Burden Sharing in Refugee Law

Eddie Bruce-Jones[1]

This chapter outlines out some of the ways in which the concept of 'burden sharing' has been considered within international refugee law. As it would be misleading to insist on too rigid a genealogy of the term 'burden sharing', given the far-reaching potential for application of such a concept within international refugee law theory and practice, the first section identifies the defining ways in which the concept is used. The second section critically interrogates the logics that underlie the commonplace notion of 'the burden' of burden sharing and postulates a different framework for understanding the concept.

Burden sharing - the main debates

Both legal scholarship and policy analysis on contemporary challenges in refugee law have incorporated, explicitly and implicitly, what has come to be known as the concept of burden sharing. While burden sharing is not a terribly stable term, it has featured explicitly in policy debates on issues ranging from climate change (*see e.g.,* Ringius, et. al., 2002) to international military defense campaigns (*see e.g*., Sandler and Forbes, 1980). In its most general sense, burden sharing can be thought of as international co-operation for the purpose of sharing the costs or, with a more ethics-based charge, responsibility for a common task. However, its deployment as a term of art within refugee law has been concisely described by Astri Suhrke, who notes that early proposals for international cooperation on refugee law by Grahl-Madsen in 1983 and Hathaway and Neve in 1997 called for collective action that would "strengthen the protection for refugees by reducing inequities among recipient states. (Suhrke, 1998: 397). Other proposals that we might refer to under the rubric of burden sharing have developed in the same context as interventions by Grahl-Madesn, Hathaway and Neve, in the form of UNHCR resettlement schemes and similar interment schemes, which Suhrke refers to as sharing schemes (ibid:

[1] Reader in Law and Anthropology, Birkbeck School of Law, University of London. I would like to thank Romit Bhandari for his insights in the drafting of this chapter.

397–398). Important to all of these schemes is the dual purpose that Suhrke identifies—to establishing the financial fairness and feasibility for receiving states to accept and, importantly, agree to accept refugees as a means to guaranteeing the proper functioning and humanitarian commitments of the refugee and asylum system.

Aspects of this core logic of burden sharing are pervasive in regional and international refugee law policy and practice. Notably, notions of the "burden" and the parameters of sharing it are contingent upon context and political purpose. Despite this, there are a few main aspects of the debates on the term 'burden sharing' that should feature in any summary of its contemporary usage.

i. Burden sharing as legal obligation

In a most general way, the idea of burden sharing in the context of refugee law can be understood as having a long trajectory in international law, linked to early calls for the co-ordination of the administrative, infrastructural and other costs borne by receiving states in their admission of refugees from abroad. The logic of burden sharing has featured within the United Nations High Commissioner for Refugees (UNCHR) system since its establishment in the 1950s, even if the term has not. This logic can be identified in the "task of persuading states to cooperate in the pursuit of refugee protection and durable solutions." (Betts, Loescher and Milner 2012: 2). In its preamble, the 1951 Convention Relating to the Status of Refugees (hereinafter: Refugee Convention) contains language that urges states to cooperate in order to alleviate the "unduly heavy burdens" that certain states may assume when fulfilling their international obligations to take in asylum applicants. At the time it was written, the Refugee Convention was intended to respond to refugee migration owing to events that occurred following the two world wars (Betts, Loescher and Milner 2012: 8-9), reference to which was included in the original definition of the "refugee" before it was amended by protocol in the 1960s.[2] Juss points out that the

[2] The pre-amended definition of the "refugee" contained the clause "as a result of events occurring before 1 January 1951".

early conception of refugee protection was inwardly focused, orientated towards regional protection that took account of cultural likeness (Juss 2006: 231–33). He recounts the dangers of using cultural difference as a factor in granting asylum and, despite its being amended, he suggests that the international regime of refugee protection continues to programmatically exclude groups along the lines of culture and race (*ibid*). The post-amendment formulation of the Refugee Convention, along with the harmonization of European Union policies on migration and asylum, has marked a shift, in contemporary Europe, from a focus on Europe's internal borders to increased resource and investment in Europe's external border. Burden sharing is now discussed with emphasis on the need for EU member states to share the costs of migration experienced most directly by states at the external border of the European Union, particularly along the Mediterranean Sea.

Goodwin-Gill and McAdam emphasise that while a general principle of cooperation exists in international law to encourage interstate cooperation in assisting or managing the movement of people across borders, such a principle does not imply a positive legal obligation to do so (Goodwin-Gill and McAdam 2007: 502).[3] Furthermore, international refugee law, insofar as it creates obligations or expectations to uniformly distribute the costs of refugee migration, are ineffective due to lack of compliance (Betts and Collier 2017: 208–9). Betts and Collier cite the European Union's Common Asylum Policy as disastrous with respect to the distribution of the costs of asylum across its member states, leaving a handful of member states with a disproportionate amount of responsibility, which undercut the common standards envisioned by European Union legislation (*ibid*: 211).

ii. Burden Sharing as a discourse of marketisation

In what has become a key text on burden sharing, Hathaway and Neve establish that refugee protection should be of a temporary nature, in order to reduce overall costs

[3] Here, Goodwin-Gill and McAdam refer to the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA res. 2625 (XXV), 24 Oct. 1970. G. Goodwin-Gill and Jane McAdams, *The Refugee in International Law,* 3rd edn, Oxford: Oxford University Press, 2007.

associated with long-term migration particularly to states that receive large numbers of refugees and externally displaced people (Hathaway and Neve 1997: 152–53). This limitation on protection operates as a concession to states, on the presumption that states are so invested in the relative proportionality of any migration-related increases in population and corresponding costs that, if this proportionality is compromised, they might not offer protection. This particular rationale seems unreliable as a rule, inasmuch as there are already great disparities in the numbers of refugees accepted by European Union countries, and although the costs of accepting refugees is not borne evenly, countries have not wholesale withdrawn from the regimes of protection. However, market reasoning is a most centrally operant paradigm, particularly in the European context of burden sharing. Some countries on the Mediterranean border of the European Union, which have high costs in terms of the management and infrastructural expenditure for receiving large numbers of refugees, have at times not been willing or able to maintain standards of protection that also uphold basic human rights (M.S.S. v. Belgium and Greece, ECtHR 2011). Additionally, any analysis of the costs of protection must be weighed against the benefits, and it is difficult to measure the positive effects on states' legitimacy that is essentially purchased when individual states agree to take in refugees in fulfillment of their humanitarian obligations under international law or the impact (or lack thereof) of programmatic offloading of responsibility on other states in return for financial sums (*see* Juss 2006: 233). Juss also points out that, "given the North's history of unilaterally and improperly off-loading most of its refugee obligations onto the South', there is no reason to believe that the pragmatic market analysis of North-North burden sharing will change the global dynamic of refugee migration and state responses. According to Betts and Collier, almost 90% of the worlds refugees are in the developing world, and more than 100 times the financial support of each refugee in the North is afforded to each refugee in the global South (2017: 3).

iii. Burden sharing as border securitisation

A third aspect of burden sharing in contemporary international refugee law is its

focus on the co-operation for the purposes of integrating refugee protection into the operant border control, including national and international mandates for peace and security. The discourse of co-operation for the purpose of greater border security is used in Europe, for example, as a way to ensure a large degree of free movement for citizens and certain legal residents within the borders of the Schengen Area. Consolidated resources and attention on the EU's external border has, not un-controversially, been thought of as a necessary element of EU citizens' rights to free movement. Collective refugee policies in Europe have shifted from protection to containment of refugee migration (Hurwitz 2010).

Goodwin-Gill and McAdam cite the peculiar example of the Cotonou Agreement, the result of a partnership between the EU and African, Caribbean and Pacific (ACP) countries aimed partly at normalizing the movement of refugees and regulating undocumented immigration, return and readmission has constituted, by some accounts, "the penalization of *emigration*, contrary to article 13(1) of the Universal Declaration of Human Rights" (original emphasis)(*ibid*: 504). In other words, a practical reality of state co-operation on management of movement is that co-operation itself is not necessarily one of legal obligation but political and financial expedience, and that this co-operation is sometimes oriented towards the slowing of migration as opposed to the accommodation of movement. Similarly, some argue that the Khartoum Process, an agreement between the African Union Commission and European Commission that increases interstate co-operation with the aim of combating irregular migration to Europe, fails to attend to the "need for legal migration channels", thereby restricting freedom of movement in a most crucial time.[4] A further example of this is the EU agreement with Libya aimed at preventing the passage of migrants across the Mediterranean into Europe, which has, according to leading academics and activists, created a condition of extreme danger for

[4] SOAS Centre for Human Rights Law, "Written evidence submitted by the Centre for Human Rights Law to the UK All-Party Parliamentary Group on Sudan and South Sudan Inquiry: UK-Sudan Relations – Consequences of Engagement." August 2016. Available online at https://www.soas.ac.uk/human-rights-law/file114315.pdf. Accessed 1 June 2019.

refugees, with devastating and fatal consequences.[5]

iv. Burden sharing as crisis management

Conversations about the nature of burden sharing have been rekindled in the European context in the midst of increased numbers of refugees entering Europe in what has been dubbed in Europe a 'refugee crisis.' In a commentary on the EU Council of Foreign Relations, commentator Susi Dennison argues that, going forward, European Union member states will need to consider the 'burden' of burden sharing to be more than simply the size of the refugee population taken in by each state, but rather other financial and resource-intensive commitments in response to the 'crisis,' including

> "financial support and human resources for reception, accommodation and integration to external border management; long term overseas aid to refugee camps in other regions; scaling up the resettlement of refugees from camps in Syria's neighbouring countries and diplomatic efforts on the sources of conflicts that drive refugee flows."

This broadening of the concept of the burden, whilst it does suggest new layers of interstate co-operation on accommodating refugee migration, does not fundamentally alter the conventional conception of burden sharing—it continues to frame the burden as the net cost of refugee migration to receiving states, in terms of capital and other resources, and including the sharpened focus on securing the border.

A specific example of burden sharing in this context is a controversial deal that has resulted between the EU and Turkey on the resettlement of refugees from Syria. The deal, which stipulated that the EU would pay the Turkish government up to €6

[5] Heller, Charles, Lorenzo Pezzani, Itamar Mann, Violeta Moreno-Lax and Eyal Weizman, "Opinion: 'It's an act of murder': How Europe Outsources Suffering as Migrants Drown", New York Times, 26 December 2018. Available online at https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html. Accessed 1 June 2019.

billion to receive irregular migrants arriving in Greece, has been criticised as disregarding the question of whether Turkey is a safe place to resettle refugees in such large numbers, on top of the fact that the deal seems to be a type of outsourcing of the EU's international humanitarian obligations towards refugees (Amnesty International 2017; *see also* European Commission 2016). The deal raises the question: what is the cost of burden sharing? More specifically, if we understand that there is a need to distribute and manage the cost of refugee migration, how do we understand that cost, and how do we really keep the best interests of refugees at the centre of our analysis if the analysis takes place within the framework of a market rationale?

The EU-Turkey deal is an example that urges us to think perhaps more critically about the nature of the burden of burden sharing, including who ultimately pays the debt of burden.

v. Burden sharing as a commitment to solidarity

In various contexts, the 'sharing' of burden sharing is understood to invest participants of the sharing in a common project, broadly understood as a form of political solidarity. In the context of refugee law, this can be seen in discussions around the Dublin Regulations in EU Law. The Dublin System, which falls within the broader remit of the Common European Asylum System, was conceived to alleviate the financial and infrastructural costs of receiving relatively large numbers of asylum applicants on European Union Member States along the external border of the EU. While some commentators believe the most recent set of reforms to the Dublin System to promise more profound change in the way costs and people are redistributed from border states to internal states of the EU, mainly by way of a mandatory relocation scheme (Van Wolleghem 2018: 4–12), others argue that the costs planned to accompany such relocation and, in the case of the European Commission's version of the proposed changes, the high threshold for triggering relocation will exacerbate the efforts to equalize the costs incurred by accommodating refugees (Young 2017: 372–376). Debates on the Dublin System and the various reforms discussed over the last fifteen years have centered upon

principles of equity, though the polices adopted, once refracted through pragmatic considerations and the broader panoply of political considerations, have been understood to fall short of the aspiration to provide fairness and solidarity between EU Member States, to the detriment of those at the borders of the region. Of course, the question of solidarity in this context is primarily one of solidarity between states, not necessarily between citizens of Europe and people not (yet) regarded as citizens.

The question of solidarity among states points to an inevitable question—one as central to the concept of citizenship as it is to the question of the refugee, who is excluded from citizenship—to whom is solidarity best paid in the context of refugee law? Further, is the argument for resource-centric state-state solidarity the only or most effective form of solidarity with refugees?

Critical Perspectives on Burden Sharing

> "4,000 people per day in the Greek islands is of course a big flow. But the number of people displaced by conflict in the world per day last year was 42,500. We now have one third of the population in Lebanon that is Palestinian and Syrian; Syrians are one fourth of the population. If one looks at other situations in Africa and in other parts of the world, we see extremely poor countries that open their borders and provide what they have - and even what they do not have - to support people. I will never forget, when the Côte d'Ivoire crisis erupted, I went to Liberia to a refugee hosting village. And before any international assistance had arrived, the people of that Liberian village were giving the refugees coming from Côte d'Ivoire the seeds of rice that they were going to use for the next planting season. They were condemning themselves to starve, unless international support would be given, just to allow for the refugees to survive. This kind of example from very poor people is something that the European Union should meditate on - with all the economic problems and difficulties and all the crises, by which my own country was also deeply affected, we still live in a privileged part of the world. And we have an enormous responsibility when we look around and see what is happening today around Europe, knowing that sooner or later, if we do not do the right thing, we will pay a heavy price.."
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> -Antonio Guterres, former UN High Commissioner for Refugees, 2015

The former UN High Commissioner for Refugees, in an address to the UN, provided a window into a possible way of thinking that stokes the fires of the imagination. What if burden sharing were thought to be relevant not only at the point of migration, but

well before it? What if receiving states were to understand their obligations, moral and otherwise, towards those crossing borders as extending beyond the financial and social surplus and into the depths of infrastructure and the core of our resources? Guterres recalls an experience in which a receiving community put itself at some risk in order to provide life-sustaining protection to an incoming community in need, at the risk of paying an even heavier price. That heavy price, in my interpretation of Guterres' speech, is not only a financial but a moral one. Failing to put refugees and their well-being at the centre of our policies on reception sustains the arbitrary taxonomy of human lives, bound up in state thinking and the bordering practices of citizenship and racialisation. The burden, to the extent that we can speak of burdens, is not the people who move, nor is it the cost incurred for their provisions. The burden is the border itself, which assaults the material, social and political interconnectedness of human beings. In Guterres' scenario, the Liberians deliberately rejected the distinction that borders imposed, risking starvation to avoid moral impoverishment. While a conventional burden-sharing perspective might insist that the Liberian approach was not sustainable, whereas international collective action provides a more durable response to refugee migration, the point remains that a focus on the costs of migration may detract from the deep-rooted damage of border logic, and the failure to identify and combat this damage may fatally condemn burden sharing to continue to address the wrong problem.

In thinking through international co-operation for the assistance of people moving across borders, combating the heavy weight of border thinking means providing assurances that national policies and international co-operation are geared to protect, in the first place. The value for protecting refugees should, accordingly and un-controversially, serve as the primary measure of co-operation. In discussing the 'principled limits to temporary protection,' Hathaway and Neve argue that it should not simply become a form of warehousing, as ineffective temporary protection often does at present (1997: 119, 181). However, it is difficult to imagine what else it would realistically become, if temporary protection, by its very nature, aims at only limited political, economic and social integration. To keep newly arrived people separate from the labour economy and other facets of social citizenship and

participation, is ultimately a form of warehousing. Temporary protection, whilst it arguably coaxes states to provide certain forms of relief up-front, would trap refugees into lives lived 'on hold.' The eventual forced return of migrants to countries of origin would threaten to break apart supportive networks and family bonds accrued in host countries, which will have, in the meantime, become home for these people (Juss 2006: 235–37). Furthermore, the temporary status of people as participants in their new home countries underlines the separation from other citizens and residents that they are bound to experience when not afforded the opportunity to work and plan futures. For them, the border, as Balibar argues, is reproduced in everyday life (Balibar 2001; *see also* Walia 2016), which certainly must constitute a burden for those on the move.

So, given the violence that takes place in individual receiving states and contours the harshness of the lives of refugees—in camps, detention centres and in the everyday state of living lives apart, in perpetual hold—one might wonder what international co-operation is to look like and who it is meant to serve. Is it only capable of redoubling local inadequacies on a global scale? My contention is that, unless we expand the notion of the burden, the moral and financial debt we have to remedy historical geopolitical violence of colonialism and global capitalism, sharing the short-term financial costs will simply proliferate and deepen long-term financial and moral costs—the 'heavy price'. An example of the price can be seen in the UK government's Hostile Environment Policy of 2012, since rebranded as a Compliant Environment Policy, the aim of which has been to make the UK as unappealing as possible to those without valid leave to remain status. The policy was the name given to a set of immigration-like regulations embedded into the laws and policies governing domestic social life in the UK, including in housing, education, health care and other basic human services. (UK Parliament, 2018; Liberty, 2018) The policy, its aggressive name and its *modus operandi* of deterring people from wanting to move to or remain in the UK by excluding them in some cases to the point of destitution, severe ill-health and family breakdown, is virtually the opposite of a humanitarian-centric approach to immigration and asylum policy. The policy exacerbates the violence of bordering, and results in what Sarah Keenan refers to as 'a border in

every street' (Keenan 2017). This heavy price of bordering, then, is not only the moral cost that we bear in the global North, but it demonstrates that if there *is* a refugee crisis, we have co-designed it—this gradual and quotidian grinding of human lives (*see also* Bruce-Jones 2018).

In *International Migration and Global Justice*, Satvinder Juss offers several critiques of Neve and Hathaway's significant article on burden sharing. These critiques centrally ask the question of whether Neve and Hathaway's idea of what burden sharing *should* look like is morally defensible on that basis that it promotes the marketisation of racial and religious preferences (2006: 229–30) and allows for states to contract out of their responsibilities precisely because the narrow conception of the burden of migration is commoditised (2006: 226). Juss also suggests, in his analysis, that refugee law should be incorporated into larger frameworks of immigration law and human rights law in order to re-orient the welfare of the refugee into the central reasoning behind programmes of international co-operation (2006: 245–46).

Alongside the numerous operational and practical criticisms that Juss levies against the important proposal by Hathaway and Neve, he offers an important framework critique that is worthy of particular note. This is the idea that it is impossible, and in Juss' words, impracticable, to distinguish between the fiscal 'burdens' and the human 'responsibilities' that must be shared (ibid). He notes that Hathaway and Neve presume different modes of analyzing the fiscal and human (and human-rights oriented) issues in the context of international co-operation on asylum. In my view, such an approach would fail to adequately apprehend the complexity of the issue, since, as we have seen with the EU-Turkey deal, the apportionment of fiscal costs has real and immediate impacts on human rights and real people's lives.

An extension of the market rationale of burden sharing is the idea of capacity-generation in receiving states. The idea is that, as space and resources are limited, states 'must facilitate repatriation to regenerate asylum capacity' (Hathaway and Neve 1997: 172). This implies that states must effectively put limits on refugee

protection now to ensure the ability to protect later, creating a sustainable environment for cycles of movement across borders. This type of pragmatism seeks, at its best, to make the most of the economy of refugee protection by optimizing the potential of the system to 'generate capacity' for the cycles of movement. However, a clear critique of the assumption that capacity is scarce is that, as a market rationale, capacity is not the issue, but rather the fear of swamping is the issue. The issue is the fear that movement is limitless, that the West is desirable and that heightened rates of immigration pose an existential threat to the cultural integrity of receiving states. The issue, then, is potentially as social as it is financial, and this further demonstrates the inability to extract fiscal from the human and social issues.

Harsha Walia shows us that, beyond the interrelatedness between fiscal policies and lived realities, there is also a relationship between historical and geopolitical formations of power and the systematic subjugation of groups of people. In *Border Imperialism*, Walia describes how Western regimes "create mass displacement" and deploy border controls within their territories against those on the move as a result of the "ravages of capital and military occupations" (Walia 2017: 5; *see also* Rodney, 1973). She argues that, in this way, and with a view toward colonial relations, Western borders have generated "cycles of mass displacement." (Walia, 2017; 5; *see also* Sharpe 2016). Compare this view to the fundamentally different idea promulgated in contemporary refugee policy which would understand 'push factors' to mean economic, social and political turmoil that is understood to be historically and geographically endemic to the global south, rendered in public discourse in isolation to the trans-historical legacy of Western colonialism; equally, compare this to the concept of 'pull factors,' a term used in immigration reform around the UK Hostile Environment Policy to describe the allure of living in the UK, which some argue has overshadowed the reality of fleeing persecution in the popular focus on so-called illegal immigration (Hamwee 2016). Walia and others note that the investment in borders in Western states is a project that involves policies of policing, deportation and systemic disenfranchisement that fuels movement in multiple directions, and this 'cycle' is not a tangential but a central part of the dynamic between border thinking and migration of vulnerable populations (Mezzadra 2013).

The external border of the European Union is a contemporary example of co-operation along international borders that leads to sharpened forms of violence in the service of imperial formations. The European Union's external border is managed by member states that contribute to Frontex, the European Border and Coast Guard Agency (Regulation (EU) 2016/1624), which exists as a way to secure the external border of Europe under the Community Border Code. In some ways, Frontex represents the apex of burden sharing in a conventional sense—given the five guiding aspects of legal obligation, market discourse, border securitisation, crisis management and international solidarity. However, it has operated mainly in a space that, in the context of asylum law, has synonymous with the constant and deadly peril of the Mediterranean Sea. The humanitarian assistance of the European Border Agency, while it has improved in recent years, is insufficient because of the competing aim of securing the external border and owing to a failure for co-operative efforts to be oriented towards the larger picture of the violence faced by refugees whilst on the move and at the border.

It bears considering that, alongside pragmatic policies that attempt to address the failures of contemporary burden- or responsibility sharing approaches in the global North, we must think creatively about the limits of current regimes of international migration and border-thinking that generates the extreme precarity of people on the move. In re-evaluating the ethics of burden sharing and contemplating a shift from inefficient co-operation to more co-operation of better quality and effectiveness, we must also think about what we understand the aims and content of the co-operation to be and what the burden is before we can reliably ascertain by what standard our approaches can be deemed ethically sound.

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