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The Politics of Burden-Sharing in the Refugee Regime

The Refugee as Point of Reference

A Thesis In Partial Fulfilment of the Requirements for a Master of Arts Degree in Middle
East Studies

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Abstract:

This thesis applies international relations theory to better understand the political maneuvering of states in refugee affairs. It argues that previous contributions to this debate have used a wrong paradigm to describe burden-sharing politics in the refugee regime, resulting in models which are too static to capture the high-politics of refugee affairs. In particular, the thesis criticizes the 'North vs. South' model proposed by Betts (2009), which argues that the burden-sharing politics in the refugee regime can be understood as an opposition between states in the global 'North' and global 'South'. Where Betts uses the geographic position of the state to understand burden-sharing politics in the refugee regime, the essay argues that burden-sharing politics in the refugee regime is based on the geographic position of the *refugee*. Using this refugee-centered paradigm as starting point, it then argues that state maneuvering in the refugee regime should not be described as North vs. South impasse, but as a zero-sum game between states seeking to evade asylum-burdens and states seeking to reduce refugee-burdens.

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Introduction

When revolt rocked the Arab world of 2010-11, few expected that the popular uprisings would result in years of prolonged warfare, hunger, and displacement. Yet instead of independent citizens, the political upheaval of the Arab Spring has foremost created refugees. A region-wide breakdown of authority has intensified the long-time role of the Middle East as a source, transit, and destination region for migrants, forced migrants, and refugees. In Libya, dictatorship was replaced with anarchy, and tens of thousands of Libyans and migrants were abused, raped and murdered¹. In Yemen, more than 10% of the local population fled a regional proxy war between Houthis and Sunnis². The Syrian Civil War has displaced over 12 million Syrians both in- and outside their home country³. Three of Syria's neighbours each host almost 2 million refugees on their territory, setting new international records⁴. By the end of 2015, 39% of the world's record-high 65 million displaced persons lived in the Middle East and North Africa⁵.

Despite this heavy refugee burden, developed countries have traditionally shown surprisingly little initiative and limited support for refugee populations and the states hosting them. While millions of Syrians struggled to make ends meet in Turkey, the entire 515-million strong European Union welcomed only 51,000 Syrian asylum-seekers in 2013 and 122,790 in 2014⁶. Official refugee resettlement quotas were less than these spontaneous arrivals⁷, nor did OECD financial support allocated to crisis alleviation in the Middle East in any way suffice. UNHCR felt forced to issue multiple emergency appeals for more funds, warning in June 2015 that its operations were "so dangerously low on funding that we risk not being able to meet even the

¹McVeigh, K. (2017). *Refugee women and children 'beaten, raped and starved in Libyan hellholes'*. The Guardian. As found online at: <https://www.theguardian.com/world/2017/feb/28/refugee-women-and-children-beaten-raped-and-starved-in-libyan-hellholes>

² UNHCR (2015). *Global Trends Report*. As found online at: <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> p.7

³ UNHCR (2015), p. 6

⁴ Lebanon hosts the largest number of refugees in the world relative to its population (183 refugees per 1000 inhabitants), with Jordan second on the same list (87 refugees per thousand inhabitants). Turkey hosted the largest refugee population in the world in absolute terms: 2.54 million refugees, most whom are Syrian citizens. All figures from UNHCR (2015), p. 2

⁵ UNHCR (2015), p. 2

⁶ European Migration Network (2015). *Eurostat figures show just over 626,000 asylum applicants registered in the EU-28 in 2014; Syrian nationals represented 20%*. As found online at: <http://emn.ie/index.jsp?p=100&n=105&a=2391>

⁷ Orchard, C. and Miller, A. (2014). *Protection in Europe for refugees from Syria*. As found online at: <http://reliefweb.int/sites/reliefweb.int/files/resources/pb10-protection-europe-refugees-syria-2014.pdf> p. 6

most basic survival needs of millions of people over the coming six months”.⁸ Four years into the Syrian Civil War, the food assistance to 1.6 million refugees was at reduced levels, 750,000 children remained out of school, 86 percent of urban refugees in Jordan lived below the national poverty line of 3.2 dollars per day, and 45% of refugees in Lebanon lived in substandard shelters⁹.

With this background, one might be forgiven for cheering on growing numbers of refugees who opted to take their fate in their own hands, crossed over the Bosphorus and headed for Berlin. But where this choice of the refugees was easily understood, the political response of policymakers did not quite fit in the modern academic understanding of refugee regime politics.

Refugee studies is a young discipline, and international relations theorization of state maneuvering in the refugee regime is younger still – only really gaining a foothold in academia since the turn of the century. One particular point of contention in the academic debate has been the issue of state cooperation in response to refugee crises. How and why do states formulate their national interest in the refugee regime and defend it on the international stage? Several studies have sought to describe the interests of states and the limitations to state cooperation in the refugee regime. Most recently, Alexander Betts has argued in multiple papers (cf. Betts 2009, 2010a, 2010b) that the refugee regime is facing a geopolitical impasse between global ‘Northern’ countries and global ‘Southern’ countries. This geographic impasse is the result of four features of the current system: the prevalence of conflict and human rights-abusing regimes in the global ‘South’, an institutional absence for a binding legal or normative framework for burden-sharing, the very low interest of Northern states in contributing to refugee protection for its own sake, and the limited bargaining power of developing refugee-hosting states in the refugee regime. As a result of the ‘North-South’ impasse, developed countries have the upper hand in control of the refugee regime, while developing nations hosting refugees have had little option other than to accept all ‘Northern’ offers that are on the table.

⁸ Dobbs, L. (2015). *Funding shortage leaves Syrian refugees in danger of missing vital support*. As found online at: <http://www.unhcr.org/news/latest/2015/6/558acbbc6/funding-shortage-leaves-syrian-refugees-danger-missing-vital-support.html>

⁹ idem.

However enticing this explanation may sound on paper, a North-South description does not quite line up with the political maneuvering put on display during the EU-Turkey refugee crisis. The global ‘North’ did not act unilaterally in response to the crisis, but squabbled amongst themselves. Hungarian Prime Minister Victor Orban exclaimed that Europe’s very existence was under threat¹⁰. Germany’s Angela Merkel welcomed refugees with the phrase: “*Wir Schaffen Dass*”¹¹. Austria and Hungary argued with Germany about who should host refugees, various Eastern European countries blocked an attempt by the European Commission to spread the refugee inflow amongst the member-states of the EU, and the normally liberal government of Sweden closed its borders to further refugee inflows once it feared that its government services were being overwhelmed. In the negotiations which would eventually lead to the March 2016 EU-Turkey ‘deal’, not a stronger ‘Northern’ country but a weaker ‘Southern’ country had the upper hand. Turkey’s negotiators demanded unprecedented and previously unthinkable financial and political support in exchange for their cooperation to the EU’s plans *and they received what they requested*¹².

In the traditional parlance of international relations and refugee studies, the build-up to the crisis had confirmed the theoretical notion of ‘Northern’ ignorance. Child labour, and vivid depictions on the despair of millions on its borders had barely registered with ‘Northern’ central decision-makers, and their support had clearly been limited. However, once refugee onward movement intensified, the European Union had been thrown into a crisis that in no way lined up with the predicted ‘Northern’ upper hand over its ‘Southern’ neighbours.

The inconsistencies between the theory of the North-South impasse and the practical reality visible in the EU-Turkey refugee crisis are reason for this essay to take another critical look at the description of refugee regime politics in terms of a ‘North’ vs. ‘South’ geography. This thesis asks the following research question: does the existing evidence support Alexander Bett’s description of state maneuvering in the refugee regime as stuck in a geographic North-South impasse?

¹⁰ <https://www.wsj.com/articles/europes-existence-threatened-by-influx-of-migrants-says-hungarys-orban-1437827281>

¹¹ <http://www.faz.net/aktuell/politik/angela-merkels-sommerpressekonferenz-13778484.html>

¹² European Commission (2015). *EU support in response to the Syrian crisis*. As found online at: http://europa.eu/rapid/press-release_MEMO-16-222_en.htm

The following pages hypothesize that the North-South impasse fails to explain the available quantitative and qualitative evidence about state maneuvering in the refugee regime, because it uses a paradigm mistake: rather than construct state politics in the refugee regime based on the geographic position of the state, politics in the refugee regime would be more accurately described based using the geographic position of the *refugee* as point of reference.

To investigate this research question and hypothesis, the thesis first lays out the basic international relations theory used to describe the need for international cooperation and the way in which the international system structures cooperation in an anarchic environment. Section two then reviews the international relations literature on the refugee regime, culminating in a description and critique of Alexander Betts' argument that the refugee regime is stuck in a 'North vs. South impasse'. Building on this critique, section three develops an alternative explanation of politics in the refugee regime which takes as its starting point that not the location of states but the location of *refugees* is decisive for the strategic decisions made by states when maneuvering in the refugee regime.

1. An International Relations Perspective of the Refugee Regime

Until quite recently, refugee and migration scholars paid surprisingly little attention to the role of the state in the refugee regime. While detailed legal and sociological analyses of forced migration exist, similar critical studies of the philosophy, international relations, and political sociology of the refugee regime remain relatively scarce¹³. Until very recently, even refugee scholars themselves admitted that this resulted in a limited understanding amongst refugee scholars of how they might most effectively influence decisions made in the refugee regime. As Landau (2007) noted:

“Without a more nuanced understanding of the incentives, limitations, and ambitions of state, UN agencies, and other actors, we limit our ability to constructively engage them and address the economic, social, and political processes we decry”¹⁴

This first section therefore explains why states have an incentive to establish and participate in an international refugee regime, and offers a brief overview of the existing refugee regime.

A. States, the Problem of Collective Action and the Theory of Public Goods

Any discussion on the politics of the refugee regime is bound to start with the most fundamental concept of international relations: the state. The state is the core entity around which most modern migration governance is built, and the institution which most defines the experience of the modern migrant.

The modern state is a social construct, originally developed to end 125 years of religious warfare in mid-17th century Europe¹⁵. The defining feature of the state is its exclusive right to use legitimate violence in the territory under its control. This monopoly of legitimate violence helps the state apparatus guarantee its sovereignty over the territorial bounds of its country¹⁶.

¹³ Landau (2007), p. 342

¹⁴ Landau (2007), p. 345

¹⁵ Biersteker, T. and Weber C. (1996). *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press

¹⁶ cf. Weber (1919). The Westphalian definition of state sovereignty differs from its predecessors in that the latter mostly proposed that sovereignty was diffusely held by earthly as well as religious rulers. Think, in Middle

European empire exported this conceptualization of the state and state sovereignty to the rest of the world from the 18th to the early 20th centuries. While the two World Wars did much to diminish European power, European ideas remained. The United Nations (UN), set up in 1945 to prevent a third great war, institutionalized the principle that all states are sovereign over their domestic affairs and that there should be ‘sovereign equality’ between states¹⁷. It was with these principles that decolonization occurred and dozens of new states would appear in the thirty years between 1945 and 1975 – making Westphalian sovereignty a global norm.

While the absolute sovereignty of the state allows for the maintenance of order within state boundaries, a principle of ‘sovereign equality’ also complicates the governance of affairs affect more than one state – i.e. international affairs. When all states are equal, there is no clear procedure to regulate conflicts between states. Under true equality, states cannot be forced to cooperate. The Westphalian international state system has therefore often been described as existing in a state of ‘anarchy’¹⁸. However, even sovereign states can be convinced that cooperation is in their best interest.

i. The Theory of Public Goods

International Relations scholars have sought to describe when, why and how equally sovereign states cooperate on trans-national issues, and when they prefer to ‘go it alone’. An extensive literature has developed, analyzing international cooperation in areas like economic globalization, world trade, and environmental regulation.

Most analyses of international cooperation find their theoretic foundation in the microeconomic theory of public goods. The theory of public goods, first developed by Paul Samuelson (1954) and Morton Olson (1965), argues that some goods require an investment to be produced, but once created can be consumed by all persons at no additional marginal cost. The most important cost to attain the benefit are therefore the costs of the initial investment. Examples of such goods include roads, national defense, radio, street lighting, or clean air.

East of the construction of legitimacy through the Caliph to the Sultan, in medieval Europe with the rivalry on temporal power between kings and popes

¹⁷ United Nations (1945). *Charter of the United Nations*. As found online at: <http://www.un.org/en/sections/un-charter/chapter-i/>. Chapter 1, Article 2.

¹⁸ Waltz, K. (1979). *Theory of International Politics*. New York: Random House; Wendt, A. (1992). *Anarchy is What States Make of It: International Organization*, Vol. 46, No. 2, pp. 391-425

In some cases, outsider access to these goods can be limited. For example, access to roads can be limited using toll booths. However, in other cases, access cannot be limited and the good - once produced - becomes part of the public domain. For example, I cannot limit my neighbor from enjoying cleaner air even if I am the only person who has reduced the excretion of pollutants and my neighbor has not contributed.

Goods which can be used without being consumed, and to which access cannot be restricted, are known as *public goods*. They stand in contrast to three other types of goods: private goods, club goods, and common-interest goods.

	<u>Excludable:</u> (access can limited)	<u>Not Excludable:</u> (access cannot be limited)
<u>Rivalrous:</u> (can only be consumed once)	Private Good e.g. car, cake	Common-Interest Good e.g. fishing stocks
<u>Non-Rivalrous:</u> (consumption does not diminish supply)	Club Good e.g. toll highways	Public Good e.g. clean air, radio waves

Public goods theory argues that actors have a rational incentive to make other people produce the public goods which they use. After all, the greatest benefit of each actor occurs if *only the other actor* invests to realize the desired benefit. The actor who does not invest can then enjoy consumption of a benefit without having to lift so much as a finger. This attempt to minimize the cost of producing a public good while still enjoying its benefits is known as ‘free-riding’.

As all actors share the same incentive, the end-result is a stalemate which both actors worse off because a sub-optimal allocation of investment and a likewise sub-optimal outcome of public goods (0,0) occurs (see below). This rational unwillingness of actors to work together to achieve a greater good is known as the “problem of collective action”¹⁹.

¹⁹ Olson Jr., M. (1965). *The Logic of Collective Action: Public Goods and the Theory of Groups*. Harvard: Harvard University Press

Actor 1:

	<i>Does not Produce the Public Good</i>	<i>Produces the Public Good</i>
<i>Produces the Public Good</i>	Actor 1: 2 Actor 2: 1	Actor 1: 1.5 Actor 2: 1.5
<i>Does not Produce the Public Good</i>	Actor 1: 0 Actor 2: 0	Actor 1: 1 Actor 2: 2

Free-ridership of public goods is a particularly notable problem in an anarchic environment, because there is no authority to impose an equal distribution of burdens and benefits. On the national level, Westphalian sovereignty ensures that the government can impose the provision of public goods and enforce burden-sharing amongst actors by punishing free-ridership. Yet on a global level, states are left without any clear assurance that they will not be ‘cheated’ into producing a public good while other countries free-ride their efforts. As far back as the late 1970s, a key challenge for international relations scholars has therefore been to identify conditions under which the problem of collective action can be overcome in an anarchic international state system.

ii. Public Goods Provision on the Global Level: Game Theory and Regime Theory

The academic debate which sought to understand how rational states might overcome the problem of collective action in international affairs relied extensively on game theory. Game theory, developed in the 1940s and 1950s is "the study of mathematical models of conflict and cooperation between intelligent rational decision-makers"²⁰.

In the late 1970s, international relations scholars applied and evolved game theoretical principles to develop ‘regime theory’ – a theory which seeks to explain how and what types of mechanisms states create to overcome collective action problems. Regimes - defined as “[i]mplicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”²¹ – were analysed as ‘intervening variables’ which enabled states (the independent variable) to pursue shared

²⁰ Myerson, R. (1991). *Game Theory: Analysis of Conflict*. Boston: Harvard University Press.

²¹ Krasner (1982), p. 2

policies (the dependent variable)²². The aim of regime theory was to explore the emergence and effectiveness of regimes; to explain how regimes are negotiated, implemented, monitored, and enforced²³; and to understand how regimes might limit and structure state behavior in world politics.

Despite much debate, regime theorists have not reached consensus about the exact influence of regimes on state actions. Initial explanations leaned on neo-realist hegemonic stability theory (HST), which argued that the hesitation of states to cooperate can be overcome through coercion by a great power, or hegemon. According to supporters of HST, regimes are an expression and extension of the hegemon's power. The stability of global regimes therefore relies on the hegemon developing and enforcing the rules of the regime. Prominent supporters of hegemonic stability theory are often linked to the neo-realist school of international relations, and have included Charles Kindleberger, Robert Gilpin, Stephen Krasner²⁴, Joseph Grieco²⁵, and Daniel Drezner²⁶.

In opposition to hegemonic stability theory, liberal institutionalists have argued that regimes can in fact be created and sustained without the presence of a hegemon. While agreeing that states are likely to defend their own interests, liberal institutionalists argued that regimes are a prominent tool for any group of states to overcome their mutual distrust because regimes: (i) provide information about the behavior of other states by monitoring and reporting on compliance; (ii) reduce the transaction costs associated with state cooperation, and (iii) generate the expectation of cooperation amongst participating states²⁷.

Some of the most persuasive evidence in support of the liberal institutionalist argument has been found in regimes where no clear hegemon can be identified. Prominent examples include

²² Young, O. (1980). *International Regimes: Problems of Concept Formation*. World Politics Vol. 32, pp. 331-356.

²³ see Krasner, S.D. (1983) *Structural Causes and Regime Consequences: Regimes as Intervening Variables*. In International Regimes, ed. by S. D. Krasner. Ithaca, NY: Cornell University Press; and Hasenclever, Mayer, Rittberger (1997) *Theories of International Regimes*. Cambridge: Cambridge University Press.

²⁴ see Webb, M.C. and Krasner, S.D. (1989). *Hegemonic Stability Theory: An Empirical Assessment*, Review of International Studies. Vol. 15, pp. 183–98

²⁵ Grieco, J. (1988). *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*. International Organization, Vol. 42, No. 3, pp. 485-507

²⁶ Drezner, D. (2007). *All Politics is Global: Explaining International Regulatory Regimes*. Princeton: Princeton University Press.

²⁷ Keohane, R. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press. Also see: Keohane, R. and Martin, L.M. (1995). *The Promise of Institutional Theory*. International Security. 20/1 pp. 39–51.

the creation of the European Union in 1992 and the signing of the 1951 Convention Relating to the Status of Refugees (CSR). In these cases, states sought to ensure reciprocity by agreeing on common principles, rules, decision-making, and verification mechanisms without any negotiating state powerful enough to function as a hegemon.

B. The Eradication of International Forced Migration as a Global Public Good

Over the past quarter-century, the eradication of international migration has become among the most controversial and hotly-debated global goods. In many ways, the debate on migration is a natural evolution from the even older discussions on international trade and the General Agreement on Tariffs and Trade (GATT). While the world has achieved a historically unprecedented integration of trade networks, goods, and financial services through GATT and WTO negotiations, the same progress has not been made in the movement of persons (i.e. international migration).

i. A State 'National' Interest and Multilateral Cooperation in Forced Migration

To understand why multilateral agreement in migration affairs has remained so elusive, it helps to consider migration from the perspective of the state.

All international migration regimes are a compromise between considerations of national sovereignty and individual freedom of movement. While international law gives individuals the right to leave and return to their country of citizenship, it does not offer a legal right to enter a foreign country. Freedom of movement between states can therefore effectively be described as “half a right” – the right to leave, but not to enter.

States have been hesitant to hand over their sovereignty about who enters their territory to an international institution for ideological and political reasons. Enlightenment social contract theory, which has since the mid-18th century been enormously influential amongst theorists and statesmen alike²⁸. In social contract theory, the Westphalian right of the state to a

²⁸ cf. Rousseau (1762). A primary debate in political philosophy is what rights the state should defend through its monopoly on violence. Outside anarchism (which embraces anarchy on a international *and* national level), even minimalist conceptions of the state-citizen relationship allow states to regulate and impose some constraints

monopoly on legitimate violence (cf. Weber 1919) is only justified in so far as it is done in line with the defense of the civil, political, economic and social rights of its citizens.

Controlling who can enter or leave a state is considered a primary duty for state authorities in the protection of the interests of their citizens and constituents.

Besides an ideational justification, political leaders also have a political incentive to retain some measure of control over their immigration policy. International migration has the potential to run counter to factional interests within the state. As international migrants arrive from a different state, they often hold to different beliefs and have a different outlook on the world. Citizens already living in the receiving state can feel threatened by these different cultural practices²⁹. Miscommunication and language and culture barriers, especially in combination with competing economic interests, can quickly lead to social conflict – and can also fan flames of resistance against the political system.

The potential political risks associated with migration have been reason enough for states to retain sovereign control over their migration policies. The desire of states to protect the perceived interests of their political community are placed above the individual right to freedom of movement³⁰. As a result of this prioritization, most attempts to regulate post-WWII international migration through binding multilateral regimes have failed.

ii. Forced Migration and State Interest in a Global Asylum Framework

The few notable exceptions where multilateral cooperation in migration has succeeded have mostly concerned problems of forced migration. The two most prominent examples are the protocols on human trafficking and smuggling, attached to the 2000 UN Convention Against Transnational Organized Crime (UNTOC), and the international ‘refugee’ regime, which provides a global asylum safety net to specific categories of international migrants who were forced to migrate abroad.

on individual freedom to act (see e.g. Nozick 1983). For nearly all it includes the defense of unwanted intrusions by persons who are not citizens, including their presence on the state’s soil.

²⁹ The modern Enlightenment vision of the ‘nation’-based citizenship may be accurately described as ‘imagined’ (cf. Anderson 1983), and national identities may justifiably be termed ‘social constructs’ (cf. Fierke 2010), but states are nonetheless limited in their actions by the belief that they exist to protect the interests of their citizens. Around the world, a citizen by law has more rights and a broader claim on the protection of the state than a non-citizen. For a solid case-study on how states form and maintain ‘national identity’ and citizenship, see: Mylonas, H. (2012). *The Politics of Nation-Building: Making Co-Nationals, Refugees, and Minorities*. Cambridge: Cambridge University Press

³⁰ Juss, S. (2004). *Free Movement and the World Order*. International Journal on Refugee Law. Volume 16 (3), p. 289-335; p. 293

For adherents to Westphalian-Enlightenment social contract theory, cooperation in the fight against irregular migration is a logically sound choice. The desire of states to control the flow of foreign persons onto their territory paradoxically also offers a powerful incentive for international cooperation to counter irregular migration flows. The transnational nature of these organized attempts to migrate mean that any successful attempt to combat smuggling or human trafficking will require considerable international cooperation from multiple states.

The provision of a global asylum safety net is even more entangled with the Westphalian-Enlightenment conception of state and citizen. As the state, with its monopoly on violence, is the pillar of order and stability in the Westphalian state system, an inability or unwillingness of the state to fulfil its duties will inevitably result in citizen insecurity and the repression of human rights. Insecurity can therefore be an important motivation (push-factor) for people to migrate in search of alternative sources of protection.

Unfortunately, the ‘half’ right of migration in international law undermines the ability of oppressed persons to flee state persecution, and can effectively trap them within the confines of their own state. At the same time, if a person were to flee across a border in an irregular fashion, an expulsion to their home country would mean their return into the hands of the very people that were abusing them in the first place.

History offers evidence that forced migrants who are unable to depend on state protection but cannot flee become more susceptible to alternative offers of protection, including from guerilla and terrorist groups who undermine international security (Lischer 2005; Juma and Kagwanja 2008). Even if they do not join such activist movements, forced migrants can become a barrier to peace-building initiatives in post-conflict situations if they are not provided with adequate protection and durable solutions (Morris and Stedman 2008; Milner 2009).

To ensure that persons at risk of persecution by their own states are not left to fend for themselves, and undermine international security in their search for protection, there is widespread consent in the international community that these persons should to have recourse to an alternative means of food, shelter, safety, and minimal legal rights. The importance of providing such a service was already recognized in Article 14 of the 1948 Universal

Declaration of Human Rights, which proclaimed that “everyone has the right to seek and enjoy in other countries asylum from persecution”³¹.

The surest way to guarantee such alternative means is for the international community to provide surrogate protection by offering an exceptional right to migrate in search for safety to another country – i.e. the right to ‘seek asylum’. States which agree to provide asylum to asylum-seekers help to uphold international justice and simultaneously pre-empt migrant susceptibility to recruitment by non-state actors, i.e. strengthen international order.

iii. The Problem of Collective Action in the Provision of Global Asylum

Despite widespread agreement that states therefore should provide asylum to people forced to flee their homes, the provision of international asylum is not a straightforward affair. The creation of a global asylum safety net is complicated by a classic collective action problem. States are not automatically willing to take up the role of surrogate protector because accepting forced migrants also means bearing uncertain financial and social costs. These costs include short-term financial investments into housing and the provision of services to asylum-seekers, but also the difficulties associated with longer-term integration of such migrants - including the possibility of social tensions between migrants and host communities.

As the benefits of a global asylum safety net are shared amongst all states, but the burden of surrogate protection is primarily born by one state, state coordination is necessary to provide a global asylum safety net. Without such coordination, states have an incentive to ‘free-ride’ on their responsibilities – to attempt to minimize their asylum burden relative to what they could provide if they acted collectively. As all states have a same personal interest, uncoordinated state behavior will quickly lead to an under-provision of international asylum.

The international community will therefore only successfully provide asylum if it establishes and supports a common set of norms, rules, principles, and decision-making procedures to clarify their common and shared obligations towards asylum-seekers. The small but growing body of academic work which analyses surrogate state protection from the perspective of international relations, most notably Suhrke (1998) and Betts (2003; 2009), has therefore

³¹ United Nations (1948). *Universal Declaration of Human Rights*. As found online at: <http://www.un.org/en/universal-declaration-human-rights/> Article 14

classified a global asylum safety net as a ‘global public good’.

C. The Weakening International Refugee Regime

Since not long after the start of the modern international order, the international community has had a multilateral framework to provide asylum to international forced migrants. This multilateral framework is known as the international refugee regime. This regime, by now over 75 years old, continues to govern the relations and burdens of states towards one another in the provision of asylum, as well as the rights of international forced migrants who request asylum or whose request for asylum has been accepted. Its provisions and content therefore matter.

i. The International Refugee Regime

The modern international refugee regime is an outcome of the Second World War. In the aftermath of that war, European states had to deal with millions of displaced foreign persons scattered across their borders by the incessant fighting. They quickly recognized that their interests would best be served through a multilateral agreement on the provision of asylum and repatriation.

After a first attempt to offer services to displaced persons collapsed under the weight of Cold War political tensions, the United Nations General Assembly in December 1949 agreed to the creation of the temporary office of United Nations High Commissioner for Refugees (UNHCR)³². UNHCR received a dual mandate: to ensure forced migrants access to protection, and to seek permanent (durable) solutions for their condition³³. Wary of the previous failed attempt to provide relief, UNHCR was explicitly established as a non-political institution, which meant in practice that it would only be allowed to work in a country upon invitation from its host government. In addition, its operations would have to be funded from voluntary donations.

Simultaneous to the establishment of this temporary multilateral organization, a select working group of United Nations member-states also set out to clarify the rights of migrants

³² Resolution 319 (IV) of the United Nations General Assembly of December 1949

³³ Resolution 428 (V) of the United Nations General Assembly of 1950, Chapter I. As found online at: <http://www.unhcr.org/3b66c39e1.pdf>

who would be supported by the international community. Their final document, the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), consolidated existing Inter-War multilateral agreements on asylum, and developed a common set of standards by which displaced foreigners should be treated.

The 1951 Refugee Convention forms the basis of the modern global asylum safety net, commonly referred to as the international refugee regime³⁴. It regulates who has the right to request asylum, and what rights asylum-seekers and refugees (persons whose claim to asylum has been recognized as valid) should have. Article 1(a)2 provides the standard definition for persons eligible to refugee status as:

“a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside of country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”³⁵.

Article 33 of the Refugee Convention prohibits the return of any person who is classified as a refugee to a country where they might risk persecution. This return prohibition – known as *non-refoulement* – overrules the traditional sovereign right of a country to deny foreigners entry into their country. It is a core principle of the international refugee regime and is now widely seen as *jus cogens* customary international law (Lauterpacht and Bethlehem 2003).

Refugees who receive protection have two additional needs: social and legal rights to help them live in their surrogate state, and a timely resolution to their predicament. The Refugee Convention only mentions the first. In order to help refugees adapt and live in their place of refuge, it defines a list of the socio-economic rights they should receive – including access to national courts, the right to employment and education. The Convention does not provide clear guidance on how a permanent resolution to refugee crises should be found. Despite this silence, the ability to resolve refugee crises is indispensable for the successful functioning of the refugee regime. A timely resolution is necessary to maintain state support for the

³⁴ Use of the term ‘refugee’ to denote persons who flee their country under duress can be traced back as far as the 1798 edition of the Encyclopaedia Britannica; see: Barnett, L. (2002). *Global Governance and the Evolution of the International Refugee Regime*. International Journal of Refugee Law Vol. 14. pp. 238-262.

³⁵ United Nations (1951). *Convention Relating to the Status of Refugees*. As found online at: <http://www.unhcr.org/3b66c2aa10> Article 1a(2); Also see: Goodwin-Gill, G. and McAdam, J. (2007). *The Refugee in International Law*. Oxford: Oxford University Press. p. 573

provision of asylum in their borders, and to help forced migrants move on with their lives. Literature on asylum policies traditionally identifies three possible 'durable' solutions: a return to the country of origin (repatriation), the assimilation of the forced migrant in the host state population (local integration), or the integration of the forced migrant in a third state (resettlement)³⁶.

Together, UNHCR and the 1951 Refugee Convention form the basis of the modern international refugee regime. Since then, the treaty stipulations of the 1951 Convention have only been updated once, in 1967. When negotiating the original treaty, states were hesitant to set too much of a precedent and agreed to limit the application of the refugee regime to persons displaced by events in Europe which had occurred before 1 January 1951³⁷. However, as the Cold War, independence and post-independence wars saw conflict erupt throughout the developing world in the 1950s and 1960s, UNHCR opted to expand its operations beyond Europe. After a successful lobby, most 1951 Convention signatories agreed to formalize this expansion in 1967 and to this end signed the New York Protocol³⁸. The New York Protocol removed all geographical and chronological restrictions in the convention, making its provisions applicable globally. The 1967 New York Protocol is an important reason why the international refugee regime continues to be relevant today

The 1951 Convention mandated UNHCR to monitor and support state compliance with the standards of the Convention. Since 1951, UNHCR has therefore advocated for state adherence to the Refugee Convention, and lobbied for a strengthening and expansion of the refugee regime. Through a mixture of persuasion, socialization, and material incentives, the institution has communicated the importance of refugee norms, and convinced many new states that the benefits of participating in the refugee regime outweigh the costs of 'going it alone'³⁹. At present, 145 nations have committed themselves to the international refugee regime, with the few hold-outs concentrated in the Gulf and Levant, South Asia and parts of South-East Asia.

³⁶ Chimni, B.S. (1999). *From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems*. UNHCR New Issues in Refugee Research, Working Paper No. 2; also see the 'Finding Durable Solutions' sections present in most annual UNHCR Global Reports.

³⁷ United Nations (1951), article 1a(2) and 1b

³⁸ United Nations (1967). *Protocol Relating to the Status of Refugee*. New York. As found online at: <http://www.unhcr.org/3b66c2aa10>

³⁹ Loescher, G., Betts, A., and Milner, J. (2008). *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century*. London: Routledge

Except for Turkey and Madagascar, all signatories of the 1951 Convention have also ratified the 1967 Convention.

Since 1967, international refugee treaty law has not been further updated on a global level. The framework of the refugee regime has therefore not changed since then, although the way in which states apply its provisions has evolved. The international refugee regime is not a static entity. State perspectives of refugee management and UNHCR's role in the regime have changed over time, and as they change the implementation and interpretation of the refugee regime have also changed. Most important for this process is the UNHCR 'Executive Committee' (ExCom), composed of interested state parties, which meets annually to produce 'soft law' consensus on the future of the refugee regime. While these 'ExCom' conclusions carry authoritative weight, they are not binding on states which are party to the Convention⁴⁰.

ii. The Weakening Refugee Regime

While the New York Protocol therefore ensured the continued relevance of the international refugee regime into the 21st century, the modern international refugee regime has over the past three decades become increasingly contested. States have become ever-more sensitive to the asylum burdens which they carry, and increasingly unwilling to carry those burdens. The power and influence of the refugee regime have declined as migration and displacement dynamics have changed, state adherence to the implementation of the refugee regime provisions has steadily eroded, and other migration consultative processes (e.g. the Khartoum Process and Barcelona Process) have proliferated⁴¹.

Of special mention are also procedural deficits within the refugee regime itself, which have become ever more apparent and problematic over time. Most of these weaknesses can be traced back to the historical circumstances in which the Refugee Convention was written. The original drafters of the refugee regime never intended it to be used as a manual to resolve modern refugee crises. The authors of the Refugee Convention emphasized the particularity of their convention by including explicit geographic and temporal limitations to its application. The original Refugee Convention was written to resolve one specific refugee

⁴⁰ There do exist multiple regional initiatives to update and expand the refugee regime. However, no established supplementary regional refugee regimes have global reach.

⁴¹ For a thorough overview of the changing role of UNHCR in the international refugee regime, see Loescher, Betts, and Milner (2008).

crisis – that of World War II refugees in Europe and in that one task, it proved remarkably successful.

The procedural gaps in the 1951 Convention only became problematic when ‘mission creep’ set in and the Refugee Regime’s provisions were applied to very different refugee crises in the 1950s, 1960s and 1970s. While the intentions behind an expansion of the Refugee Convention were honorable and praiseworthy, the failure to recalibrate the Convention to deal with the different nature of ongoing, non-European refugee crises meant that the 1967 expansion created an incomplete, limited refugee regime.

The procedural limitations and its consequences for burden-sharing in the present refugee regime can be traced to at least three linked problems: (i) incomplete burden-sharing arrangements, (ii) disparate refugee treatment, and (iii) refugee onward migration. These three problems are among the best-known and most-discussed in refugee literature. Scholars have identified and written about them for over thirty years. For example, Loescher and Monahan’s edited volume (1989) includes chapters on ‘adapting to extra-convention refugees’ (Gordenker 1989), the need to cooperate to find durable solutions to long-standing refugee crises (Cuny and Stein 1989), and the challenges posed by irregular migration (Gallagher 1989). Yet despite awareness about the incomplete nature of the refugee regime, all three problems continue to in their own way shape the politics which occur within the refugee regime

[i. Incomplete Burden-Sharing Arrangements](#)

Perhaps the most prominent omission in the 1951 Convention is the lack of a clear agreement on how the asylum burden should be shared amongst states. As the original Convention limited itself to past events, the original drafting delegations saw no need to negotiate a permanent framework for the redistribution of refugees. In later conflicts, the importance of burden-sharing arrangements became much more apparent, and how the asylum burden should be shared between countries has become a point of serious contention - so much so that it has undermined the efficacy of the entire refugee regime.

There are two types of burden-sharing possible in the refugee regime: asylum burden-sharing and financial burden-sharing. The dynamics in both arrangements are somewhat different,

although their game theoretical rationale is the same: to uphold the benefits of the collective good (asylum) while minimizing personal investment.

Asylum Burden-Sharing Arrangements:

Asylum burden-sharing refers to the redistribution of asylum-seekers or verified refugees from a state with a large asylum burden towards a state with a comparatively low asylum burden. Asylum burden-sharing arrangements are important because they regulate the global distribution of refugees. As conflict is not equally distributed across the world⁴², states in more unstable neighborhoods are often forced to deal with a greater refugee burden by ‘accident of geography’⁴³.

Refugee resettlement is the most prominent form of asylum-burden sharing in existence today. However, resettlement is most often interpreted as a long-term ‘durable’ solution which implies the integration of a refugee into their new host society. While a limited number of Western states – foremost among them the United States - have provided resettlement opportunities for refugees, the annual number of resettled refugees is rarely more than 1% of the total refugee population⁴⁴.

Temporary asylum burden-sharing arrangements, performed in the expectation that a resettled refugee will return to their home country, do not exist. In practice, this means that the overwhelming majority of migrants will remain in the country where they requested asylum.

The lack of temporary asylum burden-sharing measures, in combination with the geographic concentration of refugee-producing states in the developing world, has made that developing states provide asylum to the overwhelming majority of the world’s refugee population. Indeed, 89% of the world’s refugees are hosted in developing countries⁴⁵, with over half hosted in just 10 countries⁴⁶. In contrast, safe and wealthy Western states have seen much lower ‘spontaneous’ asylum inflows.

⁴² Institute for Economics & Peace (2015). *Global Peace Index 2015*. As found online at: http://economicsandpeace.org/wp-content/uploads/2015/06/Global-Peace-Index-Report-2015_0.pdf

⁴³ Hathaway and Neve (1997), p. 141

⁴⁴ <http://www.unhcr.org/524c31a09>

⁴⁵ World Bank (2015). *Forced Displacement: A Developing World Crisis*. As found online at: <http://www.worldbank.org/en/news/press-release/2016/09/15/forced-displacement-a-developing-world-crisis>

⁴⁶ Amnesty International (2017). *Rich nations’ self-interest means refugee crisis set to get worse, not better*. As found online at: <https://www.amnesty.org/en/latest/news/2016/10/refugee-crisis-set-to-get-worse/>

As far back as the 1970s, academics have debated about the need and potential to create more equitable global asylum-sharing arrangements. Suggestions have included Grahl-Madsen's (1983) argument for asylum burden-sharing on the metric of 'refugee per GNP', as well as Hathaway's (1997) more elaborate suggestions for a reformulation of refugee law that includes a global system of responsibility-sharing⁴⁷. No academic proposals have not ever been successfully translated into effective political action.

Financial Burden-Sharing Arrangements:

When states might not wish to support the international refugee regime by participating in an asylum burden-sharing arrangement, they have the option to financially support states which do host refugees on their territory. Again, there is no requirement for states to donate to the refugee regime. As noted, UNHCR's Statute requires the organization to depend on voluntary donations to fund its work. Only the preamble to the 1951 Convention and UNHCR Executive Committee (ExCom) Conclusion 85 of 1998 offer *non-binding* guidance on a more equitable allocation of international responsibility for refugee protection⁴⁸.

The lack of any clear guidance on how to finance the regime's obligations has resulted in the chronic underfunding of refugee needs. Over the past two decades, UNHCR has not once attained its funding targets. In several cases, the organization has even been left struggling to provide basic amenities during major refugee crises. For example, in 2015, the Syria refugee crisis received only 62% of the funds it needed to help refugees attain their rights⁴⁹ - a percentage which was high compared with the funding levels of many other crises: refugee support in South Sudan was only 28% funded⁵⁰, support for refugees in the Democratic Republic of Congo was only 32% funded⁵¹.

⁴⁷ Suhrke (1998). *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action* Journal of Refugee Studies. Vol.11(4), pp. 396-415. p. 397

⁴⁸ Milner, J. (2009). *Refugees, the State and the Politics of Asylum in Africa*. London: Palgrave MacMillan; Whitaker, B.E. (2008) *Funding the International Refugee Regime: Implications for Protection*. Global Governance: A Review of Multilateralism and International Organizations: Vol. 14(2), pp. 241-258, p. 243

⁴⁹ UNHCR (2016). *2015 Regional Refugee & Resilience Plan - 3RP (all agencies). Funding Snapshot as of 22 February 2016*. As found online at: <https://data.unhcr.org/syrianrefugees/download.php?id=10298>

⁵⁰ UNHCR (2016). *UNHCR – South Sudan – Funding Update. 2015 Contributions as of 12 January 2016*. As found online at:

<http://reliefweb.int/sites/reliefweb.int/files/resources/SouthSudanEXTERNALfundingupdate12January2016.pdf>

⁵¹ UNHCR (2015). *UNHCR DR Congo Factsheet - December 2015*. As found online at:

<http://reliefweb.int/report/democratic-republic-congo/unhcr-dr-congo-factsheet-december-2015>

ii. Disparate Refugee Treatment

An important consequence of incomplete burden-sharing arrangements has been to exasperate already-existing differences in refugee treatment between developed and developing states. Some of these differences are inevitable. Stronger social welfare structures and greater financial means in developed states mean that they can offer more services to refugees who live within their borders. However, these economic and institutional differences have been exacerbated by a lack of burden-sharing.

Greater responsibility has therefore combined with poorer refugee provisions. Because of this toxic combination, many developing states have been left unable to comply with their refugee regime obligations by themselves. Refugee-hosting states have often shown remarkable generosity in their welcome of refugees, but the sheer numbers involved in many crises can overwhelm their limited government capacity and fragile economies – and can lead to friction between host and refugee populations.

iii. Refugee Onward Migration

With such disparities in refugee treatment, it can hardly be a surprise that thousands of refugees have risked often-dangerous journeys towards countries where they are more likely to receive proper services and opportunities to rebuild their lives. As noted before, onward migration towards Western nations has rapidly increased since the late 1970s. Asylum applications in Western Europe rose from 20,000 in 1976 to 450,000 in 1990, and after a period of stagnation and slow decline have since 2012 rapidly increasing to a record 1.3 million asylum applications in 2015 and 2016⁵².

In the absence of asylum burden-sharing arrangements, one way of looking at onward migration is therefore as an attempt by refugees to force their own redistribution from countries less able to support them in their needs, towards countries which can support their needs. In other words: refugees are responding to the absence of burden-sharing and their poor future prospects in their states of residence by forcing their own relocation.

For refugees, spontaneous resettlement has proved to be a remarkably successful tactic. The very lack of asylum burden-sharing arrangements means that states cannot return refugees to

⁵² Eurostat (2016). *Asylum Statistics*. As found online at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Asylum_applicants

their original country of asylum, an oversight which migrants use to their advantage. Nonetheless, refugee onward migration carries so many risks that it can hardly be considered a solution to the problem of burden-sharing. Refugee onward migration is dangerous and expensive, and therefore almost never an option for the poorest and most vulnerable refugees who might be in greatest need of better services⁵³.

⁵³ de Haas, H. (2010). *Migration and Development: A Theoretical Perspective*. International Migration Review Vol. 44(1), pp. 227-264.

2. Conceptualising the Politics of the Incomplete Refugee Regime:

Scholars from a wide variety of disciplines have devoted countless hours of study and offered hundreds of suggestions to ‘right the ship’ and improve the refugee regime’s protection of international justice and order. Given the focus of this paper on the state maneuvering to support their interest in refugee burden-sharing arrangements, the below literature review focuses on academic work which takes an international relations perspective of the refugee regime.

A. The Refugee Regime in International Relations: A Literature Review

The first academic work on the international politics of forced migration did not use international relations theory, but were descriptive, strongly archival and empirical in nature. Gordenker (1987) was the first to explain the twentieth-century political emergence of the international refugee regime. Around the same time, an edited volume on *Refugees in International Relations* by Loescher and Monahan (1989) offered the first multi-disciplinary criticism of the weaknesses present in this international refugee regime. A decade later, Loescher (2001) developed an in-depth institutional history of the intergovernmental organization tasked to oversee the refugee regime: the United Nations High Commissioner of Refugees.

The theoretical study of refugee regime politics can be divided into four phases, based on their conceptualization of the subject of study: (i) early descriptive research on the international relations of the refugee regime; (ii) the theoretical studies of politics in the incomplete refugee regime from the perspective of the regime itself, which took off in the early 2000s, (iii) studies about the refugee regime from the perspective of states, which emerged in the early 2000s, and (iv) the expansion of the subject of study to include forced migrants not normally considered refugees in the late 2000s.

The earliest expositions of the refugee regime that used International Relations theory retained the individual refugee as the object of study. By the early 1990s ideas associated with

the Copenhagen School offered new research avenues for refugee as well. Several scholars attempted to re-conceptualize forced migration from the perspective of refugees themselves by applying the ‘human’ security concept (Newman and van Selm 2003). Others examined the empirical relationship between refugee movements and conflict. In response to experiences in Somalia, Rwanda, and the former Yugoslavia, multiple scholars highlighted that refugees are not only a consequence of conflict, but may also contribute to insecurity (Loescher 1992, 1993; Weiner 1993, 1995; Stedman and Tanner 2003; Lischer 2005). By the late 2000s, this ‘securitization of refugees’ literature led to the development of ‘spoilers’, a term used to describe how forced migrants can become a barrier to peace-building initiatives in post-conflict situations if they are not provided with adequate protection and durable solutions (Morris and Stedman 2008; Milner 2009).

The theoretical study of the refugee regime as a regime would not take hold until the late 1990s. Most noteworthy was the work of the English School of International Relations, which traced the origins of the global asylum regime to the Westphalian-Enlightenment implied state-citizen-territory nexus which forms the foundation of the modern international order (Skran 1995; Haddad 2008; Hurrell 2010). In addition, Loescher (2001), Loescher, Betts and Milner (2008) and Betts (2013) examined the role of UNHCR in the maintenance of the refugee regime. Their analysis would evolve over this decade of research under the influence of a growing body of work building theory-informed analysis of state actions in the refugee regime. Betts (2003) was the first to directly apply international relations theory to the refugee regime, showing that asylum-evading states are more likely to offer burden-sharing support to other countries if such support results in ‘joint-products’, i.e. public goods with additional private benefits. Milner (2009) traced how countries in Southern Africa practice a ‘politics of asylum’ to defend their perceived political interests. Greenhill (2010) used a realist-constructivist framework to show how forced migration has frequently become an instrument of state foreign policy, with illiberal governments using ‘strategically engineered migration’ to impose costs on target states with the aim of influencing inter-state relations to their benefit.

By the late 2000s, more structured research agendas into the international relations of forced migration governance developed, focusing on using international relations theory (foremost regime theory) to conceptualize the functioning of the refugee regime and the regulation of forced migration (Loescher, Betts and Milner 2008; Betts 2010; Betts and Loescher 2010).

This work built on the descriptive studies of the late 1980s in that both took the regime as their level of analysis, took a liberal institutionalist perspective as their theoretical framework, and placed special emphasis on the role of UNHCR in the functioning of the refugee regime.

B. Strengthening the Weakened Refugee Regime: Why Has Burden-Sharing Remained So Elusive?

Beyond expositions describing the refugee regime in its entirety, a great many more focused publications have taken on one or more of the specific problems which weaken the refugee regime as their subject of study. Notably, Hathaway and Neve (1997), Suhrke (1998), and Betts (2009) have sought to understand why the procedural flaws of the refugee regime have weakened state support for its provisions, and looked for ways to overcome the lack of burden-sharing which occurs in the refugee regime.

In describing the problems *and* possible solutions to the dysfunction of the refugee regime, these studies take a risk: the validity of their suggested improvements will depend on the accuracy of their problem-analyses. A proper conceptualization of state politics in the refugee regime is essential if we are to fully grasp the causes of the lack of burden-sharing in the refugee regime and to formulate the correct solutions which will help overcome weakening state adherence to the refugee regime. Studies of state burden-sharing in the refugee regime are one area of study where a thorough understanding of states and state behavior in the refugee regime matter greatly. To see why, it helps to briefly describe each of the three mentioned studies.

a. Hathaway and Neve

Over the seven decades that the refugee regime now exists, a great many practical studies have made a plurality of suggestions on how to strengthen the refugee regime. Perhaps the most prominent practical study from a state-based perspective – and one of the few still referenced today – was developed by Hathaway and Neve (1997).

As their report had a pragmatic focus, Hathaway and Neve do not conceptualize the politics of the current refugee regime from an international relations perspective. The authors use interviews with stakeholders and experts to identify two core problems of refugee regime dysfunction. First, states increasingly consider the refugee regime an “uncontrolled back

door” for permanent irregular migration because of the rise of the asylum-migration complex. Second, a lack of proper burden-sharing agreements undermines the functioning the regime⁵⁴.

In their analysis, the authors note: “the critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states, and dependably and equitably to share responsibilities and burdens”⁵⁵. However, Hathaway and Neve’s solutions to stabilize the refugee regime are foremost thought exercises of what states should do to improve the refugee regime, but with comparatively little theorization of how states currently practice politics in the refugee regime. To create a more equitable refugee regime, Hathaway and Neve suggest a reform of the durable solutions framework so that refugees must at some point return to their country of origin. Refugee protection should truly become a *temporary* phenomenon, which would offer political room create a framework of “common but differentiated” responsibilities amongst states in the refugee regime⁵⁶.

The effectiveness of Hathaway and Neve’s solution rests on the assumption that “most refugees will [eventually] be able to return home”⁵⁷ but does not include a concrete solution on how to achieve such a return. Given the growing number of refugees who remain stuck in multi-decennial protracted refugee situations, the promise of temporary protection - and by extension the practical viability of a ‘common but differentiated’ burden-sharing framework – is undermined by the lack of a viable means to solve protracted refugee situations. In addition, the lack of a clear theoretical explanation of why and how the refugee regime landed itself in its current quagmire impedes the applicability of the report’s solutions.

b. Suhrke: A Prisoner’s Dilemma

Astrid Suhrke (1998) was the first to conceptualize state behavior in the refugee regime using international relations theory and Game Theory. Suhrke notes how previous practical suggestions like Hathaway and Neve (1997) have all argued that a common refugee regime burden-sharing mechanism might strengthen the international order and simultaneously protect the rights of refugees⁵⁸. These suggestions rested on the belief that a burden-sharing mechanism would act as an insurance mechanism in which states accept a long-term limited

⁵⁴ Hathaway and Neve (1997), p. 116-7

⁵⁵ Hathaway and Neve (1997), p. 118

⁵⁶ idem.

⁵⁷ Hathaway and Neve (1997), p. 210

⁵⁸ Suhrke (1998), p. 398; 412

asylum burden in return for the guarantee that they would not be left to shoulder a major refugee flow alone⁵⁹. Furthermore, a burden-sharing mechanism might assuage concerns that developing countries, who have since the 1960s always shouldered the largest proportion of the world's refugees, might restrict their welcome to asylum-seekers⁶⁰.

Suhrke goes on to note that attempts to overcome the burden-sharing impasse reflect attempts to resolve an impasse that in game-theoretical terms reflects a 'Prisoner's Dilemma'. As described above (see section I.B), the Prisoner's Dilemma describes a situation where two states, both better off if they cooperate to achieve a common result, may nonetheless refuse to cooperate if their ideal outcome is the other party achieving the result without any contribution from their side.

Many early papers which described the refugee regime as facing a collective action problem would point to the success of solutions to similar collective action problems in areas like defense (NATO) and environmental affairs to back up their claim that a burden-sharing mechanism would strengthen the refugee regime. Yet Suhrke throws cold water on the applicability of these successes for the burden-sharing in the refugee regime. She notes that previous efforts to promote burden-sharing have had "very modest" results⁶¹, and expresses skepticism about the chance for greater success in the future. To support this skepticism, Suhrke argues that the refugee regime is markedly different from the security and environmental regimes for three reasons: first, states do have the capacity to ward off refugee 'threats' with unilateral action (through border closures); second, the asylum regime only addresses the symptoms of a crisis, and does not address the source of the crisis itself (namely the reason why refugees are fleeing in the first place); and third, states are customarily reluctant to commit themselves to pay for developments over which they have no control – and in particular in matters of population intake⁶².

In addition, Suhrke offers two arguments against the use of sharing schemes altogether. Almost prophetically, she argues that any successful sharing scheme, but in particular a scheme with a long time-horizon, might encourage states to define refugee flows out of existence by declaring them to foremost consist of 'migrants'. Eastern European countries have indeed used this argument during the 2015-6 refugee crisis as one justification for their

⁵⁹ Suhrke (1998), p. 412

⁶⁰ Suhrke (1998), p. 398

⁶¹ Suhrke (1998), p. 396

⁶² Suhrke (1998), p. 413.

opposition to burden-sharing in the European Union. Second, she argues that sharing schemes are not simply expressions of fortuitously harmonized values, but are likely to become a mechanism for states to fix their commitments to very low levels - institutionalizing a burden-shift among regions⁶³. In fact, a restrictive dynamic might therefore occur irrespective of whether states co-ordinate their asylum responses⁶⁴. Without co-ordination, a 'race to the bottom' is likely to ensue, whereby the temptation is to peg commitments at low admission levels and restrict refugee rights.

c. Betts: A North-South Suasion Game

Alexander Betts (2009) agreed with Suhrke (1998) that cooperation in the refugee system has broken down, but used regime and global governance theory to argue that the dysfunction is not simply a collective action problem, but the outcome of structural asymmetries in the refugee burdens between developed and developing states.

For Betts, rich developed states have little incentive to cooperate as neither they nor their immediate neighborhood is likely to become a refugee-producing region. In contrast, poorer developing states are more likely to live in conflict-prone areas, suffer from poor border controls, and have little choice but to cooperate but lack the money to provide proper care to refugees.

Betts argued that this geographic imbalance alters the mechanisms necessary to overcome the 'collective action' problem of refugee burdens. For him, the refugee regime does not face a 'Prisoner's Dilemma' but a 'Suasion Game', whereby the structural burden power imbalance between developed and developing states has prevented the development of adequate burden-sharing mechanisms. In a two-actor simulation of a Suasion Game, one privileged player with a permanent advantage over a second player must be persuaded to cooperate, while the weaker player has little choice but to cooperate; i.e. the stronger actor has little to gain and the weaker actor has little to lose from any agreement. This undermines the prospects of cooperation, but even when agreements are made Suasion Games will always only satisfy the stronger actor and will always leave the weaker actor aggrieved⁶⁵.

⁶³ Suhrke (1998), p. 412

⁶⁴ Suhrke (1998), p. 414

⁶⁵ Betts (2009). *Protection by Persuasion: International Cooperation in the Refugee Regime*. Ithaca: Cornell University Press, p. 33

Betts describes his suasion game analogy of the refugee regime as a ‘North-South’ impasse, whereby ‘Southern’ developing states have little recourse other than to accept offers made by developed ‘Northern’ states. In support of this description, he emphasizes four particular features of the current regime. First, the prevalence of conflict and human rights-abusing regimes in the developing world means that most of the world’s refugees come from and remain in the so-called global ‘South’. Second, there is an institutional absence of binding legal or normative frameworks for burden-sharing. Third, economically developed ‘Northern’ states have a very low interest in contributing to refugee protection for its own sake (although they have been willing to offer earmarked contributions if they perceive other interests to be involved, cf. Betts 2003). Lastly, the bargaining power of developing refugee-hosting (‘Southern’) states in the refugee regime has been limited to threats that have been ineffective.

C. Limitations of the North-South typology:

As we saw in the introduction, Betts’ theoretical description of regime dysfunction in terms of a ‘North-South’ terms does not quite seem capture the options and choices made by states within the refugee regime. To understand why, it helps to first critique the four features on which Betts rests his description.

a. Most Refugees Remain in the South (or do they?):

Betts’ first claim that that the world can be divided into an asylum-evading North and a refugee-burdened South seem only partially compatible with real-world statistics. As he himself admits, the use of the term ‘North-South’ in a refugee setting is to borrow a disputed term in international development to describe a more complex reality in the refugee regime⁶⁶.

Yes, 89% of refugees are hosted in the developing world, but to take this frame uncritically results in inaccurate assumptions about how the refugee regime structures international politics. In practice, the refugee regime is not so much divided between developed and developing countries as between countries directly bordering on refugee situations and those which do not. Refugees are not just foremost in the Global South. Refugees are foremost contained near their country of origin. Just 10 countries host over half the world’s refugees⁶⁷. Of the 33 countries where UNHCR-registered refugees make up more than 0,5% of the

⁶⁶ Betts (2009), pp. 12-13, footnote 1

⁶⁷ Amnesty International (2016). Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility. POL 40/4905/2016. As found online at: <https://www.amnesty.org/en/documents/pol40/4905/2016/en/>

population, 25 directly border refugee-producing countries. On the other hand, more than 90 countries host less than 1 refugee per 1,000 inhabitants. Countries with very low refugee burdens include an eclectic mixture of nations from Central and South America, Eastern Europe, Eastern Asia, the Middle East, and Africa. They include five major powers: the United States and Japan in the Global North, Brazil, India, and China in the Global South. Within the area often included in the Global South, they include the entire Gulf Cooperation Council, nearly all of South America, Indonesia and Nigeria but also Mozambique, Sierra Leone, Angola, Gabon, and Malawi⁶⁸.

b. The Lack of Institutional Burden-Sharing in the Refugee Regime (is that is necessarily a bad thing?):

In response, one might argue that per capita statistics alone do not do justice to state obligations, for example because they leave out issues of political and economic power. Wealthier, more powerful countries like the United States and China have a greater obligation to host refugees than Nigeria does.

Such an argument zooms in on Alexander Betts' second claim: the concentration of refugee burdens in just a few states is a problem because of a lack of institutionalized burden-sharing in the refugee regime. At first sight, this is a straightforward, common-sense argument with a common-sense solution: create a burden-sharing arrangement. However, creating an accurate burden-sharing arrangement that takes into account Suhrke's (1998) explanation of the limitations of institutionalized burden-sharing is exceptionally complex. Any burden-sharing will need mechanisms to discourage states from redefining refugee flows out of existence by declaring them to be 'migrants', and needs to dis-incentivize state attempts to fix any institutionalized refugee commitments at very low levels⁶⁹.

In fact, there is evidence that both these regime-undermining behaviors already occur on a regional level where attempts have been made to establish burden-sharing mechanisms. As noted, Eastern European countries continue to block implementation of a redistribution mechanism for refugees because they consider them unwanted migrants. Even the acceptance

⁶⁸ For the entire list of statistics, see: <http://unhcr.org/statistics>. These figures are based on the mid-2015 update, tab 14

⁶⁹ Suhrke (1998), p. 412

rate of asylum-seekers who arrive spontaneously at the borders of these countries are significantly lower than acceptance rates of asylum-seekers in nearby Germany and Sweden⁷⁰.

This evidence does not necessarily mean that the institutionalization of burden-sharing is a mistake. There is clearly a lack of burden-sharing by states which are not close to a refugee source country. However, any institutionalization of burden-sharing that does occur, will only work if the agreement is shaped to be highly flexible. As both Betts and Suhrke suggest, a ‘routinized response’ plan is more likely to sustainably improve state cooperation in the refugee regime than a hard-wired explicit obligation for states to take up recognized refugees from crises far from their borders.

c. Developed countries have a very low interest in contributing to refugee protection for its own sake (but are developing countries any more willing?)

Third, Betts argues that Northern ‘developed’ states have a very low interest in contributing to refugee protection for its own sake⁷¹. The figures support this observation, but they also make clear that the lack of interest goes far beyond ‘Northern’ states⁷². It is hard to find a state that has taken a truly altruistic interest and supported the refugee regime through asylum and financial burden-sharing. At best, some countries have been moved to offer support when problems in refugee-hosting countries have had spillover effects on their interests⁷³.

In fact, it is easier to inverse our discussion. Statistically speaking, especially North European asylum-evasive behavior is not an anomaly in the refugee regime, but its *involvement* is. The only countries not bordering a refugee crisis but listed in the top-30 of largest refugee-hosting countries in the world are in ‘Northern’ Europe: Sweden, Norway, Switzerland, and Austria. The GCC is among the wealthiest areas in the world but hosts relatively little Syrian refugees. *None* of the powers outside Europe fully pull their weight in asylum affairs – although the United States and Japan come closest.

⁷⁰ Eurostat (2016). *Asylum Quarterly Report*. As found online at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report cf. table 6

⁷¹ Betts (2009), p. 14

⁷² Betts (2003). *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory*. *Journal of Refugee Stud* Vol. 16 (3): 274-296

⁷³ *idem*.

Some major powers with little asylum burden-sharing do make up for it with significant financial contributions, but most of the top-10 donors to UNHCR in 2016 were countries from Western Europe. The United States gave more than USD 1.5 billion to UNHCR in 2016 and Japan donated more than USD 160 million in 2016, but financial contributions by other asylum-evading major powers are paltry: the Chinese government offered less than USD 3 million support, Saudi Arabia paid only USD 14.5 million, and Portugal (which also does not host many refugees) donated less than USD 400,000 to UNHCR in 2016⁷⁴.

An analysis of financial and asylum burden-sharing in practice therefore do not so much indicate a North-South impasse as much as major *intra-regional* differences between asylum-evading and refugee-hosting countries. Within the European Union between Northern and Eastern European countries, within the Middle East between the GCC and Syria's other neighbors, and within Africa between East-Central and more Western and Southern African nations. Political maneuvering during times of crisis also reflect and often reinforce these differences. For example, attempts to form a common internal asylum redistribution mechanism in the European Union are supported both Southern and Northern European countries, but blocked by Eastern European countries. In the Middle East, all of Syria's neighbors except for the GCC countries have taken up multiple hundreds of thousands of refugees.

d. Developing Countries lack means to Bargaining Power (or do they?)

Building on the previously discussed three claims, Betts argues that North-South discussions are often stuck in a Suasion Game because developing refugee-hosting states are 'frequently faced with either accepting whatever is on offer or harming themselves by rejecting a relatively small contribution from the North'⁷⁵. Betts bases his argument on the analysis that attempts by burden-reducing states to increase their bargaining power through non-commitment to asylum norms have proven ineffective⁷⁶. In fact, as we will see, states which host major refugee populations and are looking to reduce their refugee burdens *do* have multiple highly effective means to reduce their refugee burdens – and even to pressure states which refuse to share in their refugee burden.

⁷⁴ UNHCR (2017). *Donor Ranking 2016*. As found online at:

http://reporting.unhcr.org/sites/default/files//donor_ranking/2016%20-%20UNHCR%20Donor%20Ranking.pdf

⁷⁵ Betts (2009), p. 32

⁷⁶ Betts (2009), p. 35-6

However, even if states which host refugees do have options to retaliate, the statistics remain clear that there is an impasse between states bordering refugee source countries and those further away from crisis countries. Clearly, the lack of burden-sharing has led to a great mismatch in the support of refugee-hosting countries by *both* developed and developing countries. There is not necessarily an impasse between ‘Northern’ and ‘Southern’ countries, but there is clearly an impasse between countries hosting large refugee burdens and those not hosting large refugee burdens.

3. Between Asylum Evasion and Burden

Reduction: Conceptualising State Politics With the Refugee as Reference Point

The previously described nuances significantly weaken Betts' claim that the politics of the refugee regime should be described in geographic 'North vs. South' terms. The statistics indicate that nearly all states – in the geographic 'North' and the geographic 'South' - have quite successfully sought to minimize their asylum burdens, leaving a comparatively few states bordering refugee crises to bear the brunt of the refugee burden. Neither 'Northern' nor 'Southern' states have shown much interest to adequately support the cost of hosting refugees in the region near their home-country.

The statistics therefore indicate that refugee regime politics are not foremost based on the state's geographic location. A more useful alternative could be to analyse refugee burden-sharing politics on the physical location of the *refugee*. Like Betts' North-South explanation, a justification for theorizing state politics based on the geographic position of the refugee is based on four features of having a refugee regime. First, once a person migrates outside their home state and has applied for asylum, international law at least temporarily gives them rights and prevents their forced return home (*non-refoulement*). Second, the obligations imposed by the refugee regime foremost apply to the state hosting a refugee absent institutional burden-sharing politics. If a refugee is not physically on the territory of a state, the refugee is legally not their immediate concern. Third, decision-makers wish to expend as little political, social and financial capital as possible to host refugee burdens. Most often (but not always) this means that they wish to minimize their refugee burdens. Fourth, as refugees are only hosted by one country at a time, states are therefore locked in a zero-sum competition to minimize their refugee burdens. This competition involves one of two positions, depending on the physical location of the refugee: for refugees who have not yet arrived, central decision-makers can apply maneuvers and legislation to evade or complicate their arrival and stay. If the refugee is present on the territory of the state, central decision-makers can attempt to reduce refugee burden by encouraging return or onward migration.

State asylum-evasive and burden-reducing strategies are therefore in competition with each other for every individual refugee, but state apparatuses can implement both asylum-evasive

strategies to reduce new refugee inflows and burden-reducing tactics to reduce the impact of existing refugee populations. The combination of asylum-evasive and refugee-reducing strategies shape political maneuvering in burden-sharing affairs in the international refugee regime.

Developing a more accurate definition of the impasse in the refugee regime is about more than just semantics. Shedding all appearance that politics in the refugee regime is foremost defined by geographic or economic difference creates room for new understandings and questioning of politics in the refugee regime. Basing our discussion on two possible asylum-evasive or burden-reducing *strategies* instead of geographic references recognizes that developing and developed states have a vast palette of options to defend their strategic interests, and offers a more flexible rationale for when states are likely to employ different tactics.

The following discussion seeks to offer a more complete description of the burden-sharing politics of the refugee regime in four parts: section A describes the main strategies which states use to evade their asylum burdens. It is complemented by section B, which describes strategies used by states which host refugee populations to reduce existing refugee burdens. Section C describes several strategies pursued by states to limit the access of *potential* asylum-seekers to the rights of the refugee regime altogether. Finally, section D argues that the reorientation of focus from the state to the refugee results in a markedly different appreciation of politics in the refugee regime: not one limited by a ‘North’ vs. ‘South’ impasse, but a regime better characterized as a zero-sum political game between all states.

A. Asylum-Evasion Politics in the Incomplete Refugee Regime Complex:

Most countries in the world do not carry a significant refugee burden, but have nonetheless developed policies to evade potential future asylum burdens. For example, over 40 states have erected border walls to counter irregular migration flows since the beginning of this century⁷⁷. Yet, while very visible, border walls have not been the most effective deterrent to irregular

⁷⁷ The Economist (2016). *More neighbours make more fences*. As found online at: <http://www.economist.com/blogs/graphicdetail/2016/01/daily-chart-5>

migration. They are the nuclear option by which a country effectively opts to ignore the *non-refoulement* requirement and refugee status determination procedures of the refugee regime.

Much more effective for asylum-evasive politics in the refugee regime have been less visible institutional changes to complicate both the ability and legitimacy of asylum applications. These changes have included burden-shifting asylum responsibilities away from themselves within the refugee regime itself, as well as attempts to regime-shifting and forum-shop asylum-seekers towards regimes which overlap with but do not offer the same protections as the refugee regime.

Institutional innovations to evade refugee burdens been especially effective when they have taken advantage of the weakening refugee regime. Three tactics to evade asylum-seekers stand out: (i) the securitization of the travel regime; (ii) burden-shifting asylum responsibility through the conceptualization of ‘safe countries of asylum’; and (iii) by limiting financial contributions in the refugee regime. Let’s briefly discuss each tactic.

a. Securitizing the Travel Regime to evade spontaneous arrival asylum

The securitization of the international travel regime has made it exceptionally more difficult to seek asylum through legal migration. Developed states have taken advantage of increased regulation of the travel regime to ‘regime shift’ spontaneous asylum arrivals from the refugee regime towards travel regime. They have banned the possibility to request asylum at their embassies and refuse visas to people who express their need for asylum during embassy interviews. In addition, they have put into place ‘carrier sanctions’ - fines on airline carriers who enable irregular migrants to reach Europe by air⁷⁸. While European countries started the practice of securitized travel, its use has rapidly spread as many developing countries have - to varying degrees - also sought to tighten their entry and exit controls.

By securitizing the travel regime in this manner, states geographically further removed from refugee crises have been able to achieve a net reduction in asylum-seekers’ access to spontaneous arrival asylum. As Betts (2010) notes this ‘bypass without overtly violating the

⁷⁸ Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic (1990). *The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders*. European Union Official Journal L 239, 22/09/2000 pp. 19-62. Article 26

provisions of the refugee regime' has thus implicitly renegotiated the distribution of responsibilities for refugee care to the states geographically proximate to refugee crises⁷⁹.

b. Burden-Shifting within the Regime: Safe Countries of Asylum

Beyond attempts to complicate the spontaneous arrival of asylum-seekers, states have also looked for justifications to dispose of refugees who do make it to their territory. As Suhrke (1998) already noted, asylum-evasive behavior can also occur *within* the refugee regime, notably if states simply declare arriving refugees to be 'migrants'⁸⁰. However, to redefine refugees as migrants without offering them any recourse to the provisions of the refugee regime would be the institutional equivalent of a border wall - *de facto* ending the refugee regime in its entirety. Wishing to keep some of the refugee regime intact, developed states have used a developed subtle strategy instead: the 'safe countries of asylum' principle.

The 'safe country of asylum' concept has been a topic of discussion by member-states of the refugee regime since as early as the late 1970s⁸¹. Article 31(1) of the Refugee Convention offers room for this evolution of the regime, as it only prohibits the imposition of migration penalties on asylum-seekers and refugees when they arrive "*directly* from a territory where their life or freedom was threatened"⁸² (emphasis added). The Refugee Convention offers no guidance on how to deal with refugees who have passed through territories where their life and/or freedom is not directly threatened. Refugees who practice onward movement can therefore – in theory – be returned to another country where they had already have – or could have – requested asylum.

The lack of clear burden-sharing provisions allows states which host major refugee burden the opportunity to reduce their refugee population by pushing them to move onwards. The 'safe country of asylum' principle seeks to upend this practice by arranging for refugees to be returned to the first country where they can and therefore 'should' request asylum. If completely implemented, it would institutionalize the existing lack of burden-sharing in the refugee regime, and leave states nearest any refugee crisis to face the brunt of (if not the

⁷⁹ Betts (2010), p. 26

⁸⁰ Suhrke (1998), p. 412

⁸¹ UNHCR (1991). *Background Note on the Safe Country Concept and Refugee Status Background Note on the Safe Country Concept and Refugee Status*. EC/SCP/68. As found online at:

<http://www.unhcr.org/afr/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html>

⁸² United Nations (1951), article 31

entire) refugee crisis themselves. In practice, implementation of ‘safe country of asylum’ concept has proven complicated and controversial.

The UNHCR Executive Committee first defined a clear set of conditions under which ‘safe country of asylum’ procedures could be implemented in 1989⁸³. European countries lobbied for the adoption of this conclusion, and rapidly adapted it into their regional legislation because of worries about the impact of the Schengen Zone on different European asylum cultures. While border controls had originally left each individual country responsible for the deterrence of irregular onward migration attempts, the creation of an internal border-free Schengen Zone meant that simple deterrence of onward migration through border checks would no longer be possible. European Union leaders therefore established two prominent ‘safe country’ regulations to deter refugee onward movement: the ‘safe first country of asylum’ and the ‘safe third country of asylum’ principles. Their contents were slightly different. One was directed at the distribution of asylum-seekers and refugees *within* the European Union, the second directed at the possibility of returning refugees to countries outside the Union.

i. A Safe Country of First Asylum:

Asylum-seekers are aware of the stark differences in refugee treatment within Europe, and have consistently opted to travel to the locations with more liberal refugee policies when able to do so. The incentives for this practice – known as ‘asylum-shopping’ in European parlance – are significant. For example, in the fourth quarter of 2016, less than 3% of asylum-seekers were recognized as refugees or a subsidiary form of protection in Hungary, while 74% of applicants in Sweden and 84% of applicants in Malta did receive protection⁸⁴. Refugee care also continues to see major discrepancies between countries: in Slovakia, accepted refugees receive 40 eurocents daily pocket money and a one-off EUR 300 cash grant; in Germany, the same refugee will receive around EUR 200 per month in cash benefits and a basic income of around EUR 400 per month⁸⁵.

⁸³ UNHCR Executive Committee (ExCom) (1989) *Conclusion No. 58 (XL) on Irregular Movements*. Geneva: UNHCR. As found online at: <http://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html>, paragraphs (f) and (g)

⁸⁴ Eurostat (2017). *First Instance Decisions by Outcome and Recognition Rates 4th quarter 2016*. As found online at: http://ec.europa.eu/eurostat/statistics-explained/images/c/cf/First_instance_decisions_by_outcome_and_recognition_rates%2C_4th_quarter_2016.png

⁸⁵ Reuters (2015). *Factbox: Benefits offered to asylum seekers in European countries*. As found online at: <http://www.reuters.com/article/us-europe-migrants-benefits-factbox-idUSKCN0RG1MJ20150916>

To prevent asylum-shopping within the Schengen Zone, Schengen member-states established an internal ‘safe country of first asylum’ regime through the ‘Dublin’ regulation. The Dublin regulations, first agreed to in the Dublin Convention of 1990⁸⁶ and updated in 2003 (Dublin II) and 2013 (Dublin III), arranged that persons would be allocated to a country for asylum processing based (in descending hierarchical order) on family considerations, to the recent possession of a visa or residence permit in an EU member-state, to responsibility by the country through which an irregular migrant entered the Union⁸⁷.

However, the Dublin regulations have always been highly controversial within the EU for both political and practical reasons. Politically, the shift of the asylum-burden away from wealthy North-West Europe to countries on an external border has become a festering source of frustration for Schengen Zone countries protecting the external borders of the European Union⁸⁸. Practical reasons against the Schengen Zone have focused on the dysfunction and sub-par provisions of most Southern European asylum facilities. For example, human rights organizations made multiple calls to suspend Dublin returns to Greece because of the inadequate facilities and asylum processes there⁸⁹, and in 2011 the European Court of Human Rights blocked the return of an Afghan asylum-seeker from Belgium to Greece because of inhumane conditions in Greek asylum centers⁹⁰. Greece’s failing asylum system threw a wrench in the ‘safe first country of asylum’ approach to asylum⁹¹. This wrench itself is also both political: continuation of the administrative chaos can help “shield” the Greek

⁸⁶ Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic (1990).

⁸⁷ European Union (2013). *Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*. Official Journal of the European Union. L180/31. As found online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=EN>. see Chapter III (articles 7-15)

⁸⁸ There is some indication that this attempt at burden-shifting has been somewhat successful. See, for example: Porps, A.P. (2015) *EU Asylum Policy - To what extent is the asylum-burden, in terms of physical distribution, shifted towards the EU external border countries, after the adoption of the Dublin Regulation?* Enschede: University of Twente. As found online at: <http://essay.utwente.nl/67188/>

⁸⁹ Human Rights Watch (2008). *Stuck in a Revolving Door. Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union*. As found online at: <https://www.hrw.org/report/2008/11/26/stuck-revolving-door/iraqis-and-other-asylum-seekers-and-migrants-greece/turkey>

⁹⁰ European Court of Human Rights (2011). *Case of M.S.S. v. BELGIUM AND GREECE*. Judgment published on 21 January 2011

⁹¹ BBC (2010). *Sweden stops returning migrants to Greece*. As found online at: <http://www.bbc.com/news/world-europe-11682905>

government “from the possible mass return of failed asylum seekers from elsewhere in the EU”⁹² who entered through its borders.

ii. A Safe Third Country of Asylum

Beyond the internal redistribution of asylum-seekers, Western states have sought to further externalize asylum by establishing ‘safe third country’ agreements with states who are not part of the European Union. Safe third country arrangements work along the same lines as the Dublin Regulation, except that their implementation requires a bilateral agreement between the EU and the counterpart state which must include several criteria that are not required in a transfer under the Dublin regulation.

The most important additional criterion of safe third country of asylum returns is the need to establish a “genuine connection” between the asylum-seeker and the third country. The meaning of ‘genuine connection’ is contested. UNHCR, for example, has argued that ‘transit migration’ or the mere opportunity to apply for asylum enough of a meaningful link to return an asylum-seeker to a safe third country⁹³. Nonetheless, international law leaves the decision-making power on such issues with states who partake in the agreement.

Use of the safe-third country provisions reflects a growing attempt by European countries to institutionalize their geographic advantage evading asylum in the refugee regime. While the safe third country notion is part of EU law under Article 38 of the Asylum Procedures Directive, it is written down as a permissive provision - meaning that it allows states to develop safe third-country agreements but does not require them to do so. The safe third country notion was initially especially-used when dealing with asylum-seekers from Eastern Europe and declined in relevance after their entry to the Dublin regime in 2004. In fact, by the early 2010s only two countries were known to use the concept: the UK to handle asylum claims from the US and Canada, and Spain on a case-by-case basis with claims from some Latin-American and African states. Spain reportedly never used the safe-third country notion the sole ground for inadmissibility or rejection⁹⁴. The 2016 European Union Refugee Deal

⁹² The Guardian (2017). *Where did the money go? How Greece fumbled the refugee crisis*. As found at: <https://www.theguardian.com/world/2017/mar/09/how-greece-fumbled-refugee-crisis>

⁹³ UNHCR (2003). *Aide Mémoire: Directive on Minimum Standards on Procedures on Granting and Withdrawing Refugee Status*, 18 November 2003, available at: <http://www.unhcr.org/refworld/docid/402a2d6e4.htm>

⁹⁴ UNHCR (2010). *The safe third country concept*. As found online at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opensslpdf.pdf?reldoc=y&docid=4bab55e22>

with Turkey reactivated the application of the third safe country of asylum principle⁹⁵, and there has since then been a political push to expand its use to other countries which lie on the southern border of the European Union⁹⁶.

c. The Benefits of Reduced Asylum Inflows: The minimization of Financial Contributions

Insofar as these asylum-evasive measures have helped prevent asylum inflows in asylum-evading states, the personal interest of states to contribute to refugee protection has also declined. As noted before, asylum and financial burden-sharing are not included in the provisions of the refugee regime. Only non-binding guidance on a more equitable allocation of international responsibility for refugee protection exists⁹⁷. Since states are not legally obliged to fund the refugee burdens of other countries, most opted to not do so. UNHCR operations have been chronically underfunded, to the point that budgetary issues as such have become one of the organization's never-ceasing discussion points. The voluntary nature of UNHCR funding in combination with the unpredictability of refugee movements have severely inhibited its ability to fulfil its mandate⁹⁸.

Nonetheless, states sometimes *do* provide funding. Their reasons reflect the defense of their private benefits. Roper and Barria (2010) – following Betts (2003) – describe funding for the refugee regime as an “impure” public good, whereby states not only calculate their funding based on their desire to free-ride the public good provision but also by additional private benefits they might derive from funding support⁹⁹. In other words: states provide funding because they see a personal domestic or foreign interest which benefits if money is channeled through the refugee regime. For example, Betts (2003) argues that European Union member-states allocate their money within the refugee regime based on security concerns and historical linkages with receiving countries – often their former colonies.

⁹⁵ European Council (2016). *EU-Turkey Statement*. As found online at:

<http://www.consilium.europa.eu/en/policies/migratory-pressures/countries-origin-transit/eu-turkey-statement/>

⁹⁶ Abderrahim, T. (2017). *North Africa, Europe's Last Resort on Migration*. Washington, D.C.: Carnegie Endowment for International Peace. As found online at: <http://carnegieendowment.org/sada/68097>

⁹⁷ UNHCR Executive Committee (ExCom). (1997). *No. 85 (XLIX) – Conclusion on International Protection (1998)*. As found online at: <http://www.refworld.org/pdfid/4b28bflf2.pdf> paragraph (o)

⁹⁸ Roper, S.D. and Barria, L.A. (2010), *Burden Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good*. *Journal of Conflict Resolution*. Vol. 54(4). pp.616-637. p. 619

⁹⁹ Roper and Barria (2010), p. 631

States can make such specific demands of the refugee regime because of a practice called ‘earmarking’. Earmarking is a practice by which states specify where and/or how the donated funds may be used. While earmarking allows states to increase accountability of refugee regime expenditures, it also allows them to play politics with their funding. Two types of earmarking exist: ‘tight’ earmarking, which involves specifying specific states and activities where the donated funds should be spent, and ‘light’ earmarking which only specifies a geographic region where the money should be spent. Over the past 20 years, over half the funding received by UNHCR has been ‘tightly’ earmarked, and 20 to 30% has been ‘lightly’ earmarked.¹⁰⁰ Only 15-20% of all received funding ‘unrestricted’, meaning it could be freely spent where the organization saw the greatest need.

While earmarking is prominently used throughout the humanitarian system – and has become more common over the past two decades¹⁰¹ – it carries one great weakness: it is highly inflexible. The strings attached to funding which has been provided can actually undermine the provision of international protection because ‘market failures’ in the allocation of resources within and between refugee relief operations can still occur. Such failure is visible throughout the modern refugee regime, where underfunding is omnipresent, but – in addition – the level of underfunding can vary significantly between operations. Since the early 1980s, the private benefits of states alone have not been enough to cover the funding needs of the refugee regime. Funding levels remain far below requested levels throughout the MENA region and sub-Saharan Africa. Reduced financial burden-sharing has inevitably had an impact on the functioning of the regime in refugee-hosting countries. The Cold War was a major strategic support factor for implicit burden-sharing in the refugee regime, as states sought to maintain developing country alignment with – or at the very least not against – Western influence, but its end ironically dealt a major blow to refugee financing, as the perceived strategic need for international cooperation against an opposite ideological system (capitalism/communism) declined. The collapse of the Soviet Union reduced the perceived geopolitical significance of major international cooperation in developed countries¹⁰². The changing strategic environment reduced the willingness of developed states to support the

¹⁰⁰ Roper and Barria (2010), p. 624; Endres, D. (2015). *UNHCR funding in 2014 and requirements in 2015*. Presentation. Geneva: UNHCR. As found online at: <http://www.unhcr.org/54fdab5b9.pdf>;

¹⁰¹ Future Humanitarian Financing Initiative (2014). *Looking Beyond the Crisis*. As found online at: https://interagencystandingcommittee.org/system/files/fhf_looking_beyond_the_crisis_report.pdf, p. 19

¹⁰² Crisp (2003b), p. 5

refugee populations in developing countries, a trend reinforced by the asylum-evasive measures taken around the same time.

B. Reducing Burdens by Engineering Migration Flows

In so far as the refugee regime indeed carries the appearance of a North-South impasse, the above description is not new. However, Betts (2009) suggestion that refugee-hosting developing states lack bargaining power or means to retaliate to the asylum-evading actions of developed states does not add up with the available evidence.

The next pages argue that major refugee-hosting states have two well-documented strategies to minimize the costs associated with hosting refugees: (i) minimizing refugee services and (ii) ‘encouraging’ or even enforcing asylum-seeker and/or refugee return. While the former has been more discussed, the latter has been of greater political use. States have a significant amount of (indirect) control over migration flows, and they can use this control to advance their personal interest – to encourage refugee return *and* to encourage refugee onward movement. ‘Controlled’ refugee flows can be used in support of a multitude of other international interests. Refugees can be used to attract additional foreign funding and investment. They can also be used to raise political pressure on target states in support of other political aims.

These three tactics build on each other, and it helps to describe them in order from service reductions, to ‘encouraged’ return, to ‘encouraged’ refugee onward migration.

a. Reducing the impact of refugees: between warehousing and urban refugee strategies

From the perspective of major refugee-hosting states, the collapse of the 1984 ICARA II negotiations was an attempt by developed nations to evade their share of the asylum burden; a retreat that fit in a wider pattern of Western retrenchment including declining official development assistance budgets and structural adjustment programs. In combination with environmental degradation, health scares, and high levels of unemployment, many developing countries slowly dropped off into a wholesale systemic crisis. As governments struggled to retain even basic service provisions for their own citizens, the economic and political difficulties of the local population contrasted markedly with the alimentary, educational and

health care services traditionally provided to refugees by the international community¹⁰³. The contrast offered fertile ground to central decision-makers for a crackdown on refugee rights.

Both developed and developing refugee-hosting countries have traditionally been hesitant to provide refugees with access to their local labour markets or agricultural land. States worry that competition between refugees and their own citizens for gainful employment may result in social tensions, and are furthermore concerned that the provision of stable employment will decrease the likelihood that refugees will return home¹⁰⁴. With a few exceptions, refugee access to labour markets is therefore “mediated by political and economic considerations”¹⁰⁵, and rarely provided with the clarity envisaged in the 1951 Convention. As a result, refugees have traditionally been highly dependent on handouts for their survival.

However, handouts are often an expense so large as to be unsustainable over prolonged periods of time. Developed and developing countries have therefore found several ways to minimize costs – and by extension refugee services as well. Developed nations have managed to minimize the impact of these costs by reorienting development aid from international projects to cover costs associated made while supporting domestic refugee burdens. For example, the Organisation for Economic Cooperation and Development (OECD) noted that its member states had in 2016 spent 10.8% of their official development aid budgets to support refugee care costs at home¹⁰⁶.

Developing countries do not have the capacity to support refugees, and given their budgetary dependence on international aid obviously also suffer from reductions in the availability of OECD development aid budgets. Until the mid-2000s, limited financial support therefore led many developing states to often ‘warehouse’ refugees in confined camps and settlements in desolate areas in order to minimize costs and the risk of social tensions between refugees and host populations. Warehousing is a practice in which refugees are held in camps “in

¹⁰³ Crisp (2003b), p. 5-6

¹⁰⁴ Smith, M. (2004). *Warehousing Refugees: A Denial of Rights, a Waste of Humanity*, World Refugee Survey. Washington, D.C.: US Committee for Refugees. p. 53

¹⁰⁵ ILO (2016). *The access of refugees and other forcibly displaced persons to the labour market*. Geneva: ILO. As found online at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/meetingdocument/wcms_490753.pdf

¹⁰⁶ OECD (2016). *Development aid rises again in 2016 but flows to poorest countries dip*. As found online at: <http://www.oecd.org/dac/development-aid-rises-again-in-2016-but-flows-to-poorest-countries-dip.htm>; also see: The Guardian (2016). *Hosting refugees now uses 9% of foreign aid budgets*. As found online at: <https://www.theguardian.com/global-development/2016/apr/13/aid-budgets-hosting-refugees-oecd-figures>

protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention”¹⁰⁷. The practice, which grew as the number of protracted refugee situations grew from the late 1970s onwards, resulted in absolute despair amongst refugees who were forced to remain idle and were completely dependent on international aid. Nonetheless, development agencies supported the development of such camps, concerned that refugees might struggle to otherwise survive given the legal obstacles to their earning a livelihood¹⁰⁸. For much of the late 1980s and 1990s, warehousing therefore became the *de facto* fourth durable solution for protracted refugee crisis. By the early 2000s, the majority of recognized refugees then under UNHCR care (7 of 12 million total) had languished in refugee camps for over a decade - essentially imprisoned in an oft-terribly unfriendly natural and social environment with no prospect for economic integration or development.

The abject living circumstances mobilized considerable pushback against warehousing practices by the early 2000s, but did not inspire additional refugee funding from asylum-evading countries. Instead, an ‘anti-warehousing’ campaign succeed in changing the focus of refugee management from refugee care to self-reliance¹⁰⁹, and by extension away from camps towards urban refugee support. Because of the campaign, UNHCR’s policy towards urban refugees made a 180-degree turn between 1997 and 2014: from effectively attempting to keep refugees in camps¹¹⁰, to the promotion of urban refugee status through an ‘alternative to camps’ policy¹¹¹.

Yet even where this anti-warehousing campaign proved successful, reducing camp sizes and encouraging refugees to instead settle with host populations, other restrictions have remained in place. Refugees are still commonly forbidden from working, even though the money they

¹⁰⁷ Smith (2004), p. 38

¹⁰⁸ Smith (2004), p. 44

¹⁰⁹ Crisp (2003b). *UNHCR, refugee livelihoods and self-reliance: a brief history*. As found online at: <http://www.unhcr.org/research/eval/3f978a894/unhcr-refugee-livelihoods-self-reliance-brief-history.html>; also see: UNHCR (2006). *Self-Reliance Handbook*. As found online at: <http://www.unhcr.org/44bf3e252.html>

¹¹⁰ Human Rights Watch (2002). *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala*. As found online at: <https://www.hrw.org/reports/2002/kenyugan/>

¹¹¹ UNHCR (2014). *Alternative to Camps Policy*. Geneva: UNHCR. As found online at: <http://www.unhcr.org/protection/statelessness/5422b8f09/unhcr-policy-alternatives-camps.html>; for a broader discussion on how this evolution occurred, also see: Crisp, J. (2015). *Finding Space for Protection: An Inside Account of the Evolution of UNHCR’s Urban Refugee Policy*. *Canada’s Journal on Refugees* Vol 33(1). As found online at: <http://refuge-journals.yorku.ca/index.php/refuge/article/view/40451>

receive from UNHCR is too little to survive. Children are often barred from attending public schools, and as a result regularly work as child laborers to keep their families afloat¹¹².

Urban refugee strategies in developing countries are therefore not necessarily an improvement: refugees without rights, foremost among them the right to work, remain particularly susceptible to abuse, extortion, and absolute poverty irrespective whether they live in camps or cities. In addition, urban refugee strategies face a peculiar problem which refugees do not face in camps: refugee suffering becomes a whole lot less visible in urban settings, and it becomes quite easy for the problems of refugees to be drowned out amidst the astounding misery present in urban slums throughout the developing world. In other words, it offers a way for states to regime-shift refugees into the development regime.

Given the importance of media exposure to refugee burdens to push financial support from the international community, an urban refugee strategy can therefore potentially be self-defeating for refugee rights: refugees are hidden in cities where they are expected to make a living at the same time as they are forbidden from working, are subject to abuse and discrimination, and often lack full recourse to legal officials.

However, a regime-shift of refugees from the refugee regime into the wider development aid regime offers major opportunities for all states to spend less money and attention on refugees. In addition, the ‘disappearance’ of refugees into major urban conglomerations offers new means for states ‘encourage’ refugee onward migration.

b. ‘Encouraging’ Repatriation and Onward Migration

There is significant evidence that states at times do forcibly repatriate refugees. Indeed, the widely-supported notion that states can encourage or force refugees to return to the countries from which they fled is the reason the principle of *non-refoulement* was included in the original Refugee Convention in the first place..

While it has historically been suggested that proper burden-sharing arrangements can uphold the refugee regime by preventing forcible repatriation of refugees, Suhrke (1998) already

¹¹² Terres des Hommes (2016). *Because we Struggle to Survive*. As found online at: <http://www.terredeshommes.org/because-we-struggle-to-survive/>;

notes that the relationship between burden-sharing and refoulement shaky¹¹³. Of course, states can forcibly repatriate refugees because of a lack of burden-sharing arrangements, but in multiple other cases – for example during the mid-1990s Great Lakes crisis - more immediate pressures and interests not related to the refugee regime have offered a better explanation why states opted to refoul refugee populations.

Of course, refouling a refugee population is a drastic measure, and states with major refugee populations have developed at least three strategies to ‘encourage’ the voluntary return home of refugees focused on psychological instead of physical force: offering financial incentives, impoverishing asylum conditions, and the aforementioned attempts to regime-shift refugees into the humanitarian regime.

The most prominent incentives for *voluntary* return home have ranged from informing refugees about the situation in the country of origin, to offering financial incentives to asylum-seekers to return home. These tactics take advantage of the *relative* nature of the terms ‘force’ and ‘voluntary’ by seeking to make return as attractive as possible even when life in refugee-producing countries is less than stellar. Germany is one country which prominently incentivizes return, having offered free plane tickets and grants of up to several thousands euros to asylum-seekers who agree to return home¹¹⁴. While such programs have had some success, they may unintentionally also make a country more attractive for newly arriving irregular migrants primarily seeking to reach a developed nation to make a living.

More common and controversially, refugee-hosting countries have sought to ‘encourage’ asylum-seekers to ‘choose’ to return home by making asylum procedures and facilities as uncomfortable as possible. For example, Whitaker (2008) describes how the Tanzanian government in the early 2000s imposed restrictions and ration cuts on Burundian refugees when donor states reduced their funding. This successfully caused the ‘spontaneous’ repatriation of over 30,000 Burundian refugees, who noted that living in Burundian

¹¹³ Suhrke (1998), p. 398

¹¹⁴ Washington Post (2016). *Germany learns how to send back Migrants: Pay them*. As found online at: https://www.washingtonpost.com/world/europe/germany-learns-how-to-send-back-migrants--pay-them/2016/03/19/0685dc96-e552-11e5-a9ce-681055c7a05f_story.html?utm_term=.873fe0ab74fb
The Independent (2016). *Germany offers asylum seekers up to €1,200 each to voluntarily return to their home countries*. As found online at: <http://www.independent.co.uk/news/world/europe/germany-offer-asylum-seekers-1200-euros-voluntarily-return-home-countries-refugees-crisis-merkel-a7561701.html>

persecution was better than in Tanzanian asylum¹¹⁵. More extreme forms of warehousing have a similar aim, for example in Hungary, where refugees are being housed in containers, ostensibly because they are a terrorist threat¹¹⁶.

Third, developing and developed states have sought to bypass the refugee regime *non-refoulement* clause by regime-shifting refugees into the humanitarian regimes through the creation of safe zones to which refugees can be ‘encouraged’ to return. While asylum-evading states establish safe to discourage the outflow of new refugees, refugee-hosting states turn this logic around by pushing for safe zones in order to return home refugees who are already on their territory. In the past decade, Turkey and Lebanon have issued calls to establish safe zones in Syria¹¹⁷, while the Kenyan government has (so far unsuccessfully) explored the possibility of establishing safe zones in Somalia to encourage the return of refugees¹¹⁸.

c. States that Leverage Onward Refugee Movement: It’s rather common

If refugees can be ‘encouraged’ to repatriate themselves, they can also be directed *onwards* towards third countries. States have at least two incentives to tolerate or facilitate onward migration. First, the absence of institutional burden-sharing mechanisms in the refugee regime offers states an opportunity to reduce their asylum burden by passing on costs associated with asylum identification and refugee care. So long as no ‘safe country’ agreements have been signed, refugees who leave a country are no longer its immediate concern. Second, if other states object to the onward migration of refugees, the bargaining power of the states tolerating onward migration flows in fact increases as these flows are incredibly difficult to halt other than by provoking the collapse of the entire refugee regime. Given the limited ability of states to halt irregular migration flows unilaterally, they must depend on – and therefore buy - the cooperation of the state facilitating the onward migration¹¹⁹.

¹¹⁵ Whitaker (2008), p. 247-8

¹¹⁶ The Guardian (2017). *Hungary to detain all asylum seekers in container camps*. As found online at: <https://www.theguardian.com/world/2017/mar/07/-hungary-to-detain-all-asylum-seekers-in-container-camps>

¹¹⁷ Reuters (2012). *Turkey to keep pushing for UN-backed Syria safe zones*. As found online at: <http://www.reuters.com/article/us-syria-crisis-zones-idUSBRE87U0VY20120831>

Reuters (2017). *Lebanese president calls for safe zones in Syria for refugees*. As found online at: <http://www.reuters.com/article/us-mideast-crisis-syria-aoun-idUSKBN1511WQ>

¹¹⁸ Human Rights Watch (2012). *Kenya: Somalia Unsafe for Refugees to Return*. As found online at: <https://www.hrw.org/news/2012/03/30/kenya-somalia-unsafe-refugees-return>

¹¹⁹ Greenhill (2010), p. 30-1

Yet, unlike the ‘race to the bottom’ in quality of asylum care in developed countries, the idea that states tolerate and even facilitate onward mixed migration flows remains somewhat controversial in the academic literature. In the still-limited international relations literature on the refugee regime, it is still too often assumed that developing states have only limited control over their borders, and therefore limited bargaining power in the international refugee system¹²⁰. In contrast, wider international relations literature has noted the practice with less controversy. For example, Myron Weiner (1983) already asserted that sending states in fact exercise far more control over their out-migrations than might seem to be the case at first sight, and can treat migration as a ‘national resource’ to be managed like any other¹²¹. Kelly Greenhill (2010) built on the idea of international migration as a ‘national resource’ to offer significant proof that many states do indeed regularly create and exploit of migration crises for political purposes. Evaluating migration politics in the period 1953-2006, she shows that states engineered migration crises at least 56 times to gain leverage over states both near and far, and with remarkable success¹²².

If Greenhill’s tally of over one case per year seems excessive, it is in fact likely to be an *under*representation of how often states have engaged in coercive migration attempts. Evidence for coercive migration is notoriously difficult to identify: on the one hand, states that have been successfully targeted in the past are often reluctant to advertise events which have transpired– even within their own foreign policy establishments. A state which admits that it was the victim of a blackmail attempt, or worse that central decision-makers *gave in* to a blackmail attempt, risks extensive scrutiny of its credibility and status in the domestic and international affairs. On the other hand, would-be coercers can issue their threats and demands in private. Those that do, often leave comparatively little written evidence of their actions¹²³.

Sending states can politically leverage migration flows in one of three ways: by generating migration flows, by escalating existing flows, or to leverage existing migration flows to their advantage with e.g. threats. The most aggressive states actively create or threaten to create

¹²⁰ Betts (2009), p. 36

¹²¹ Weiner, M. (1983). *International Emigration: A Political and Economic Assessment*, paper presented at the conference on Population Interactions between Poor and Rich Countries, Cambridge, Mass., October 6–7, 1983, quoted in Teitelbaum, M. *Immigration, Refugees, and Foreign Policy*. International Organization 38 (1984), p. 447.

¹²² Greenhill (2010), p. 16-7

¹²³ Greenhill (2010), p. 19

cross-border population movements and tie their actions to counterpart concessions to their negotiating demands. More commonly, states have simply co-opted small-scale migrant outflows into full-scale crises or have preferred to not play a direct role in the creation of migration crises but to tolerate and exploit crises created by others for their own gain¹²⁴.

Of course, facilitating irregular migration is not a science, and miscalculations can destabilize not only the target state but also the state of origin. The persons employed to ‘incentivize’ the onward migration by refugees or other migrants may be thugs or irregulars who lack discipline and whose objectives differ from those of central decision-makers. Migrants and refugees retain their autonomy to change their plans while traveling¹²⁵, making longer-distance migration manipulation more difficult.

However, these difficulties do not change the base fact that states can and do control refugee onward migration flows to a much greater extent than has been recognized in most previous research on refugee regime politics, and many state have reason to accept the risk. Migration engineering has proven an astonishingly successful technique for states to achieve their aims. For example, irrespective if their demands were economic, political or ethnic, states who engineered migration crises in the second half of the 20th century saw most all its demands satisfied 57% of the time. If we include partial successes, more than 70% of all measured engineered migration attempts resulted in a marked success for states who engineered migration flows¹²⁶. These figures are significantly higher than more widely established coercion attempts, including economic sanctions and hegemonic coercive diplomacy (both successful around 33% of the time)¹²⁷.

c. Beyond the Refugee Regime itself: Using Regime Complexity to Limit Access to Refugee Rights

Both states hosting refugees and states not hosting refugees therefore have access to – and at different times employ – a wide variety of tactics to minimize their exposure to and maximize the benefit of hosting refugees. However, state options do not end within the refugee regime.

¹²⁴ Greenhill (2010), p. 27

¹²⁵ Greenhill (2010), p. 36

¹²⁶ Greenhill 2010: 32

¹²⁷ idem.

These asylum-evasive vs. burden-reducing strategies aim to help states to maximize their advantage for the lack of burden-sharing in the refugee regime (observation 2 on p. 23 above). Given the zero-sum nature of this struggle (observation 4), states have also developed a desire to reduce access to the refugee regime altogether – taking advantage of the distinctly *international* nature of the refugee regime (observation 1).

There is a whole category of possible strategies which states might undertake to further limit unwanted refugee inflows – strategies which are of interest not based on the geographic location of the refugee but the geographic location of the *potential* refugee.

The basis of these strategies is a geographic limitation in the Refugee Convention. Only people who migrate outside their home state can apply for asylum. As refugee burdens have risen since the late 1970s, there have therefore been growing attempts by states to limit the need (and/or ability) of potential refugees to travel abroad to claim refugee status. The stakes, and potential consequences of have been anything but trivial. At the end of 2015, UNHCR counted a record 40.8 million persons forcibly displaced but still within the borders of their home state – known internally displaced persons (IDPs)¹²⁸. Many IDPs – who total are twice as many as the total refugee worldwide population today - are asylum-seekers in all but location: they have fled persecution in line with the Convention refugee definition, but they have not yet crossed outside their country of origin.

To limit the access of these (potential) refugees to their rights, states have sought to ‘regime-shift’ refugees into different regimes where they have much fewer rights. This tactic has become possible as a result of a peculiar feature that has appeared as the body of international law has grown over the past seventy years, known as regime complexity.

a. Using Regime Complexity to Free Ride Treaty Obligations

Even if states no longer agree with a treaty’s fundamental provisions, they often prefer to remain a party of the treaties to which they have signed up. However, remaining in a treaty is not the same as supporting all treaty provisions. Instead of withdrawal, a state may attempt to

¹²⁸ UNHCR (2015). *Global Trends Report*. As found online at: <http://www.unhcr.org/statistics/unherstats/576408cd7/unhcr-global-trends-2015.html> p.7

enhance its perceived interests by shifting the meaning of legal provisions in a regime. This process is known as regime-shifting, which results in so-called ‘regime complexity’.

As state interdependence has grown during the rapid globalization of the past half-century, so have the number of bilateral and multilateral treaties which they have signed. By the beginning of the 21st century, the UN registry counted more 40,000 international treaties amongst states, including almost 3,000 multilateral treaties¹²⁹. The growth of international treaties has also resulted in an increase in the number provisions with conflicting implications¹³⁰. Such conflicts between regime provisions – known as ‘international regime complexity’ - occur so-called in three types: ‘nested’, ‘partially overlapping’, and ‘parallel’ international regimes. Nested regimes are regimes embedded within larger regimes, for example when a smaller group of states desires different or deeper cooperation than the whole, and therefore create an additional agreement. Overlapping regimes exist where the content in two agreements touches on the same topic and the agreements are not mutually exclusive or subsidiary to another. This may occur when discussions on one topic give rise to discussions on a related topic, creating spillover across treaties. Parallel regimes are regimes which have no formal or direct substantive overlap. Nonetheless, they can be used to create “strategic ambiguity” about how to interpret any single agreement, or create redundancies that allow for continued cooperation should any single agreement fail¹³¹.

Conflicting legal provisions are not all too unique – they also regularly occur in national legislation. Yet their impact is much greater on the international than on the domestic level. To resolve conflicting legal provisions on the domestic level, states have established processes of judicial review and parliaments may pass bills to reconcile such conflicts. In contrast, the international state system is without sovereign (i.e. anarchic) and most international treaties lack a clear arbiter to resolve disputes amongst participating states. Regimes are not normally hierarchically ordered, and there is no default process to order them. This lack of clear final arbiter to distinguish and clarify contradicting provisions in different regimes threatens the “fragmentation” of international law: it reduces the clarity of a legal obligation by introducing overlapping sets of legal rules and jurisdictions¹³².

¹²⁹ Peters, A. (2005). *The Growth of International Law between Globalization and the Great Power*. Austrian Review of International and European Law Online. Vol. 8(1). Pp. 109-139

¹³⁰ Alter and Meunier (2009), p. 13

¹³¹ Alter and Meunier (2009), p. 14

¹³² Alter and Meunier (2009), p. 16

Without a sovereign to uphold and enforce international law, the international legal system becomes a “chessboard”¹³³ whereon states can attempt to make changes in any one regime in order to influence the legal interpretations of other regimes. Such rearrangements occur regularly, both intentionally and accidentally, and are an important part of international regime politics.

The final ratification of an international agreement turns the incentives present during international negotiations on its head. While domestic constituencies do not lose their power over central decision-makers, and at times do change their mind, treaty ratification now leaves the other participating states with a binary reaction to state disagreement: to stick with the deal, or to reduce participation. They are unlikely to completely withdraw from the regime given the previously discussed negative effects associated with such a drastic action.

Given the continuing strength of domestic power-brokers, central decision-makers will maneuver in international politics with the goal of enhancing their domestic standing, and in so far as possible pursue their own conception of the national interest in the international context¹³⁴; i.e. to move an international agreement closer to domestic wishes without the regime fully collapsing. There will almost certainly be a desire for such maneuvering, given that the varied – and at times competing - preferences expressed by domestic power-brokers during the negotiations¹³⁵.

To minimize the blowback and justify their political maneuvering, central decision-makers can reduce perceived negative consequences of regime participation through targeted international regime complexity. Regime complexity is an attempt to reinforce the advantage of a participating states without erasing the gains offered by the regime itself, and is meant to a subtle, stretched-out process.

Alter and Meunier (2009) identify three ways in which states can use regime complexity and international law fragmentation to promote their interests: forum-shopping, regime-shifting,

¹³³ Alter, K.J. and Meunier, S. (2010) *The Politics of International Regime Complexity*. Perspectives on Politics, Vol. 7(1), pp. 13-24, p. 16

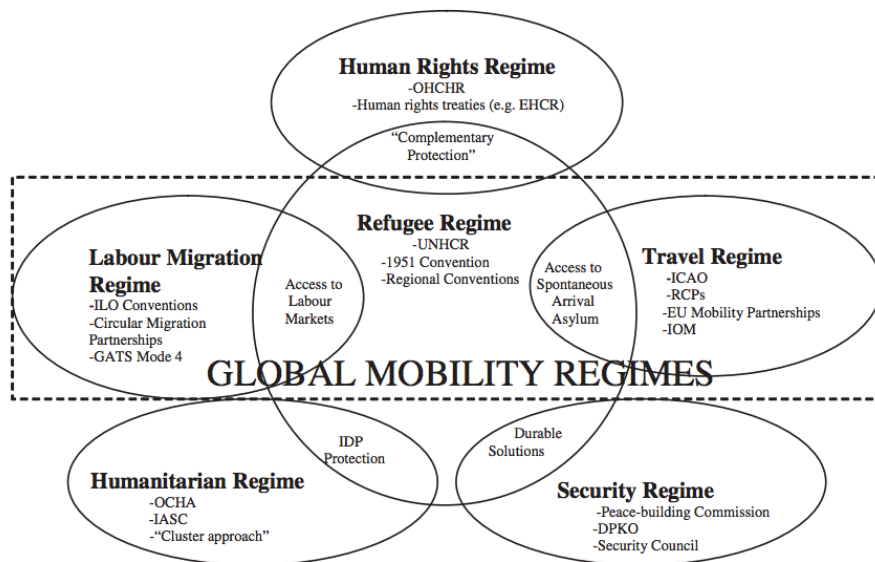
¹³⁴ Putnam (1988), p. 457

¹³⁵ Putnam (1988), p. 445-6

and strategic inconsistency. Forum shopping occurs when states select their preferred venue or regime based on where they are best able to promote specific policy preferences, with the goal of eliciting a decision that favors their interests. Regime shifting goes a step further, and is political action with the aim of reshaping the global interpretation of rules. Finally, strategic inconsistency occurs when contradictory rules are created in one parallel regime with the intention of undermining another regime.

b. Complexity in the Refugee Regime:

Research on the influence of regime complexity on the refugee regime has remained limited to a very few articles. Alexander Betts (2010) describes how regime complexity explains why the refugee regime became entangled with at least five other regimes. Within the typology laid out by Alter and Meunier (2009), these regimes can be classified as *partially overlapping* regimes. Institutionally speaking, the incomplete refugee regime has therefore become something of an incomplete “refugee regime complex”¹³⁶, and while states have retained the same interest they had before in the refugee regime – namely to minimize their overall burdens – their strategies are not limited to the refugee regime but involve regime-shifting between these five regimes.



The refugee regime complex. The above diagram illustrates the main actors and institutions in the global refugee regime and how the regime exists in parallel to, and partly overlaps with, other mobility and non-mobility regimes. Source: Betts (2010), p. 22

¹³⁶ idem.

The refugee regime complex offers states the ability to deter or reclassify refugees and potential refugees in order to minimize their refugee burden. States do indeed forum-shop, regime-shift, and at times even create strategic inconsistency to advance their strategic interests on the international level.

c. Limiting Access by Regime-shifting Refugees into the Humanitarian Regime: IDPs, the Internal Flight Alternative, and ‘Safe Zones’

Regime complexity has been used as a tool to legitimize burden-reducing strategies (for example in the form of complementary protection) and asylum-evading strategies (in the form of the securitized travel regime, which limits spontaneous asylum arrival). However, of special interest to limiting refugee access to the refugee regime has been the rise of regime-shifting tactics towards the humanitarian and security regime.

Three related developments have made this limitation of refugee access to the refugee regime possible: the development of a protection framework for ‘internally displaced persons’, limitations on refugee access for persons who have an ‘internal flight alternative’, and a push for the international community to intervene and created ‘safe zones’ where no internal flight alternatives exist.

i. The Rise of ‘Internally Displaced Persons’:

The rapid rise of concepts like ‘internally displaced persons’, ‘internal flight alternative’, and ‘safe zones’ is not incidental. Their formulation in the mid-1980s came as states of all stripes and types placed enormous pressure on UNHCR to find new durable solutions which would be politically more feasible than the ‘local integration’ or ‘resettlement’ of millions of refugees. With two out of the three durable solutions considered off-limits, UNHCR was left with a straightforward challenge on how to stabilize refugee-producing countries enough so as to justify a return of refugees to their countries of origin. The identification of IDPs, internal flight alternatives and ‘safe zones’ helped achieve this goal, and in the process offered room to regime-shift (potential) refugees into the humanitarian regime.

As the number of irregular migrants and refugees grew in the 1980s, awareness also spread that millions of ‘internally displaced’ persons were the refugees of the future in everything

except location¹³⁷. The breakdown of burden-sharing negotiations and growing mixed migration flows fueled growing concern with IDPs as potential future refugees. Information-gathering was increased (the first statistics on IDPs were recorded in 1989), and more IDP research performed by academics and practitioners in the course of the 1990s (cf. Davies 1998; Lee 1996, Deng and Cohen 1998). In 1992, the United Nations Secretary General set up a Special Representative for IDPs, who coordinated the drafting and development of ‘Guiding Principles on Internal Displacement’. The Guiding Principles, finally published in 1998, offered the first standard definition of IDPs, defining them as:

“Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular because of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”¹³⁸

Critically, this definition of the Guiding Principles was proclaimed a descriptive definition only, i.e. not a legal definition. The IDP definition describes the factual situation of a person being displaced within their country of habitual residence but is not a legal category which offers IDPs special rights beyond the standard human rights already accorded by the standard human rights treaties. Walter Kalin defended this arrangement, arguing that the application of additional legal rights would not be necessary because IDPs continue to be able to rely on their host state, while refugees are outside their own state and, unable to enjoy its protection, require a special legal status¹³⁹. Of course, this description ignores the practical needs of many IDPs and despite much controversy, the UN Inter-Agency Standing Committee (IASC) in 2005 developed an institutional framework for IDP protection within the humanitarian framework.

The creation of a humanitarian framework for IDP protection has proven highly controversial. Those in favour have argued that a framework offers access to protection for a category of

¹³⁷ For a more comprehensive overview of IDP policy, see: Weiss, T. and Korn, D. (2007). *Internal Displacement: Conceptualization and its Consequences*. London, Routledge

¹³⁸ Deng, F. (1998). *The Guiding Principles on Displacement*. E/CN.4/1998/53/Add.1, February 11. New York: United Nations

¹³⁹ Kälın, W. *Guiding Principles on Internal Displacement: Annotations*. Studies in Transnational Legal Policy, No. 32. Washington, D.C.: American Society of International Law and the Brookings Institution Project on Internal Displacement. p. 2; as referenced in Mooney, E. (2005). The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern. *Refugee Survey Quarterly*, Vol. 24(3), p. 9

people who previously lacked sufficient protection. Critics have countered that the IDP protection framework might serve as a “migration control agenda”¹⁴⁰. For example, Black (2001) describes the IDP literature as an example of a literature co-opted by organisations with “particular political or bureaucratic interests”¹⁴¹. Dubernet (2001) argued that displaced persons command global attention when they threaten to overrun borders exactly because states want to prevent them from doing so, and that the notion that states might support IDPs out of the goodness of their heart is dispelled by the “indifference displayed in the early days of [a refugee] crisis”¹⁴²

Within this discussion, the growing number of internally displaced persons (growing from 4.2 million persons in 1992 to 37.5 million persons in 2015¹⁴³) can be attributed to at least four possible factors: there are simply growing numbers of IDPs as more crises affect more people; the registration of IDPs has improved; IDPs are being better cared for at home, reducing their incentive to become refugees; or external attempts at containing IDPs in their home country are proving effective and have so reduced the pressure on the refugee regime. It remains unclear what the role (if any) is of each of these four factors in the rapid growth in IDP numbers.

ii. Internal Flight Alternative:

The development of the IDP principle occurred as states started to apply greater scrutiny of asylum applications in search of what would become known as the ‘internal flight alternative’ (IFA). The IFA test examines if a person might not be safe in part of their home country even if they are indeed at risk of persecution in their home city or region. If relocation to a safe region within the home country is possible, this is considered reason enough for a person to not receive international protection¹⁴⁴.

¹⁴⁰ Betts (2010), p. 22-3

¹⁴¹ Black, R. (2001), *Fifty Years of Refugee Studies: From Theory to Policy*. International Migration Review. Vol. 35(1). pp. 57–78, p. 65

¹⁴² Dubernet, C. (2001). *The International Containment of Displaced Persons: Humanitarian Spaces without Exit*. Aldershot: Ashgate. p. 76

¹⁴³ UNHCR (2015). *Global Trends Report*.

¹⁴⁴ Hathaway and Foster (2003). *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination*. In Feller, E. (ed.) (2003). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press. pp. 357-417 p. 358.

The precise origins of the IFA test are unclear, although most sources trace the test back to paragraph 91 of the 1979 UNHCR Handbook. The Handbook only articulates the IFA as a negative, stating that: “a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so”¹⁴⁵. In practice, the internal flight alternative concept was not part of policy or the academic debate until the 1980s, when the rise in asylum applications pushed states to look for inventive means to reduce incoming refugee flows. Hathaway and Foster (2003) trace the first IFA jurisprudence to a ruling by the 1983-4 German Higher Administrative Court, which established that a person could be denied refugee status if they could relocate to an alternative safe region in their country of origin. That ruling did not include the retrospective notion mentioned in the Handbook that persons can still receive refugee status if they could not reasonably have reached that safety without fleeing abroad.

Throughout the 1990s, court support for the IFA encouraged a significant increase in the number of asylum rejections on IFA grounds¹⁴⁶. Some of the rise could be attributed to the growing number of persons seeking asylum from regionalized threats (including internal armed conflicts) rather than monolithic aggressor states¹⁴⁷. However, given the lack of rights associated with IDP status, the IFA principle became one way for states to regime-shift potential refugees from the refugee into the humanitarian regime¹⁴⁸.

Both court analyses and UNHCR analyses of the IFA concept have evolved over time. By the end of the century, UNHCR endorsed the IFA with the argument that the existence of an internal flight alternative could be used as proof that the Refugee Convention’s ‘well-founded fear’ criterion was not met¹⁴⁹. The academic reaction to the IFA test was split. Multiple authors argued that the 1951 Refugee Convention implied the value of the IFA test in the formulation of the refugee definition, even if it did not state the IFA test outright. A person would need international protection if it could not rely on the protection of its own state – or as Shacknove (1985) put it: “refugees are, in essence, persons whose basic needs are unprotected by their country of origin, *who have no remaining recourse other than to seek*

¹⁴⁵ Hathaway and Foster (2003), p. 361

¹⁴⁶ Hathaway and Foster (2003), p. 362

¹⁴⁷ Hathaway and Foster (2003), p. 360

¹⁴⁸ Betts (2010), p. 22-3

¹⁴⁹ Hathaway and Foster (2003), p. 364

international restitution of their needs, and who are so situated that international assistance is possible” (emphasis added)¹⁵⁰. In opposition, multiple authors that argued that refugee status could not be lawfully denied simply because the asylum seeker ought first to have attempted to flee within their own state¹⁵¹.

iii. Safe Zones:

It is, conceptually speaking, a small step from discussions on ‘internal flight alternatives’ towards the creation of safe zones in places where no natural internal flight alternatives can be found¹⁵².

Safe zones have traditionally referred to a different concept: locations within a disputed country or territory that are neutral or free of belligerent activity, and with secure access for humanitarian relief¹⁵³. These types of safe zones are centuries old, and through mediation by the International Committee of the Red Cross (ICRC) have become part of codified humanitarian law: the first mention of safe zones in international law occurs in the 1949 Geneva Conventions, with further provisions described in the Additional Geneva Convention Protocol I of 1977¹⁵⁴. Despite their long legal history, very few safe zones in line with the ICRC definition have been established because the demands for their creation are very high. ICRC safe zones require the consent of all warring parties – who are often loathe to put humanitarian priorities above their strategic priorities. Between 1930 and 1980, less than a dozen such safe zones were actually established¹⁵⁵.

Yet from the early 1990s onwards, the nature of safe zones changed. Global and regional powers attempted to enforce ‘safe zones’ in developing world conflicts without requesting consent from those who were party to the conflict. The evolution was driven by the changing strategic nature of civil wars and the changing global balance of power. From the late 1980s onwards, attempts at ethnic cleansing had become a tool of war in internal conflicts in Iraq,

¹⁵⁰ Shacknove, A.E. (1985). *Who is a Refugee?* Ethics, Vol. 95(2), pp. 274-284. As referenced in Story, H. (1998). *The Internal Flight Alternative Test: The Jurisprudence Re-examined*. International Journal of Refugee Law. Vol. 10(3). pp. 499-532. p. 500

¹⁵¹ Hathaway and Foster (2003), p. 359

¹⁵² Landgren, K. (1995). *Safety Zones and International Protection: A Dark Grey Area*. International Journal of Refugee Law. Vol. 7(3), pp. 436-458; Frelick, B. (1993), *Preventing Refugee Flows: Protection or Peril*. World Refugee Survey, p. 10

¹⁵³ Landgren, K. (1995), p. 438

¹⁵⁴ Landgren, K. (1995), p. 438-40

¹⁵⁵ Sandoz, Y. (1995) *The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin*, ICRC: Geneva.

Bosnia and Rwanda, reflecting the longer-term trend in the evolution of war itself: at the beginning of the 20th century, 90% of all war casualties had been military personnel; by its end, 90% of all casualties were civilians¹⁵⁶. A continued inability of great powers to push conflicting parties towards peaceful resolution of their disagreements incentivized a search for alternative means to protect local populations. However, the idea of imposing safe zones only became politically feasible when the bipolar Cold War world order gave way to unipolar American hegemony. Where great power intervention had often resulted in a great power proxy war during the Cold War, United States (or U.S.-backed) interventions now had no need to fear such pushback. Humanitarian intervention offered a way to protect local populations. Obviously, this meant that safe zone would no longer have an exclusively civilian and demilitarized character¹⁵⁷.

Imposed safe zones also served important secondary political objectives of interested states. Safe zones imposed externally can promote political aims under a humanitarian cloak¹⁵⁸. This happened, for example, when the West established a safe zone in Kurdistan in 1991 (which weakened Saddam Hussein) and repeated this feat under UN Security Council-sanctioned 2011 intervention in Libya (which dealt a fatal blow to Khaddafi). Most of all, imposed safe zones are logical culmination of attempts to contain refugees inside their own country¹⁵⁹. Imposed safe zones are a logical solution to three impassible features of the refugee regime: the chronic inability to resolve crises in refugee-producing countries, the desire to reduce pressure on the refugee regime, and the right to return rejected asylum-seekers to internal flight alternative locations in their home country.

Both developed and developing nations have therefore argued for the use of safe zones to 'protect' refugees in their countries of origin. Ever since Thailand suggested to study the use of safety zones for refugees or displaced persons as a way of lessening the burden for the international community in 1985¹⁶⁰, examples of such practices abound: the European powers justified the creation of safe zones in Yugoslavia in the mid-1990s as a means to protect internally displaced persons. Turkey has forcefully argued for safe zones in Iraq (1991, 2003) and Syria (2012-present). East African governments have also pushed for safe zones,

¹⁵⁶ Landgren, K. (1995), p. 437

¹⁵⁷ Landgren, K. (1995), p. 441-2

¹⁵⁸ Landgren, K. (1995), p. 443

¹⁵⁹ Landgren, K. (1995), p. 456-7

¹⁶⁰ Asian-African Legal Consultative Committee (1994), *Establishment of 'Safety Zones' for the Displaced Persons in the Country of Origin (discussion paper)*. New Delhi: The AALCC Secretariat. p.1

including Tanzania when discussing the Great Lakes crisis in the mid-2000s¹⁶¹, and Kenya as a solution to the Somalia refugee crises¹⁶².

Yet the imposition of safe zones outside the parameters described by the ICRC has also proven a devilishly difficult exercise. Multiple attempts to impose safe zones have resulted in traumatic experiences – including during the Yugoslav Wars (notably at Srebrenica), but later also in Sri Lanka (2009), and the Central African Republic (2014) have pushed a growing resistance to the idea amongst academics in the past two decades¹⁶³. Landgren (1995) already argued for a return to the ICRC definition of negotiated safe zones, emphasizing that:

“The most basic of all refugee rights is the right to seek and be granted safety from persecution...International protection of refugees encompasses more than bare 'safety'. Safety, however, is the starting point, and the international community has been cavalier with regard to the nature and duration of safety in some of the safe areas it has created”¹⁶⁴

D. Burden-Sharing Politics in the Refugee Regime as a Zero-Sum Game

Regime complexity, asylum-evasive and burden-reducing strategies all share a primary interest in the geographic location of the (potential) refugee. They reflect that refugee regime politics take place where the geographic location of a (potential) refugee intersects with maneuvering by states to advance their perceived interests by participating in the refugee regime.

This political maneuvering through which states seek to gain an advantage is not driven by a specific geographic ('North-South') opposition but is better described using Alter and Munier's (2009) description of a political 'chess game'¹⁶⁵. As with a chess game, most of the institutional techniques to evade or reduce refugee burdens are equally available to all states.

¹⁶¹ Whitaker (2008), p. 245

¹⁶² Human Rights Watch (2012). *Kenya: Somalia Unsafe for Refugees to Return*. As found online at: <https://www.hrw.org/news/2012/03/30/kenya-somalia-unsafe-refugees-return>

¹⁶³ see e.g. Wolfe, F. (2017). *There are no real 'Safe Zones' and there Never Have Been*. Foreign Policy. <http://foreignpolicy.com/2017/03/30/there-are-no-real-safe-zones-and-there-never-have-been-syria-iraq-bosnia-rwanda/>

¹⁶⁴ Landgren, K. (1995), p. 438

¹⁶⁵ Alter and Munier (2009), p. 16

In fact, typically ‘Northern’ countries have nearly all used burden-reducing tactics, while many developing states have at varying times made use of the asylum-evasive tactics described above.

Burden-shifting in the refugee regime is zero-sum: short of durable solutions or obstacles preventing access to the refugee regime altogether, any reduction in the refugee population of one state will mean an increase in the refugee population of another state. Given the high social, political and financial stakes involved in refugee policies, strategies enacted by one state are therefore likely to evoke a response by other states. In other words, state refugee policy is not simply static or internal but also socially constructed in response to the actions of other states in the refugee regime.

Of course, economics and geography do play a role in the exact strategy which states use to evade asylum burdens and/or reduce their refugee burden. Economic prowess can offer a state some advantages, for example the ability to reorient development assistance from other countries to internal refugee-hosting processes. However, economic success can also put states at a disadvantage – for example by making it more difficult to convince refugees that onward migration would be more beneficial than staying in their receiving country. In addition, the political maneuvering of some states is constrained by additional limitations expressed in regional refugee law. For example, the strategy of rejecting refugee status based on the existence of an ‘internal flight alternative’ is of little use to countries which have signed the 1969 OAU Refugee Convention, as the OAU refugee definition explicitly covers all refugees – including when the disturbance for which they fled occurred “in either part or the whole country of origin or nationality”¹⁶⁶.

	Evading	Asylum Burden-Sharing	Reject Return	
Asylum- Evasive Countries	Cooperation			Refugee- Hosting Countries
	Reducing Financial Support		Ration Refugee Aid	
	Securitize Migration		‘Encourage’ Onward Migration	

¹⁶⁶ Hathaway and Foster (2003)

Shift Asylum-Seekers into the Humanitarian Regime

Table 1. Some of the respective asylum-evading and burden-reducing strategies available to states seeking to advance their interest in the refugee regime

Conclusion: From Bipolarity to Complexity to Collapse?

This thesis has argued that the politics of burden-sharing in the refugee regime is best explained by taking the geographic position of a (potential) refugee as its reference point. This argument differs from previous work, most notably that of Alexander Betts (2009; 2010a; 2010b), which took the geographic position of the state as reference point to explain burden-sharing politics in the refugee regime.

The shift from the reference point of the state to refugee has marked consequences in our analysis of refugee regime politics. It allows for a more flexible analysis of state *strategies* which are not fixed but have room to evolve. At the same time, it recognizes that states find themselves in a zero-sum game to evade refugee burdens: in a world where durable solutions have not kept up with the inflow of new asylum-seekers, every recognized refugee evaded by one state will become the responsibility of another state. With multiple available strategies but a shared goal of minimal refugee burdens, state maneuvering in the refugee regime therefore represents a zero-sum political game where the gain of one state is the loss of another state.

Theorising the refugee regime as a zero-sum game creates room for a much more thorough understanding of state maneuvering, including actions that did not line up with a 'North' vs. 'South' typology. For example, it makes better sense of the choice by many Eastern European states to employ typical burden-reducing techniques - including diminished service provision levels, high rejection rates, and 'encouraged' onward refugee movement - to reduce the number of asylum-seekers within their borders during the 2015-6 EU-Turkey refugee crisis.

A theorization of burden-sharing in the refugee regime as a zero-sum game does more than just contextualize state burden-sharing politics. It also re-emphasizes an altogether worrying weakening of state adherence to the refugee regime. As a strategy, prolonged regime complexity which has been visible over the past twenty years is like a chess player ignoring the rules of the game. Just like prolonged, determined undermining of established game rules will result in a cessation of any recreational game, so the prolonged use of regime complexity

result in regime weakening – a process defined by Krasner (1983) as follows:

“If the principles, norms, rules, and decision-making procedures of a regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then a regime has weakened.”¹⁶⁷

The more gradual nature of regime weakening as opposed to regime collapse may look different, but if pursued over a prolonged time is likely to have the same end-result: regime failure. The obfuscation of regime weakening through regime complexity makes it not unlikely for a formal regime to remain on the books even if the letter of its law is dead in practice. As such, its greatest use will be as a tool to justify other attempts at regime complexity, fueling further international law fragmentation.

It remains a question for further research how states can be incentivized to not undermine the refugee regime through regime complexity. While it is clear that some innovation is necessary in order to prevent the complete collapse of the refugee regime, it remains an unanswered question what regime might incentivize state cooperation instead of their detraction. However, refugee complexity amidst a refugee regime political ‘zero-sum game’ does offer one hint: any institutionalization of burden-sharing that does occur, will only work if the agreement is shaped to be highly flexible. As both Betts and Suhrke already suggested, a ‘routinized response’ plan is more likely to sustainably improve state cooperation in the refugee regime than a hard-wired explicit obligation for states to take up recognized refugees. Yet, irrespective of how such an adaptation of the current regime might look, one fact remains clear: it is better to have a flawed refugee regime than no asylum safety net at all.

¹⁶⁷ Krasner, S.D. (1983) *Structural Causes and Regime Consequences: Regimes as Intervening Variables*. In *International Regimes*, ed. by S. D. Krasner. Ithaca, NY: Cornell University Press. p. 189

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