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SNAKES IN IRELAND: QUESTIONING THE ASSUMPTION OF 'COLLECTIVE RESPONSIBILITY' TO PROTECT REFUGEES

Marjoleine Zieck♥

1. INTRODUCTION: SNAKES IN IRELAND

The 'Shares' (short for: 'shared responsibility in international law') project regarding the international protection of refugees proceeds from the assumption of 'collective responsibility' for refugees.[1] This assumption reminded me of a reference to a legendary essayist on 'Snakes in Ireland' who simply wrote, "There *are* no snakes in Ireland".[2] The question I will, therefore, address is whether this assumption is justified.

The question is a complex one since it is not clear what 'collective responsibility', also by way of synonym referred to as 'shared responsibility', actually designates. Which collective, first of all, is referred to? What is the relevant collective? Secondly, what does 'sharing' in this respect mean? Thirdly, what is the content of this collective or shared responsibility, that is, beyond the general reference to 'refugee protection'? There are, in short, three preliminary questions that should be posed: (1) which collective? (2) what does sharing mean in this respect?, and (3) what specific obligations regarding the protection of refugees are possibly shared?

2. WHICH COLLECTIVE(S)?

The collective whom is assumed to share responsibility is as yet unspecified and not immediately obvious either, especially not since more than one collective can be identified that would be relevant in the context of refugees.

In view of the international scope and nature of the problem of refugees, the collective could be taken to refer to the international community as the totality of individual states. Illustrative of this are the frequent calls on this community to recognize or, rather, assume collective responsibility for particular refugee situations, such as the crisis in the Great Lakes region,[3] and refugee problems such as protracted refugee situations.[4] The mere fact that such calls are necessary appears to be indicative of the lack of any collective obligations in this respect. A complicating factor is that the international community in the sense of the totality of sovereign states includes a substantial number of states that are not parties to the relevant international refugee law instruments. Put differently, although the 'refugee problem' is considered to be an international one, this recognition has not resulted in formal equality of legal obligations

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[1] This research paper was presented at the ACIL (Amsterdam Center for International Law) Seminar on Shared Responsibility in International Refugee Protection ("In search for a Legal Basis of Burden-Sharing"), which took place on 30 May 2011 at the University of Amsterdam. On the 'Shares' project, see http://www.sharesproject.nl

[2] Taken from W.W. Bishop, "The International Rule of Law", 59 *Michigan Law Review* 1961, 553-574 at 553 (emphasis in original).

[3] UN doc. A/AC.96/SR.601 para. 83 (UNHCR): "the international community should focus its attention on the humanitarian crisis in the Great Lakes region and should give its full support to the local communities in host States, such as [...] Tanzania, to ensure that their burdens were shared".

[4] High Commissioner's Dialogue on Protection Challenges. Theme: Protracted Refugee Situations. Chairman's Summary, 11 December 2008: "We must recognize that protracted refugee situations are a collective responsibility of the international community" at 2.

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pertaining to refugees: a substantial number of states, amounting to 25%, chose not to act upon this collective concern.

An alternative collective that is frequently called upon is the 'humanitarian community'. It was called upon, for instance, to prevent and respond to sexual violence against women and girls in refugee settings.[5] This community is more extensive than the 'international community' in that it includes, apart from states, international humanitarian organizations and NGOs.
Another collective that figures in the context of refugee problems is the 'donor community',[6] a much smaller community than the 'international community' if recourse is had to the list of major donor states which are responsible for answering UNHCR's annual call for voluntary contributions.[7]

Calling upon indeterminate collectives may well be tantamount to a voice crying in the wilderness bound to fall on deaf ears, and I would, therefore, like to narrow the search for the relevant collective to the universal international refugee law regime, more in particular states parties to the 1951 Convention Relating to the Status of Refugees (hereafter: 1951 Convention) on the one hand, and the United Nations as representative of the international community on the other, and thus include the 25% states who are not party to the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (hereafter: 1967 Protocol). The reason to focus on the international refugee law regime, in the narrow sense just indicated, is based on the observation that it originated in the recognition that the problem of refugees is international in scope and nature,[8] a recognition that induced both the adoption of the 1951 Convention and the establishment of UNHCR. The question is whether that recognition gave rise, at the time, to any form of shared responsibility and, if not, whether the regime has since converted the sense of collective concern into shared responsibility.

3. WHAT DOES 'SHARING' MEAN?

In order to be able to answer this question, the meaning of 'sharing' should be elucidated. The elucidation proceeds from municipal law constructs. Although it is a moot point whether the relevant principles can be transposed to international law, this point need not detain us for the principles are merely used as a heuristic device.

'Sharing' responsibility either means that two or more actors are jointly responsible to achieve a particular result, they, put differently, have combined to achieve a collective purpose. When they fail to accomplish this purpose, they are solidarily liable; their share of liability as between themselves may, however, be subject to a predetermined amount. Alternatively, 'sharing' means dividing and parcelling out in shares, in short: apportioning responsibility. When the desired result fails to materialize liability follows the apportionment made; the resulting – several

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[5] UNHCR Press Release, New Guidelines to Better Protect Refugee Women Against Violence, 19 September 2003: "Launching the 158-page publication […] the Assistant High Commissioner told donor representatives, UN partner agencies and NGOs that the challenge of preventing and responding to sexual violence against women and girls in refugee settings can only be effectively tackled if the humanitarian community assumed collective responsibility for addressing the problem".

[6] See, *inter alia*, UN docs. UN doc. S/Res/1923 (2010), para. 18; A/AC.96/SR.582, para. 13; A/AC.96/SR.601, para. 62.

[7] See UN doc. EC/61/SC/CRP.9 (Update on budgets and funding in 2010 and projections for 2011); the major donors include: the United States (UNHCR's largest donor), Japan, the European Commission, Sweden, Norway, the United Kingdom, Denmark, Germany, Canada, Australia. Although it should be added that this list, which is spearheaded by the United States, looks differently when the contributions are not considered merely in terms of amount donated but are measured against capita respectively percentage of GDP, see UNHCR Global Report 2009 - Donor Profiles: when the contributions are considered per capita, Luxembourg is the major donor state; when the contributions are considered in terms of percentage of GDP Sweden is the major donor state. The Netherlands ranks 8th in either set (compared to number 6 when regard is solely had at the amount of money donated).

[8] UN doc. A/Res/319(IV); *cf.* A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 2009 at 9.

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- liability is proportionate to this apportionment. It is submitted that joint responsibility is not part of the universal international refugee law regime characteristic for which is the apportioning of responsibility. This, in turn, entails that the third question - which obligations regarding the protection of refugees are possibly shared? - becomes irrelevant.

4. THE ORIGINAL APPORTIONMENT

The current international, universal, refugee law regime was drafted in the wake of the Second World War. The vast extent of displacement caused by that war gave rise to the creation of various agencies including the International Refugee Organization charged with voluntary repatriation and resettlement. When it ceased to exist, the 'refugee problem' had not been solved: there were still refugees, consisting of the so-called 'hard core' for whom no resettlement places could be found and 'new' post-hostility refugees mainly from eastern Europe. This refugee problem was considered to be the responsibility of 'the international community', and the IRO suggested the United Nations take responsibility for it.[9]

When the refugee problem was thereupon discussed in the UN, two key decisions were made regarding the apportioning of responsibility for the protection of refugees. The first decision was that the responsibility for the protection of refugees would rest with the states on whose territory they found refuge, and secondly, that refugees would no longer be the responsibility of an international organization.[10] In the words of the then Secretary-General, the new, post-IRO phase: "will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. […] the refugees will no longer be maintained by an international organization as they are at present".[11]

This decision had profound repercussions for UNHCR, which would, unlike the IRO, be anything but an operational agency. UNHCR was merely to supplement the efforts of states that were, preferably, governed by the 1951 Convention. The functions assigned to UNHCR in its Statute are accordingly of an indirect nature and wholly geared to supporting the allocation of responsibility for the protection of refugees to individual states. "It was emphasized by the General Assembly that responsibilities for care and maintenance as well as for resettlement would have to be borne by those governments in whose territories the refugees found themselves. UNHCR would not fill the function of an international authority for the protection of refugees as IRO had done to some extent but rather the role of a mediator who would make his good offices available to both refugees and governments".[12]

5. THE LACK OF A DISTRIBUTIVE MECHANISM

Whereas UNHCR was consciously given a universal mandate, after all a United Nations agency, the recognition of the international scope and nature of the problem of refugees did not necessarily mean that states were prepared to consider this to be tantamount to a universal problem for which they bore responsibility. The awareness of the (possibly) universal scope of the problem induced the drafters of the 1951 Convention to instead hedge in the definition of refugee by limitations as a result of which the problem to be addressed was reduced in time and space. It was in essence confined to (known) European refugees, and any sense of collective responsibility for a problem which had, from the outset, been characterized as an international one – presumably, not merely European – was consequently denied. Even thus confined, the responsibility for those refugees

[9] Not all states were, however, members of the United Nations at the time. Illustrative for the wish to engage the international community at large, that is, including states not members of the United Nations is the decision to include those states in the advisory body of UNHCR, see Art. 4 Statute of UNHCR.
[10] See M.Y.A. Zieck, *UNHCR's Worldwide Presence in the Field, A Legal Analysis of UNHCR's Cooperation Agreements*, 2006 at 17-26.
[11] UN doc. E/AC.32/2 (1950) (Memorandum of the Secretary-General) at 6-7.
[12] D.B. Fowler, "The Developing Jurisdiction of the United Nations High Commissioner for Refugees", 7 *Revue des Droits de'l Homme/Human Rights Journal* 1974, 119-144 at 130-131.

was not shared but made subject to contingency: the responsibility of states would only be triggered when refugees would come within the jurisdictional orbit of an individual state: "The approach taken [was] essentially an 'individualistic' one with the responsibility for the refugee problem devolving entirely on the receiving State".[13] As a result, states would only become responsible for part of the problem: solely that part that consists of the refugees who happen to seek refuge in their respective territories.

The responsibility of individual states would be triggered, I said, when a refugee would come within the jurisdictional orbit of that state. This is an implicit reference to the prohibition of *refoulement*.[14] Whilst this prohibition secures the protection of refugees, it causes, simultaneously, huge disparities in terms of distribution. By virtue of geographical proximity to the country of origin, enhanced by no entry devices and deterrence practices of other states,[15] some states may end up with huge refugee populations, sometimes even disproportionately large when compared to the size of the hosting population or per capita income GDP in the country of refuge. Since the 1951 Convention does not comprise any "substantive provision […] relating to the country of origin or to other States in the context of international solidarity and co-operation in burden sharing",[16] states that observe the prohibition of *refoulement* are subject to its indiscriminate effects in terms of numbers of refugees they are thus forced to host.

It was not that the drafters had been unaware of the possibility that some states could be confronted with larger numbers of refugees than others. France, most likely since it was hosting Spanish refugees at the time and hence aware of the exceptional nature of the burden assumed by receiving states,[17] suggested to inserting the following provision in the Preamble to the 1951 Convention:[18]

> "But considering that the exercise of the right of asylum places an undue burden on certain countries because of their geographical situation, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation to help to distribute refugees throughout the world".[19]

It explained that this paragraph "recalled the need for a collective effort to solve the problem of refugees and to help to distribute them throughout the world",[20] but was nonetheless not intended to impose on states any obligation with respect to the right of asylum or otherwise.[21] The proposal met with criticism since it did not correspond with the substantive body of the Convention and would therefore be out of place in the preamble.[22] It was consequently not accepted and gave way

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[13] G. Coles, "The Basis and Functions of Refugee Law" in D.S. Constantopoulos, *Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki*, vol. 13, 1987, 655-667 at 663.

[14] "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion", Art. 33 (1), 1951 Convention.

[15] *E.g.* 'first country of asylum' objections of third states, *i.e.* rejecting asylum claims on the basis of the fact that protection was and is available in the first state, *cf.* UNHCR, Refugee Protection and Mixed-Migration: The 10-Point Plan in Action: Ch. 8 Addressing secondary movements. Reference 3 - UNHCR, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, February 2003, PPLAS/2003/01 at 18-25.

[16] Coles, 1987, *loc. cit. supra* n. 13 at 657.

[17] The terminology used of old is that of 'burden' and 'burden sharing', rather than 'responsibility sharing'. Although a rather negative designation, it is retained in this paper in order not to confuse the different senses of 'responsibility'.

[18] UN docs. E/AC.7/SR.160 (18 August 1950) (Rochefort, France) at 26; E/AC.7/SR.166 at 13.

[19] UN doc. E/L.81 (29 July 1950) (Rochefort, France). The representative of Mexico (De Alba) observed that the proposal had the merit of seeking to awaken a feeling of collective responsibility, UN doc. E/AC.7/SR.166 (22 August 1950) at 13.

[20] UN doc. E/AC.7/SR.160 at 26.

[21] UN docs. E/AC.7/SR/166 at 17 (Rochefort, France); A/CONF.2/SR.31 (Rochefort, France) at 29.

[22] See UN doc. E/AC.7/SR.166 at 19 (Meagher, Canada); likewise the representatives of the United States (Henkin) and Belgium (Delhaye), see UN doc. E/AC.7/SR.167 at 9. Worth adding is

to the current, much less specifically worded provision from which 'geographical proximity' as the cause of 'unduly heavy burdens' has disappeared as well as the suggested solution of 'distributing refugees':

"Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation".[23]

The possible incidence of huge disparities was revisited at the Conference of Plenipotentiaries that adopted the 1951 Convention and it led to the following recommendation:

"that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement".[24]

This recommendation focuses on refugees rather than on the states that are called upon to host those refugees. The present wording originates, however, in a proposal that did address the burden incurred by states:

"RECOMMENDS all governments to undertake jointly with the countries of first reception to bear the costs arising out of the right of asylum in respect of refugees whose lives are in danger".[25]

The Holy See proposed this recommendation, remarkable both for its emphasis on expenses and its sense of shared responsibility.[26] Although the desire for international solidarity in the discharge of responsibilities relating to the protection of (political) refugees was applauded,[27] its inclusion was objected to on account of the financial burden it would entail. The US representative observed "he could not hold out hope that it would assume further financial commitments after the termination of the International Refugee Organization".[28] Similar objections were voiced by the United Kingdom:

"While recognizing the validity of the expression therein of the ideal principle that the financial burden and heavy responsibilities of countries of first refuge should be equally shared by all governments, he felt that it was essential the Conference should bear in mind the difficulties which, under present conditions, governments experienced in committing themselves to such an undertaking as that contemplated".[29]

6. SIXTY YEARS LATER

Sixty years later, the structure of the international refugee law regime is still the same even though the refugee definition has been divested from its temporal limitation and consequently from the possibility of a corresponding geographical limitation save for the few states that decided to maintain this geographical limitation as they are entitled to also under the terms of the 1967

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the proposal of the representative of Belgium to insert the pertinent provision in the operative part of the Convention (UN doc. E/AC.7/SR.166 at 16-17), a proposal that was not considered, most likely on account of the fact that it was never submitted in the form of a formal proposal, *cf.* UN doc. E/AC.7/SR.167 at 8.

[23] 4th preambular paragraph.

[24] Recommendation D.

[25] UN doc. A/CONF.2/103 (24 July 1951) (The Holy See: Draft recommendations for inclusion in the Final Act of the Conference).

[26] UN doc. A/CONF.2/SR.34 (30 Nov. 1951) (Msgr. Comte, The Holy See) at 4.

[27] *Ibid.* (Von Trutzschler, Federal Republic of Germany) at 6.

[28] *Ibid.* (Warren, United States) at 6.

[29] *Ibid.* (Hoare, United Kingdom) at 7.

Protocol: individual states still bear the responsibility for the refugees they host.[30] The limitations of the international refugee law regime, however, in particular the indiscriminate effects observance of the prohibition of *refoulement* entails, have made themselves felt: not all individual states can cope with the resulting responsibility which is sometimes exceptionally large, giving rise to calls for burden-sharing. Calls that have not so far resulted in a more equitable distribution of responsibilities among states despite attempts to that effect most notably in the form of the 'Convention Plus initiative' of the High Commissioner.[31] An initiative that failed since it did not address the lack of a distributive mechanism in the Convention, omitted to address the question why states should engage in burden-sharing, and lost itself in highly specific issues without explaining how these would contribute to an effective system of global burden-sharing.[32]
When the international refugee law regime was created, the collective responsibility of the international community or rather the recognition that the problem of refugees is of international scope and concern resulted in transferring the international aspect of the problem to the United Nations, more in particular UNHCR whose "cardinal function" is "to provide international protection to refugees on behalf of the international community".[33] When the United Nations decided to establish UNHCR, the General Assembly explicitly recognized "the responsibility of the United Nations for the international protection of refugees".[34] Although UNHCR too refers to the international community as a whole to provide the international protection to refugees,[35] it nonetheless emphasizes the original allocation of responsibility, that is, the responsibility of the states hosting refugees,[36] and its own mere supplementary role in providing international protection that involves, "above all", "ensuring that Governments take the necessary action to protect all refugees within their territory, as well as persons seeking admission at their borders who may be refugees".[37] The question is whether or not the present day allocation of the responsibility to protect refugees corresponds with this statement.

7. 'WE LIVE IN A COUNTRY OF UNHCR'

The role of UNHCR has changed dramatically over the past 60 years, and it has turned into the opposite of what had been intended: UNHCR is as operational as its predecessor, the IRO. It currently employs 6.880 staff members, over 80% of who operate in the field in some 123 states where it has 396 offices, yielding a budget of more than 3 billion USD. Those figures are indicative of the fact that the protection of refugees is no longer exclusively borne by individual countries of refuge. The current extent of UNHCR's operationality can largely be attributed to two factors. First of all, to an unequal distribution of burdens (80% of all refugees are hosted by developing states). Secondly, to a lack of capacity: not all states are capable of protecting refugees, they simply lack the means, and hence "they need to receive the assistance of the international community to enable them to do so".[38] The question is whether assistance that is provided to compensate large numbers of refugees and/or incapacity in the sense indicated has resulted in a mere shift in responsibility – that is, an alternative apportioning – or given way to joint responsibility.

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[30] Turkey is a case in point, see M.Y.A. Zieck, "UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks", 22 *International Journal of Refugee Law* 2010, 593-622.
[31] See M.Y.A. Zieck, "Doomed to Fail from the Outset? UNHCR's 'Convention Plus Initiative' Revisited", 21 *International Journal of Refugee Law* 2009, 387-420.
[32] *Ibid.*
[33] UNHCR Research Unit Division of International Protection, Note on the Categories of Persons to Whom the High Commissioner is Competent to Extend International Protection, 1981 at 2.
[34] UN doc. A/Res/319 (IV).
[35] UN doc. A/AC.96/830 (Note on International Protection), para. 11.
[36] UN doc. A/AC.96/930 (Note on International Protection), para. 2; "UNHCR's international protection function has evolved greatly over the past five decades from being a surrogate for consular and diplomatic protection to ensuring the basic rights of refugees, and increasing their physical safety and security. While the main responsibility for safeguarding the rights of refugees lies with States …", *ibid.*
[37] *Ibid*. para. 13.
[38] UN doc. A/AC.96/830 (Note on International Protection), para. 18.

The answer is affirmative with respect to shifting responsibility: the tasks UNHCR assumes have resulted in a weakening of the principle that governments have the primary responsibility for the "welfare" of refugees on their territory.[39] The main reason for this is the increasing responsibility UNHCR assumes for in particular long-term 'care and maintenance' programmes for refugees in countries of refuge.[40] Characteristic for these programmes is "the extent to which it endowed UNHCR with the responsibility for the establishment of systems and services for refugees that were parallel to, separate from, and in many cases better resourced than those available to the local population".[41] As a result, "a widespread perception" was created "that the organization was a surrogate state, complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation, etc.) and even ideology (community participation, gender equality)".[42] UNHCR is not merely assuming tasks that are properly those of states, this assumption, as if interconnecting tanks, entails a limited role for the country of refuge whose role is confined to the admission and recognition of refugees, and sometimes even recognition is performed by UNHCR on behalf of the host state, protection against *refoulement*, and the provision of security to refugees.[43] It should not, therefore, come as a surprise that refugees express their frustration at UNHCR rather than the government of the country of refuge. The protest slogan of Sudanese refugees in Egypt addressed to UNHCR is a case in point: "We live in a country of UNHCR".[44]

UNHCR nonetheless frequently recalls the original allocation of responsibilities, that is, it emphasizes that states have the primary responsibility for refugees on their territory.[45] Meanwhile, however, it secured a territorial foothold in many states which enables it to assume tasks in the territory of states. Its presence in states is usually governed by a host state agreement, 'cooperation agreement' in UNHCR terminology, which comprises the following provision:[46]

> "Cooperation between the Government and UNHCR in the field of international protection of, and humanitarian assistance to, refugees and other persons of concern to UNHCR shall be carried out on the basis of the Statute of UNHCR, of other relevant decisions and resolutions relating to UNHCR adopted by United Nations organs and of Article 35 of the Convention Relating to the Status of Refugees of 1951 and Article 2 of the Protocol Relating to the Status of Refugees of 1967".[47]

Practice demonstrates a more substantial role for UNHCR in the field, and the cooperation agreements provide the legal basis for UNHCR's providing protection and humanitarian assistance to refugees and other persons of its concern in the territory of (host) states.[48] The question is whether they have jointly converted the original allocation and division of responsibilities between UNHCR and states into shared responsibility. Although it has become difficult to identify the specific apportioning that applies, it will moreover vary per state, it is submitted it does not: even while UNHCR has been given a more extensive mandate in the territory of states, the various responsibilities remain distinct: the host state or country of refuge is

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[39] A. Slaughter, J. Crisp, "A surrogate state? The role of UNHCR in protracted refugee situations", UNHCR Research Paper No. 168 (2009) at 2. Note that the reference is to the 'welfare' of refugees rather than their 'protection'.
[40] *Ibid.* at 1.
[41] *Ibid.* at 8.
[42] *Ibid.*
[43] *Ibid.* at 1-2.
[44] See *inter alia*, C. Moulin, P. Nyers, "`We Live in a Country of UNHCR' – Refugee Protests and Global Political Society", 1 *International Political Sociology* 2007, 356-372.
[45] UN doc. A/AC.96/1024 (Note on International Protection), para. 5.
[46] Not all cooperation agreements that have been concluded comprise this particular provision, but most do by virtue of the fact that UNHCR introduced the use of a model cooperation agreement. For the text of this model agreement, see Zieck, 2006, *op. cit. supra* n. 10, Annex 2.
[47] The reference to respectively Article 35 and Article 2 are omitted in case the agreement is concluded with a state that is not a party to the relevant instruments.
[48] On the cooperation agreements, see M.Y.A. Zieck, 2006, *op. cit. supra* n. 10, in particular Ch. 7.

ultimately solely responsible for the protection of the refugees it hosts.[49] It can hardly be otherwise: UNHCR is a non-territorial entity and its role is in that sense confined to do whatever it can to induce the government of the host state to grant protection, and to provide assistance that facilitates the government to do so, alternatively temporarily assuming some of its tasks. It can thereby rely on the norms that govern the cooperation with the host state by virtue of the cooperation agreement, norms that are all, incidentally, predicated on the original allocation of responsibility regarding the protection of refugees, which is especially useful in states that are not parties to the 1951 Convention and/or 1967 Protocol.

8. THE UNITED NATIONS BEYOND UNHCR

So far the focus was on UNHCR, but the search for the relevant collective set out with a reference to the United Nations as representative of the international community of states. The focus on UNHCR comes natural since the General Assembly whose involvement with refugees became part of its functions since the United Nations was created, decided to charge UNHCR with its responsibilities in this respect. Beyond resolutions which directly relate to UNHCR, the General Assembly addresses refugee problems in resolutions that partake of the legally non-committal rhetoric of collective responsibility. It, for instance, recognized "the universal collective responsibility to share the urgent and overwhelming burden of African refugees".[50] Beyond the General Assembly and UNHCR, reference could be made to the Security Council,[51] a collective within the United Nations to whom the members have conferred the primary responsibility for the maintenance of international peace and security. This responsibility encompasses increasingly refugee situations and problems. The question is whether its acts – decisions, recommendations, resolutions - are indicative of shared responsibility.

Leaving its calls that address the 'international community' at large with respect to refugee (related) problems aside, more specific calls of the Security Council serve to reinforce the position of UNHCR to enable it to implement its Statutory tasks, for instance by urging states to cooperate with UNHCR with respect to voluntary repatriation of refugees,[52] to implement agreements governing voluntary repatriation,[53] and to granting UNHCR access,[54] and are reminded of their obligations regarding refugees including their right of return, the responsibility to create conditions which allow refugees to return,[55] to preserve the civilian nature of refugee camps,[56] and more in general, to fulfil their obligations under international refugee law.[57] Worth considering in this respect are the mandates of peace-keeping operations established by the Security Council in so far as they relate to refugees. A review of the mandates of the missions in Sudan (UNMIS),[58] Burundi (ONUB),[59] Cambodia (UNTAC),[60] the Democratic Republic of the

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[49] *Ibid*. at 322-325. Particularly relevant is the *Affaire D. et Autres c. Turquie* (Application no. 24245/03), judgment of the European Court of Human Rights of 22 June 2006, on this case, see M.Y.A. Zieck, "*Affaire D. et Autres c. Turquie* of de rol van UNHCR in landen van toevlucht" [D. and others *v*. Turkey or the role of UNHCR in countries of asylum], 31 *Nederlands Tijdschrift voor de Mensenrechten* / *NJCM-Bulletin* 2006, 1160-1170; Zieck, 2010, *loc. cit. supra* n. 30, at 602-605.

[50] UN doc. A/Res/35/42 para. 9; see also UN docs. A/Res/38/126, para. 6; 39/139, para. 6; 40/117, para. 9; 41/122, para. 10; 42/107, para. 10.

[51] In addition, of course, reference can be made to the ECOSOC.

[52] *E.g.* UN docs. S/Res/882, para. 17; S/Res/898 (1994), para. 18; S/Res/916, para. 18.

[53] *E.g.* UN doc. S/Res/1494 (2003), para. 14.

[54] *E.g.* UN docs. S/Res/941 (1994), para. 5; S/Res/988 (1994), para. 19; S/Res/1199 (1998), para. 5 sub (d).

[55] UN doc. S/Res/1199 (1998), para. 5 sub (e).

[56] UN docs. S/Res/1923 (2010), para. 23; S/Res/1319 (2000), para. 1; *cf.* the rather explicit statement pertaining to the responsibility of states hosting refugees in resolution 1208 (UN doc. S/Res/1208) of 1998, in which the Council affirms "the primary responsibility of States hosting refugees to ensure the security and civilian and humanitarian character of refugee camps and settlements in accordance with international refugee, human rights and humanitarian law" (para. 3).

[57] UN doc. S/Res/1430 (2002), preamble.

[58] UN doc. S/Res/1590 (2005), para. 4 sub (b).

[59] UN doc. S/Res/1545 (2004), para. 5.

Congo (MONUC, MONUSCO),[61] Darfur (UNAMID),[62] Rwanda (UNAMIR),[63] the Central African Republic and Chad (MINURCAT),[64] Somalia (UNOSOM II),[65] Western Sahara (MINURSO),[66] Afghanistan (UNAMA),[67] Kosovo (UNMIK),[68] Sierra Leone (UNAMSIL),[69] and Georgia (UNOMIG)[70] reveals that their tasks consist of the facilitation and coordination of the voluntary return of refugees, monitoring the voluntary and safe return of refugees in cooperation with UNHCR, assisting UNHCR in the provision of logistical support for the repatriation of refugees, supporting the government's efforts to create an environment conducive to the voluntary repatriation of refugees, contributing to a secure environment for the sustainable return of refugees to their homes, assisting the government in facilitating the voluntary and safe return of refugees, and liaising with the government and UNHCR in support of efforts to relocate refugee camps which are in close proximity to the border.

The acts of the Security Council, whether calls on states or mandates given to peace-keeping operations, whilst issued on behalf of a collective – states members of the United Nations – do not appear to be indicative of shared responsibility: they rather seem to confirm the system of several responsibility by means of repeatedly reminding states of their obligations regarding refugees including cooperation with UNHCR in the exercise of its Statutory functions and thus contribute to realizing the international responsibility the international community as represented in the General Assembly agreed to assume (but not to finance) and assign to UNHCR.

9. CONCLUDING OBSERVATIONS: INDEED, NO SNAKES IN IRELAND

The current universal international refugee law regime involves different collectives: the international community of states as represented in the United Nations, states parties to the 1951 Convention and/or 1967 Protocol as well as states not parties to either one of those two instruments who are bound to observe the prohibition of *refoulement* by virtue of customary international law. The recognition of the international scope and nature of the refugee problem, mitigated by the experiences gained after the Second World War, led to the establishment of a regime with a clear-cut allocation of responsibilities: individual states were to be responsible for the protection of refugees they happen to host, and UNHCR was assigned to supplement their efforts on behalf of the international community mainly by directing individual states to behave according to the set allocation. Large numbers of refugees, coupled to incapacity of states of refuge led to a changed role for UNHCR: it may have to assume functions in the territory of states that were originally, and still are, considered to be those of states themselves. Actual situations may, in other words, require changes in the original apportioning of responsibilities that consist of the international community in the form of UNHCR assuming more responsibilities and states less. Such shifts do not, however, alter the nature of the apportionment of several responsibility for the protection of refugees.[71]

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[60] UN doc. S/Res/745 (1992) *jo.* UN docs. S/23613 (1992), S/23613/Add.1 (1992).
[61] UN docs. S/Res/1565 (2004), para. 5 sub (b); S/Res/1856 (2008), para. 3 sub (b); S/Res/1925 (2010), para. 12 sub (g).
[62] UN doc. S/Res/1769 (2007), para. 1 *jo.* UN doc. S/2007/307/Rev.1, para. 54 sub (e).
[63] UN docs. S/Res/872, para. 3 sub (f); S/Res/997 (1995), para. 3 sub (b); S/Res/1029 (1995), para. 2 sub (a), (b).
[64] UN docs. S/Res/1778 (2007), para. 1; S/Res/1861 (2009), paras. 6 sub (c), 25 sub (a), (b); S/Res/1923 (2010), para. 8 sub (ii).
[65] UN docs. S/Res/814 (1993), para. 12; 897 (1994), para. 2 sub (e).
[66] UN docs. S/Res/1084 (1996), para. 5; S/Res/1198 (1998), para. 3; S/Res/1495 (2003), para. 5 *jo.* the original settlement plan (UN doc. S/22464) and the subsequent peace plan (UN doc. S/2003/565).
[67] UN doc. S/Res/1974 (2011), para. 6 sub (e).
[68] UN doc. S/Res/1244 (1999), para. 9 sub (c).
[69] UN doc. S/Res/1346 (2001), para. 8.
[70] UN docs. S/Res/937 (1994), para. 6 sub (i); S/Res/1494 (2003), para. 14.
[71] They do, however, affect the supervisory responsibility of UNHCR, on this, see *e.g.*, M.Y.A. Zieck, "UNHCR's toezicht op de toepassing van het Vluchtelingenverdrag" [UNHCR's supervision of the

States display a tendency to minimize, evade or even all together deny the obligations they incur by virtue of the prohibition of *refoulement*. This practice is both demonstrative of and a response to the absence of collective or joint responsibility regarding the protection of refugees. This absence or lack can only be remedied by a system that secures not just joint responsibility but joint and several responsibility whereby individual states have the right of recourse to other states to recover any 'overpayment'.[72] Put differently, collective responsibility requires a mechanism of burden sharing that compensates the current indiscriminate effects of the observance of the prohibition of *refoulement* in terms of number of refugees for which states become individually responsible. In order to exchange the current system of several responsibility, any such burden-sharing mechanism requires the participation of all states unlike the current feeble mechanisms in place, which are wholly contingent on the benevolent discretion of (very few) states and not necessarily geared to compensating unduly heavy burdened states either.[73] This requires exchanging the collective responsibility rhetoric regarding burden-sharing in grand statements such as in particular the Millennium Declaration,[74] and the World Summit Outcome,[75] and pledges made in the Declaration of States Parties to the 1951 Convention and 1967 Protocol,[76] for a non-discretionary system of burden-sharing.[77]

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application of the 1951 Convention Relating to the Status of Refugees], *Asiel & Migrantenrecht* 2010, no. 2, 59-67; M.Y.A. Zieck in A. Zimmermann (ed.) *Commentary on the 1951 Convention relating on the Status of Refugees and its 1967 Protocol*, 2011 on Article 35 of the 1951 Convention at 1459-1510.

[72] Point made by Edgar du Perron, Professor of Private Law at the Amsterdam Law School, when discussing forms of responsibility in the context of international refugee law with the author on 23 May 2011.

[73] UNHCR and particularly state practice concerning resettlement is a case in point, see on this, *e.g.*, M.Y.A. Zieck, "'Quota Refugees', the Dutch Contribution to Global 'Burden Sharing' by Means of Resettlement of Refugees", forthcoming.

[74] UN doc. S/Res/55/2, para. 26.

[75] UN doc. A/Res/60/1, para. 133.

[76] Declaration of States Parties to the 1951 Convention and/or its Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, 12-13 September 2001, UN doc. HCR/MMSP/2001/09, 16 January 2002, para. 12.

[77] Proposals for such a system were developed over a decade ago by J.C. Hathaway and R.A. Neve: "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection", 10 *Harvard Human Rights Journal* 1997, 116-211. UNHCR itself can be considered to constitute a burden-sharing mechanism – then High Commissioner Lubbers characterized the existence of UNHCR as a manifestion of burden-sharing at the First Meeting of the High Commissioner's Forum on 27 June 2003 – but the distributive principles on which it bases its interventions are far from clear and, moreover, largely donor-driven, see Zieck, 2009, *loc. cit. supra* n. 31 at 415-418.