Amsterdam Center for International Law
University of Amsterdam

SHARES
RESEARCH PROJECT ON
SHARED RESPONSIBILITY IN INTERNATIONAL LAW

EXPERT SEMINAR REPORTS

SHARES Expert Seminar Report

Shared Responsibility in International Refugee Law

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Foreword

The Amsterdam Center for International Law held a one-day Expert Seminar in Amsterdam on 30 May 2011 devoted to the topic Shared Responsibility in International Refugee Law.

The seminar was part of the project research project on Shared Responsibility in International Law (SHARES),[1] which seeks to rethink the allocation of international responsibilities in cases where multiple actors, through concerted action, a joint enterprise or other forms of interaction contribute to an international wrong.

In order to enhance the understanding of shared responsibility, the SHARES project has launched the Expert Seminar Series to uncover the practice in diverse areas. The seminar on the allocation of responsibility in the context of refugee protection was the second of these seminars, preceded by a seminar on multinational military operations and followed by a seminar on international environmental law.

The overall aim of this seminar was to map and examine the principles and practice in regard to the following issues: the existence, scope and content of the collective responsibility of states and international institutions, most notably UNHCR, to protect refugees; shared responsibility arising out of extra-territorial refugee policies and shared responsibility arising out of refoulement of refugees to a state where they are subsequently persecuted.

This report summarizes, without any claims of being complete, the presentations made by the experts and the following discussions. The seminar was held under the Chatham House rules. The report therefore does not attribute any points of discussion to participants or organizations.

André Nollkaemper

[1] For more information, see www.sharesproject.nl.

1. Collective responsibility for the protection of refugees

The first panel discussed international refugee protection which, at first sight, seems to be an area of international law that involves questions of 'collective responsibility'. International protection is generally understood as protection provided by the international community because the refugee, due to a well-founded fear of persecution, is unable or unwilling to avail him- or herself of the protection of the country of nationality.[2] The United Nations often refers to the 'collective responsibility' of the United Nations High Commissioner for Refugees, its partners and States to protect and find lasting solutions for the global refugee problem.

1.1. Background of the current refugee regime

The current refugee regime was drafted in the aftermath of the Second World War. In order to deal with the vast amount of people uprooted by the war, the International Refugee Organization (IRO) was created. The IRO assumed the role of international authority for the protection of refugees and could, as such, be said to carry a collective responsibility for voluntary repatriation and resettlement. When it ceased to exist, there were still many refugees and millions more were to be displaced in the decades to come.

Around the same time, the Convention Relating to the Status of Refugees (1951 Convention)[3] was drafted, which to this day form the pinnacle of the regime. It was expressed during the seminar that, while the international scope and nature of the refugee problem were given ample consideration during the drafting process and even found its way into the Preamble of the 1951 Convention, it did not lead to the adoption of a true system of collectivized responsibility. This is reflected by two key decisions.

[2] Article 1 of the 1951 Convention: 'For the purposes of the present Convention, the term "refugee" shall apply to any person who … [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

Firstly, the responsibility for refugee protection was assigned to individual States, more specifically, to the State on whose territory a refugee sought refuge. This individualized responsibility to protect can be deduced from Article 33 of the 1951 Convention, laying down the legal obligation of States not to "refoule", or forcibly return, refugees by sending them back into danger.[4]

Corresponding to this individual responsibility of States, the second decision specified that refugee protection would no longer be a responsibility incumbent on an international organization. The United Nations High Commissioner for Refugees (UNHCR) was not established with an operational mandate, which distinguished it from its different predecessor organization, namely the IRO. Instead, pursuant to Article 35 of the 1951 Convention, UNHCR supervises the allocation of responsibility for the protection of refugees to individual States and supports them in the provision of this protection.

1.2. Nature of the principle of burden sharing

There was certainly no doubt among the participants of the seminar that the responsibilities of offering protection to refugees are unevenly distributed. UNHCR recently estimated that 80% per cent of the world's refugees are being hosted by developing countries.[5] It was argued that the obligation on non-refoulement has to some extent contributed to this unfortunate situation, since it imposes a larger responsibility or 'burden' on those States that are geographically close to refugee-producing countries. No all individual States can cope with the resulting responsibility – Pakistan was mentioned as a prominent example – giving rise to recurrent calls for burden sharing.

An interesting question discussed in this respect was whether the principle of burden sharing constitutes a legally binding duty on States to achieve a more equitable sharing of the burden of refugee protection? Most participants agreed that the principle is a soft law norm. It was even stated by one of the participants that it is important that it remains as such,

[4] Article 33(1) of the 1951 Convention: '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.'

[5] —— 'World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries' UNHCR <http://www.unhcr.org/4dfb66ef9.html> (11 June 2011).

because it serves a useful political function in strengthening international cooperation without giving way to obligations of States regarding the protection of refugees. Put differently, States should not be able to invoke the principle of burden sharing as a precondition to hosting large amounts of refugees.

1.3. International refugee protection and the role of UNHCR

International refugee protection remains a collective concern of the international community, especially in cases of mass influx. Situations in which large numbers of refugees put an unsustainable pressure on the hosting capacity of States have led to changed role for UNHCR. While UNHCR has frequently reaffirmed the primary responsibility of States in relation to protection of refugees, it was noted that in reality it has assumed many functions that are properly those of States, giving it the distinct character of a surrogate state. The extent of this increased operationalization was aptly captured by the phrase of a Sudanese refugees in Egypt: "We live in a country of UNHCR".

The presence of UNHCR in host states is governed by so-called 'cooperation agreements'. These agreements provide the legal basis for the provision of humanitarian assistance to refugees by UNHCR. Due to extended mandate of UNHCR in these states it has been suggested that responsibility has effectively been shifted to UNHCR. Yet, the assumption of tasks by UNHCR is wholly dependent on and derived from the responsibility of individual States. The original allocation of responsibility regarding the protection of refugees thus remains the same.

On the basis of the foregoing it was observed that there is an innate focus on UNHCR when talking about the collective responsibility to protect refugees. This is reinforced by the tendency of both the General Assembly and the Security Council to refer to UNHCR when addressing the 'international community' at large. Mandates of peacekeeping operations, for instance, often make mention of UNHCR and urge States to cooperate with the organization in the handling of refugee-specific issues. However, beyond UNHCR, more collectives can be identified when speaking of the collective responsibility to protect refugees, such as the totality of States parties to the 1951 Convention, the 'humanitarian community' and the 'donor community'.

1.4. Legality of the practice of responsibility sharing (or 'protection elsewhere')

The increased cooperation in the field of refugee protection has mostly revolved around the idea of 'protection elsewhere'. On the mundane level of international practice this means that refugees are required to seek refuge and settle in the first country they reach. But unless and until refugees have received specialized UN protection or have been recognized as *de facto* nationals of another country pursuant to Articles 1D and 1E of the 1951 Convention respectively,[6] there is no ground in international law that limits their choice of asylum country, according to one of the participants. Refugees may, in other words, take their chances on refugee protection in any country.

Although this may be perceived as requiring States to provide refugee protection unilaterally, the seminar continues, this is not the case. In fact, it was submitted that before a refugee is actually admitted to a State's refugee determination procedure - at which point he or she becomes, in the language of Article 32 of the 1951 Convention 'lawfully present'[7] - responsibility sharing between States parties is in principle allowed. In order to be lawful, such sharing or reallocation must, however, be implemented in a manner that respects the acquired rights of refugees. The assignment of 'protection elsewhere' may thus not be a basis for rights-stripping.

As to the measure of compliance with acquired rights, some debate erupted between the participants. The 1951 Convention provides a contingent rights structure.[8] Depending on whether a refugee is simply present, lawfully present, lawfully residing or habitually residing, more or less rights apply. The complete gamut of applicable rights must be accorded to refugees in the State to which protective responsibility is assigned. Nevertheless, some participants questioned whether the ability to secure entry and be

[6] Article 1D of the 1951 Convention: 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.';

Article 1E of the 1951 Convention: 'This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.'

[7] Article 32(1) of the 1951 Convention: 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.'

[8] See in general James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press: Cambridge, 2005).

protected from *refoulement* isn't just the maximum feasible, especially in mass influx situations? Besides the practical difficulty of defining a benchmark of what constitutes a mass influx situation, the majority of participants principally insisted that, beyond Article 33 of the 1951 Convention, the full requirements of refugee and human rights law must be complied with by States when engaged in responsibility sharing.[9]

1.5. European refugee protection and the role of the Dublin II Regulation

On the level of European refugee protection, cooperation on migration issues originally focused on protection and humanitarian objectives. Asylum seekers, for example, could choose their country of asylum unless there were established connections with another country (e.g. nationality, previous residence, family, language). This was turned on its head with the advent of the 1990 Dublin Convention,[10] which was later replaced by the Dublin II Regulation.[11] During the seminar, this instrument was basically characterized as an asylum-limiting instrument, prompted/inspired by the European Union's containment driven discourse.

The Preamble of the Dublin II Regulation lists numerous objectives, such as the promotion of free movement in the European Union (EU), the harmonization of EU asylum policies and the efficiency of EU asylum processes, but the key purpose arguably remains the prevention of the lodging of simultaneous or consecutive asylum applications in EU member States. Additionally, the Regulation is also supposed to address 'orbit situations'. To this effect, it ensures that at least one State, usually the

[9] This was confirmed by the High Court of Australia in NAGV and NAGW of 2002 v. MIMIA [2005] HCA 6, paras 27-31: '[A] perusal of the Convention shows that, Article 33 apart, there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as "protection obligations".'

[10] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990 [1997] OJ C 254 (1990 Dublin Convention).

[11] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003 [2003] OJ L 50/1 (Dublin II Regulation).

State where the asylum seeker illegally entered the EU,[12] is responsible for examining an asylum claim.[13]

The Dublin II Regulation is based on the legally vague notion of mutual trust. Presuming that protection standards in member States are the same or at least equivalent, they have agreed to recognize each other as safe third countries to which asylum seekers can be returned. Yet, the harmonization efforts undertaken by the EU have thusfar not remedied the difficulties arising from the differences in levels of protection for refugees. Having said that, there is a risk of violations of refugee rights, urging one of the participants to remark that "the onus is on the sending State" to guarantee the protection of those rights.

Much of the controversy surrounding the Dublin II Regulation deals with its perceived lack of burden sharing. While no statistics were discussed during the seminar, it was signalled that countries at Europe's external borders find many refugees crossing their borders. The operation of the Regulation increases the pressures on their asylum systems and, as such, contradicts the principle of burden sharing. On the basis of the foregoing, the argument was put forward that the Regulation, in its current form, challenges "the very foundations of the international refugee regime, which is based on a collective endeavour and commitment to protect refugees".[14]

[12] Article 10(1) of the Dublin II Regulation: 'Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.' In Chapter III, the Dublin II Regulation lays down a hierarchical list of criteria that determine which State is responsible.

[13] Article 1 of the Dublin II Regulation: 'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.';

Article 3(1) of the Dublin II Regulation: 'Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

[14] Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press: Oxford, 2009) 5.

2. Shared responsibility arising out of extra-territorial refugee policies

The second panel discussed extra-territorial refugee policies and the different scenarios of shared responsibility that may ensue from their unlawful implementation. Extra-territorial refugee policies can be described as initiatives that seek to 'deterritorialize' the asylum system by providing protection to refugees and processing asylum claims outside the territory of the state implementing the policy.[15] Western politicians and policy makers increasingly consider such policies as a viable response to the strains placed upon their domestic asylum systems. The panel discussion focused in particular on the development and implementation of extra-territorial refugee policies in EU context.

2.1. Selected examples of extra-territorial refugee policies

Extra-territorial refugee policies have taken a variety of forms. In EU context, policies at two levels may be discerned. On the level of the EU, the concept of 'intergrated border management' features prominently when discussing efforts to control the external border. As part of this concept, the following measures were discussed during the seminar: the requirement to submit data for obtainment of visa, the imposition of carrier sanctions on private parties and third countries; the stationing of immigration liaison officers at diplomatic missions and international air- and seaports and the establishment of the Frontex agency for sea border controls (see under 2.2.).

On the level of individual member States, domestic migration and asylum policies are also increasingly externalized. While many examples can be mentioned in this regard, the interception of boat migrants was highlighted by way of presentation and discussion of the Marine I case.[16] This case concerned a capsized ship with 369 immigrants on board, mostly from India and Pakistan. After being rescued by the Spanish Guardia Civil, they were detained in Mauritania by Spanish security forces only to be repatriated to their respective countries of origin over a period of six months. A complaint

[15] See Alexander Betts, 'The International Relations of the 'New' Extra-territorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR' (2004) 22(1) *Refuge* 58.

[16] *P.K. et al. v. Spain*, Communication No. 323/2007, UN Doc. CAT/C/41/D/323/2007, 21 November 2008.

was filed with the Committee Against Torture regarding inhumane conditions while on board and in the repatriation centre. Given the involvement of various actors (e.g. Spain, Mauritania, UNHCR, IOM), interesting questions of shared responsibility were raised (see under 2.3).

2.2. Extra-territorial refugee policies and the role of Frontex

Extra-territorial refugee policies in general and external border control in particular have gained greater prominence with the abolition of the internal borders between the member States of the EU. This role has been taken up by the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), which was established in 2004.[17] The legal basis for its establishment can be found in Article 62 and more broadly Title IV of the Treaty Establishing the European Community, which governs visa, asylum, immigration and other policies related to free movement of persons.

The main task of Frontex is to strengthen border security by ensuring the coordination of member States' activities in the field of management of external borders.[18] Central to the implementation of the operational aspects of border control management is maritime interception. To this end, Frontex has launched a number of interception operations on the high seas and even further, such as in the territorial seas of States of departure and transit (e.g. Mauritania, Senegal, Cape Verde). Questionable in this regard are the secrecy and non-transparency surrounding such operations. For instance, the non-disclosure of so-called 'operational plans' was negatively commented upon during the seminar.

2.3. Shared responsibility in case of extra-territorial refugee policies

Extra-territorial refugee policies, or rather the implementation thereof, are not unproblematic in terms of their compliance with international law. The application and territorial scope of international obligations under refugee and human rights law, in particular the principle of non-refoulement, were

[17] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 October 2004 [2004] OJ L 349 (Frontex Regulation).

[18] Article 2(1)(a) of the Frontex Regulation: 'The Agency shall perform the following tasks: … coordinate operational cooperation between Member States in the field of management of external borders.'

of specific interest to the participants of the seminar. In line with the position of UNHCR,[19] they fully agreed these obligations apply to extraterritorial refugee policies. In this vein, the reference to obligations concerning international protection by Frontex was warmly welcomed.[20] Yet, despite such encouraging developments, there may still be violations occurring as a result of the implementation of extra-territorial refugee policies. Different scenarios of shared responsibility were therefore discussed during the seminar.

2.3.1. Shared responsibility between States and IOs (Frontex)

The first scenario concerns shared responsibility between States and international organizations (IOs), such as Frontex. In the case of Frontex, it was explicitly provided that the responsibility for the control and the surveillance of the external border lies with the member States.[21] However, this position warrant scrutiny according to the participants of the seminar, since it is widely accepted that IOs cannot evade their responsibility by pointing to their member States and *vice versa*. Depending on what is agreed between Frontex and the member States in question on the issue of responsibility, which is not always known nor specified in advance, some form of shared responsibility may arise. Interestingly, it was also suggested that the EU, to which Frontex's conduct is attributable, may be responsible to the extent that is shares competences with its member States.

[19] According to UNHCR, being within the control or authority of a State is the appropriate criterion for engaging the responsibility of extraterritorially acting States. See UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' <www.unhcr.org/refworld/pdfi d/45f17a1a4.pdf> (26 January 2007) 17.

[20] Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, 11 July 2007 [2007] OJ L 199/30 (RABIT Regulation). Article 2 of the RABIT Regulation: 'This Regulation shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.'

[21] Article 1(2) of the Frontex Regulation: 'While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.'

2.3.2. Shared responsibility between multiple States

The second scenario concerns the possibility of multiple state responsibility, which is most likely to occur as a result of joint border controls in which several States take part. In the course of such controls, national border guards of one State are sometimes made available to another State. When that happens in such a way that a State exercises exclusive command and control over another State's border guards, their actions are attributable to the State at whose disposal they were placed as per Article 6 of the Articles on State Responsibility.[22] However, since it was explained that most border guards operate within the command structures of their own country and are therefore not at the complete disposal of another State, this option was not discussed in debt during the seminar.

Instead, more emphasis was placed on a broader notion of shared responsibility. A State thereby remains independently responsible for conduct carried out by its border guards. But since those border guards were involved in joint border controls together with border guards from other States, multiple States may be responsible for the same course of action. In other words, the responsibility of several States, whose conduct has contributed to a single injury, is distributed to them separately, rather than resting on them collectively.[23]

[22] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN GAOR Supplement No. 10 (A/56/10) chp.IV.E.1 (Articles on State Responsibility). Article 6 of the Articles on State Responsibility: 'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'

[23] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' ACIL Research Paper No. 2011-07 (SHARES Series) finalized 2 August 2011 (www.sharesproject.nl) 69.

3. Shared responsibility arising out of the practice of refoulement

The third panel discussed the principle of non-refoulement and the different scenarios of shared responsibility that may precede and follow from its violation. Generally regarded as the centrepiece of the international refugee regime, the term non-refoulement refers to the obligation inscribed in a number of refugee and human rights law instruments preventing the expulsion of a person where removal would expose him or her to persecution or to a real risk of ill-treatment.[24] Since it touches upon different legal regimes and may play a role during different stages of refugee's flight (e.g. before, during and after), the panel discussion focused on a wide variety of legal topics pertaining to the practice of refoulement.

3.1. Shared responsibility and causes of refugee flows

Foreign intervention and occupation can both create and avert large-scale refugee crises. With regard to the former, this means that a situation of persecution is created that would not have existed otherwise. An interesting question raised was whether multiple actors, in the case of coalitional warfare, can be held responsible for causing refugee flows? Here a comparison was drawn to the environmental law principle of common but differentiated responsibilities.[25] This principle establishes a legal framework to distribute responsibility by incorporating factors such as economic capabilities and historic contributions.

However, owing to the difficulty of determining causal links, it was considered unrealistic to establish shared responsibility in this manner. Moreover, the focus on responsibility for causing refugee flows carries a danger in that it obfuscates the obligation of every State to provide protection for refugees, regardless of which actor was responsible for their flight. Phrased differently, there are many refugee-producing situations

[24] See Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Cambridge University Press: Cambridge, 2005) Chapter 4; Hathaway (n 8) Chapter 4; Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia: Antwerp, 2009).

[25] United Nations Framework Convention on Climate Change (opened for signature 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). Article 3(1) of the UNFCCC: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'

where there was no foreign intervention or occupation, and therefore no responsible actor other than the persecuting entity. That does not absolve other States from their obligation to offer safe havens to those in need.

Shared responsibility may still be the result of a breach of obligations that concern the protection of individuals in other areas of law such as international human rights and humanitarian law. The idea of the 'Responsibility to Protect' (R2P) is often discussed in this context; likewise during the seminar where it was considered that R2P can form the basis for collective action to stop and avert large-scale refugee crises. Strictly speaking, R2P is not a responsibility but rather an umbrella concept for different collective obligations incumbent on the international community as a whole. Shared responsibility may thus be incurred for not having complied with these obligations.

3.2. Shared responsibility between multiple States in case of refoulement

Shared responsibility may also ensue from the violation of the obligation of non-refoulement. The different scenarios, which overlap with those already mentioned in relation to extra-territorial refugee policies (see under 2.3), were discussed through the prism of a case-study, namely M.S.S. v. Belgium and Greece.[26] In this landmark judgment, the European Court of Human Rights revisited its case law on the Dublin II Regulation.[27] The case concerned the transfer of an Afghan national from Belgium to Greece, where he faced degrading detention and living conditions as well as the risk of refoulement to Afghanistan due to structural deficiencies in Greek asylum procedures.

The Court held both the sending and receiving State individually responsible for violating their own obligations of non-refoulement. With regard to the sending State, Belgium, this covered both direct refoulement for knowingly exposing him to ill-treatment in Greece, effectively enforcing the primacy of non-refoulement over mutual trust (see under 1.5), and indirect refoulement for exposing him to subsequent expulsion to Afghanistan. Viewing them as separate international wrongs, the Court thus made a distinction between these different forms of refoulement – something it

[26] *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011.

[27] *K.R.S. v. United Kingdom*, Application No. 32733/08, 2 December 2008; *T.I. v. United Kingdom*, Application No. 43844/98, 7 March 2000.

failed to do in earlier case law.[28] At the same time, both were dealt with under Article 3 of the European Convention of Human Rights and that provision only.[29] Putting everything into "the small basket of Article 3", which is how one of the participants described it during the seminar, was considered too confining by most; other provisions should also be taken into account (see under 1.4).

In addition to holding multiple States responsible for separate international wrongs, the participants also discussed the possibility of holding a State responsible for aiding and assisting another State in the commission of an internationally wrongful act. The international law concept of aid and assistance, or complicity, is not without controversial elements. According to the Articles on State Responsibility, two requirements must be fulfilled: (1) the assisting State must be aware of the circumstances making the conduct of the assisted State internationally wrongful and (2) the act must be internationally wrongful if committed by the assisting State.[30] In light of the fact that the threshold for establishing responsibility in this manner is considerably higher, combined with the resulting lack of practice, the participants viewed this as a challenging option.

[28] See *K.R.S. v. United Kingdom* (n 25) in which the ill-treatment the applicant could suffer in Greece played no role in the Court's appraisal, even though it had recognized that the 'objective information before it on conditions of detention in Greece [was] of some concern'.

[29] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222 (European Convention on Human Rights). Article 3 of the European Convention on Human Rights: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[30] Article 16 of the Articles on State Responsibility: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.'

4. Conclusions

The SHARES Expert Seminar on Shared Responsibility in International Refugee Law had the aim of mapping and examining principles of collective and shared responsibility. The presentations and discussions held during the seminar demonstrated that these principles can be approached from different dimensions.

Generally, when speaking of collective responsibility, participants referred to the consensual relationship between States and/or IOs *inter se*. This inter-state dimension, which encapsulates such challenges as burden sharing, can touch upon the 'protection to refugees'-dimension. In the context of this latter dimension, which concerns the non-consensual relationship between one or more States and/or IOs on the one hand and refugees on the other, situations of shared responsibility were discussed.

While some participants judged international law, as it currently stands, to be well-equipped to deal with situations of shared responsibility arising out of the practice of extra-territorial refugee policies and the practice of refoulement, others found that we have moved from a position of classical independent responsibility to a less than desirable position of collective ambiguity.

List of participants

Speakers
- James Hathaway, University of Michigan Law School
- Maarten den Heijer, University of Leiden
- Agnès Hurwitz, United Nations High Commissioner for Refugees
- Isabelle Swerissen, ACIL, University of Amsterdam
- Tom Syring, Norwegian Immigration Appeals Board
- Sakari Vuorensola, Legal Affairs Unit, Frontex
- Marjoleine Zieck, ACIL, University of Amsterdam

Chairs
- Christiane Ahlborn, ACIL, University of Amsterdam
- Dov Jacobs, ACIL, University of Amsterdam
- André Nollkaemper, ACIL, University of Amsterdam

Other participants
- Daniëlle van Asperen, Dutch Ministry of the Interior and Kingdom Relations
- Roeland Böcker, Dutch Ministry of Foreign Affairs
- Michel Bravo, Dutch Ministry of the Interior and Kingdom Relations
- Evelien Brouwer, Utrecht University
- León Castellanos, ACIL, University of Amsterdam
- Bahisja Chane, Advisory Committee on Migration Affairs
- Galina Cornelisse, VU University Amsterdam
- Marieke van Eik, Böhler Law Firm
- Johannes van Gemund, UNHCR Geneva
- Geor Hintzen, Advisory Committee on Migration Affairs
- Claire Inder, United Nations High Commissioner for Refugees
- Erik Kok, ACIL, University of Amsterdam
- Kris Pollet, European Council on Refugees and Exiles
- Jorrit Rijpma, Leiden University
- Evelien van Roemburg, ACIL, University of Amsterdam
- Myrthe Wijnkoop, Dutch Council for Refugees