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ARTICLES

The Origins of 'Burden Sharing' in the Contemporary Refugee Protection Regime

Claire Inder*

ABSTRACT

Recent increases in large-scale refugee movements, particularly as a result of the Syria crisis, have led to renewed policy and academic interest in the long-contested principle of burden sharing in the refugee regime. Recital 4 of the preamble of the 1951 Convention relating to the Status of Refugees (1951 Convention) expresses this principle as follows:

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 ...

Through an analysis of the *travaux préparatoires* of the 1951 Convention relating to recital 4, this article seeks to shed light on the origins of the inclusion of burden sharing in the contemporary refugee protection regime. It is argued that the *travaux préparatoires* reveal considerable divergence among the drafters regarding both the placement of the burden-sharing principle in the preamble (form) as well as its scope and legal effects (substance), and suggest that the ultimate decision to retain recital 4 was a political compromise. In considering the intentions of the drafters with respect to recital 4, particular focus is placed on three potential 'legal effects' that arise to a greater or lesser extent from the discussions: (1) recital 4 as having a force majeure effect; (2) recital 4 as creating positive obligations to assist receiving States; and (3) the implications of recital 4 for interpretation of other provisions of the 1951

* Office of the United Nations High Commissioner for Refugees (UNHCR) and University of Geneva. The views expressed are those of the author, and do not represent the position of UNHCR or the United Nations. Many thanks to Professors Guy S Goodwin-Gill, Jane McAdam, and Laurence Boisson de Chazournes, Frances Voon, the two anonymous Journal reviewers, and participants at the First Annual Conference of the Refugee Law Initiative for their comments on previous versions of this article.

Convention. The article shows that the position taken by some of the drafters, notably with respect to the ability of States receiving large numbers of refugees to implement certain 1951 Convention obligations in the absence of international support, was questionable from the perspective of international treaty law. However, the discussions also foreshadowed doctrinal and practical issues in the application of the 1951 Convention regime that remain ongoing today, and provide important context for the considerable ambivalence that subsists with respect to the scope and nature of the burden-sharing principle in modern refugee law.

1. INTRODUCTION

1.1 Background

The conflict in Syria, which has given rise to one of the largest refugee outflows in many decades,[1] has once again thrown into relief a recurring tension in the global refugee regime. On the one hand, the regime is premised on the understanding that individual host States will provide international protection to refugees on behalf of the international community. On the other, States' protection obligations under international refugee law generally attach to the country that has jurisdiction over an individual asylum seeker or refugee.[2] State contributions as host countries are necessarily unequal, even arbitrary, as most refugees at least initially arrive and stay near to their countries of origin, where they are first able to reach safety.[3] At the end of 2016, primarily by virtue of geographic proximity to refugee origin countries, States in the 'global South' hosted 84 per cent of the world's refugees.[4] This is not just a 'north–south' issue, however; within the European Union (EU), there have also been serious concerns about the uneven distribution of State responsibilities for hosting refugees – a concern that was magnified with the large increase in arrivals in 2015 and 2016.[5]

At the heart of these tensions is a key set of principles: international cooperation, solidarity, burden sharing, and responsibility sharing (hereafter 'burden sharing'[6])

1 UNHCR, 'Global Trends: Forced Displacement in 2016' (20 June 2017) <http://www.unhcr.org/5943e8a34> accessed 11 July 2017.

2 UNHCR, 'Burden-Sharing – Discussion Paper submitted by UNHCR Fifth Annual Plenary Meeting of the APC' (2001) 17 ISIL Yearbook of International Humanitarian and Refugee Law 2. See also UNHCR, 'Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims. Legal Standards and Policy Considerations with Respect to Extraterritorial Processing' (November 2010) 3–4 <http://www.refworld.org/docid/4cd12d3a2.html> accessed 10 December 2016.

3 UNHCR, *The State of the World's Refugees: In Search of Solidarity* (Oxford University Press 2012) 197. Compare S Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) International Journal of Refugee Law 567.

4 UNHCR, 'Global Trends' (n 1) 2.

5 For the latest data on arrivals across the Mediterranean, see UNHCR, 'Refugees/Migrants Emergency Response – Mediterranean' (updated regularly) <http://data.unhcr.org/mediterranean/regional.php> accessed 9 November 2016.

6 See further part 1.2 below for an explanation with respect to terminology.

between States in the refugee regime. Recital 4 of the preamble of the 1951 Convention relating to the Status of Refugees (1951 Convention) expresses this as follows:

> 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 ...[7]

Presented in this way, the principle of burden sharing acknowledges that granting asylum may create difficulties for some States, the need for the international community to support such States, and that refugee challenges are a matter of international concern.

References to the need for burden sharing in refugee-related instruments are numerous. In addition to recital 4 of the preamble of the 1951 Convention, mentioned above, the principle is recalled in non-binding international instruments[8] and in binding regional conventions.[9] However, to date, the burden-sharing principle has not been clearly incorporated in the operational part of a binding international refugee treaty.

For this reason, most refugee experts consider that burden sharing, while desirable and even necessary, does not constitute a 'hard' legal principle in international

[7] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention); Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[8] See eg Declaration on Territorial Asylum, UNGA res 2312 (XXII) (14 December 1967) art 2(2); United Nations Millennium Declaration, UNGA res 55/2 (18 September 2000) para 26; UNHCR Executive Committee Conclusion No 112 (LXVII), 'International Cooperation from a Protection and Solutions Perspective' (2016) para 1; UNHCR Executive Committee Conclusion No 100 (LV), 'International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004) preambular recitals 1, 2, 3, and 5, para k; UNHCR Executive Committee Conclusion No 52 (XXXIX), 'International Solidarity and Refugee Protection' (1988) paras 3 and 4; UNHCR Executive Committee Conclusion No 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) paras I.3 and IV.1. See further, generally, UNHCR, 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', UN doc EC/GC/01/7 (19 February 2001) <http://www.unhcr.org/3ae68f3cc.html> accessed 21 August 2017; UNHCR, 'International Cooperation to Share Burdens and Responsibilities', Discussion Paper (June 2011) <http://www.refworld.org/docid/4e533bc02.html> accessed 21 August 2017; UNHCR, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities', Summary Conclusions (28 June 2011) <http://www.refworld.org/docid/4e9fed232.html> accessed 21 August 2017.

[9] See eg Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art II(4); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, arts 67(2), 80.

refugee law,[10] and is at best an 'emerging'[11] or 'soft law' principle.[12] Indeed, many proposals to reform the refugee protection regime have been premised on the need for a stronger binding obligation with respect to burden sharing, translated into practice by, for example, mechanisms to distribute refugees worldwide by ranking host countries according to an index of wealth and population density.[13] A small number of commentators have sought to argue that the principle of burden sharing does amount to a binding obligation of refugee law.[14] However, they remain in the minority, and this literature

[10] See eg J Milner, 'Burden Sharing' in M Gibney and R Hansen (eds), *Immigration and Asylum: From 1900 to the Present* (ABC-CLIO 2005) 56 ('Although these statements [such as recital 4 of the 1951 Convention] suggest the desirability of burden-sharing, they do not constitute binding obligations'); PH Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 Yale Journal of International Law 243, 272 ('[i]nternational practice in the area of refugee protection reveals the existence of what might be called a weak norm of burden-sharing ... In the international instruments in which it can be discerned the burden sharing imperative is essentially precatory and hortatory'); G Noll, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field' (2003) 16 Journal of Refugee Studies 236, 236 ('A look at numerical inequalities in reception among Member States, the handling of the Bosnian and the Kosovo refugee crises as well as the protracted efforts to legislate on a supranational level suggest that burden-sharing continues to be a desideratum at best, a deceptive rhetorical veil at worst'); Legomsky (n 3) 608 ('While international law imposes no obligation on states to accept refugees for permanent resettlement, agreements to share responsibility for doing so are highly beneficial and therefore strongly encouraged by UNHCR and others' (fns omitted)).

[11] GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 505 ('Arguably, an emerging principle requires States to cooperate, in accordance with principles of international solidarity and burden sharing, and to promote solutions').

[12] A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 164 ('Even if not legally binding, in that international responsibility will not be incurred for its breach, burden-sharing is nevertheless a crucial norm under international refugee law, in fact, one of its founding principles, and, to that extent, it must necessarily have some bearing on the conduct of States and international organizations'). See also JC Hathaway and RA Neve, 'Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115, 170–71 ('Clearly, states are committed in principle to sharing burdens and responsibilities, and are in some circumstances legally obliged to act collectively').

[13] A Grahl-Madsen, 'Refugees and Refugee Law in a World of Transition' (1982) 3 Michigan Yearbook of International Legal Studies 65 (proposing refugee protection quotas for States based on gross national product and population). Other discussions on reforming the refugee protection regime based on stronger notions of burden sharing have included: A Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11 Journal of Refugee Studies 396; Hathaway and Neve (n 12); Schuck (n 10); D Anker, J Fitzpatrick, and A Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1988) 11 Harvard Human Rights Journal 295.

[14] See eg G Martin, 'International Solidarity and Cooperation in Assistance to African Refugees' in G Martin (ed), *Africa in World Politics: A Pan-African Perspective* (Africa World Press 2002); J-P Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1978–80) 8 Australian Yearbook of International Law 162, 184 ('The consistent, widespread pattern of recognition of the validity of the principle of

dates largely to the 1980s, coinciding with the achievement of relatively successful large-scale and high-profile burden-sharing arrangements to address refugee challenges in 'Indochina' and Central America.[15]

The recent increase in refugee movements and the continued unevenness of the impact on certain host States has recently led to renewed policy and academic interest in the principle of burden sharing. Not least, the adoption of the New York Declaration for Refugees and Migrants (New York Declaration) by the General Assembly in September 2016 was a significant milestone, with States committing to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees.[16] The initiation of a process towards the adoption of a 'global compact on refugees' by the General Assembly in 2018, with the goal of ensuring more equitable and predictable burden and responsibility sharing at its heart, may also be another important step forward.[17]

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burden-sharing in refugee protection, coupled with its repeated application in State practice, seems to leave little room indeed for doubt concerning the legal nature of the principle, and its binding character for States, at least within the framework of UN Charter law' (fn omitted)); JN Saxena, 'International Solidarity and the Protection of Refugees' (Congress on International Solidarity and Humanitarian Action, San Remo, 1980).

15 See generally R Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?' (2006) 18 International Journal of Refugee Law 537; A Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' (2006) UNHCR New Issues in Refugee Research Working Paper 120 <http://www.refworld.org/docid/4ff163c82.html> accessed 7 August 2016. See also less positive literature around the time of the response to the conflicts in the former Federal Republic of Yugoslavia in the late 1990s and early 2000s: Suhrke (n 13); M Barutciski and A Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing' (2001) 14 Journal of Refugee Studies 95.

16 New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA res 71/1 (3 October 2016) para 68. Although see further: V Türk and M Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28 International Journal of Refugee Law 656; E Ferris, 'The Global Summit on Refugees and Migrants: The Pesky Issue of Level of Ambition' (14 September 2016) <http://www.kaldorcentre.unsw.edu.au/publication/global-summit-refugees-and-migrants-pesky-issue-level-ambition> accessed 17 August 2017; J McAdam, 'Filling Up or Emptying the Glass? Musings on the 19 September Refugee Summit' (5 September 2016) <http://www.kaldorcentre.unsw.edu.au/publication/filling-or-emptying-glass-musings-19-september-refugee-summit> accessed 28 January 2017.

17 The first thematic discussion towards the global compact on refugees, organized by UNHCR in July 2017, focused on past and current burden- and responsibility-sharing arrangements with a view to building on good practices and lessons learned. See UNHCR, '"Towards a Global Compact on Refugees": Thematic Discussion 1 – Past and Current Burden and Responsibility Sharing Arrangements', Concept Paper (19 June 2017) <http://www.unhcr.org/59525f887> accessed 11 August 2017; UNHCR, '"Towards a Global Compact on Refugees": Thematic Discussion 1 – Past and Current Burden and Responsibility Sharing Arrangements', Summary Conclusions (20 July 2017) <http://www.unhcr.org/5971d1b17> accessed 11 August 2017.

Against this background, the purpose of this article is to better understand the initial inclusion of the principle of burden sharing in the 1951 Convention regime through an analysis of the *travaux préparatoires* with respect to recital 4. Following brief notes on terminology (part 1.2) and the architecture of the 1951 Convention (part 1.3), part 2 provides an overview of relevant discussions on early drafts of the 1951 Convention, which initially included reference to the burden-sharing principle in the operative part. Part 3 of the article then analyses the relevant portions of the *travaux préparatoires* regarding the inclusion of recital 4 in the preamble of the 1951 Convention. The focus is on understanding the intentions of the negotiators at the time with respect to this clause. It is argued that the *travaux préparatoires* reveal considerable divergence among the drafters regarding both the placement of the burden-sharing principle in the preamble (form) as well as its scope and legal effects (substance), and suggest that the ultimate decision to retain recital 4 was a political compromise. Particular focus in this part is placed on three potential 'legal effects' of recital 4 that arise to a greater or lesser extent from the discussions among the drafters: (1) recital 4 as having a force majeure effect; (2) recital 4 as creating positive obligations to assist receiving States; and (3) the implications of recital 4 for interpretation of other provisions of the 1951 Convention. This article shows that the discussion among the drafters on the legal effects of recital 4, while questionable from the perspective of international treaty law, foreshadowed key doctrinal and practical issues in the application of the 1951 Convention regime today.

1.2 Terminology

In international refugee instruments, policy discussions, and the literature, there are four separate terms that are used, interchangeably as well as consecutively, to refer to similar ideas: (1) international cooperation; (2) international solidarity; (3) burden sharing; and (4) responsibility sharing.[18] Despite this, it is arguable that these terms are not completely synonymous from an international legal perspective. Generally, for example, the principle of 'international cooperation' is understood to be more firmly embedded in international law than 'international solidarity', but also to be narrower in scope. Among other differences, 'cooperation' is generally neutral as to outcome (that is, States may have a duty to cooperate that could be satisfied regardless of the results of this cooperation), while 'solidarity' tends to imply a normative obligation to support States that face particular difficulties.[19]

[18] Hurwitz (n 12) 167 identifies an additional term that may also be relevant in the general international law context: 'good neighbourliness' (part of the law of co-existence, it entails respect by States of their obligations under public international law, above all its basic principles). See also Türk and Garlick (n 16).

[19] See eg J Delbrück (ed), *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law, May 23–26, 2001* (Duncker & Humblot 2002); K Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections' in R Wolfrum and C Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010); AG Koroma, 'Solidarity: Evidence of an Emerging International Legal Principle' in HP Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012); J Delbrück, 'The International Obligation to Cooperate: An Empty Shell or

Unfortunately, as will become apparent in the extracts provided below, the *travaux préparatoires* are not helpful in suggesting a preferred term or clarifying the difference between these variants. The drafters of the 1951 Convention did not refer to a principle of 'burden sharing'. This term only emerged in the 1970s with the onset of the Indochina crisis;[20] nor did they refer to 'responsibility sharing', which came into use in the late 1990s, the result of an understandable yet perhaps ill-advised shift based on a growing distaste for the characterization of refugees as 'burdens'.[21] Most of the delegates used the term 'international cooperation', with some references also to 'international solidarity' and 'international collaboration'. There was no attempt to use the term 'cooperation' to link the principle specifically to, for example, the Charter of the

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a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law' in HP Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012); R Wolfrum, 'Cooperation, International Law of', *Max Planck Encyclopedia of Public International Law* (2012) <http://opil.ouplaw.com/home/EPIL> accessed 2 February 2016; D Campanelli, 'Solidarity, Principle of', *Max Planck Encyclopedia of Public International Law* (2012) <http://opil.ouplaw.com/home/EPIL> accessed 2 February 2016.

[20] By way of example, the first reference to 'burden sharing', as opposed to 'international cooperation' or 'international solidarity', in a conclusion on international protection adopted by UNHCR's Executive Committee was in 1979, at the height of the Indochina crisis: UNHCR Executive Committee Conclusion No 15 (XXX) 'Refugees without an Asylum Country' (1979) para (f) ('States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing').

[21] 'Ill-advised' because the introduction of a new principle of 'responsibility sharing' (in a context where there were already three existing terms – cooperation, solidarity, and burden sharing) may have distracted from efforts to better understand the principle of burden sharing in practice. For objections to the characterization of refugees as burdens, see eg C Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers' (date unknown) <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF> accessed 5 May 2016 ('[i]t must be noted from the outset that the expression "responsibility-sharing" should be preferred to "burden-sharing", which suggests that refugees are a burden on the community of states'); Noll (n 10) 237 ('[t]he term "burden-sharing" is a problematic one. It appears to suggest that refugee protection is necessarily burdensome. Whether this is indeed the case, depends much on the time frame one chooses to adopt'); UNHCR, 'Global Consultations on International Protection/Third Track: Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', UN doc EC/GC/01/7 (19 February 2001) ('The inclusion of "responsibility" along with "burden-sharing" reflects a more positive image of refugees and a stronger framework for international cooperation'). At the same time, '[a]ttempts to replace the term in this area with a call for responsibility-sharing or the "equal balance of efforts" between the Member States have had little impact on the way the public debate has been led': ER Thielemann and T Dewan, 'Why States Don't Defect: Refugee Protection and Implicit Burden-Sharing' (2013) fn 2 <http://personal.lse.ac.uk/thielema/Papers-PDF/Thielemann-Dewan-WEP.pdf> accessed 17 August 2017.

United Nations, article 1(3);[22] and there was also no explicit discussion on which of the terms should be preferred.[23] Indeed, the final wording of recital 4 of the preamble contains different terms in the French ('*solidarité*') and English ('cooperation') versions respectively.[24]

The fact that the appropriate terminology to use was not clearly resolved at the time the 1951 Convention was drafted has both linguistic and substantive repercussions today. The terminology used to describe the burden-sharing principle continues to shift, often according to rhetorical expediency. This is problematic because arguably the unclear nomenclature with respect to the burden-sharing principle has only added to the difficulties faced in identification of its normative content and what it does or does not require of States. If it is not known what a principle, rule, or obligation is called, it is difficult to be clear about what it requires of the actors that are subject to it. Clarifying the differences in terminology is, however, beyond the scope of this article. In the interests of simplicity, albeit perhaps somewhat unfashionably, the term 'burden sharing' is preferred and should be understood to refer to all the terminological variants mentioned above.

1.3 Architecture of the 1951 Convention

The 1951 Convention is, together with the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), a foundational pillar of the modern refugee regime.[25] Adopted by the United Nations (UN) Conference of Plenipotentiaries on

[22] Art 1(3) of the Charter states that one of the purposes of the United Nations (UN) is to 'achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion': Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945).

[23] See, however, part 3.2.2, regarding a somewhat confusing exchange between France and the US on the difference between 'collaboration' and 'cooperation'.

[24] Recital 4 of the preamble in French reads: 'Considérant qu'il peut résulter de l'octroi du droit d'asile des charges exceptionnellement lourdes pour certains pays et que la solution satisfaisante des problèmes dont l'Organisation des Nations Unies a reconnu la portée et le caractère internationaux, ne saurait, dans cette hypothèse, être obtenue sans une *solidarité internationale*' (emphasis added).

[25] For further details with respect to the refugee regime in place prior to 1950 and the context of the drafting of the 1951 Convention, see eg: C Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press 1995); G Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993); E Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge University Press 2008); P Orchard, *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge University Press 2015); M Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press 2009); L Holborn, *Refugees: A Problem of Our Time*, vol I (Scarecrow Press 1975); National Population Council, *National Population Council's Refugee Review* (Australian Government Publishing Service 1991). It is noted that many States, including significant host States, are not parties to the 1951 Convention and that the modern refugee protection regime now extends beyond the 1951 Convention to include a range of hard and soft law instruments or principles

the Status of Refugees and Stateless Persons, held in Geneva from 2 to 25 July 1951,[26] and entering into force in April 1954, the 1951 Convention broke new ground in several respects. For the purposes of this article, the most significant were twofold.

First, by adopting a general definition of a 'refugee' based on a well-founded fear of being persecuted on various grounds (race, religion, nationality, membership of a particular social group, or political opinion), the 1951 Convention went further than earlier refugee treaties, which had referred to specific national and ethnic groups rather than establishing generalized criteria that could fit future situations[27] – albeit limited by the geographical and temporal restrictions contained in article 1B.[28] Secondly, unlike previous refugee instruments and institutional arrangements, including under the International Refugee Organization (IRO) (1946–52), the purpose of the 1951 Convention was to set out internationally consistent standards of treatment for refugees in their host countries, including access to courts (article 16) and the labour market (article 17) on a 'national treatment' or 'most-favoured nation' basis. In other words, the 1951 Convention was essentially an agreement between States as to how they would treat refugees on their territories and the bulk of the 1951 Convention's provisions concern the rights and obligations of refugees in the territories of contracting States.[29]

Contrary to contemporary criticisms that the 1951 Convention is too narrow to accurately capture the full scope of displacement, at the time, therefore, it was seen as imposing significant obligations on host countries. The 1951 Convention notably did not address the question of admission to any country or establish a right to seek and enjoy asylum. Further, it did not apportion responsibility between States, for example

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(eg regional instruments and customary international law in the case of the former; and conclusions on international protection adopted by UNHCR's Executive Committee and General Assembly resolutions in the case of the latter). Accordingly, any analysis of burden sharing as contained in the 1951 Convention is not conclusive as to the operation of the burden-sharing principle in the refugee regime as a whole.

[26] The procedural history of the 1951 Convention is summarized in GS Goodwin-Gill, 'Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees' (*UN Audiovisual Library of International Law*, 2008) <http://legal.un.org/avl/ha/prsr/prsr.html> accessed 5 May 2016.

[27] See eg Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663, art 1 ('The present Convention is applicable to Russian, Armenian and assimilated refugees, as defined by the Arrangements of May 12th, 1926, and June 30th, 1928, subject to such modifications or amplifications as each Contracting Party may introduce in this definition at the moment of signature or accession').

[28] See 1951 Convention, art 1A(2) ('as a result of events occurring before 1 January 1950') and art 1B(1)(a) (allowing States to limit obligations to 'events occurring in Europe before 1 January 1951').

[29] J-F Durieux and J McAdam, '*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 International Journal of Refugee Law 4, 6; Goodwin-Gill (n 26); Holborn (n 25) 84 (noting that '[t]he effect of the Convention was to establish a code of the basic rights of refugees, rights which signatories of the Convention pledged themselves to respect').

by prescribing which State should deal with a claim to refugee status or establishing quotas for admission.[30] The exception to this was the draft burden-sharing provision, ultimately included in recital 4 of the preamble, which will be addressed below.

2. ANALYSIS OF THE *TRAVAUX PRÉPARATOIRES*: EFFORTS TO INCLUDE BURDEN SHARING IN THE OPERATIVE PART OF THE 1951 CONVENTION

The question of international support to relieve the 'burden' on States receiving large numbers of refugees was initially considered for inclusion in the operative part of the 1951 Convention, explicitly linked to the question of admission as well as efforts to recognize a 'right' to seek and enjoy asylum along the lines of article 14 of the Universal Declaration of Human Rights.[31] The original draft text of the 1951 Convention proposed by the Secretary-General in January 1950 included a 'chapter II' entitled 'admission', which contained the following article:

> Article 3
>
> 1. In pursuance of Article 14 of the Universal Declaration of Human Rights the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution on account of their race, religion, nationality or political opinion.
> 2. The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to persons to whom paragraph 1 refers. They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.[32]

In the discussion of this draft provision, it is striking that the practical need for States to come to the assistance of overburdened receiving countries with respect to refugees, at least in certain circumstances, was not called into question by any delegation. The United Kingdom (UK), for example, reiterated that '[i]t was only natural' that 'countries geographically adjacent to the refugees' countries of origin' should 'wish the burden on them to be shared', and that 'it was to be hoped that [other countries] would provide them with all requisite assistance, as in fact [they] had already done in the past'.[33]

At the same time, it is also striking that, despite the proposed inclusion of the need for burden sharing in the operative part of the text, there was never any intention to make draft article 3 either 'legally binding' or more precise in terms of State obligations. For example, in the comments on the text by the Secretary-General, it was clarified that

[30] Goodwin-Gill (n 26).

[31] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III).

[32] Ad Hoc Committee on Statelessness and Related Problems, 'Memorandum by the Secretary-General, Annex, Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons)', UN Economic and Security Council, UN doc E/AC/32/2 (3 January 1950) 22–23.

[33] Ad Hoc Committee on Statelessness and Related Problems (1st Session), 'Summary Record of the Seventh Meeting', UN Economic and Social Council, UN doc E/AC.32/SR.7 (2 February 1950) para 32.

the article 'does not touch on the actual status of refugees and lays down no binding legal obligations. It does, however, indicate a number of guiding principles which it might be thought desirable to incorporate in the Convention.'[34] The rationale for draft article 3(2) above,[35] as set out by the Secretary-General, was that '[o]wing to their geographical position and liberal traditions, some States are destined to become the initial reception countries for refugees', and that '[i]t is but just that other countries should not allow these [States] to bear the whole burden and by agreeing to admit a certain number of refugees to their territory should assume their equitable share.'[36] Again, however, the Secretary-General stressed that '[c]learly no binding and precise obligations can be imposed on Governments – for example by specifying the extent to which they must agree to receive refugees on their territory. It is for this reason that the Article includes the deliberately vague form of words: "a certain number of refugees"'.[37]

The failure of draft article 3(2) to propose any concrete or binding obligations served as a basis for several States to object to its inclusion in the substantive part of the 1951 Convention, essentially as a matter of legal drafting. Venezuela, for example, observed:

> that it was generally accepted in international law that only those provisions which imposed obligations on the signatories were included in the articles of international instruments; clauses containing statements of principle, hopes, wishes, etc were generally inserted in the preamble and not in the operative part.[38]

As chapter II 'did not ... impose any specific obligation' but 'simply stated a general principle', the text 'was unnecessary, since it was obvious that the effectiveness of the convention would depend on the goodwill and the spirit of solidarity of the signatory States'.[39]

Similarly, in objecting to the clause, the delegate from the United States (US) noted that his country 'was in no way seeking to avoid the obligations of international solidarity', rather '[t]he question ... was whether the obligation to relieve the burden of the initial reception countries should appear in the operative part of the convention.'[40] Several States advocated for the draft burden-sharing provision to be included either in the preamble or in a General Assembly resolution.[41] Indeed, Brazil suggested that

[34] Ad Hoc Committee on Statelessness and Related Problems (n 32).

[35] The discussions on the issues with respect to admission in para 1 are not summarized in this article. However, it was the strong position of the US, in particular, that the Convention 'must deal with the rights of refugees who had already been admitted into a country, without seeking to establish who should admit them and in what circumstances': Ad Hoc Committee on Statelessness and Related Problems (n 33) para 29. France strongly opposed this, noting '[i]t was indisputable that the most essential, most urgent and primary right for the refugee was that of finding a reception country; otherwise he would never obtain the status of a refugee and would never be able to benefit by the legal protection provided by the convention': at para 42.

[36] Ad Hoc Committee on Statelessness and Related Problems (n 32) 22.

[37] ibid 23.

[38] Ad Hoc Committee on Statelessness and Related Problems (n 33) para 8.

[39] ibid para 9.

[40] ibid paras 38–39.

[41] For example, Venezuela: ibid para 12.

a General Assembly resolution could 'stipulate the method by which that principle of international solidarity could be put into practice',[42] while the US said that 'in the interests of [receiving countries] it would be better for the problem to be raised in the United Nations rather than within the framework of the convention'.[43]

France was the primary proponent of retaining chapter II in the operative part of the 1951 Convention, for reasons that will be explored further in part 3 below. The delegation objected to removing the clause, arguing that:

> if countries far from those from whence the refugees were coming were not prepared to make some effort to relieve the burden assumed by initial reception countries, the latter would be unable to support indefinitely the considerable commitments resulting from their liberal policy and the Committee's work would be absolutely purposeless.[44]

France stressed that '[a] wish expressed in the preamble of the convention or in a separate text would certainly not have the same force as a moral obligation set forth in the body of the convention'.[45] With respect to allegations that the language of the article was 'vague', the French delegate, Mr Rain, stated that 'he feared that the article would give rise to insuperable objections if the obligation stated therein was couched in more explicit form'.[46] The Chairman (Canada) also defended the proposed clause, arguing that the Committee 'should not allow itself to be excessively influenced by legal considerations in seeking to formulate provisions to ensure that a certain category of human beings, the refugees, should receive the minimum of consideration to which they were entitled'.[47] Denmark noted that first asylum countries ('which received refugees and for which it was in practice impossible to question their admission') required assurance that other countries 'would favourably consider admitting refugees'; otherwise, '[i]f such assurances were not given to countries of initial reception, some of them might be somewhat apprehensive about opening their doors to refugees'.[48]

The Committee ultimately voted by six votes to three with two abstentions that no clause on admission – and thus on burden sharing – should be included in the operative part of the 1951 Convention. The question of finding 'another place' for the reference, either in the preamble or a resolution of the General Assembly, was left open.

[42] ibid para 17.
[43] ibid para 39.
[44] ibid para 14.
[45] ibid para 22. See also ibid para 44 (noting 'a mere expression of hope in the preamble or in a separate resolution would not have the same binding character as a moral commitment explicitly accepted by plenipotentiaries on behalf of the States principals).
[46] ibid para 43 ('Certainly, all delegations were fully aware that their countries were under a moral obligation to assist the initial reception countries to solve the refugee problem and that it was impossible to specify exactly the extent of that obligation because it was not possible to foresee in advance how it would be put into practice in each particular case').
[47] ibid para 19.
[48] ibid para 30.

Following the vote, the Chairman specifically stated that 'he hoped that the fundamental idea of that clause would be expressed in the generous spirit which the initial reception countries had the right to expect'.[49] And, in prescient remarks, the Director General of the IRO cautioned that:

> one of the fundamental characteristics of the refugee problem produced by the Second World War and its aftermath ... has been the continuing influx of refugees into certain countries which have been called upon to bear the brunt of providing first asylum. It would ... be opportune for an attempt to be made on the international level to deal with the problem of admission, and also to provide some means whereby the burden imposed upon countries of first asylum might in some degree be shared by the other members of the international community of nations through the inclusion in the international convention relating to the status of refugees of provisions concerning the admission of refugees ... the Director-General of the IRO therefore considers that it is his duty to point out the special need for the inclusion in the draft Convention Relating to the Status of Refugees of provisions concerning admission, and that *a failure to include any such provision will leave a most serious gap in the Convention.*[50]

3. ANALYSIS OF THE *TRAVAUX PRÉPARATOIRES*: INCLUDING BURDEN SHARING IN THE PREAMBLE

After early attempts to include burden sharing in the operative parts of the 1951 Convention failed, the focus then turned to the preamble.[51] The text of what became recital 4 was initially proposed by France as follows:

> 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 cooperation *to help to distribute refugees throughout the world.*[52]

[49] ibid para 50.

[50] Emphasis added. Ad Hoc Committee on Refugees and Stateless Persons, 'Refugees and Stateless Persons. Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems (Document E/1618)', 'Memorandum by the Secretary-General', UN Economic and Social Council, UN doc E/AC.32/L.40 (10 August 1950) 20–23, paras 4 and 13.

[51] The preamble was discussed by the Ad Hoc Committee on Statelessness and Related Problems (16 January – 16 February 1950) and the Social Committee of the Economic and Social Council (meeting in July and August 1950). The draft refugee definition and the preamble as amended were adopted by the Economic and Social Council on 11 August 1950. See further Goodwin-Gill (n 26).

[52] Emphasis added to highlight language that was ultimately changed or deleted in the final version of the recital as adopted. 'France: Amendment to the Draft Convention relating to the Status of Refugees, UN doc E/L.81 (29 July 1950) para 4.

Following the Spanish Civil War and the Franco dictatorship, France had received and assumed primary responsibility for some 500,000 refugees from Spain.[53] Speaking as a host country that had experienced what has come to be known as a 'mass influx',[54] the delegate from France, Mr Rochefort, consistently expressed concern throughout the negotiations that if the 'burdens' experienced by refugee-receiving States were not accounted for, the 1951 Convention might be unable to be meaningfully applied in practice. In justifying the insertion of recital 4, for example, the French delegate noted that '[t]he grim reality which the Ad Hoc Committee would have to take into account was that a number of countries were overburdened with refugees and were threatened with continuous new intakes'.[55] The French delegate stated that '[i]f that situation were not taken into account, the instrument created might prove incapable of serving its purpose'.[56] Foreshadowing the views of many receiving countries today, France also emphasized that geography would mean that some States would always receive larger flows of refugees than others;[57] the need for the 1951 Convention to ensure 'equity' for those States in this respect;[58] and the fairly onerous obligations that the 1951 Convention imposed through the generalized refugee definition and the high standards of

[53] See further Skran (n 25) 59 (noting that '[a]lthough the number of Spanish refugees approximated the number from the Third Reich, this exodus differed in that it took place within a much shorter period of time, and the responsibility for assisting the refugees fell to one country, France. ... They did not have major difficulties in finding temporary asylum in France but, once there, they still needed some form of international legal protection and a means of earning a living while they waited and hoped for revolution in their home country').

[54] While there is no accepted international definition of a 'mass influx' (or large-scale refugee movement), it has been characterized as involving either a sudden large number of arrivals, or more steady but frequent numbers of arrivals over time. See UNHCR, Discussion Paper (n 8). See further Durieux and McAdam (n 29) 5.

[55] Economic and Social Council, 'United Nations Economic and Social Council Official Records' (11th Session) 406th meeting, UN doc E/SR.406 (11 August 1950) 275.

[56] ibid.

[57] Noting that '[t]he truth was that certain European countries were the victims of their geographical situation which had made them, for more than 30 years, a haven of refuge in a particularly disturbed part of the world': Social Committee, 'Summary Record of the Hundred and Fifty-Eighth Meeting', Economic and Social Council, UN doc E/AC.7/SR.158 (15 August 1950) 8.

[58] 'The wording proposed by the French delegation presented the problem of refugees in terms that were equitable both for the refugees themselves and for the countries receiving them': Social Committee, 'Summary Record of the One Hundred and Sixtieth Meeting', Economic and Social Council, UN doc E/AC.7/SR.160 (22 August 1950) 26; '[t]he Committee should not lose sight of the exceptional burdens assumed by certain countries or the need to submit for signature by the Governments especially concerned a text which they would find equitable': ibid 27; the 'French amendment endeavoured to provide a definition of the refugee problem which would be equitable both to the refugees themselves and to the countries which granted them hospitality': ibid 12; 'The rights of countries of refuge should be safeguarded, as well as the rights of refugees': Economic and Social Council (n 55) 276.

treatment to be provided by contracting States, despite the Convention's temporal and geographical limitations.[59]

As with the brief discussion that took place when the burden-sharing principle was considered for the operative part of the 1951 Convention, no delegation ever contested the basic fact that burden sharing would be necessary to support receiving countries in some cases. The US, for example, noted that '[i]t went without saying that there should be international co-operation to alleviate the burden falling on certain countries because their geographical situation was such that an inordinately large number of refugees fled to them.'[60] Some delegations went further, referring, in the case of Mexico, to the fact that the clause 'had the further merit of seeking to awaken a feeling of collective responsibility'.[61] Nonetheless, despite their in-principle support for the need for burden sharing in practice, the discussions among the drafters of the 1951 Convention reveal certain ambivalences about both the form and substance of recital 4 of the preamble and indicate that its ultimate inclusion in the 1951 Convention was the result of compromise in both respects. These issues are addressed in turn below.

3.1 Questions of form: does recital 4 belong in the preamble?

There was significant discussion and divergence of views among delegations on the appropriateness of including the draft burden-sharing recital in the preamble. This was because the recital arguably went beyond the scope of the 1951 Convention which, as outlined above, was essentially an agreement between States as to the standards of treatment to be applied to refugees found on their territory. For example, Belgium was 'not opposed to the ideas expressed in the amendment, but considered that they had no place in the Convention.'[62] Denmark's delegate noted that it 'commended his entire support in matters of substance; but some of it, perhaps, went beyond what one would expect to find in a preamble, although the points covered would require consideration sooner or later.'[63] Most clearly, the representative from Canada stated:

[59] Noting 'the Convention itself would entail considerable obligations for the Contracting Parties': Social Committee, 'Summary Record of the One Hundred and Sixty-Seventh Meeting', Economic and Social Council, UN doc E/AC.7/SR.167 (22 August 1950) 6–7. The French delegate particularly emphasized his concern about the breadth of the definition of a refugee under discussion: 'Never before had a definition so wide and generous, but also so dangerous for the receiving countries, been put forward for signature by governments': Economic and Social Council (n 55) 276. Further, 'Mr ROCHEFORT (France) thought it impossible to begin the general discussion on the definition of the word "refugee" without first considering the preamble to the Convention relating to the Status of Refugees … The French delegation would, indeed, find it impossible to give an opinion on the specific issue of the definition of the word "refugee" unless it could at the same time express its views on the refugee problem as a whole': Social Committee (n 57) 5.

[60] Economic and Social Council (n 55) 278.

[61] Social Committee, 'Summary Record of the One Hundred and Sixty-Sixth Meeting', Economic and Social Council, UN doc E/AC.7/SR.166 (22 August 1950) 13.

[62] Economic and Social Council (n 55) 279.

[63] Social Committee (n 59) 5.

> the draft Convention laid down a series of obligations towards refugees in any country, but contained no article regarding the distribution of refugees. The preamble should surely be directly related to the matter of the Convention. In short, the paragraph amounted to an acceptance of a decision on high policy and was therefore unsuited to form part of a preamble to a convention conferring specified rights on specified categories of refugees.[64]

As with the initial discussions addressed in part 2 above, delegations opposed to the clause largely advocated for its inclusion in a General Assembly resolution instead. The US stated that 'the substance of the text might be incorporated in a General Assembly resolution, where it would be more proper and effective'.[65] India was 'opposed to inserting in the preamble something which went beyond the scope of the definition or something which was not normally considered proper in such a preamble',[66] and likewise suggested that the reference would be better suited to a General Assembly resolution.[67] One State – Belgium – took the opposite position, suggesting again that the clause be inserted in the operative part of the Convention,[68] a proposal that was not taken up by other States.[69]

Over the course of the negotiations, France was insistent on the inclusion of the burden-sharing clause in the preamble and, despite the concerns expressed by a number of delegations above, France's persistence ultimately prevailed.[70] However, the French

64 Social Committee (n 61) 19. This statement was also supported by Belgium: ibid 20.

65 Economic and Social Council (n 55) 278. See also Social Committee (n 61) 13, with the US delegate again noting his 'only doubt' to be 'whether those provisions should go into a preamble at all … much of what the French representative proposed to add would be better adopted in the form of a General Assembly resolution'.

66 Economic and Social Council (n 55) 279.

67 Social Committee (n 61) 18–19.

68 'This delegation, however, would like to go still further and insert after article 26 of the draft Convention another article drawn up in the same terms as those used in the fourth paragraph of the French amendment': ibid 16–17.

69 Despite France's initial advocacy for burden sharing to be included in the operative part of the 1951 Convention, France also appeared to reject the Belgian suggestion to put the clause in a new article, although the delegate's reasoning for this was not exactly clear; he noted simply that it 'would be difficult to find a suitable place for the fourth paragraph, relating to the undue burden certain countries had to bear, in the substantive portion of the Convention': ibid 17. The French delegate later reiterated that he would indeed have preferred to see the burden-sharing provision in the substantive part of the 1951 Convention: 'some provisions had been placed in the preamble which he would have preferred to see in the body of the Convention itself, particularly those stating the need for international cooperation'. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirty-First Meeting', UN doc A/CONF.2/SR.31 (29 November 1951) 25.

70 The French delegate ultimately insisted on the inclusion of the recital, and threatened not to sign the Convention without it. The burden-sharing recital was initially rejected by the Committee and watered down in the new draft proposed by the UK. See eg Social Committee, 'Summary Record of the One Hundred and Seventieth Meeting', Economic and Social Council, UN doc E/AC.7/SR.170 (23 August 1950) 8: '[t]hough the preamble had originally been based on a

delegate's argumentation provided a first indication that, whether the result of wishful thinking or otherwise, he may have been inclined to give more weight to the preamble than is usually accepted as a matter of international treaty law, an issue addressed further in part 3.2 below. In dismissing the inclusion of the draft burden-sharing recital in a General Assembly resolution, for example, he noted:

> Since a preamble formed an integral part of a convention, it carried greater weight than a General Assembly resolution. Although he did not wish to cast doubts on the value of resolutions adopted by the General Assembly, he ventured to suggest that in practice some of them had had very little positive effect. On the other hand, the preamble, being bound up with the Convention, would have the same authority as the Convention itself. It was for that reason that the French delegation was pressing for the inclusion in the preamble of the ideas it had put forward, especially as the Convention itself would entail considerable obligations for the Contracting Parties.[71]

The French delegate also stated that '[w]hereas the General Assembly's vote was binding only in the moral sense, signature and ratification [of the Convention] imposed financial and other contractual obligations', and '[t]hat was why, in the draft preamble that it had submitted, the French delegation had asked that the problem be presented in truly international and equitable terms'.[72]

To summarize, while the factual premise in terms of the need for burden sharing to support receiving States in certain circumstances was generally supported, it appears that many delegations recognized at the drafting stage an inherent inconsistency in inserting the burden-sharing recital into the preamble, given that its relationship to the substantive provisions of the 1951 Convention was unclear. The fact that the draft burden-sharing recital was ultimately retained in the preamble was a compromise, giving it more weight than a mere reference to the need for burden sharing in a General Assembly resolution, without going so far as including the clause in the operative part of the Convention.

3.2 Questions of substance: does recital 4 have any legal effects?

Compared to the questions of form, the discussion among delegations about the intended scope of the draft burden-sharing clause and its legal consequences for States was more limited. However, the *travaux préparatoires* raise a number of questions in this respect.[73]

French proposal, it had emerged from the Committee shorn of a clause which he felt to be essential, and the French delegation would vote against it if it were put to the vote as it stood'. Further, 'his delegation was no longer in a position to discuss certain articles of the draft convention, since neither in the preamble nor in the main body of the instrument was there any safeguarding clause relating to any exceptional situations which might later arise': Social Committee (n 59) 12.

71 Social Committee (n 59) 6–7.

72 Social Committee (n 57) 6–7.

73 At the time the 1951 Convention was drafted, the law of treaties was not codified but consisted of a body of principles that was widely seen as constituting customary international law. The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January

As various delegations appeared to recognize, as indicated in parts 2 and 3.1 above, it is generally accepted that preambular recitals do not establish binding legal obligations for State signatories to an international convention.[74] The function of the preamble is to outline the purpose and considerations that led the parties to conclude the treaty. Thus, while preambular recitals are not 'legally powerless' in that they may have (sometimes quite considerable) weight in terms of treaty interpretation, an issue considered briefly in part 3.2.3 below, they 'contain only exhortative clauses and do not create any legal commitment above and beyond the actual text of a treaty'.[75] Nor do they make 'substantive declarations of rights or obligations'.[76]

Against this background, part 3.2 considers three possible legal effects of recital 4 that arise to a greater or lesser extent from the discussion among the drafters of the 1951 Convention: (1) recital 4 as having a force majeure effect; (2) recital 4 as creating positive obligations to assist overburdened receiving countries; and (3) the role of recital 4 in interpreting the other substantive obligations contained in the 1951 Convention. As will be evident below, the main focus was (1), with (2) and (3) considered only in passing. For each of these issues, links to and implications for contemporary doctrinal debates and practical challenges in the day-to-day application of the 1951 Convention are highlighted, as relevant.

3.2.1 Recital 4 as a 'safeguarding clause'? The French delegate's position

Although preambular recitals do not generally establish binding legal effects for States parties to a treaty, the remarks of the French delegate indicate that he had relatively ambitious expectations from the inclusion of the burden-sharing recital in the preamble. Namely, at many points throughout the negotiations he appeared to characterize recital 4 as a 'safeguarding clause', which could justify a State's failure to implement some of its obligations under the 1951 Convention in certain circumstances.

> The obligations flowing from the convention were such that the day might come when certain countries might find it impossible to honour them: hence the necessity of certain safeguarding clauses. France herself could not be bound by the convention were it one day to be again faced with an influx of refugees as large as was that of the Spanish Republican refugees, amounting to 500,000.[77]

1980) 1155 UNTS 331 (1969 Vienna Convention) is now seen as stating the general international law of treaties. K Zemanek, 'Vienna Convention on the Law of Treaties' (*UN Audiovisual Library of International Law*, 2009) <http://legal.un.org/avl/ha/vclt/vclt.html> accessed 2 February 2017.

74 See M Mbengue, 'Preamble', *Max Planck Encyclopedia of Public International Law* (2012) <http://opil.ouplaw.com/home/EPIL> accessed 2 February 2017; MH Hulme, 'Preamble in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281; R Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 186–87.

75 Mbengue (n 74).

76 Hulme (n 74) 1305; see also the comments of Venezuela in part 2 (n 38). Hulme cites the UN Convention on International Multimodal Transport of Goods as an exception to this rule, containing 'multiple detailed obligations in its preamble', but also notes that it never entered into force, having failed to receive the requisite number of signatures and ratifications: Hulme (n 74) 1305, fn 114.

77 Economic and Social Council (n 55) 276.

Further:

> Certain countries not represented at the present meeting might find that they were not in a position to give effect to every article of the Convention. Investigation would then reveal that the problem was perhaps beyond those countries, and that it could not be considered that everything was cut and dried and that they were therefore failing in their duty by not applying the Convention in its entirety. It was obvious, therefore, that steps should be taken to ensure that the Convention was applicable in their case. Hence he felt the mention of 'international collaboration', which had proved its efficacy, should be retained, so that a State which failed to carry out its obligations under the Convention would not be regarded as at fault if it found itself in a position which was really beyond it. ... It was not out of the question that France, for example, would have to deal with a huge influx of refugees. If so, international collaboration would be the only remedy. Without it, the Convention would become quite inapplicable.[78]

These extracts suggest a desire on the part of the French delegate to elevate recital 4 to act almost as a force majeure clause,[79] excusing States experiencing large numbers of arrivals from the breach of at least certain of their obligations under the 1951 Convention. Consistent with this, at a later point in the negotiations, the French delegate even sought to include in the 1951 Convention's reservation clause (article 42) a statement that reservations would not be permitted concerning the preamble or articles which included recommendations, an effort that was rejected by other States on the basis that the preamble did not impose any obligations.[80]

The French delegate was, however, somewhat vague about exactly how recital 4 could operate with force majeure effect in practice. At other points in the discussion, he seemed to downplay the importance of the recital, characterizing it as 'the recognition of a *de facto* situation, rather than a statement of a specific obligation'[81] and 'a minor matter compared with the obligations which it [France] was willing to accept'.[82]

> His delegation considered that the preamble represented the only return asked of the international community in exchange for the recognition of its right to determine the status of refugees in the reception countries, such return taking the form of a definition, not of the refugee himself, but of the refugee problem, in fair and accurate terms in conformity with reality and the aims pursued. The

78 Social Committee (n 70) 11–12.

79 There are several definitions of 'force majeure'. See eg J Currie, *Public International Law* (Irwin Law 2001) 419, defining 'force majeure' as 'a justification advanced to counter a claim of state responsibility on the basis that the allegedly internationally wrongful act of a state is due to an unforeseen event or irresistible force, beyond the control of the state, which makes it materially impossible for the state to respect an international obligation.'

80 See Ad Hoc Committee on Refugees and Stateless Persons, 'Summary Record of the Forty-Third Meeting', Economic and Social Council, UN doc E/AC.32/SR.43 (28 September 1950) 7.

81 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 69) 29.

82 Economic and Social Council (n 55) 276.

> preamble itself was a modest one, simply a compromise which the French delegation thought a sincere one and likely to prove acceptable to all in its entirety, since it formed a coherent whole.[83]

The vagueness of the French position is best exemplified by the statement below – downplaying the insertion of the burden-sharing recital on the one hand, but also reiterating that it could be a 'safety clause' for certain States unable to implement their 1951 Convention obligations on the other.

> [T]he French amendment ... was not a request to governments, but only a statement of certain obvious truths, with an indication of certain situations which might arise and, in that event, of the conclusions to be drawn from them. Recalling once more the undue burden which France had had to bear in the matter of receiving refugees, he thought that all European countries which ran the same risks should be conscious of the need for including such a safety clause in the Convention.[84]

In terms of specifying the scope of the recital that the French delegate had in mind, the extract below is probably the most helpful:

> the original text, which alluded to the exceptional position of certain countries was, he felt, indispensable for continental countries liable to be faced with a large-scale influx of refugees. It had been argued that the Convention did not govern the question of admission, but continental countries had no choice in the matter. When faced with a flood of refugees upon their frontiers, they could not help but grant them a right of asylum, and possibly refugee status. In the case in point, the normal application of the Convention might be completely invalidated. If, for example, as had already happened, a State was suddenly called upon to take in half a million refugees, certain provisions of the Convention, particularly those relating to housing and the right to work, could not be applied without presenting the country concerned with problems which, temporarily at least, would prove insoluble. In such a case there would have to be international collaboration, and it was therefore not demanding too much of countries of immigration to ask for the implicit appeal ... to be retained.[85]

This statement by the French delegate is notable, in that he presumed that receiving States would have 'no choice' in terms of the admission of refugees to their territory, even in cases of mass influx. Rather, the issue was which other obligations contained in the 1951 Convention States might potentially be unable to fulfil for large numbers

[83] Social Committee (n 57) 11.

[84] Social Committee (n 61) 22. Similarly, 'The preamble to the Convention should contain various general ideas giving certain guarantees to the Contracting States, should they be prevented by exceptional circumstances from extending the benefits of the Convention to a few hundred or even a few thousand persons': Social Committee (n 59) 17.

[85] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 69) 25–26.

unless international assistance was forthcoming – and here France singled out the rights to housing and to employment as examples.

No State pressed the French delegate for more details on how a simple preambular recital could work to excuse a State from its Convention obligations, and in what circumstances.[86] Only one delegation, the UK, offered an alternative interpretation of the clause, in justifying the removal of part of the burden-sharing recital from the revised preamble at a certain stage of the discussions.[87] The representative noted that while it 'had not been omitted from the United Kingdom amendment by way of dissent from the statement of fact which it contained, which everyone fully recognized' the fact was that:

> he had doubted the value of introducing in a few words the idea that some other form of international action was necessary. If the notion of international solidarity was retained, it would, he felt, be interpreted merely as referring to international solidarity achieved through the signing and ratification of the present Convention.[88]

In other words, for the UK, the simple fact of signing the 1951 Convention was in itself the 'international cooperation' that was referred to in the burden-sharing recital of the preamble. This highly limited interpretation of recital 4 was not commented on by any other delegation, however, ultimately leaving the *travaux préparatoires* inconclusive as to any State agreement on the scope of the recital.

That recital 4 could in practice operate in the way envisaged by the French delegate is questionable from an international legal perspective. Just as a preambular recital does not usually create substantive rights and obligations, a point noted by several delegations in the context of the ability to make 'reservations' to the preamble, discussed above, it would also be highly unusual for a preambular recital to excuse State responsibility for failing to meet treaty obligations. For the French delegate, it appears that his 'quixotic quest'[89] to argue that recital 4 would have a force majeure effect was yet another compromise – the 'next best' option once it became clear that a positive

[86] Although certain States, including Pakistan, recalled the function of the preamble in general terms: see (n 123) below. While a number of States, including Switzerland, Germany, Sweden, and the Netherlands, ultimately expressed support for the French delegate's remarks, it is not clear from the record whether they were merely welcoming the sentiment he expressed with respect to the need for burden sharing in certain circumstances, or his explicit characterization of recital 4 as 'force majeure': ibid 27–28.

[87] Specifically, the amendment proposed by the UK read: 'Considering that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international cooperation': A Takkenberg and C Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol III 'The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2–25 July 1951' (Dutch Refugee Council 1989) 29 (noting the UK amendment made in UN doc A/CONF.2/99, para 3).

[88] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 69) 29.

[89] Thanks to one of the anonymous reviewers for this succinct encapsulation of the French delegate's position.

obligation to provide assistance to host countries would not be forthcoming (see further part 3.2.2 below).

In hindsight, however, the practical concerns raised by the French delegate regarding implementation of many 1951 Convention obligations in mass influx situations have arguably proven founded, even if his legal 'solution', treating recital 4 as a force majeure clause, has not been explicitly relied on by any State. In practice, many States admitting large numbers of refugees *de facto* suspend all but the 'most immediate and compelling protections' provided by the 1951 Convention, upholding the principle of *non-refoulement* (article 33) but not many of the social and economic protections it provides to refugees.[90] In recognition of this reality, it has been suggested that the incorporation of a derogation clause for mass influx emergencies in the architecture of the 1951 Convention, akin to those found in human rights law, would address the practical gaps in application of the Convention which arise during large-scale situations.[91] Experts have been cautious to note that, as in human rights law, under such a derogation regime certain fundamental rights would need to be treated as non-derogable, including article 33 (*non-refoulement*), but also potentially article 16(1) (access to courts) and article 31 (from which a non-derogable guarantee against arbitrary detention could be derived).[92]

There is also related literature, stemming from the work of Professor Goodwin-Gill, elaborating on the contingency of the principle of *non-refoulement* over time[93] and the notion of 'temporary refuge'.[94] This work suggests that in the context of large-scale movements there cannot be either a presumption or a reasonable expectation that a local durable solution, encompassing all the social and economic protections contained in the 1951 Convention, for example, will be forthcoming.[95] In doctrines of temporary refuge, the need for burden sharing by the broader international community to find durable solutions, including through resettlement, is given great prominence.[96]

[90] Durieux and McAdam (n 29).

[91] ibid 13, noting that 'the international community seems to have conceded that granting full Convention rights to refugees in mass influx situations cannot be realistically pursued' and '[t]he price that States have demanded in accepting the obligation to admit large numbers of refugees and asylum seekers is a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention'.

[92] ibid 21.

[93] ibid 13–15.

[94] Goodwin-Gill 'invokes a dynamic concept of "temporary refuge" as the practical consequence of *non-refoulement* through time, providing "a platform upon which to build principles for refugees pending a durable solution, whereby minimum rights and standards of treatment may be secured"': J-F Durieux, 'The Duty to Rescue Refugees' (2016) 28 International Journal of Refugee Law 637, 639, citing Goodwin-Gill and McAdam (n 11) 343. See also GS Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in D Cantor and J-F Durieux, *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014); GS Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers' (1985–86) 26 Virginia International Law Journal 897.

[95] Durieux and McAdam (n 29) 13, citing GS Goodwin-Gill, *The Refugee in International Law* (2nd edn, Oxford University Press 1996) 20.

[96] Durieux (n 94) 639–40, citing Goodwin-Gill and McAdam (n 11) 344 ('*Non-refoulement* through time is posited as "the core element both promoting admission and protection, and *simultaneously*

In line with these contemporary doctrinal positions, it is notable that in his conception of recital 4 as having a force majeure effect which would excuse receiving States from certain 1951 Convention obligations in the absence of sufficient international support, the French delegate never sought to argue that recital 4 would justify a receiving State in refusing to admit refugees in the first instance. Again, he appeared to believe receiving States would have 'no choice' in this regard (this sentiment was supported by other States, including Denmark).[97] His concern was rather with being in a position to assure other 1951 Convention rights to large numbers once refugees were safely on French territory and had been granted initial asylum, and he singled out rights such as those related to housing and labour market access.

In practice, however, there have been instances where host States experiencing mass influx have gone further than the French delegate appeared to envisage, using an absence of sufficient international burden sharing to justify the closure, or threatened closure, of their borders to refugees – in other words, denying even admission and temporary refuge.[98] Some of the most well known examples of successful large-scale burden-sharing arrangements, including the Comprehensive Plan of Action for Indochinese Refugees and the Humanitarian Evacuation Programme for Kosovar refugees, were triggered in response to such actual or threatened border closures by receiving States.[99] Further, while not explicitly making a force majeure argument, a minority of host States have sought to argue that violations by receiving States of the principle of *non-refoulement* in the absence of sufficient support from other States would be a responsibility shared by the international community. Turkey, speaking in UNHCR's Executive Committee in 1987, argued as follows:

> The principle of *non-refoulement* ... had to be scrupulously observed. Nevertheless ... countries of first asylum or transit ... faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard *refoulement* as the only way out. If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole.[100]

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emphasizing the responsibility of nations at large to find [durable] solutions"..., because "in admitting large numbers of persons in need of protection and in scrupulously observing *non-refoulement*, the State of first admission can be seen as acting on behalf of the international community"').

97 See (n 48).

98 As Durieux (n 94) 640 notes, the *non-refoulement* norm has a 'modality of non-rejection at the border'. See generally K Long, 'No Entry! A Review of UNHCR's Responses to Border Closures in Situations of Mass Influx' (2010) <http://www.refworld.org/docid/4c21ad0b2.html> accessed 10 May 2016.

99 Long (n 98).

100 Executive Committee (38th Session), 'Summary Record of the 418th Meeting', UN doc A/AC.96/SR.418 (14 October 1987) para 74 (Mr Yavuzalp (Turkey)), cited in GS Goodwin-Gill, 'The Mediterranean Papers: Athens, Naples, and Istanbul' (2016) 28 International Journal of Refugee Law 276, 299.

This argument by Turkey is effectively an echo of the French delegate's position in the *travaux préparatoires*: that in the absence of sufficient international support, receiving States should not be held responsible for failing to uphold their refugee protection obligations. However, Turkey goes one step further, in applying this reasoning to the fundamental principle of *non-refoulement* and access to asylum, as opposed to the 1951 Convention's economic and social protections.

In response to such arguments, UNHCR's Executive Committee and UNHCR itself have stressed that an absence of burden sharing does not justify a failure by a State to implement its *fundamental* refugee protection obligations.[101] For example, in Conclusion No 85 (XLIX) (1998), paragraph (p), UNHCR's Executive Committee:

> *Recognizes* that international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles; stresses, however, in this regard, that access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community.[102]

[101] UNHCR, 'Annual Theme: International Solidarity and Burden-Sharing in All Its Aspects: National, Regional and International Responsibilities for Refugees', UN doc A/AC.96/904 (1998) 3–4 <http://www.refworld.org/docid/4a54bc2f0.html> accessed 5 May 2016 ('Under the terms of international law, primary responsibility for protecting and assisting refugees and returnees lies with the States which are hosting them … While regional or international burden-sharing initiatives may be needed to assist host States in fulfilling their obligations towards refugees and returnees, these should not be seen as in any way diminishing the responsibilities of host countries'). See also Saxena (n 14) 303; Goodwin-Gill and McAdam (n 11) 339 ('While as a matter of law, international protection is not contingent on burden sharing, there is some acknowledgment that practical responses to alleviate the pressure on countries of first asylum may be necessary to ensure that the principle is not violated'). There are also those who have sought to argue that the *non-refoulement* obligation may be conditional in some circumstances: see eg Barutciski and Suhrke (n 15) 107 ('Given the consensual nature of treaty law, we cannot expect states to assume an obligation to allow refugees admission onto their territory if there is a serious threat that this would lead to national destabilization. The most basic principle in international refugee law, *non-refoulement*, should be read in this perspective'). See also JC Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 358–59 ('The duty of state parties to respect the principle of *non-refoulement* (at least on a temporary basis) is in fact balanced against a duty of international solidarity owed by other state parties to the receiving country'). Compare Hurwitz (n 12) 145, stating that '[t]hese views may be reconciled by differentiating *non-refoulement* and its corollary, the granting of temporary refuge or "admission", which is absolute and unconditional, from asylum understood as a more permanent protection given to refugees and predicated on the existence of effective burden-sharing'. This latter position is in line with theories of *non-refoulement* through time and temporary refuge, highlighted above.

[102] UNHCR Executive Committee Conclusion No 85 (XLIX), Conclusion on International Protection (1998). This position, which decouples the obligation to provide admission and protection against *refoulement* from the provision of sufficient international support by the

To reiterate, while it was suggested by some of the drafters of the 1951 Convention that the burden-sharing recital in the preamble could potentially operate as a force majeure clause with respect to certain of the obligations contained in the 1951 Convention, it does not appear that, even for the French delegate, this was intended to apply to the most fundamental issues of access to asylum and protection against *refoulement*. Today, the status of the principle of *non-refoulement* – as a principle of customary international law[103] – would in any event be likely to 'trump' any right of receiving States to make respect for *non-refoulement* contingent on burden sharing as a legal matter, even in cases of force majeure, as noted by authors in the derogation context.[104] In other words, even if the absence of sufficient burden sharing could excuse a failure by receiving States to implement certain of their obligations under the 1951 Convention in cases of mass influx – and this would certainly require further consideration – it is unlikely that this would extend to the *non-refoulement* obligation.

The French delegate's position with respect to the force majeure effect of recital 4 was legally questionable. However, it did succinctly foreshadow a range of legal and practical issues that continue to affect the day-to-day operation of the refugee regime, with echoes in both the doctrine of temporary refuge and arguments for the need for a derogation regime in the 1951 Convention. Nonetheless, while in practice burden sharing can be essential to the ability of refugee-receiving States to protect and assist large numbers of refugees, other States remain unwilling to be bound by any such positive obligation to provide this assistance, an issue addressed briefly in the next section.

3.2.2 *Recital 4 as establishing a 'positive obligation' on other States to assist refugee-receiving States?*

In terms of the 'legal effects' of recital 4, the key argument of the French delegate was on its potential to justify or excuse the failure by receiving States to uphold some of their obligations under the 1951 Convention in the event of mass influx and in the absence of sufficient international support. The French delegate did not seek to argue explicitly that the preambular recital could create a positive obligation or responsibility for other States, or the international community at large, to provide such assistance to receiving States. Although at one point he described the burden-sharing clause as amounting to an 'implicit appeal' in this regard,[105] this was as far as he was prepared to go.[106]

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international community has been criticized by some authors, who suggest that it 'contributes to deepening, rather than bridging, the gap between the peremptory nature of the *non-refoulement* rule and the discretionary character of international solidarity construed as "burden sharing"': Durieux (n 94) 640 (characterizing this as the 'protection before burden-sharing tradition').

[103] See eg 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' (26 January 2007) <http://www.refworld.org/docid/45f17a1a4.html> accessed 5 May 2016. See also C Costello and M Foster, 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2016) 46 Netherlands Yearbook of International Law 2015: 273; Goodwin-Gill, 'Temporary Refuge' (n 94).

[104] See (n 92).

[105] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 69) 26.

[106] See also (n 84), with France noting that the preamble was not intended to be a 'request' to governments.

The question of whether recital 4 could potentially generate positive obligations for States to 'cooperate' was, however, raised in passing during a rather confusing exchange between the US and France on the meaning of the phrase 'a wide degree of international cooperation.'[107] In response to a request from the US delegate to clarify this language, France noted that:

> The term 'solidarité' used in the French text ('collaboration' in English) was certainly wider than 'cooperation', which referred to States which would accede to the Convention, whereas the former might be extended to cover States which, while not signing the Convention, would be in a position to help in the solution of certain aspects of the problem. *The word 'requires' might well be used in connection with the cooperation of States signatory to the Convention.*[108]

In other words, the French delegate sought to imply here that 'cooperation' could be said to be 'required' of State signatories to the 1951 Convention – that is, to constitute an obligation on their part. However, this exchange is unclear on its face as to whether the 'requirement' would simply be to cooperate with the High Commissioner for Refugees (ultimately included in recital 6 of the preamble) as opposed to a requirement to come to the assistance of overburdened receiving States. The French delegate's suggestion that international 'collaboration' would equate to '*solidarité*' in French and that this would apply to States who were not party to the 1951 Convention – as opposed to 'cooperation' which would be narrower and only apply to States parties – also indicates some efforts to distinguish between the terminology of 'cooperation' as opposed to '*solidarité*' ('collaboration'), along the lines addressed in part 1.2 above. This issue was not discussed further, however.

Aside from this exchange, the potential of recital 4 to establish a positive obligation on States to cooperate generally or to assist overburdened host States specifically was briefly mentioned by other delegations only with a view to clearly rejecting any such consequences. In an exchange on the language in the original draft proposed by France, which contained the qualifier that international cooperation would be undertaken to 'redistribute refugees throughout the world', some States quickly noted that they would not be in a position to accept refugees from other countries. China, for instance, stated:

[107] This exchange took place when the standalone burden-sharing draft recital had been deleted from the draft preamble, and the French delegate had proposed to re-insert the need for 'cooperation' between States into the recital regarding cooperation with UNHCR (eventually recital 6 of the preamble): Social Committee (n 70) 10. The draft clause under discussion read: 'the High Commissioner for Refugees will be called upon to supervise the implementation of this Convention, without losing sight of the fact that the effective implementation of this Convention can only be obtained with the full cooperation of States with the High Commissioner and with a wide degree of international co-operation'. Specifically, the US asked 'what was the exact significance of the proposed phrase "a wide degree of international cooperation", which was not altogether clear'.

[108] ibid 10 (emphasis added). It should also be noted that in response to the French delegate's clarification and proposed alternative language, the US delegate reiterated that he 'felt that the last phrase added nothing to the meaning of the paragraph and was only confusing': ibid 11.

> In connexion with the reference in the fourth paragraph to the necessity for international co-operation to help to distribute refugees throughout the world ... the Chinese Government was not in a position to accept refugees from other countries, though in the past China had played its full part by giving asylum, particularly to White Russians and Jews.[109]

Ultimately, the reference to the redistribution of refugees 'throughout the world' was removed by the drafting committee, leaving simply the reference to 'international cooperation' without further elaboration. This appears to remove any implication that States would be required to participate in the physical distribution of refugees. In addition, the removal of this language suggests that the drafters may have been keen to prompt 'cooperation' without specifying its ends or forms. This has, in principle, rendered the actions and contributions by States that may amount to burden sharing more flexible, encompassing more than the 'sharing' of people, to include material and financial assistance.[110] Despite this, arguably the 'sharing' of people through places for resettlement or other physical relocation schemes is still seen as the ultimate form of burden sharing today, and whether burden-sharing arrangements are assessed to have been successful or not is often linked to the number of resettlement or relocation places that have been offered by third States.[111] The provision of financial and material assistance by governments to States hosting large numbers of refugees – through UNHCR, other UN agencies or non-governmental organizations, or directly via foreign assistance – takes place more or less routinely,[112] but on its own is rarely seen as sufficient to constitute 'burden sharing', and indeed sometimes leads to allegations of 'burden shifting'.[113]

More generally, there was discussion among the delegates about whether recital 4 created 'obligations'. However, it appears this was not about whether the clause would bind other States to come to the assistance of overburdened countries. Rather, it related

[109] Social Committee (n 61) 18.

[110] See eg UNHCR, Discussion Paper (n 8) 15.

[111] For example, 'successful' burden-sharing arrangements, such as the Comprehensive Plan of Action for Indochina Refugees and the Humanitarian Evacuation Programme and Humanitarian Transfer Programme for Kosovo, involved significant relocation or resettlement efforts. See (n 15). Although cf the 'CIREFCA' (International Conference on Central American Refugees) example which focused on voluntary repatriation and local integration, with only a symbolic number of refugees being resettled to third countries. See M Bradley, 'Unlocking Protracted Displacement: Central America's "Success Story" Reconsidered' (2011) 30 Refugee Survey Quarterly 84.

[112] Admittedly, chronic underfunding of humanitarian operations for refugees has become increasingly problematic: see eg UNHCR, 'Global Appeal 2016–2017' (2016) <http://www.unhcr.org/ga16/index.xml> accessed 31 January 2017.

[113] The arrangement between Turkey and the EU has been a case in point. See eg J-B Farcy, 'EU–Turkey Agreement: Solving the EU Asylum Crisis or Creating a New Calais in Bodrum?' (*EU Immigration and Asylum Law and Policy*, 7 December 2015) <http://eumigrationlawblog.eu/eu-turkey-agreement-solving-the-eu-asylum-crisis-or-creating-a-new-calais-in-bodrum/> accessed 15 October 2016.

to concerns that the proposed language of the recital, referring to States that were overburdened 'due to their geographical situation', created obligations for such States with respect to the admission of refugees or their right to seek asylum – both of which were otherwise absent from the 1951 Convention.[114] In response, the French delegate noted that: 'the reference in the fourth paragraph of the preamble to the undue burden placed on certain countries was merely a statement of fact, and was in no way designed to create a legal obligation';[115] and he proposed to remove all reference to geographical situation, again noting that the adoption of the text would not be regarded as imposing on States 'any obligation in respect of the right of asylum.'[116] In response to these concerns, the reference to the 'right' to asylum was ultimately changed to the 'grant' of asylum,[117] and the reference to the burdens on States due to their geographic situation was removed.

To sum up, the drafters did not appear to consider that recital 4 of the preamble, on its own, would create a positive obligation on States or the international community to 'cooperate' to come to the assistance of those States receiving large numbers of refugees. Unlike the 1951 Convention, there are treaties which do contain clear legal obligations to cooperate in their operative parts.[118] At the same time, today it is well recognized

[114] For example, Chile suggested that 'on the grounds of legal drafting the reference in the fourth paragraph to the geographical situation of certain countries should be removed': Social Committee (n 61) 14. Belgium noted that 'the Chilean representative had made some very pertinent juridical observations on the geographical situation and the right of asylum referred to therein': ibid 16–17.

[115] ibid 15.

[116] ibid 17.

[117] The representative from the Netherlands proposed that the words 'right of asylum' be replaced by the 'right to seek and to enjoy asylum in other countries', the wording used in para 1 of art 14 of the Universal Declaration of Human Rights. The UK then suggested that the point made by the Netherlands might be met by the substitution of the word 'grant' for the words 'exercise of the right' in the first line. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (n 69) 28–29.

[118] See international environmental law (eg UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, various references in art 3 ('principles') and art 4 ('commitments') amongst others) and international maritime law (eg International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278, regulation 33, 1–1 ('Contracting Governments shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable'). See similarly International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119, para 3.1.9.

that the line between 'hard' and 'soft' obligations to cooperate can be difficult to draw. 'Soft law' and non-binding instruments urging cooperation have also formed the basis for changes in law and practice in other fields, with calls for cooperation 'hardening' into more binding commitments over time.[119] Accordingly, despite the fact that this was not envisaged by the drafters at the time, this does not in itself preclude recital 4 from providing a genesis for some positive obligations on the part of the international community to assist overburdened host States.[120] This would require further analysis.

3.2.3 Relevance of recital 4 for interpretation of other provisions in the 1951 Convention

The preamble of a convention, while generally not laying down binding obligations in itself, can play an important role in its interpretation.[121] Article 31 of the 1969 Vienna Convention states that the preamble may constitute 'context' for the purpose of the interpretation of a treaty: notably, a preamble may provide evidence of a treaty's object and purpose.[122] As stated by Gardiner, 'the substantive provisions [of a treaty] will usually have greater clarity and precision than the preamble but where there is doubt over the meaning of a substantive provision, the preamble may justify a wider interpretation, or at least rejection of a restrictive one.'[123]

Despite the potential significance of recital 4 for the interpretation of the operative provisions of the 1951 Convention, this issue was little discussed among the drafters of the text – although they were clearly aware that the preamble was relevant to

[119] See eg Rio Declaration on Environment and Development, Annex I of the Report of the UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, which includes directives for States to cooperate on specific issues in principles 5, 7, 13, 14, 24, and 27, as well as the overall goal of achieving 'new levels of cooperation among States, key sectors of societies and people' in the third preambular recital. See generally CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850; G Shaffer and M Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706; Delbrück, 'The International Obligation to Cooperate' (n 19).

[120] Not least through subsequent practice in the application of the 1951 Convention by its parties. See 1969 Vienna Convention, art 31(3)(b) ('There shall be taken into account, together with the context … any subsequent practice regarding the agreement of the parties with respect to its interpretation'). See further part 3.2.3 below.

[121] The preamble, and discussions among the drafters with respect to recital 4, may also, arguably, be relevant in applying art 62 of the 1969 Vienna Convention ('Fundamental change of circumstances'), also known as the principle of *clausula rebus sic stantibus*. Thanks to Professor Guy S Goodwin-Gill for this suggestion.

[122] 1969 Vienna Convention, art 31; Hulme (n 74) 1300.

[123] Gardiner (n 74) 187. The important role that can be played by preambles in treaty interpretation was notably demonstrated by the Appellate Body of the World Trade Organization in the 'US-Shrimp Case', with the Appellate Body using a reference to the objective of sustainable development in the preamble of the WTO Agreement to interpret a substantive provision of the 1994 General Agreement on Tariffs and Trade: Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO doc WT/DS58/AB/R (12 October 1998) discussed in Mbengue (n 74).

interpretation in principle. In objecting to the inclusion of the burden-sharing recital in the preamble on the basis that it was unrelated to the substantive provisions of the text, for example, the delegate from Pakistan noted that a preamble usually has two functions: to provide an account of historical antecedents of the operative part and to provide a key for its interpretation.[124]

The relevance of recital 4 in interpreting the scope of the various provisions of the 1951 Convention also remains largely unexplored today. Noll, for example, has relied on recital 4 to read the reference to 'coming directly' in article 31 of the 1951 Convention narrowly, arguing that recital 4 suggests that refugees were not to be contained in countries of transit, and thus they should generally be protected against penalization for unlawful entry or stay if they move onwards and seek protection elsewhere.[125] However, there are broader questions that warrant further exploration. Given that recital 4 contains the only reference to 'asylum' in the 1951 Convention, it may be useful in explaining and interpreting the temporally contingent character of the various rights in the 1951 Convention.[126] In particular, and along the lines considered in part 3.2.1 above, while the French delegate's characterization of the recital as a force majeure clause appears to be legally dubious, there could be an argument that recital 4, coupled with the differing levels of 'attachment' specified for different rights and protections contained in the 1951 Convention, would indeed justify an interpretation that would make international burden sharing a condition for the fulfilment of those rights over time by host States. More broadly, recital 4 could also be relevant in interpreting the limits and legality of 'safe third country' and related practices, which are sometimes seen as attempts to 'shift' responsibility for refugee protection to others.[127]

The purpose of this article is to better understand the original intentions of the drafters with respect to recital 4 of the preamble. Further, with respect to the *travaux préparatoires* themselves, Hurwitz notes the potential limitations in using them to inform interpretation of the 1951 Convention.[128] Accordingly, a detailed analysis of how recital 4 affects the interpretation of other obligations in the 1951 Convention, or indeed broader practices in the refugee protection regime, is beyond the scope of this article.

[124] Social Committee (n 61) 21.

[125] G Noll, 'Article 31, Refugees Unlawfully in the Country of Refuge' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1256–57.

[126] Thanks to one of the anonymous reviewers for this suggestion. See further Durieux and McAdam (n 29) 14–15 (noting that the 1951 Convention architecture is deliberately characterized by a gradual improvement of standards of treatment over time, with access to such rights dependent on the nature of the refugee's stay in the host State, and that this differentiation appears to give States some latitude in providing Convention rights to persons arriving in a mass influx situation).

[127] On 'safe third country' concepts, see further generally Legomsky (n 3).

[128] According to art 32 of the 1969 Vienna Convention, the preparatory work of a treaty may constitute supplementary means of interpretation, where necessary. However, as Hurwitz (n 12) 132 notes: 'The *travaux préparatoires* should be used with particular caution in the case of the Refugee Convention, given that only 26 States participated in the drafting of the Convention to which 144 States are now party'.

However, this would be an essential next step in better understanding the legal effects of recital 4 in modern refugee law.

4. CONCLUSION

This article has considered in detail the discussions among the drafters of the 1951 Convention with respect to the draft burden-sharing provision ultimately contained in recital 4 of the preamble. This serves to better understand the origins of the principle of burden sharing in the contemporary refugee regime.

In particular, it has been demonstrated that there was considerable divergence of views among the drafters with respect to the form of the draft burden-sharing recital, in terms of the appropriateness of including it in the preamble, as well as its scope and legal effects, with France seeking to imbue it with a far-reaching force majeure character. The fact that recital 4 was retained in the preamble appears to be the result of political compromise, which provides some context for the ongoing ambivalence with respect to the principle today.

While legally dubious, the arguments of the French delegate on the force majeure character of recital 4 also foreshadowed ongoing tensions in the 1951 Convention regime that have never been resolved. The purpose of the 1951 Convention regime was to set out certain obligations that bind host States in relation to refugees on their territory, irrespective of the size of the refugee influx or how unevenly distributed refugee-hosting responsibilities may be. But practically, it is inequitable, and in some circumstances impossible, to expect States to provide permanent protection[129] including all the rights and obligations in the 1951 Convention to large numbers of refugees, for increasingly protracted periods of time, without predictable and sustainable international support, including physical relocation of refugees to other countries in some circumstances. With the significant scope and scale of the Syria conflict,[130] as well as longstanding host States such as Kenya and Pakistan threatening to return all refugees on their territories,[131] this unresolved structural tension in the design of the 1951 Convention (or 'most serious gap' in the words of the Director General of the IRO)[132] is arguably a challenge for the viability of the regime as a whole going forward.

Despite this, the *travaux préparatoires* confirm that in 1950 the political appetite to establish binding, positive commitments to burden sharing with respect to refugees was not there. The French delegate insisted on the insertion of the burden-sharing recital into the preamble based on an understanding that certain States would always be liable to receive more refugees than others by virtue of their geography. The burden-sharing

[129] Subject to the cessation of refugee status under art 1C of the 1951 Convention.

[130] See eg UNHCR, 'Syria Regional Refugee Response', updated regularly <http://data.unhcr.org/syrianrefugees/regional.php> accessed 3 June 2016.

[131] See eg with respect to Kenya, 'Has Kenya's Brinkmanship over Dadaab Worked?' (*IRIN*, 15 June 2016) <http://www.irinnews.org/analysis/2016/06/15/has-kenya's-brinkmanship-over-dadaab-worked?utm_source=IRIN+-+the+inside+story+on+emergencies&utm_campaign=58442186c5-RSS_EMAIL_ENGLISH_ALL&utm_medium=email&utm_term=0_d842d98289-58442186c5-15763241> accessed 3 August 2016.

[132] See (n 50).

recital was simply one attempt to respond, more or less successfully, to potential issues for individual States that could result from this.

Since the drafting of the 1951 Convention, the refugee regime has had over 65 years to evolve and expand, with an abundance of developments in terms of normative instruments, institutional frameworks, and State practice. The adoption of the New York Declaration in 2016, and its explicit commitment to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees may further advance the debate, particularly if a forward-looking 'global compact on refugees' is successfully adopted in 2018. This article has also briefly highlighted critical work that could be done in clarifying the implications of recital 4 for interpretation of the substantive provisions of the 1951 Convention and in considering the potential 'hardening' of the burden-sharing norm in the refugee regime over time. The analysis of the *travaux préparatoires* contained in this article is thus just a first step in seeking to better understand the scope and nature of the principle of burden sharing in the refugee regime today.