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“The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach”

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The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach

Eiko Thielemann

Abstract

In June 2007, the Commission presented its Green Paper on the Future of the European Asylum System. The Green Paper builds on the 2005 Hague Programme Action Plan with its objective of creating a common European asylum system. Such a system aims not only at establishing a level playing field in protection standards across the Member States, but also to ensure a higher degree of solidarity between them. According to the Commission, there is an urgent need for increased European solidarity in the area of asylum and it wants to ensure that responsibility for processing asylum applications and granting protection in the EU is shared equitably. Hence, one of the five chapters of the recent Green Paper is exclusively dedicated to the issue of “Solidarity and Burden-Sharing”. The background of this concern about solidarity is the fact that the distribution of asylum seekers and refugees in European countries appears highly inequitable. Moreover, earlier attempts at EU burden-sharing in this area have not been particularly effective. It will be argued here that this limited effectiveness is in part the result of specific shortcomings in the institutional design of existing EU burden-sharing instruments. However, even a far-reaching reform of the existing instruments, even though it should be welcomed, is unlikely to achieve the objective of equalising responsibilities across the Member States in this area. What the EU needs is a more comprehensive burden-sharing approach. In this paper I propose that such a new approach should be based on a new conception of burden sharing which entails both reactive and proactive elements.

1 Asylum responsibilities and types of burden-sharing mechanisms

The recent Commission Green Paper on the Future of the European Asylum System² shows that European policy-makers continue to be concerned about the numbers of asylum seekers arriving in Europe. In part, this concern is linked to the fact that most refugees in Europe arrive in their host countries, not on the basis of an offer of resettlement, but as “spontaneous” asylum seekers – over which states have only limited influence given a volatile international system and obligations under

² Commission of the European Communities (CEC) (2007a) *Green Paper on the Future Common Asylum System*, COM (2007) 301 final.

international law.³ However, policy makers are not just worried about the overall inflow of persons asking for refugee status on their territory; they are also concerned about the distribution of asylum applications between states, in particular when they feel that restrictive policy measures adopted in neighbouring states shift responsibilities and are in part responsible for increasing their own asylum burden.⁴ Recent developments towards a common asylum policy in Europe have therefore been closely linked with the perceived need for *burden-* or *responsibility-sharing* in this area.⁵ The ambitions for an EU burden-sharing system were already made explicit in the text of the Amsterdam Treaty of October 1997, Article 63 (ex 73k), which states that the Council shall adopt measures “promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons”.

In other EU documents we find even more concrete calls for solidarity and fairness in this area. A recent Commission document states that “the implementation of such a [EU asylum] policy should be based on solidarity between Member States and requires the existence of mechanisms intended to promote a balance in the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons”.⁶ The commitment of Member States in this regard was perhaps most clearly stated at the Brussels European Council meeting in November 2004. In their final declaration, EU leaders stressed that the development of a common policy in the field of asylum, migration and borders “should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical co-operation between Member States.”⁷ The United Nations High Commissioner for Refugees (UNHCR) echoes this concern because “... burden-sharing is a key to the protection of refugees and the resolution of the refugee problem.”⁸ In 2005, the then UNHCR High Commissioner Lubbers stated that “[t]here is a need for responsibility and burden-sharing within the EU... I fear that high protection standards will be difficult to maintain in a system which shifts

³ All EU Member States are signatories of the Geneva Convention (UN Convention on the Status of Refugees 1951, as amended by the 1967 New York Protocol) under which they are under an obligation not to return a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.”

⁴ Like in the Green Paper, the focus here is on intra-EU solidarity and burden-sharing. The Green Paper also mentions the need for South-North responsibility sharing in its chapter on the ‘External Dimension of Asylum’. The question of global burden-sharing, however, raises a set of different issues that cannot be adequately addressed within the scope of this paper.

⁵ For an overview of the debate this has sparked in the academic literature, see Thielemann, Eiko Ralph (ed.) (2003) *European Burden-Sharing and Forced Migration*, special issue of the *Journal of Refugee Studies*, Vol.16, No.3.

⁶ 2004/904/EC: Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010.

⁷ Brussels European Council, 4/5 November 2004, Presidency Conclusions, page 18.

⁸ Official Documents Burden-Sharing - Discussion Paper Submitted By UNHCR Fifth Annual Plenary Meeting Of The APC; ISIL Year Book of International Humanitarian and Refugee Law, Vol. 17 (2001); URL: <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/17.html>

responsibility to states located on the external border of the EU, many of which have limited asylum capacity.”⁹ In its recent Green Paper the Commission echoes this concern and emphasises that “there is a pressing need for increased solidarity in the area of asylum, so as to ensure that responsibility for processing asylum applications and granting protection in the EU is shared equitably”.¹⁰

How (un)equal is the distribution of asylum burdens?

When analysing the development of asylum applications across EU countries, the distribution of asylum applications appears highly unbalanced. Attention was first drawn to this in 1992 when Germany received over 438,000 asylum applications, which constituted more than 62 percent of all applications registered in Europe at the time.¹¹ In more recent years the UK and France have topped the table in terms of the absolute number of asylum applications in the EU. Over the past decade, the largest numbers of asylum seekers have originated from former Yugoslavia, Afghanistan, Iraq and most recently Russia (Chechnya). However, analysing reception burdens by comparing *absolute* asylum figures is often misleading. When using the more meaningful measure of *relative* burdens, that is, one which takes account of differences in states’ reception capacity, the unevenness in distribution becomes much clearer. The available data suggests that between 1994 and 2002 some smaller EU countries such as the Netherlands, Belgium and Sweden were among those EU states bearing the highest relative (per capita) asylum burdens (see Table 1).¹²

Table 1: Average Number of Asylum Applications per Year in selected OECD countries, 1994-2002 (per thousand of population)

HIGHEST				LOWEST			
Switzerland	3.5	Norway	1.8	UK	1.0	Spain	0.2
Netherlands	2.2	Denmark	1.6	Australia	0.5	Italy	0.2
Belgium	2.1	Germany	1.2	France	0.5	Japan	0
Sweden	1.8	Canada	1.0	US	0.3		

In more recent years some new Member States such as Malta and Cyprus have had to deal with the highest per capita burdens. High relative burdens have constituted a considerable domestic challenge in

⁹ United Nations High Commissioner for Refugees, Mr. Ruud Lubbers, Talking Points for the Informal Justice and Home Affairs Council (Luxembourg, 29 January 2005).

¹⁰ CEC 2007a, at p.10.

¹¹ UNHCR, Statistical Yearbook. Geneva: UNHCR, 1999.

¹² Even if one expanded the table to include responsibilities for refugees and individuals granted subsidiary protection status, the ranking of countries in the table would not look very different. See Thielemann, Eiko and Torun Dewan, (2005) “The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing”, *West European Politics*, Vol. 29, No. 2, pp. 355.

many of these countries, in particular those with little previous experience of dealing with large inflows of asylum seekers. When thinking about how it might be possible to address the challenges of unequal responsibilities in this area through multilateral policy measures, several different types of burden-sharing mechanisms can be usefully distinguished.

Types of international burden-sharing regimes

One can identify two substantively different types of international burden-sharing regimes and four principal burden-sharing mechanisms (see table 1).

Table 1: Types of International Burden-Sharing Mechanisms

		Dimensionality	
		One Dimensional	Multi Dimensional
Distribution Rule	Hard	Binding Rules	Explicit Compensation
	Soft	Voluntary Pledging	Implicit Trade

First, there are **one-dimensional** burden-sharing regimes that aim to equalize the efforts of states on one particular contribution dimension, usually by seeking to equalise the number of asylum seekers and refugees that states have to deal with. This tends to be done in two ways – through binding rules or through voluntary pledging mechanisms. Policy harmonisation would be an example of the former method as it is based on the assumption that agreeing on a common set of rules will overcome burden inequalities. By obliging states to harmonise their policies or to comply with a set of common international rules, we may expect that individual countries will face converging burdens. The core idea of such a mechanism is that common rules will reduce the need for corrective action. Redistributive quotas are also classic examples of such “binding rules” mechanisms as they try to equalize observed imbalances or inequities in burdens through some agreed distribution key (which is usually based on one or several fairness principles such as responsibility, capacity, benefit or cost).¹³ Germany, for

¹³ The “responsibility” principle is commonly used in environmental regimes and also known as the “polluter pays” principle. The “capacity” principle refers to a state’s “ability to pay” (and is often linked to relative GDP). The “benefit” principle proposes that states should contribute to a particular regime in relation to the benefit they gain from

example, operates such a quota regime for asylum seekers on its territory. Individuals who seek refugee status in Germany are initially processed in centralised reception centres, before they get distributed across the sixteen Länder of the Federal Republic according to the Länder's population size (a capacity based distribution key).

A second type of one-dimensional burden-sharing mechanisms are those which are based on non-binding "pledging" mechanisms. If states cannot agree on a binding distribution key, they can make appeals which ask states with smaller responsibilities to alleviate some of the high burdens that other states are being faced with. During the Kosovo crisis in 1999, the UNHCR operated such a system through which it encouraged countries to alleviate the burdens of bordering countries, such as Macedonia, by agreeing to resettle refugees in their territory. A more institutionalised EU system exists (at least on paper) since 2001, when the Council agreed to set up a Council Directive on Temporary Protection in the Case of Mass Influx.¹⁴ The directive develops a range of ultimately non-binding mechanisms based on the principle of *double voluntarism* which means that the agreement of both the recipient state and the individuals concerned is required before protection seekers can be moved from one country to another. In its efforts to enhance solidarity and equalise responsibilities across the Member States, existing EU burden-sharing initiatives in this area have until recently largely relied on a one-dimensional burden-sharing logic.

Multi-dimensional burden-sharing regimes are those that do not seek to equalise burdens or responsibilities on one particular contribution dimension alone, but instead operate across several contribution dimensions. On the one hand, some multi-dimensional regimes are based on an explicit compensation logic. In these cases, a country's disproportionate efforts in one contribution dimension are recognized and that country gets compensated (through benefits or cost reductions) on other dimensions. An example of this is Schuck's "decentralized, market-based refugee sharing system,"¹⁵ which is similar to the Kyoto emission trading scheme. According to this model, an international agency would assign a refugee protection quota to each participating state on the basis of which states would then be allowed to trade their quota by paying others (with money or in kind) to fulfil their obligations.

it and the "cost" principle suggests that states' relative costs in making certain contributions should be taken into account when establishing burden-sharing regimes.

¹⁴ Council Directive 2001/55/EC of 20 July 2001.

¹⁵ Schuck, Peter, (1997) "Refugee Burden-Sharing: A Modest Proposal." *Yale Journal of International Law*, 22.

A second type of a multi-dimensional burden-sharing mechanism is based on an implicit trading logic which recognises that states contribute to international collective goods such as refugee protection in different ways.¹⁶ In the refugee context, these include what might be called *pro-active* measures, which attempt to halt the escalation of potential refugee problems by, for instance, sending peacekeeping troops to a region in order to prevent or contain forced migration. Another set of contributions are those which can be called *reactive* measures. The latter measures deal with the consequences of refugee problems once they have occurred, in particular by admitting protection seekers to a host country's territory. During the negotiations of recent EU refugee burden-sharing initiatives, the British and French governments expressed their wishes that their participation in peacekeeping operations should be taken into account when assessing the burdens borne by individual Member States.¹⁷ This suggestion, however, has not been followed up in the more recent EU discussions.

2 Existing EU asylum burden-sharing initiatives

There have been several European burden-sharing initiatives in the area of asylum. Following Noll's categorisation,¹⁸ there are essentially three ways to address the unequal distribution of protection seekers that states are faced with: (1) physical burden-sharing (sharing people); (2) harmonising of asylum legislation (sharing policy) and (3) financial burden-sharing (sharing money).

Sharing People

The idea of "people sharing", i.e. the physical transfer of protection seekers from one host territory to another, is perhaps the most obvious method to address disparities in refugee burdens. The Dublin Convention is often regarded as the flagship of the EU's asylum acquis. It provides the rules that determine the responsible Member State for dealing with a particular asylum claim. In essence, the rule states that asylum seekers who move to another member state as a secondary movement can be sent back to the "state of first entry". Its principal aim is to "establish which Member State is responsible for the examination of an asylum application lodged on EU territory [...] and to prevent secondary movements between Member States".¹⁹ Other more recent EU initiatives based on the idea of people-sharing have been influenced not only by the recent experience with the refugee crises in Bosnia and Kosovo but also by people-sharing arrangements found in the refugee regimes of several Member

¹⁶ See Thielemann, Eiko Ralph, and Torun, Dewan (2006) "The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing", *West European Politics*, Vol. 29, No. 2, pp. 351-69.

¹⁷ Council resolution of 25 September 1995 "on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis" (OJ No C 262/1, 7 October 1995).

¹⁸ Noll Gregor (2000) *Negotiating Asylum, the EU Acquis, Extraterritorial Asylum and the Common. Market of Deflection*, The Hague: Kluwer Law International.

¹⁹ CEC 2007a, at p.10.

States.²⁰ Particularly noteworthy in this context is the 2001 Council Directive on Temporary Protection in the Case of Mass Influx (see above).²¹

Sharing Policy

A further possible way to achieve a more equitable distribution of asylum burdens is to take a common policy approach through the harmonisation of domestic refugee legislation. The EU has worked towards the convergence of Member States' laws on forced migration since the mid-1980s. What started with initially non-binding intergovernmental instruments has since then been followed by developments in Community law. Most noteworthy here are several directives that have aimed to level the asylum playing field and to lay the foundations for a Common European Asylum System.²² The 2003 Reception Conditions Directive guarantees minimum standards for the reception of asylum-seekers, including housing, education and health. The 2004 Qualification Directive contains a clear set of criteria for qualifying either for refugee or subsidiary protection status and sets out what rights are attached to each status. The 2005 Asylum Procedures Directive seeks to ensure that, throughout the EU, all procedures at first instance are subject to the same minimum standards. The Commission Green paper summarises the underlying logic of EU policy harmonisation as a burden-sharing instrument as follows: "Further approximation of national asylum procedures, legal standards and reception conditions, as envisaged in creating a Common European Asylum System, is bound to reduce those secondary movements of asylum seekers which are mainly due to the diversity of applicable rules, and could thus result in a more fair [sic] overall distribution of asylum applications between Member States".²³

Sharing Money

More recently, the EU has started to introduce multi-dimensional burden-sharing elements in order to address existing disparities. It has done so through the payment of financial compensation to the most popular destination countries for asylum seekers. This kind of explicit financial burden-sharing has been taking place since the establishment of the European Refugee Fund (ERF), which was put in place to support and encourage efforts of the Member States in receiving and bearing the consequences of

²⁰ See e.g. Boswell, Christina, (2003) "Burden-Sharing in the EU: Lessons from the German and UK Experience", *Journal of Refugee Studies*, Vol. 16, No. 3.

²¹ Council Directive 2001/55/EC of 20 July 2001.

²² Council Directive 2003/9/EC of 27 January 2003; Council Directive 2004/83/EC of 29 April 2004 and Council Directive 2005/85/EC of 1 December 2005.

²³ CEC 2007a, at p.11).

receiving refugees and displaced persons.²⁴ Created on the basis of Article 63(2) (b) of the EC Treaty, the Council Decision of 28 September 2000 established the European Refugee Fund (ERF).²⁵ The ERF is to allocate resources proportionately to the burden on each Member State by reason of their efforts in receiving refugees and displaced persons. This Fund, which is jointly financed by the Member States, seeks to support special projects for the reception, integration and repatriation of refugees and displaced persons. Its rationale is “to demonstrate solidarity between Member States by achieving a balance in the efforts made by those Member States”. The decision’s text states as its rationale that “it is fair to allocate [EU] resources proportionately to the burden on each Member State by reason of its efforts in receiving refugees and displaced persons”.²⁶ For its first funding period (2000-2004), the ERF had at its disposal a total budget of €216 million. In 2004, the Council adopted a European Commission proposal to extend ERF for the period 2005–2010.²⁷ At the same time, it was agreed to triple the size of the Fund to just under €700 million.

3 Criticism and Proposals for Reform

EU burden-sharing initiatives have attracted criticism, not just in terms their impact on individual asylum seekers and refugees, but also with regard to their effectiveness from a burden-sharing perspective which will be the focus of the analysis here.

Dublin

In its Green Paper, the Commission acknowledges that “the Dublin System may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location”.²⁸ Nonetheless, the Commission re-emphasises the need for a system that clearly allocates responsibility for the examination of an asylum claim among the Member States in order to avoid the phenomena of “asylum shopping” (individuals making multiple asylum claims in different countries) and “refugees in orbit” (no country taking responsibility for a displaced person). However, the Commission does see the need to establish “corrective burden-sharing mechanisms” that are complementary to the Dublin system.²⁹ In particular, it advocates the development of an intra-EU resettlement system without making clear how such a system might operate.

²⁴ For a more extensive analysis on this, see Thielemann, E. R. (2005) “Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-Payments and the European Refugee Fund”, *Journal of Common Market Studies*, Vol. 43, No. 4, 807–824.

²⁵ OJ L 252/12 of 6 October 2000.

²⁶ OJ L 252/12 of 6 October 2000, para. 11.

²⁷ 2004/904/EC; OJ381/52 of 28/12/2004.

²⁸ CEC 2007a, at p.10.

²⁹ CEC 2007a, at p.11.

The UNHCR is more critical of the Dublin system. It laments that the system is based on the flawed assumption that the asylum laws and practices of the participating states are based on common standards and produce comparable results. “In reality, asylum legislation and practice still vary widely from country to country, and as a result, asylum-seekers receive different treatment from one Dublin State to another”.³⁰ From a human rights perspective, UNHCR would favour a system that allocates responsibility for an asylum seeker to the Member State in which the first application for asylum was made.³¹ However, in the short-term it advocates two changes to the existing “people-sharing” arrangements. First, it would like to see more flexibility in the management of the Dublin system, with the possibility of States facing disproportionate pressures being released from their responsibility for the examination of asylum requests, with the responsibility being transferred to the State in which the asylum application is first lodged. Second, like the Commission, the UNHCR would like to complement the Dublin system with new reallocation arrangements for both asylum-seekers and refugees that are aimed at helping States which are facing pressures exceeding their reception capacities. Again, few detailed proposals regarding the operation of such systems are made, but the UNHCR insists that any transfer under such a new mechanism would require the consent of the individuals concerned.

The European Council on Refugees and Exiles (ECRE) also questions the track-record of the Dublin system, given the significant human and financial costs incurred as a result of its operation. It highlights the findings of the recent Commission report, which shows that in recent years, transfer of responsibility was requested in 17% of all asylum applications lodged across the EU, with 30% of accepted requests for transfer being effected.³² ECRE advocates a revised system that “delivers quick, efficient and fair status determination, wherever a claim is lodged, followed by an opportunity for recognised refugees and those who have been granted subsidiary protection to relocate within the EU”.³³

³⁰ UNHCR, *Response to the European Commission’s Green Paper on the Future Common European Asylum System*, September 2007, p. 38.

³¹ *Ibid.*

³² Commission of the European Communities (CEC) (2007b) *Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System*, COM (2007) 299 final.

³³ European Council on Refugees and Exiles (ECRE), *Submission from the European Council on Refugees and Exiles in response to the Commission’s Green Paper on the Future Common European Asylum System*, 2007. p. 37.

Policy Harmonisation

The Green Paper recognises that even the establishment of a common asylum procedure and a uniform status will not completely eradicate all reasons why asylum seekers may find some Member States more attractive than others.³⁴ Policy harmonisation can only address imbalances due to differences in domestic legislation in the first place. It is well established that policy differences are only one of several determinants for a protection seeker's choice of host country, with structural factors such as historic networks, employment opportunities, geography or a host country's reputation being at least equally, if not more, important. The Commission's belief in the equalising effect of policy harmonisation might therefore be exaggerated. If structural pull factors are indeed crucial for the scale of a countries' asylum and refugee burdens, then policy harmonisation might actually do more harm than good to the EU's efforts to achieve a more equitable distribution of asylum seekers across the Member States. EU policy harmonisation curtails Member States' ability to use national asylum policies to counterbalance their country's unique structural pull-factors (language, colonial ties, etc.). This is why policy harmonisation might in fact undermine rather than facilitate efforts to achieve to more equitable responsibility sharing.³⁵ There appears to be an emerging agreement that the moves towards EU policy harmonisation at the very least need to be complemented by initiatives that tackle disparities through intra-EU resettlement or the development of more effective financial compensation mechanisms.

The European Refugee Fund

The Commission emphasises the need to identify ways to better use ERF funding "to reduce disparities and to raise standards".³⁶ The Green Paper suggests setting up new information-sharing mechanisms to identify more effective projects and programmes that could be funded by the ERF. However, this focus seems rather narrow, as it does not address the crucial issue; namely that the ERF has so far failed to provide for effective incentives that would make states with smaller asylum and refugee burdens accept greater responsibilities. While much of the UNHCR's response on this issue engages with the question of how allocated resources from the ERF could be spent better in the future, it does raise the issue of existing allocation mechanisms that go the heart of the ERF's functioning as a burden-sharing mechanism. The UNHCR expresses its concern about the fact 'that the current allocation based on [the absolute] numbers of asylum claims tends to favour larger Member States with well-established asylum

³⁴ Ibid, at p. 11.

³⁵ For a more extensive treatment of this argument see Thielemann, E. R. (2004) "Why European Policy Harmonization Undermines Refugee Burden-Sharing", *European Journal of Migration and Law*, Vol. 6, No. 3, 43–61.

³⁶ CEC 2007a, at p. 11.

systems'.³⁷ It therefore supports higher minimum allocations for new Member States that will help them to build up their reception capacities.

ECRE also stresses this point, stating that in order to develop into a more effective burden-sharing instrument, "the ERF should target a greater proportion of its funding at states with historically less developed asylum systems while at the same time continuing to compensate states which receive a higher volume of asylum applications".³⁸ Instead of supporting an expansion of the fixed dispensing element of the Fund, it advocates the development of "a mechanism that is specifically designed to allow states with less developed asylum systems to catch up with more developed states". The ECRE paper also argues that ERF funding should be allocated by taking account of Member States relative (rather than absolute) protection responsibilities. This means that resources should be distributed 'according to the degree of relative efforts required by different states', taking account of differences in states' size, wealth, etc. Finally, ECRE emphasises that a more effective ERF would need to be large enough to realistically reflect the financial responsibilities faced by States, if it is to provide some States with incentives to accept increased responsibilities in this area.³⁹ To put the ERF's resources in perspective, it is instructive to compare them with costs incurred at the national level. According to UK Home Office estimates, Britain spent just under €30000 per asylum-seeker in 2002, if one includes administrative costs, legal bills, accommodation and subsistence. According to figures from the ERF's mid-term review, the UK was the second largest recipient of the fund in 2002, and received just over €100 ERF money per asylum application received that year. It therefore seems clear that, on their own, the reforms discussed above should not be expected to achieve an equitable distribution of asylum and refugee burdens across Europe. To achieve this aim, the EU will need to develop a broader burden-sharing regime in this area.

4 The need for a more comprehensive burden-sharing approach

Given the limitations of the existing EU refugee-sharing initiatives, it might be time to further explore the fourth burden-sharing mechanism discussed above: trade. The Member States have not yet used this mechanism in their burden-sharing efforts. Several objections have been made against a Kyoto-style refugee burden-sharing regime based on the idea of "explicit burden trading", as proposed by Schuck,

³⁷ UHCHR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, p.42.

³⁸ European Council on Refugees and Exiles (ECRE), *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System*, 2007.

³⁹ For all three of these proposals, see also Thielemann (2005) *op. cit.*

which raised “unease about treating refugees as commodities in inter-state transactions”.⁴⁰ An alternative “implicit trade” model suggests that countries can be expected to specialize according to their comparative advantage as to the type and level of contribution they make to international collective goods. Applied to the area of forced migration, Thielemann and Dewan suggest that countries contribute to refugee protection in two principal ways: proactively (e.g. through peace-keeping/making, aid, trade or investment in regions of origin) and reactively (most commonly through providing protection for displaced persons on a host state’s territory).⁴¹ While pro-active measures seek to alleviate push-factors and aim at preventing a refugee crisis to develop in the first place, re-active measures aim at dealing with the crisis once it has occurred. Empirically, one indeed finds evidence that some countries make disproportionate contributions in “pro-active” refugee protection contributions (such as through peace-keeping efforts) while other countries contribute disproportionately with “reactive” measures related to refugee reception. It therefore appears that some implicit trading in refugee protection contributions is already taking place.

From a theoretical perspective, it is not difficult to see why such a division of labour occurs as countries can be expected to have a comparative advantage in providing certain types of collective goods over others which means that every country can contribute to some collective goods *relatively* more cheaply than another country.⁴² It seems perfectly reasonable to assume that countries are not equally well placed to contribute to refugee protection in same way. From an economic efficiency of countries specific contributions differ. For example, from such a perspective, one might expect a country with well established asylum/refugee institutions to be relatively more efficient in processing and offering refuge to protection seekers than a country without such institutions. In contrast, a country with a large army and experience in interventions abroad can be expected to be more efficient in pro-active refugee protection efforts than a country with a small army and no such experience. One can extend this argument to the political realm.⁴³ A country’s political comparative advantage is determined by its political environment, with national policy-makers being constrained by the preferences of their constituents. To remain in power, policy-makers will usually take such preferences into account. In a country where public attitudes are strongly opposed to its army's intervention abroad but where there is

⁴⁰ Anker, Deborah, Fitzpatrick, Joan and Andrew Shacknové, (1998) “Crisis and Cure: A Reply to Hathaway/Neve and Schuck”, *Harvard Human Rights Journal*, Vol. 11, pp. 295-310.

⁴¹ See Thielemann, Eiko Ralph and Torun Dewan, (2006) “The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing”, *West European Politics*, Vol. 29, No. 2, pp. 351-69, 2006.

⁴² Individual countries need only have a relative (not an absolute) advantage in the production of a particular good to be able to reap benefits from specialisation and trade. Even if a country can produce every good more efficiently than other countries, it will still be better off when it specialises in the production of goods in which it holds the greatest relative advantage.

⁴³ See Mark Boyer, *International Cooperation and Public Goods*, Baltimore and London : John Hopkins University Press, 1993.

general support for refugee protection in general, granting refuge to displaced persons (i.e. re-active rather than pro-active refugee protection measures) might be a government's policy of choice.⁴⁴ Take the example of post-war Germany. Given its historical legacy, for much of the post-war period, the German public insisted on a policy of non-intervention by the German security forces, which constitutionally prohibited 'out of area' operations by the German army. The resulting policy choices, became most obvious during the time of the Bosnian conflict in the early 1990s, when Germany chose not to participate in NATO-led military action against the Bosnian Serbs. Instead it provided refuge to very large numbers of Bosnian asylum seekers.

The specialisation in countries' contributions suggested by the implicit trade model, has potentially important implications for attempts to develop multi-lateral burden-sharing initiatives that are perceived to advance states' interests in providing more equitable, efficient and effective refugee protection. First, evidence of inter-country specialisation suggests that overall refugee protection contributions are perhaps not as inequitable as often assumed. Second, it is possible that burden-sharing initiatives that attempt to force all nations to increase contributions into any particular category of provision are likely to be counterproductive for the efficient provision of collective goods such as refugee protection. It can then be argued that the provision of this collective good is closer to optimum when countries are able to specialise with regard to their contributions.

Allowing for specialisation in states' contributions can help to increase the efficiency of refugee protection efforts. While it might be tempting to conclude from the exclusive analysis of reactive protection contributions (as most current EU burden-sharing initiatives do) that some countries should be brought in line with others, such a conclusion would be simplistic and misleading. It appears reasonable to expect that attempts to impose exclusively one-dimensional burden-sharing mechanisms can constitute a hindrance for greater specialisation and trade which will have adverse overall effects on states' willingness to contribute. EU burden-sharing initiatives, if they are to more effectively strengthen refugee protection, need to be aware of variations in states' preferences as to how to contribute in this area and need to recognise the comparative advantages individual states possess with regard to making certain kinds of contributions. If they do not, they risk undermining the search for more effective refugee protection efforts.

⁴⁴ Even in the case when the people of a country and by extension its policy-makers are reluctant to engage in either pro-active and re-active forms of refugee protection, a government that wants to react to its concerns about irregular flows of displaced persons will favour the less costly type of contributions. Of course, like in the case of international trade where a country can choose not to trade with other countries, an isolationist state could also decide not to make contribution to refugee protection, being prepared to accept the cost of such 'non-action'.