martinus Nijhoff Publishers).

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

ROSENBLUM Marc R., SALEHYAN Idean, 'Norms and Interests in US Asylum Enforcement' (2004) 41(6) *Journal of Peace Research* 677.

SCHUCK Peter H., 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 *YJIL* 243.

SCHUCK Peter H., 'Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later Fifteen Years Later' (2013) 480 *Yale Law & Economics Research Papers*.

SKORDAS Achilles 'Article 7 1951 Convention' in A. Zimmermann, F. Machts, J. Dorschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 715.

SKORDAS Achilles, 'Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass

Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof' in K. Hailbronner (ed), *EU Immigration and Asylum Law Commentary on EU Regulations and Directives* (Hart Publishing 2010) 803.

SUHRKE Astri, 'Burden Sharing During Refugee Emergencies: The Logic of Collective Versus National Action' (1988) 11(4) *IJRL* 396.

THIELEMANN Eiko R., 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' (2003) 16(3) *Journal of Refugee Studies* 253.

THIELEMANN Eiko R., ARMSTRONG Carolyn, 'Understanding European Asylum Cooperation under the Schengen/Dublin System: A Public Goods Framework' (2013) 22(2) *European Security* 148.

THORBURN Joanne, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe' (1995) 7(3) *IJRL* 459.

TRAN Yen, 'Closing of the Saga of the Vietnamese Asylum-seekers: The Implications on International Refugees and Human Rights Laws' (1994) 17 *Houston Journal of International Law* 463.

UNGA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85.

UNGA, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

UNGA, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

UNGA, Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (A/44/523), 22 September 1989, UN doc A/44/523.

UNHCR, 'Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR' (2005) 24(1) RSQ 118.

UNHCR, 'Syria Regional Refugee Response Inter-agency Information Sharing Portal Last Updated: 2 December 2015' <<http://data.unhcr.org/syrianrefugees/regional.php>> accessed 2 December 2015.

UNHCR, 'UNHCR Position Paper on the Treatment of Refugees and Asylum-Seekers from Kosovo', 18 November 1998.

UNHCR, Executive Committee of the EC//46/SC/CRP.44 UNHCR's Programme 19 August 1996, Standing Committee, 4th Meeting, Update on Regional Developments in Asia and Oceania <<http://www.unhcr.org/3ae68cf94.pdf>> accessed 1 December 2015.

UNHCR, *The State of World Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000).

UNHCR, 'Roundtable on Temporary Protection: 19-20 July 2012' International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection' 20 July 2012.

UNHCR, 'UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence' January 2008, <<http://www.refworld.org/pdfid/479df7472.pdf>> accessed 1 December 2015.

VAN SELM Joanne, *Refugee Protection in Europe: Lessons from the Yugoslavian Crisis* (Martinus Nijhoff Publishers 1998).

VANHEULE Dirk, VAN SELM Joanne, BOSWELL Christina, 'The Implementation of Article 80 TFEU - on the Principle of Solidarity and Fair Sharing of Responsibility, Including its Financial Implications, between the Member States in the Field of Border Checks, Asylum and Immigration (European Parliament Study 2011).

VOLKER Türk, 'Forced Migration and Security' (2003) 15 IJRL 113.

WHITMAN Jim, 'Nato's Humanitarianism versus Human Rights' (2000) 4(3) International Journal of Human Rights 164.

Cases/ Mahkeme Kararları

Chahal v UK (1997) 23 EHRR 413.

Soering v. UK (1989) 11 EHRR 439.

Hirsi Jamaa and Others v Italy, Application No 27765/09 (ECHR, 23 February 2012).

Vilvarajah and Others v. UK App No 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECHR, 30 October 1991).