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When Sharing Is No Longer Caring: a Critical Examination of EU-North Africa Border Management

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When Sharing is No Longer Caring:  
A Critical Examination of EU-North Africa Border Management

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I. Introduction

Even though the current level of irregular migration into Europe is only a fraction of the peak flow during the refugee crisis in 2015, the issue continues to fuel a polarizing international debate. Some conservative politicians describe it as an “invasion” or threat to domestic tranquility while humanitarian organizations call it a protracted crisis. In fact, around the world, there are still 25.9 million refugees and 3.5 million asylum seekers waiting for a determination of their refugee status. Interestingly, at the end of 2016, around 84% of the world’s refugees lived in countries in the “global south.” Thus, with some distance from the height of the crisis, this moment offers a chance to step back and reevaluate the means of international cooperation in border management. After all, refugee protection will remain a persistent issue as some parts of the world, including Spain, continue to experience an influx of irregular migrants.

Over the last decade, the European Union faced significant challenges in processing and absorbing migrants and refugees from sub-Saharan Africa and other regions in the global south. This gave rise to a body of international agreements that allowed European states to partner with neighboring countries to divide the responsibility of refugee protection. However, as this paper will argue, these procedural measures under the name of responsibility sharing have devolved into an avoidance of the obligations that these states committed to in the 1951 Refugee Convention, the cornerstone of international refugee law. Moreover, obligations for refugee protection have become a political negotiation chip between EU and North African

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countries. This represents a departure from the intended rights-based framework and ultimately deprives asylum seekers of the rights to which they are entitled.

This paper begins with an overview of the international conventions that establish the rights of refugees and asylum seekers. Section III describes the more recent agreements and instruments for responsibility sharing that jeopardize the rights of migrants through border control and migrant processing procedures. Finally, section IV discusses the implications for the next stage of refugee protection initiatives including the recently announced Global Compact on Refugees.

II. Background: International Conventions

International refugee law is anchored by both international treaties specific to the subject matter as well as regional conventions. To provide the background legal context, this section presents an overview of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the European Convention on Human Rights. Importantly, these three documents all emphasize the human rights of refugees and asylum seekers as well as the consequent state obligations to preserve these rights. In this respect, these documents stand in sharp contrast to the more contractual nature of the more recent international instruments amongst European countries or between Europe and North African countries discussed in Section III.

A. The 1951 Convention Relating to the Status of Refugees

While the people that fled their home countries after World War I were deemed to be the first refugees in the 20th Century, international agreements and conventions took time to develop
and eventually culminated in the 1951 Convention Relating to the Status of Refugees (“the Convention”) following the end of World War II.\(^4\) The Convention is rooted in Article 14 of the Universal Declaration of Human Rights (1948), which recognizes the right of persons to seek asylum from persecution in other countries.\(^5\) Around the world, 146 states are party to the Convention and have consented to be bound to the Convention, including EU member countries, Morocco, and Tunisia.\(^6\) More specifically, the Convention guarantees the rights of people that qualify for the legal definition of “refugee” as determined by the state in which the person applied for asylum. To that end, the Convention is legally binding and Article 38 refers all disputes to the International Court of Justice while Article 35 provides the United Nations High Commissioner for Refugees with supervisory authorities.\(^7\) However, to date, there have been no real or legal consequences to non-compliance.

This section begins with understanding the scope of the Convention through (i) the definition of refugee and the defined state obligations, including (ii) non-refoulement and (iii) certain social and economic rights. Given the focus of this paper on responsibility sharing, the section ends with (iv) a discussion of the only mention of the concept in Recital 4 in the Preamble of the Convention.

i. Definition of “refugee”


The definition of refugee is important because it determines the scope and reach of the Convention. To that end, there are two aspects to the scope of refugee protection: first, the rights guaranteed for refugees based on the text of the Convention and second, the principles for enforcing the rights.

First, based on Article 1(A)(2), a refugee is when someone with 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 or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Article 1(B)(1) limits the definition of refugees to those whose well-founded fear is a result of events occurring in Europe before 1 January 1951. Both the temporal and geographic criteria serve to restrict the universe of people who could claim refugee status to an existing population as governments were unwilling to “sign a blank cheque and undertake obligations toward future refugees, the origin and number of which would be unknown.”

There are several key elements of this definition that have become assessment criteria for adjudicating refugee status. First, “well-founded fear of being persecuted” combines both objective and subjective assessments because “fear” is a subjective state of mind but the qualifier “well-founded” means that the “fear” must be supported by the prevailing condition or situation.

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in the applicant’s country of origin.\textsuperscript{11} The subjective element requires an assessment of credibility, which takes into account a person’s membership in racial, religious, national, social or political groups, and personal experiences, which includes experiences of friends, relatives and other members that may show that the applicant will also soon be a victim.\textsuperscript{12} The credibility assessment involves evaluating the reliability of applicant’s documents, any inconsistencies in the applicant’s evidence and inconsistency with Country of Origin information.\textsuperscript{13} The second element is “persecution.” While the term has not been universally defined, it typically includes threat to life or freedom or any other serious violations of human rights on account of race, religion, nationality, political opinion or membership of a particular social group.\textsuperscript{14} Relatedly, agents of persecution could be government authorities but is not limited to such. Persecution can also occur when a government knowingly tolerates seriously discriminatory or other offensive acts by the local populace, even if they are against established local laws.\textsuperscript{15} Third, “for reasons of race, religion, nationality, membership of a particular social group or political opinion” means that the adjudicator must analyze all possible nexus, which refers to these categories.\textsuperscript{16} While it is immaterial how many of these aforementioned reasons apply, mere membership in a certain group is usually insufficient as there would need to be special circumstances affecting the group.

\textsuperscript{12} Id.
\textsuperscript{15} Id.
The fourth element is “unable, or owing to such fear, unwilling to avail himself of the protection of that country.” The “unable” prong refers to circumstances beyond the will of the individual applicant concerned. For example, in times of war, a country cannot extend effective protection to its people. The “unwilling” prong somewhat qualifies the high standard set by “unable.” However, it is combined with the qualifier “owing to such fear” to limit the exception because applicants from countries where national protection is available generally not qualify for refugee status. 17

The second aspect of understanding the extent of the protection offered by the Convention is the principles for enforcing the definition. According to the text of the Convention, refugee status is constitutive, which means that anyone who fulfills the criteria is entitled to the enumerated rights. However, in reality, when someone arrives at a country to apply for refugee protection, the country must first evaluate their circumstances and then determine whether refugee status is warranted. Accordingly, said receiving country maintains significant control over the treatment and protection of migrants. Refugee is thus an adjudicated legal status.

The 1951 Refugee Convention laid out a set of criteria that qualifies an individual for refugee protection while also restricting the population that could claim the status. 18 As a result, before the receiving country recognizes such a status, the applicant is legally only someone seeking asylum. While the term “asylum seeker” is not specifically defined in the Convention,

asylum seeker describes a migrant who is seeking recognition as a refugee. While not every asylum seeker will be recognized as a refugee, every refugee started out as an asylum seeker.  

ii. Principle of non-refoulement

The Convention enumerates refugee rights through listing obligations of the contracting states. For example, Article 32 of the 1951 Refugee Convention provides that refugees can be expelled only with due process of law. See Appendix 1. This section focuses on Article 33, “Prohibition of Expulsion or Return (‘Refoulement’),” because of its relevance to this topic at hand and because the concept of non-refoulement has risen beyond mere recognition by the signatories of the Convention to the level of customary international law. Article 33 of the 1951 Refugee Convention states that

“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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” (Emphasis added).

The phrases “where his life or freedom would be threatened” and “in any manner whatsoever” prohibit both direct and indirect refoulement. The latter refers to returning a refugee not to the

state of origin but to a third state, where the refugee would still be at risk of further persecution or at risk of being sent back to the country of origin. Given these obligations imposed on contracting states, the prohibition of refoulement is understood to be a human-rights based limitation imposed upon states' sovereign right to restrict the entry and stay of asylum-seekers.23

Nevertheless, just as there are principles for understanding the definition of refugee, there is more to the right of nonrefoulement than the text in the Convention. While contracting parties of an international convention express their agreement through ratification and their willingness to bind themselves legally, the nuance and true impact of these conventions depends on means of implementation, which can be controversial as it involves other relevant regional or international agreements. The 1951 Convention is no exception and non-refoulement is a great example of the resulting complexity. The act of refoulement could be interpreted narrowly so that it “does not create a right of admission to the territory per se.”24 This is because the difference between the right to seek asylum and the right to be granted asylum is debated and creates differences in implementation protocols like the Dublin III Regulation in Europe (discussed below).25 As another example, the geographic reach of the non-refoulement duties, or where and when this obligation arises, has also been debated. According to some interpretations, “the non-refoulement principle presupposes some kind of contact between the State and the protection-seeker.”26 Accordingly, some European countries have attempted to avoid such contact.27 In contrast, the Human Rights Committee interprets jurisdiction to be more than just geographic

23 Id.
27 Id.
scope and includes “anyone within the power or effective control of that State party, even if not situated within the territory of the State party.” 28 As such, the non-refoulement obligation would apply in at least some border situations, even if there is not direct contact with European soil. 29 Lastly, while the 1951 Convention only applies the right of non-refoulement to the definition of refugees, countries must also take into account Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which also provides that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believe that he would be in danger of being subjected to torture” (emphasis added). 30 This means that the right to non-refoulement applies to all migrants.

iii. Other civil, political, social and economic rights granted through the Convention

In addition to the key principle of non-refoulement, the Convention articles outline refugees’ legal rights and obligations of the state. There are two primary levels of rights granted to refugees: the same rights as enjoyed by nationals of the receiving country or the same rights as enjoyed by foreign nationals in the receiving country. For example, Article 13 entitles refugees to treatment no less favorable than aliens in the same circumstances when it comes to acquisition of movable and immovable property. 31 Article 16 entitles refugees the same access to courts as

28 Id. at 293, citing Human Rights Committee, General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 12 May 2004, HRI/GEN/1/Rev.7 at 195; 11 IHRR 905 (2004).
29 Id. at 295.
30 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, United Nations Office of the High Commissioner for Human Rights (Dec. 10, 1984), available at: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx. Article I of the Convention Against Torture defines “torture” to be “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as…punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reasons based on discrimination of any kind…”
nationals. Additionally, the Convention includes civil and political rights. According to Article 4, refugees are entitled to the same treatment as nationals in terms of freedom to practice their religion. In terms of economic rights, Article 17 grants refugees the same rights as foreign nationals in the same circumstances with regards to the right to engage in wage-earning employment.  

iv. Burden Sharing

While the body of the Convention laid out the substantive rights guaranteed by the contracting parties, the Preamble is significant for our purposes of understanding international responsibility sharing. Recital 4 of the Preamble of the 1951 Refugee Convention states that

“the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem… cannot therefore be achieved without international co-operation.”

However, neither the 1951 Refugee Convention nor the 1967 Protocol includes any specific mechanisms for distributing the responsibility or burden.

Despite the Convention’s role in setting up the modern refugee protection regime, it would be difficult to deem Recital 4 as the origin of the concept of burden sharing. The drafting history of the Convention reveals that the concept had already been contemplated at the time of drafting but it was the means in which it was written into the Convention that represented a political compromise. On the one hand, some countries like France proposed for the concept to be included in the body of the Convention, in an article on admission of refugees. On the other

32 Id.
33 Id.
35 Id.
hand, it was ultimately removed from the body of the Convention because other countries like the U.S. and China did not want to create a positive obligation to accept refugees from other countries.\textsuperscript{36} It is clear from its current place in the Preamble that it does not create legal obligations like the articles in the body of the Convention. Nevertheless, the ultimate inclusion of the concept still suggest that it is important for the refugee protection at large because it stands out as the only clause discussing responsibility amongst contracting states while every other clause creates obligations by contracting states to refugees.

Since Recital 4 did not create legal obligations, the concept of burden sharing would at most be “soft law.” Nevertheless, the concept has been of continued interest in the international community. More than six decades later, the 2016 New York Declaration for Refugees and Migrants is an unanimously-adopted UN resolution in which all 193 member states committed to sharing the international responsibility of protecting refugees more equitably and predictably.\textsuperscript{37} As seen with developments in international environmental law, concepts in soft law can become origin for positive obligations that “harden” into binding agreements overtime.\textsuperscript{38} Thus, even though neither the Convention nor subsequent international agreements have created a legal obligation for international cooperation, it is important to understand its current manifestations and their consequences in order to better understand where there is room for improvement in our current refugee protection regime.

\textsuperscript{36} \textit{Id.} at 549.


The 1967 Protocol extended the definition of a refugee to our current understanding. The Protocol enlarged the scope and reach of the 1951 Refugee Convention by removing the temporal and geographic limitations. As a result, “protection would be available to any person with a well-founded fear of persecution for any of the reasons set out in the Convention, regardless of when or where the events that gave rise to that fear occurred.”

This represents a significant shift from the 1951 definition. With the previous temporal and geographic limits, the number of people who qualify for refugee status decreased over time and countries’ obligations therefore decreased over time. After 1967, however, contracting states’ obligations become ongoing as the number of refugees in the world that states must receive and protect could increase without limit.

C. The European Convention on Human Rights (ECHR)

While international treaties set a baseline framework, regional conventions and national legislations build on top of them and create various additional obligations as well as regionally specific approaches to implementation. For example, the ECHR and the Convention both prohibit the expulsion of refugees but the former elaborates on additional refugee protections such as access to effective legal remedy (Article 13). Established by Article 19 of the ECHR, the European Court of Human Rights (ECtHR) enforces the ECHR. This document binds 47


\footnote{40} *European Convention on Human Rights*, Council of Europe, Availble at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.
signatory states, which includes all members of the European Union.\textsuperscript{41} While the scope of this paper precludes a thorough analysis of case law that interprets the articles of the ECHR, the key provisions relevant to the protection of refugees, namely Article 1, Article 13, and Article 4 of Protocol 4, are discussed below with the accompaniment of a few select case examples. See Appendix 2.

First, both the text of the ECHR and case law from the ECtHR have helped define the jurisdiction of ECHR, which affects the rights of refugees and asylum seekers in Europe because ECHR also speaks on the right of migrants. Article 1 of the ECHR states that

“the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”\textsuperscript{42}

This text suggests that the jurisdiction of the signatory states determines the extent of the contracting states’ obligations. The ECtHR takes a functional approach whereby either \textit{de jure} and \textit{de facto} jurisdiction can trigger the application of the ECHR.\textsuperscript{43} More concretely, case law has established that \textit{de facto} jurisdiction can be established based on control over a territory,\textsuperscript{44} control over persons,\textsuperscript{45} or in a combination of the territorial and personal factors and a background exercise of public powers.\textsuperscript{46} As such, jurisdiction is more of a legal determination rather than a geographical concept when it comes to human rights under the ECHR. Importantly, case law on Article 1 extends the reach of refugee protections in ECHR beyond the rights

\begin{footnotesize}
\textsuperscript{44} Loizidou v Turkey [1995] ECtHR, Application no. 15318/89
\textsuperscript{45} Medvedyev v France [2010] ECtHR, Application no. 3394/03
\textsuperscript{46} Al-Skeini v United Kinddon [2011] ECtHR, Application. 55721/07.
\end{footnotesize}
granted in the 1951 Convention because the latter only applies to those that have gained refugee status while the rights for aliens apply to anyone within the ECHR’s jurisdiction, regardless of whether they have gained refugee status.\textsuperscript{47}

Besides case law, domestic legislation often represents a certain interpretation of the obligations flowing from international agreements. Spain, a country that receives a disproportionately high inflow of migrants because of its geographic location at the border of the EU territory, is one example where a domestic interpretation hurts refugees. Just as the principle of non-refoulement can be interpreted narrowly, Spain’s 2009 Asylum Act qualifies its guarantee of refugee protection by only recognizing the right to seek “international protection” as opposed to asylum for those who are present in the Spanish territory.\textsuperscript{48} These localized interpretations raise the bars set by the Convention and ECHR and makes it more difficult for asylum seekers to assert their qualifications.

Second, Article 13, which require states to provide access to effective legal remedy, is generally applicable to everyone within ECHR jurisdiction but particularly important in the refugee context. For example, the case of \textit{N.D. and N.T. v Spain} involved a Malian and an Ivorian who tried to cross from Morocco into Spain when the Spanish Guardia Civil and the Moroccan law enforcement officials violently pursued them and turned them over to Moroccan authorities without inquiring about their identification or personal circumstance.\textsuperscript{49} The ECtHR did not require “an automatically suspensive remedy” that would halt removal, but an effective

\textsuperscript{48} Maria-Teresa Gil-Bazo, \textit{The Safe Third Country Concept in International Agreements on Refugee Protection}, 33 Netherlands Quarterly of Human Rights 42, 55 (2015), citing Ley 12/2009 de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria; BOE núm. 263, of 31 October.
possibility of challenging the expulsion decision by way of a thorough examination of a complaint in an independent and impartial domestic forum.\(^{50}\) In conjunction with the prohibition of expulsion in Article 4 of Protocol 4, this echoes the due process requirement in Article 32 of the 1951 Refugee Convention and provides more clarity into what such a process should look like in the European context.

Third, Article 4 of Protocol 4 prohibits collective expulsion of aliens and is directly on point with regards to protection of migrant rights. The substance of the right comes through case law and fills in some gaps left by the Convention. For example, \textit{Hirsi Jamaa v Italy} was the 2009 case about Italian pushbacks, where Italian Coast Guards intercepted three boats carrying asylum seekers from Libya, transferred them to Italian warships headed towards Tripoli, and turned them over to Libyan authorities upon arrival at the port, all without inquiring about their identity, potential need for international protection, and qualification for refugee status.\(^{51}\) In \textit{Hirsi Jamaa v Italy}, the Grand Chamber, an appellate body sitting above the ECtHR, established that indiscriminately processing applications without consideration of migrants’ individual circumstances violates Article 4 of Protocol 4.\(^{52}\) Specifically, the undisputed fact that individuals on the boats did not go through any identification procedure, that the personnel on the warships were not trained to conduct individual interviews, and the absence of interpreters and legal advisors constituted sufficient evidence for failure to fulfill the ECHR’s guarantees of individual examinations.\(^{53}\) Additionally, the jurisdiction of this article also applies extra-territorially.\(^{54}\) This

\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) \textit{Hirsi Jamaa and Others v. Italy}, Application no. 27765/09, Council of Europe: European Court of Human Rights, para 185, 23 February 2012, available at: https://www.refworld.org/casesECHR,4f4507942.html.
\(^{53}\) Id.
means that asylum seekers cannot be returned without an individual examination of their application, even if officials of a contracting state encountered the migrants outside of the borders of the state.

All in all, these localized sources of law can extend asylum rights as the ECHR had done or curb them, as legislation like the Spanish Asylum Act had done. At a macro level, the differences in local implementation protocol further plays into the overall dynamics of the refugee protection system, as detailed below in the actual mechanisms of burden sharing.

III. Instruments of Responsibility Sharing

Despite the protections guaranteed by the Convention and ECHR, EU procedures for border management have departed from the human rights-focused framework. This section discusses various instruments of responsibility sharing, such as the Asylum Procedure Directives (APD) and bilateral agreements for mobility partnerships. Through mechanisms for deflecting migrants to third countries or incentivizing countries to readmit asylum seekers, European countries have used these instruments to offload its obligations under the Convention and the ECHR, leaving refugees and asylum seekers without the international protection and the rights guaranteed by those conventions.

A. The Asylum Procedures Directive and the Dublin III Regulation

While the Convention does not provide guidance on the means for distributing responsibility, the APD and the Dublin III Regulation help fill that gap through procedures like the safe third country mechanism. When applying border procedures in reality, the safe third country mechanism provides one example showing that state responsibilities are not as straightforward as outlined in the Convention and the ECHR.
The goal of the APD was to standardize the asylum applications process and spread out the responsibility of taking in and providing for refugees. Adopted by the European Parliament and the European Council in 2013, the APD is an EU directive, which means that it is a legislative act that sets out an objective that all EU countries must achieve but the legislation itself does not dictate the means that individual countries utilize to achieve the objective.\footnote{Regulations, Directives and Other Acts, European Union, https://europa.eu/european-union/eu-law/legal-acts_en.} The APD builds on ECHR and provides procedures for granting and withdrawing migrant protection.\footnote{Asylum Procedures, European Commission Migration and Home Affairs, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/common-procedures_en.} For example, Chapter II of the APD provides basic guarantees such as right to information and counselling to be provided at border crossing points and detention facilities.\footnote{Asylum Procedures Directive, Official Journal of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en.} Chapter III outlines “Procedures at First Instance,” which include specific rules such as a time limit that the examination for asylum should be concluded within six months of the application as well as broader concepts like safe third country.\footnote{Id.} Chapter V provides for “Appeals Procedures,” which include allowing applicants or asylum seekers to remain in the territory until the time limit for exercising their right to effective remedy has expired.\footnote{Id.}

Since the APD is a directive, the safe third country rules operate in conjunction with the Dublin III Regulation, the latest in the series, all of which seeks to allocate responsibility across the EU through “an order of precedence” used in examining an application. The Dublin
Regulation is an EU legislation, binding on all members states.\textsuperscript{60} According to the Dublin Regulation, the first country of arrival bears the of assessing asylum applications.\textsuperscript{61}

i. Safe third country

The safe third country concept, described in Article 38 the APD, is an important mechanism for sharing the responsibility of refugee protection. Originally developed in Denmark in 1986 and formalized through the Dublin Convention, the predecessor to the Dublin Regulations, safe third country is based on the idea that a country’s obligation with regards to non-refoulement does not necessarily include granting asylum.\textsuperscript{62} The safe third country could refer to a safe country of origin, a third country, or a first country of asylum, which could be a non-EU Member state where the asylum seeker first arrived and did not fear persecution.\textsuperscript{63} As a result, when an asylum seeker “move[s] in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere,” the asylum seeker is no longer entitled to a substantive refugee determination.\textsuperscript{64} This is because it is presumed that the person has already enjoyed and could or should have requested refugee protection in that earlier country.\textsuperscript{65} The later state may then deem the asylum application

\begin{footnotesize}
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\textsuperscript{63} Maria-Teresa Gil-Bazo, The Safe Third Country Concept in International Agreements on Refugee Protection, 33 Netherlands Quarterly of Human Rights 42, 43 (2015).
\textsuperscript{64} Id. at 47 citing UNHCR EXCOM Conclusion No. 58(XL) ‘Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection’ (1989), para a.
\end{footnotesize}
inadmissible and send the asylum-seeker back to the earlier country.\textsuperscript{66} This following discussion focuses on two interrelated problems: (1) the shift from examining merits of an asylum claim to deflecting asylum seekers to another country and (2) receiving countries that are actually not safe.

Since countries also have the right to send refugees back to the first country of asylum, later countries focus primarily on determining whether the asylum seeker could be sent to another country, as opposed to assessing substantive eligibility for refugee status.\textsuperscript{67} In fact, Chapter III of Dublin III provides for a “hierarchy of grounds” to determine whether a country is responsible for processing an asylum application: for reasons of family unity, issuance of resident permits or visas, irregular entry and visa-waived entry.\textsuperscript{68} Absent these grounds, the EU member country can send the asylum seeker back to the first country of asylum.\textsuperscript{69} This focus on a third country option as opposed to merits of an asylum seeker’s application seems to contradict the spirit of the 1951 Refugee Convention, which makes the definition of refugee constitutive so that an asylum seeker is \textit{entitled} to protection just by fulfilling the criteria, regardless of the country they have landed in. This process has now turned into an assignment of responsibility where the criteria are no longer related to qualifications for asylum. This also opens the possibility for countries to have a “back door” in setting their own policies on border management since the Convention does not create specific requirements for migrant transfer.

\textsuperscript{69} \textit{Id.}
policies. However, this seems to violate Article 4 of Protocol 4 of the ECHR because it denies the asylum seeker an individual assessment in the country where they wanted to seek asylum. Thus, countries take advantage of the Dublin procedures to “deflect” asylum seekers before the individuals even had a chance to make a claim for asylum avoid the responsibility for refugee protection.

The second problem is whether safe third countries are actually safe. Article 38 of the APD sets forth standards where use of a safe third country must still be in compliance with the principle of non-refoulement. See Appendix 3. However, numerous cases have shown that reality is otherwise. In the Case of M.S.S. v. Belgium and Greece, the ECtHR held that the Belgian government had violated the rights of an asylum seeker from Afghanistan under Article 3 of the ECHR by returning him to Greece, the country he had initially transited through, to adjudicate his asylum claim. This is because it was common knowledge that the Greek government lacked adequate asylum procedures. Even though the Belgian government had a right to transfer the asylum seeker under the Dublin Regulation, returning the applicant to Greece put the person at risk of being returned to Afghanistan where his life or freedom would be in danger. This represents one example where superficial or formalistic compliance with the

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70 Id. at 10.
71 Id. at 9.; see also Maria-Teresa Gil-Bazo, The Safe Third Country Concept in International Agreements on Refugee Protection, 33 Netherlands Quarterly of Human Rights 42, 59 (2015).
Convention and APD does not necessarily protect the asylum seeker rights that these documents intended to guarantee.

Hungary represents a similar problem on a whole new level. UNHCR has urged other European states to stop Dublin transfers to Hungary because of an amended law on asylum that allowed the mandatory detention of asylum seekers and the expulsion of anyone who enters the country irregularly, which violates the country’s obligations under international and European conventions. 75 In fact, there were reports asylum seekers, including children, being detained in shipping containers for the duration of the entire length of their asylum procedures. 76

Fortunately, there are some judicial checks in the application of these regulations. Although the first country of arrival has responsibility for evaluating asylum applications, the ECHR will not allow subsequent countries to use this against the asylum seekers in defense of a Protocol 4 Article 4 violation where groups of asylum seekers are expelled without due process. 77 However, judicial enforcements are less effective when victims lack the ability and resources to access the courts in practicality.

Subsequent case law has also been helpful in protecting refugee rights and reducing the negative consequences of the deflection procedures. NS v. Secretary of State for the Home Department involved an Afghan national who was removed to Greece from the UK after he was initially detained in Greece and expelled to Turkey before he had even arrived at the UK to make

76 Id.
an asylum claim.\textsuperscript{78} In this case, the Court of Justice of the European Union reinforced the ruling from \textit{M.S.S. v. Belgium} and held that an asylum seeker may not be transferred to a Member State where there are ‘systemic’ deficiencies in the asylum procedure and substantial grounds to believe that asylum seeker would be exposed to a risk of inhuman or degrading treatment.\textsuperscript{79} Unfortunately, there have been many other cases of unsafe transfers to states like Italy and Bulgaria.\textsuperscript{80} Because the Dublin Regulations intend to provide for a system in burden sharing, these deficiencies in the system could only increase burden on other countries and render the whole system defective.

As a result, without the proper safeguards, these procedural regulations for responsibility sharing create loopholes that endanger refugee rights. Specifically, while the safe third country concept was intended to distribute responsibility of hosting refugees or asylum seekers, it has opened a path for shirking responsibilities at the outset of the process that has left asylum seekers with less protection than they are entitled under the 1951 Refugee Convention. Thus, safe third regulations operate based on the assumption that all countries within the system uphold the same standard for refugee protection. However, that is not always the case, especially when combined with other mechanisms such as readmission agreements, discussed below.

\textsuperscript{78} N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: https://www.refworld.org/cases,ECJ,4ef1ed702.html [accessed 30 July 2019].


\textsuperscript{80} Tarakhel v Switzerland App No 29217/12 (ECHR, 4 November 2014); Minos Mouzourakis, ‘We Need to Talk about Dublin’ Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, (University of Oxford Refugee Studies Centre Working Paper Series No. 105, 2014). Pg. 15.
B. Readmission Agreements

Whether taking the form of bilateral or multilateral agreements, readmission agreements are rooted in Article 79(3) of the Treaty on the Functioning of the European Union (TFEU), which forms the basis of EU law. Article 79(3) grants the European Union and its members the power to “conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.” Readmission agreements represent another instrument of responsibility sharing as they provide a means for a country to send refugees back to transit countries, known as the receiving country. However, in practice, these agreements become problematic because sending countries do not always guarantee refugee safety in the receiving country and because the terms of readmission agreements have become part of a quid pro quo manner of dealing between border countries.

Readmission agreements typically set out administrative and operational procedures for countries to cooperate on identification of irregular migrants and regulation of migration flow at the border. In a typical readmissions arrangement, a country outside of the EU, such as Morocco, Tunisia, or Libya, acts as the receiving state while a European country on the southern border of the EU is the requesting or sending state. This section discusses the EU-Turkey

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84 Id. at 182.
Readmission Agreement as an example. To begin, the provisions of the agreement apply to any person who does not or no longer fulfills the requirements for entrance or residence Turkey or the EU.\textsuperscript{85} This would include any third country nationals who might have passed through Turkey on their way to the sending country but is deemed unqualified for refugee status as well as Turkish citizens who no longer have a legal permit for living in the EU.\textsuperscript{86}

Similar to the problem of “safe” non-EU third countries that are not actually safe, one of the dangers with readmission agreements is chain refoulement, whereby migrants are indirectly transported back into their country of origin or another in which their well-founded fear also exists.\textsuperscript{87} Responsibility sharing through readmission agreements increases the likelihood of chain refoulement when the safe third country criteria from Article 38 of the APD are not integrated into readmissions agreements. Moreover, since receiving countries are North African states, asylum seekers would likely lose the protection of the ECHR. For example, Libya participates in a readmission arrangement with Italy but does not fulfill the Article 38 criteria for a safe third country, primarily because it has not ratified the 1951 Refugee Convention. Nevertheless, Italy has already trained the Libya Coast Guard members in an effort to intercepting irregular migrants before they can arrive on the Italian coast.\textsuperscript{88} Another less obvious example is Morocco. While a District Court in the Netherlands ruled Morocco as a safe third


\textsuperscript{86} \textit{Id.}


country, its status is being appealed. As recent as August 2018, Amnesty International reported an incident where Moroccan authorities arrested 150 sub-Saharan people in Tangier, bussing them to southern cities and abandoning them. In another incident, Moroccan security services set camps on fire, burned migrants’ belongings and stole mobile phones. Thus, even seemingly safe states that participate readmission agreements may violate the principle of non-refoulement and jeopardize the rights of asylum seekers in the EU who are entitled to both the protection of the ECHR and the Convention.

Another problem with readmission agreements is how they have been used in quid pro quo political bargaining between sending and receiving countries. Since these readmission agreements are usually signed between the EU and neighboring developing countries in North Africa, there is some inherent asymmetry in terms of political bargaining power during the negotiation of terms. At the same time, real-world implementation of these agreements revealed even more abuse, from both sending and receiving countries.

The EU-Turkey Agreement was a well-known agreement for migrant burden sharing while Turkey and Greece also had an accompanying readmission agreement. Nevertheless, after the migrants are removed from the EU, they are sometimes automatically detained, even if they were not crossing in an irregular situation. Turkey also suspended the readmission agreement


91 *Id.*

92 *Id.* at 182.

after Greece released Turkish soldiers who participated in the attempted coup of 2016. While this move was used to create political pressure on Greece, it likely had a real impact on how migrants are treated as suspending readmission constrains Greek resources for migrants. This kind of tit-for-tat interaction between states has turned international responsibility for migrant protection into levers for exerting political pressure, a complete departure from the rights based framework of the international conventions. The asylum seekers would thus suffer the ultimate consequences, deprived of the rights they were entitled to and with hardly any advocates to represent them.

The exchange between Greece and Turkey is not the only example. In 2018, Aziz Ajanuch, the Moroccan Minister of Agriculture, publically threatened to loosen control over the border while negotiating the agricultural and fisheries agreement with the EU. Less than two weeks later, hundreds of sub-Saharan migrants entered Spain through the Ceuta fence. Shortly after, the fisheries agreement was signed and Morocco won a desired term as well as €55 Million in supplementary funding for Morocco and Tunisia. Morocco then readmitted 116 of the migrants who had crossed over to Spanish Ceuta and arrested hundreds of sub-Saharan African migrants in Moroccan territory. The arrested migrants were removed from their camps and homes in cities like Rabat, and dropped off in the southern part of Morocco, far away from the

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96 Id.

border it shares with Spain. The quid pro quo nature of these actions ignores the agency and individual rights of migrants that are guaranteed by the 1951 Refugee Convention, which binds all of these countries. This type of political practice turns asylum seekers and refugees into numbers and bargaining chips, which runs contrary to the asylum seekers’ right to individualized assessments guaranteed under ECHR Article 4 of Protocol 4 and right to an effective remedy, as guaranteed under Article 13 of ECHR. In fact, scholars have also noted that there seems to be a fundamental mismatch. On the one hand, the principle of fundamental human rights is that they are universal. On the other hand, the current implementation through readmission agreements and mobility partnerships, discussed below, suggests that state parties attempt to contract around these rights. The readmission agreements and the subsequent quid pro quo practice of trading readmission of migrants for economic benefits seem to commercialize border management, which is a function of sovereignty.

C. Mobility Partnerships

Another agreement-based tool for responsibility sharing is the mobility partnerships between the EU and countries in North Africa. These mobility partnerships were formed under the European Neighbourhood Policy (ENP), an EU initiative based on Article 8 of the TFEU.

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Article 8 provides that “the Union shall develop a special relationship with neighbouring countries” through specific agreements with the countries concerned that consist of reciprocal rights, obligations, and joint actions. Other sources of legal authority include TFEU Title V on the Union’s external actions as well as Article 206-207 and Article 216-219, which focus on trade and international agreements respectively. The mobility partnerships represent politically symbolic relationships and provide a non-legal binding basis for negotiation. Through an analysis of the text of the EU-Morocco Mobility Partnership (“the Mobility Partnership”) as a representative example, this section will show that a mobility partnership is an indirect responsibility sharing tool that is a further departure from the rights-based framework presented in the Convention. This is because the EU incentivizes North African countries to take up more of the refugee protection burden by providing them with benefits in adjacent policy areas like trade and conflating different migration issues.

i. Issue conflation across policy areas

Various terms of the Mobility Partnership that discuss different policy areas from trade to irregular migration management seem to form a package deal where Morocco is being offered various economic benefits to absorb more readmissions. Beginning with the framing of the partnership, the Mobility Partnership states that:

“[39] the signatory parties take the view that the elements contained in the various components of this partnership will be implemented using a balanced overall approach
and constitute a package, particularly the visa and readmission facilitation agreements,” emphasis added.106

Visa and readmission refer to partially overlapping but different segments of the migration population. Visas give permission for Moroccan nationals to live and work in the EU while readmissions require Morocco to take in both Moroccan nationals that no longer qualify to live in the EU as well as the irregular migrants from sub-Saharan Africa that might have passed through Morocco on their way to the EU but was eventually turned away. More importantly, Morocco’s attitude towards these two populations are vastly different. To some extent, Morocco as a nation would advocate for more visas or rights for its nationals but there is no one to advocate for more refugee admittances. As a country of finite resources, Morocco would be unlikely to prioritize providing for refugees or using its political capital to help them assert their asylum claims. When both issues are discussed in the same breath and open for negotiation, the asylum seekers and refugees have no advocate for the enforcement of rights that are guaranteed under international conventions and no place at the bargaining table.

In order to incentivize Morocco to take up more responsibility in migration management, the Mobility Partnership promises other types of benefits. However, this has become more of responsibility shifting, whereby EU wanted help with border enforcement without sharing in the responsibility of an actual resolution for migrants. In fact, under the heading “Migration and Development,” only two of the seven terms were tenuously related to the development of Morocco while all other terms focused on Moroccan migrants abroad:

“[21] to strengthen cooperation between Morocco and the EU…in support of the socio-economic development regions with high migration potential by implementing targeted

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policies and encouraging investment, including by Moroccans resident abroad, in order to generate employment…

[26] To encourage migrants to invest productively in Morocco, in particular by promoting the financial education of the migrants and recipient families.”

Optimistically, paragraph 21 looks like a development strategy of pre-emptively reducing the need for involuntary migration. However, a closer look at the section reveals that nearly all the beneficial terms are directed at Moroccan nationals in the EU, which makes a lot of sense given the signatories of the agreement. Morocco may want to benefit from terms like:

“[23] To help Moroccan migrants residing legally in the EU to acquire vocational or academic skills which will enable them to develop viable economic activities and improve their employability on their return to Morocco,” or

“[25] To enhance the establishment of measures in the EU and Morocco to reduce the cost of remittances by Moroccan migrants, in cooperation as appropriate with relevant private-sector actors.”

While both of these promises benefit Morocco and its nationals, asylum seekers from other countries are again left without advocates or checks to help enforce their rights in a conversation that significantly affects their treatment and ability to assert their right to asylum.

Finally, it is helpful to contextualize the Mobility Partnership among other practices prevalent in the region. For example, the Netherlands spends official development funds on capacity-building of the Ghanaian government directly related to migration control.107 The 2006 French-Senegalese bilateral agreement also provides an example of development money being spent on goals such as the modernization of the Senegalese police apparatus (aimed at controlling irregular migration) and information campaigns against irregular migration.”108 Thus, in general, it is unclear if mobility partnerships increase development assistance or simply divert


it. Nevertheless, this type of issue conflation and linkage with other types of international cooperation distort incentives for how each country would treat migrants in their country. Both the textual and contextual evidence suggest that these “package deal” border management mechanisms drive crucial countries further away from the rights guaranteed under the 1951 Convention. Recalling the agriculture and fisheries agreement with Morocco in the previous section on Readmission Agreements, there is no clear winner in this strategy as the migrant problems persist so that Europe needs to give more economic incentives in other policy areas to get the help of its neighboring countries. As a result, Europe seems to be “subjugating an ever-growing share of its foreign policy and trade agendas to the appeasement of Turkey and Libya’s authoritarian leaders.”

ii. Conflation of different types of irregular migrants

From a personal safety perspective, the more dangerous type of issue conflation is the lack of distinction between irregular migrants who are asylum seekers and other types of migrants, which ranges from undocumented economic migrants to human traffickers to drug smugglers. The UN Office of the High Commissioner for Human Rights (OHCHR) has noted that linking irregular migration with human trafficking gives the false impression that irregular migration is a criminal offense linked to security concerns and crime even though that is not always the case. Nevertheless, the danger of this type of issue conflation is that law enforcement assistance designed to stop the flow of illicit materials may have the additional effect of sealing borders, encouraging push-backs (discussed below), and increasing apprehensions and reducing

access to protection mechanisms. Making the journey more dangerous for asylum seekers might simply push them to seek out even more dangerous routes, creating a downward spiral of needing more measures and yet higher costs for managing borders.

An example of this type of issue conflation can be seen in the Mobility Partnership. Under the heading “Preventing and combating illegal immigration, people-smuggling, border management” (emphasis added), paragraph 13 of the agreement states that:

“[13] To resume negotiations between the EU and Morocco in order to conclude a balanced readmission agreement, with provisions relating to third-country nationals as well as accompanying measures and reconciling the need for operational efficiency with the requirement to observe the fundamental rights of migrants.”

Categorizing this item under a heading about illegal immigrants suggests that the real target for border management is third-country nationals, as a homogenous, illegal group, which would be an overgeneralization that infringes on the rights of those who are genuinely seeking asylum and transiting through Morocco. According to Article 31 of the Convention, a third-country national who is fleeing political persecution is within their rights to arrive at the Spanish border to apply for asylum. See Appendix 1. Nevertheless, as border security increases, migrants resort to more informal and dangerous ways to cross borders. In both 2015 and 2016, the Mediterranean Sea accounted for around 60% of migrant deaths and missing migrants recorded by the International Organization for Migration.

Thus, while the concept of cross-border partnership is designed for collaboration in sharing the burden of refugee protection, the politicization of the issue has

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shifted real life practice from a rights-based approach for handling migrants to a pure numbers approach.

D. Joint Border Enforcement

As alluded to in the previous section, problematic collaboration is not limited to agreements but also manifest in real danger at the borders. “Hot returns” or “pushbacks” refer to the practice where border agents on both sides of a border collaborating to return migrants upon crossing, without asking any questions regarding identifications and personal circumstance. These border encounters emerged from the practice of joint enforcement of a border and represent yet another example of responsibility sharing that have led to deprivation of migrant rights and even violence. Similar to the previously mentioned relationship between Italy and Libya, Spain has used the joint enforcement of its border with Morocco to shift responsibility and liability, giving rise to cases like N.D. and N.T. v Spain.\(^\text{113}\)

Today, the Ceuta and Melilla borders in between Spain and Morocco have become a testing ground for Europe’s attempt to externalize its borders.\(^\text{114}\) The N.D. and N.T. v. Spain case involved two individuals, N.D. and N.T., from Mali and Cote d’ivoire respectively, who were among a group of sub-Saharan migrants crossing into Spain at Melilla. Both the Spanish Guardia Civil and the Moroccan law-enforcement officials pursued the group and allegedly inflicted violence upon individuals in the group. As soon as the migrants jumped down from the fence at the border, the Guardia Civil apprehended them and sent them back to Morocco, without checking identity or

\(^{113}\) N.D. and N.T. v Spain, 8675/15 and 8697/15

personal circumstance or checking for identification. While the ECtHR found violation of both Article 13 and Article 4 of Protocol 4 of the ECHR in this case, there are potentially thousands of others who do not make it to court.\textsuperscript{115} Moreover, there have also been reports that “Moroccan forces not only considerably outnumber Spanish ones but, strategically detain Sub-Saharan Africans before they can reach the Spanish Border Asylum Office.”\textsuperscript{116} Additionally, “a Spanish Army helicopter leaves the city every week to identify the camps on Moroccan territory. This is routinely followed by the brutal destruction of the camps by the Moroccan Special Forces, accompanied by detentions and violence against the migrants and asylum seekers.”\textsuperscript{117}

All of these practices exist in the name of collaboration or joint enforcement of the border. While the strain of resources on border countries are real and warrant addressing, the procedures for handling irregular migration cannot be so wholly divorced from the rights-based framework that more than one hundred countries committed to more than half a century ago. The refugee crisis has now become ongoing and more than half of today’s refugees have been displaced for over 4 years.\textsuperscript{118} As such, it is more important than ever to reincorporate the rights-based approach into responsibility sharing mechanisms.

\begin{footnotes}
\item[117] Id.
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IV. Policy Notes for the Future

It is beyond the scope of this paper to put forth a comprehensive proposal that would address every concern with burden sharing and border management. Nevertheless, this section seeks to examine existing and potential reform efforts on two priority dimensions: global distribution of refugee protection responsibilities and enhanced supervision of the 1951 Convention.

i. Global responsibility sharing

The 2016 New York Declaration and the Global Compact for Refugees (“the GCR”) are two of most recent international efforts to improve burden sharing. The New York Declaration was a UN resolution adopted by all 193 Member States that committed to sharing the international responsibility of protecting refugees more equitably and predictably.\footnote{New York Declaration for Refugees and Migrants, United Nations High Commissioner for Refugees, https://www.unhcr.org/en-us/new-york-declaration-for-refugees-and-migrants.html.} As a follow-up to the New York Declaration, the High Commissioner for Refugees proposed the GCR in 2018 and it was adopted by the UN General Assembly.\footnote{Global Compact for Refugees, United Nations, https://refugeesmigrants.un.org/refugees-compact.} The GCR is a compact, or a non-legally binding, political – legal international instrument subsidiary to existing international agreements.\footnote{Thomas Gammeltoft-Hansen, The Normative Impact of the Global Compact on Refugees, International Journal of Refugee Law (2019).} While both of these documents emphasize the concept of responsibility sharing, this paper has shown that practice can be much different and dangerously so.

Nevertheless, the GCR does show some promise. First of all, it speaks of responsibility sharing in global terms, not on regional terms restricted to origination countries and neighboring countries that migrants can reach. This distinction warrants attention because all the aforementioned mechanisms for responsibility sharing were confined to border countries,
making the burden of border management a zero-sum game. As a result, responsibility sharing became responsibility shifting, which created incentives for countries to seek means like readmission agreements to ease their own burden at the expense of migrant rights. As described in the GCR, “Global Refugee Forums” are global, ministerial-level meetings for bringing financial and technical assistance from across the world. Hopefully, these new mechanisms may relieve some pressure from Europe and other countries that are neighbors to the origination countries of migrants and refugees.\textsuperscript{122}

Additionally, the GCR introduces “Support Platforms,” a mechanism that host countries can activate to seek financial, material, and technical assistance as well as resettlement pathways for admission to third countries.\textsuperscript{123} Each Support Platform would engage a group of states that are “specific to the context.” While it is unclear what “context” this phrase refers to, such a mechanism could give the host country more agency. Moreover, engaging a seemingly ad hoc group of states might open up more resources to the host country and mitigate the political bargaining with same players. For example, if Support Platforms can bring in funding from other parts of the world, this mechanism can diminish the need for transit countries like Morocco and Turkey to participate in quid pro quo exchanges with neighboring states in Europe.

\begin{itemize}
  \item[ii.] Enhanced supervision of 1951 Convention rights
\end{itemize}

While the concept of responsibility sharing is to some extent filled with practical concerns and good intentions, it is of the utmost importance to find ways back to the rights-based framework established by the Convention. Lack of enforcement mechanisms is a unique

\begin{footnotes}
\item[122] \textit{Id.} at para 18.
\item[123] \textit{Id.}
\end{footnotes}
weakness of the 1951 Convention. Scholars have thus proposed both a preventative strategy and an evaluative strategy to drive better adherence to the Convention.

The preventative strategy includes setting up a special committee that would issue non-legally binding but authoritative advisory opinions on issues such as whether a third country is truly a safe receiving country. Publication of these advisory opinions would be helpful for different countries to have more consistent and clearer interpretations of their obligations under the Convention. Nevertheless, the ultimate effectiveness of this special committee would depend on countries’ willingness to take on the administrative cost of asking for advisory opinions and eventual efforts and availability of funding for following the advisory committee.

In contrast, the evaluative strategy takes a post hoc perspective and establishes a committee to address complaints and determine whether a certain state practice is in compliance with the Convention. Members of the committee can even undertake country visits and conduct talks with government bodies or civil society representatives to assess the situation at hand. After the investigation, the findings and recommendations would be made public. Since UNHCR collects periodic information on the condition of refugees and laws or regulations relating to refugees through the Universal Periodic Review authorized by Article 35 of the Convention, collaboration between UNCHR and this committee would provide periodic checks on the implementation of the committee’s recommendations, even if they are not legally binding.

126 Id. at 404.
127 Id. at 406.
128 Id.
Taking abroad view, the international nature of refugee issues creates unique difficulties for allocation of resources and enforcement of rights. As a result, neither the global distribution mechanisms nor the supervisory proposals can work alone. While it is difficult to implement new, legally binding solutions, the two aforementioned proposals are likely to be more palatable to governments and therefore represent promising ways to both help countries share in the responsibility of refugee protection and provide a quality check on the result.
Appendix

Appendix 1 – Key Provisions of 1951 Refugee Convention

Article 31: Refugees unlawfully in the country of refugee
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32: Expulsion
1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33: Prohibition of expulsion or return (“refoulement”)
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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
Appendix 2 – Key Provisions of the European Convention on Human Rights

Article 1: Obligation to respect Human Rights
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 13: Right to effective remedy
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Protocol No. 4, Article 4: Prohibition of collective expulsion of aliens
Collective expulsion of aliens is prohibited.
Appendix 3 – Safe third country provision in the Asylum Procedures Directive

Article 38: The concept of safe third country

3. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:
   (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
   (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
   (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
   (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
   (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

4. The application of the safe third country concept shall be subject to rules laid down in national law, including:
   (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
   (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
   (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

5. When implementing a decision solely based on this Article, Member States shall:
   (a) inform the applicant accordingly; and
   (b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

6. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.