NEW ISSUES IN REFUGEE RESEARCH

Research Paper No. 201

"We live in a country of UNHCR" The UN surrogate state and refugee policy in the Middle East

Michael Kagan

Policy Director
Asylum Access

E-mail: kaganm@aucegypt.edu

February 2011

UNHCR
The UN Refugee Agency
Policy Development and Evaluation Service

Introduction

Many gaps in the protection of refugees can be connected to a *de facto* transfer of responsibility for managing refugee policy from sovereign states to United Nations agencies.[1] This phenomenon can be seen in dozens of countries in the Middle East, Africa and Asia, where the UN High Commissioner for Refugees (UNHCR) or the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) manage refugee camps, register newly arrived asylum-seekers, carry out refugee status determination, and administer education, health, livelihood and other social welfare programs.

In carrying out these functions, the UN acts to a great extent as a "surrogate state,"[2] performing a "state substitution role,"[3] but without the capacity to fully substitute for a host government.[4] Such situations have been labelled "legal anomalies,"[5] and it is UNHCR policy to avoid the operation of such "parallel services."[6] Yet they are widespread and commonplace nonetheless.

The difficulties that result from state-to-UN responsibility shift are central to current discussions about protecting refugees in urban settings and resolving protracted refugee situations. The primary solution offered to date, endorsed both by UNHCR and by some of its sharpest critics, has been to refocus attention on the primacy of state responsibility. Yet a refugee protection strategy focused on getting host governments to replace the UN surrogate state is not likely to be politically viable in many countries.

Using Arab states in the Middle East as a focal point, I wish to propose an alternative approach for building a foundation for refugee protection. The argument offered is that the existence of a UN surrogate state offers important advantages to some host governments and can sometimes be a more viable political foundation for refugee protection than more conventional notions of state responsibility. Although unsettling to traditional assumptions about state responsibility, there are good reasons to seek such alternative strategies that may increase the political will of governments to protect refugees in the global south.

---

[1] This paper does not represent the official views of Asylum Access.

[2] A. Slaughter and J. Crisp, (2008) 'A surrogate state? The role of UNHCR in protracted refugee situations,' in G. Loescher, J. Milner, E. Newman, and G. Troeller (eds.), *Protracted Refugee Situations* (Tokyo: United Nations University Press), 123-140.

[3] V. Turk (May 2010) 'UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate,' Keynote Address, International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto.

[4] V. Turk and E. Eyster (2010) 'Strengthening Accountability in UNHCR,' 22 *International Journal of Refugee Law* 159, 163.

[5] G. Verdirame, 'Human Rights and Refugees: The Case of Kenya,' (1999) 12 *Journal of Refugee Studies* 54-77.

[6] UNHCR (September 2009) 'Policy on Refugee Protection and Solutions in Urban Areas,' para. 113 ("As a general rule, when working in urban areas, UNHCR will avoid the establishment of separate and parallel services for its beneficiaries, and will instead seek to reinforce existing fully authorized delivery systems, whether they are public, private or community-based.").

To be clear, I do not argue that state-to-UN responsibility shift is an ideal arrangement. There are some essential components of refugee protection that only a sovereign state may deliver. Any situation that leads to a perception that UNHCR is a complete substitute for a government is bound to produce disappointment and failure.[7] UNHCR has expressed concern that urban refugees sometimes develop "unrealistic expectations" for the protection outcomes that UNHCR will actually be able to deliver.[8]

Nevertheless, absent a strategic change in the incentives for host governments, reversing the responsibility shift phenomenon is not easy to achieve. Moreover, there are many aspects of refugee protection that the UN can deliver effectively, and sometimes better, than many governments. The UN's refugee agencies should develop their capacity to accept such shifts of responsibility, and to use them as opportunities to advance refugee protection. Responsibility shift, when used, must be limited and defined, so that lines of accountability are clear and expectations realistic.

This article begins with an overview of the origins of responsibility shift, and offers some observations about some of the debates and critiques that have developed around the issue. I then attempt to develop a theory about the role of the UN surrogate state in refugee policy in Arab states. I then highlight some of the major limitations on the UN as a substitute for states, and attempt to propose ways that UNHCR can more effectively use limited responsibility shift as a refugee protection strategy.

The origins of responsibility shift

The responsibility shift phenomenon grows from a basic inequality between the global north and global south. As James C. Hathaway has observed, the driving purpose of refugee law "is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulated international migration in accordance with the interests of states."[9]

In general, developed nations of the north accept relatively small asylum burdens while most refugees remain in the global south.[11] As Amy Slaughter and Jeff Crisp explain, host governments in the global south suggested "that they would only admit and refrain from *refoulement* of refugees if the needs of such populations were fully met by the international community."[12] This is a daunting challenge since third country resettlement

---

[7] Ibid., 84.
[8] UNHCR, above n. 6, 14-15 para. 84.
[9] J. C. Hathaway (1990) 'A Reconsideration of the Underlying Premise of Refugee Law,' 31 *Harvard International Law Journal* 129, 133; *See also* A. E Barnes (2009) 'Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan and Lebanon,' New Issues in Refugee Research Paper No. 167, 1 ("Carving out protection space is not without its obstacles; for in addition to meeting the protection needs of refugees, UNHCR must simultaneously meet the concerns of states.").
[11] M. F. Cuellar (2006) 'Refugee Security and the Organizational Logic of Legal Mandates,' 37 *Georgetown Journal of International Law* 583, 622.
[12] Slaughter and Crisp, *above* n. 2, 128.

is accessible to only a small minority of the world's refugees, and forced migration has been increasingly viewed by governments as a threat to be contained.[13]

The stalemate that results from this north-south gap has been bridged, to some extent at least, by what Mariano-Florentino Cuellar calls the "grand compromise" of global refugee policy,[14] amounting to an *ad hoc* form of burden sharing which took shape because other more desirable arrangements have been thwarted. UNHCR's ability to deliver aid to desperate refugees in the south offers northern donor states a channel by which to funnel assistance monetarily while simultaneously helping host governments in the south to keep refugees from imposing a burden on their own societies.[15]

When host governments deflect the burden for caring for refugee populations onto international actors, they weaken the normal connection between territorial sovereignty and state responsibility for people who are present on their territory. Slaughter and Crisp describe a general pattern that has emerged from this process. Host governments confine themselves to respect for the principle of *non-refoulement*, and provision of security.[17]

At the same time, UNHCR and partner humanitarian agencies assume effective responsibility for delivering direct assistance to refugees.[18] UNHCR in the south often took over unnatural roles "in order to fill gaps in the international refugee regime,"[19] and thus slow the downward spiral of refugee protection that would have otherwise occurred. In should be noted that responsibility shift does not take hold everywhere in the global south,[20] though it is nearly universal in the Middle East.

While the precise division of labour between state and UN varies from country to country, the general pattern of responsibility shift fits Isaiah Berlin's classic distinction between positive and negative liberties. Host governments' role is limited to protection of negative liberties. For refugees, the critical security threats of *refoulement* and detention emanate from the state itself, through deportation or police harassment and immigration enforcement.

As a result, host governments can substantially live up to their end of the bargain by literally doing nothing. They can "protect" refugees simply by restraining themselves from deporting them, through a policy of benign neglect. UNHCR and its partners bear the heavier load by taking responsibility for refugees' registration and status determination, healthcare, education, nutrition and livelihood assistance.

Keeping refugees apart from local populations and dependent on a separate UN-operated aid system sometimes finds support in refugee communities. Because of the *de facto*

---

[13] Ibid., 126.
[14] Cuellar, above n. 11, 622.
[15] Ibid., 659.
[17] Slaughter and Crisp. *above* n. 2, 124.
[18] Ibid.
[19] Ibid., 123.
[20] Notable exceptions include South Africa, India and Ecuador, among others. Explaining why some states opt not to rely on the UN surrogate state would require additional comparative study.

division of labour in these situations, refugees learn to expect very little from government, and a great deal from the UN. In many situations, refugees come to prefer UNHCR over host governments as their protector, orientating their aspirations toward third country resettlement to (primarily to the United States, Canada and Australia).[21] Katarzyna Grabska quotes refugees in Egypt saying, "We live in a country of UNHCR."[22]

Palestinian refugees in the Middle East are the paradigmatic example of this phenomenon, with a nationalist narrative that resists *tawtin* (local integration) and argues that the UN has special responsibility to care for them.[23] But this is not exclusive to Palestinians. Separation from the local society can support a political orientation focused on resettlement or repatriation, which for exile political movements facilitates recruitment.[24] Refugees may also resist local integration because they have a tense relationship with the host population, or in order to maintain their identity in exile.[25]

Criticism and consensus

Conventional notions of state responsibility make accountability relatively straightforward so long as sovereign states are paramount, but when UNHCR is acting like a surrogate state it is less clear in practical terms who is ultimately responsible for protection failures. In theory the principle of state responsibility still holds. For instance, states can be held accountable for relying on errant decisions in refugee status determination made by UN agencies.[26]

But this theory is difficult to apply in situations where there are no effective judicial authorities accessible to refugees. In situations of responsibility shift, the sovereign state exists only far in the background. A legal system that cannot reach the frontline actors will risk irrelevance in the real lives of refugees. With ambiguity about who is responsible, institutions often "pass the buck amongst themselves" for actually implementing abstract norms.[27]

The practical reality that UNHCR and its staff wield real power over refugees has produced a situation where activists and scholars sometimes "criticize the good guys" for violating refugee rights.[28] Such criticisms sharpened with the 2005 publication of former

---

[21] Ibid., 132.

[22] K. Grabska (2008) 'Brothers or Poor Cousins? Rights, Policies and the Well-being of Refugees in Egypt,' in K. Grabska and L Mehta (eds.), *Forced Displacement: Why Rights Matter* (Houndsmills: Palgrave MacMillan), 71-92, 87.

[23] See generally M. Kagan (2009) 'The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East,' 22 *Journal of Refugee Studies* 417.

[24] Ibid., 135. *See also* J. Crisp (2003) 'No solutions in sight: The problem of protracted refugee situations in Africa,' New Issues in Refugee Research, Research Paper No. 75, 5-6.

[25] Slaughter and Crisp, above n. 1, 136.

[26] See *D. v. Turkey*, European Court of Human Rights, *Application Number 24245/03* (22 June 2006).

[27] K. Grabska and L. Mehta, 'The Politics of Rights,' in K. Grabska and L Mehta (eds.), *Forced Displacement: Why Rights Matter* (Houndsmills: Palgrave MacMillan, 2008), 159-177, 244-246, 245.

[28] A. Sachs (2005) 'Forward,' in G. Verdirame and B. Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Oxford: Berghahn Books), ix.

High Commissioner Sadako Ogata's book *The Turbulent Decade*. One group of commentators, notably Barbara Harrell-Bond,[29] Guglielmo Verdirame,[30] Zachary Lomo,[31] and Jacob Stevens,[32] has been especially critical of UNHCR, blaming the agency for usurping the responsibility of states for refugee policy and facilitating refugee rights violations in the process. The central thesis of these critics is that UNHCR's primary institutional motivation is the pursuit of donor money and institutional power, rather than refugee welfare,[33] and that UNHCR thus seeks to "control" refugees so as to benefit itself.[34]

One reason critics place primary blame on the UN for the creation of the UN surrogate state is the deeply embedded assumption in political thought that entities always seek greater power for themselves. Many post-colonial countries are the most zealous in guarding the traditional concept of state sovereignty over aspirations for global cooperation.[35] Thus if power shifts from these states to the UN, one could easily assume that it must be the work of self-interested UN agencies at the expense of weak host governments.

Appearances on the ground can feed this view. In large refugee settlements in Africa, Asia and the Middle East one can find a humanitarian infrastructure dwarfing local government and dominated by international agencies based in the West, funded by Western states, and led by international staff. This gives refugee policy an air of neo-colonialism, which encourages criticism of the UN for pushing sovereign governments aside.

Many of the critics' specific allegations about UNHCR in the Ogata era have been pointedly contested.[36] But for present purposes it is the provocative macro-critique that UNHCR wants to take power away from states that deserves attention. By focusing on UNHCR's allegedly selfish motivations, this group of critics tend to de-emphasize host governments as decisive actors in shaping refugee policy in the geopolitical south. This allows the assumption that governments follow UNHCR's direction,[37] and thus to the conclusion that that UNHCR is the primary cause of protection failures. However, the

---

[29]G. Verdirame and B. Harrell-Bond (2005) *Rights in Exile: Janus-Faced Humanitarianism* (Oxford: Berghahn Books).

[30] Ibid.

[31] Z. Lomo, (2000) 'The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work,' 18 *Berkeley Journal International Law* 268.

[32] J. Stevens (2006) 'Prisons of the Stateless,' 42 *New Left Review*, online: http://www.newleftreview.org/?view=2644 (last checked 27 Sept 2009).

[33] Ibid.; Verdirame and Harrell-Bond, above n. 29, 34, 272.

[34] Ibid., 288.

[35] T. G. Weiss (2009) *What's Wrong with the United Nations and How to Fix It* (Cambridge: Polity Press) 20, 22.

[36] See N. Morris (2007) 'Prisons of the Stateless: A response to New Left Review,' New Issues in Refugee Research, Research Paper No 141.

[37] See, e.g., Lomo, above n. 31, 282 (arguing that Kenya confined refugees to camps because UNHCR made this a condition for receiving aid); Verdirame and Harrell-Bond, above n. 29, 335-338 (arguing that local integration received too little attention in Kenya and Uganda because UNHCR and its donors were dedicated to encampment and repatriation).

implicit assumption that a sovereign state would not want a UN agency to usurp its authority is faulty.

The concept of global governance, which has emerged from the field of international relations, offers more useful analytical tools to understand how states may relate to agencies like UNHCR on the ground.[38] The responsibility shift phenomenon may be best understood by extending an analysis recently developed by Thomas Weiss. He argues that in the 21st Century the UN confronts a paradox in that international governance should be more essential than ever to confront what Kofi Annan called "problems without passports,"[39] and yet states continue to be reluctant to surrender their sovereignty.[40]

However, scholars sometimes distinguish a "first United Nations," which is a "stage or arena for state decision-making," from the "second United Nations," consisting of semi-autonomous secretariats and agencies.[41] It is not at all surprising that a state might fiercely resist surrendering any sovereign prerogatives to "first UN" bodies like the Security Council, and yet might find it advantageous to shift some functional aspects of sovereignty onto "second UN" agencies like UNHCR. Even if this pattern takes hold *ad hoc*, it offers a practical mechanism by which the UN has partially bridged the gap between the need for global cooperation and the continued pre-eminence of state-centrism. This is what makes the grand compromise of refugee policy possible.

The global grand compromise of refugee policy inverts many of the usual incentives for states. In the north, governments are usually assumed to want to place firm limits on the class of migrants who will be legally recognized as refugees, so as to limit their obligations to let them stay. But in the global south governments have an incentive to do something their northern counterparts typically resist: expand the refugee definition. Formally labelling forced migrants as "refugees" facilitates shifting responsibility for their care to the international community, while at the same time marginalizing them from the host society.[42]

Once the logic of responsibility shift takes hold, host governments have reason to keep refugees segregated and highly visible in order to maintain the pressure on the international community to continue to support their care and maintenance.[43] Host governments become firmly opposed to local integration,[44] eliminating one of the classic

---

[38] See: T. G. Weiss and R. Thakur (2010) G*lobal Governance and the UN: An Unfinished Journey* (Bloomington: Indiana) 6.

[39] Weiss, above n. 35 4 .

[40] Ibid., 19.

[41] Ibid., 8. The concept of a first and second UN is originally traced to Inis Claude, Jr. (1956) *Swords into Plowshares: The Problems and Prospects of International Organization* (New York: Random House).

[42] M. Kagan (2007) 'Legal Refugee Recognition in the Urban South: Formal v. *de facto* Refugee Status,' 24 *Refuge* 1-26, 15-16.

[43] M. Sommers (2001) 'Young, Male and Pentecostal: Urban Refugees in Dar es Salaam, Tanzania,' *Journal of Refugee Studies* 347-370, 349.

[44] J. Crisp (2003) 'No solutions in sight: The problem of protracted refugee situations in Africa,' New Issues in Refugee Research, Research Paper No. 75, 3-4.

durable solutions that might resolve a refugee situation.[45] They thus oppose including refugee aid in their general development programs, as UNHCR advocates,[46] leading UNHCR to develop parallel and separate assistance programs.[47] Thus, when state-to-UN responsibility shift happens, we should not hastily assume that it is the UN that wanted to the shift to occur. There are powerful political forces that lead states in the south to *want* to transfer their responsibilities to the United Nations, for their own benefit.

While some major critics of UNHCR over simplify political dynamics in blaming UNHCR for responsibility shift, it is interesting that they largely agree with official UNHCR policy about the remedy. Beyond the blow-by-blow exchanges about the culpability of UNHCR for building the surrogate state, both sides agree that state-to-UN responsibility shift is fundamentally a bad thing, and that it should be reversed. But how might that be accomplished? Stevens for example recommends that UNHCR should re-focus "on enforcing the Convention provisions upon its signatories."[48] As soon as UNHCR lets go of the reins of power over refugee policy in the south, normal state responsibility for refugee protection would be re-established.

A proposal for this type of approach has been offered for Egypt by Tarek Badawy.[49] who argues that UNHCR should have ceased conducting refugee status determination with Egypt's ratification of the Refugee Convention in 1981,[50] and argues that in 2004 UNHCR should not have extended temporary protection to Sudanese in order to pressure Egyptian authorities to take responsibility for them under the recent Egypt-Sudan Four Freedoms Agreement.[51] Others have called for similar approaches on a wider scale.[52]

The real world is more complicated than may be appreciated by formalistic paradigms focused narrowly on state sovereignty. When a host state stands back, *ad hoc* UNHCR responses to refugee emergencies lay the groundwork for enduring parallel structures that allow host states to avoid protection responsibilities indefinitely.[53] In this view, UNHCR is pressured by exigent circumstances and sometimes lacking in strategic foresight, but is not the primary source of the problem. Even if fully committed in principle to state responsibility, UNHCR is often trapped into accepting quasi-government functions indefinitely, fearful that if it pulls back refugees would simply be abandoned because host governments would turn out to be unwilling to step in.[54]

---

[45] Slaughter and Crisp, above n. 2, 131.
[46] UNHCR, above n. 6, para. 113.
[47] Slaughter and Crisp, above, n. 2, 131-132.
[48] Stevens, above n. 32.
[49] T. Badawy (2010) 'The Memorandum of Understanding Between Egypt and the Office of the United Nations High Commissioner for Refugees: Problems and Recommendations, CARIM Analytic and Synthetic Notes 2010/07, European University Institute, Robert Schuman Centre for Advanced Studies.
[50] Ibid., 12.
[51] Ibid., 14.
[52] M. De Lorenzo (2 May 2007) 'Dignity, Safety and Health for Refugees,' *The Washington Post* (""The solution is to remove UNHCR from the equation and help national governments to determine refugee status fairly and then adjudicate decisions in their own courts.")
[53] UNHCR (2008) 'Protracted Refugee Situations: A discussion paper for the High Commissioner's Dialogue on Protection Challenges,' UNHCR/DPC/2008/Doc.02, 13-14 paras 53-59.
[54] Slaughter and Crisp, above n. 2, 132.

Refugee policy in the Middle East

Like other troubled regions, the Middle East hosts millions of refugees, just as it produces them. By conventional legal measures, most Middle Eastern countries have done very little to implement their obligations to protect refugees, in that few have signed the Convention and none have passed domestic refugee legislation. Indeed, by these traditional legal criteria refugee policy in the Middle East is much less developed than in sub-Saharan Africa.

In a recent article, Ruben Zaiotti examined the state of refugee policy in the Middle East and found it alarming. He wrote:

> Despite its importance, throughout their recent history Middle Eastern states have not paid much attention to the issue of forced migration. Apart from the Palestinian case, the question has maintained a low profile on their political agendas. No formal provision regulating the status of refugees has been devised, and few countries in the region have acceded to the main legal instruments defining the international refugee regime. Policies towards these individuals therefore have been formulated on an *ad hoc* basis. As a result, refugees have enjoyed few guarantees and minimal protection.[55]

Zaiotti's analysis reflects two analytical traits that are common to studies of refugee issues in the Middle East. First, Zaiotti assumes, incorrectly in my view, that Palestinian and non-Palestinian refugees are entirely separate categories that cannot be examined together, even though they exist together in the same host countries.[56] Second, Zaiotti asks statecentric questions to examine whether international refugee law has been implemented. Have states ratified the Convention? Have they passed legislation?[57] Have Arab states developed a successful regional regime to govern refugee status?[58]

Asking these simple questions leads to the general conclusion that there is basically no refugee policy in the Middle East, that there are only refugee problems and – at best – occasionally some *ad hoc* and discretionary steps taken to alleviate suffering for short periods of time.

---

[55] R. Zaiotti (2006) 'Dealing with non-Palestinian Refugees in the Middle East: Policies and Practices in an Uncertain Environment,' 18 *International Journal of Refugee Law* 333-353, 334.

[56] For a development of this argument, see Kagan, above n. 23.

[57] For an overview of laws relevant to refugees in the region, see L. Hilal and S. Samy (2008) *Asylum and Migration in the Mashrek* (Copenhagen: Euro-Mediteranean Human Rights Network), 67-69.

[58] See Barnes, above n. 9, 17 ("In addition, in the Middle East, a regional regime similar to those in Africa or Latin America does not exist. A document that may have represented a starting point for such a regime; the Declaration on the Protection of Refugees and Displaced Persons in the Arab World, was drafted in 1992. In 1994 the Arab Convention on Regulating the Status of Refugees in the Arab Countries was adopted, but has not been ratified.").

Yet, a refugee arriving in a major Arab state will not be in a total vacuum. There are some systems in place to receive people fleeing persecution; some refugees are able to find shelter, though many people are likely to fall through the cracks and the amount of protection available is certainly quite limited. The systems that exist on the ground for refugees in the Middle East are essentially off the radar screen of conventional thinking in the field of international law because they rely on shifting responsibility from state to the UN. The difference in the Middle East is that there are two relevant UN refugee agencies, UNRWA for Palestinians and UNHCR for non-Palestinians, and urban settings have long been more prominent than rural encampments of refugees.

The surrogate state pattern that Slaughter and Crisp date to the 1960s in Africa developed even earlier in the Middle East, with the establishment of UNRWA in the early days of the Palestinian refugee crisis. A desire by Arab states to maintain the visibility of the Palestinian refugee issue in international politics has long been noted as a reason why Arab states preferred to maintain a separate UN apparatus in the form of UNRWA rather than incorporate Palestinians into the new international refugee regime in 1950-1951.[59] But focusing on why UNRWA was kept separate from UNHCR skips the threshold question: Why was so much emphasis placed on the United Nations to begin with?

Citizens, foreigners and sponsors

Arab states are generally classified as "developing," but most Arab states have strong central governments with elaborate bureaucracies that regulate the status of and deliver services to their populations as part of a social contract between citizens and autocrats. As a recent UNHCR study observed, "Cities such as Aleppo, Amman, Beirut and Damascus are relatively prosperous and expensive when compared to cities such as Accra, Khartoum, Nairobi or New Delhi."[60]

With the possible exceptions of Lebanon, Yemen and post-Baathist Iraq (where central governments are weak) it is probably an error to think of Arab governments as unable to administer refugee policy on their own. It would be more accurate to say that they are unwilling, and there are specific reasons why. To understand the reasons, it is important to examine the ways in which Arab states are accustomed to dealing with foreign populations.

There are substantial ideological obstacles to local integration of any migrants in Arab states.[61] In a recent study, Gianluca Parolin observed, "Citizenship in the Arab world is essentially defined by the individual's membership in a kin group, in a religious community and in a nation-state."[62] Prospects for naturalization of foreigners are limited

---

[59] J. C. Hathaway (1991) *The Law of Refugee Status*, (Toronto: Butterworths), 206-207.
[60] J. Crisp, J. Janz, J. Riera, S. Samy (2009) 'Surviving in the City: A Review of UNHCR's operation for Iraqi refugees in urban areas of Jordan Lebanon and Syria,' PDES/2009/03, 9 para. 34.
[61] Hilal and Samy, above n. 57, 66.
[62] G. P. Parolin (2009) *Citizenship in the Arab World: Kin, Religion and Nation State* (Amsterdam University Press), 115.

because, "if not attributed by paternal descent, nationality in the Arab world is essentially closed."[64]

Depending on the political circumstances communal affiliation can work for or against integration. In several cases around the Arab world whole kin groups have been de-nationalized or in a few cases naturalized on a communal basis, typically to serve a local political purpose by privileging or marginalizing groups seen as loyal or disloyal to the ruling regime.[67] Arab states so resist the idea of granting citizenship to a person with connections to another state that they are divided on voluntary acquisition of a second nationality; some consider it impossible without the consent of the first state of nationality based on the principle of perpetual allegiance, while others view it as automatically leading to loss of nationality in order to prevent dual nationality.[68]

But while citizenship in Arab states is inaccessible to most foreigners, Arab countries typically tolerate and in many cases welcome large populations of long term foreign residents through the widespread usage of the *kefala* (sponsorship) system, which has now become a source of severe criticism by the human rights community because of its connection to worker exploitation.

The *kefala* system is in some respects an extreme version of work permit systems used in many countries, in that it begins with an employer's application for a visa for an employee.[69] But its distinctive feature is the level of control given to employers over their workers, including their ability to move freely, obtain driver's licenses or bank accounts, and severely restricting their ability to seek alternative employment.[70]

Especially in the sphere of domestic work, social scientists have explained mistreatment of workers as a reinforcement of patriarchal social structures, in which the "fictive kin" who work as maids and nannies are treated as subordinate parts of the family structure.[71] While this subordination heightens abuse, it may also entail a paternalistic sense of obligation on the part of some employers.[72]

The *kefala* system is a legalist means of regulating relations between employers and foreign workers, but it is not used everywhere in the region. Egypt in particular has been a noted exception where the law does not necessarily allow employment of foreigners in most cases, but authorities tolerate it on a wide scale nonetheless.[73] In Egypt migrant

---

[64] Ibid.

[67] Ibid., 116-117.

[68] Ibid., 108.

[69] See, *e.g.*, Human Rights Watch (2009) 'The Island of Happiness: Exploitation of Migrant Workers on Saadiyat Island, Abu Dhabi,' 28.

[70] Ibid., 29.

[71] B. Anderson (2000) *Doing the Dirty Work: The Global Politics of Domestic Labour* (London: Zed Books), 145; R. Jureidini and N. Moukarbel (2004) 'Female Sri Lankan domestic workers in Lebanon: a case of 'contract slavery'?' 30 *Journal of Ethnic and Migration Studies* 581-607, 586.

[72] See generally, R. Jureidini (2009) 'In the Shadows of Family Life: Toward a History of Domestic Service in Lebanon,' 5 *Journal of Middle East Women's Studies* 74-101.

[73] R. Jureidini (2009) 'Irregular Workers in Egypt: Migrant and Refugee Domestic Workers,' 11 *International Journal on Multicultural Societies* 75-90, 78.

workers may have (relatively) more control of their lives not because the state protects them, but because the state ignores them. An extra-legal existence may be relatively preferable to enforcement of a restrictive legal regime.[74] But this still leaves a legal sword over their heads, since on paper they have no right to do what they are doing.

The symbolic role of third party sponsors

In neither the *kefala* system nor in the case of migrants living outside the law are foreigners recognized as people with autonomy over their own lives. In kefala, the legal relationship between employer and employee appears most analogous to a parent and child, or alternatively master and slave.[75] What is critical here is that the state recognizes the right of the sponsor to have an employee and to make decisions about the employee more than it recognizes the rights of the worker. The foreigner's relationship to the state is mitigated through the third party sponsor, thus facilitating the hosting of foreigners without creating a binding relationship between foreigners and host states.

This idea of a third party sponsor is important for understanding how Arab states have responded to the presence of refugees in their countries, beginning with the Palestinians in 1948. At the birth of the Palestinian refugee crisis, Arab states faced a political challenge. There was, and largely still is, a popular Arab consensus insistent on Palestinian return as the only acceptable solution to the refugee problem. Yet while Arab states have supported and often encouraged this sentiment among their peoples, Arab governments have lacked the power to force Israel to accept repatriation.[76] Arab host states found themselves insisting that Palestinian refugees should go home even though they lacked the power to make this happen.

Shifting responsibility for the refugees to the UN defused this tension. It accommodated the practical reality of long term exile without surrendering in principle the insistence on the return as the only acceptable permanent solution.[77] For this political strategy to work it would not have been adequate for Arab states to simply persuade the international community to share the resource burden of hosting the refugees via humanitarian or development aid. Arab states wanted the shift of responsibility for the refugees to the international community to be highly visible, what Jalal Husseini calls "the necessary public emphasis on UN involvement."[78] This symbolism was important enough that when UNRWA was established Arab states asked that "UN" be added to its name, instead of the original suggestion that it be called "Near East Relief and Works Agency (NERWA)."[79]

---

[74] See Hilal and Samy, above n. 57, 10 ("Laws on migration that have been adopted in the Mashrek countries are mainly repressive and provide no, or very few, rights for migrants.").

[75] See generally Jureidini and Moukarbel, above n. 71.

[76] J. Husseini (2007) 'The Arab States and the Refugee Issue: A Retrospective View', in Benvenisti, E., Gans, C. and Hanafi, S. (eds.) (2007) *Israel and the Palestinian Refugees* (Berlin: Springer) 435–463, 441.

[77] Ibid.

[78] Ibid., 443.

[79] Ibid.

Palestinians were not the first refugee group to be blocked from integration in host countries. In December 1946, the United Nations established the International Refugee Organization. The IRO's constitution mandated it to help refugees to find new permanent homes except "in the case of Spanish Republicans [who should] establish themselves temporarily in order to enable them to return to Spain when the present Falangist regime is succeeded by a democratic regime." What was new in the Palestinian case was that a new narrative discourse developed by which host states could better justify this limbo status.[80]

This UN responsibility thesis[81] is fairly unique to the Palestinian case, but the general pattern of state-to-UN responsibility shift is the common foundation of refugee policy for both Palestinian and non-Palestinian refugees in Arab host states. The arrangement that emerged with UNRWA in the Middle East fits Slaughter and Crisp's description of the UNHCR surrogate state in Africa. Both host governments and the refugee community opposed local integration. Host governments largely limited their involvement to regularization of refugees' residency status. UNRWA, and later UNHCR, set up registration, education, health and other social welfare systems separate from those operated by the host governments.

The precise demarcation of responsibility varies, with the governments of Syria and Jordan offering more to refugees than Lebanon. But UNRWA remains central to Palestinain welfare throughout the region. As Nicholas Morris has written, "UNRWA has direct responsibilities broadly analogous to those of a government's health, education and social welfare authorities."[82]

A key lesson from the early days of UNRWA is that responsibility shift offers symbolic political benefits to host states, in addition to its utility in facilitating shifting of resource burdens. Governments have also used UNHCR's operations to symbolically transfer the burdens of their welfare to the UN.[83] In addition to helping to defray the resource burdens of hosting refugees, state avoidance of responsibility helped to deal with political sensitivities.[84] The fact that refugees in the Arab world typically come from other Arab League states poses a political problem for host governments that do not want to accuse fellow Arab states of persecution.[85] It is politically expedient to leave this task to UNHCR, and to portray the refugees' presence as temporary, just as was done first with Palestinians.[86]

---

[80] Ibid.

[81] For a critique of the "UN responsibility thesis" as applied to Palestinians, *see* Kagan, above n. 23.

[82] N. Morris (2008) 'What Protection Means for UNRWA in Concept and Practice,' U.N. Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) Consultant's Report, 4, available at http://www.un.org/unrwa/publications/pubs08/ProtectionReport_mar08.pdf (last visited 15 February 2008).

[83] K. Grabska (2008) 'Brothers or Poor Cousins? Rights, Policies and the Well-being of Refugees in Egypt,' in K. Grabska and L Mehta (eds.), *Forced Displacement: Why Rights Matter* (Houndsmills: Palgrave MacMillan) 71-92, 86.

[84] Ibid., 80.

[85] Ibid., 76.

[86] Ibid., 77.

By combining Husseini's study of the historical origins of Arab state reliance on UNRWA and Parolin's analysis of Arab citizenship, we can develop a theory explaining Arab states' approaches toward refugees more generally. First, in general Arab states are accustomed to hosting large numbers of foreigners but are not open to offering permanent integration to them absent exceptional political calculations.

Second, shifting responsibility for refugee populations to UN agencies can provide a ready explanation for the otherwise contradictory facts of long-term residence and non-integration of refugees. In the absence of a foreign state of origin or employment sponsor that can take responsibility for the migrants, visibly attaching a group of foreigners to the UN can serve to explain why they cannot be (and need not be) integrated to the host community.

One can see the symbolic utility of a third party sponsor in the otherwise anomalous example of Egyptian treatment of Palestinian refugees. Egypt is the only state bordering Israel/Palestine where UNRWA does not operate.[87] The historical explanation for this is unclear. According to official accounts from the United Nations, UNRWA chose not to provide assistance to Palestinians in Egypt because of insufficient resources.[88]

But according to other accounts, the Egyptian Government decided not to request UNRWA's assistance because it did not want to encourage the refugees to stay inside Egypt.[89] The number of Palestinian refugees who entered Egypt in 1948 was relatively small,[90] and Egyptian authorities sought to contain the refugees in the Gaza Strip, which was under Egyptian military occupation from 1949 to 1967 and where UNRWA did operate.[91]

For those few Palestinians who remained in Egypt, the Egyptian Government essentially invented a third party sponsor where none otherwise existed. For Palestinians in Egypt in the 1950s, the functions that today might be carried out by UNHCR were undertaken instead by the Cairo-backed "Government of All Palestine" (GAP), which purported to be a Palestinian government in exile. Beginning in 1950, Palestinian refugees in Egypt received travel documents and birth certificates from GAP, and then were allowed to receive residence permits from the Egyptian authorities.[92]

In general, the theory I am suggesting is that Arab governments are likely to acquiesce to the presence of refugees on their territory only so long as responsibility for their maintenance and ultimate departure from the country is visibly assigned to an international body or other third party. Efforts to integrate refugees are likely to be blocked either by explicit policy or by the grinding resistance of what Parolin calls the

---

[87] UNRWA maintains a liaison office in Cairo, but does not carry out refugee assistance programs in Egypt.
[88] L. Bartholomeusz (2009) 'The Mandate of UNRWA at 60,' 28 *Refugee Survey Quarterly*.
[89] O. El-Abed (2009) *Unprotected: Palestinians in Egypt since 1948* (Ottawa: IDRC), 36.
[90] Ibid., 17.
[91] Ibid., 19.
[92] Ibid., 37.

"silent machinisations" of the state.[94]

But without the UN's role, Arab states would be forced to face more directly the contradiction between the presence and non-integration of refugees. They might resolve this contradiction in the Egyptian manner, through systemic non-enforcement of laws on the books, leaving refugees in a fragile state outside the rule of law. A state might try to regularize the status of refugees by creating an alternative third party sponsor. Or, the state might respond by simply expelling them.

The idea that the UN is functioning as a sponsor of refugees raises intriguing questions about protection strategy. In Lebanon in 2008, UNHCR agreed to pay illegal entry fines for Iraqi refugees held in detention, in exchange for their temporary release.[95] But Lebanese authorities released the refugees with only a three-month visa, during which time they had to find an employer or become illegal again.[96] Such measures raise concerns about whether UNHCR might be incentivizing detention by paying fines on behalf of refugees. But there is also implied possibility.

If UNHCR can secure temporary release by paying a fine (reportedly $630 per refugee),[97] might UNHCR also be able to "buy" a longer term status for refugees? Employment sponsorship of a foreigner involved a $300 fee, proof of a $1000 bank deposit, and provision for medical tests and insurance. Such a strategy would appear crude because it makes the responsibility shift explicit, based on a transparent payment of money, but it might not fundamentally alter the *de facto* arrangements that exist anyway. If sponsorship would make UNHCR's role more easily digested by the local system, might it not be a strategy worthy of consideration?

The symbolic power of a third party in normalizing the status of foreigners is a critical factor in the way the "grand compromise" takes shape in Arab states. If state interests were solely resource-driven, UNHCR could induce a government to take responsibility for critical functions by providing the necessary funds. For example, in Africa and Latin America UNHCR sometimes provides the funding for a government to establish its own refugee status determination apparatus. In general, the symbolic importance of having a visible third party take responsibility for refugees is likely to lead governments to generally prefer parallel structures, even if a more integrationist approach would offer equal benefits in sharing material resources.

The MOU: A shadow legal regime?

While the Refugee Convention is not widely ratified and even less commonly followed by Arab states, the bilateral Memorandum of Understanding (MOU) between UNHCR

---

[94] Parolin, above n. 62, 128.

[95] Y. Bayoumy, (2008) 'UNHCR hails Lebanon move to legalize Iraqi refugees,' Reuters.

[96] Ibidd.

[97] International Federation for Human Rights (FIDH) (21 March 2008) 'UNHCR-GSO Agreement Fails to Protect Refugees in Lebanon,' available at www.fidh.org/UNHCR-GSO-Agreement-fails-to-protect-refugees-in.

and host governments has emerged as an alternative legal instrument for regulating the status of refugees in several countries. These MOUs, which UNHCR has reached with Egypt, Jordan, and Lebanon, occupy an ambiguous place in international law, for reasons I explain below.

These documents formalize the responsibility shift arrangement, and come closer than more conventional sources of international law to describing the real refugee system on the ground. While the Refugee Convention defines refugee status and rights, the central focus of the MOUs is on codifying the division of labour between host governments and UNHCR.

UNHCR's oldest office in the Middle East is in Egypt, where the agency reached a memorandum of understanding with the government in 1954.[98] Its terms were quite general relative to later MOUs, but nevertheless were clear about the state v. UN division of labour. UNHCR would "help … the most destitute refugees"[99] and would coordinate the activities of "welfare societies" for the benefit of refugees.[100] There was no explicit reference to registration and refugee status determination, which have in practice been central parts of UNHCR's operations in Egypt until the present time.

But these roles were implied by the provision that UNHCR would "cooperate with the governmental authorities in view of undertaking the census of and identifying the refugees eligible under the mandate of the High commissioner."[101] For its part, the Egyptian government agreed to grant residence permits to "bona fide refugees … who fall within the High Commissioner's mandate."[102] Egypt promised no other rights to refugees, and the agreement indicates that only repatriation or resettlement would be considered as durable solutions. UNHCR agreed to facilitate voluntary repatriation,[103] and to promote resettlement "in every possible measure, to the countries of immigration, the refugees residing in Egypt."[104] In practice the arrangement described in Memorandum of Understanding continued long after Egypt's ratification of the Refugee Convention in 1981.[105]

Where the Egypt MOU was general, later agreements between UNHCR and Arab states have been more specific. Jordan reached an agreement with UNHCR in 1997[106] establishing a basis for UNHCR's office in the country, a memorandum of understanding

---

[98] *Accord entre le Haut Comissariat des Nations Unies pour les Réfugiés et le Gouvernement Egyptien*, (10 February 1954) online: http://www.unhcr.org/refworld/docid/3edf49814.html [accessed 30 September 2009].
[99] Ibid., article 2(d).
[100] Ibid., article 2(e).
[101] Ibid., article 2(a).
[102] Ibid., article 6.
[103] Ibid., article 2(b).
[104] Ibid., article 2(c).
[105] M. Kagan (2006) 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determintion,' 18 *International Journal of Refugee Law* 1, 4-5.
[106] Agreement Between the Government of the Hashemite Kingdom of Jordan and the United Nations High Commissioner for Refugees, (30 July 1997) online:
http://www.unhcr.org/refworld/docid/3ae6b3a124.html [accessed 30 September 2009].

in 1998,[107] as well as a temporary agreement in 2003 which was specific to Iraqi refugees.[108] In Lebanon UNHCR operated for several decades according to an unwritten "Gentleman's Agreement" with UNHCR, but this broke down in the late 1990s. Following several years of systematic detention and deportations, especially to Iraq and Sudan, UNHCR reached an MOU with the Lebanese Government in 2003.[109]

The Jordan and Lebanon agreements contain several common features, beginning with the explicit statements that these are transit countries only. The Jordan MOU describes the presence of refugees as a "sojourn,"[110] while the Lebanon agreement says in the preamble "Lebanon is not an asylum country."[111] The Jordanian agreement incorporated the 1951 Convention's definition of refugee status,[112] but the Lebanese version offered a revealing alternative definition: "the term 'asylum-seeker' shall mean … 'a person seeking asylum in a country other than Lebanon.'"[113] Both agreements assigned responsibility for refugee status determination to UNHCR.[114]

A structural flaw in these agreements is that the parties lack the actual capacity to deliver on their substantive commitments. The Jordanian and Lebanese MOUs give force to the transit country concept by imposing strict time limits on refugees' residence, six months in the case of Jordan [115] and 12 months in Lebanon.[116] Because of the strict time limits, UNHCR agreed with both counties to "endeavour" [117] to seek a durable solution elsewhere. The prescribed timelines create a significant protection gap since only in exceptional cases is UNHCR able to resettle a refugee within one year of her arrival.

Even if the time limits were extended, UNHCR has no authority to force resettlement countries to accept refugees. UNHCR's MOU with Jordan restricted the civil and political rights of refugees, and created a peculiar connection between refugees' political activities and UNHCR's resettlement criteria. Article 4 imposed on refugees and asylum-seekers a "duty" to not embarrass government on its relations with other countries or giving interviews to the media. In the case of violation UNHCR would endeavour to resettle recognized refugees.[118] One should question whether UNHCR has the legal authority to trade on refugees' civil and political rights by signing onto such restrictions.

---

[107] Memorandum of Understanding between the Government of Jordan and UNHCR, (5 April 1998), online: http://www.unhcr.org/refworld/docid/3ae6b31920.html [accessed 30 September 2009].

[108] Letter of understanding between the government of the Hashemite Kingdom of Jordan and the Office of the United Nations High Commission for Refugees, 2222 UNTS 213-216.

[109] Memorandum of Understanding between the Directorate of the General Security (Republic of Lebanon) and the Regional Office of the UN High Commissioner for Refugees, Concerning the processing of cases of asylum-seekers applying for refugee status with the UNHCR Office, 9 September 2003.

[110] Memorandum (Jordan), above n. 107, article 5.

[111] Memorandum (Lebanon), above n. 109, Preamble.

[112] Memorandum (Jordan), above n. 107, article 1.

[113] Memorandum (Lebanon), above n. 109, Preamble (internal punctuation original).

[114] Memorandum (Jordan), above n. 107, article 2(2), 3; Memorandum (Lebanon), above n. 109, article 8.

[115] Memorandum (Jordan), above n. 107,, article 5.

[116] Memorandum (Lebanon), above n. 109, articles 5 and 9. The MOU provides for an initial 3 month visa for asylum-seekers, then 6 months for recognized refugees, extendable by another three months.

[117] Memorandum (Jordan), above n. 107.

[118] Ibid., article 4.

Despite these limitations, the MOUs contain some substantial advances for refugee rights in countries that have not ratified the Refugee Convention. The Jordanian government agreed to abide by the principle of *non-refoulement*,[119] and both the Jordanian and Lebanese agreements guaranteed that UNHCR would be able to conduct RSD with asylum-seekers who entered the country illegally.[120] In Lebanon, the government promised to notify UNHCR about detention of asylum-seekers,[121] though there was no provision actually regulating when they can be detained and no ironclad guarantee that UNHCR would actually be able to access them.[122]

In all these MOUs, responsibility for most social and economic concerns was assigned to UNHCR, though the Jordanian government agreed in vague terms to also play a role. In Jordan UNHCR agreed to take responsibility for assistance to refugees to "needy refugees."[123] For Iraqis in 2003, the government agreed to take "responsibility for admission and immigration procedures, in accordance with the principle of *non-refoulement*,"[124] and for registration of refugees.[125]

Somewhat ambiguously, Jordan agreed to "support" healthcare for Iraqi refugees through national institutions,[126] but UNHCR agreed to seek international aid "to assist in the provision of" health, education and other social services for Iraqis.[127] This formulation left the precise division of labour between the government and UN somewhat ambiguous, with the exception of food assistance, for which the World Food Programme was assigned primary responsibility.[128] In Lebanon the division of labour was more black and white: "UNHCR provides … the necessary assistance to refugee holding temporary circulation permits …in order to avoid that those refugees be forced to violate the national laws or constitute a burden on the Lebanese Government.[129]

The case of Iraq

The willingness of Arab states to host large numbers of refugees with limited rights has been illustrated by their response to the Iraqi refugee crisis since 2003. The Iraq response has been highlighted as a testing ground for UNHCR's new approach to protecting and assisting urban refugees,[131] and has been thoroughly profiled elsewhere.[132] In general, UNHCR's experience has been regarded as a relative success, in that protection space

---

[119] Ibid., article 2.
[120] Ibid., article 3.
[121] Memorandum (Lebanon), above n. 109,article 12.
[122] Cf. Ibid., article 13.
[123] Memorandum (Jordan), above n. 107, article 11.
[124] Letter, above n. 108, article 3(1.5).
[125] Memorandum (Jordan), above n. 107, article 3(1.6).
[126] Ibid., article 3(1.10).
[127] Ibid., article 3(2).
[128] Ibid., article 3(2.1).
[129] Memorandum (Lebanon), above n. 109, article 14.
[131] See generally, Crisp et al, above n. 60.
[132] Ibid.; *see also* Barnes, above n. 9.

was expanded beyond early expectations,[133] especially in view of the fact that the key host states are not parties to the Refugee Convention and are opposed to local integration of refugees.[134]

Although governments did open some services to refugees in the fields of education and health,[135] the response to the Iraqi refugee crisis was in others ways to strengthen the pre-existing UNHCR surrogate state. UNHCR experimented with new means of directly delivering food and monetary assistance to needy refugees[136] and carried out reception and registration.[137]

Whether services were delivered by governments or UNHCR, much of this success has been attributed to the high interest of donors and resettlement states in the Iraqi refugee issue, allowing UNHCR to mobilize considerable resources for responsibility sharing.[138] This is consistent with the "grand compromise" of global refugee policy that we have already seen. In fact, the Iraq crisis might have been the best possible scenario for the grand compromise to work. As a UNHCR-PDES study warned, "With donor support now likely to decline, UNHCR will be confronted with some hard questions with regard to the sustainability of the programme and the need to prioritize some activities while reducing or phasing out others."[139]

It is important to remember that the Iraq operation has been a *relative* success. Iraqi refugees have not in general been granted the right to work, and thus survive through informal economic means.[140] Their legal status and security are not stable, and there have been reports of deportations.[141] Although Arab host states could certainly have treated Iraqi refugees more harshly, the lack of local integration leaves the refugees "very much in limbo,"[142] without a durable solution. Only general improvements on the ground in Iraq offer some hope that this will not become a large scale protracted refugee situation similar to what Sudanese, Somalis and Palestinians have experienced in the Middle East.

The PDES report recommended that UNHCR continue to seek incremental improvements in protection space, guided by a rights-based, holistic and community-oriented concept of refugee protection.[143] But it also suggested that UNHCR needs a more robust strategy "to lead and coordinate international action" for refugees, with particular attention sharing responsibility.[144] To develop such a strategy, UNHCR will need to develop a coherent

---

[133] Crisp, et al, above 60, 15-16, para 54.

[134] Ibid., 16, para. 56.

[135] For instance, with UNHCR financial contributions Syria and Lebanon opened schools to Iraqi children. Ibid., 40, paras. 183-184. Iraqi refugees also had access to health clinics on a basis similar to nationals in Jordan and Lebanon. Ibid., 39 paras. 177-178.

[136] Ibid., 36-37.

[137] Ibid., 21-23.

[138] Ibid., 16, paras. 57-59.

[139] Ibid., 41, paras 190-191.

[140] Ibid., 17 para 65. See also Barnes, above n. 9, 21.

[141] Ibid., paras. 62, 66.

[142] Ibid., 17 para. 65.

[143] Ibid., 19 para. 74-75.

[144] Ibid., 19, paras. 77-78.

approach to the responsibility shift dilemma. If it is not possible to ask host states to take on all responsibility for refugee protection, what responsibilities can be shared with UNHCR, and what responsibilities cannot?

The limits of the surrogate state

A UNHCR surrogate state is not a complete substitute for an actual state, in large part because UNHCR ultimately has limited power to restrain a government determined to do ill to refugees. A vivid example of this occurred a decade ago in Lebanon, when UNHCR conducted refugee status determination and the Lebanese authorities simply refused to give any significance to UNHCR's RSD decisions, detaining and deporting hundreds of refugees and asylum-seekers.[145]

More recently, Lebanon has presented a more complex scenario. On the one hand, Lebanon's ministries of education and heath have opened school and hospital places to refugees,[146] a relatively rare example of a state extending protection of positive liberties to refugees. Yet protection of negative liberties remains deeply problematic. UNHCR recently reported that long term detention of refugees, including children, are continuing concerns in Lebanon. [147]

Another ominous warning about the limitations of responsibility shift may be recent changes in Egyptian practice toward refugees and asylum-seekers. Over five decades Egypt built a solid record of observing the principle of *non-refoulement* by respecting UNHCR's decisions in refugee status determination, while also deferring to UNHCR responsibility for refugees' social welfare. But in recent years this arrangement in Egypt was disrupted. In 2004 UNHCR suspended refugee status determination for most Sudanese in Egypt in favour of temporary protection,[148] and moved away from large scale resettlement "leaving many refugees disappointed."[149] This led to immediate refugee protests in 2004, and the reported arrests of 23 demonstrators. The following year several months of much larger mass demonstrations outside UNHCR's offices at Mustafa Mahmoud Square in Cairo culminated in the deaths of 27 people (around half of them children) when Egyptian police used force to break up the protest camp.[150]

In 2007, a new smuggling route from the Horn of Africa to Israel came to prominence, with hundreds and then thousands of Eritreans and then other Africans entering Egypt

---

[145] Kagan, above n. 105, at 6.
[146] UNHCR (April 2010) 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report,' Universal Periodic Review: The Republic of Lebanon, 2.
[147] Ibid.
[148] See Hilal and Samy, above n. 57, 38.
[149] K. F. Afeef (2009) 'A promised land for refugees? Asylum and migration in Israel,' New Issues in Refugee Research, Research Paper No. 183, 9.
[150] For an accounting of theses events, *see* F. Azzam (2006) 'A Tragedy of Failures and False Expectations: Report on the Events Surrounding the Three-Month Sit-In and Forced Removal of Sudanese Refugees in Cairo, September-December 2005,' The American University in Cairo, Forced Migration and Refugee Studies Program (June 2006).

illegally intending to transit through the Sinai border to Israel. This raised the political costs for the Egyptian Government to host refugees because they now posed a threat to Egypt's ability to control its borders, and were suddenly a significant irritant in Egypt's most sensitive foreign policy theatre. In summer 2007 Egyptian forces began to shoot migrants on the Sinai border with Israel, leading to the death of dozens over the ensuing two years. Egypt also began to block UNHCR's access to asylum-seekers in detention, especially if they had entered the country illegally, and in 2008 deported Eritreans *en masse*.[151]

The right to a livelihood raises a particular sticking point in countries practicing responsibility shift. While other social and economic rights (healthcare, education, etc.) are typical positive liberties calling for services to be provided to refugees, the right to earn an income is actually a negative one - the right to engage in wage-earning employment or entrepreneurship without state interference. The UN Development Programme has said: "Beyond continuing insecurity, trying to earn a decent income is the single greatest challenge that displaced people encounter, especially where they lack identity papers."[152] A recent UNHCR publication reported that of 214 countries surveyed, only 37 percent fully met international standards in protecting refugees' right to work, and 32 percent of countries do not even partially meet international law standards.[153]

Merely issuing identity papers and residence permits to refugees (which is routinely done in several Arab states) does not on its own open legal avenues of employment. In Egypt, refugees' residence permits do not bear the critical phrase "work is permitted" that is used on other foreigner's work permits. A survey of 252 refugees in Egypt in 2003 found that 56 percent "stated that the main problem they encounter when looking for a job is the impossibility for them to obtain a work permit," more than double the number citing lack of skills, cultural or language obstacles, or even general shortage of jobs.[154]

Restrictions on refugees' right to work impose far greater burdens on nutrition and cash assistance programs to alleviate extreme poverty, and also add pressure to resettle more refugees for lack of local integration prospects. But this is precisely why restricting refugees' right to work makes sense for host governments. If refugees are able to support themselves, it will appear that they are on the road to integration, which is opposed by host governments that want the international community to share the costs of hosting refugees. While it seems logical that scarce resources should be targeted at the most vulnerable, host governments that want to attract the same resources have an incentive to make the refugees on their territory as vulnerable as possible.

In a region where states have limited commitment to refugees, priority must be on their willingness to recognize their right to basic security. UNHCR could, resources

---

[151] See generally Human Rights Watch (2008) *Sinai Perils:Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel.*

[152] UNDP, 'Human Development Report 2009: Overcoming Barriers: Human Mobility and Development,' 63.

[153] UNHCR (2009) 'Designing appropriate intervention in urban settings: Health, education, livelihoods, and registration for urban refugees and returnees,' 18.

[154] UNHCR Regional Office (Cairo) (2003) *Refugee Self-Reliance in Cairo: Obstacles and Prospects,* 50.

permitting, substitute for many of the functions of education and health ministries. But it cannot free refugee children from detention if security agencies, prosecutors and courts refuse to do so. Being explicit and clear about the responsibilities that UNHCR can and cannot take on is essential.

Amending the paradigm: shared responsibility

A UNHCR study of the agency's response to the Iraqi refugee crisis contains a succinct expression of the basic strategic dilemma which UNHCR faces in Arab states in the Middle East. "In the words of a senior UNHCR staff member, 'We were right when we decided against any attempt to impose the full refugee regime on the Iraqi refugee situation, but we have gone as far as possible with the 'tolerance regime.'"[155]

The prevailing current answer to this dilemma is to re-focus on host state responsibility. In its new policy on urban refugee protection, UNHCR has sought to simultaneously lower expectations about what UNHCR can accomplish on its own[156] while re-emphasizing the role of host governments.[157] In addition to resisting the creation of parallel social welfare systems for refugees, UNHCR "ideally" seeks to supplement state services to refugees only for a "limited time" until they can be including in national systems.[158]

The problem with this approach is that it does little more than state an objective, without proposing a strategy by which to achieve it. It has not been my purpose in this paper to dispute the objective of states taking responsibility for hosting and ultimately providing genuine asylum to refugees. But merely stating the ideal does not make it a reality.

Given the structural political incentives for states that lead to responsibility shift to begin with, it is difficult to conceive of how it can be reversed absent some substantial strategic shift. In the Middle East, one would have to find a way to persuade governments to turn away from the longstanding ideological opposition to integration of outsiders, a task made more difficult by the powerful ideological opposition to integration of Palestinians.

Certainly any viable strategy would have to involve the cooperation of donor states, but the international pressure would need to be considerable. At a minimum, donors would need to insist on including refugees in development programs as a condition for receiving development aid at all, so that Arab host governments would not perceive a gain for their own citizens in marginalizing refugees.

There is reason for scepticism about whether donor states would prioritize refugee welfare enough to place this kind of pressure on host governments,[159] and reason for

---

[155] Ibid., 18. For a similar commentary, see Hilal and Samy, above n. 57, 70.

[156] UNHCR, above n. 6, 3 para. 12.

[157] Ibid., 6 para. 27.

[158] Ibid. para. 29. For a stronger articulation of this ideal, *see* De Lorenzo, above n. 52.

[159] K. Grabska (July 2006) *Who Asked Them Anyway? Rights, Policies, and Well-Being of Refugees in Egypt*, Forced Migration and Refugee Studies, The American University in Cairo, 87.

worry that even if donors followed this path host governments might still resist for ideological reasons. Donors would also have to overcome resentment that they generally take on small refugee hosting burdens than many Arab states. As we have seen in Lebanon, even when donor assistance opens doors to state-provided health and education, refugees can still be in grave danger of detention and *refoulement*. The risks are clear: refugees might be abandoned entirely.

The primary analytical tools of refugee law are state-centric, making it difficult to perceive state-to-UN responsibility shift as anything but an anomaly. Formal international law often highlights a stalemate between the principled recognition of rights and norms and strong state sovereignty that makes norms difficult to impose or enforce directly.[160] But despite this paradox, there is possibly more adaptability built in to the international system than meets the eye. There is already sufficient flexibility built into UNHCR's mandate to allow for a departure from the premise that states alone must deliver refugee protection in all circumstances.[161]

As UNHCR's Director of International Protection Services has said, UNHCR's mandate is built on a "clear international consensus that states cannot manage or resolve forced displacement or statelessness problems unilaterally and in isolation from each other."[162] He noted that UNHCR's frontline protection work "is a unique feature in international law: an international institution interceding directly on behalf of distinct individuals and groups of people."[163]

My goal here is to point toward a more pragmatic strategy, without compromising on the rights that refugees should enjoy, based on the philosophy that legal form should follow protection function. The assignment of responsibility for protecting rights should be to the institution best positioned to carry out the duty. As a default rule, the state should usually be responsible because in the international arena states are presumed to have the clearest ability and authority to act. But there are situations where either state capacity is lacking, or political constraints lead governments to be unwilling to use it. In these situations, the United Nations may be best able to promote the protection of refugees by taking on *some* of the responsibility for refugee protection.

As Sir Brian Urquhart wrote recently in *The New York Review of Books*, "What is needed now is not to abolish national sovereignty but to reconcile it with the demands of human survival and decency in the astonishingly dangerous world we have absentmindedly created."[164] This adaptation is possible because while governments remain stubbornly

---

[160] See R. B. Bilder (2000) 'Beyond Compliance: Helping Nations Cooperate," in Dina Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford), pp. 65-73, 65-66 (arguing that international law usually cannot be imposed on states, and the goal should be "helping nations cooperate rather than simply making them behave.").

[161] Turk, above n. 3, 3-4, 8.

[162] Ibid., 3.

[163] Ibid., 3.

[164] B. Urquhart (27 May 2010) 'Finding the Hidden UN,' *The New York Review of Books* 26, 28 available online at http://al.odu.edu/mun/docs/Article_NYbookreview_27_May_2010.pdf (last checked July 19, 2010).

committed to narrow national interest at the primary basis for state action,[165] sovereignty as a concept has proven to be a dynamic concept that can evolve as national interests demand.[166] States are able to find advantage in shifting functions to international agencies, without compromising on their ultimate independence. Responsibility shift represents a means of enhancing global cooperation.

When parallel structures are the most effective means to achieve functional rights for refugees, UNHCR need not apologize for them. There are some things that only states can do, but there are nevertheless some critical components of refugee protection that UNHCR often performs better than many governments.[167] Rather than continue to insist on pure state responsibility as a policy for all situations, it might be better to build on the positive/negative liberties distinction that is in evidence in most responsibility shift situations. Wherever direct resources or active implementation are required, the UN would take primary responsibility, by operating health programs, paying for schools, or carrying out refugee status determination. Negative liberties, which depend on restraining state action, would be a state responsibility for the simple reason that these areas of protection cannot be transferred.

When responsibility shift is deeply rooted, the goal should be to identify the bare minimum that must be asked of states in order to functionally realize refugees' security, social and economic rights, and to develop incentives for states to do these things, and only these things. The UN would take responsibility for all other areas of refugee protection. But to be a viable foundation for refugee protection, responsibility shift would need to be *de jure*, not *de facto*.

The division of labour between states and the UN would need to be explicit, and the UN would need to address its own internal accountability gaps so that it administers services consistent with norms of due process. This might be accomplished by pushing for stronger MOUs with host governments, in which UNHCR more directly agrees to take on certain responsibilities for refugees, in exchange for firmer commitments from governments.Table 1: Dividing Roles between UNHCR and States

Roles that can shift to UNHCR if necessary	Roles that require state action
Health services	Non-refoulement
Education*	Freedom for arbitrary detention

[165] Weiss, above n. 35, 21.

[166] Ibid., 21.

[167] RSDWatch.org (24 July 2008), 'Statistics show UNHCR more likely to protect asylum-seekers than most governments,' available online at http://rsdwatch.wordpress.com/2008/07/24/statistics-show-unhcr-more-likely-to-protect-asylum-seekers-than-most-governments/; RSDWatch.org (15 July 2009), 'UNHCR's recognition rate: Relatively high overall, but inconsistent up close,' available online at http://rsdwatch.wordpress.com/2009/07/15/unhcrs-recognition-rate-relatively-high-overall-but-inconsistent-up-close/

Roles that can shift to UNHCR if necessary	Roles that require state action
Monetary and nutritional assistance	Protecting the right to work
Other social services	Police functions and physical security
Refugee status determination and registration**	

* It is preferable for refugee children to be integrated with non-refugees in schools, which could be accomplished by UNHCR paying school fees. However, if this inclusive approach is blocked, it is preferable for refugee children to attend separate schools rather than none at all.

** UNHCR can perform these roles if the state agrees to recognize UNHCR's decisions, in order to protect from refoulement and arbitrary detention.

In many respects, what is outlined here is what UNHCR already does on the ground. In a sense, what I am advocating is less a change in practice than a change in norms, based on the premise that for refugees, real functional access to the normative rights established by law is much more important than the state v. UN division of labour. Excessive focus on state responsibility puts UNHCR on the defensive in seeking support (i.e. donor contributions) for parallel structures, when stated policy calls for building up host government capacities. But in the end it matters much more whether a refugee has access to a doctor than whether that doctor is employed by a government or the UN.

Even if it is less than ideal, state-to-UN responsibility shift has in many ways been a successful example of global governance. The UN surrogate state has increased international cooperation and navigated political minefields so as to produce a much more humane outcome for refugees than might otherwise have occurred in many countries.

Conclusion

In sum, responsibility shift exists because it addresses political interests of states, both in terms of material benefits and symbolic benefits. It serves material resource interests because responsibility shift is a means by which states in the south manage to deflect the material burdens of hosting refugees onto northern donor states without any formalized system by which to achieve meaningful international burden sharing. On a symbolic level, responsibility shift helps states that politically could not accept full integration of refugees to nevertheless tolerate their long term presence. It also can help reduce the political costs for a host state in external relations, in that the host government is freed from making key decisions about a refugee population that may be a source of political sensitivity with a neighbouring state.

These state interests are reflections of the imperfect world in which we live, but must be taken seriously. Calling for states to re-assume their responsibilities for refugee protection is essentially a search for a total cure for a serious disease. If this is achievable, it should of course be pursued. But the problem is that not every disease is curable, and even treatable diseases are not curable for every patient. If this is the case for responsibility shift in some countries, then refugee protection should be based on a strategy akin to disease management.

These critical functions have come about through a largely *ad hoc* process in which responsibility shift has been treated as an anomaly. My argument is that it might be more fruitful to legitimize the UNHCR surrogate state as an effective strategy to promote protection, to seek out more effective means to channel the underlying state interests into wider protection of refugee rights, and to be more clear about the responsibilities that can and cannot be assigned to UNHCR.

The UN surrogate state can be a good thing, and in some cases it should be strengthened. When it is the path of least resistance to realizing refugee rights, responsibility shift should be considered a legitimate protection strategy. But in so doing, UNHCR's actual responsibilities must be clearly defined and limited, so that there is no implication that UNHCR can remedy all problems on its own. For those things that UNHCR can control, it should be accountable and due process should apply. But for matters beyond its capacities, there should be clarity that responsibility lies with the state.