

ARTICLE

THE UN “SURROGATE STATE” AND THE FOUNDATION OF
REFUGEE POLICY IN THE MIDDLE EAST*Michael Kagan**

ABSTRACT

Many challenges surrounding refugee protection relate to a de facto shift of responsibility from sovereign governments to the UN Refugee Agency (UNHCR) to directly administer refugee policy. This phenomenon is legally anomalous, and it is UNHCR policy to avoid the operation of such “parallel structures.” Yet the existence of a UN “surrogate state” offers important advantages to some host governments, which makes state-to-UNHCR responsibility shift difficult to reverse. Using the Arab Middle East as a case study, this article argues that, while not ideal, UNHCR’s state substitution role offers important symbolic and material benefits to governments that host refugees and should not always be treated as an anomaly. Addressing challenges inherent in state-to-UN responsibility shift will be a key task if any government in the wake of the Arab Spring seeks to improve its system of refugee reception and protection. Responsibility shift can sometimes offer a more viable political foundation for refugee protection than conventional notions of state responsibility.

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INTRODUCTION

Many gaps in the protection of refugees relate to a de facto transfer of responsibility for managing refugee policy from sovereign states to United Nations (UN) agencies. This phenomenon can be seen in dozens of countries throughout 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. As other writers have observed, when the UN carries out these roles, it acts to a great extent as a “surrogate state”¹ or a “blue state”² performing a “state substitution role,”³ but without the capacity to fully substitute for a host government.⁴ Such situations have been labeled “legal

¹ Amy Slaughter & Jeff Crisp, *A surrogate state? The role of UNHCR in protracted refugee situations*, in UNITED NATIONS, PROTRACTED REFUGEE SITUATIONS 123 (Gil Loescher et al. eds., 2008).

² Riccardo Bocco, *UNRWA and the Palestinian Refugees: A History within a History*, 28 REFUGEE SURV. Q. 229, 234 (2010) (describing UNRWA as a “blue state” performing a “quasi-state function” for Palestinian refugees).

³ Volker Turk, Dir. of Int’l Protection for UNHCR, UNHCR’s Role in Supervising Int’l Prot. Standards in the Context of its Mandate, Keynote Address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto (May 17-20, 2010) (transcript available at <http://www.unhcr.org/4bf406a56.html>).

⁴ Volker Turk & Elizabeth Eyster, *Strengthening Accountability in UNHCR*, 22 INT’L J. OF REFUGEE L. 159, 163 (2010).

anomalies,”⁵ and it is UNHCR policy to avoid the operation of such “parallel services.”⁶ Yet, such parallel services continue to be widespread. Addressing these challenges will be a key task if any government in the wake of the Arab Spring seeks to improve its system of refugee reception and protection,⁷ and may be essential to reverse a trend toward violence against forced migrants in the Middle East and North Africa (MENA) region.⁸

The primary solution offered to date, endorsed by both UNHCR and some of its sharpest critics, has been to refocus attention on the primacy of state responsibility. A refugee protection strategy focused on getting host governments to replace the UN surrogate state, however, is not likely to be practically or politically viable in many countries. Using Arab states in the Middle East⁹ as a focal point, I wish to propose an alternative approach for building a political foundation for refugee rights. The argument offered is that the existence of a UN surrogate state provides important advantages to some host governments and can sometimes become a more viable political foundation for refugee protection than conventional notions of state responsibility. Although unsettling to traditional assumptions about state responsibility, there are good reasons to seek such alternative strategies which may increase the political will of governments to protect refugees in the global south.

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

⁵ Guglielmo Verdirame, *Human Rights and Refugees: The Case of Kenya*, 12 J. REFUGEE STUD. 54 (1999).

⁶ UNHCR, Policy on Refugee Protection and Solutions in Urban Areas, ¶ 113 (2009), <http://www.unhcr.org/refworld/docid/4ab8e7f72.html> [hereinafter Policy on Refugee Protection and Solutions in Urban Areas] (“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.”).

⁷ See, e.g., Melissa Fleming, *UNHCR chief applauds Egypt, calls for humanitarian access to Libya*, UNHCR (Apr. 1, 2011), <http://www.unhcr.org/4d95c3239.html> (last visited Apr. 24, 2011) (UN High Commissioner for Refugees (UNHCR) António Guterres expressed hope for “a new beginning for refugee protection in Egypt.”).

⁸ See Cynthia Johnston, *Violence at Egypt border points to migration shifts*, REUTERS (July 30, 2009), <http://www.reuters.com/article/2009/07/30/idUSLS359973> (illustrating violence against forced migrants in Egypt); U.S. DEPT. OF STATE, *2010 Human Rights Report: Egypt* (Apr. 8, 2011), available at <http://www.state.gov/documents/organization/160456.pdf>.

⁹ The Middle East is not a precisely defined region, though in this paper I am focusing on the region southeast of Europe, north of Sudan and east of Iran. I am excluding Israel and Turkey, since they do not have Arab governments. I am also not addressing the states of the Maghreb (Morocco, Tunisia, and Algeria) where the politics on refugees may differ.

to produce disappointment and failure.¹⁰ UNHCR in particular has expressed concern that urban refugees sometimes develop “unrealistic expectations” for the protection outcomes that UNHCR will actually be able to deliver.¹¹ Nevertheless, absent a strategic change in the incentives for host governments, reversing the responsibility shift phenomenon would not be an easy feat to achieve. Moreover, there are many aspects of refugee protection that the UN can deliver effectively, and sometimes with more high quality service and responsiveness, than many governments. The UN’s refugee agencies should develop their capacity to accept such shifts of responsibility strategically and to use them as opportunities to advance refugee protection. Responsibility shift, when used, must be limited and defined in scope so that the lines of accountability are clear, and the expectations realistic.

This Article begins with an overview of the origins of responsibility shift and offers observations about some of the debates and critiques that have developed around the issue. I then develop a theory about the role of the UN surrogate state in the refugee policy of Arab states, connecting recent scholarship about citizenship in the Arab world with historical assessments about the emergence of responsibility shift in the early days of the Palestinian refugee crisis after 1948. Lastly, I highlight some of the major limitations on the UN as a substitute for state-based responsibility and propose ways in which UNHCR can more effectively use limited responsibility shift as a refugee protection strategy.

I. THE ORIGINS OF RESPONSIBILITY SHIFT

The responsibility shift phenomenon grows from a basic inequality between the “global north” and “global south.” In general, developed nations of the northern hemisphere accept relatively small asylum burdens while most refugees largely remain in developing countries of the southern hemisphere.¹² As Amy Slaughter and Jeff Crisp explain, many 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.”¹³ This is a daunting challenge, since third country resettlement is accessible to only a small minority of the world’s refugees, and governments increasingly view forced migration as a threat which needs to be contained.¹⁴

¹⁰ Policy on Refugee Protection and Solutions in Urban Areas, *supra* note 6, at 14-15, ¶ 84.

¹¹ *Id.*

¹² Mariano Florentino Cuellar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT’L L. 583, 622 (2006).

¹³ Slaughter & Crisp, *supra* note 1, at 128.

¹⁴ *Id.* at 126.

The implementation of international refugee law has been heavily shaped by this basic north-south tension. As James C. Hathaway 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.”¹⁵ The stalemate that results from the north-south gap has been bridged, to some extent at least, by what Mariano-Florentino Cuellar calls the “grand compromise” of global refugee policy,¹⁶ 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 traditional northern donor states a channel by which to funnel monetary assistance, while simultaneously helping host governments in the south keep refugees from imposing untenable burdens on their own societies.¹⁷

The presence of a UN surrogate state, however, tends to complement a tendency to see refugees as a problem to be managed rather than as people with rights.¹⁸ When host governments deflect the burden of caring for refugee populations onto international actors, they weaken the normal connection between territorial sovereignty and state responsibility for people who are present in 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 the provision of security.¹⁹

At the same time, UNHCR and partner humanitarian agencies assume effective responsibility for delivering direct assistance to refugees.²⁰ UNHCR in the south often takes over unnatural roles “in order to fill gaps in the international refugee regime,”²¹ and thus slow the downward spiral of refugee protection that would have otherwise occurred. It should be noted

¹⁵ James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L. J. 129, 133 (1990); see also Anne Evans Barnes, *Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan and Lebanon*, in NEW ISSUES IN REFUGEE RESEARCH (UNHCR) (“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.”).

¹⁶ Cuellar, *supra* note 12, at 622.

¹⁷ *Id.* at 659.

¹⁸ James C. Hathaway, *Forced Migration Studies: Could We Agree to Just ‘Date’?*, 20 J. REFUGEE STUD. 349, 350 (2007).

¹⁹ Slaughter & Crisp, *supra* note 1, at 124.

²⁰ *Id.*

²¹ *Id.* at 123.

that while responsibility shift does not take hold everywhere in the global south,²² it has become nearly universal throughout the Middle East.

While the precise division of labor between states and the UN varies from country to country, the general pattern of responsibility shift loosely fits the classic distinction between positive and negative liberties. Negative liberties are defined by the absence of something, most typically, a person's autonomy free of interference from the state.²³ 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, 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 the impact of restrictive immigration policies through a policy of benign neglect. By contrast, positive liberty requires the presence of something,²⁴ typically founded on the understanding that to enjoy genuine autonomy a person needs to have certain things, typically involving either the provision of a service or the distribution of goods so as to overcome material inequality.²⁵ The heavy burden of addressing refugees' positive liberties typically falls to UNHCR and its partners who carry out 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 division of labor in these contexts, refugees learn to expect very little from the host government and a great deal from the UN. In many situations, refugees come to prefer UNHCR over host governments as their protector, orienting their aspirations toward third country resettlement—primarily, to the United States, Canada, and Australia.²⁶ For instance, Katarzyna Grabska has quoted refugees in Egypt as saying, "We live in a country of UNHCR."²⁷

²² 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.

²³ IAN CARTER, *Positive and Negative Liberty*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2012 ed. Mar. 5, 2012), available at <http://plato.stanford.edu/archives/spr2012/entries/liberty-positive-negative/>.

²⁴ *Id.*

²⁵ See LAWRENCE CROCKER, POSITIVE LIBERTY 2 (1980).

²⁶ Slaughter & Crisp, *supra* note 1, at 132.

²⁷ Katarzyna Grabska, *Brothers or Poor Cousins? Rights, Policies and the Well-being of Refugees in Egypt*, in FORCED DISPLACEMENT: WHY RIGHTS MATTER 71, 87 (Katarzyna Grabska & Lyla Mehta eds., 2008).

Palestinian refugees in the Middle East are the paradigmatic example of this phenomenon, with a national narrative that resists *tawtin* (local integration) and argues that the UN has special responsibility to care for them.²⁸ But this view 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.²⁹ Refugees may also resist local integration because there remains a tense relationship with the host population or in order to maintain national identity in exile.³⁰

II. CRITICISM AND CONSENSUS

Conventional notions of state responsibility render accountability relatively straightforward so long as sovereign states take a paramount role in providing support. But when UNHCR acts like a surrogate state, it becomes less clear which entity is ultimately practically 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.³¹ 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.³²

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”³³ for violating refugee rights.³⁴ Such criticisms

²⁸ See generally Michael Kagan, *The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East*, 22 J. REFUGEE STUD. 417 (2009).

²⁹ Slaughter & Crisp, *supra* note 1, at 135; see also Jeff Crisp, *No solutions in sight: The problem of protracted refugee situations in Africa*, in NEW ISSUES IN REFUGEE RESEARCH 5-6 (UNHCR).

³⁰ Slaughter & Crisp, *supra* note 1, at 136.

³¹ See *D. v. Turkey*, App. No. 24245/03, Eur. Ct. H.R. (June 22, 2006).

³² Katarzyna Grabska & Lyla Mehta, *The Politics of Rights*, in FORCED DISPLACEMENT: WHY RIGHTS MATTER 71, 87 (Katarzyna Grabska & Lyla Mehta eds., 2008).

³³ Albie Sachs, *Forward to BARBARA HARRELL-BOND & GUGLIELMO VERDIRAME, RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM*, at ix (2005).

³⁴ I have made criticisms of UNHCR for violating due process rights in refugee status determination (RSD), though these critiques are less sweeping than those of other writers discussed here. See, e.g., Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT’L J. REFUGEE L. 1 (2006).

sharpened with the 2005 publication of former High Commissioner Sadako Ogata's book, *The Turbulent Decade*.³⁵ One group of commentators, notably comprised of Barbara Harrell-Bond,³⁶ Guglielmo Verdirame,³⁷ Zachary Lomo³⁸ and Jacob Stevens,³⁹ 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,⁴⁰ and that UNHCR thus seeks to "control" refugees so as to benefit and perpetuate itself.⁴¹

One reason why some critics place primary blame on the UN for the creation of the UN surrogate state is a deeply embedded assumption that entities always seek greater power for themselves. Many post-colonial countries have been zealous in guarding the traditional concept of state sovereignty over aspirations for global cooperation.⁴² As a result, if functions normally assigned to sovereign states shift from these states to the UN, one could easily assume that self-interested UN agencies must have seized greater turf for themselves at the expense of weak host governments. Appearances on the ground can often feed this view. In large refugee settlements in Africa, Asia, and the Middle East, one can find a humanitarian infrastructure dwarfing local government, dominated by international agencies based in the West, funded mainly by Western states, and led by international staff. This gives refugee policy an air of neo-colonialism;⁴³ this can unfortunately further encourage criticism of the UN for pushing

³⁵ Sadako Ogata, *The Turbulent Decade: Confronting the Refugee Crises of the 1990s* (2005).

³⁶ See generally BARBARA HARRELL-BOND & GUGLIELMO VERDIRAME, *RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM* (2005).

³⁷ *Id.*

³⁸ Zachary Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT'L L. 268 (2000).

³⁹ Jacob Stevens, *Prisons of the Stateless*, 42 NEW LEFT REVIEW (2006), available at <http://www.newleftreview.org/?view=2644> (last visited Sept. 27, 2009).

⁴⁰ *Id.*; Harrell-Bond & Verdirame, *supra* note 36, at 34, 272.

⁴¹ Harrell-Bond & Verdirame, *supra* note 36, at 288.

⁴² THOMAS G. WEISS, *WHAT'S WRONG WITH THE UNITED NATIONS AND HOW TO FIX IT* 20, 22 (2009).

⁴³ Cf. Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 344 (discussing the idea that the IMF and World Bank "represent neocolonial measures by the West to maintain its hegemony over the developing world" by using control of financial resources to take economic and political control).

sovereign governments aside and perpetuating such inequitable power dynamics in host countries.

Many of the critics’ specific allegations about UNHCR in the Ogata era have been pointedly contested.⁴⁴ But for present purposes, it is the provocative macro-critique that UNHCR wants to take power away from states that deserves some attention. By focusing on UNHCR’s allegedly self-interested motivations, this group of critics tends to deemphasize host governments as decisive actors in shaping refugee policy in the geopolitical south. This allows for the assumption that governments follow UNHCR’s direction⁴⁵ and thus the conclusion that UNHCR is the primary cause of protection failures.

The implicit assumption that a sovereign state would not want a UN agency to usurp its authority is, in some cases, lacking in a nuanced analysis of practical facts on the ground. 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.⁴⁶ In particular, the responsibility shift phenomenon may be best understood by extending an analysis recently developed by Thomas Weiss. Weiss argues that in the twenty-first 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,”⁴⁷ –yet states continue to be reluctant to surrender their sovereignty.⁴⁸

The UN is not monolithic, and the diversity of institutions that fall under its umbrella helps, to some extent, to respond to this challenge. 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 intergovernmental secretariats and agencies.⁴⁹ It is not at all surprising that a state might fiercely resist surrendering any sovereign prerogatives to “first UN” bodies like the Security Council, but a state might find it advantageous to shift some

⁴⁴ See Nicholas Morris, *Prisons of the Stateless: A response to New Left Review*, in NEW ISSUES IN REFUGEE RESEARCH (UNHCR).

⁴⁵ See, e.g., Harrell-Bond & Verdirame, *supra* note 28, at 335-38 (arguing that local integration received too little attention in Kenya and Uganda because UNHCR and its donors were dedicated to encampment and repatriation); Lomo, *supra* note 38, at 282 (arguing that Kenya confined refugees to camps because UNHCR made this a condition for receiving aid).

⁴⁶ See THOMAS G. WEISS & RAMESH THAKUR, *GLOBAL GOVERNANCE AND THE UN: AN UNFINISHED JOURNEY* 6 (2010).

⁴⁷ Weiss, *supra* note 42, at 4.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 8. The concept of a first and second UN is originally traced to Inis Claude Jr. See INIS CLAUDE JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROSPECTS OF INTERNATIONAL ORGANIZATION* (1956).

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 operated to partially bridge the gap between the need for global cooperation and the continued preeminence 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 definition of a refugee. Formally labeling more migrants as “refugees” facilitates state-to-UN responsibility shift since refugees fall under UNHCR’s mandate, and at the same time, operates to marginalize migrants from the host society.⁵⁰

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.⁵¹ Host governments become firmly opposed to local integration,⁵² eliminating one of the classic durable solutions that might resolve a refugee situation.⁵³ They thus oppose including refugee aid in their general development programs as UNHCR advocates,⁵⁴ leading UNHCR to develop parallel and separate assistance programs.⁵⁵ Therefore, when state-to-UN responsibility shift happens, it should not be hastily assumed that it is the primary purpose of the UN to facilitate this shift. There are powerful political forces that lead states in the south to *want* to transfer their responsibilities to the United Nations for their own sovereign benefit.

While some major critics of UNHCR oversimplify political dynamics in blaming UNHCR for responsibility shift, it is interesting that critics largely agree with the official UNHCR policy regarding the remedy for the resulting tensions and conflicts. 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 refocus “on enforcing the

⁵⁰ Michael Kagan, *Legal Refugee Recognition in the Urban South: Formal v. de facto Refugee Status*, 24 REFUGEE 1, 15-16 (2007).

⁵¹ Marc Sommers, *Young, Male and Pentecostal: Urban Refugees in Dar es Salaam, Tanzania*, 14 J. REFUGEE STUD. 347 (2001).

⁵² Crisp, *supra* note 29, at 3-4.

⁵³ Slaughter & Crisp, *supra* note 1, at 131.

⁵⁴ Policy on Refugee Protection and Solutions in Urban Areas, *supra* note 6, ¶ 113.

⁵⁵ Slaughter & Crisp, *supra* note 1, at 131-32.

Convention provisions upon its signatories.”⁵⁶ A proposal for this type of approach has been offered for Egypt by Tarek Badawy,⁵⁷ who argues that UNHCR should have ceased conducting refugee status determination with Egypt’s ratification of the Refugee Convention⁵⁸ in 1981,⁵⁹ and, that in 2004, UNHCR should not have extended temporary protection to the Sudanese in order to pressure Egyptian authorities to take responsibility for them under the recent Egypt-Sudan Four Freedoms Agreement.⁶⁰ Others have called for similar approaches on a wider scale.⁶¹

These proposals are built on the assumption that as soon as UNHCR relinquishes the reins of power over refugee policy in the global south, normal state responsibility for refugee protection will be reestablished. But states might not react to a UNHCR withdrawal in such a positive manner. 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.⁶² In this view, UNHCR is pressured by exigent circumstances and sometimes lacks strategic foresight, but that 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 be unwilling to step in.⁶³

III. REFUGEE POLICY IN THE MIDDLE EAST AND NORTH AFRICA

Like other troubled regions, the Middle East region hosts millions of refugees, just as it produces them. However, by conventional legal measures,

⁵⁶ Stevens, *supra* note 39.

⁵⁷ TAREK BADAWY, THE MEMORANDUM OF UNDERSTANDING BETWEEN EGYPT AND THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES: PROBLEMS AND RECOMMENDATIONS (CARIM AS 2010/07, Robert Schuman Centre for Advanced Studies, European University Institute, 2010).

⁵⁸ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 2545 [hereinafter Refugee Convention].

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 14.

⁶¹ Mauro De Lorenzo, *Dignity, Safety and Health for Refugees*, WASH. POST (May 2, 2007, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/01/AR2007050101056.html> (“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.”).

⁶² UNHCR, *Protracted Refugee Situations: A discussion paper for the High Commissioner’s Dialogue on Protection Challenges*, UNHCR/DPC/2008/Doc.02, 13-14, ¶¶ 53-59 (2008).

⁶³ Slaughter & Crisp, *supra* note 1, at 132.

most countries in this region have done very little to implement their obligations to protect refugees. Very few have signed the Refugee Convention⁶⁴ and none have passed domestic refugee legislation. Indeed, by these traditional legal criteria, refugee policy in the Middle East region is much less developed than in the Eastern and Sub-Saharan African regions.

In a 2006 article, Ruben Zaiotti examined the alarming state of refugee policy in the Middle East region. 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.⁶⁵

Zaiotti's analysis reflects two analytical lacunae that are common to studies of refugee issues in the region. 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.⁶⁶ Second, Zaiotti asks state-centric questions to examine whether international refugee law has been implemented, such as "Have states ratified the Convention? Have they passed legislation?"⁶⁷ and "Have Arab states developed a successful regional regime to govern refugee status?"⁶⁸ Asking these simple questions leads to the general conclusion that there is basically no refugee policy in the Middle East region, that there are

⁶⁴ In the region covered by this article, only Egypt, Israel and Yemen ratified the Refugee Convention. The Refugee Convention has found greater acceptance in North Africa, with Algeria, Tunisia and Morocco all having ratified it.

⁶⁵ Ruben Zaiotti, *Dealing with non-Palestinian Refugees in the Middle East: Policies and Practices in an Uncertain Environment*, 18 INT'L J. REFUGEE L. 333, 334 (2006).

⁶⁶ For a development of this argument, see Kagan, *The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East*, *supra* note 28.

⁶⁷ For an overview of laws relevant to refugees in the region, see LEILA HILAL & SHAHIRA SAMY, *ASYLUM AND MIGRATION IN THE MASHREK* 67-69 (2008).

⁶⁸ See Barnes, *supra* note 15, at 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.").

only refugee problems and – at best – occasionally some ad hoc and discretionary steps taken to alleviate suffering for short periods of time.

Yet, a refugee arriving in a major Arab state will not encounter a total vacuum. There are some systems in place to receive people fleeing persecution; some refugees are able to find shelter, although 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 region are essentially off the radar screen of conventional thinking in the field of international law, primarily because they rely on shifting responsibility from the sovereign 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 first years 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 one of the central reasons 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 1950-1951.⁶⁹ But focusing on why UNRWA was kept separate from UNHCR overlooks the threshold question as to why so much emphasis was placed on the UN to begin with.

IV. CITIZENS, FOREIGNERS AND SPONSORS

Arab states have been generally classified in the international community as “developing” countries, but most have traditionally had strong central governments with elaborate bureaucracies which regulate the status of and deliver services to their populations as part of a social contract between citizens and autocrats.⁷⁰ 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.”⁷¹ With the possible exceptions of Lebanon, Yemen and post-Baathist Iraq, where central governments are weak, one risks making an incorrect generalization to think that Arab

⁶⁹ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 206-07 (1991).

⁷⁰ See Randa Alami & Massoud Karshenas, *Deficient Social Policies Have Helped Spark the Arab Spring*, 70 DEV. VIEWPOINT, Feb. 2012, available at <http://www.soas.ac.uk/cdpr/publications/dv/deficient-social-policies-have-helped-spark-the-arab-spring.html>.

⁷¹ Jeff Crisp et al., *Surviving in the City: A Review of UNHCR’s operation for Iraqi refugees in urban areas of Jordan Lebanon and Syria*, PDES/2009/03, ¶34 (2009).

governments are 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 these reasons, it is important to examine the ways in which Arab states have become accustomed to dealing with foreign populations.

There are substantial ideological obstacles to local integration of any migrants in Arab states.⁷² 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."⁷³ Depending on the political circumstances, communal affiliation can work for or against integration of a group of people or specific population. In several cases around the Arab world, whole kin groups have been de-nationalized or, in a few cases, naturalized on a communal basis, usually to serve a local political purpose by privileging or marginalizing groups seen as loyal or disloyal to the ruling regime.⁷⁴

Prospects for naturalization of foreigners are limited because "if not attributed by paternal descent, nationality in the Arab world is essentially closed."⁷⁵ The attachment of a citizen to the nation to which he or she has blood ties is so strong that Arab states generally resist the idea of granting citizenship to a person with connections to another state. Some Arab states dispute whether a second nationality may be acquired voluntarily; some consider it impossible without the consent of the first state of nationality because of the principle of perpetual allegiance, while others view it as automatically leading to loss of nationality in order to prevent dual nationality.⁷⁶ In essence, citizenship in the Arab world is founded on *jus sanguinis* principles understood through the lens of patriarchal kinship.⁷⁷

But while citizenship in Arab states remains inaccessible to most foreigners, Arab countries typically tolerate and in many cases welcome large populations of long-term foreign residents. This would seem to be contradictory in Western states where systems of immigration control are

⁷² See Hilal & Samy, *supra* note 67, at 66.

⁷³ GIANLUCA PAOLO PAROLIN, *CITIZENSHIP IN THE ARAB WORLD: KIN, RELIGION AND NATION STATE* 115 (2009).

⁷⁴ *Id.* at 116-17.

⁷⁵ *Id.*

⁷⁶ *Id.* at 108.

⁷⁷ *Jus sanguinis* translated from Latin, means "right of the blood," and generally means citizenship bestowed on the children of existing citizens. See STEPHEN M. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY*, 1290 (5th ed. 2009). I use patriarchal kinship to refer to a system of understanding family identity that privileges masculine parentage.

closely connected to naturalization.⁷⁸ In the Arab world, where immigration is not a pipeline to naturalization, the long-term residence of non-citizens is managed 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 reported connections 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.⁷⁹ However, 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, often severely restricting workers’ ability to seek alternative employment.⁸⁰ 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.⁸¹ While this subordination heightens abuse, it may also entail a paternalistic sense of obligation on the part of some employers.⁸² It might also be suggested that fictive kinship involving foreigners operates as a natural extension of more traditional kinship-based systems of citizenship.

V. THE SYMBOLIC ROLE OF THIRD PARTY SPONSORS

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.⁸³ In Egypt, migrant 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 in a

⁷⁸ For example, in the U.S., foreigners who acquire legal permanent residence are potentially eligible in the future to naturalize as a citizen. 8 U.S.C.A. § 1427 (2006). It is interesting, at least as a hypothetical problem, to contemplate what it would mean for the status of legal immigrants in the United States if this path to citizenship were removed.

⁷⁹ See, e.g., HUMAN RIGHTS WATCH, *THE ISLAND OF HAPPINESS: EXPLOITATION OF MIGRANT WORKERS ON SAADIYAT ISLAND, ABU DHABI* 28 (2009).

⁸⁰ *Id.* at 29.

⁸¹ Bridget Anderson, *DOING THE DIRTY WORK: THE GLOBAL POLITICS OF DOMESTIC LABOUR* 145 (2000); Ray Jureidini & Nayla Moukarbel, *Female Sri Lankan domestic workers in Lebanon: a case of 'contract slavery'?*, 30 *J. ETHNIC & MIGRATION STUD.* 581, 586 (2004).

⁸² See generally, Ray Jureidini, *In the Shadows of Family Life: Toward a History of Domestic Service in Lebanon*, 5 *J. MIDDLE EAST WOMEN'S STUD.* 74 (2009).

⁸³ Ray Jureidini, *Irregular Workers in Egypt: Migrant and Refugee Domestic Workers*, 11 *INT’L J. MULTICULTURAL SOCIETIES* 75, 78 (2009).

country that maintains lax enforcement mechanisms may be relatively preferable to aggressive enforcement of a restrictive legal regime.⁸⁴ But this still leaves a legal sword over the heads of migrants, where, under local law, they may have no right to do what they are doing. In neither the *kefala* system nor in the case of migrants living outside the law are foreigners *legally* 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 or servant.⁸⁵ 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 crisis in the region.⁸⁶ Yet while Arab states have supported and often encouraged this sentiment among their citizenry, Arab governments have lacked the power to force Israel to accept repatriation.⁸⁷ Arab host states found themselves insisting that Palestinian refugees should go home even though they lacked the power to make this happen.⁸⁸

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 return as the only acceptable permanent solution.⁸⁹ 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, in what Jalal

⁸⁴ See Hilal & Samy, *supra* note 67, at 10 (“Laws on migration that have been adopted in the Mashrek countries are mainly repressive and provide no, or very few, rights for migrants.”).

⁸⁵ See generally Jureidini & Moukarbel, *supra* note 81.

⁸⁶ See Jalal Hussein, *The Arab States and the Refugee Issue: A Retrospective View*, in ISRAEL AND THE PALESTINIAN REFUGEES 435, 437 (Eyal Benvenisti et al. eds., 2007) (describing an “Arab consensus” favoring repatriation).

⁸⁷ Hussein, *supra* note 86, at 441.

⁸⁸ *Id.* at 441, 449-50.

⁸⁹ *Id.* at 441.

Husseini calls “the necessary public emphasis on UN involvement.”⁹⁰ 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).”⁹¹

Palestinians were not the first refugee group to be deliberately blocked from integration in host countries in order to serve political agendas. In December 1946, the United Nations established the International Refugee Organization (IRO).⁹² The IRO’s constitution mandated it to help refugees 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.”⁹³ What was new in the Palestinian case was that a new narrative discourse developed by which host states could better justify a liminal status for Palestinian refugees: that the refugees should be left in the hands of the UN, because the UN was “to blame” for their exile.⁹⁴

This UN responsibility thesis⁹⁵ 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.⁹⁶ The arrangement that emerged with UNRWA in the Middle East fits Slaughter and Crisp’s description of the UNHCR surrogate state in Sub-Saharan Africa.⁹⁷ Both host governments and the refugee community opposed local integration.⁹⁸ Host governments largely limited their involvement to the regularization of refugees’ residency status.⁹⁹ UNRWA, and later UNHCR, set up registration, education, health, and other social welfare systems separate from those operated by the host governments.¹⁰⁰ The precise demarcation of responsibility varies, with the

⁹⁰ *Id.* at 443.

⁹¹ *Id.*

⁹² G.A. Res. 62(I), U.N. Doc. A/Res/62 (I) (Dec. 15, 1946).

⁹³ *Id.* Annex, pmbl.; *see also id.* art. 2(1)(c).

⁹⁴ Husseini, *supra* note 86, at 443.

⁹⁵ For a critique of the “UN responsibility thesis” as applied to Palestinians, *see* Kagan, *The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East*, *supra* note 28.

⁹⁶ For descriptions of the role of UNHCR in some of these states, *see generally* Kagan, *The Beleaguered Gatekeeper*, *supra* note 34; Crisp et al., *supra* note 71; Grabska, *supra* note 27.

⁹⁷ Slaughter & Crip, *supra* note 1, at 131-32.

⁹⁸ *See* Husseini, *supra* note 86, at 442.

⁹⁹ *Id.* at 449, 453-55.

¹⁰⁰ UNRWA, for example, operates its own schools and health clinics catering to Palestinian refugees. UNHCR conducts refugee status determination in most Arab states,

governments of Syria and Jordan offering more services to refugees than Lebanon.¹⁰¹ Yet, UNRWA remains central to Palestinian welfare throughout the region. As Nicholas Morris wrote, “UNRWA has direct responsibilities broadly analogous to those of a government’s health, education and social welfare authorities.”¹⁰²

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 a shift of resource burdens. Governments have also used UNHCR’s operations to symbolically transfer the burdens for social welfare to the UN.¹⁰³ Along with helping to defray the resource burdens of hosting refugees, state avoidance of responsibility has helped ameliorate political sensitivities.¹⁰⁴ The fact that refugees in the Arab world typically come from other Arab League states posed a political problem for host governments that did not want to accuse fellow Arab states of persecution.¹⁰⁵ It is politically expedient to leave this task to UNHCR and to portray the refugees’ presence as temporary, as was the original approach Arab States had taken with Palestinian populations.¹⁰⁶

By combining Husseini’s study of the historical origins of Arab state reliance on UNRWA with Parolin’s analysis of Arab citizenship, we can develop a theory explaining common approaches among Arab states towards refugees more broadly. 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 the non-integration of refugees in Arab states. 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.

operates its own health program for refugees in Egypt and Lebanon (among others), and in some cases funds separate refugee schools.

¹⁰¹ Most Palestinian refugees in Jordan are citizens, while in Syria their status is analogous to permanent residents.

¹⁰² NICHOLAS MORRIS, WHAT PROTECTION MEANS FOR UNRWA IN CONCEPT AND PRACTICE 4 (2008) available at http://www.un.org/unrwa/publications/pubs08/ProtectionReport_mar08.pdf (last visited 15 February 2008).

¹⁰³ Grabska, *supra* note 27, at 86.

¹⁰⁴ *Id.* at 80.

¹⁰⁵ *Id.* at 76.

¹⁰⁶ *Id.* at 77.

Egypt is the only state bordering Israel/Palestine where UNRWA does not operate.¹⁰⁷ 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.¹⁰⁸ But according to other accounts, the Egyptian Government decided not to request UNRWA’s assistance because it did not want to encourage Palestinian refugees to stay inside Egypt.¹⁰⁹ While the number of Palestinian refugees who entered Egypt in 1948 was relatively small,¹¹⁰ 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.¹¹¹

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 might be carried out today by UNHCR were undertaken instead by the Cairo-backed “Government of All Palestine” (GAP), which at least for consular purposes in Egypt operated as a Palestinian government in exile.¹¹² Beginning in 1949, Palestinian refugees in Egypt received travel documents and birth certificates from GAP and were allowed to receive residence permits from the Egyptian authorities.¹¹³ In 1960, Egypt replaced the GAP documents with new travel documents issued by the Egyptian government.¹¹⁴

With the notable exception of Egypt, the theory I suggest is that many Arab governments are more likely to acquiesce to the presence of refugees on their territory if 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 “silent machinisations” of the state.¹¹⁵ Without the UN’s role in acting as a sponsor for refugees, Arab states would be forced to face more directly the contradiction between the presence and non-integration of refugees. They

¹⁰⁷ UNRWA maintains a liaison office in Cairo, but does not carry out refugee assistance programs in Egypt.

¹⁰⁸ Lance Bartholomeusz, *The Mandate of UNRWA at 60*, 28 REFUGEE SURV. Q. 452 (2009).

¹⁰⁹ OROUB EL-ABED, UNPROTECTED: PALESTINIANS IN EGYPT SINCE 1948, at 36 (2009).

¹¹⁰ *Id.* at 17.

¹¹¹ *See id.* at 19.

¹¹² *Id.* at 54 (“[T]he Cairo-based ‘Government of All Palestine’ had an almost entirely paper existence, but it did have one real function: It issued travel documents to Palestinians both in Egypt and in the Gasa Strip from 1949 until 1960.”).

¹¹³ *Id.* at 37.

¹¹⁴ *Id.* at 54.

¹¹⁵ Parolin, *supra* note 72, at 128.

might resolve this contradiction by following the historic Egyptian example, through the systemic non-enforcement of laws on the books, which unfortunately leaves refugees to live with a fragile, uncertain status, outside the rule of law. A state might try to regularize the status of refugees by creating an alternative third party sponsor, as Egypt did in the 1950s; or, by taking a more aggressive nationalist approach, the state might respond by simply expelling them.¹¹⁶

The idea that the UN functions as a sponsor of refugees raises intriguing questions about refugee protection strategy. Consider, as an example, the case of Lebanon in 2008. In an effort to mitigate prolonged detention of refugees, UNHCR agreed to pay illegal entry fines for Iraqi refugees held in detention, in exchange for their temporary release.¹¹⁷ Lebanese authorities released the refugees with only three-month visas, during which time they had to find an employer or risk becoming “illegal” in Lebanon again.¹¹⁸ Such measures raised concerns about whether UNHCR might be incentivizing detention by paying fines on behalf of refugees.

However, if UNHCR can secure temporary release by paying a fine (reportedly \$630 per refugee),¹¹⁹ might UNHCR also be able to “buy” a longer-term, more secure 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.¹²⁰ Such a strategy would appear crude because it makes the responsibility shift explicit, based on a transparent payment of money; but such an approach would not fundamentally alter the de facto arrangements that currently exist. If sponsorship would make UNHCR’s role more easily digestible by local state systems, then perhaps it is a strategy worthy of consideration.

The symbolic power of a third party working to normalize the status of foreigners is a critical factor in the way the “grand compromise” continues to take shape within diverse 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, throughout Africa and Latin America, UNHCR sometimes provides funding for sovereign state governments to establish their own refugee status determination apparati. In general, the symbolic importance of having a

¹¹⁶ For example, in 2000 Lebanese authorities launched a crackdown on UNHCR recognized refugees. See Kagan, *The Beleaguered Gatekeeper*, *supra* note 34, at 5.

¹¹⁷ Yara Bayoumy, *UNHCR hails Lebanon move to legalise Iraqi refugees*, REUTERS, Feb. 21, 2008, <http://www.reuters.com/article/2008/02/21/idUSL21812333>.

¹¹⁸ *Id.*

¹¹⁹ Int’l Fed’n for Human Rights (FIDH), *UNHCR-GSO Agreement Fails to Protect Refugees in Lebanon* (Mar. 21, 2008), available at www.fidh.org/UNHCR-GSO-Agreement-fails-to-protect-refugees-in.

¹²⁰ *Id.*

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visible third party take responsibility for refugees is likely to lead governments to prefer parallel structures, even if a more integrationist approach would offer equal benefits in the opportunity to share material resources.

VI. THE MOU: A SHADOW LEGAL REGIME?

While the Refugee Convention is not widely ratified and even less commonly followed by Arab states, bilateral Memoranda of Understanding (MOU) between UNHCR and host governments have emerged as alternative legal instruments for regulating the status of refugees in several countries. UNHCR has concluded MOUs with Egypt, Jordan, and Lebanon.¹²¹ These documents formalize the responsibility shift arrangement and come closer than more conventional sources of international law to describing the refugee system as it currently operates on the ground. They also occupy an ambiguous place in international law for many of the reasons I explain below.

While the Refugee Convention is ratified only by a few countries in the region and is meant to be applicable to refugee situations worldwide, the MOUs are negotiated directly with the individual state government and can thus be tailored to an individual state’s concerns, including by recognizing fewer rights for refugees. Combined with the fact that it is not clear whether an MOU creates binding obligations on a state the way a treaty would, it is not surprising that MOUs are more attractive than the Convention for governments in the Middle East region.

UNHCR’s oldest office in the Middle East region is in Egypt, where the agency reached an MOU with the government in 1954.¹²² Its terms were quite general in relation to later MOUs, but were nevertheless fairly clear about the division of labor between the state and the UN agency. UNHCR would “help . . . the most destitute refugees”¹²³ and would coordinate the activities of “welfare societies” for the benefit of refugees.¹²⁴ 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. Rather, these roles were implied by the provision that UNHCR would “cooperate with the governmental authorities in view of undertaking

¹²¹ Memorandum of Understanding between the Government of Jordan and UNHCR, Apr. 5, 1998, available at http://www.carim.org/public/legaltexts/LE2JOR002_AREN.pdf [hereinafter Jordan MOU].

¹²² *Accord entre le Haut Commissariat des Nations Unies pour les Réfugiés et le Gouvernement Egyptien*, Feb. 10, 1954, http://www.carim.org/public/legaltexts/LE3EGY1054_844.pdf (last visited Sept. 30, 2009).

¹²³ *Id.* art. 2(d).

¹²⁴ *Id.* art. 2(e).

the census of and identifying the refugees eligible under the mandate of the High [C]ommissioner.”¹²⁵ For its part, the Egyptian government agreed to grant residence permits to “bona fide refugees . . . who fall within the High Commissioner’s mandate.”¹²⁶ Egypt promised no other rights to refugees, and the agreement indicates that only repatriation or resettlement would be considered viable or durable solutions.¹²⁷ UNHCR agreed to facilitate voluntary repatriation¹²⁸ and to promote resettlement “in every possible measure, to the countries of immigration, the refugees residing in Egypt.”¹²⁹ In practice, the arrangement described in the MOU continued long after Egypt’s ratification of the Refugee Convention in 1981.¹³⁰

Whereas the original Egypt MOU was couched in general language, later agreements between UNHCR and other Arab states have employed more specific language. Jordan reached an agreement with UNHCR in 1997¹³¹ establishing a basis for UNHCR’s office in the country, an MOU in 1998,¹³² as well as a temporary agreement in 2003 that was specific to Iraqi refugees.¹³³ In Lebanon, UNHCR operated for several decades according to an unwritten “Gentleman’s Agreement”, but this broke down in the late 1990s.¹³⁴ Following several years of systematic detention and deportations, especially to Iraq and Sudan, UNHCR reached an MOU with the Lebanese Government in 2003.¹³⁵

The Jordan and Lebanon agreements contain several common features, beginning with the explicit statements that these are transit countries only.

¹²⁵ *Id.* art. 2(a).

¹²⁶ *Id.* art. 6.

¹²⁷ *See generally id.*

¹²⁸ *Id.* art. 2(b).

¹²⁹ *Id.* art. 2(c).

¹³⁰ Kagan, *The Beleaguered Gatekeeper*, *supra* note 34, at 4-5.

¹³¹ Agreement Between the Government of the Hashemite Kingdom of Jordan and the United Nations High Commissioner for Refugees, July 30, 1997, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a124.html>.

¹³² Jordan MOU, *supra* note 121.

¹³³ Letter of Understanding between the Government of the Hashemite Kingdom of Jordan and the Office of the United Nations High Commission for Refugees, Apr. 15, 2003, 2222 U.N.T.S. 39512, *available at* http://www.carim.org/public/legaltexts/LE2JOR003_EN.pdf [hereinafter Letter of Understanding].

¹³⁴ *See* Kagan, *The Beleaguered Gatekeeper*, *supra* note 34, at 5; Samira Trad & Michael Kagan, *Rights, Needs and Responsibility: Challenges to Rights-Based Advocacy for Refugees’ Health and Education in Lebanon*, in *FORCED DISPLACEMENT: WHY RIGHTS MATTER* 159, at 162-63 (Katarzyna Grabska & Lyla Mehta eds., 2008).

¹³⁵ 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, Sept. 9, 2003 [hereinafter Lebanon MOU].

The Jordan MOU describes the presence of refugees as a “sojourn,”¹³⁶ while the Lebanon agreement says in the preamble, “Lebanon is not an asylum country,”¹³⁷ a particularly noteworthy phrase to be found in a document signed by the Office of the High Commissioner for Refugees. The Jordanian agreement incorporated the 1951 Convention’s definition of refugee status,¹³⁸ but the Lebanese version offered a more revealing alternative definition: “The term ‘asylum-seeker’ shall mean . . . ‘a person seeking asylum in a country other than Lebanon.’”¹³⁹ Both agreements assigned responsibility for refugee status determination to UNHCR.¹⁴⁰

A common structural flaw in these agreements is that UNHCR lacks the actual capacity to deliver on its 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,¹⁴¹ and twelve months in Lebanon.¹⁴² Because of the strict time limits, UNHCR agreed with both countries to “endeavor”¹⁴³ to seek a durable solution elsewhere. The prescribed timelines create a significant protection gap since UNHCR is not consistently able to resettle a refugee within one year of her arrival.¹⁴⁴ Even if the time limits were extended, UNHCR has no authority to force resettlement countries to accept refugees.

¹³⁶ Jordan MOU, *supra* note 121, art. 5.

¹³⁷ Lebanon MOU, *supra* note 135, pmb1.

¹³⁸ Jordan MOU, *supra* note 121, art. 1.

¹³⁹ Lebanon MOU, *supra* note 135, pmb1.

¹⁴⁰ Jordan MOU, *supra* note 121, art. 2 (2), 3; Lebanon MOU, *supra* note 135, art. 8.

¹⁴¹ Jordan MOU, *supra* note 121, art. 5.

¹⁴² Lebanon MOU, *supra* note 135, arts. 5, 9. The MOU provides for an initial 3-month visa for asylum-seekers, then 6 months for recognized refugees, extendable by another three months.

¹⁴³ Jordan MOU, *supra* note 121.

¹⁴⁴ In 2010, UNHCR reported that on average it takes five months from the time it submits a refugee case to a resettlement government until the refugee is able to travel. UNHCR, Information Note and Recommendations – Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, at 6 (July 6-8, 2010), *available at* <http://www.unhcr.org/refworld/pdfid/4bf3adfb2.pdf>. However, this five-month timetable is only an average, and only counts the time after UNHCR submits a case to a government. Before this UNHCR must complete registration and refugee status determination, and must prepare the dossier for submission, a process that normally takes months and often takes years. Based on my own experience as a legal aid practitioner in the Middle East, it is my observation that the process has generally functioned as follows. After arrival, a refugee must first find the UNHCR office and register. In some cases registration is immediate, but UNHCR offices sometimes schedule appointments for registration several weeks in the future. The asylum-seeker would then be scheduled for an intensive refugee status determination interview, normally scheduled months in advance. After the interview there is another wait for a decision, which can come within weeks but sometimes is delayed for months. If the person is rejected,

There are other reasons to doubt the wisdom of UNHCR's consent to the terms of these agreements. For example, 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 the host government vis-à-vis its relations with other countries and prohibits them from giving interviews to the media.¹⁴⁵ In the case of a violation of these provisions, UNHCR would endeavor to resettle recognized refugees.¹⁴⁶ One should question whether UNHCR has the legal authority to trade refugees' civil and political rights in this manner.

Nevertheless, the MOUs contain some substantial advances for refugee rights in countries which have not ratified the Refugee Convention; this presumably explains some of UNHCR's willingness to agree in certain cases. The Jordanian government agreed to abide by the principle of non-refoulement,¹⁴⁷ and both the Jordanian and Lebanese agreements guaranteed that UNHCR would be able to conduct refugee status determination (RSD) with asylum-seekers who entered these countries illegally.¹⁴⁸ In Lebanon, the government promised to notify UNHCR about the detention of asylum-seekers,¹⁴⁹ though there was no provision actually regulating when they could be detained and no ironclad guarantee that UNHCR would actually be able to access them.¹⁵⁰

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 "needy refugees."¹⁵¹ For Iraqis in 2003, the central government agreed to take "responsibility for admission and immigration procedures, in accordance with the principle of *non-refoulement*,"¹⁵² and for the registration of refugees.¹⁵³ Somewhat ambiguously, Jordan agreed to "support" healthcare for Iraqi refugees through national institutions,¹⁵⁴ but UNHCR agreed to seek international aid

she would have the right to appeal. Appeal processing varies, but is typically treated as a lower priority by UNHCR offices and can take several months or years.

¹⁴⁵ Jordan MOU, *supra* note 121, art. 4.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* art. 2.

¹⁴⁸ *Id.* art. 3.

¹⁴⁹ Lebanon MOU, *supra* note 135, art.12.

¹⁵⁰ *Cf. id.* art. 13.

¹⁵¹ Jordan MOU, *supra* note 121, art. 11.

¹⁵² Letter of Understanding, *supra* note 133, art. 3(1.5).

¹⁵³ Jordan MOU, *supra* note 121, art. 3(1.6).

¹⁵⁴ *Id.* art. 3(1.10).

“to assist in the provision of” health, education, and other social services for Iraqis.¹⁵⁵

This formulation left the precise division of labor between the government and UN somewhat ambiguous, with the exception of food assistance for which the World Food Programme (WFP) was assigned primary responsibility.¹⁵⁶ In Lebanon, by contrast, the division of labor became more black and white: “UNHCR provides . . . the necessary assistance to refugees 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.”¹⁵⁷

The MOU has emerged as the primary legal codification of the UN surrogate state, and embodies many of the pitfalls of state-to-UN responsibility shift. While the Refugee Convention defines refugee status and rights, the central focus of the MOUs is on setting out the division of labor between host governments and UNHCR. Equally important, the MOU reframes refugee protection as a bilateral contract between a state and an international humanitarian agency. Refugees are not a party to the arrangement, and have no means of enforcing it. So long as UNHCR is willing to sign, a state can effectively use the MOU to codify the social and economic marginalization of refugees. At the same time, UNHCR is under considerable pressure to agree even to a heavily compromised version of refugee protection since otherwise there might be no legal mechanism at all to address the refoulement of refugees.

VII. THE CASE OF IRAQ

The willingness of Arab states to tolerate large numbers of refugees while affording them only limited rights has been illustrated by their shared 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,¹⁵⁸ and has been thoroughly profiled elsewhere.¹⁵⁹ In general, UNHCR’s experience has been regarded as a relative success in that the space for protection has expanded beyond early expectations,¹⁶⁰ especially in view of the fact that the key host states are not parties to the Refugee Convention and have thus far been opposed to the local integration of refugees.¹⁶¹ UNHCR was able to experiment with new

¹⁵⁵ *Id.* art. 3(2).

¹⁵⁶ *Id.* art. 3(2.1).

¹⁵⁷ Lebanon MOU, *supra* note 135, art. 14.

¹⁵⁸ *See generally* Crisp et al., *supra* note 71.

¹⁵⁹ *Id.*; *see also* Barnes, *supra* note 15.

¹⁶⁰ *See* Crisp, et al., *supra* 71, at 15-16, ¶ 54.

¹⁶¹ *See id.* at 16, ¶ 56.

means of directly delivering food and monetary assistance to needy Iraqi refugees,¹⁶² and carried out reception and registration.¹⁶³ Host governments did open some services to refugees in the fields of education and health.¹⁶⁴

In most respects, the response to the Iraqi refugee crisis was to reinforce the pre-existing UNHCR surrogate state. Much of the 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.¹⁶⁵ This is consistent with the “grand compromise” of global refugee policy as discussed *supra* in Parts I and II. In fact, the Iraq crisis might have been the best possible scenario for the grand compromise to work. As a 2009 UNHCR 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.”¹⁶⁶

It is important to remember that the Iraq operation has been a *relative* success. Iraqi refugees have not generally been granted the right to work and thus subsist through informal economic means.¹⁶⁷ Their legal status and security are not stable, and there have been reports of deportations.¹⁶⁸ Although Arab host states could certainly have treated Iraqi refugees more harshly, the lack of local integration leaves the refugees “very much in limbo”,¹⁶⁹ 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, Somali, and Palestinian refugees have experienced in the Middle East Region.

The 2009 UNHCR 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.¹⁷⁰ It also suggested that UNHCR pursue a more robust strategy “to lead and coordinate international action” for refugees, with particular attention to sharing responsibility.¹⁷¹ To develop such a strategy, UNHCR will need to develop a coherent approach to the responsibility shift dilemma. If it is not

¹⁶² *Id.* at 36-37.

¹⁶³ *Id.* at 21-23.

¹⁶⁴ For instance, with UNHCR financial contributions, Syria and Lebanon opened schools to Iraqi children. *Id.* at 40, ¶¶ 183-84. Iraqi refugees also had access to health clinics on a basis similar to nationals in Jordan and Lebanon. *Id.* at 39, ¶¶ 177-78.

¹⁶⁵ *Id.* at 16, ¶¶ 57-59.

¹⁶⁶ *Id.* at 41, ¶¶ 190-191.

¹⁶⁷ *Id.* at 17, ¶ 65; *see also* Barnes, *supra* note 15, at 21.

¹⁶⁸ Crisp, et al, *supra* note 71, at 17, ¶¶ 62, 66.

¹⁶⁹ *Id.* at 17, ¶ 65.

¹⁷⁰ *Id.* at 19, ¶¶ 74-75.

¹⁷¹ *Id.* at 19, ¶¶ 77-78.

possible to ask host states to take on complete responsibility for refugee protection, it is essential to define clearly those responsibilities that can be shared with UNHCR.

VIII. THE LIMITS OF THE SURROGATE STATE

A UNHCR surrogate state is not a complete substitute for an actual state, because UNHCR ultimately can only exercise limited power to restrain a government determined to harm refugees. A vivid example¹⁷² of this power dynamic occurred just ten years ago in Lebanon, when UNHCR conducted refugee status determination and the Lebanese authorities flatly refused to give any significance to UNHCR’s RSD decisions—ultimately detaining and deporting hundreds of refugees and asylum-seekers.¹⁷³ More recently, Lebanon has presented a more complex scenario. On the one hand, Lebanon’s ministries of education and health have opened schools and hospitals to refugees,¹⁷⁴ a relatively rare example of a state extending protection of positive liberties¹⁷⁵ to refugees. Yet protection of negative liberties¹⁷⁶—protection from arrest and detention by the state—remains deeply problematic. UNHCR recently reported that long-term detention of refugees, including children, are continuing concerns in Lebanon.¹⁷⁷

Another ominous warning about the limitations of responsibility shift may be the recent changes in Egyptian practice toward refugees and asylum-seekers. Over five decades, Egypt built a solid record 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.¹⁷⁸ But in recent years, this arrangement in Egypt was disrupted. In 2004, UNHCR suspended refugee status determination for

¹⁷² See also Marjolein Zieck, Inaugural Lecture at Amsterdam Law School: *UNHCR’s Parallel Universe: Marking the Contours of a Problem* (Apr. 23, 2010) (transcript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620929) (last visited Feb. 23, 2012).

¹⁷³ Kagan, *The Beleaguered Gatekeeper*, *supra* note 34, at 6.

¹⁷⁴ Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report, Universal Periodic Review: Republic of Lebanon (Apr. 2010), *available at* <http://www.unhcr.org/refworld/docid/4bcd705e2.html>.

¹⁷⁵ See *supra* text accompanying note 26.

¹⁷⁶ See *supra* text accompanying note 25.

¹⁷⁷ Policy on Refugee protection and Solutions in Urban Areas, *supra* note 6.

¹⁷⁸ For example, the Department of State’s annual human rights reports for Egypt in 2001, 2002, 2003 and 2004, all included the statement, “The Government generally cooperates with the UNHCR and treated refugees in accordance with minimum standards and agreed arrangements.” U.S. DEPT. OF STATES, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: EGYPT 2004 (2002-2005) (also included in the 2001 – 2003 editions), *available at* <http://www.state.gov/j/drl/rls/hrrpt/>.

most Sudanese migrants in Egypt in favor of temporary protection¹⁷⁹ and moved away from large-scale resettlement, “leaving many refugees disappointed.”¹⁸⁰ This led to immediate refugee protests in 2004, and the reported arrests of twenty-two demonstrators.¹⁸¹ 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 twenty-seven people (around half of them children) when Egyptian police used force to break up the protest camp.¹⁸²

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 illegally and intending to transit through the Sinai border to Israel. This raised the political costs for the Mubarak-led Egyptian Government to host refugees because the refugees now posed a threat to Egypt’s ability to control its borders and were suddenly a complicating factor for Egypt’s relationship with Israel, the country’s most sensitive foreign policy theater. In the summer of 2007, Egyptian forces began to shoot and kill migrants on the Sinai border with Israel, leading to the death of dozens over the ensuing two years.¹⁸³ Egypt began to systematically block UNHCR’s access to asylum-seekers in detention, especially if they had entered the country illegally, and in 2008 deported a number of Eritreans en masse.¹⁸⁴

The right to a livelihood¹⁸⁵ raises a particular sticking point in countries practicing responsibility shift. While other social and economic rights

¹⁷⁹ See Hilal & Samy, *supra* note 67, at 35.

¹⁸⁰ Karin Fathimath Afeef, *A Promised Land for Refugees? Asylum and Migration in Israel*, in NEW ISSUES IN REFUGEE RESEARCH 9 (Dec. 2009), available at <http://www.unhcr.org/4b2213a59.html>.

¹⁸¹ FATEH AZZAM, 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, at 11 (American University in Cairo ed., June 2006).

¹⁸² For an accounting of these events, *see id.*

¹⁸³ *See generally*, HUMAN RIGHTS WATCH, SINAI PERILS: RISKS TO MIGRANTS, REFUGEES, AND ASYLUM SEEKERS IN EGYPT AND ISRAEL (2008).

¹⁸⁴ *See id.*

¹⁸⁵ *See generally* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 740 (2005) (describing the limited applicability of general human rights law to non-citizens with regard to economic rights). In international law, a refugee’s right to seek employment depends on the applicability of the Refugee Convention’s articles 17 and 18. In the region described in this article, only Egypt has ratified the Convention. However, there has been confusion about whether these articles are binding on Egypt, since Egypt entered a reservation to article 24, relating to labor legislation. Some sources suggest that this reservation excludes refugees in Egypt from right to work protections in the Refugee Convention. *See, e.g.*, Elizabeth Umlas, *Cash in hand: Urban refugees, the right to work and UNHCR’s advocacy activities*, ¶ 15, UNHCR PDES/2011/05 (May 2011). This is not correct.

(healthcare, education, etc.) are typical positive liberties¹⁸⁶ 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.¹⁸⁷ The UN Development Programme (UNDP) 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.”¹⁸⁸ A recent UNHCR publication reported that of the 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.¹⁸⁹

Merely issuing identity papers and residence permits to refugees—which is routinely done in several states throughout the Middle East Region—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 foreigners’ 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.”¹⁹⁰ More than double that number cites lack of job skills, cultural or language obstacles, or even general shortage of jobs.¹⁹¹

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, a policy opposed by host governments which seek to share costs with the international community in hosting refugees. While it seems logical that scarce resources should be targeted and reserved for those individuals who are the most vulnerable, host governments that want to attract the same resources have, in many ways, a

Egypt entered no reservations to article 17 and article 18, and is bound to recognize refugees’ right to work to the full extent of the Refugee Convention.

¹⁸⁶ See *supra* text accompanying note 25.

¹⁸⁷ *Id.*

¹⁸⁸ UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS: HUMAN MOBILITY AND DEVELOPMENT 63, *available at* http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf.

¹⁸⁹ UNHCR, DESIGNING APPROPRIATE INTERVENTIONS IN URBAN SETTINGS: HEALTH, EDUCATION, LIVELIHOODS, AND REGISTRATION FOR URBAN REFUGEES AND RETURNEES 18 (2009), *available at* <http://www.unhcr.org/4b2789779.pdf>.

¹⁹⁰ UNHCR REGIONAL OFFICE (CAIRO), REFUGEE SELF-RELIANCE IN CAIRO: OBSTACLES AND PROSPECTS 50 (2003).

¹⁹¹ *Id.*

perverse 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 placed on sovereign state willingness to recognize the refugees' right to basic security.¹⁹² UNHCR could, resources permitting, substitute in many ways for many of the functions of sovereign state education and health ministries. However, it cannot free refugee children from detention if domestic state security agencies, prosecutors, and courts refuse to do so. It is therefore essential that states and the UNHCR, in joint MOU agreements and elsewhere, make explicit and clear the responsibilities that UNHCR can and cannot take on.

IX. AMENDING THE PARADIGM: SHARED RESPONSIBILITY

The 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 Region. 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.'"¹⁹³ The prevailing answer to this dilemma, today, is to refocus international resources 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 own¹⁹⁴ while reemphasizing the role of host governments.¹⁹⁵ 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 included in national systems.¹⁹⁶

The problem with this approach is that it does little more than state an objective. The purpose of this Article is not 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

¹⁹² For refugees, the core of security is the principle of *non-refoulement*, which in the Refugee Convention is one of the rights to which no state may enter a reservation. Refugee Convention, *supra* note 58, art. 42. It is also a principle of customary international law. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW* 87 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003). In practical terms, social and economic rights are difficult to realize without secure legal status and physical protection. See Trad & Kagan, *supra* note 134.

¹⁹³ UNHCR REGIONAL OFFICE (CAIRO), *REFUGEE SELF-RELIANCE IN CAIRO: OBSTACLES AND PROSPECTS* 18 (2003). For a similar commentary, see Hilal & Samy, *supra* note 67, at 70.

¹⁹⁴ Policy on Refugee Protection and Solutions in Urban Areas, *supra* note 6, at 3 ¶ 12.

¹⁹⁵ *Id.* at 6, ¶ 27.

¹⁹⁶ *Id.* at 6, ¶ 29. For a stronger articulation of this ideal, see De Lorenzo, *supra* note 61.

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 Region, one would have to find a way to persuade governments to turn away from the longstanding ideological opposition to the integration of outsiders, a task made more difficult by powerful ideological opposition to the 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 minimum, donors would need to insist on including refugees in development programs as a condition for receiving development aid at all so that host governments would not perceive a gain for their own citizens in marginalizing refugees.

There is reason for skepticism about whether donor states would prioritize refugee welfare enough to place this kind of pressure on host governments¹⁹⁷ and reason for worry that even if donors followed this path, host governments might still resist for ideological or political reasons. Donor states would also have to overcome resentment that they generally take on smaller 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, when placed in a Hobson’s choice situation for sovereign states that have relied for some time on UNHCR to handle most services, 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; the traditional paradigm thus makes these norms difficult to impose or enforce directly.¹⁹⁸ Despite this paradox, there is more adaptability built into 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.¹⁹⁹ As UNHCR’s Director of International Protection Services

¹⁹⁷ Katarzyna Grabska, *Who Asked Them Anyway? Rights, Policies, and Wellbeing of Refugees in Egypt*, FORCED MIGRATION & REFUGEE STUDIES, at 87 (2006), http://www.migrationdrc.org/publications/research_reports/Kasia_Egypt_Research_ReportEDI TED.pdf.

¹⁹⁸ See Richard Bilder, *Beyond Compliance: Helping Nations Cooperate*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 65 (Dina Shelton ed., 2000) (arguing that international law usually cannot be imposed on states and that the goal should be “helping nations cooperate rather than simply making them behave”).

¹⁹⁹ Turk, *supra* note 3, at 3-4, 8.

said, UNHCR’s mandate is built upon a “clear international consensus that states cannot manage or resolve forced displacement or statelessness problems unilaterally and in isolation from each other.”²⁰⁰ 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.”²⁰¹

My goal here is to point toward a more pragmatic strategy without compromising on the rights that refugees should enjoy; a practical approach should be based on the philosophy that legal form should follow the protection function. Assignment of the responsibility for protecting rights should be allocated 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 disincentivize state governments from using it. In these situations, the United Nations may best be able to promote the protection of refugees by taking on *some* of the responsibility for refugee protection.

As Sir Brian Urquhart has written, “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.”²⁰² This adaptation is possible because while governments remain stubbornly committed to narrow national interests as the primary basis for state action,²⁰³ sovereignty has proven to be a dynamic concept that can evolve as national interests demand.²⁰⁴ States are able to find advantage in shifting functions to international agencies without compromising on their ultimate independence. Responsibility shift is just one means of enhancing global cooperation.

When parallel UN 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.²⁰⁵ Rather than continue to insist on pure state

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.*

²⁰² Brian Urquhart, *Finding the Hidden UN*, THE NEW YORK REVIEW OF BOOKS, May 27, 2010, at 26, 28, available at http://al.odu.edu/mun/docs/Article_NYbookreview_27_May_2010.pdf (last visited July 19, 2010).

²⁰³ Weiss, *supra* note 42, at 21.

²⁰⁴ *Id.*

²⁰⁵ RSDWATCH.ORG, *Statistics show UNHCR more likely to protect asylum-seekers than most governments* (July 24, 2008), available at

responsibility as a policy for all situations, it might be better to build on the positive/negative liberties distinction that is evident in most responsibility shift situations. Wherever direct resources or active implementation are required, the UN can 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.

The goal should be to identify the bare minimum which must be asked of states in order to functionally realize refugees’ security, social, and economic rights, and to develop incentives for states to perform these roles—and only these roles. The UN could take responsibility for all other areas of refugee protection. To build a viable foundation for refugee protection, responsibility shift would need to be *de jure*, not simply *de facto*. The division of labor 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 can administer services consistent with standard due process norms. 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 state governments.

Table 1: Dividing Roles between UNHCR and States

| Key roles that can shift to UNHCR, if necessary | Roles that require state action (responsibility shift impossible) |
|--|--|
| Health services | Non-refoulement |
| Education* | Freedom from arbitrary detention |
| Monetary and nutritional assistance | Protecting the right to work |
| Other social services | Police functions and physical security |

<http://rsdwatch.wordpress.com/2008/07/24/statistics-show-unhcr-more-likely-to-protect-asylum-seekers-than-most-governments/>; see also RSDWATCH.ORG, *UNHCR’s recognition rate: Relatively high overall, but inconsistent up close* (July 15, 2009), available at <http://rsdwatch.wordpress.com/2009/07/15/unhcrs-recognition-rate-relatively-high-overall-but-inconsistent-up-close/>.

| Key roles that can shift to UNHCR, if necessary | Roles that require state action (responsibility shift impossible) |
|--|--|
| 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 refugees 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 advocate 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 division of labor between sovereign states and the United Nations. Excessive focus on state responsibility puts UNHCR on the defensive in seeking donor support for parallel structures when the 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 a host government or the United Nations employs that doctor.

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

X. CONCLUSION

State-to-UN responsibility shift exists because it addresses political interests of states, both in terms of material benefits and symbolic benefits. It serves material resource interests in helping states in the global south 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, which could not politically 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 that the host government is freed from making key decisions about a

refugee population that may be a source of political sensitivity with a neighboring state.

These state interests are reflections of the imperfect world in which we live, and they must be taken seriously. As the confluence of popular democratic movements throughout the region, popularly known as the “Arab Spring,”²⁰⁶ change the dynamics of governance in Arab countries, there is likely to be increased capacity to seek improvements in how refugees throughout the region are treated and received. Should a more democratic system of government take hold, it will be essential for those who want to build a stronger system of refugee protection to carefully consider how best to take advantage of any window of opportunity that results. Increased openness in government, strengthened civil society, a more responsive and independent judiciary, and renewed faith in rule of law all can work in favor of refugee rights.

Nevertheless, there are reasons for caution as well. It may be difficult to convince a newly elected government to take on substantial new burdens for refugees at a time when its citizens are expecting rapid progress on a range of economic, social, and political fronts. Also, elected governments can be impacted by popular resentments of immigrants. Inspirational ideas of national unity can give birth to uglier forms of nationalism and xenophobia.

A conventional approach to reforming refugee protection would be to press for treaty ratification and legislation that embrace refugee rights to create a genuine system of asylum in the Arab world. This should remain, without question, the ultimate goal. But advocates for refugees should be conscious of the political demands that this places on fragile governments and should consider whether it is the only way to achieve better protection of refugee rights. There may be substantial risks in trying for this maximalist approach and failing, and in the process missing a rare opportunity. My argument is that it might be more fruitful to consider building upon what already exists in skeletal form, 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 the wider protection of refugee

²⁰⁶ Somewhat ironically, the phrase “Arab Spring” was first used by proponents of the 2003 U.S. invasion of Iraq to describe the political changes that they believed would follow from the toppling of Saddam Hussein. See Gale, *Arab Spring*, GLOBAL ISSUES IN CONTEXT (June 10, 2012), <http://find.galegroup.com/gic/infomark.do?&source=gale&idigest=87c3696ed657d25964dd4ad8a05241ea&prodId=GIC&userGroupName=rich43584&tabID=&docId=CP3208520388&type=retrieve&contentSet=GREF&version=1.0>. The term re-emerged in early 2011 as the wave of protests against authoritarian Arab governments spread from Tunisia to Egypt. See Joshua Keating, *Who first used the term Arab Spring?*, FOREIGN POLICY (Nov. 4, 2011, 3:17 PM), http://blog.foreignpolicy.com/posts/2011/11/04/who_first_used_the_term_arab_spring.

rights, and to be clearer about the responsibilities that can and cannot be assigned to UNHCR.²⁰⁷

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. However, in so doing, the division of labor between states and UNHCR must be assigned appropriately. UNHCR's actual responsibilities must be clearly defined and delimited so that there is no implication that UNHCR can remedy all problems on its own. For those things that UNHCR can control, it should become more accountable to the refugees, the host state, the international community and standard due process safeguards which should apply for refugees seeking protection with the UNHCR. But for matters beyond its capacities, there should be clarity that responsibility lies with the state.

²⁰⁷ For a detailed proposal of how this approach might be applied, see Michael Kagan, *Shared responsibility in a new Egypt: A strategy for refugee protection*, AM. U. IN CAIRO CENTER FOR MIGRATION & REFUGEE STUD. (2011), available at <http://www.aucegypt.edu/GAPP/cmrs/reports/Pages/In-depthanalyses.aspx>.