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Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union

By Gregor Noll[*]

Introduction

In the ongoing debate on European refugee legislation, the metaphor of 'Fortress Europe' has been introduced to denote the exclusion of protection seekers from access to the territories of European States. The question whether or not this is a correct description of reality is beyond the scope of this text. The metaphor in itself, however, has some bearing on the arguments presented in the following.

Apart from keeping out an enemy, a fortress restricts the mobility of its defenders as well. In that respect, each fortress bears the potential of a prison. Translated to the language of law, this suggests that stipulating norms entails a risk of limiting future choices – not only for their addressee, but also for the legislator, provided the latter is interested in maintaining coherence within the corpus of norms.[1]

This text aims at exploring the relationship between a more equitable sharing of the responsibility for protection seekers[2] and the normative framework on refugees and immigration already existing in Europe. Hopefully, it will emerge in the following to what extent both are consistent with each other.

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[*] The author would like to thank *Johannes van der Klaauw, Jens Vedsted-Hansen,* the participants of the meeting on International Burden-sharing in Mass Flight Situations, and his colleagues at the Faculty of Law and the Raoul Wallenberg Institute for Human Rights and Humanitarian Law for valuable comments on earlier versions of this paper.

[1] Even if law can be changed in an appropriate forum, each change incurs costs that ultimately limit the rationality and feasibility of change.

[2] In spite of its prejudicial timbre, the term 'burden-sharing' will be used throughout the text. Better terminological alternatives have failed to gain entry into the language used by actors of international law.

I. A Brief Survey of Relevant Norms

The close linkage of human rights with humanitarian law and refugee law has been widely acknowledged.[3] Accordingly, a systematic analysis of the normative framework relevant for burden-sharing issues needs to go beyond the 1951 Refugee Convention.[4] Any reasoning on contemporary refugee law should look back to the instrument representing the foundation of the international human rights system. In 1948, the General Assembly of the United Nations approved the Universal Declaration of Human Rights,[5] pronouncing that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution" in Article 14. Just as the other civil, political, economical, social and cultural rights enshrined in the Universal Declaration, Article 14 must be viewed in the light of Article 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

This provision assigns States the duty of optimizing the international order to accommodate the exercise of human rights. By virtue of Article 28, the Universal Declaration can be seen as a starting point for the development of a comprehensive human rights regime. While the 1966 Covenants were designed to safeguard human rights under national jurisdictions, the 1951 Refugee Convention, the Convention relating to the Status of Stateless Persons,[6] and the Agreement relating to Refugee Seamen[7] were conceived as secondary means of human rights protection. Broadly speaking, their rationale was to safeguard human rights when the country of origin had failed to protect individuals under its jurisdiction.

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[3] *See, e.g., Göran Melander*, The Relationship between Human Rights, Humanitarian Law and Refugee Law, in: *Göran Rystad* (ed.), Encountering Strangers, 1997, 11, 32.

[4] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 [hereinafter 1951 Refugee Convention]. In the following, reference to the 1951 Refugee Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

[5] GA res. 217 A (III) of 10 December 1948 [hereinafter Universal Declaration]. Various opinions have been put forward as to the binding nature of this instrument. Some writers hold that the Universal Declaration in its totality has acquired the status of customary international law, while others hold that this might be said only of single rights enshrined in it. The latter view is held by *Oscar Schachter*, who holds that, among others, the individual right to leave and to return to one's country as well as the principle of *non-refoulement* for refugees threatened by persecution must be seen as norms of customary international law. Lack of space prohibits developing these arguments further. *See Oscar Schachter*, International Law in Theory and Practice, 1991, 335 *et seq.* A good compilation of doctrinal views on the topic of customary human rights law and the Universal Declaration can be found in *Henry J. Steiner/Philip Alston*, International Human Rights in Context, 1996, 132 *et seq.*

[6] Convention relating to the Status of Stateless Persons, 23 September 1954, 360 UNTS 117.

[7] Agreement relating to Refugee Seamen, 23 November 1957, 506 UNTS 125.

Fully in line with this layout, the 1951 Refugee Convention refers to the Universal Declaration in its preamble. It emanates clearly from the context that the Universal Declaration is regarded as the foundation for a human rights system both on a national and an international level. The Convention is one of the tools employed to let a special class of refugees benefit from the widest possible exercise of human rights.

> The High Contracting Parties,
>
> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms,
>
> Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement. . . .

While it is clear that each State is responsible for the protection of its citizens and persons otherwise under its jurisdiction, the responsibility for refugees is not as clearly attributable. Neither the Universal Declaration nor the 1951 Refugee Convention contains an individual legal claim vis-à-vis a receiving State to be granted asylum. However, as a result of Convention obligations and practical circumstances, such a State may find that it has no choice but to keep a refugee once he has set foot on its territory. To wit, the prohibition of *refoulement* contained in Article 33,[8] in addition to the unwillingness of third States to receive a certain refugee, amounts to a stalemate in which a refugee's stay on its soil has to be accepted by a State. As long as a State could not hermetically seal off its borders and as long as a redistribution scheme for the exoneration of heavily burdened States did not exist, one would have to live with an uneven distribution of refugees and asylum-seekers. The drafters of the 1951 Refugee Convention were very much aware of this. The preamble continues as follows:

> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,
>
> Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between States, . . .
>
> Have agreed as follows: . . . .

[8] "(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The "international cooperation" required for sharing the burden of refugees was, however, not the subject of the Convention. Nevertheless, the pressing need for regulation was clearly perceived. In the Final Act adopted by the 1951 United Nations conference of plenipotentiaries on the Status of Refugees and Stateless Persons, the topic of burden-sharing emanates once more:

> The Conference, . . .
>
> Recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.[9]

According to this document, continuing refugee reception and international co-ordination and cooperation to exonerate heavily burdened States are indispensable elements of a global protection order. A conjuration rather than a recommendation, these lines still appear to demarcate the state of the art with respect to burden-sharing.

In 1967, the need for an implementation of this insight persisted, as Article 2 (2) of the Declaration on Territorial Asylum reveals:

> Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.[10]

A similar wording, nonetheless conceived as a binding rule as part of a treaty instrument, can be found in Article 2 (4) of the 1969 OAU Refugee Convention:[11]

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

In Paragraph 5 of the same article, the linkage between a temporary reception, burden-sharing, and resettlement surfaces:

> Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

However, as the verb "may" indicates, the Contracting Parties avoided stipulating an individual right, which would have put a systemic pressure behind international burden-sharing efforts. It must be acknowledged that the implementation of these norms has not been a success.

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[9] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, 2 - 25 July 1951, section IV, D, UN Doc. A/Conf.2/108.

[10] GA res. 2312 (XXII) of 14 December 1967.

[11] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 14 UNTS 691 [hereinafter OAU Refugee Convention].

Apart from this regional pioneering effort to elaborate on the content of international cooperation in a binding manner, no corresponding clarity was attained on a universal level. The problem of sharing the burden flowing from persecution and flight was handled in practice with varying success. Burden-sharing was repeatedly alluded to in the Conclusions of the UNHCR Executive Committee. As widely acknowledged, these are not binding by themselves, but may provide argumentative support when determining customary law obligations.[12]

Suffice it here to cite recent Conclusions in order to reflect how the concept of burden-sharing is conceived by States participating in the Executive Committee.

The 1995 General Conclusion on International Protection[13] adopted by the Executive Committee of the UNHCR indicate that there is still a need for action:

> The Executive Committee, . . .
>
> (o) Calls on all States to manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways which reinforce their capacity to maintain generous asylum policies, through cooperation in conjunction with UNHCR to support the maintenance of agreed standards in respect of the rights of refugees; reiterates the critical importance of development and rehabilitation assistance in addressing some of the causes of refugee situations, as well as their solutions, including voluntary repatriation when deemed appropriate; and also in the context of development of prevention strategies.

In the 1996 General Conclusion on Protection,[14] burden-sharing and international solidarity figure as "principles." If there is to be any consistency in the terminology of EXCOM Conclusions, the drafters' intention must have been to express that burden-sharing is the object of a binding norm of international law.[15]

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[12] An effort to endow burden-sharing with the quality of an obligation under customary law is made *in J.-P. L. Fonteyne*, Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees, Australian Yearbook of International Law, vol. 8, 1983, 162, 175 *et seq.*. Apart from EXCOM Conclusions quoted *supra*, references to burden-sharing and international solidarity are made in the following Conclusions: No. 15 (XXX) 1979; No. 22 (XXXII) 1981; No. 52 (XXXIX) 1988; No. 61 (XLI) 1990; No. 67 (XLII) 1991; No. 68 (XLIII) 1992; No. 71 (XLIV) 1993; No. 74 (XLV) 1994.

[13] UNHCR EXCOM Conclusion No. 77 (XLVI) 1995.

[14] UNHCR EXCOM Conclusion No. 79 (XLVII) 1996.

[15] The prohibition of *refoulement* is generally regarded as a customary law norm. In EXCOM Conclusions, this norm is generally referred to as the principle of *non-refoulement*, whereas the term "principle" seems to refer to the fundamental nature and legally binding character of the norm. In this context, it must be reiterated that EXCOM Conclusions are not of a binding character. Nevertheless, the language of State representatives in EXCOM could be indicative of States' *opinio juris* regarding burden-sharing. However, even if one interprets these statements as manifestations of *opinio juris*, it would still prove difficult to trace a clear and consistent practice. State behaviour during the Bosnian conflict is indicative in this regard.

The Executive Committee . . .

(h) Recognizes that countries of asylum carry a heavy burden, including in particular developing countries with limited resources and those which, due to their location, host large numbers of refugees and asylum-seekers; reiterates in this regard its commitment to uphold the principles of international solidarity and burden-sharing and calls on governments and UNHCR to continue to respond to the assistance needs of refugees until durable solutions are found.

The 1996 Conclusion on Comprehensive and Regional Approaches within a Protection Framework[16] places *non-refoulement* and burden-sharing in a catalogue of elements constituting such approaches:

The Executive Committee . . .

(e) Encourages States, in coordination and cooperation with each other, and with international organizations, if applicable, to consider the adoption of protection-based comprehensive approaches to particular problems of displacement, and identifies, as the principal elements of such approaches: . . .

  (iii) respect for the institution of asylum, including the fundamental principle of non-refoulement, and ensuring international protection to all those who need it

  (iv) measures to reinforce international solidarity and burden-sharing.

In practice, burden-sharing remains a challenge with regard to both reception in the region and resettlement.[17] The 1995 Note on International Protection by the High Commissioner contains clear words on the absence of international solidarity in this respect:

> Over recent years, despite the broadening of State involvement with refugee issues, the lack of tangible international solidarity has remained an obstacle to the positive development of the international refugee protection regime. Successive Executive Committee Conclusions, endorsed by the General Assembly, have called for international solidarity and burden-sharing, enjoining all States to take an active part, in collaboration with UNHCR, in efforts to assist countries, in particular those with limited resources, that host large numbers of refugees and asylum-seekers. It remains the shared responsibility of the international community to support the capacity of host States to receive and protect refugees, including States lacking the necessary resources and those where domestic concerns, including anti-immigrant sentiment as well as social, economic, political and environmental concerns, militate against effective protection. Issues of national security are also increasingly relevant in this respect, particularly in regard to the political and related consequences of a prolonged stay of large groups of refugees.[18]

To conclude this section, it can be established that burden-sharing has been understood as a functional prerequisite for the observation of the norm prohibiting *refoule-*

[16] UNHCR EXCOM Conclusion No. 80 (XLVII) 1996.

[17] This can be inferred from experiences with comprehensive responses (CPA, CIREFCA and ICARA I/II).

[18] Executive Committee of the High Commissioner's Programme, Forty-sixth session, Note on International Protection, International Protection in Mass Influx (submitted by the High Commissioner), UN Doc. No. A/AC.96/850, 1 September 1995, para. 14.

ment,[19] the preservation of protection capacities, and access to territory of potential host States. As this prerequisite has been identified in an early stage of the development of the current protection regime, States have had ample opportunity to develop a normative framework securing burden-sharing. Hitherto, this has only been done in the African context. On a universal level, the regime will remain incomplete as long as this lacuna is not filled.[20]

II. Two Strategies

By means of the 1951 Refugee Convention, States have agreed on a definition, on a catalogue of differentiated individual rights, and on a basic protection rule, namely the prohibition of *refoulement*. Both the question of a right to access to protection and the question of cooperation in shouldering the burdens emanating from a global human rights protection remain unanswered.

The unwillingness to stipulate an individual entitlement to long-term protection is understandable in the absence of a situation where States can rest assured that a refugee flow will be distributed on an equitable basis in a certain region. Without equitable distribution, a State risks being punished for a liberal attitude towards refugee reception.

Two strategies are prone to make distribution more equitable. The first is to create equal conditions for refugees in all States affected. This would eliminate refugee preference for a certain State providing better treatment of refugees. However, it is a truism that harmonization can take two directions. States with less developed protection systems may adjust their legislation to meet the standards of States granting the refugee a stronger position. But the adjustment may as well take the opposite direc-

[19] *See Fonteyne* (note 12), 175. *Perluss/Hartman* argue that the international community chose not to mold burden-sharing into an obligatory form, as this would risk weakening rather than strengthening protection, providing front-line States with an excuse for *refoulement* if no assistance from less affected States would materialize. *Deborah Perluss/Joan F. Hartman*, Temporary Refuge: Emergence of a Customary Norm, Virginia Journal of International Law, vol. 26, 1986, 572, 588. For affirmation of the necessity of burden-sharing without taking position on its normative quality *see Joan Thoburn*, Transcending Boundaries: Temporary Protection and Burden-sharing in Europe, International Journal of Refugee Law, vol. 7, 1995, 459, 467 *et seq*.

[20] *But see*, *Fonteyne* (note 12), who argues that States are obligated to practice burden-sharing by customary law. His argument is based on Article 14 of the Universal Declaration; Articles 55 and 56 of the UN Charter, observations on the *opinio juris* of States as expressed in UNHCR EXCOM and UN bodies, and deductions from State practice. If one accepts this line of argument as valid, the problem remains that the resulting norm is a fairly abstract one. This inhibits its proper functioning as a stabilising factor in a real-world refugee crisis, as shown *infra* in section IV.

tion towards a minimum common denominator. During the 1990s, national policies in Europe have corresponded to such a spiral of restriction.[21]

Even with a harmonized legislation and refugee reception, differences between States remain. Geographic proximity to the region of crisis, the refugees' perception of the goal State as well as ethnic or family ties may produce situations in which single States will attract more refugees than others. Ultimately, the harmonization strategy gives no guarantees for an equitable distribution.

The second strategy is to enter into international agreements on the distribution or redistribution of protection-seekers along the lines of certain, pre-established rules. This form of burden-sharing is focused on the question of which country is going to receive a certain protection seeker on its territory.

While the harmonization strategy is founded on a liberal paradigm, inasmuch as it relies on the free interplay of forces, the burden-sharing strategy relies on a control paradigm.[22] Reallocation mechanisms deny refugees the choice of a goal country. This is true both for collective reallocation on the basis of a burden-sharing arrangement in situations of mass-influx and for individual reallocation based on agreements like the Schengen and Dublin Conventions.[23] Needless to say, augmented control is followed by augmented responsibility of those who exercise it on the behalf of others. From the protection seekers' point of view, a burden-sharing order may be perceived as legitimate, if it can assure at least the same level of protection as a liberal system.

Both strategies have been used in the European context. In the following section, more recent moves in this respect will be presented in greater detail.

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[21] A more recent example is the Joint Position Defined by the Council on the basis of Article K.3 of the treaty on European Union on the Harmonized application of the definition of the term "Refugee" in article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, adopted on 4 March 1996, Doc. No. 12105/95. The consensus on the notion of persecution by non-State agents mirrored in this Joint Position represents a minimum common denominator.

[22] At least in theory, burden-sharing and a liberal paradigm could be reconciled. One could imagine a system allowing protection seekers a free choice of host country. Countries experiencing an aggregation of protection seekers on their territory could be assisted financially by means of a common fund.

[23] Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen, 19 June 1990 [hereinafter Schengen Convention]; Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990 [hereinafter Dublin Convention]. *See infra*, section V.

III. European Solidarity: Beyond Cheap Talk?

The dismantling of the iron curtain and the violent dissolution of the Federal Republic of Yugoslavia were two issues of utmost importance for the migrational agenda of Western European States. The Balkan war had set off the largest refugee flow in Europe since the end of the Cold War. As a consequence, the number of asylum applications in European States participating in the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia reached an all-time high in 1992 with almost 700,000 cases.[24]

The European asylum infrastructures were allegedly not prepared to cope with the situation. The harmonization project pursued by Member States of the European Community after the coming about of the Single European Act[25] had not moved fast enough to provide the infrastructures on the regional level that could cope with the situation. This is not surprising, as the goal of the Member States was to create an area without internal borders rather than to launch a regional refugee regime. The latter would have required more comprehensive harmonization measures as well as new legislation.

Persons fleeing the conflict in former Yugoslavia were partly refugees in the sense of the 1951 Refugee Convention definition and partly humanitarian refugees trying to evade the threats of armed conflict. Before the conflict, the question of humanitarian refugees had not been addressed in any way by the harmonization policies pursued within the EU. Accordingly, the solutions chosen in single Member States differed – and still differ – to a considerable extent.

The largest populations of protection seekers from Bosnia were found in countries of Western Europe which were either geographically proximate or already hosting immigrant communities from former Yugoslavia. In descending order, per capita, Austria, Sweden, Germany and Switzerland[26] received most of these persons. In total numbers, Germany alone had accommodated 63 percent of all Bosnian refugees hosted by EU Member States. In relation to all Western European States, the German share is 58 percent.[27] This provides ample proof of the fact that no steering instruments existed to ensure equitable burden-sharing in Western Europe.

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[24] The statistics referred to here were reproduced in International Journal of Refugee Law, vol. 8, 485.

[25] For details, *see Elspeth Guild/Jan Niessen*, The Developing Immigration and Asylum Policies of the European Union, 1996.

[26] At the time, Austria and Sweden had not acquired membership of the European Union. Switzerland was not and is not a member of the European Union.

[27] Address by *Udo Heyder*, Federal Ministry of the Interior, Hohenheimer Tage des Ausländerrechts 1997, 31 January 1997.

Let us track the European discussion on burden-sharing triggered by the Balkan crisis. A first mention of burden-sharing was made during the International Meeting on Victims of the Humanitarian Crisis on 29 July 1992. In a common position taken by the European Community and its Member States,[28] it was held that a just and lasting solution "will not be assisted by movements of people outside the boundaries of the former Yugoslavia." The strategy envisaged was to contain the conflict as well as flight from the conflict area. Furthermore, the position holds that "the burden of financing relief activities should be shared more equitably by the international community." No allusion was made to a more equitable sharing of the responsibility for arriving refugees.

At the London meeting of the EU ministers responsible for immigration on 30 November and 1 December 1992, a Conclusion on People Displaced by the Conflict in the Former Yugoslavia was adopted.[29] Apart from a reference to the common position spelled out in Geneva, no mention of burden-sharing was made. However, the ministers undertook to respect certain guidelines. Two of them are of indirect relevance for our topic, as they seem to preserve an uncoordinated mechanism of protection seeking. These guidelines were worded in the following manner:

- flexible application of visa and entry controls,
- readiness to offer protection on a temporary basis to those nationals of the former Yugoslavia coming direct from combat zones who are within their borders, and who are unable to return to their homes as a direct result of the conflict and human rights abuses.[30]

Respect for the first guideline vanished already the following year. Most European States introduced visa requirements for the successor States of former Yugoslavia during 1993.

Paragraph 5 of the Conclusion refers to certain categories of vulnerable persons, which the Ministers are "in principle willing to admit temporarily on the basis of proposals made by UNHCR and the ICRC in accordance with national possibilities and in the context of co-ordinated action by all the Member States." In the same paragraph, ministers "call upon the Presidency, in cooperation with UNHCR, to negotiate with other States, to create the necessary conditions to enable these States also to be involved in the reception of nationals of the former Yugoslavia in the context of temporary admission arrangements."

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[28] Reiterated in Article 1 of the Conclusion on People Displaced by the Conflict in the Former Yugoslavia, Doc. No. 10518/92, 30 Nov./1 Dec. 1992.

[29] *Id.*

[30] *Id.*, para. 4.

The reference to national possibilities and the prerequisite of coordinated action by *all* the Member States are effective means of inhibiting the creation of a functioning distribution mechanism. Simultaneously, Member States were eager to involve Non-Member States. At the time being, Non-Member States as Austria, Sweden and Switzerland were already offering protection to a much larger extent than the majority of Member States did.

The willingness "in principle" did not correspond to willingness in practice. Immediately before the London meeting, the UNHCR and the ICRC had appealed to the international community to receive camp prisoners from former Yugoslavia. In spite of earlier promises, the international community reportedly provéd to be reluctant.[31]

The reception conditions of vulnerable persons were further elaborated, albeit in a vague, non-obliging language, in the Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia. This resolution was adopted during the Copenhagen meeting of the EU ministers responsible for immigration on 1 and 2 June 1993. Still, the focus was on containment and no mention was made of how to share the group of potential beneficiaries.

As an attempt to break the stalemate of vagueness and non-compliance, Sweden launched a proposal on burden-sharing in the autumn of 1993. According to the Swedish Undersecretary of State, the "strategy of giving support near the conflict areas may well be completely inadequate when the winter sets in."[32] Austria, Denmark, Germany, Norway, and Switzerland backed up the Swedish effort. Together, the six countries presented a draft resolution at the Fifth Conference of Ministers responsible for immigration affairs in Athens on 18 - 19 November 1993.[33]

It was stated in the draft that "a more equal distribution of the outflow caused by the present situation in former Yugoslavia would facilitate protection to be given to all those forced to leave their homes." Furthermore, the proposed text contained an appeal to all States of the world "to offer shelter and to host, on a more equitable basis, in particular displaced persons and war refugees from Bosnia and Hercegovina who cannot avail themselves of protection in the region." As the draft was resisted by

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[31] *Migration News Sheet,* European countries are reluctant to accept more refugees from the former Yugoslavia, November 1992, 5.

[32] *Migration News Sheet,* Sweden calls for burden-sharing of Bosnian refugees, November 1993, 5. Sweden had earlier sought to raise support for a more equitable distribution of Bosnians in need of protection, *inter alia* by means of the 'Scandinavian Initiative' proposing a quota system for the reception of vulnerable persons and persons having certain links to the Scandinavian countries. The Scandinavian Initiative did not lead to a concerted reception mechanism.

[33] *Migration News Sheet,* Member States refuse a proposal to assist Bosnian refugees on a more equitable basis, December 1993, 4. In contradistinction to the aforementioned meetings, this conference was arranged within the framework of the Council of Europe.

a number of States, among others France, the United Kingdom and the Netherlands, it was never put to a vote at the Athens meeting. However, the ministers agreed to ask the Vienna Group on East-West migration to study the draft "as a matter of urgency."[34]

Accordingly, the draft was discussed again at the Vienna Group plenary meeting in Strasbourg on 27-28 January 1994. Even at this forum, the idea of burden-sharing met firm resistance. According to the Swedish Immigration Minister, the United Kingdom had motivated its unwillingness to accommodate Bosnian refugees with its expenses emanating from military presence in Bosnia-Hercegovina.[35]

Earlier in the same month, the European Parliament had passed a Resolution on the General Principles of a European Refugee Policy, which underscored that all Member States share responsibility for a common refugee policy. Accordingly, "it should follow that the much heavier burden borne by some of them due to geographical or other reasons should be equally shared by all Member States."[36] In its operative part, the European Commission is urged to elaborate an emergency plan for refugee reception on the basis of an equitable distribution among the Member States.[37]

The 1994 Communication from the Commission to the Council on Immigration and Asylum Policies[38] (the so-called "Flynn paper") attempted to offer a more specific solution by proposing the "[d]evelopment of a monitoring system for absorption capacities and creation of a mechanism which would make it possible to support Member States who are willing to assist other Member States faced with mass influx situations; . . ."[39] According to the Communication, such a matching system would fall short of a formal burden-sharing arrangement, but would increase the probability of support between Member States in situations of 'absorption problems'.[40]

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[34] *Id.*

[35] *Migration News Sheet,* Idea of burden-sharing for Bosnian refugees is dead, February 1994, 4.

[36] Resolution on the General Principles of a European Refugee Policy, adopted 19 January 1994, Doc. No. A3-0402/93, Preamble, art. J.

[37] *Id.*, art. 16. Already in its 1992 Resolution on the Harmonization within the European Community of Asylum Law and Policies (adopted on 15 November 1992, Doc. No. A3-0337/92), the European Parliament had urged "that in the event of an influx of refugees, each Member State should take refugees in proportion to its capacity" (art. 19) and "that arrangements be made and formalized for Member States to come to the assistance of one Member State which is receiving a large number of refugees" (art. 21).

[38] European Commission, Communication from the Commission to the Council on Immigration and Asylum Policies, COM (94) 23 final, 23 February 1994.

[39] *Id.*, 42, para. 10.

[40] *Id.*, 26, paras. 98 and 99.

Within the European Union, burden-sharing continued to be an issue causing dissent on the intergovernmental level. The informal meeting of Ministers responsible for immigration in Salonika on 6 - 7 May 1994 gave further proof of the divide in interests between more affected States facing large inflows and other States.

Burden-sharing was declared to be one of the issues to be examined by the Council in 1994 according to the Priority work plan for that year. Accordingly, the German presidency presented an ambitious Draft Council Resolution on Burden-sharing with Regard to the Admission and Residence of Refugees[41] in July 1994. However, the Draft had difficulties in attracting the necessary support.

On 8 September 1994, the German Draft was discussed at an informal meeting in Berlin without signs of progress on the issue. Obviously, the detailed provisions setting out a distributive key (see infra) were causing controversy. Accordingly, the Draft was replaced by a less detailed proposal launched by France, which was discussed at the Paris meeting on 6 April 1995. A further draft initiative was launched by Austria, Germany and the Netherlands, followed by a simplified Spanish draft.

During the Spanish presidency, a limited consensus on burden-sharing had finally begun to develop, as the adoption of a Council Resolution on Burden-sharing with Regard to Admission and Residence of Displaced Persons on a Temporary Basis on 25 September 1995 indicated.[42] Let us make a brief comparison between the German Draft of 1994 and the 1995 Resolution.

The most daring feature of the Draft was to propose a specific distributive key which "could be used by Member States."[43] This key was based on Member States'

— percentage of the total Union population,

— percentage of Union territory and

— percentage of the Unions' Gross Domestic Product.

Each of these criteria should be given equal weight. The Draft featured a table of indicative figures[44] for each Member State which were to be revised every five years by

[41] Doc. No. 7773/94 ASIM 124 [hereinafter the Draft].

[42] O.J. No. C 262/1, 7 October 1995 [hereinafter the 1995 Resolution].

[43] The Draft (note 41), para. 7.

[44] *Id.* A look at these figures might help to understand both the German urge and the failing support of other large Member States. In descending percentage order, the figures read as follows:

joint agreement. The possibility to depart from these figures by joint agreement was expressly provided for in Paragraph 8 of the Draft.

The centerpiece of the envisaged redistribution mechanism was contained in Paragraph 9:

> Where the numbers admitted by a Member State exceed its indicative figure under paragraph 8, other Member States which have not yet reached their indicative figure under paragraph 8 will accept persons from the first Member State.

Accordingly, the Draft intended to introduce compulsory resettlement relying on a distributive key. However, a reduction of reception obligations was envisaged with respect to military expenditure triggered by intervention in the refugee-producing crisis[45] and the Convention refugee population already present in a Member State.[46]

In terms of *realpolitik*, the resistance against the Draft can be explained by the fact that Germany would have been its first beneficiary, with additional reception responsibilities falling upon all other Member States.

Turning to the 1995 Resolution, it is striking to see that the indicative figures have vanished and the stipulated distributive key is devoid of any precision:[47]

> 4. The Council agrees that the burden in connection with the admission and residence of displaced persons on a temporary basis in a crisis could be shared on a balanced basis in a spirit of solidarity, taking into account the following criteria . . . :
> — the contribution which each Member State is making to prevention or resolution of the crisis, in particular by the supply of military resources in operations and missions ordered by the United Nations Security Council or the Organization for Security and Cooperation in Europe and by the measures taken by each Member State to afford local protection to people under threat or to provide humanitarian assistance,
> — all economic, social and political factors which may affect the capacity of a Member State to admit an increased number of displaced persons under satisfactory conditions.

Germany (21.58), France (19.40), Italy (15.83), United Kingdom (14.28), Spain (13.63), Netherlands (3.55), Greece (3.20), Portugal (2.65), Belgium (2.42), Denmark (1.78), Ireland (1.54), Luxembourg (0.12).

[45] Paragraph 9 of the Draft states: "Member States which are helping, by means of particular foreign and security policy measures in the country of origin of the persons referred to in paragraph 1, to control the refugee situation in the State in question, need not admit the full figure assigned to them under paragraph 8. The resulting shortfall should be covered by the other States in proportion to their indicative figures. Measures of this nature include in particular peace-keeping or peace-making initiatives in the framework of the United Nations, NATO or the Western European Union."

[46] According to paragraph 11 of the Draft, Convention refugees are set off against the indicative figure in paragraph 8.

[47] With regard to the vagueness of the given criteria, I omit a detailed discussion of their implications. For a critical analysis, *see ECRE*, Comments from the European Council on Refugees and Exiles on the 1995 "Burden-Sharing" Resolution and Decision adopted by the Council of the European Union.

In a footnote linked to the first paragraph of this article, it is said that "[t]hese criteria are norms of reference that may be supplemented by further criteria in the light of specific situations."

To wit, this statement reveals the self-contradiction contained in the present instrument. In the preamble, it is correctly stated that "situations of great urgency . . . require prompt action and the development beforehand of principles governing the admission of displaced persons." However, these principles are developed *ex post facto* by the Council. The 1995 Resolution has been followed by a "Decision on Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis"[48] which lays down the procedural framework for Council decisions and monitoring in burden-sharing situations.

In short, burden-sharing is initiated as follows. On the initiative of the Presidency, a Member State or the Commission, an urgent meeting of the Coordinating Committee under Article K.4 of the Treaty on European Union is convened with the task to establish whether or not a given situation necessitates burden-sharing as envisaged in the 1995 Resolution.[49] Given such a necessity, the Coordinating Committee prepares a proposal for submission to the Council for approval.[50] If the Coordinating Committee fails to reach consensus within a month, the provisions laid down in the Council's Rules of Procedure for urgent cases may be applied, implying *inter alia* that the Council may adopt a relevant act by a written vote.[51]

This *ex post facto*-framework clearly fails to provide the necessary predictability of a fair burden-sharing. Consequently, a cautious State would rather block access for refugees than trust in the outcome of this ad-hoc exercise in the Council.[52]

Who are the beneficiaries of a burden-sharing exercise under the 1995 Resolution? Its personal scope comprises various categories of vulnerable persons "whom Member States are prepared to admit on a temporary basis under appropriate conditions in the event of armed conflict or civil war, including where such persons have already left

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[48] O.J. No. L 063, 13 March 1996, 10.

[49] *Id.*, para. 1.

[50] *Id.*, para. 3.

[51] *Id.* The relevant rules are contained in Council Decision of 6 December 1993 adopting the Council's Rules of Procedure, O.J. 93/662/EC.

[52] The importance of a detailed and predictable burden-sharing framework seems to have been realized by the authors of the German Draft Resolution. *See* paragraph 5 of the Draft:

"The Council is convinced that if Member States are to be able to react promptly in emergencies, they must first devise an appropriate range of measures for the admission of refugees from war or civil war. Such measures must include prior agreement on principles for distributing refugees. Otherwise there is a risk that, in situations in which prompt action is necessary to avert serious danger to human life, decisions which need to be taken urgently will be delayed by the fact that complicated consultation procedures must first be initiated."

their region of origin to go to one of the Member States."[53] These categories stem from the aforementioned June 1993 Resolution. They were also contained in the Draft and comprise former camp internees, medical evacuation cases, persons exposed to direct threat of loss of life or limb, cases of sexual violence, and war refugees having come directly from a combat zone to the territory of a Member State. In the 1995 Resolution, an exclusion clause similar to Article 1 F (a) and (b) of the 1951 Refugee Convention has been inserted.

It emerges clearly that no State obligation to admit is envisaged. Any decision on admission remains within the discretion of the relevant Member State.

Furthermore, the 1995 Resolution does not apply retroactively, *i.e.* to persons admitted before its adoption.[54] The responsibility for persons applying for refugee status under the 1951 Refugee Convention will be distributed by the rules laid down in the Dublin Convention.[55] Interestingly and in contradistinction to the 1995 Resolution, the Draft contained a provision allowing for the reduction of a certain State's reception obligations with the number of persons residing there under the 1951 Refugee Convention or the ECHR.[56]

As the remaining personal scope is imprecise and ultimately refers back to the assessment made by each Member State, it is not clear how Member States are to single out a group of persons which could be the subject of burden-sharing according to article 4 of the 1995 Resolution.

A practical illustration of the persisting stalemate regarding solidarity emanated at the same meeting at which the resolution was adopted. The ministers discussed a request of the UNHCR on the long-term admission of 50,000 internees from Kuplensko Camp in Croatia. Not a single State declared itself willing to admit persons from this group.[57]

Both the Draft Resolution and the Resolution finally adopted relied heavily on what has been identified as a control strategy.[58] In the 1995 Resolution, however,

[53] 1995 Resolution (note 42), art. 1 (a).

[54] *Id.*, art. 7.

[55] *Id.*, preamble.

[56] The Draft (note 41), para. 11.

[57] *Migration News Sheet*, Most Member States Unwilling to Take in Ex-Yugoslav Refugees, October 1995, 4.

[58] *See Johannes van der Klaauw*, Refugee Protection in Western Europe: A UNHCR Perspective, in: *Jean-Yves Carlier/Dirk Vanheule* (eds.), Europe and Refugees: A Challenge?, 1997, 227, 244, who criticises the EU approach to burden-sharing as too narrow-minded and focused on immigration control.

steering principles had been watered down to a degree to which allocating capacity was lost and the whole instrument became dysfunctional.[59]

With regard to the very limited achievements hitherto, it merits mentioning that the issue of burden-sharing is still on the work programme of the Justice and Home Affairs Council.[60] Nevertheless, the debates preceding the adoption of the 1995 Resolution seem to have led to an exhaustion of energies with regard to the topic.

Nevertheless, the issue of burden-sharing resurfaced in March 1997, when the European Commission launched a proposal on a Joint Action concerning Temporary Protection of Displaced Persons.[61] On a strategic level, this proposal signaled a certain caution with regard to the demanding paradigm of control. Rather, its drafters returned to the proven technique of harmonization. The Proposal's main goal is to eliminate distortional effects[62] flowing from differences between national regimes of Temporary Protection.

With the proposal, the Commission seeks to frame a Union-wide "Temporary Protection Régime," containing a number of minimum rights[63] and a mechanism for the common opening up and phasing out of such a régime.[64] Interestingly, the binding decisions on opening up and phasing out are proposed to be taken by qualified majority in the Council.[65]

Article 5 of the Proposal addresses the question of assistance to particularly affected States:

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[59] *But see, James Hathaway/Alexander Neve,* Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, Harvard International Law Journal, vol. 10, 1969, 115, 143, who acknowledge the importance of the 1995 Resolution and the following Decision, as they provide for a consultative mechanism ('the meeting') which is said to be crucial for burden-sharing processes. In the absence of a pre-established distributive key, I would argue, negotiations will simply lead to a stalemate described *supra* in section IV.

[60] EU Council Doc. No. 7813/96.

[61] European Commission, Proposal to the Council for a Joint Action based on Article K.3 (2) (b) of the Treaty of European Union concerning Temporary Protection of Displaced Persons. O.J. C 106/13, 4 April 1997 [hereinafter The Proposal].

[62] *Id. See also* paras. 7 and 8 of the Explanatory Memorandum attached to the Proposal.

[63] *Id.*, arts. 6 - 9 of the Proposal. If the goal of harmonization is to be taken seriously, a deviation from these minimum rights in favor of beneficiaries is rather improbable.

[64] *Id.*, arts. 3 and 4.

[65] *Id.*, art. 12.

> On the basis of the report of the Commission referred to in Article 4,[66] the Council shall examine how best to support Member States which have been particularly affected by the mass influx of persons in need of international protection.[67]

The Explanatory Memorandum attached to the Proposal underscores that

> one of the very purposes of the joint action is precisely to create conditions for an effective sharing of the responsibility with regard to situations of mass influx of persons in need of international protection. Article 5 reflects the content of the Council resolution on burden-sharing which foresees the possibility of taking measures based on solidarity if one or more Member States are particularly affected by mass-influx situations. Such measures may for example take the form of financial compensation and/or, if that is not sufficient, a fair allocation of the persons who are fleeing from the crisis region.[68]

Under the consultation procedure, the European Parliament has introduced a number of amendments to this Proposal.[69]

At the time of this writing, the fate of the Proposal had not been decided. Nevertheless, it seems to be quite evident that harmonization should meet with less controversy than redistribution or financial burden-sharing. This lets us infer a certain pattern of preferences regarding equitable distribution of protection burdens in the European Union: Harmonization is the primary strategy to minimize differences between Member States' protection mechanisms and, accordingly, to level out their attractiveness to protection seekers. Nevertheless, differences in the actual reception might persevere due to factors like historical ties, geographical proximity and social networks. If those differences effect an inequitable distribution of considerable importance, recourse will be taken to more demanding control tools (as the redistribution of protection seekers envisaged in the 1995 Resolution). As for now, it can be concluded that burden-sharing as a control tool is largely lacking in substance.

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[66] *Id.* According to Article 4, the Commission is to prepare a yearly report on the situation in the country of origin, the application of the Temporary Protection régime by the Member States, and its financial implications. This report will *inter alia* provide the basis for decisions on the phasing-out of a Temporary Protection régime.

[67] *Id.*

[68] *Id.*, para. 21 of the Explanatory Memorandum.

[69] European Parliament, Legislative Resolution embodying Parliament's opinion on the proposal to the Council for a Joint Action based on Article K.3 (2) (b) of the Treaty on European Union concerning temporary protection of displaced persons (COM(97)0093 — C4-0247/97 — 97/0081 (CNS)), A4-0284/97, 23 October 1997. These amendments reinforce the language of the original Proposal, stress the exceptional nature of temporary protection, and underscore the importance of complying with international law and of consulting the UNHCR in the context of temporary protection.

It might be of some interest that the recently modified Treaty establishing the European Community[70] contains two articles on burden-sharing. Article 73 k (2) of the consolidated TEC stipulates that the Council shall adopt

> [m]easures on refugees and other displaced persons within the following areas:
>
> ...
>
> (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and other displaced persons

within a period of five years after the entry into force of the Treaty of Amsterdam.

While this cautious wording does not exceed the reach of the 1995 Resolution, article 73 l transgresses unanimity in decision making:

> In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

The impact of the latter provisions will depend on the interpretation of what constitutes a "provisional measure."

IV. Prisoners' Dilemma in Fortress Europe

A look at the different solution attempts presented in the last section leaves the observer with a number of questions. Why does it prove so difficult to reach a substantial consensus on matters of burden-sharing? Is it probable that viable normative developments will take place in the near future? Which factors will influence the outcome of such developments?

Answers to these questions risk developing into long narratives. As a shortcut, I would propose the application of game theory,[71] which might help to trace and systematize the recurring elements of a burden-sharing conflict. In a human rights context, this choice of method might appear slightly bizarre. After all, game theory be-

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[70] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997.

[71] In addition to the contextual explanation given below, readers might be interested in a general definition of game theory: "Game theory is a branch of mathematics which is frequently employed in a heuristic manner in order to draw attention to certain apparent paradoxes and dilemmas which emerge when interdependent decision-making is studied from a 'rational choice' perspective – that is on the assumption that individuals choose courses of action that are believed to maximise their welfare, defined broadly." *C. Brown*, Understanding International Relations, 1997, 58 - 59. For an application of game theory in international law, *see J. K. Setear*, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, Harvard International Law Journal, vol. 37, 139.

came widely known as a tool to frame nuclear conflict as a rational form of behavior.[72]

Like cybernetics, game theory drew on a positivistic paradigm. The development of both disciplines was fueled by their instrumental value for military ends. In quest for order, predictability and control, both approaches presupposed rationality in action.[73]

While the behavioristic roots were common, game theory concentrated on different questions. Its development is inextricably linked to the name of *John von Neumann*, a U.S. mathematician who became deeply involved in nuclear missile defense planning after World War II. *Von Neumann* first presented his theory in an article featuring a logical analysis of chess strategies (*Zur Theorie der Gesellschaftsspiele*, published in 1928). Expanding into new disciplines, he carried out a study on the *Theory of Games and Economic Behavior*[74] together with *Oskar Morgenstern* in 1944. Today, the interdisciplinary merger of Law and Economics is heavily indebted to *von Neumann* and *Morgenstern's* pioneer work.

Game theory provided the tools to translate complex real-world conflicts into a limited number of abstract 'games'. Its ultimate promise was the identification of optimal moves and rational conflict resolution in spheres of reduced complexity. It did not come as a surprise that *von Neumann* moved on to yet another field of application. Eventually, he was appointed as an advisor to RAND Corporation, a think-tank originating in the U.S. defense industry.[75] In the following, a considerable number of 'defense intellectuals' used a game theory paradigm when inquiring into the conflict arenas of the Cold War, notably nuclear deterrence and the arms race. This move secured a stable position for game theory in the study of International Relations.[76]

Why should one resort to game theory when analyzing burden-sharing? Just like nuclear deterrence or the arms race, burden-sharing is a problem of cooperation in an

[72] *Kees van der Pijl*, Vordenker der Weltpolitik, 1996, 240 *et seq.*

[73] The initial problem of cybernetics was to calculate the flight of an enemy aircraft in order to guide anti-aircraft weaponry; it soon developed into a comprehensive behavioristic theory conceiving of the human psyche as a self-regulating mechanism. *See P. Galison*, Die Ontologie des Feindes. *Norbert Wiener* und die Kybernetik, in: *H.-J. Rheinberger/M. Hagner/B. Wahrig-Schmidt* (eds.), Räume des Wissens. Repräsentation, Codierung, Spur, 1997.

[74] *John von Neumann/Oscar Morgenstern*, The Theory of Games and Economic Behaviour, 1944. *See K. van der Pijl* (note 72), 241.

[75] *Id.*

[76] *Andrew Kytt/Duncan Snidal*, Progress in Game-Theoretical Analysis of International Regimes, in: *Volker Rittberger* (ed.), Regime Theory and International Relations, 1993, 112. For a recent and comprehensive application of game theory to various forms of conflicts from an international relations perspective, *see Michael Nicholson*, Rationality and the Analysis of Conflict, 1992, 63 *et seq.*

international environment without a central enforcement institution. As we will see, its main actors can be divided into two groups of 'players', which fit into the attractive simplicity of the game model.

However, it must be underscored that our goal is not to point out the ultimate 'rational choice' in a given burden-sharing game. Rather, game theory is used as an interpretative device.[77] That means two things. Firstly, as the actors of a burden-sharing game seek to attain different goals, ranging from protection to cost-reduction, the outcome of the game lets us reconstruct those goals, which have been dominating. If there is a difference between State rhetoric and State action, it should emerge at this point.

Secondly, game-theoretical analysis means a reduction of reality to an underlying structure. By means of such a structure, a future comparison of different burden-sharing games becomes more manageable. Moreover, this structure establishes a base for the analysis of how effective modifications of the present burden-sharing might be.

After this attempt to justify and delimit the use of game theory in this text, I would like to resort to a rather well known analytic device from its toolbox which goes under the name of Prisoners' Dilemma.[78] Let us briefly recall the choices facing the metaphorical prisoners:

Two prisoners, against whom there is not enough incriminating evidence, are interrogated separately. Each faces two alternative ways of acting: to confess the crime, or to keep silent. They both know that if neither confesses, they will be convicted of some minor offense, concerning which there is sufficient evidence against them, and will be sentenced to a year in prison. However, if only one confesses, he thereby turns king's evidence and is thus set free, whereas the other receives a heavy term of ten years.[79]

Cooperation between the prisoners, namely an agreement to the effect that both keep silent, will yield an outcome which is beneficial for both. If both confess, the outcome will be a long sentence for both. If the prisoners are able to communicate, they will eventually agree on keeping silent. However, there is a strong temptation for each prisoner to break such an agreement, if he wants to avoid punishment altogether. Furthermore, how can he be sure that his fellow prisoner will not break the agreement? The safest thing to do is to confess, if one wants to avoid the maximum

[77] *Kytt/Snidal* (note 76), 114, 131.

[78] I am indebted to *Fredrik Danelius* for supplying the idea to describe dilemmas of refugee protection as a Prisoners' Dilemma. Large parts of the following presentation are founded on *Edna Ullmann-Margalit*, The Emergence of Norms, 1977, a philosophical work dealing with Prisoners' Dilemma norms, co-ordination norms, and norms of partiality.

[79] *Id.*, 18.

penalty of ten years. Technically speaking, confession dominates non-confession, or defection dominates cooperation.

Each single prisoner's preferences may be depicted as a linear chain of dominances. In this chain, D stands for defect, C for co-operate. The first letter indicates the behavior of the actor whose perspective is taken. By way of example, DC stands for the following situation: the prisoner whose perspective is taken defects, while the other prisoner co-operates. Accordingly, the classical Prisoners' Dilemma described above would translate to the following chain:

$$DC > CC > DD > CD.$$

To be sure, DC will result in freedom, CC in one year in prison and DD in five years. CD is the least desirable outcome, and will yield 10 years of incarceration.

Does burden-sharing resemble a Prisoners' Dilemma? Let us take a brief look at the characteristics of the latter:

> In Prisoners' Dilemma-type situations the state which is mutually desired by the participants is such that there is a strong temptation for each to deviate from it unilaterally. The state that results when they all deviate, however, is bad for all, jointly as well as severally. The problem, therefore, is to devise a method which will protect the 'good' state and annihilate the temptation to deviate.[80]

Before addressing the temptation to deviate, it has to be asked what constitutes the "mutually desired" state in the European context. In other words, which are the goals Member States want to attain in the field of burden-sharing? Partly drawing on the language of formerly presented instruments, one could compile the following non-hierarchical list:

1. To ensure free movement of persons between Member States while controlling the inflow and movements of extracommunitarians (*migration control*)
2. To observe international law obligations, in particular those flowing from the 1951 Refugee Convention and the ECHR (*international law compliance*)
3. To demonstrate "solidarity between Member States" and to "share the responsibility regarding admission"[81] (*equitable burden-sharing*)
4. To "reflect Europe's humanitarian tradition, thus ensuring to all persons in need of international protection within their jurisdiction a treatment in conformity with human dignity"[82] (*protection*)
5. To attain the aforementioned goals at a minimum of financial, social and political costs (*cost reduction*)

[80] *Id.*, 9.

[81] Preamble of the 1995 Resolution (note 42).

[82] *Id.*

In comparison to Prisoners' Dilemma, there is not merely a single goal (namely to minimise penalty), but an amalgam of goals. Now, there are two possibilities. The group of Member States can choose a solution that accommodates all goals in form of a certain compromise. Or, the group of Member States can choose a solution that neglects one or more goals.[83]

The cheapest option for a single State is to close its borders, thus minimizing its reception costs, while other States keep their borders open, thus providing protection (DC). Mutual c-operation (CC) will also accommodate goals 1 through 4, but induce higher expenses for a single Member State than the DC alternative. DD accommodates the control and cost reduction goal, while it clearly sets aside the protection and possibly the law compliance goal. The CD alternative may ensure protection and law compliance, but it maximizes costs for the single Member State and fails to attain equitable burden-sharing which makes it the least attractive of all options. Accordingly, if *all* goals are to be accommodated, one could expect that the situation would be structured as a classical Prisoners' Dilemma (DC > CC > DD > CD).

As long as cooperation for the achievement of *all* goals is not stable and predictable, a single State faced with the probability of a refugee influx will be tempted to resort to defection. In this context, defection may take the form of blocking access to State territory without regard for the interests of refugees as well as the ensuing "overburdening" of other States.

Hitherto, we have looked into a simplified situation in which there are no significant differences between two participating States. Mutual cooperation yields optimal protection, as it ensures bigger capacities (more refugees can be protected) and greater choice (refugees can be 'matched' with an optimal asylum country with regard to factors as personal preferences, social ties, linguistic background and cultural characteristics). While bilateral defection renders protection impossible altogether, unilateral defection leaves the refugees with the protection capacity of one of the two countries.

At this stage, it emerges clearly that a third-party interest exists, without being taken into account in a direct way. Refugee interests are not necessarily congruent with State interests. We have focused on States' interest in protection, not refugees' interest in protection. There is no room for direct participation by refugees in our contemporary decision-making system.[84] To a certain extent, refugees' interests can influence State interests through the intermediary of international organizations as well as internal or external pressure groups, but both phenomena should be kept

[83] Clarifying goal preferences amounts to the revelation of actors' values. For more on values revealed by choices *see, Isaac Levi*, Hard Choices, 1986, 83 *et seq.*

[84] *See Gregor Noll*, The Democratic Legitimacy of Refugee Law, Nordic Journal of International Law, vol. 66, 1997, forthcoming.

apart for the sake of analysis. Refugee advocacy can, however, impact the goal of cost reduction.[85] A few more words on this relationship might be appropriate.

Bilateral defection renders an undesirable outcome as to refugee protection. Exactly how undesirable this outcome is depends on the impact of refugee protection on the political agenda in each State. If there is a strong advocacy for refugee protection, the desirability of a complete denial of protection will be very low. In such a situation, bilateral cooperation is more desirable than bilateral defection.

If, however, the electorate accepts the dismantling of refugee protection for the sake of reducing financial costs, the outcome will change. There are no political costs to be anticipated for the blocking of access. In such a situation, it is not likely that cooperation on refugee protection and burden-sharing will take place.

Apart from the impact of advocacy on cost assessment, other factors could influence choices made by the actors. In context of free movement over internal borders, access of protection seekers to one single State might trigger problems for other States in the long run. As the control of movement between Member States is being dismantled, secondary movements of the protection seekers must be calculated. Against this background, DC might be perceived as less favorable and blocking access not only to a single Member State, but to the whole Union, emerges as the preferred solution: DD > DC > CC > CD.

To be sure, the focal point of analysis is the relationship between protection and the reduction of financial costs. If protection is perceived as less important than the cutting of expenses, DD may dominate CC. If the opposite is true, CC will be preferred to DD.

So much for our simplified model. Let us now get back to the reality of burden-sharing in the 1990s. In contradistinction to our model, States proved not to be equal. This emerged very clearly in the context of the Balkan refugee crisis. Among Western European States, two different groups of States could be made out: States which host a large population of Balkan crisis refugees had similar interests, while other States less affected in terms of refugee reception did not necessarily share those interests.

The more affected States hosting large refugee populations had become victim of a containment strategy which they had masterminded themselves — reception in the

[85] Domestic and international advocacy could be incorporated in a game-theoretical approach by describing the situation as a two-level game, in which statesmen simultaneously play against other States and advocacy actors. Such an inquiry might answer interesting questions (*e.g. why* did certain goals dominate?), but reaches clearly beyond those asked in this text (namely which goals dominate in European burden-sharing and what structural impediments influence the outcome of burden-sharing games). For further on two-level games *see Kytt/Snidal* (note 76), 130 *et seq.*

region.[86] According to this concept, refugees should be protected as near as possible to the region of crisis. In the case of the Balkan crisis, the notion of 'region' had to be successively expanded. Given the overburdening of States in the immediate vicinity of the conflict and the insecure conditions prevailing there, the region where protection would take place was extended to Austria, Switzerland, Germany and Sweden. The geographic proximity was one determining factor in the choice of the refugees, historical ties another, and the 'network' factor of social ties established by preceding migratory flows a third one.[87]

In 1993, the more affected States had but one choice — to denounce reception in the region in favor of international burden-sharing. This was very clearly spelled out by the Swedish government.[88]

Let us have a look at the different choices at the outset of 1993, before a group of more affected States started pushing for burden-sharing and before containment measures such as visa requirements for Bosnian citizens came into being. More affected States had already received a considerable number of protection seekers and faced the probability of a continuing inflow. They had a strong interest in changing the CD situation and reducing their costs. While geographical, social and political factors made unilateral defection outright impossible for these States, the two options left were either to co-operate on reception (CC) or to block access for further refugees (DD).

For less affected States, being in a DC situation, cooperation on burden-sharing would have led to an augmented reception of refugees, which means increasing costs in a short-term perspective. Cost-wise, mutual defection (DD) would be equally as desirable as the *status quo* for less affected States. As more affected States were pushing for a change of the situation, this was the only alternative which can be reconciled with the self-interest of less affected States.

A move to mutual defection was precisely what happened. By the end of 1993, most European States had introduced visa requirements, which made it hard for refugees from former Yugoslavia to seek protection outside the conflict zone. Western Europe had moved from a status quo of non-equitable reception and relatively open borders to a status of blocked access.[89]

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[86] Allusions to this concept can be found *inter alia* in the preamble of the 1995 Resolution (note 42).

[87] For further on networks as pull-factors *see*, *Grete Brochmann*, Migration Policies of Destination Countries, in: *Council of Europe* (ed.), Political and demographic aspects of migration flows to Europe (Population studies no. 25), 1993, 110 *et seq.*

[88] *Id.*; Migration News Sheet (note 32).

[89] It is true that this decision was not taken in a co-ordinated fashion. This does not detract from the point made, as the first States introducing visa requirements must have been perfectly aware of the fact that other States were forced to follow.

Thus, it can be inferred that, by the end of 1993, burden-sharing in Europe was structured as DC > DD > CC > CD.

Contrary to State rhetoric, the goal of cost reduction dominated the goal of protection in the collective action (and inertia) of Western European States.

Finally, it should be asked whether any structural changes have taken place since the end of 1993. Did Member States attempt to or even succeed with changing the dominance order depicted above?

In 1993, more affected States had a short-term interest — to get other States to take a 'fair share' of Bosnian refugees. They had and still have a long-term interest — to prevent the repetition of the inequitable sharing of refugees seen in the case of former Yugoslavia in a future crisis.

States less affected by the Balkan crisis had a different short-term interest, namely to keep their level of involvement with refugee flows low. Their long-term interest depended on what scenario they deemed to be probable for the future: Would there be the possibility of a crisis producing an inflow into their own territory? If so, would they be in need of burden-sharing in such a situation? A State that answers both questions in the affirmative has a long-term interest in the establishment of a burden-sharing mechanism.

A long-term perspective produces a classical Prisoners' Dilemma, with a dominance of mutual cooperation over mutual defection (CC > DD).

The language of the 1995 Resolution at least emulates such a perspective. If we take this perspective seriously, the stark differences between more affected States and less affected States begin to vanish. This is good in that it opens up for mutual cooperation as a rational choice. It leaves us, however, with the question whether the better-yet-weak choice of cooperation actually has been strengthened. To be sure, unilateral defection dominates cooperation in a classical Prisoners' Dilemma. To change this, the choice of cooperation must be stabilized by reducing the pay-offs of defection.

The first stabilizing factor springing to mind is retaliation. In a situation where all States are potentially affected by flight movements, defection in one crisis brings about the risk of becoming the victim of others' defection in the next. However, retaliation alone does not seem to be sufficiently stabilizing. If it were, one could argue that burden-sharing already was tacitly practiced. The deliberations within the European Union in 1995 and any further debate on the topic would have to be regarded as quite superfluous.

Next then, does the normative content of the 1995 Council Resolution represent a sufficient stabilizing device? The analysis carried out in the preceding section indicates that this resolution sets a framework for further deliberations on burden-sharing

rather than providing a fixed distributive key securing a predictable outcome.[90] Accordingly, this instrument cannot help to reduce the pay-off for defection. The dominance of mutual defection over mutual cooperation prevails.

At this stage, it seems reasonable to conclude that cooperation on burden-sharing still is a better-yet-weak choice. However, I would like to go one step further. By means of the Schengen Convention[91] and the Dublin Convention,[92] States have stabilized the dichotomy between more affected States and less affected States. It has emerged hitherto that inequality effectively inhibits cooperation. As long as the Schengen and Dublin Conventions preserve inequality, burden-sharing would be a systemic contradiction.[93]

V. Schengen and Dublin: Preserving Inequality

The rationale of the Dublin Convention and of Chapter 7 of the Schengen Convention is to allocate responsibility for the examination of asylum applications lodged on the territory of the contracting parties.[94] The rules laid down in both instruments serve *inter alia* to eliminate the processing of multiple applications filed in different contracting States. A State responsible for a certain application will take over the task of processing the application together with the obligation to take charge of the applicant.[95]

With regard to allocation, two stages must be discerned. After the responsibility of a certain State has been established, an applicant is temporarily allocated to that State. After a positive status decision by that State, the latter will normally allow an applicant to remain on its territory subject to its national legislation. A positive status decision will turn the temporal allocation into a more permanent one. In a formal sense, the Schengen and Dublin Conventions only have a bearing on the temporal allocation. But in cases falling under some of the protection categories of the responsible State, they indirectly trigger a more permanent allocation.

[90] *See* German Draft Resolution (note 52) and accompanying text.

[91] Schengen Convention (note 23).

[92] Dublin Convention (note 23).

[93] In this context, it should be noted that the 1995 Council Resolution gives prevalence to the Dublin Convention in its preamble.

[94] For more on the Dublin Convention, *see, Guild/Niessen* (note 25), 112 *et seq*. For further on the Schengen Convention, *see, Meijers et al.* (eds.), Schengen, 1992. *See also Johannes van der Klaauw,* The Dublin Convention, the Schengen asylum chapter and the treatment of asylum applications, in: *P. R. Giuseppin/W. A. M. Jansen* (eds.), Het Akkoord van Schengen en vreemdelingen. Eeen ongecontroleerde grens tussen recht en beleid?, 1997.

[95] Dublin Convention (note 23), arts. 10, 11; Schengen Convention (note 23), arts. 31.2, 33, 34.

At this stage, it could be objected that burden-sharing as understood by the Member States of the European Union mainly focuses on non-Convention refugees, while the application of the Schengen and Dublin Conventions explicitly has been limited to applicants for asylum under the 1951 Refugee Convention.[96] In other words, it would be unnecessary to deal with the Schengen and Dublin Conventions within the framework of this text. Such an objection would, however, disregard the fact that even protection seekers not falling under the 1951 Refugee Convention to a very large extent apply for asylum. In this respect, the Schengen and Dublin instruments must be scrutinized even with a view to their effect on cases in need of protection without necessarily fulfilling the criteria of the 1951 Refugee Convention definition.

Furthermore, it is difficult to see how the categories of Convention refugees on one hand and non-Convention refugees on the other hand can be kept apart before an individual assessment is carried out. The development of temporary protection practices and the postponement of individual status assessment vis-à-vis protection seekers from former Yugoslavia illustrates the problem of mixed categories in a very graphic fashion. It was claimed by affected States that the process of breaking up that group along different categorizations in an individual procedure would have consumed too much time and resources. Suffice it to note that neither the 1995 Resolution nor the Commission Proposal on a Joint Position on Temporary Protection[97] provides a solution to this problem.

We cannot but conclude that an analysis of protection schemes for non-Convention refugees must include the factual allocation effected by the Schengen and Dublin Conventions. In that respect, both instruments are of importance for any burden-sharing mechanism to be developed.

Let us give a brief description of how an asylum claim will be handled in an European context incorporating the allocation mechanism set out in the Schengen and Dublin Conventions.

1. A protection seeker files an asylum application with a contracting State.
2. The contracting State receiving the application assesses whether there is any third State to which it wishes to return the protection seeker according to its national legislation.[98]

[96] On the Resolution on Burden-Sharing, *see supra* section III; Dublin Convention (note 23), art. 1; Schengen Convention (note 23), art. 1.

[97] 1995 Resolution (note 42); The Proposal (note 61).

[98] Dublin Convention (note 23), art. 3.5; Schengen Convention (note 23), art. 30.2. Paragraph 3 (a) of the Resolution on a harmonised approach to questions concerning host third countries gives prevalence to return to a host third country before considering return to a Member State, 30 November/1 December 1992, Doc. No. SN 4823/92. *See Guild/Niessen* (note 25), 121 - 122.

3. The State responsible for the application will be made out by the contracting States along the lines of the criteria given in the Schengen or Dublin Convention.
4. The protection seeker and his application is taken charge of by the responsible State.
5. The responsible State carries out an individual determination procedure.

This procedure can produce three results:

a) The applicant is declared to be a refugee in the meaning of the 1951 Refugee Convention or a corresponding national protection category.

b) The applicant falls under another protection category[99] according to the national legislation of the responsible State.

c) The applicant does not fall under any of those protection categories.

While results under a) and c) do not pose a problem in this context, a result under b) begs a number of questions with regard to potential beneficiaries of burden-sharing schemes.

Firstly, as protection under non-Convention categories differs from State to State, the outcome of the whole procedure is highly unpredictable for a war refugee. While he or she may benefit from a permanent residence permit under a humanitarian status in one country, another country might limit the benefits afforded to a mere tolerated status or, worse than that, deny this person any form of protection.

Secondly, the allocation criteria contained in the Dublin and Schengen Conventions risk stabilizing an inequitable distribution of processing and reception burdens. An assessment of this risk motivates a closer look at the distributive key immanent in both instruments, namely the criteria along which the responsibility for examination is allocated.

Concerning those criteria, the Dublin Convention and the Schengen Convention are roughly identical with some deviations in detail. In the order of priority, the following criteria will steer the allocation of responsibility:

1. *Family*: If a spouse or a child under 18 to the applicant has been recognized as a refugee under the 1951 Refugee Convention by one contracting State, that State shall be responsible for the application.[100]
2. *Residence and entry permits:* If the applicant has been issued a valid residence permit or a visa, the issuing State shall be responsible for the application.[101]

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[99] For the purpose of this argumentation, such categories would even include tolerated status and mere protection from deportation excluding any other benefits.

[100] Dublin Convention (note 23), art. 4; Schengen Convention (note 23), art. 35.

[101] Dublin Convention (note 23), art. 5; Schengen Convention (note 23), art. 30 (1) a - d.

3. *Entry*: If the applicant arrived irregularly, the State through which he first entered the territory of the contracting States shall be responsible for the application.[102]

4. *State in which the application was lodged:* If no other contracting State can be made out, the State in which the applicant has lodged his application shall be responsible for it.[103]

It has been stated earlier that geographical proximity to crisis regions and family ties were among the factors leading to the inequitable distribution of protection seekers fleeing the Balkan crisis. In this respect, it must be asked how the responsibility criteria relate to these factors. Do they counteract concentration tendencies, or do they reinforce them?

The top priority of family ties is indispensable from a human rights perspective. From a distributive point of view, it must be acknowledged that it may lead to a further accumulation of refugees in major recipient countries. Inequitable sharing of protection seekers is aggravated by family reunion. However, it must be noted that the group of persons falling under that norm is narrowly defined in two ways. Firstly, the concept of family is reduced to a core of spouse and children under 18, and, secondly, the family reunion criterion is only triggered by the presence of a family member who is recognized as a Convention refugee. Other protection categories fall outside the scope of this norm and, accordingly, under the discretion of the States involved.[104]

The second criterion concerning residence and entry permits may not be as crucial for a fair distribution of protection seekers, as States can reduce the risk of attracting the responsibility for applications by simply being very restrictive in the issuing of such permits.

The criterion on entry, however, is of utmost importance, as it is intimately related to geographic proximity. To some extent, States can resort to more effective entry control, of which the means are visa requirements linked to carrier sanctions and reinforced border surveillance. However, it is an empirically established fact[105] that

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[102] Dublin Convention (note 23), art. 6. The Convention contains an additional criterion regarding entry in general, *see* art. 7. Schengen Convention (note 23), art. 30 (1) e.

[103] Dublin Convention (note 23), art. 8; Schengen Convention (note 23), art. 30 (3).

[104] "Any Member State, even when it is not responsible under the criteria laid out in this Convention, may for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires." Dublin Convention (note 23), art. 9. The Schengen Convention contains a similar rule in article 35. It must be observed, however, that the protection of family life under article 8 of the ECHR may force States to allow family reunion even for non-Convention refugees.

[105] Official German statistics indicate that the majority of asylum seekers manage to circumvent border controls and to apply for asylum in-country. This sheds some light on the efficacy

borders cannot be sealed hermetically. Accordingly, those States whose borders are more exposed to illegal entry attempts will be automatically stuck with larger numbers of asylum applications.

All in all, the third and fourth criteria are prone to further reinforce concentration in States that already carry a considerable processing and reception burden. To a limited extent, the same goes for the criterion on family reunion. What does this mean for future developments in the field of protection and burden-sharing? Two consequences can be made out.

On a national level, more affected States will be inclined to cut back protection and benefits for those groups not covered by international law. In this context, it should be remembered that Germany received the vast majority of Bosnian protection seekers. However, most of these protection seekers were merely tolerated. This must be compared with other more affected countries like Sweden that accorded a comparably favorable humanitarian status to the majority of Bosnian protection seekers.

On the level of international cooperation, it is worthwhile to return to the analysis presented in the preceding chapter. The Dublin Convention and the Schengen Convention actually structure burden-sharing as a Prisoners' Dilemma with unequal participants. This brings us back to the situation prevailing at the end of 1993, where mutual defection was the only conceivable common choice (DC > DD > CC > CD). There are no prospects for cooperation and mutual reception, as the only change acceptable for all participants is a complete blocking of access.

Translated back to reality, this means that a viable burden-sharing strategy first and foremost needs to break free from the conservation of inequality by the Dublin and Schengen instruments.[106] Considering the geographical and demographic differences between European States, the effect of those instruments and the quest for equitable burden-sharing are simply not compatible.

What has been said on the effects of the Schengen and Dublin Conventions on burden-sharing applies *mutatis mutandis* to bi- and multilateral readmission of protection seekers to so-called Safe Third Countries as well. This expands the scope of the problem to certain parts of Central and Eastern Europe. In this context, the ongoing discussions on the drafting of a Parallel Convention to the Dublin Convention

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of one of the most developed border surveillance systems in Europe. For further on this topic *see*, *Gregor Noll*, Non-admission and return of protection seekers in Germany, International Journal of Refugee Law, vol. 9, 1997, 415.

[106] It seems that only a binding instrument of international law could a) legally override the Schengen and Dublin Conventions and b) provide for the necessary stabilizing effect on the Prisoners' Dilemma of burden-sharing. The political feasibility of such an instrument is quite another matter.

should be noted. This instrument would allow Central and Eastern European States to be integrated into the reallocation mechanism contained in the Dublin Convention.

Conclusions

Let us briefly recall the main conclusions that emerged in the course of this inquiry.

1. In the absence of a specific obligation for States to receive refugees, the preservation of their willingness to do so is essential for the functioning of the contemporary international refugee regime. Equitable burden-sharing is inextricably linked to the preservation of this willingness.
2. In this sense, equitable burden-sharing is a part of an obligation to create an international system in which the right to seek and enjoy protection from persecution can be fully realized.
3. Two strategies are prone to comply with this obligation. Harmonization intends to level out differences between States, which differences are significant for attracting refugees. Harmonization is part of a liberal approach, which takes account of refugees' choices. However, geographic or demographic differences are beyond influence and represent the limits of this strategy. Burden-sharing proper, *i.e.* the redistribution of refugees along a certain key, represents the second strategy, ultimately relying on a control paradigm.
4. While the harmonization strategy has been used to some extent by European States, they have hitherto failed to develop a viable burden-sharing mechanism.
5. The Schengen and Dublin Conventions stabilize an inequitable distribution of protection seekers between contracting States. It represents a paradox that those States have used a form of burden-sharing strategy, namely the Schengen and Dublin Conventions, for the preservation rather than the dissolution of inequality.
6. As equitable burden-sharing is systemically blocked by the Schengen and Dublin instruments, the only choice left for States perceiving themselves as overburdened is:

   a) to restrict benefits accorded to non-Convention refugees or

   b) to block access to their territory.

Of course, the challenges of burden-sharing in Europe are not limited to those mentioned here. It remains to be seen whether EU Member States actually perceive the reception of protection seekers as a matter of collective action. If this turns out to be the case, States still need to establish consensus on which form burden-sharing should take. Would financial contributions be sufficient, or is there a need to share responsi-

bility for the sociopolitical reality of refugee reception? Having answered this question, the next task would be to develop a distributive key and a mechanism preventing defection by single States. How all this should be done is a matter falling beyond the scope of this text.[107]

[107] A study of the German attempts to redistribute Bosnian refugees between the different *Länder* would be a valuable contribution to the continuing debate. With large inflows of Bosnians in the South, the Ministers of the Interior of the *Länder* organised a rudimentary form of burden-sharing. *See, e.g.*, Erlaß des Innenministeriums vom 11. März 1994, Az.: 4-13-Bosnien-Herzegowina/2 (Baden-Württemberg).