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Burden Sharing in the Field of Asylum: Legal Motivations and
Implications of a Regional Approach

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ABSTRACT

This paper aims at explaining and evaluating the current development of burden sharing schemes among EU member states in the field of asylum. It purports to assess the motivations and detect the potential effects and consequences of the European burden sharing project. To achieve this objective, the paper confronts the potentialities and virtues of burden sharing development with recently enacted legal norms at the EU level (mainly the July 2001 Temporary Protection Directive and the October 2000 European Refugee Fund Regulation but also other norms regulating immigration and impacting on asylum).

The paper shows that although conceived with ambitious objectives – e.g. fairness for protection seekers, solidarity among member states, restoration of the hosting capacities of the overburdened European states - the European burden sharing project has up to now fallen short of its objectives. It might have been an alternative to the previous deleterious interstate competition of the 80s and its negative consequences. Indeed, burden sharing is frequently presented as an alternative, replacing deregulation spill-over by co-operation, with a minimum number of compulsory mechanisms ensuring an equitable distribution of people among states, complemented by shared norms and financial solidarity. However the negative effects of regulatory competition have not given EU member states sufficient incentive to co-operate. Rather, they have implemented burden sharing mechanism mainly in reaction to their loss of power. In fact, it is the achievement of EU objectives other than the definition of a common asylum policy that creates both constraints and incentives to act collectively rather than to free ride.

As it stands, the burden-sharing system is incomplete: it lacks a people-sharing commitment. The core seems to lie in financial solidarity, but the system is unlikely to provide Member States with enough predictability or compensation to encourage them to adopt additional burden-sharing schemes. The foreseeable results or implications of regional burden-sharing are additional burden-shifting to non-European countries. There is risk for the formation of a discriminatory and exclusionary alliance.

Keywords: Asylum policy, Policy analysis, Policy cooperation, Regulation, Regulatory competition.

INTRODUCTION¹

The concept of burden sharing reappeared on the EU political agenda at the outbreak of the Yugoslavian crisis. Although presented at that time as an innovative solution for asylum and refugee policy problems, in fact, the preamble of the 1951 Geneva Refugee Convention already referred to it. It was even conceived of as a binding rule in the 1969 OAU Refugee convention, and the conclusions of the UNHCR Executive Committee persistently alluded to it. But even if some EU member states had inaugurated burden sharing schemes at the regional level with the Dublin and Schengen Conventions, burden sharing was only brought to the fore when some member states began experiencing difficulties in coping with the huge flows of protection seekers coming from the Balkans. Europe's overburdened states called for more solidarity.

Since the early 90s, many positions, declarations, drafts, conclusions have emerged to suggest the adoption of burden sharing schemes². Today, two major

¹ This working paper is a revised version of a paper presented to the UACES Workshop on Internal and External Dimensions of EU Burden-Sharing, London School of Economics, 27 April 2002

² The burden-sharing debate started during the International meeting on victims of the humanitarian crisis on 29 July 1992. A Common position referred to burden sharing as a means of ensuring a just and lasting solution. At the London meeting on November 30th and December 1st, 1992, the Ministers responsible for immigration elaborated a Conclusion on People Displaced by the Conflict in the Former Yugoslavia which makes reference to a co-ordinated action by all the Member states for admitting temporarily vulnerable persons. Then came several national proposals, among which the Swedish Proposal on burden-sharing in November 1993 calling for a more equitable distribution of Bosnians in need of protection. The draft was discussed again in 1994, while at the same time the European Parliament passed a resolution on the General Principles of a European Refugee policy on January 19th, 1994 urging the Commission to elaborate an emergency plan for refugee reception on the basis of an equitable distribution among member states. In February 1994, the Commission adopted a communication to the Council on Immigration and asylum policy. The most ambitious plan was certainly the German draft Council resolution on burden sharing with regard to the admission and residence of refugees of July 1994. This draft was not adopted and replaced by a very light document, i.e. the Council resolution of September 25th, 1995 on burden-sharing with regard to admission and residence of displaced persons on a temporary basis, which does not lay down any distributive keys, simply calling for a spirit of solidarity. The following document was the Decision on alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis of 1996 that lays down a purely procedural framework for Council decisions and monitoring in burden-sharing situations. In the frame of the third pillar, several joint-positions and actions have been adopted, incrementally developing burden-sharing schemes.

Since the entry into force of the treaty of Amsterdam, the debate on burden-sharing has been renovated as Article 63(2) states that the Council shall adopt « measures on refugees and other displaced persons within the following areas (...) b) promoting a balance of effort between member states in receiving and bearing the consequences of receiving refugees and displaced persons ».

EU norms reinforce the burden-sharing principle in the field of protection. The first one is the Council directive of July 20th, 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on minimum measures promoting a balance of efforts between Member states in receiving such persons³. The second one is the Council decision of September 28th, 2000 creating a European Refugee Fund⁴.

In theory, these texts have the potential to radically and substantively alter the EU approach to asylum, especially should burden sharing become the centrepiece of the upcoming EU asylum policy. Indeed, burden sharing is recognised as a collective mechanism aimed at ensuring equality in the distribution of protection seekers, responsibility and costs. Its adoption would represent a move away from the 80s asylum policies in the European member states.

The purpose of this paper is to confront recently adopted EU legal norms with the academic and political debate on the potentialities of burden sharing. This paper aims at giving an assessment of the reality and foreseeable consequences and effects of burden-sharing development among EU member states. The paper will retain a broad definition of burden sharing, encompassing Noll's three forms of burden sharing: norms-sharing, people-sharing and costs-sharing (Noll, 2000, 270). Therefore the analysis will not be limited to burden sharing in the field of temporary protection but includes all forms of protection. Henceforth the terms "asylum" and "protection" will be used indifferently and encompass refuge as defined by the Geneva 1951 Convention, territorial asylum, constitutional asylum, subsidiary protection, temporary protection etc.

The main idea of the paper is that the nascent burden-sharing project is problematic and calls for pessimism: expectations should be lowered. It represents a change and its objective is to replace previous deleterious regulatory competition by cooperation among member states (I). But the motivations for enacting burden sharing are entangled and though seemingly benefit protection seekers, are mainly related to the protection of state interests. The underlying objective is to implement a scheme that compensates the loss of states' capacities to deal unilaterally with flows of unwanted migrants (II). The current establishment of burden sharing mechanisms, despite some interesting proposals made during the 90s, leads to an incomplete, incoherent system which paves the way for its own deadlock (III). Although any conjecture regarding the future remains hypothetical, it is not implausible to suggest that the regional mechanism of burden sharing as it stands now creates new risks and may lead to

³ Directive 2001/55, OJ 7.8.2001

⁴ Decision 2000/596, OJ 6.10.2000

a situation of collective burden shifting as well as maintain the low level of legal protection provided today in the EU member states (IV).

I- THE NEED FOR AN ALTERNATIVE TO REGULATORY COMPETITION

The major explanation generally given for the birth of the burden-sharing principle in Europe is the war in Yugoslavia, the subsequent massive migration to the EU, and the unevenness in the distribution of asylum seekers and refugee among member states. However this assertion conceals the fact that burden sharing is not limited to temporary protection in cases of massive *influx* of protection seekers but concerns the whole system of protection⁵. Thus, to capture the features and meaning of the burden sharing system in the field of asylum, one must recall what characterised the asylum system in the EU during the 80s. This helps to demonstrate that burden-sharing projects are rooted in the premise that the previous ‘state of nature’, i.e. interstate competition that developed from the mid-80s onwards (1) had to be replaced by a new logic of regulation (2).

1- The development of regulatory competition among EU member states

Before any cooperation instruments were established at the common European level in the field of asylum, i.e. before the mid-1990s⁶, member states regulated unilaterally and individually. Each state autonomously adopted its legal provisions to grant (or to refuse to grant) rights to protection seekers (right to enter, to sojourn, to access the labour market, political rights, to access the specific status of refugee etc). Certainly, as will be discussed later, this legal autonomy was limited by the constraints of the Geneva Convention provisions, mainly the *non-refoulement* principle. But insofar as states were respectful of this provision, they could enact their legislation in accordance with strictly national political preferences (See for comparative analysis, Jeannin et al., 1999).

Despite their legal autonomy, EU member states were nevertheless legally interdependent. As the number of protection seekers increased considerably in the 80s and because no one member state was any more eager than its neighbour to receive “all of the world’s poverty and persecution”⁷, a phenomenon of legal

⁵ Indeed the Schengen and Dublin Conventions, which can be considered to be the first European burden sharing schemes in the field of asylum, deal with asylum and not temporary protection. One must recall that these conventions were supported by Germany after the fall of the Berlin Wall when Germany became a main EU border state for asylum seeker movements.

⁶ If taking the entry into force of the Dublin Convention into consideration.

⁷ Statement usually attributed to Michel Rocard, but unfair since the majority of protection seekers is located in Southern countries

interaction progressively developed. States started integrating into their regulation scheme a strategic calculus of the consequences of their legislation. In other words, member states progressively entered into a competitive process in which national legislative options were assessed in relation to legal norms adopted by their competitors (the other member states), the assumption being that a 'generous' legislative policy would be a pull factor to their territory. Indeed, at the core of the competitive process is the real or perceived threat of asylum - or forum – shopping: after having selected certain criteria, protection seekers choose their state of destination, weighing the advantages and shortcomings of each potential destination state. Among the criteria informing this decision, are the norms organising their legal status: right to work, to stay etc. (See Koser, 1997)

It has been shown that the selection of a destination state is not based on the sole criterion of legal protection⁸: family ties, the presence of national communities, the geographic location of a country, the national language, etc are equally strong pull factors. Therefore, asylum shopping as a free and rational choice cannot be empirically proven⁹. Yet states remain convinced that a generous level of protection would attract protection seekers to their territory: the fear of asylum shopping can be evidenced by political declaration, and the explanatory memoranda of the current harmonisation directives on asylum and refugee law. Therefore, by the mid-80s there was a competitive market, each member state instrumentalizing its legal norms, using them as leverage to dissuade protection seekers from approaching their territory. Strategic and competitive actions developed: when defining their regulation of migratory flows, if one state chose to grant fewer rights than its competitors, the latter would then enact new legislation, lowering previous standards of protection and so on and so forth. The crisis reached its peak when Germany and France, followed by Spain, amended their constitutions in order to restrict the protection

⁸ It is difficult to establish conclusively what factors cause asylum applicants to lodge their claims in particular Member states. See in particular Anita Bocker and Tetty Havinga, *Asylum migration to the European Union : Patterns of origin and destination*, Institute for the Sociology of law, Nijmegen, published by the Office for Official Publication of the European Communities, 1998.

⁹ The paper acknowledges the fact that political choices in the field of asylum often take the form of "reflex strategies" rooted in the arguable conviction that asylum seekers represent a threat as they are truly rational actors in a position to choose their destination state and route. States also tend to neglect the progressive decrease in asylum seeker flows and refugee settlement in the EU as well as rely too much on the purported efficiency of removals while in practice few people are really sent back to a safe country. Therefore, when the paper explicitly uses a cost and benefits analysis, it builds in the fact that states' choices or decisions may not be exclusively based on rationality or on adequate mastery of solid empirical evidence.

traditionally granted, i.e. what was usually called the constitutional asylum (See Jeannin et al, 1999)¹⁰.

The phenomenon that appeared is typical of the ‘Delaware competition’ model of regulatory competition (Esty and Geradin, 2001; Sun and Pelkmans, 1995; Reich, 1992; Ogus, 1999). Legal norms granting rights are analysed in terms of ‘interchangeable’ products for protection seekers. Laid down by States, or ‘law suppliers’, according to competition vocabulary, these instruments are designed to repel their ‘consumers’, i.e. protection seekers. Legal notions or mechanisms considered efficient in one state are imported and integrated into the legal order of other member states. Hence the reference by analogy to the Delaware regulatory competition model which seeks to explain the strategic use of legal norms by states in an effort to match preferences of law merchants, the only difference being that, in the case of competition in the field of asylum law, the objective is the opposite. Rather than seeking to attract companies to their territory, states seek to “manage flows of law merchants” by checking them.

2- Negative competition and deleterious effects

The result of the competition among states’ legal norms is a “race to the bottom”, as defined by anti-Delaware model scholars and a “Beggart-hy-neighbor” configuration. The race-to-the-bottom can be observed in the evaluation of the standards of protection granted to protection seekers. All scholars have emphasised the constant and convergent legislation amendments in Europe with a common tendency towards the adoption of *non-entrée* measures, deflection (Landgren, 1999), the limitation of the scope of application of the Geneva Convention, the reduction of the rights granted to persons, even once they have been awarded refugee status (See Joly, 1999).

A second and related problem concerns compliance with international obligations. Because member states have been innovative in enacting deflecting measures as a means of repelling new asylum seekers, they have laid down measures that do not necessarily comply with their international obligations. Two sets of measures are particularly problematic.

First, the “safe country” and “manifestly unfounded application” concepts were introduced in all national legislation¹¹. The “safe country” notion

¹⁰ To be fair, the amendments were partly triggered by the requirements regarding the ratification of Schengen. But the restrictive dimension of the amendments was not required by the Schengen convention which organises exceptions, in particular, through the sovereignty and the humanitarian clauses.

¹¹ First introduced in the London European Council resolution of November 30th 1992, the concept then was adopted by national legislation. It was first introduced in the German

permits a state not to process an asylum application when the asylum seeker has entered its territory after travelling through another country qualified as 'safe' (i.e. guaranteeing the *non-refoulement* principle). The "manifestly unfounded application" concept allows states to not process applications or to have recourse to accelerated procedures offering fewer guarantees for the examination of cases. The signature of numerous readmission agreements with third countries has accompanied the introduction of these concepts in national law (Achermann and Gattiker, 1995; Noll, 1997). From a formal point of view, those instruments do not breach the Geneva Convention. But, in practical terms, 'chains of readmission' have appeared. Member states have returned asylum seekers to countries which legislation or practice breach the Geneva Convention. Thus, the receiving countries have often returned the asylum seekers to another so-called 'safe third country' – frequently a first transit country – which, for various reasons has repatriated the asylum seeker to his/her country of origin, that is to say the country of persecution. Those 'chain readmission' are extremely problematic from a legal point of view.

The second questionable set of norms concerns carriers' liability. Member states, in order to avoid applications, have implemented sanctions against carriers transporting undocumented persons. In breach of the Chicago Convention¹², the mechanism leads to a situation in which private agents are deemed responsible for border controls and, eventually, illegal entry (Cruz, 1995). This also comes into conflict with the provision of the Geneva Convention that lays down that asylum seekers cannot be punished for having entered a state illegally¹³.

A third problem arising from the absence of cooperation among EU member states lies in the unevenness in the distribution of protection seekers in Europe. All data confirm the exceptional load carried by the German system whether it be in regard to Geneva Convention refugees or temporary protection seekers during the Yugoslavian crisis (UNHCR, 1999). Whatever criterion is used to measure the burden (number of refugees, number of asylum applications, the ratio of the number of refugees or asylum seekers to population

Constitution in 1993. Within three years, the majority of the other member states had introduced it in national positive law. See Jeannin, L., Meneghini, M., Pauti, C., Poupet, R., *Le droit d'asile en Europe. Etude comparée*, L'Harmattan, 1999.

¹²Article 13 of the 1944 Chicago Convention on International Aviation requires that an airline passenger comply with the entry formalities of the country of destination but does not impose a legal duty on the airline (operator) to enforce such compliance by the passenger.

¹³Article 31 of the Geneva Convention accepts that there is a valid justification for a refugee's illegal entry or presence in the asylum country. The incompatibility between carriers' liability and the protection of refugees has been regularly pointed out by the Council of Europe, especially through Parliamentary Assembly recommendations. See Recommendation No. 1163 (1991).

and gross national product), the imbalance is striking among member states. Certainly this is not the direct consequence of the competitive process. But the market system, because of its very nature, makes no provisions towards the absorption of the imbalance in burden. None of the traditional mechanisms used to regulate the competitive process and ensure its efficiency (transparency, full access to information, prohibition of cartels etc), aims at a more equitable distribution among competitors.

This description highlights an evident negative result of the regulatory competition process. In a nutshell, the final result is an “all loser” one. Protection seekers are either repelled or, once admitted, granted lower protection. States face a simple choice: either they host protection seekers and bear the costs, or they repel them and if using deflecting measures, face criticism from the national constituencies. This is particularly problematic when national judges assess a violation of the international obligations. The need for a different approach appeared then all the more glaring. Logically, burden sharing debates and proposals called for collective action and cooperation in the place of unilateral action and competition.

II- PUSH FACTORS AND MOTIVATIONS FOR BURDEN SHARING IN THE EU

Numerous virtues are attributed to burden sharing in the field of asylum. First, it is said to foster solidarity and equality among states, guarantee fairness for protection seekers and to increase the reception capacity of states. Indeed, the key aspect of an ethical asylum policy (Harvey, 1998) - the introduction of burden-sharing mechanism in EC law - should not be misunderstood, that is to say as a strategy endorsed by over-burdened states to rid themselves of an excessively large number of protection seekers. It should be viewed, instead, as a means to maintain and restore states' admission capacities in the long term (Hailbronner, 2000). As burdened states can expect assistance from their partners, burden sharing makes it possible for them to maintain or increase their acceptance of protection seekers. Therefore, a collective share of the flows of protection seekers should prevent states from resorting to violations of their international obligations, among which the *non-refoulement* principle. Second, in financial terms, burden sharing is said to avoid peak costs and, globally, to reduce the costs for hosting protection seekers. In short, “the logic of burden-sharing rests on the axiom that an equitable distribution of costs and responsibility in protection will generate not only a maximum of fairness among states but also a maximum of openness vis-à-vis protection seekers. (...) There are two beneficiaries to such arrangements – host states and protection seekers” (Noll, 2000, 266). Lastly, burden sharing is described as an insurance mechanism that guarantees predictability and security to the members participating in the cooperation scheme.

This potential, inspired by international relations theory (See Acharya and Dewitt, 1997), justifies the attractiveness of the burden sharing approach as an innovative solution to cope with asylum problems in Europe. But the question is why the very same proclaimed values of burden sharing failed to induce cooperation before the 90s? Why do member states only recognise now, or so they claim in policy statements, the value of burden sharing as a solution that EC institutions must promote and organise?

The motivations underlying the decision to cooperate are as follows: states are individually bound to international obligations that impose on them a legal responsibility towards protection seekers but there is no compensation to be found in the shape of an international obligation of solidarity (1). But because of their belonging to the EU, they can no longer act individually to avoid this responsibility. In other words, states can less and less rely on their sovereign competence to insulate their territory against unwanted migrants (2). Moreover, the progressive establishment of cooperation schemes deprives them of the opportunity to undertake competitive and strategic action in order to prevent people from asking for protection (3).

1-Imbalance in the international legal obligations

The root of the difficulties for member states, is legal responsibility. As Article 33 of the Geneva Convention prohibits the *refoulement* of any asylum seeker risking persecution in his/her state of origin, states cannot resort to expulsion or repatriation measures once a protection seeker has lodged an application on its territory. Thus they face what Hathaway calls a “peremptory regime”. Indeed, international refugee law “arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach” (Hathaway, 1997, xviii). States only have the right to exclude criminals and persons who represent a threat to security. Apart from this possibility, the duty not to turn back refugees who arrive at a state’s frontier does not take into account the potential impact of refugee flows on the receiving state. “This apparent disregard for their interest has provided states with a pretext to avoid international obligations altogether” (Hathaway, 1997, xviii). As a consequence of their unavoidable and immediate responsibility, states analyse their situation in terms of passivity: they are recipients and protection seekers actors. This is frequently transformed into a security argument demonstrating how states perceive the ‘threat’ of people seeking protection.

In this perspective the logic of burden sharing can be seen as an attempt to deal with this peremptory legal responsibility. Perluss and Hartman for example analyse the burden sharing principle as the necessary consequence of the peremptory regime deriving from legal obligations. They indicate that “if the

granting of temporary refuge is no more than a simple voluntary act of charity by the refuge state, there is no particular reason why other states should be obliged to come to its assistance with material support. If, however, the state of refuge lacks free choice because it is constrained by an international norm requiring that it grants temporary refuge, its moral claim to burden-sharing from the non-refugee State is a powerful one.” (Perluss and Hartman, 1986, 572)

In a nutshell, the international legal situation is problematic because it is asymmetrical. While denying states the capacity to avoid their responsibility, international law contains no parallel international obligation of solidarity. Certainly, scholars like Fonteyne have tried to ground an obligation to share the burden of reception in international customary law (Fonteyne, 1983). Solidarity is sometimes qualified as a fundamental principle of international law (Mc Donald, 1996) but these proposals cannot be grounded in established practice. The situation is rather similar in EC law. Although the ECJ has referred to solidarity as one of the Union’s principles of EC law flowing from the particular nature of the Communities¹⁴, this principle does not create new obligations on states in the field of asylum.

As a consequence, in the absence of any legal duty or obligation, the motivation to share the burden can only be explained by the fact that states are progressively losing a significant part of their sovereign competence in the matter of asylum, refuge and temporary protection. In terms of incentives, Hans and Suhrke’s analysis gives interesting insights: the authors indicate that the main incentive triggering acceptance of burden-sharing scheme is that “a state cannot reasonably expect to insulate itself from refugee flows in the near future and therefore looks to cooperative schemes” (Hans and Suhrke, 1997, 106). This description fits the current EU framework perfectly. While the achievement of the EU objectives adds some constraints on member states by imposing a positive duty to be fair to asylum seekers which rules out burden shifting or egoism by definition, its greatest impact is on the states’ room to manoeuvre. It has gradually eroded the states’ range of policy options with regards to asylum, and most notably the possibility to insulate themselves, thereby avoiding responsibility by shifting the burden onto other member states.

¹⁴ The ECJ has explicitly accepted solidarity as a general principle of European Law flowing from the particular nature of the Communities in *Commission v. Great-Britain*, ECJ 128/78, p. 419

2- Loss of capacity to insulate

Member states are progressively losing their capacity to enact defensive measures deflecting protection seekers.

Firstly, empirical studies have pointed to the impossibility of hermetically sealing a borderline. The development of smuggling networks is a general trend worldwide and despite the reinforcement of border control measures, states cannot impede entry onto their territory (See Koser, 1997). Be that as it may, states can reasonably expect border controls to limit the number of entries as well as the subsequent obligations to process applications. But the achievement of the internal market and migration policy impacts on the member states' capacity to close or control these borders, seriously challenging it. The completion of the internal market and the enactment of the Schengen agreements have removed internal borders, so that states cannot insulate themselves from entries and secondary movements from other member states.

The Dublin Convention was enacted in part to solve this very problem and avoid secondary movements in the EU.¹⁵ It therefore aimed at protecting the states which have accepted the removal of their internal frontiers. But in practice, Dublin criteria are not foolproof because they produce concentration effects. Through the application of the "entry criterion" states in geographical proximity to crisis regions are deemed primarily responsible and incur the risk of becoming overburdened. So, the Dublin mechanism, rather than protecting member states it increases their powerlessness vis-à-vis protection seekers (See Noll, 2000; Lavenex, 1999).

It follows that states can rely on external border controls alone. But a second and parallel loss of capacity to insulate comes from the progressive establishment of a common visa policy. Member states are still competent for

¹⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, JO C 254 19.08.1997 p.1

A protection seeker entering one member state who then chooses to move to another member state will be returned to the first state by application of the Dublin criteria. Indeed, the Dublin convention organises a mechanism determining which state is deemed responsible for processing the asylum application of a protection seeker who has entered the EU. In order of priority, the following criteria steer the allocation of responsibility: presence of family members, allocation of residence and entry permits, entry (whether legal or illegal), place where the asylum application is lodged. As it stands, the mechanism mainly requires that participating countries accept the consequence of their lax border controls. A state can deny the right to enter (visa) and reside. But if a protection seeker enters illegally, this state will be deemed responsible for examining the asylum claim and will be obliged to readmit the asylum seeker in the hypothesis of secondary movement.

issuing long-term visas. Yet they are progressively losing their competence for short-term visas (less than three months). Initiated with the Schengen convention, the emergent visa policy was born with the Treaty of Maastricht and reinforced by the Treaty of Amsterdam and the introduction of Article 62. This provision gives competence to the European institutions to enact regulations determining the lists of countries whose nationals must possess a visa for entering the EU¹⁶.

In sum, the European integration progressively deprives states from their traditional capacities and competence to deal with asylum. States are logically “pushed” towards collective action in order to compensate for the loss of unilateral capacities.

Analysing the same reality from a different perspective, one must stress the costs of non-collaboration. Hans and Surhke root burden-sharing in the recognition that “shifting” by some members will create disorder for all (Hans and Surhke, 1997). In the current EU framework, the reasons to collaborate and to avoid “creating disorder for all” are grounded in the link between asylum policy and the other EU objectives and policies. To put it differently, although promoted in the sole field of asylum, the purpose of burden sharing is in reality to avoid tensions or problems in collateral fields. The objective is to eliminate potential threats to the European integration project. Indeed, non-burden sharing would impact on other parts of the European integration, such as the general completion of the internal market, and the progressive establishment of a migration policy, including the Dublin and Schengen systems. Without any sharing schemes or guarantees, the overburdened states are likely to seriously consider reinstoring national borders, thus impeding the completion of the internal market. Ultimately they could decide to challenge border controls collaboration, namely the visa policy and Schengen mechanisms. The three states that opted on title IV of the EC treaty comfort this point of view in that they have stated that non cooperation schemes are still attractive and remain preferable when the guarantees afforded by cooperation are insufficient.

Lastly, the decision creating the European Refugee Fund¹⁷ interestingly establishes a link between asylum burden-sharing and the economic and social cohesion of the EU. The preamble of the Council Decision indicates that integration of refugees into the society of the country in which they are settled is one of the objectives of the Geneva Convention. To that end, actions

¹⁶ See Council regulation listing the third countries whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that requirement, 2001/539/EC, March 15th, 2001

¹⁷ Council decision of September 28th, 2000 establishing a European Refugee Fund, 2000/596, OJ L 252/12, 6.10.2000

undertaken in member states to promote their social and economic integration should be supported “in so far as it contributes to economic and social cohesion, the maintenance and strengthening of which is one of the Community’s fundamental objectives referred to in Articles 2 and 3(1) k of the treaty.” The absence of cooperation in hosting refugees would impede the achievement of one of the EU’s main objectives and probably impact on an objective that is the most explicit and formalised expression of solidarity among member states.

One can legitimately argue that these various elements do not trigger any concrete obligation of burden sharing. But they do constitute new political and institutional constraints. Member states must take into account the fact that unilateral burden shifting or non-cooperation in the field of asylum becomes more problematic in the institutionalised framework of the EU. Egoism is more dicey and politically more costly.

3- Loss of capacity to compete

The loss of capacity to insulate is the first ‘push factor’ to share the burden. The second incentive is the progressive loss of capacities to compete. Indeed the current harmonisation of asylum legislation is based precisely on the conviction that the elimination of disparities among these norms and the promotion unified European-wide rights will eliminate the (cause of) asylum shopping. But if viewed from the perspective of the states, each parcel of asylum or refugee law that is harmonised means fewer opportunities to compete. As well as stipulating the prohibition of *refoulement* in the Geneva Convention “has pacified the area of return from interstate competition” (Noll, 2000), the approximation of national legislation and the recognition of equivalent rights to protection seekers are costly. States indeed accept that the harmonised parts of the refugee protection will be non competitive areas. As Noll states, this cost “can be regarded as an insurance fee paid to solidarity system, guaranteeing refugees as well as states a minimum level of protection.” (Noll, 2000, 271). Moreover, these constraints are growing at an accelerated pace since article 63 of the EC treaty imposes a legislative agenda. The Council shall adopt, within a period of five years after the entry into force of the treaty of Amsterdam, measures on refugees and other displaced persons.

In addition, it must be stressed that the harmonisation norms do not promote the unification of the norms applicable in Europe. Instead, the aim is to set out “minimum standards”. This situation entails an additional complexity for states. While the legal differences which feed asylum shopping remain, minimum standard measures create a threshold. States cannot decrease their standard of protection below this limit, which evidently reduces their capacity to

use their legal norms as leverage to redirect possible new comers onto their territory.

To sum up, constraints – whether legal, political, or moral- have mustered the political will for a new approach. This explains for the decision for promoting a burden-sharing scheme as much as the Yugoslav trauma. In some ways, this confirms Hans and Surhke’s hypothesis that existing patterns of regional cooperation may be extensible to refugee matters (Hans et Surhke, 1997). Finally, it demonstrates that the motivations for burden sharing are entangled and extremely complex. Certainly they should not be construed within the sole framework of unilateral strategic behaviour and interests and thus can be considered in light of the more ethical objectives of justice and fairness for protection seekers (Thielemann, 2002). However, the significance of the progressive substitution of the competitive regulatory process by collective sharing of protection seekers can only be fully restored by taking into account the unavoidable loss of the states’ capacities and competence. Burden sharing appears then as a compensation scheme.

III-BURDEN SHARING IN EU POSITIVE LAW: IN-BETWEEN MECHANISM

A comparison with previous ad hoc burden-sharing schemes provides an interesting point of reference for evaluating the current European mechanisms of burden sharing. Hans and Suhrke describe two resettlement plans in the aftermath of the Second World War. Evaluating the repatriation of refugees in the western camps in the late 40s, they conclude that the operation organised under the mandate of the United Nation’s Relief and Rehabilitation Agency was relatively successful. Indeed, apart from the ‘hard core’ (diseased, elderly persons for whom the resettlement mechanism did not work), the resettlement system was efficient in other respects. Several reasons explain the positive result. First, shared values, cultural commonalities between protection seekers and host societies facilitated resettlement. Second, western countries needed to replenish their workforce. Third, a moral obligation towards the victims of the war facilitated resettlement. Last and mainly “something akin to a market mechanism functioned reasonably well in allocating state responsibility for most of the refugees, and the IRO merely served as a facilitating agent and a clearing house” (Hans and Suhrke, 1997, 86). The resettlement plan for Vietnamese refugees was also efficient. While it lasted, the market system of resettlement “was reasonably successful in finding compatibility between the needs of the receiving countries and refugees.” (Hans and Suhrke, 1997, 101). Following the two authors, the efficiency of the resettlement plans results from the emergence of a market. This rejoins Hathaway’s idea that a valuable refugee system should be rooted in the search for convergence of state interests and protection seekers’ wishes or needs. One is not surprised then by the proposal made by Schuk of

creating a stock exchange system where protection seekers and states could trade and find common interests (Schuk, 1997).

These examples give indications on the conditions that would ensure the efficiency of burden-sharing schemes. The blueprint for the progressive establishment of burden sharing in the EU seems to lie between a “market system”, i.e. a mechanism that ensures the convergence of interests of both parties, and a minimum of organisation, centralisation and formalisation. Compared with this theoretical ‘model’, the features of the nascent burden-sharing project in the EU are still indeterminate. The following lines will stress three aspects. First, the mechanism developed is passive, in the sense that it does not change the basic structures of protection seeking and distribution in the EU. In abandoning the idea of establishing compulsory resettlement schemes, even in the event of a humanitarian crisis, states have left intact the cause of the unevenness in the distribution of protection seekers (1). Second of all, the system as it stands does not guarantee enough predictability or compensation to member states. States have not accepted prior commitment or quota (2). Lastly, the system is confined to an ex-post sharing scheme, that is to say, the granting of financial compensation to burdened states (3).

1- Voluntary allocation of protection seekers

Let us turn back to the main cause of the uneven distribution of protection seekers among member states. States cannot return a protection seeker placed under their jurisdiction. Nor can they select the protection seekers, the latter deciding unilaterally of their destination and route for entering into the EU. In 2000, the Commission has published a Working paper evaluating the Dublin system of determination of the state responsible for processing asylum applications¹⁸. It highlights, with a somewhat ambiguous terminology, the problems deriving from the asylum shopping phenomenon. It recalls the member states’ concern that “if people are free to choose the member state in which they lodge an asylum application, there is increased scope for them to go to a particular state for economic reasons and to lodge an asylum application to ensure that they cannot be removed.” The paper also reiterates the concern that, if asylum applicants freely decide the member state in which they claim asylum, “there might be a tendency for them to treat some member states as transit countries rather than as countries of destination.” It later insists on the misuse of asylum procedures by asylum seekers and “the attempts to circumvent their immigration controls through exploitation of their systems, including cases where traffickers in human beings are targeting particular destinations and

¹⁸ Revisiting the Dublin Convention : developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, March 21st, 2000, SEC(2000)522

advising their clients to claim asylum both to prevent removal and secure economic benefits.” This approach is questionable as it creates a confusion between the right to choose a destination state and the misuse of the asylum systems such as smuggling and fraudulent behaviours. Yet these passages are interesting in that they insist on the selection of particular member states by protection seekers and the consequential unequal distribution of protection seekers in Europe.

A radical answer to asylum shopping would consist in abolishing the choice of the destination state. The German draft¹⁹ was far-reaching insofar as it promoted an authoritative and compulsory resettlement system. Following that plan, each state would receive a certain proportion of protection seekers. In some ways, the solution was efficient. While it mechanically distributed persons to states, it eliminated the possibility to select a “best” country thus putting an end to uneven distribution. It was also based on pragmatism insofar as it promoted the only viable solution. Indeed, two factors in the current harmonisation process cast doubts on the disappearance of asylum shopping in the near future. First, harmonisation will never be complete. Many parts of protection law will never be covered by European norms, creating loopholes, allowing legal differences to remain and therefore fueling asylum shopping and regulatory competition. Second, even in the unlikely hypothesis of a complete unification of the law of asylum seekers and refugees, asylum shopping will just be based criteria other than legal rights. The criteria used to select among member states will be displaced on other fields, such as geographical situation, language spoken, presence of national communities and so forth.

The question faced then is the following: is it legally possible to put an end to asylum shopping through compulsory resettlement?

Looking at the UNHCR resettlement system, the answer is negative. The UNHCR bases its resettlement operations on the strict basis of voluntarism. People are not sent to a host state without their consent as to their destination.

The July 2001 directive on burden sharing and temporary protection also guarantees this right. No authoritative resettlement is allowed, the principle being that of double consent (of the receiver state and of the protection seeker). The directive proposal affirmed that “only a physical distribution based on voluntary action of the member states and the displaced persons themselves will

¹⁹ See draft presented by the German presidency : Draft Council Resolution on Burden sharing with regard to the admission and residence of refugees, of July 1994 Doc. No. 773/94 ASIM 124

found a consensus in the EU”²⁰. The directive does not explicitly refer to state voluntarism but does require the protection seeker’s consent at all stages of the resettlement arrangement. Article 25 reinforces the principle by extending it to beneficiaries of temporary protection who are not yet on the territory of one of the Member States: they must be willing to be received, thus guaranteeing them the right not to be forcibly moved. As for secondary movement or transfers, Article 26 of the directive organises cooperation among member states with regards to the transfer of residence of persons enjoying temporary protection from one member state to another. The principle of the person’s consent irrigates the entire system. One must also take note of the explicit reference in the directive proposal to the obligation to avoid “any movement which is forced and contrary to human rights.”

These assertions, together with the UNHCR practice for resettlement might suggest the emergence of an international norm. The consent of the people to be displaced constitutes the core and the limit of any resettlement, taking the form of a right to choose the destination state or, to be more cautious, the right not to be constrained to go to a country without agreeing to it.

The proposal for a Council Regulation to replace the Dublin Convention²¹ also consolidates, albeit in an indirect way, the legitimacy of the principle of choice of the destination state. It abandons the restrictive approach advocated by the working paper. The latter suggested²² that “the structure of the [future] Dublin convention system should theoretically deny asylum applicants the freedom to travel within the EU before deciding where to lodge an application for asylum”. The 2001 Regulation proposal, on the contrary, places the choice of the destination state at the core of the system of determination of responsibility, thus modifying in a substantive way the previous Dublin mechanism. Indeed, article 5 of the proposal states “1. The criteria for determining the Member state responsible established in this chapter shall be applied in the order in which they are presented. 2 The state responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a member state”. In other words, following article 5, the choice of a protection seeker would trigger the responsibility of a state.

²⁰ Proposal for a Council directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance between Member States in receiving such persons and bearing the consequences thereof, 24-5-2000, COM(2000)303 final, p. 11

²¹ Proposal for a Council Regulation determining the member state responsible for examining an asylum application lodged in one member state by a third country national, COM/2001/0447 final, OJ C304, 30.10.2001

²² Proposal for a Council Regulation determining the member state responsible for examining an asylum application lodged in one member state by a third country national, COM/2001/0447 final, OJ C304, 30.10.2001, point 40

Compared with the previous Dublin system, it is a radical departure that tends to confirm the possible existence of a ‘right’ to choose the state of destination.

2- Ad hoc and non-binding people-sharing mechanism

There is a strong discrepancy between the proposals on burden sharing mechanisms adopted in the early 90s and the final result as it is organised in the July 2001 directive or the decision creating the European Refugee Fund. In the immediate aftermath of the crisis in Yugoslavia, states discussed ambitious versions of burden-sharing plans. As for scholars, they praised systems of responsibility sharing, i.e., in reference to Noll’s classification, people-sharing. But, upon examination of the texts enacted, one must conclude that states and the EU institutions have abandoned all idea of responsibility-sharing, have refused any kind of *ex ante* commitment, and given up on the prospect of formalised and centralised schemes.

The burden-sharing scheme in fact does not set out a formalised plan of distribution of people. The contrast is striking with the German draft Council Resolution on burden sharing of 1994²³. It advocated distribution of protection seekers among member states with a distributive key based on member states’ percentage of the total Union population, the percentage of the Union’s territory and the percentage of the Gross Domestic product of the Union. It organised the following system: “when the numbers admitted by a Member state exceed its indicative figure, other member states which have not yet reached their indicative figure will accept persons from the first member states.” The draft interestingly proposed a compulsory resettlement plan relying on distributive keys. These keys would be negotiated every five years by joint agreement.

Strong reservations expressed by other member states (mainly France and the UK) watered down the project and what remains is a very ‘light’ system. The 1995 Decision on Alert and Emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis²⁴ replaces the formalised German arrangement by a procedural framework for Council decisions and monitoring in crisis situations. Noll rightly considers that “this ex-post de facto framework clearly fails to provide the predictability necessary for fair burden-sharing. Consequently, a cautious state would rather block access for refugees than trust in the outcome of this ad hoc exercise in the Council” (Noll, 2000, 296). The July 2001 Directive rests on the same logic. Articles 4 to 7 refer to duration and implementation of temporary protection. Article 5 reads: “The existence of mass influx of displaced persons shall be

²³ Draft Council Resolution on Burden sharing with regard to the admission and residence of refugees, of July 1994 Doc. No. 773/94 ASIM 124, paragraph 9

²⁴ OJ 1996, L 063/10

established by a Council decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a member state that it submit a proposal to the Council. (...) 3-The Council decision shall have the effect of introducing temporary protection for the displaced persons to which it refers”. Clearly, the mechanism relies on *ad hoc* arrangements. In the event of a mass influx of protection seekers in Europe, the Council must certify its existence, a prerequisite for triggering temporary protection and subsequent burden-sharing schemes. The only element that allows for the possibility to override any given state’s resistance is the qualified majority requirement as opposed to unanimity. Apart from this last element, there is no doubt that the refusal to adopt a set prior agreement among states is the first flaw of the system.

After activation of the solidarity scheme by the Council, states are not bound by any concrete obligations. They are only required to indicate, in figures or in general terms, their capacity to receive such persons. This information shall be set out in the Council decision referred to in article 5²⁵. After the decision has been adopted, member states may indicate additional reception capacity by notifying the Council and the Commission. Should a state reach its reception quota of displaced persons, article 25, paragraph 3 has foreseen a solution. When the number of those who are eligible for temporary protection exceeds the reception capacity, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for member states affected. The Council has no other power than to recommend, and clearly, states are not bound beforehand by any set reception figure. The idea that an equitable distribution should take into account criteria such as gross national product, the number of refugees already hosted etc has been given up. In other words, and borrowing from Suhrke’s analysis of the 1995 resolution, “no premiums are to be paid in advance” (Suhrke, 1998).

It is true that the refusal to formalise binding distributive keys was also a means of avoiding the thorny question of numbers: if required to subscribe to a fixed numbers, states were likely to commit themselves to very low figures indeed. States have been conscious of the constraint represented by the principle of non-reciprocity in EC law. Whereas in the international system, they can usually argue that a co-contracting party has not respected its legal obligations in order to justify their own non-compliance with commitments, this argument is proscribed in EC law. Consequently states would have to “pay the premium” whatever the case.

²⁵ Article 25 of the Directive.

A last characteristic of the system that is progressively being built is the absence of institutions responsible for the allocation of protection seekers among states. In the examples of resettlement plans examined above, an institution played the role of facilitator between State interests and protection seekers' needs. Hathaway is one of the scholars advocating the creation of a specialised institution competent for the organisation of resettlement plans. He supports, together with Hans, Surhke et al. "a future international supervisory agency (ISA)" (See Hathaway, 1997, xxiv) in charge of developing mechanisms to share-out equitably responsibility for the protection of refugees among states. But this proposition has never been seriously considered in the EU framework.

In fact, states have refused to organise a binding people-sharing system. One can even go so far as to conclude that they have just about relinquished the idea of sharing people. Constrained by the impossibility to deny the right to choose the destination state, they could not be persuaded to promote a compulsory system of allocation or distribution. Therefore, faced with the impossibility to predict the number of protection seekers entering their territory, they have decided to continue acting unilaterally. In turn this raises doubts on the validity of the expression 'responsibility sharing' frequently used by scholars. Implicitly, the term suggests the common exercise of responsibility. But firstly it finds no confirmation in positive law. Secondly, even were such a system of distribution of people to exist, it could not qualify for such an appellation. Indeed, once a member state receives a protection seeker, it alone is bound by the obligation to grant minimum protection in conformity with its international obligations.

The current situation can be described as a vicious circle. States are not eager to promote more co-operation without compensation and guarantees of security and predictability. But in order to organise such an insurance system, they have to act collectively. This is how Surhke explains the differences between burden-sharing project in the field of defense and asylum. He situates the main obstacle to burden-sharing establishment in the field of asylum in the "discrepancies between the up-front costs of sharing and the uncertainty of reciprocal benefits" (Surhke, 1998, 400). Indeed the absence of long-term, institutional arrangements undermines the prospect of reciprocity and weakens the insurance logic, i.e. the very elements appealing enough to make states want to join in the first place.

In practical terms, states have refused to commit themselves to hosting people. But, by creating the European refugee Fund (ERF)²⁶, they have paved the way for fiscal sharing in the field of asylum.

²⁶ Council decision of September 28th, 2000 establishing a European Refugee Fund, 2000/596, OJ L 252/12, 6.10.2000

3-Preference for a reparative approach

The ERF is the necessary component of a mechanism aimed at financially compensating overburdened states. As opposed to a preventive people-sharing mechanism which aims at guaranteeing predictability, the objective here is compensation through the establishment of an ex-post reparative mechanism.

Of course, the creation of the ERF represents a substantive change because States have agreed to institutionalise a form of financial solidarity among themselves. The fund will serve to finance actions undertaken to improve the conditions of reception, integration of displaced persons in the host society, and repatriation. This fiscal burden sharing relies on a mechanism set out by Article 10. Each member state shall receive a fixed and equal amount of the ERF's annual allocation (500000 EURO in 2000). The remainder of the resources shall be distributed proportionally between the member states. Two criteria are used for this distribution. 65% will be attributed in proportion to the number of asylum applicants (including refuge-seekers), people under temporary protection or whose right to temporary protection is being examined by a member state. 35% will be allocated in proportion to the number of refugees or people granted asylum over the three previous years. This system of allocation of resources has been criticised because it distributes a non-negligible proportion of funds to low receivers. But this fixed amount decreases every year²⁷. The emphasis is thus progressively put on compensating the real burden placed on states and granting resources on the basis of need, i.e. the number of protection seekers effectively hosted.

Therefore, in establishing a set institutionalised fiscal-sharing system beforehand, the ERF ensures a system with low receivers compensating to the major receivers. Refusing ex ante to receive pre-determined percentages of protection seekers, states have accepted a sort of 'polluter-payer' configuration'. To put it differently, states are faced with an option as to the manner in which they express their solidarity: either they receive protection seekers or they contribute to the costs of reception and integration. The approach is minimalist: it does not create any commitment towards receiving protection seekers, but the reparative mechanism at least rewards "good" states.

The question arises, then, whether this reparative approach is likely to trigger a decision to further share the burden. In other words, can we expect the ERF to encourage more people sharing on behalf of less burdened states? Looking at the total budget of the Fund leads to a pessimistic conclusion. The budget is extremely limited: 216 millions EURO. Noll, in commenting the

²⁷ 50 000 EURO in 2000, 400 000 EURO in 2001, 300 000 in 2002, 200 0000 in 2003 to 100 000 EURO in 2004

decision proposal, already observed that care and maintenance costs in the Swedish protection system alone amounted to 144 millions dollars in 1994 (Noll, 2000, 315). This minor point serves to underline the fact that so long as states can only expect a symbolic financial compensation, they will have no incentive to soften their position with regards to costly protection seekers.

It ensues from all of the above that, although in theory the introduction of burden sharing is designed to achieve ambitious objectives, in fact none of the EU initiatives contributes to a substantive change. The EU burden sharing approach is paradoxical. It is based on the states' loss of capacity to cope individually with the reception and financial problems related to asylum but does not promote sufficient collaboration, which in turn is likely to dissuade states from further collective action. Legal norms guaranteeing rights to protection seekers are minimal yet they are perceived of as new unwelcome constraints by states deprived of their possibilities to compete. Furthermore after more than ten years of debate, the burden sharing mechanism has changed faces. The initial proposals set out ambitious formalised schemes, but the norms finally enacted consecrate little more than a framework for *ad hoc* arrangements, organise low financial burden sharing, and avoid the creation of specific institutions in charge of the organisation and implementation of burden-sharing schemes agreed on ex-ante.

IV-IMPLICATIONS OF A REGIONAL BURDEN-SHARING MECHANISM

The previous Part highlighted the lack of political will, legal constraints, and the unlikely emergence of the expected insurance mechanism. Up until now the debate has been Eurocentric. At present it should be contrasted with different proposals set out to enhance worldwide burden sharing. The UNHCR, in reference to the Geneva Convention, frequently recommends an international system of burden sharing. Scholars also advocate global solidarity. Acharya and Dewitt promote a “distributive-development” framework for sharing the financial burden of refugee protection through financial aid as a means for Northern countries to express their solidarity towards Southern transit or reception countries (Acharya and Dewitt, 1997). Hans and Suhrke favour regional burden sharing because physical protection is best provided within the refugee's region of origin. The regional hosting principle would be complemented with selective extra-regional protection to meet special need cases. For states outside the region, they would accept a commitment to fiscal burden sharing (Hans and Suhrke, 1997)²⁸.

²⁸ ECRE is advocating a show of regional solidarity in the forum of the OSCE in order to avoid the transfer of responsibility for assisting people in need of protection to Central, Eastern and Southern Europe especially in case of sudden large scale arrivals (ECRE Position

The European burden-sharing approach is quite different from these proposals. While the principle that protection seekers should be resettled preferably in the vicinity of their country of origin is accepted, the motivations that found the solidarity expressed through the burden sharing approach are specific to the 15 member states, the only likely extension being that to other European countries such as Norway and Switzerland.²⁹

This last part tries to forecast the possible evolution of the burden sharing scheme established by EU member states. It is a prospective and somewhat pessimistic analysis based on the observation of current legal developments. It will show that a burden sharing scheme set up at a regional level may lead to only light and low harmonisation (1) as well as burden shifting to Southern countries (2). The last question concerns the nature and form of the burden sharing mechanism developed: Is it an exclusionary alliance? Is it the regional dimension of the project that explains the deviation of a burden sharing project towards a burden shifting system?

1-Predictable low harmonisation

Norm-sharing, i.e. harmonisation, is the preferred form of burden sharing. Firstly, European institutions seem to rely on the capacity of harmonisation to eliminate or reduce asylum shopping³⁰. Secondly, norm-sharing is the least costly form of burden sharing for States. While it is likely to reduce the phenomenon of asylum shopping it does not deny protection seekers the “right” to choose their destination state. It constitutes an indirect form of regulation because it reduces systemic biases and other market imperfections. It also appears as a pre-requisite for people-sharing. Indeed, it is impossible to organise fair resettlement plans so long as there is a great variety and disparity of protection regimes among and within European states. As a pre-condition of

on sharing the responsibility: protecting refugees and displaced persons in the context of large scale arrivals, March 1996, available on www.ecre.org/positions

²⁹ The Dublin system is progressively extended to non-member countries. See Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a member state of in Iceland or Norway, OJ L 093, 3.4.2001, p. 38.

³⁰ The working paper «Revisiting Dublin » point 43, concluded that together with the reform of the Dublin system, other components of the Common European asylum system will reduce the differences between Member States which may influence the distribution pattern of asylum applications within the European Union. It states that «substantive asylum law and asylum procedures have not yet been approximated and the recognition rates for certain nationalities can vary significantly from one Member state to another. It is no surprise then that people in need of international protection find one Member state a more attractive destination than another». Norm-sharing then tends to become the answer to tackle the unequal distribution of protection seekers.

future responsibility sharing, a similar level of protection, including basic socio-economic rights and the right to family life, should be guaranteed in all the states concerned (ECRE, 2001).

The preference for norm-sharing instead of fiscal or people-sharing is expressed in the treaty. The treaty of Amsterdam has imposed a five-year agenda to harmonise national legislation, but Article 63 exempts burden-sharing from the five year time limit. This agenda may confirm Noll's prediction that as long as this rationale prevails, "a rational state will opt for a minimum of level of protection. Translated back to practice, this promotes the spiral of restriction in EU asylum policies" (Noll, 2000, 299). Interestingly, the proposal for a Council directive on temporary protection and burden sharing³¹ recognised that the level of member states' obligations towards beneficiaries has to meet a number of constraints. First, they must be fair. But "second, they must be attractive enough to ensure that there is no excess of asylum application". This ambiguous sentence seems to indicate that states are not eager to collectively grant a high level of harmonised protection.

Keeping in mind the benchmarks of the system in which states are operating, it is possible to predict the results of the harmonisation process. It can be argued that, in the absence of norm-sharing or people-sharing with other Western countries, minimum harmonisation is probable. Indeed, as an alternative to physically closing its borders, and in order to prevent entry onto its territory, a state can resort to indirect action, that is to say by competing with its neighbours and becoming less attractive for asylum shoppers. However as norms are progressively harmonised, the feasibility of this second course of action dwindles more and more. It follows then that states with a low level of protection are logically reluctant to accept a high level of harmonised protection. On the other hand, less competitive States with a high level of protection favour a high level of harmonised protection. But a second element, generally underestimated in the European debate, may dissuade the latter from supporting high level of protection: member states are not the only "rich", attractive receiver countries for protection-seekers. A phenomenon of regulatory competition might emerge with other attractive states such as the United States, Canada, Australia and New Zealand. In many respects - because of the language spoken, the presence of important foreign communities, democracy, a high level of development etc – these countries represent viable alternatives for protection seekers. It must be kept in mind that regulatory competition requires a certain degree of similarity among products offered to law consumers. Although

³¹ Directive laying down minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance between Member States in receiving such persons and bearing the consequences thereof, 24-5-2000, COM(2000)303 final, p. 8

competition between Europe and other receiver countries has yet to be studied, it should not be set aside as a factor liable to impact on the harmonisation process. To avoid being more attractive than their 'new' competitors, member states should favour a low European standard of protection. The European protection level may be downgraded in order to redirect protection seekers to the other countries.

A detailed analysis of the negotiation process as well as the content of recently enacted or proposed texts may confirm these theoretical assumptions both for incomplete harmonisation and low standards of harmonised protection. First, in contrast to public rhetoric, a lack of political will to agree on common standards characterises the states' approach to the legislative process. During legislative negotiations, most states have exhibited a reluctance to move beyond national practice. Secondly, member states have anticipated on the future development of a European asylum policy by modifying their legislation preventively and restrictively to create " 'facts on the ground' to strengthen their negotiating positions or to drive down standards before they are agreed at the EU level" (ECRE, 2001, 25). ECRE has denounced the fact that more than simply wishing to preserve the status quo, governments are rushing ahead with major changes to national legislation, without waiting for European agreements. Indeed, the UK, Greece, Denmark, Austria and the Netherlands have recently amended their asylum legislation³². The race to amend national legislation in the last two years can be seen as an effort to define a strategic position before a common norm is enacted and imposes new constraints. One may interpret these strategies in two different ways. They may reflect unilateral behaviour and therefore illustrate states' difficulty to co-operate when they still have the power, albeit limited, to enact competitive regulation. Or else, one may argue that while acting individually, states are contributing to the formation of a general policy they tacitly agree upon. In other words, the restrictive individual actions would in fact be welcomed by the majority of the other participants and therefore are the expression of a self defensive strategy vis-à-vis the integrative proposals of the Commission supported by a few front-runner states.

Finally, the content of the harmonisation norm does not allow for optimistic expectations. It raises doubts about member states' willingness to

³² Just one month after Tampere, the UK's wide-ranging 1999 Asylum and Immigration Act introduced compulsory dispersal of asylum seekers and replaced cash welfare benefits with vouchers. A new Aliens law was introduced in Greece in spring 2000, followed by a change in Danish law to allow asylum seekers suspected of a criminal offence to be detained indefinitely. In April 2001, the Dutch Aliens Act entered into force, introducing a single status for all those in need of protection and a single set of rights. Austria has recently amended its legislation with respect to safe third countries. The ECRE supports «a loyalty clause whereby Member States would commit themselves not to pass national laws that conflicts with EU proposals under discussion».

promote a high standard of protection. The directive on temporary protection is criticised by numerous NGOs. It is considered to fall short of acceptable standards in a number of areas (ECRE, 2001, 9). Even in an emergency situation, visa controls and other restrictions will not be lifted to ease access to the EU. Temporary protection can be withdrawn from a person who applies for asylum, which is a considerable disincentive, as reception standards for asylum seekers are likely to be much lower than those made available to people under temporary protection³³. The major risk is that temporary protection might be used in situations when the granting of refugee status or of another form of international protection is the more appropriate response. NGO's main concern is a general fragmentation of the guarantees laid down by the Geneva Convention through the creation of various and multiple ad hoc and low-level protection status. Therefore, despite strong political statements made in the Tampere conclusions, states seem to be committed to a minimalist European asylum policy.

2-Foreseeable collective burden shifting towards Southern countries

The second possible effect of burden sharing in the EU complements the first one. It takes the form of a generalised burden-shifting to Southern countries.

To be fair, this pitfall is not the immediate and direct consequence of burden-sharing development. In the early 80s, i.e. prior to any burden-sharing system in the EU, the international situation was already characterised by the unevenness in burden between Northern and Southern countries. In the early 1990s, "Fortress Europe" was denounced, states establishing a "market of deflection" (Noll, 2000; Landgren, 1999; ECRE, 1995). The CEECs have become the EU's "buffer zone" through the network of readmission agreements signed with the EU member states (Lavenex, 1999). Traditional transit countries such as Iran, Jordan and Turkey were already overloaded and rather than adopting resettlement plans in Europe, member states negotiated agreements implementing more stringent border-controls with them. The question now then is whether the introduction of a burden-sharing scheme modifies this situation or, on the contrary, accentuates the restrictiveness of European policy.

³³ JUSTICE expresses its concern that article 18 permits States to make temporarily protected and asylum-seeker statuses mutually exclusive. It indicates that a reversed approach would be preferable, that is to say the article should explicitly allow member states to accept asylum applications during the period of temporary protection, without requiring to do so. See JUSTICE comments of the Proposal for a directive on minimum standards for temporary protection in the event of a mass influx and on measures promoting a balance of efforts between Member States in receiving such persons, available on ECRE's website.

The norms recently enacted point to the conclusion that the burden-adding trend of the 1980s and 1990s is reinforced by the replacement of unilateral norms with common norms and actions. In terms of priority, states have preferred transferring to the EU powers that are the prerequisites for the adoption of *non-entrée* measures and border controls. Unsurprisingly, none of the norms enacted since 1999 gives hope for the definition of a more generous asylum policy. The most obvious example is the adoption in December 2000 of a Regulation creating a European database of asylum seekers' fingerprints (EURODAC)³⁴. In 2001, the measures enacted were also defensive. A regulation establishing a Common visa list was passed in March 2001³⁵ and includes Afghanistan, Iraq and Sri Lanka among states whose nationals must be in possession of a visa to enter the EU. One is not surprised by this choice given that many asylum seekers are from these three states. In May 2001, the norms adopted were all related to security arguments: the Directive on mutual recognition of decisions on the expulsion of third country nationals³⁶ and the Directive on carrier's sanction³⁷ are both linked to proposals to reinforce measures against human trafficking and combating human smuggling. Accordingly, the Directive proposal on asylum procedure³⁸ allows for the detention of asylum applicants and the processing of asylum applications at borders, sea and airports, as well as authorises the implementation of accelerated procedures which do not provide sufficient legal and procedural safeguards to prevent *refoulement*. Lastly, there is neither a proposal nor even a debate to remove the "safe third country" notion from national legislation. On the contrary, one can observe a phenomenon of 'cut-and-pasting' of national concepts or legal provisions imported in European law. In addition, competence has been transferred to the EU to sign readmission agreements. Article 63-3-b of Title IV TEC grants the Council the power to adopt measures on immigration policy in the area of illegal immigration and residence, including the repatriation of illegal residents. This means that the Community has competence to conclude readmission agreements with third states. As yet, the only EC-third country

³⁴ Council Regulation concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention, December 2000.

³⁵ Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt from that requirement, 539/2001, March 2001

³⁶ Council Directive 2001/40 on mutual recognition on expulsion, May 28th, 2001, OJ L 149, 2.6.2001

³⁷ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of June 14th, 1985, OJ L 187, 10.07.2001, p. 45

³⁸ Proposal for a Council directive on minimum standards on procedure in Member States for granting and withdrawing refugee status, COM (2000) 578 final.

readmission agreement that has been signed is with Hong-Kong³⁹ but negotiations are under way with Russia, Morocco, Pakistan⁴⁰ and Sri Lanka, all traditional refugee transit countries. These agreements or negotiations are in line with the spirit of the six Action Plans drawn up by the High Level Working Group on Asylum and Migration established prior to Tampere concerning Albania, Afghanistan, Somalia, Iraq, Morocco and Sri Lanka. The six Action Plans put the emphasis on the need for migration controls in the country of origin or transit. The most characteristic feature of the future European asylum policy is the accent put on the reinforcement of containment measures. Since Tampere, one can note a steady increase in the number of immigration officers sent overseas to ensure that people not carrying correct documentation are prevented from boarding flights to Europe. ECRE gives evidence of this tendency in the CEECs (ECRE, 2001, 17). Under the European Commission's PHARE program of financial and technical assistance to Central and Eastern European countries, nearly all of the funds allocated in the period 1997-2000 to assisting candidate countries with meeting their obligations to adopt the acquis of EU legislation were distributed for border controls (EURO 230 million). Just EURO 11 million have been distributed for asylum and visa systems.

3-General trend: exclusionary alliance?

Now, can the current European burden sharing system be defined when it is analysed from an international perspective?

One can refer to the three conceptions of burden-sharing borrowed by Acharya and Dewitt from international relations theory (Acharya and Dewitt, 1997, 124). They distinguish between multilateral, alliance and distributive-developmental frameworks. Multilateralism corresponds to co-operation based on rules of conduct commonly applicable to countries, i.e. based on the principle of non-discrimination⁴¹. Alliance burden sharing, on the contrary, provides an exclusionary and discriminatory form of collaboration against outside actors. Co-operation is founded on a commonly perceived external threat, rooted in the logic of national security. "By definition, alliances are exclusionary in scope and essentially defensive in posture" (Acharya and Dewitt, 1997, 126) in that the strategy designed consists mainly in deterring and defeating the common enemy. The third form of burden sharing, called "distributive-developmental

³⁹ European Commission News : EU-Hong-Kong Readmission Agreement concluded, November 22nd, 2001.

⁴⁰ See proposal for a Council Decision concerning the conclusion of the co-operation Agreement between the European Community and the Islamic Republic of Pakistan, Doc. 598PC0357, 18.06.2001

⁴¹ In economic relations, differential treatment of partners is forbidden and point-of-entry barriers to transactions are minimised

framework” is rooted in the literature on North-South relations. Burden-sharing in this perspective focuses on the need for a redistribution of resources from the North to the South in order to enable the latter to overcome its own problems and vulnerabilities.

Upon reading the Tampere conclusions, one might expect that the EU adheres to a distributive-developmental framework. Indeed the conclusions support a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This approach requires combating poverty, improving living conditions, preventing conflict and consolidating democracy as well as ensuring respect for human rights. To that end, “the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development”⁴².

But despite the political will asserted at Tampere, after analysis of the norms actually enacted one is led to the conclusion that the second model is more appropriate in describing the European burden-sharing system. Our previous examination of EU norms indicated that member states are incrementally building or favouring a defensive alliance in order to deal collectively with unwanted migrants. The persistent reluctance of many member states to participate in the resettlement plans of the UNHCR confirms, if need be, the lack of concern for the international burden imbalance.

Be that as it may, one must try to understand why burden sharing plans can become burden shifting mechanisms.

Suhrke has shown that the consequence of sharing schemes is that they may encourage collective action along restrictive lines (Suhrke, 1998, 398). The following proposes to examine why the reinforcement of burden shifting may mechanically emerge out of the burden sharing tools chosen. To demonstrate this effect, one can reason along the lines of a constraints-choice analysis. To this aim, one must focus again on states’ possible strategies. Both Noll and Suhrke have referred to the prisoner’s dilemma configuration to describe the current position of states. Noll insists on the obstacles for co-operation (Noll, 2000). He emphasises the dominance of mutual defection over mutual co-operation, assuming that states still have the option to deflect by closing their borders. He stresses the fact that at the current stage, co-operation on burden sharing is still a “better-yet-weak choice”, yet the Dublin convention and safe

⁴² Tampere European Council, Presidency conclusions, p. 3

third country-arrangements actually structure burden sharing as a prisoner's dilemma with unequal participants. Thus "there are no prospects for co-operation and mutual reception, as the only change acceptable for all participants is a complete blocking of access". Suhrke complements this analysis and stresses the fact that states are not in prison, in the sense that they retain insulation capacities. States can escape the dilemma by taking unilateral action to ban or expel asylum seekers, or, less dramatically, impose stringent visa requirements as legal barriers (Suhrke, 1998, 402). In accordance with this metaphor, one must admit that states do have an alternative to unilateral action: an efficient and relatively inexpensive strategy would consist in collectively "accusing a third prisoner". In other words, potentially European burden sharing may encourage collective burden-shifting or burden-adding to those excluded from the alliance. Hence the added value of co-operation changes. It takes the form of a collective legitimisation of restrictive protection policy. It was noticed that "the profound irony of the European experience is that a restrictive dynamic might easily occur whether states co-ordinate their responses or not" (Suhrke, 1998, 414). By pushing this analysis one step further, one can argue that in the event of a collective response such as the one at hand, embodied in the legislation enacted, there may appear even greater incentive to shift the burden and maintain a low level of protection.

When analysed in political terms, this relates to Moravcsik's hypothesis (Moravcsik, 1998, 11) that centralisation occurs only in those areas where the need for a credible commitment or co-ordination outweighs the risks of surrendering sovereignty. It has been shown that states are extremely reluctant to abandon their sovereignty and capacity to insulate themselves from migrants that have entered the EU through other member states. But the need for collective burden-shifting may come to dominate the reluctance to yield sovereignty. States can easily agree on organising burden-shifting. In terms of a constraints-choice analysis, member states may be reluctant to co-operate in order to share the burden 'on the inside' because they have different preferences and mainly seek to avoid altering their migration-related priorities. But, the hypothesis of a collective burden shifting is likely to find favour all the way across the board: states can agree on the greater efficiency of a collective approach, and prefer options that do not endanger other EU objectives. In other words, EU burden shifting mechanisms would constitute a process of collective legitimisation (Thouez, 2000). European receiving states are able to adopt restrictive migration-related policies because they have agreed do so collectively rather than unilaterally.

If a regional burden sharing mechanism can create a dynamic of cooperation, how can it produce external negative effects one may wonder. When observing the case of asylum, it is because of a common interest, shared-

values, a tradition of cooperation and solidarity, together with the existence of an institutionnalised frame, that the progressive establishment of a burden sharing plan was triggered. Such incentives, are difficult to find for cooperation with non-European countries. Indeed there is neither such tradition of cooperation and solidarity nor an institutionnal framework liable to develop interactions and interdependance among states.

Defending an approach based on *realpolitik*, Hathaway *et al.* (Hathaway, 1997) support regional burden sharing but they fail to indicate the means that would prevent this regional scheme from becoming restrictive. Thus the question as to whether a regional burden sharing plan can avoid becoming exclusionary is open to debate.

Conclusion

Finally, the problem can be reformulated in the following way: the causes of deleterious regulatory competition are likely to become the causes of a restrictive European burden sharing scheme.

The literature on burden-sharing in fields such as the environment or defense gives clues to understanding why burden-sharing is so difficult to achieve in the field of asylum (Suhrke, 1998, 4). States cannot address the causes of the problem but only its consequences. The causes lie beyond the states' control, in conflicts that one cannot realistically hope to resolve. Second, the Geneva Convention creates a peremptory obligation to not return people once they have entered a state's territory. This structure probably explains why in the 1980s, regulatory competition among norms granting protection has turned out to be negative. Referring to Tiebout's description of the conditions that ensure that competition is efficient (Tiebout, 1965), it is possible to argue that the legal autonomy prerequisite is not fulfilled. States are constrained by their legal environment. This last remark questions the viability of an efficient "market of asylum". Accordingly, this structure might impede the development of balanced and efficient burden-sharing schemes.

Debate in the future should focus on the question of whether legal norms are apt to provide a solution for this problem.

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