

# In Search of a Comprehensive European System for the Protection of 'Non-convention' Refugees

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*In the first part of this essay the major insufficiencies of the existing international refugee regime to cope with the post-Cold War mass flows of 'non-convention' refugees were briefly reviewed. This was followed by a repertory of arguments for the need of the creation of the regional protection regime in Europe, to be called the Comprehensive European System for the Protection of 'Non-Convention' refugees, (CES). Subsequently, some light was shed on the connotation of the overall aim of the postulated system, as well as upon its basic tenet: the 'burden-sharing' principle.*

*Having in mind a growth in the perception of the refugee problems as 'high' politics issues, it was argued that the CES would need to take into consideration not only the protection claims of refugees but also the structural features of the contemporary international system, as well as the response preferences of the donor/host nations. It is only in such a situation that one has a realistic chance to convince potential donor/host states to agree on legal sanctioning by the future CES of their obligations to bear a 'fair' share of the settlement of the large-scale non-convention refugee problems. Only then is there a chance to provide the minimum legal guarantees that responses to 'non-convention' refugees would not be dependent merely — to use Hannah Arendt's expression — 'upon charity and chance' but upon a fixed set of rules guaranteed by the civilized international community.*

**Key words:** REFUGEE, PROTECTION, REFUGEE STATUS, REFUGEE POLICIES, HUMAN RIGHTS

## INTRODUCTION

There is an urgent need for the creation of a new regional regime to settlement of the massive presence in Europe of those protection-seekers who do not qualify for obtaining 'convention' refugee status. The prevailing majority of today's protection seekers in Europe do not flee from individual persecution for reasons of race, ethnicity, religion, political opinion or belonging to a special social group as stipulated in Art.1.par. 2 of the 1951 *Geneva Convention*. Instead, they flee from various forms of so-called 'generalized violence' (notably from internal ethnic conflicts), 'massive and persistent patterns of human rights violation,' economic emergency, and environmental deprivation, or they are forced from their places of origin by natural catastrophes or man-made disasters. Hereafter they are denoted in this essay by the misnomer 'non-convention' refugees. Since there are insufficient international legal and material structures to settle this type of refugee problem, they people involved are caught in a kind of legal (and existential) 'limbo.' Consequently, there are reasonable grounds to fear that, if not tended to, a massive *ad hoc* presence of 'non-convention' refugees in Europe may become a new and volatile source of instability in the region, building up to a European version of the 'Palestinian' problem.

Below, major humanitarian versus 'realpolitikal' arguments for the need of the creation of such a regime are briefly reviewed. This will be followed by some tentative suggestions with regard to the structure of the Comprehensive European System for the Protection of Non-Convention Refugees. Particular attention will be devoted to its core element: a 'burden-sharing principle.'

## I. DEFICIENCIES OF THE EXISTING INTERNATIONAL REFUGEE REGIME: HUMANITARIAN PERSPECTIVE

The end of the Cold War and the breakdown of Communism have impinged both upon paradigmatic transformations in the dynamics of the contemporary international refugee problem, as well as upon the change in the logic of international responses to refugees (Dacyl, 1992a; Ogata, 1992a).

The major causal factors which pushed Eastern Europeans from their homes during the Cold War period — notably persecution for political opinion and lack of democratic institutions — have to a large extent disappeared. Still, the ongoing democratization process, a breakdown of the old power structures and the weakness of new post-communist ones have facilitated the resurfacing of numerous historic ethnic conflicts in the region. This, in conjunction with economic crises and political instability, has been forcing millions of Eastern Europeans to leave their places of habitual residence even after the 1989 revolution. The opening of Eastern European borders for free migration has been facilitating this process. A case in point is dynamics of the refugee problem in 1992. Ironically, in spite of the fact that '1992' had been declared the first year of the 'decade of repatriation'<sup>1</sup> by the United Nations High Commissioner for Refugees, as in the very same year over three million people were forced to leave their homes, particularly in the former Yugoslavia (UNHCR:COO/GEN/88 D). Over half a million of them sought protection in the West, particularly in the member states of the European Union (see *Diagram 1* below). This first year also witnessed another tragic landmark in the UNHCR's history: for the first time the UNHCR's budget exceeded \$ 1 billion (A/AC.96/793. Part III).

EU member-countries	1991	1992	1993
Belgium	15.354	17.647	22.039
Germany	256.112	438.191	322.599
Denmark	4.609	13.884	6.121
Spain	8.138	11.708	5.778
France	47.380	27.000	
Greece	5.944	4.000	827
Ireland	31	250	65
Italy	28.000	2.500	1.075
Luxemburg	238	2.000	381
Holland	21.615	20.346	35.399
Portugal	163	200	2.091
U.K.	57.700	32.000	22.350
TOTAL	447.275	571.718	420.718

Diagram 1: Source: NIDI-report 'Asylum-seekers and Refugees: Statistic and Background in the Twelve EC-countries;' och 'Draft Communication of the Commission of European Communities to the Council and the European Parliament on Immigration and Asylum Policies,' 1994: 12.<sup>2</sup>

<sup>1</sup> Developments were more positive in other parts of the world: over one million people had indeed been repatriated that year in Asia, Africa, and Central America with the UNHCR's assistance.

<sup>2</sup> Source, 'Communication of the Commission to the Council and the European Parliament on Immigration and Asylum Policies' (1993), Annex 1, p. 5. See also 'Survey of Implementation of Temporary Protection' issued as a working document during the session of the Humanitarian Issues Working Group of the International Conference on the Former Yugoslavia, Geneva, July 1993.

All this implied a substantial increase in protection claims in Western Europe.

As stated earlier, one of the characteristic features of these developments is that the predominant majority of these refugees fall outside the scope of the 'convention refugee' definition. Since the existing international refugee regime has been created in order to manage not only 'qualitatively' but also 'quantitatively' different refugee problems than that which Europe faces today, sufficient international legal and material structures to settle this type of refugee problem are missing. With hundreds of thousands of refugees inadequately accounted for, the potential for instability on the European continent is significant.

It still needs to be recalled that the issue of the inadequacy of the existing international regime to provide satisfactory solutions to contemporary refugee problems has now and again been placed on the agenda of various international forums.<sup>3</sup> Already by the mid-1950s it became apparent that the international refugee regime did not cover the protection and assistance needs of a whole range of new categories of refugees who did not flee individual persecution, but various forms of 'generalized violence' (e.g. ethnic conflicts or external invasion), a massive and persistent pattern of human rights violations, or natural disasters. Labels such as 'bona fide refugees',<sup>4</sup> 'displaced people',<sup>5</sup> 'externally displaced',<sup>6</sup> 'economic refugees',<sup>7</sup> 'victims of man-made disasters',<sup>8</sup> 'de facto refugees',<sup>9</sup> etc. have gradually entered international protection discourse.

In order to provide some measure of protection to these new and highly diversified categories of protection-seekers, the mandate of the High Commissioner's Office has now and again — and in a rather *ad hoc* manner — been broadened by the resolutions of the United Nations General Assembly, United Nations Security Council or resolutions of the Economic and Social Council. Gradually, the so-called 'good offices'<sup>10</sup> of the U.N. High Commissioner have emerged as an operational device legitimating the provision of legal protection and/or material assistance to **specifically denoted groups** of 'non-convention refugees,' for example refugees in and from Bangladesh 1971 (Goodwin-Gill, 1983 & 1987; Melander, 1987).

Simultaneously, the dramatic increase in the number of refugees which occurred during Third World decolonization (Holborn, 1972; Zarjevski, 1988) necessitated a removal of the 'time' (1 Jan. 1951) and 'geographic' (Europe) limitation clauses from the Convention. The two clauses were removed by the 1967 New York Protocol Relating to the Status of Refugees. However, the international community has not managed to reach a consensus to

<sup>3</sup> For example, in December 1980, at the initiative of the Federal Republic of Germany, the UN General Assembly adopted a resolution on '*International Co-operation to Avert New Flows of Refugees*' (UN Doc. E/CN. 4/1503). But all too characteristically, the matter was then pursued essentially as a human rights issue. Soon afterwards, the U.N. Commission on Human Rights decided to appoint a Special Rapporteur to study human rights and mass exoduses. In April 1981, Prince Sadruddin Aga Khan, a former High Commissioner, submitted his comprehensive, commissioned report. In the same year, the UN passed a resolution in which one called for a "new international humanitarian order". These discussions led to a second resolution on '*International Co-operation to Avert New Flows of Refugees*' (G.A. Res. 36/136).

<sup>4</sup> For the remarks on the 'bona fide' refugees, see, 1979 *Executive Committee of the High Commissioner's Programme*, Recommendation No 15 (CC) of the Sub-Committee of the Whole on International Protection of Refugees.

<sup>5</sup> GA Res. 2958(XXVII) of 12 December 1972, and UNHCR, Doc. No. 12A (A/35/127 Add. 1.) of 1980.

<sup>6</sup> UNGA Res. 3455(XXX) of 9 Dec, 1981.

<sup>7</sup> Plentzer 1991:13.

<sup>8</sup> UNGA Resolution 36/148 of 16 Dec. 1981.

<sup>9</sup> Council of Europe, Parliamentary Assembly Recommendation 773 (1976).

<sup>10</sup> For the first time the UNHCR 'good offices' had been used to bring assistance for Chinese refugees in Hong Kong in 1957. On 5 December 1960 the UNGA authorised the UNHCR's 'good offices to refugees from Algeria in Morocco and Tunisia and in 1961 to Angolan refugees in the Congo [GA resolutions: 1167(XII) of 26 Nov. 1957; 1500(XV) of 5 Dec. 1960; GA Resolution 1671(XVI) of 18 December 1961 and 1672(XVI) of 18 Dec. 1962].

modify the Convention's refugee definition, especially with regard to broadening the scope of flight causes that entitle protection seekers to obtain a convention refugee status. This in conjunction with the fact that there is no international body to **specifically** see to protection interests of these diversified categories of non-convention refugees (Beyer, 1989; Cuénod, 1991:5-48),<sup>11</sup> implies that millions of people in flight lack clearly and explicitly conceptualized 'rights' to protection. It also means the international community does not have sufficiently strong legal 'obligations' to provide protection for them.

It is not surprising in such a situational context that contemporary European refugee policies are increasingly perceived as part of *realpolitik* rather than as 'pure' humanitarian issues (see also Dacyl, 1995 a & b). Host states fear losing control of national borders, of the 'right of entry' and subsequently, of decision-making with regard to 'who' — in due time — should be allowed to become a citizen. Spontaneous and unwieldy mass refugee flows are thus perceived as a challenge to the post-Westphalian concept of nation-state sovereignty; and hence as a threat to the modern nation-state system (Dacyl, 1993). These have also been perceived as a challenge to host states' vital national interests — defined in terms of national identity, economic balance, or even domestic political stability. Altogether, the above implies that refugee issues are no longer regarded as 'merely' a humanitarian, 'low' politics issues but instead have increasingly been incorporated into the agendas of 'high' politics' (Hastedt and Knickrehm, 1989; Dacyl, 1992b: Chapter 3 & 10; Dacyl, 1993a). This shift in the perception of refugee issues from 'low' to 'high' politics need not necessarily be negative for refugees themselves, as elucidly pointed out by High Commissioner Mrs. Sadako Ogata, in her 'Opening Statement' at the Forty-Third Session of the Executive Committee of the High Commissioner's Programme (5 October 1992). Mrs Ogata stated as follows:

*'Let me conclude ... by recalling that two years ago, my predecessor, Mr. Stoltenberg spoke to this Committee of his ambition to see the issue of movement of people placed on the international political agenda. Today, it is undoubtedly there. I welcome this development. It is through political initiatives that the root causes of displacement can be addressed. It is through political agreement that durable solutions to refugee problems can be attained. Humanitarianism can create space for political action but it can never be a substitute for it' (pages 10-11).*

Also ECRE, European Consultations on Refugees and Exiles, (ECRE: 1994), recently pointed out that

*'...there is a need to relate the refugee issue to the social and political realities of the day, to advance a principled position and to provide a basis for constructive dialogue between all persons of good-will in governments, the inter-governmental system and the non-governmental sector ... there is a vacuum at the heart of the refugee debate as Europe moves from the Cold War certainties to the uncertainties of the new international order.'<sup>12</sup>*

Additionally, the ongoing (late 1980s and early 1990s) economic crisis as well as increases in racist and xenophobic tendencies (Westin et. al. 1994) undoubtedly creates a climate conducive to a new perception of the role of mass refugee flows in global politics. This is especially so since an increasing number of host countries declare themselves unable to deal with refugee problems on a unilateral basis and put into the question the feasibility of using permanent external asylum as a major means to deescalate mass refugee flows; a case in point provides current problems related to the settlement of mass refugee flows in/from the former Yugoslavia, Northern Iraq, Somalia, Haiti, Cuba or Rwanda.

<sup>11</sup> For a review of competence of various international bodies involved in the international refugee assistance, see also UNHCR, EC/SCP/71-GE.92-01890: 10: par. 36. For a discussion on the need of the modification of the contemporary international refugee regime see also j.-P. Hocké (1989); Goodwin-Gill, (1993); L. Minear et. al. 1992.

<sup>12</sup> *An Introductory Statement t A European Refugee Policy in the Light of Established Principles*, April 1994.

Conclusively a whole spectrum of new protection dilemmas has entered international protection discourse. These include:

- (a) *Who should receive protection and/or material assistance?*  
/‘convention’ versus ‘non-convention refugees’/;
- (b) *What type of protection should distinct categories of people in need be entitled to?*  
/asylum versus temporary refuge and other forms of protection/;
- (c) *Who has the duty to provide protection and/or assistance?*  
/recipient country versus international community/; and,
- (d) *Where should protection/assistance be supplied?*  
/country of origin versus host state(s)/.

Hence, the need of the modification of the contemporary international refugee regime,<sup>13</sup> and especially with regard to the creation of new mechanisms for handling settlement of massive flows of non-convention refugees. In recent years various initiatives have been presented in this respect. A part, albeit a very important one, of these initiatives has been the idea — presented in various policy statements — of the creation of a new regional regime for the protection of non-convention refugees; in this presentation it will be referred to as the ‘Comprehensive European System,’ CES.<sup>14</sup>

## II. THE NEED FOR A REGIONAL SOLUTION TO MASS FLOWS OF ‘NON-CONVENTION’ REFUGEES IN EUROPE:

### A REALPOLITICAL PERSPECTIVE

It is argued here that **Europe constitutes that part of the modern global system which is most ‘sensitive’ to massive and difficult to control refugee and migratory flows.** This ‘sensitivity’ needs to be linked to a momentum that is currently being built up by a whole range of factors related to:

- (a) paradigmatic changes in the dynamics of the European refugee phenomenon (see diagram 2);
- (b) the profound political transformations taking place both at the regional European-, as well as at the global level;
- (c) the shift in the perception and the role of refugee issues in global politics.

A brief repertory of these factors is presented below. Needless to say, this repertory constitutes only a review of arguments increasingly present in the contemporary international refugee discourse, and **does not reflect** any normative standing whatsoever on the part of this author. Still, it is my contention there is a need for both policy-makers as well as for academia to meet these arguments in a responsible and balanced manner; otherwise challenges related to the settlement of mass refugee flows will be open to exploitation by racist

<sup>13</sup> For the discussion of the on-going transformations in the international refugee regime, see for example, Cooperland 1992; Charles B. Keely & Sharon Stanton Russell 1993 and 1994a & b; Melander 1992.

<sup>14</sup> Sometimes, both the name and the idea itself are linked to the 1989 *Comprehensive Plan of Action for Southeast Asian Refugees* [UN doc. A/CONF. 148/2, 26. April 1989.] For an evaluation of the CPA see for example, International Journal of Refugee Law, IJRL (1993), vol. 5, no. 4.

and xenophobic forces in the region 'seeking to persuade the public that the Community's richness is being jeopardized by immigration from Third World and Eastern European countries and calling for this richness to be "protected"<sup>15</sup>

(1) *Refugees are no longer an ideological asset for the West*

The end of the Cold War, the breakdown of Communism, and the ongoing transition of Eastern European nations from planned to market economies and authoritarian rule liberal democracy, implies that refugees from Eastern Europe have ceased to constitute a foreign policy asset for the West. This change in the role of refugee issues in West-East relations seriously decreased the willingness of host nations in the West to admit Eastern European protection seekers. It is also facilitated by the fact that refugee and migration pressures upon Western European borders are much stronger than before; this is to a large extent a result of the opening of Eastern European borders for free outmigration.<sup>16</sup>

(2) *Europe has been the heart of the nation-state system*

The nation-state principle, the basic principle of the modern post-Westphalian international order, has reached its most full-fledged form in Europe. Since preservation of the nation-state's full control over external borders and over 'the right of entry' constitutes a core element of sovereign statehood, the host state's sovereignty is perceived to be challenged by unforeseen and difficult to control mass refugee movements (Dacyl, 1993).

(3) *The European plateau has until recently been an arena of global superpower contention*

Simultaneous to the foundation of the international refugee regime at the end of the 1940s and the beginning of the 1950s, Europe became the major arena for global super-power contention. It has also been the location of three permanent members of the UN Security Council (the UK, France and the USSR) and housed the strong military presence of a fourth — the USA. In addition it has been the location of the major military alliance, NATO. At least until the end of the 1980s, the region has, consequently been an area of the highest concentration of highly sophisticated weapons. Created in this way, a balance of threat between East and West facilitated the preservation of the existing *status quo*, and, hence, peace. The post-Cold War massive refugee and migratory flows, notably flows due to ethnic cleansing taking place in the former Yugoslavia, or those related to relocation of large segments of the population in the former Soviet Union, challenge this *status quo*.

(4) *Europe is the location of a multitude of historic ethnic conflicts*

In the situation of political vacuum after the breakdown of the old power structures, the democratization process, in conjunction with political instability, economic crisis and other profound changes that were put into the motion by the breakdown of Communism and the end of the Cold War, facilitates the resurfacing of many historic conflicts in former Eastern Europe. Again, the former Yugoslavia and the former Soviet Union are paradigm examples.

<sup>15</sup> *European Parliament Resolution on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence* (A3-0127/93, PV 7 II, 21. 4. 1993, PE 170. 813, page 85ff:3. For similar considerations see also: *European Council's declaration on racism and xenophobia*, issued at Maastricht in December 1991 and its *Declaration on the principles governing external aspects of migration policy* issued at Edinburgh in December 1992; *The Commissions Communications of 11 October 1991 on immigration [SEC (91) 1855] and 18 October 1991 on the right of asylum [SEC (91) 1859]*; *European Parliament's resolutions of 18 November 1992 on European immigration policy and on the harmonization within the European Community of asylum law and policies OJ no. c 337, 21. 12. 1992, p. 94 and p. 97.*

<sup>16</sup> In 1992, 156.792 persons from Eastern Europe (excluding former Yugoslavia) sought asylum in the member-states of the European Union. Source: *Draft Communication of the Commission to the Council and the European Parliament on Immigration and Asylum Policies, 1994, Annex 1, p. 5.*

(5) *Memories of past liberal refugee policies in Western Europe still 'pull' refugees*

Since the foundation of the contemporary international refugee regime, Western Europe has been a major host area for refugees. In the collective memories of substantial segments of Eastern Europeans who received a significant part of their political schooling through the broadcasts of the radio 'Free Europe' and the radio 'Voice of America,' a conviction still exists that they are welcomed in the West. In the past, recipient countries have had a sense of control over the flow of foreign citizens into their territories — not only due to own border control capacity, but most essentially due to the existence of the 'iron curtain.' Consequently, it is first now, with the opening of the Eastern European borders for free outmigration, that a real potential for refugee and migratory pressures from the Eastern to the Western part of the region is resurfacing.

(6) *Refugee flows are increasingly perceived in Europe as a 'challenge to the vital national interests' of the host states*

A unwieldy increase in the number of protection seekers in Western Europe impinges upon the increasing perception of the post-Cold War refugee phenomenon as a new challenge to the basic national interests of host states, defined e.g. in terms of economic well-being and political stability, and ethnic and cultural identity, as well as a challenge to sophisticated social welfare systems in Western Europe.

(7) *'Fortress Europe' is built up in the region*

As a consequence of the increasing perception of the refugee flows as a kind of 'threat,' a whole set of exclusionary measures have been put into practice in Europe in recent years. These include, inter alia, imposition of visa requirements for persons coming from the refugee producing countries, declining percentages of persons recognized as 'convention refugees,' tighter interpretation of a 'first asylum country principle,' etc. Altogether, these exclusionary tendencies build up a broader phenomenon that is labelled in the discourse as 'Fortress Europe.'

(8) *Refugees challenge established procedures of acquiring citizenship*

Diminishing possibilities for the Western host states to effectively exercise control over the issue of which foreign citizens should acquire the 'right of entry' into their respective polities seriously questions sovereign states' autonomy with regard to decision-making in the 'membership rights' issue area; that is control over the question as to who, in time prescribed by law, should acquire the right to obtain host state's citizenship.

(9) *Refugees are perceived as a challenge to regional identity*

Continued migration of persons from culturally distant regions is regarded by critics of liberal refugee and migration policies and those who insist upon the preservation of the existing cultural status quo as challenging Europe's cultural identity. This perception has been increasingly visible since 1985, the year when for the first time the number of those outside-European protection seekers exceeded the number of those who came from European peripheries.

(10) *Refugees are perceived as a challenge to Western European political culture*

Politically active diasporas (as for example Kurdish or ex-Yugoslavian) from those source areas where political extremism and violence constitute a part of the political culture are regarded as a challenge to the democratic traditions of Western political culture. Consequently there is an increasing unfortunate tendency to link refugee problematique to the issue of terrorism. This tendency may be discerned not only among those segments of public

opinion which call for closing European borders, but even among decision-makers. The most visible linkages are discussions on refugee issues in the framework of TREVI Group (consisting of Ministers of Interior and Ministers of Justice from all 12 EU countries).

(11) *Refugees challenge 'the grand modernity project' in Europe*

Western 'modern' order, based *inter alia* upon a high degree of 'standardization' by rules, laws, decrees, etc. of both the individual's role in society as well as the public policy domain, is perceived to be challenged by 'spontaneous,' unpredictable and difficult to control refugee flows.

(12) *Western Europe is relatively accessible to people from several major refugee source areas*

The close geographic proximity of several refugee-producing areas and the relatively 'easy' (by land) mobility both from the European peripheries in Eastern Europe as well as from the Middle East and Northern Africa, create conditions conducive to refugee and migratory pressures into Europe.

(13) *Refugees challenge secularized Western culture*

The predominantly secular, liberal and democratic political culture of the West is said to be challenged by the different upbringing of many refugees and migrants. In particular, the occurrence of a religious fundamentalism among quite limited but visible segments of the refugee and migrant population in Western Europe is perceived as a challenge to the secular culture of the region.

(14) *Mass refugee crises call into the question well in advance prepared harmonization plans with regard to single migration space within the European Union*

Spontaneous, difficult to predict mass refugee flows — that are unequally targeting host Western nations — call into the question the feasibility of harmonization efforts of the refugee and migration policies inside the European Union. A failure of the Maastricht top-meeting to agree upon a placement of the refugee issues in the Pillar I ('Community matters'), symbolizes this situation.<sup>17</sup>

### III. PROPOSING A NEW PROTECTION SYSTEM FOR 'NON-CONVENTION REFUGEES'

Since the mid-1980s the idea of creating a new system has been discussed on intergovernmental levels within the framework of the so-called *North-American European Consultations on Refugees and Exile*. However, the consultations broke down in June 1992, most probably due to imminent difficulties in bridging a conceptual gap between the Consultation's rather 'realpolitik' type of approach to the settlement of the refugee problem in Europe, and the UNHCR's humanitarian mandate.

On 21 July 1992, during the Geneva conference on the Yugoslavian refugee crisis, the idea of the creation of a new system for handling the massive flows of non-convention refugees in Europe was put forward again by the Swedish Minister for Immigration, Mrs. Birgit Friggebo. However, due to opposition from such states as Great Britain, France and Spain (who at the time of the Geneva conference did not host large amounts of protection seekers from the former Yugoslavia), the CES idea did not receive sufficiently strong sup-

<sup>17</sup> Exception provide questions related to common visa policies as well as common visa format for the European Area that already in Maastricht have been defined as 'community matters'.



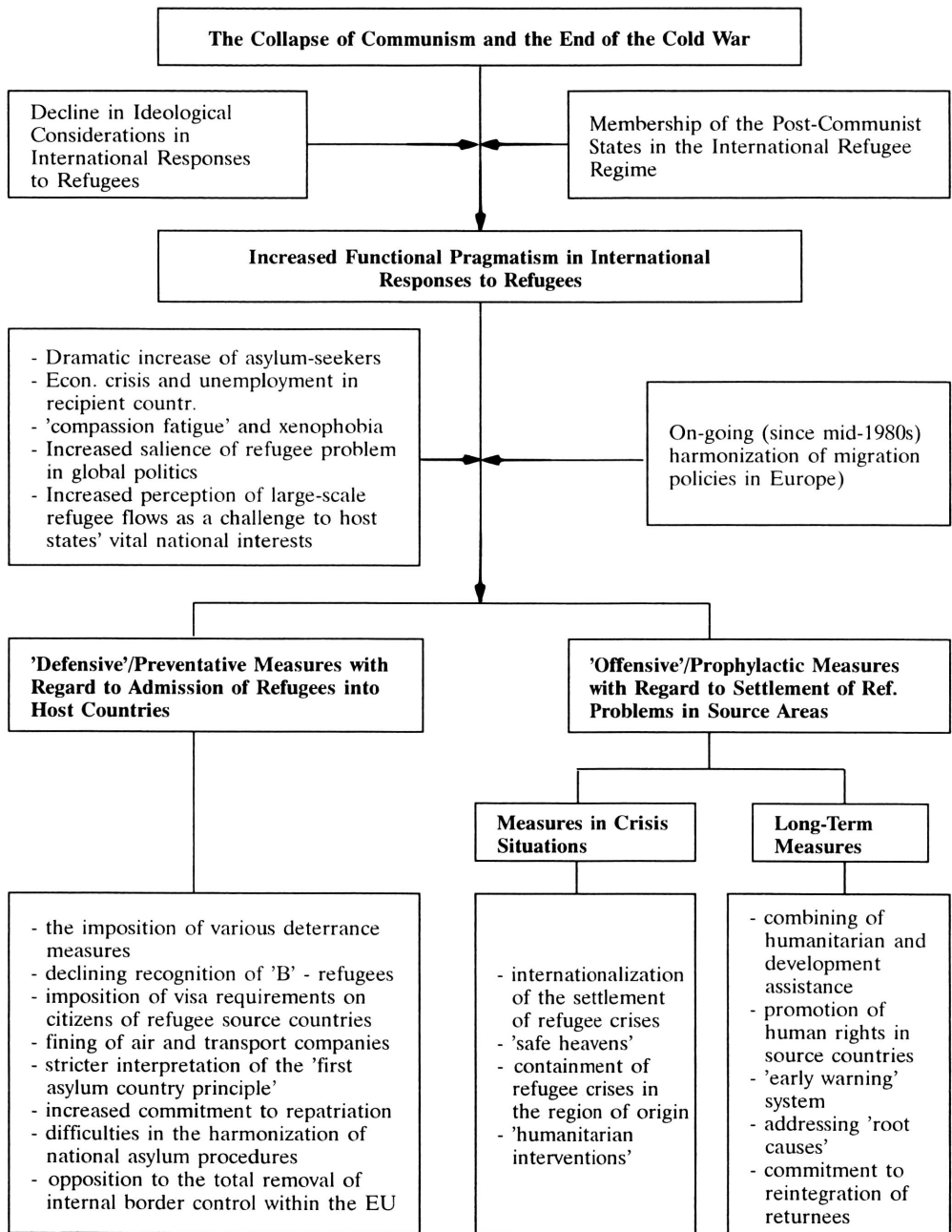


Diagram 2 : The impact of the end of the Cold War and the collapse of the Communism upon the international responses to refugees.

port. Consequently, a tacit consensus was reached that the host states would even in the future retain their distinct admission procedures with regard to non-convention refugees.<sup>18</sup> Still, the United Nations High Commissioner for Refugees, Madame Sadako Ogata, urged the international community to apply humanitarian standards in the settlement of non-convention refugee flows and also to equally share the refugee burden.

The need for a concerted approach to the settlement of the contemporary refugee problem in Europe has been expressed by Swedish representatives on other occasions; in Her 'Statement on Behalf of Sweden to the 43rd Session of the Executive Committee of the United Nations High Commissioner for Refugees, on 5 October 1992, Mrs. Friggebo, strongly underlined a need for the formulation of a 'comprehensive and concerted system to deal with the variety of new challenges posed by the contemporary refugee and forced migration phenomenon.'<sup>19</sup>

Since the level of protection claims in Europe still remains at a very high level,<sup>20</sup> and also because the refugee burden is not equally shared by the European states, international discourse on the need for the creation of a separate international protection system to handle mass flows of 'non-convention refugees once again has been revitalised in recent months both in the UNHCR,<sup>21</sup> the European Union,<sup>22</sup> the Council of Europe,<sup>23</sup> and even within the NGO.

Below, selected suggestions with regard to the future CES will be put forward.

#### A. Tentative Suggestions Regarding 'CES' Structure

Any successful international action on behalf of refugees and other people of humanitarian concern needs to have first of all a clearly defined sense of direction. In spite of the fact that it is self-evident that a 'solution' or 'settlement' should provide such a guiding motive, so far the concept of a solution and the question of its relationship to protection and assistance are among the least examined issues concerning international action in aid to refugees. For example, as Coles (1989:42) rightly points out 'the question of "solution"

<sup>18</sup> For a brief review of the national reception procedures, see for example, Muus et. al (1993) or Danish Refugee Council (1992).

<sup>19</sup> See also statement of the head of the Swedish delegation Mr. Erik Lempert to the 13—14 April 1992, to meeting of the *Sub-committee of the Whole on International Protection, on 'A regional solution for europe?'* (UNHCR, GE. 92-01980, EC/S CP/71: 9: par. 34), or the latest *'Report on the right of asylum,'* by the Swedish MP and human rights activist, socialist lawyers Mr. Hans-Göran Frank submitted at the on 23 March 1994 to the Parliamentary Assembly of the Council of Europe *'Report on the right of asylum,'* Rapporteur: Mr G. Frank, Sweden, ADOC7052; 1403-1173/94-4-E.

<sup>20</sup> As at 1 April, 1994. UNHCR estimates on refugees/sylum-seekers from ex-Yugoslavia in various European countries looked as follows: Austria 55,000; Belgium 4,865; Czech Republic 2,730; Denmark 20,128; Finland 3,041; France 15,918; Germany 309,449; Greece 165; Hungary 8,886; Ireland 19; Italy 33,902; Liechtenstein 265; Luxembourg 2,535; Netherlands 42,253; Norway 18,563; Poland 675; Portugal 150; Russia 8; Slovak Republic 2,400; Spain 3,676; Sweden 76,189; Switzerland 32,102; Turkey 33,817; United Kingdom 8,027. In addition to this there were about 14 380 of ex-detainees and their dependants in Europe (as at June 1994). (Source: UNHCR, 14 July 1994).

<sup>21</sup> See for example, the *High Commissioner's 'Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia and subsequent documents,* such as, *'UNHCR Background Note: Informal Meeting of Government Experts on Temporary Protection,'* Geneva, 23 March 1994.

<sup>22</sup> See, *Commission of the European Communities, 'Communication of the Commission to the Council and the European Parliament on Immigration and Asylum Policies, Brussels, 1993; European Parliament, 'Resolution on the general principles of a European refugee policy,' A3-0402/93: par. 7.*

<sup>23</sup> *The Council of Europe, Parliamentary Assembly, Forty-Third Ordinary Session, 'Recommendation 1149 on Europe of 1992 and refugee policies,' Assembly debate on 23 April 1991 (3rd Sitting) (see Doc. 6413, Report of the 13—14 April Meeting of the Sub-Committee of the Whole on International Protection, UNHCR: GE.92-01890; 'Report of the 13—14 April Meeting of the Sub-Committee of the Whole on International Protection,' UNHCR, GE.92-01890, EC/SCP/91, page. 10, par. 10.*

has not been adequately examined in a legal framework; what does refugee law and doctrine say about what is or what is not a solution? What are the implications of a concept of solution for protection principles and the protection mandate of an international body, such as the Office of the United Nations High Commissioner for Refugees?' Below selected aspects of the concept of 'solution,' especially as applied to international action on behalf of 'non-convention refugees,' will be addressed.

Although, the settlement of the massive problems of 'non-convention' refugees in the broadest sense would include all three functional domains — (1) removal of the (potential) 'push' factors before the flight is put into the motion, (2) settlement of the on-going massive internal displacement, and, (3) settlement of the on-going massive external displacement (see *Diagram 3*) — it will be primarily the third domain which will provide a focus for the future Comprehensive European System for the Protection of Non-Convention Refugees (see also Ogata 1992a). There are several reasons for this. As indicated previously, some of them constitute Europe-specific regional determinants; another provides the fact of existence of a number of regional refugee regimes outside Europe, which address to a great degree protection needs of some categories of protection seekers who fall outside the scope of a 'convention' refugee status.

*Diagram 3.*

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I. Removal of the (potential) 'push' factors **before the flight is put into the motion.**

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**Area of operation:**

mainly country of origin but may include it's external environment. (for example preventing external aggression.)

**Measures inter alia include:**

- (a) the activation of the so-called 'early warning system' and;
  - (b) in the long-time perspective, addressing the so-called 'root causes.'
- 

II. Settlement of the existing massive **internal displacement**

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**Area of operation:** country of origin.

**Measures to be applied:**

- (a) humanitarian intervention;
  - (b) creation of safe heavens;
  - (c) humanitarian assistance;
  - (d) sending humanitarian observers.
- 

III. Settlement of the existing massive **external displacement**

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**Area of operation:** recipient country.

**Measures to be applied:**

- (a) provision of shelter ('temporary refuge', or permanent asylum);<sup>24</sup>
  - (b) securing safe return to country of origin ('voluntary repatriation');
  - (c) local integration in the first refuge country (after a transition from temporary to permanent residence status);
  - (d) resettlement from the first temporary refuge country to the permanent refuge country undertaken in the framework of 'burden-sharing' scheme;
  - (e) sharing the financial costs of the provision of protection by other members of the CES or by the international institution following the framework of 'burden-sharing'.<sup>25</sup>
- 

<sup>24</sup> Certainly, in some situations host states will choose to grant permanent asylum even to those who do not qualify for the obtaining of a 'convention' refugee status.

<sup>25</sup> This is the issue area where it seems that the future *Comprehensive European System for protection of non-convention refugees will be most applicable.*

Still, the idea of one grand global system for the settlement of all possible refugee and migratory flows is tempting indeed, especially for tired and frustrated refugee bureaucrats. However, as for example unsuccessful attempts of modifying the 1951 refugee definition indicate such a 'grand design' seems quite unrealistic, most of all due to diversified, and sometimes even contradictory interests of the countries concerned in the refugee policies. Besides, it is doubtful whether such a general system would address the diversified protection needs of distinct refugee categories in a balanced manner. On the contrary, there are reasonable grounds to fear that — in a framework of such a system — 'non-convention' refugees would be in all increasing grade qualified instead as 'regular migrants' and therefore refused protection.

It appears that in the last extent the structure of the future Comprehensive European System for the protection of non-convention refugees will depend upon the way in which the international community will address the following questions:

*Should the character of protection to be provided by the CES to 'non-convention' refugees differ from the connotation of protection currently guaranteed to those who qualify for obtaining convention 'refugee' status?*

If 'yes', should such a difference be solely linked to variation in the character of the danger threatening non-convention refugees as compared to convention refugees?

*What considerations should constitute the basis for the apprehension of differences in the danger threatening non-convention refugees as compared to convention refugees?*

Furthermore, since the type of danger that forces people to flee their places of habitual residence may vary with regard to: (a) underlying flight cause(s); (b) form and scope of an immediate danger; as well as (c) its grade/intensity (see for example, Aleinikoff 1991, Hathaway 1991c and 1992), the creation of a separate international regime for the protection of 'non-convention' refugees will require building a tacit international consensus which will recognize that:

(1) *Danger threatening (en group) non-convention refugees, differs 'qualitatively' or 'quantitatively' from the danger directed against (individual) convention refugee(s). /These differences should be 'objectively' identifiable in at least one of the three dimensions as noted above./; or/and,*

(2) *There is substantial difference in the possibility to provide protection to non-convention refugees as compared to convention refugees. /This may in turn be understood as: (a) the 'moral' conviction of the desirability of the existence of such differentiation (in the level of 'supply' protection); or (b) variation in the level of political will to provide protection to 'non-convention' refugees as compared to convention refugees./*

Subsequently, the first consensus need to be regarded as an 'objective conditionality,' and the second consensus as a 'subjective' conditionality for the creation of the separate protection system for 'non-convention' refugees. If one links this postulate to research findings of earlier studies (Dacyl, 1992b:Ch.3&10) which indicate that in the situations of mass refugee flows two extreme response logics on the part of the recipient countries may be identified — one 'purely' humanitarian, called 'compassion beyond borders', and the other 'realpolitical',<sup>26</sup> two alternative approaches towards the conceptualization of the future Comprehensive System for the Protection of Non-Convention Refugees seems to exist. While in accordance with the first approach, the CES would be conceptualized as a **regime creating a set of 'protection rights' (droit) for non-convention refugees**, according to the second approach the CES would be conceived to impose **protection duties (devoir) on the member states of the CES**.

<sup>26</sup> *With a whole continuum of intermediate response logics, that are a kind of mixture between the extrema.*

In the first case, the most sensitive legislative challenge would provide conceptualization of the **minimum conditions** — **'lowest amount of danger'** — **legitimizing a protection seeker to demand protection from the international community or from individual member states of the system.** Needless to say, 'the more the danger the stronger the basis for demanding protection.'

In the second case, the most sensitive legislative challenge would constitute denoting conditions **allowing for exceptions** from the state's obligations to provide protection. Some of these obligations may already be drawn from the existing body of international law, humanitarian law, human rights law or existing refugee law, while new ones would be stipulated by the CES .

A tentative postulate is put forward that a *'non-convention refugee'* will be defined as such protection seeker, or group of protection seekers who

- (a) fall outside the scope of a *'convention-refugee definition'*; and,
- (b) who owing to generalized violence, massive and persistent pattern of human rights violations, or natural catastrophes;
- (c) is subjected to objectively identifiable facts of existence of intentionally or unintentionally created by man or nature conditions in country of origin which seriously threaten life, security, or survival possibilities.

Furthermore, since the conditions noted above usually target the 'non-convention' refugees *en group*, a subsequent question needs to be posed *regarding whether non-convention refugees' right to protection should be conceptualized as an individual right or as a group right* If it were to be conceptualized as a right ascribed to a whole group ('flock') of protection seekers, 'how', in which legal form, should the group concerned demand protection? How should implementation procedures for such rights be shaped? Furthermore, should newly arriving protection-seekers be 'automatically' entitled to the same type of protection as those who fled in earlier phases of the flow?

The actual location of the protection-seekers will impinge both upon the scope of protection claims as well as the proper international body/actor obliged to provide protection.

It is suggested here that with regard to the *internally displaced*, the 'entire' international community would be responsible for the provision of protection. Consequently, *'which institution'* should in this case stand for the entire international community?

(In this context insights drawn from the international discussion of the UNHCR's so-called 'crossed-mandate' may prove instructive in the future; during the 1992 London meeting on the Yugoslavian conflict the Office of the UN High Commissioner for Refugees had been denoted as the coordinating agency for provision of humanitarian aid in Bosnia-Herzegovina.<sup>27</sup> To some extent one may also draw here from arguments presented at the beginning of the 1980's when for example the Federal Republic of Germany put forward an idea to create a new special organ of the UN General Assembly to deal with mass refugee flows.<sup>28</sup> At the end of 1980s some suggestions have been made with regard to covering financial costs of settlement of mass refugee flows, and especially, re-definition for this aim of the 'Fund for Durable Solutions' /Garvey, 1989/.)<sup>29</sup>

<sup>27</sup> For review of international institutions responsible for the provision of humanitarian assistance to refugees and other displaced people see Cuénod 1991.

<sup>28</sup> 35 U.N. GAOR Special Political Comm. (Agenda Item 122, 43rd mtg.), U.N. Doc. A/SPC/35/SR. 43 at 4—5.

<sup>29</sup> With regard to institutional responsibility for the provision of international protection to those various categories of protection seekers who fall outside the scope of the 'convention refugee definition,' interesting ideas were presented by Beyer (1989).

Still, *in what way* should protection claims of 'non-convention refugees' be conceptualized? Lessons drawn from past mass flight situations in Southeast Asia, the Horn of Africa, and Central America clearly indicate that internally displaced protection seekers, starving, threatened by the violence and other dangers, are seldom capable by their own efforts alone to put sufficiently strong pressures on the international community to initiate protection measures. Therefore, the new system should stipulate obligatory initiation of protective measures, for example humanitarian intervention, by a specifically denoted international body.<sup>30</sup>

Needless to say both the general public as well as the mass media may play an important role in creating momentum conducive to initiation of international action on behalf of the internally displaced: however, it seems that it would be difficult to legally formalize their role in the process of the initiation of, for example, humanitarian intervention.

The scope of protection rights of *externally displaced* 'non-convention' refugees may first of all be understood as: (a) the 'right of entry' (when protection-seekers are at the host state's external borders); (b) the 'right to remain' ('temporary refuge') until flight causes ceases to exist in the source country (Suhrike, 1993); and, particularly, (c) the right to *non-refoulement*. Both the 'right of entry' and the 'right to non-refoulement' have certain established connotations in the protection doctrine of convention refugees. Therefore, an inquiry needs to be made as to *whether*, and to *what extent* the content of these two rights, when ascribed to non-convention refugees, should differ from the corresponding rights ascribed to convention refugees. To some extent these considerations apply even to the concept of 'temporary refuge': to what extent should the content of the norm of 'temporary refuge' differ from the content of the norm of asylum?

#### IV. THE ISSUE OF 'FAIR' INTERNATIONAL BURDEN-SHARING

A review of the post-Cold War international protection discourse provides reasonable grounds to assume that the greatest challenge in the process of the creation of the CES will constitute the conceptualization of the 'burden-sharing' principle; selected problems related to the conceptualization of this principle will be touched upon below.

Thus, it needs to be remembered that there is a growing conviction among public opinion in Europe that 'the burden resulting from the application of the Geneva Convention of 1951 relating to the Status of Refugee is not fairly shared by all European countries. In the opinion of the Parliamentary Assembly of the Council of Europe, this belief contributes to the rise of xenophobic and racist sentiments.'<sup>31</sup> Also *European Parliament*,<sup>32</sup> noted recently that

*'...outbreaks of xenophobia are not only morally repugnant but also undermine the international legal order. However, it is not enough to raise an outcry or sentence those responsible. Xenophobia will rear its head as long as the problems that trigger flows of refugees and lead to heavy concentration in certain regions remain unsolved and there is no solidarity internationally or domestically' (ibid.: 9).*

It is suggested that some of this compassion fatigue might be reduced if there was an established scheme for international burden-sharing in situations of mass influx. In the sub-

<sup>30</sup> For relevant insights with regard to humanitarian intervention (see for example Sandoz 1992 and Torrelli 1992).

<sup>31</sup> Recommendation 1222/1993, *On the fight against racism, xenophobia and intolerance, Parliamentary Assembly of the Council of Europe, Forty-Fourth Ordinary Session. Assembly debate on 29 September 1993 (49th Sitting) (see Doc. 6915, Report of the Political Affairs Committee, Rapporteur: Mr Espersen, Doc. 6937, opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Lopez Henarez; and Doc. 6935, opinion of the Committee on Culture and Education, Rapporteur: Mrs Err). Text adopted by the Assembly on 29 September 1993 (49th Sitting).*

<sup>32</sup> In the 'Report of the Committee on civil Liberties and Internal Affairs on the General Principles of a European Refugee Policy' submitted by Mr. Panayotis Lambrias, of 3 December 1993 (DOC-EN/RR/241/241218).

sequent, 'Resolution on the general principles of a European refugee policy,' of 19 January 1994<sup>33</sup> European Parliament recognized that

*'the structure and arrangements for reception in the various countries vary greatly in scope and quality,' (par. G). It further persisted that 'if it is to be accepted that all Member States share responsibility for a common refugee policy, it should follow that the much heavier burden borne by some of them due to geographical and other reasons should be equally shared by all Member States' (par. J).*

Subsequently, the resolution called also *'on the Commission to draw up plans for a European Fund for Refugees and to draw up an emergency plan for the reception of refugees which provides for them to be distributed evenly amongst the countries of the Community' (par. 16).* It also made the appeal that

*'whereas it is necessary that the European Union take action to harmonize Member States' refugee policies and whereas, for that purpose, a comprehensive European policy is needed (par.D); 'whereas the European Union has a special responsibility for resolving the world-wide refugee problem since, in addition to its historical responsibility, it is one of the world's wealthiest regions (par. E); 'whereas it is necessary that the European Union contribute at world level to a long-term global strategy aimed at confronting the challenge of increasing and unpredictable movements of populations ( par.F)*

Also the UNHCR<sup>34</sup> underlined *'the need for concerted international action in a spirit of international burden-sharing and solidarity in the face of a recognized humanitarian need.'* Subsequently the UNHCR called upon all the parties concerned — notably the Council of Europe, the European Union, the UNHCR and the host nations — for *'fair' burden-sharing and international solidarity in the settlement of the contemporary refugee problem on the continent' (ibid.: 11:iv).*

A need of the creation of the *'burden-sharing' system* has been noted on a number of occasions by NGOs. For example *Caritas Europe*,<sup>35</sup> recently stated

*'...a fair distribution of costs and resources amongst member states is needed for the admission of migrants. In this area, humanitarian and democratic principles must be respected: Human Rights and transparent administrative regulations are at the top of the list. A common authority, recognized by all member states, is the only one capable of enforcing these requirement, which come directly from the Maastricht Treaty...*

#### **A. A structure of the principle of 'burden-sharing'**

It is suggested here that the actual location of protection seekers— inside or outside the borders of the country of their origin — will heavily impinge upon the structure and functions of the international *'burden-sharing' scheme.*

##### *(1) Internally displaced*

A *'fair' burden-sharing* by the State Members of the CES in the provision of international protection and assistance to internally displaced non-convention refugees may be conceptualized as:

<sup>33</sup> A3-0402793-PE 178.921.

<sup>34</sup> *'Background Note: Informal Meeting of Government Experts on Temporary Protection,' UNHCR, 23 March 1994, (page 1. par 1.3).*

<sup>35</sup> *European Parliament, Committee on Civil Liberties and International Affairs, Notice to Members prepared by Caritas Europe, 'Proposal in the view of a new European immigration policy,' (PE/XIV/CM-2/94, PE 208.168 of 28.2. 1994).*

- (a) **Participation in supplying humanitarian aid** inside the borders of the country of origin, or/and sharing the costs of such an action;
- (b) Participation in provision of **international protection** by:
  - (b1) sending military units and/or, by
  - (b2) participation in covering financial costs of operations undertaken by other members of the regime.

Consequently, a question needs to be addressed as to 'how' workable implementation procedures in the above noted instances of burden-sharing should be conceptualized.

## (2) *Externally displaced*

Burden-sharing with regard to settlement of massive **external** displacement of non-convention refugees may be understood as:

- (a) Granting of a temporary right to remain to the 'fair' portion of protection seekers until the flight causes in the source country cease to exist;
- (b) Financial participation in covering costs of protection-seekers' temporary presence inside the territory of other Member States of the CES;
- (c) Resettlement of a 'fair' portion of protection seekers from the first temporary refuge country.

## **B. Implementation Procedures: 'Rights' versus 'Duties'**

Subsequently, a question arises as to whether implementation procedures for the above noted forms of international burden-sharing in settlement of the massive 'non-convention' refugee problem should be conceptualised as 'rights' or as 'duties'.

In the first case, a first asylum/refuge country would be given the (legal) right to demand actions noted above — e.g. provision of financial support, resettlement of a portion of refugees, participation in humanitarian intervention, etc. — from other members of the scheme. Consequently, in what way would a single host state or international community, here members of the burden-sharing scheme, be able to 'force' other states to resettle a segment of the protection seekers from the first refuge country if the country in question refuses to do so?

In the second case — burden-sharing conceptualized in the form of a (legally binding) 'duty' — all member states of the burden-sharing scheme would be obliged by international treaty to lighten the refugee burden that is borne by other nations.

Once again, it must be considered as to *how workable implementation procedures should be conceived in the above instances of burden-sharing*. For example, should these implementation rules be conceptualised as 'rights' of the state of first temporary refuge to demand actions noted under (2b) and (2c) from the remaining members of the system? Consequently, in what way should a single host state or international community (here members of the CES) be legally entitled to 'force' other states to resettle a part of the protection seekers?

Another important issue related to the creation of the burden-sharing scheme in Europe concerns the connotation of the principle of 'fairness' with regard to the physical distribution of protection seekers among the member states. Should it presuppose a kind of a 'quota' system? How, then, should such a quota be conceived? Should it mean a kind of proportionality related to: (a) host state's population, (b) to number of previously accepted refugees, (c) to host country's ethnic composition, or, (d) even to its economic capabilities? Additionally, in which legal form should an individual recipient state be allowed to demand from other members of the system resettlement of part of the 'non-convention refugees'?



Again, it needs to be remembered that some general legal foundations for international cooperation in the settlement of the massive 'non-convention' refugee problem may be identified in the existing body of refugee law, humanitarian law, human rights law or public international law.

Still, the process of the formulation of the burden-sharing scheme denotes a sensitive issue area since it touches upon the notion of state sovereignty and the nation-states' freedom of behaviour in the international arena. In the last instance, it is still the sovereign autonomous host state alone which will decide about provision of protection for refugees in its territory. To put it in a more drastic way: contemporary international law is still insufficiently advanced to 'force' sovereign nation-states to act more 'humane' than they choose to do with regard to responses to massive flows of foreign citizens (Dacyl, 1992b&1993a). This holds true despite an increasing number of humanitarian rules in contemporary global society, and despite the role that public opinion may currently play in putting pressures on governments to conduct more humanitarian refugee policies than these would otherwise choose to do. What really matters is the existence of political good-will to provide shelter in concrete refugee emergencies. Still, there are reasons to believe that a workable international burden-sharing, for example in the form of financial contributions, may increase the willingness of economically weak states to welcome refugees.<sup>36</sup>

Recently, the Commission of the European Communities, put forward an idea that 'a permanent form of co-operation between the various departments involved could be set up. It would then be possible to make the necessary arrangements on the basis of estimations of numbers and costs involved and create contingency plans for emergency situations. On the basis of this information, the Union could try to establish some matching of national absorption capabilities. Such a matching system would offer reciprocal assurance among Member States that, when they are confronted with serious problems in implementing their reception policies, they would not stand alone, but could reckon with active support from other Member States and from the Union itself. In the context of such a matching system, it is noteworthy that the European parliament has asked the Commission to submit a proposal for the creation of a European Fund for Refugees. It seems logical that any such fund might be used for emergency situations facing Member States, for example mass influxes, where, on a strictly voluntary basis and/or for geographical reasons a Member State may find itself undertaking responsibility that it would have to under the criteria laid down in the Dublin Convention. It could equally be used to Member States which lack the necessary administrative capacity when faced with new pressures.'<sup>37</sup>

### C. A Note on Legal Sources of the Norm

Creation of the international 'burden-sharing' scheme for the settlement of the non-convention refugee problems will, on the one hand, imply formalization of the existing state practices and, on the other hand, further strengthening of international cooperation in humanitarian issues. Let us remember in this context that, Article 2(2) of the United Nations Declaration on Territorial Asylum<sup>38</sup> proclaims that

*(W)here a State finds difficulty in granting or continuing to grant asylum, States individually, or joining through the United Nations shall consider in a spirit of international solidarity, appro-*

<sup>36</sup> This seems to be the underlying logic of Polish, Hungarian and Czechoslovakian admission to the Schengen Agreement as well as bilateral agreements between Poland and Germany. Current Swedish-Galtic States, and US-Venezuela agreements seems to be governed by the same underlying logic.

<sup>37</sup> *Commission of the European Communities, Communication of the Commission to the Council and the European Parliament on Immigration and Asylum Policies, (1993/1994: 26—27, pars. 98—100).*

<sup>38</sup> *GA. Res. 2312 (XXII), 22 UN. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).*

*prate measures to lighten the burden on that State', or by offers of resettlement or by financial or other material assistance.*<sup>39</sup>

However, several factors seriously impinge upon difficulties in the application of this recommendation. First, the UNHCR operates under a wholly recommendatory and non-binding legal mandate. In a tenuous sense, state obligation resides in the undefined duty of states to "cooperate" with the UNHCR. Besides, 'there is no expressly recognized obligation of states to address impending or ongoing refugee problems to the UNHCR, or any other international institution, or to abide by any particular procedure' (Garvey, 1985:488). The Statute of the UNHCR is an annex to a General Assembly resolution. As such, it cannot bind states (Maynard, 1982:415-6).<sup>40</sup>

Therefore, one should welcome the recent initiative of the Parliamentary Assembly of the Council of Europe to create in close co-operation with the Office of the United Nations High Commissioner for Refugees of a European Refugee Commission or Forum 'to promote policies and measures which would be aimed at improving solidarity between member states as regards the consequences of receiving refugees and asylum seekers.'<sup>41</sup> Also, Council of Europe, *Committee on Migration, Refugees and Demography* declared recently that it 'cannot but support the proposal ... of the creation, in cooperation with the Office of the United Nations High Commissioner for Refugees, of a European Refugee Forum or Commission to promote policies and measures aiming at improving solidarity between member states as regards the consequences of receiving refugees and asylum-seekers. Our committee would like to be associated with this work in due course.'<sup>42</sup>

Finally, although there is no mechanism worked out for apportioning obligations among states and coordinating necessary contributions of resources, while creating a workable burden-sharing scheme, one could draw upon lessons from international cooperation in the settlement of past large-scale refugee flows as in the case of the Southeast Asian refugee problem. It seems that international measures undertaken during the 1979 Geneva Conference on the Southeast Asian Refugee problem, or those put forward ten years later in the framework of the 1989 Comprehensive Plan of Action could be, to some extent, applied even in contemporary Europe (Bronée, 1993; Drüke, 1990; Dacyl, 1992b). In May 1979, the UNHCR concluded with the government of Vietnam a memorandum of Understanding on the Orderly departure of persons from Vietnam. This was followed by the Meeting on Refugees and Displaced Persons on South East Asia, Geneva, 20-21 July 1979 (UN doc. A/34/427, Annex E). The Memorandum of Understanding was the first step, organizing and structuring the process of departure to reduce the tragedy and adverse impacts on other states as far as possible. The conference further affected the policy of the government of Vietnam, orchestrating international pressure to alter that policy. The conference also rationalized and spread the responsibilities of asylum through equitable "burden sharing". In fact as a result of the conference, a number of states made the pledges of asylum spaces

<sup>39</sup> See 33 U.N. GAOR (63d plen. mtg.), U.N. Doc. A/Res/33/26, at 2 (1978).

<sup>40</sup> Maynard, (1982) *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INTL & COMP. L. Q., pp. 415-6.

<sup>41</sup> Recommendation 1222, (1993), on the fight against racism, xenophobia and intolerance, Parliamentary Assembly of the Council of Europe, Forty-Fourth Ordinary Session: par. 11: iv. For the support of the idea of a European Refugee Forum, see also, European Parliament, 'Report of the Committee on Civil Liberties and Internal Affairs on the general principles of a European Refugee Policy' submitted by Mr. Panayotis Lambrias, of 3 December 1993 (DOC-EN/RR/241/241218), page. 11 : par. 4 and page 15, par. 13b; Council of Europe, Parliamentary Assembly, Report on the Right of Asylum, Draft Recommendation submitted by Mr. Göran Frank, Sweden (Draft Recommendation, par. 8:ii: c and d, 23 March 1994, ADOC7052, 1403-11/3794-4-E, page 3); Commission of the European Communities, Resolution A3-0280/92, par. 7, adopted on 18 November 18, 1992.

<sup>42</sup> Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, Draft Opinion on, the Fight Against Racism, Xenophobia and Intolerance, by Mrs. Robert, Switzerland, Strassbourg, 23 September 1993.

necessary to end the crisis of the "boat people." Thus, although protection and relief was organized only after inducement by large-scale tragedy, international leverage through state-to-state relations was formalized to become a vehicle for insisting on state responsibility as the basis for a resolution of the Indo-Chinese refugee crisis. (Garvey, 1985; Suhrke, 1985; Wain, 1979).

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## U POTRAZI ZA SVEOBUHVAJNIM EUROPSKIM SUSTAVOM ZAŠTITE IZVANKONVENCIJSKIH IZBJEGLICA

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*U prvome dijelu rada prikazani su glavni nedostaci postojeće međunarodne prakse skrbi za izbjeglice kada je riječ o masovnom priljevu tzv. izvankonvencijskih izbjeglica u razdoblju nakon hladnoga rata. Slijedi prezentacija argumenata koji potvrđuju potrebu stvaranja sustava regionalne zaštite u Europi pod nazivom "Sveobuhvatni europski sustav za zaštitu van-konvencijskih izbjeglica" (CES). Autorica pritom analizira ukupni cilj postuliranog sustava i njegov središnji dio - princip podjele dužnosti-i-odgovornosti.*

*Imajući u vidu povećanu percepciju problema izbjeglica kao važnoga političkog pitanja, autorica smatra da bi CES morao uzeti u obzir ne samo izbjegličke zahtjeve za zaštitom već i strukturalne odlike suvremenoga međunarodnog sustava te odgovarajuće preferencije zemalja-domaćina. Jedino se tako otvaraju stvarne mogućnosti pristanka potencijalnih zemalja-domaćina na pravno sankcioniranje njihovih obveza (udio u zbrinjavanju izvankonvencijskih izbjeglica) kroz buduće djelovanje CES-a. To je jedini način osiguranja minimuma pravnih garancija da odnos prema izvankonvencijskim izbjeglicama neće biti određen - parafrazirajući Hannah Arendt - tek "samilošću i slučajnošću" već i utvrđenim skupom pravila zagaraniranima od strane civilizirane svjetske zajednice.*