No entry!

A review of UNHCR's response to border closures in situations of mass refugee influx

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Introduction

1.   This paper reviews the way in which UNHCR has responded when states close their borders to mass refugee influxes. Examining both the existing international legal framework and the political and practical experiences of the organization in reacting to border closures in the post-Cold War period, the paper considers whether a 'policy toolkit' could be developed which would help to guide UNHCR responses to on-going and future border closures.

2.   When High Commissioner for Refugees Antonio Guterres asked PDES to commission a study on this issue, his primary concern was the closure of the border between Somalia and Kenya. As the paper was being readied for publication in June 2010, however, the Uzbekistan government announced that it had closed its border with Kyrgyzstan in response to fears of a mass influx of refugees fleeing violent ethnic clashes in the city of Osh, five miles from the Uzbek border.

3.   At time of writing, up to 100,000 largely ethnic Uzbek refugees were massing at the Kyrgyzstan-Uzbekistan border and the UN was warning of an impending humanitarian crisis. According to Uzbekistan's Deputy Prime Minister, "today we will stop accepting refugees from the Kyrgyz side because we have no place to accommodate them and no capacity to cope with them" (The Times, 15 June 2010). As this paper demonstrates, when states adopt such positions, UNHCR is confronted with a number of difficult ethical dilemmas and operational challenges.

Border closures and refugee rights

4.   The act of border-crossing is central to the concept of an international refugee regime. The ability of refugees to access international protection is dependent upon their ability to cross international borders. The right to leave one's country and the right to seek asylum are both enshrined in the Universal Declaration of Human Rights.

5.   Yet the reality of border-crossing – both in principle and in practice – is far more complex. In the past 20 years states have repeatedly closed their borders to refugee influxes, usually with the aim of preserving security and relieving pressure on national capacity.

6.   Border closures pose a particular dilemma for UNHCR because they force the organization to confront the tensions between protection and assistance in such circumstances. When a state opts to close its border to a refugee influx, effectively denying their right to seek asylum and placing a refugee at risk of continued persecution, defending the right to asylum may be in direct conflict with the practical delivery of humanitarian assistance.

7.   Border closures are intensely political. Controlling borders – and by extension, determining who may enter a state's territory – is a fundamental expression of state sovereignty, the lynch-pin of contemporary international political order. The

obligation to offer asylum may thus directly conflict with a state's claim to sovereignty, especially if the claim is made that a mass influx will threaten the security (even the very survival) of the nation-state.

8.   Borders are thus the front-line in a struggle to reconcile the international political regime – focused above all on the security and stability of existing states-structure – with the universal protection principles UNHCR is charged with safeguarding.

9.   The politics of border closure, however, extend beyond the tensions between state sovereignty and humanitarianism. In practice, major border closures in the post-Cold War period have tended to occur in states or regions of significant strategic interest to Western and donor states. In Northern Iraq in 1991, in Kosovo in 1999 and Afghanistan in 2001, the direct actions of states, led by the USA and its NATO allies, played a major role in influencing the shape of the international community's responses to these border closures.

10.   It is no coincidence that the two major international responses to border closure – in Northern Iraq and Kosovo – were also the sites for the significant (if problematic) evolution of the doctrine of 'humanitarian intervention'. Given the plethora of other powerful agents who have tended to become involved in responding (or, in the case of Afghanistan and the on-going Kenya-Somalia border closure, in not responding) to post-Cold War border closures, this paper considers not only how UNHCR should respond, but also the extent to which it can respond as an independent actor.

11.   In responding to border closures, UNHCR itself is likely to have to prioritise among its own complex interests. Should UNHCR aim to provide an immediate response to refugees needs in a humanitarian crisis, even if this means tacitly accepting a state's decision to abrogate from its obligations under the 1951 Convention? Should it advocate for the principles of asylum and *non-refoulement* even if this means refusing cooperation? How should it account for the political trade-offs that are likely to be offered as inducements for participation (or threatened for non-compliance) by donor or host states, in terms of financial assistance or access to previously closed areas of territory?

12.   Balancing these interests is likely to be difficult and controversial, both internally and externally. However the history of UNHCR's responses to major border closures indicates that there is a need for the organization to acknowledge these inherent tensions between its protection and assistance duties in order that it can better prepare and respond in an operational context.

Defining border closures

13.   Analyzing the politics of border closure is a process fraught with conceptual difficulties. Even accurately identifying a physical border is often problematic, particularly if the border is the relic of arbitrary and artificial state creation by European colonial powers with little everyday meaning (as with the Pakistan-Afghan border, for example, which placed Pashtun on both sides of the border.

14.   Where natural features such as mountain ranges mark state borders, they are often inhospitable and sparsely populated, which in turn results in poor demarcation. During the 1991 crisis in Northern Iraq, for example, UNHCR staff were uncertain

whether some Kurdish refugees were in Turkish or Iraqi territory. The real geography of borders is one of buffer zones, 'no-man's lands' and intermittent border posts.

15.   Given these ambiguities, do borders matter? As researchers looking at transnational and cross-border livelihood strategies have conclusively shown, borders are often highly porous, abstractions which do not reflect lived reality (e.g. Bakewell 2000; Kaiser 2010). Yet for UNHCR – and for refugees – borders, however artificial, are not mere abstractions. Borders do matter because in a sovereign state system they are legal markers of authority. Refugees become refugees – and thereby able to access protection and asylum – only because they have crossed an international border.

16.   The case studies in Part II demonstrate the extent to which porous borders complicate any attempt to assess the effects (and even the intended effects) of a formal border closure. However, determining what constitutes a closure is equally problematic. In fragile states with weak authority, borders may be closed by *ad hoc* local alliances acting without central government knowledge.

17.   Furthermore, as one UNHCR staff member interviewed for this paper remarked, it is weak and poor states that tend to resort to formal, physical border closures. Strong and rich states have a range of policy options which, in the post-Cold War period, have been employed to effectively close their borders to asylum seekers, even while they remain theoretically open to receiving refugees.

18.   Many researchers have documented the strategies used by Western states to deter asylum seekers from entry. As early as 1980, Western states began developing a battery of measures designed to prevent applicants from reaching their borders where they could make a claim under the 1951 Convention. These include the increased use of visas, the issuing of heavy fines for those carriers found transporting irregular migrants and the extra-territorial processing of asylum claims.

19.   Hathaway provides an impressive number of examples: the UK's decision to introduce visas for Zimbabweans in 2003 in order to deter rising numbers of asylum seekers, Australia's decision to 'excise' its off-shore territories to prevent asylum seekers entering mainland Australia, and the use of the 'country of first asylum' principle by EU states to avoid having to admit asylum seekers who have transited through Southern states among them (Hathaway 2005, 283-298).

20.   The question of pushbacks on the sea has also proved particularly contentious. In 1993, the US Supreme Court – in a heavily criticized judgment – determined in the case of Sale vs. Haitian Center Councils (by a vote of 8-1) that the right of *non-refoulement* could not be claimed by Haitian asylum seekers who had been intercepted by the US Coastguard before reaching US soil.

21.   Recent Italian pushbacks of mixed migration flows arriving by sea from North Africa follow the same logic. There is little doubt that Western states will continue to use such strategies to insulate their territories from the arrival of asylum seekers while declaring their continued commitment to the principle of asylum.

22.   Developed nations with the capacity to run functioning bureaucracies are simply less crude in the methods they employ to circumvent asylum seekers' rights, able to manipulate rather than close borders. Yet as the case studies examined in Part

II show, there is a clear connection between Western states' determination to secure their borders and Southern states' own increasingly restrictive attitudes to asylum.

23.   Despite these connections, this paper looks only at the political and operational challenges UNHCR faces in responding to formal, concrete centrally-authorised border closures, in part because these closures represent an extreme and explicit denial of refugees' right to asylum. In the post-Cold War period these have been a number of these border closures by prospective host states deliberately aimed at preventing entry[1].

24.   Since 1990, borders closed in response to refugee flows include (but are not limited to) the Turkey-Iraq border (1991), the Zaire-Rwanda border 1994 and 1996) the Tanzania-Burundi border (1995), the Rwanda-Burundi border (1996), the Macedonia-Kosovo border (1999), all of Afghanistan's borders with neighbouring states (2000-2001), the Chad-Sudan border (2006), the Jordan-Iraq border 2006), the Syria and Iran borders with Iraq (2007) the Malawi-Tanzania border (2007), the Kenya-Somalia border (2007 onwards), Egypt's borders with the Gaza strip and Israel (2007 onwards), the DR Congo-Zambia border (2008) and the Saudi Arabia-Yemen border (2009).

25.   This list underlines the fact that post-Cold War border closures to prevent refugee entry have most often occurred in regions when weak host states have little absorptive capacity and there are strong state and security concerns about the actual or potential influxes.

Existing literature

26.   Border closures are a remarkably under-researched subject in refugee and forced migration studies. Legal scholars have long addressed the practice of border closure as one form of *non-refoulement*, debating in particular whether the principle is applicable at the frontier or in cases of mass influx (e.g. UNHCR 1994; Hathaway 2005; Goodwin-Gill and McAdam 2007). Yet their concerns are not the political or operational dimensions of international responses to border closure.

27.   Historians of refugee protection have outlined border closure as a major feature of the collapse of asylum norms in the 1930s (e.g. Marrus 1985); Skran 1995), but in the period between 1951 and the end of the Cold War, the question of border closure disappeared almost entirely from the international agenda. Alan Dowty's book, *Closed Borders: the Contemporary Assault on Freedom of Movement,* published in 1987, reveals its Cold War-era origins in its almost total focus on restrictions placed by authoritarian states on their citizens' rights to exit (Dowty 1987).

28.   In the post-Cold War context, there has been remarkably little research published which specifically relates to the practice of closing borders by host countries in response to the arrival of refugee flows at the border. Both the Northern Iraq and the Kosovo crises have been the subject of considerable scrutiny and some researchers have specifically focused on UNHCR's role in them (e.g. Frelick 1992, 1998; Suhrke 2000) but the complexity of these emergencies – in terms of reconfiguring state sovereignty and the concept of humanitarian intervention – means

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[1] Border closures by states of origin (designed to prevent exit) are also beyond the scope of this paper.

that politics of the border closures themselves have largely figured as a side-note to these discussions.

29.   The same is true in terms of the Afghan border closure in 2000-2002. Apart from a few notable articles (Ruiz 2002; van Selm 2002), the wider political and humanitarian context of international intervention in Afghanistan obscured the specific politics of border closure. Those researchers who examined the Tanzanian border closure in 1995 have also tended to view the border closure in 1995 as a prelude to the more significant UNHCR-sanctioned involuntary return of Rwandese to their country of origin in December 1996 (Rutinwa 1996; Miller 2000).

30.   On the one hand, these studies underline the importance of setting border closures in a much wider political landscape. Yet on the other hand, the lack of any serious comparative study of the politics of border closure is a remarkable gap in refugee-related research.

31.   Given the importance UNHCR attaches to the principles at stake in border closure (*non-refoulement*, the right to seek asylum, the protection of neutral humanitarian space), and the operational reality of repeated border closures in many regions where UNHCR operates, it is clear that there is a need for more analysis of this political practice. This paper therefore offers the first account of the politics of border closure, aiming to inform UNHCR's future policy responses.

Structure of the review

32.   This paper is divided into three parts. The first part considers the political and legal framework surrounding border closures. The paper focuses particularly on the question of *non-refoulement*, especially in terms of its applicability to rejection at the frontier and state obligations in the case of mass influx. Considering the pre-1951 history of border closures, it underlines the extent to which the collapse of the asylum regime of the 1930s was signalled by the mass closure of borders to refugees coming from Germany.

33.   The humanitarian consequences of these border closures had a significant influence in shaping the contemporary refugee regime and precipitating states' recognition of the norm of *non-refoulement*. The first part of the article concludes by considering the reasons why, despite this legal framework, some states do choose to close borders.

34.   The second part of the paper looks at five post-Cold War case studies of border closures. It considers the Turkish border closure with Northern Iraq in 1991, Tanzania's closure of its border with Burundi in 1995, the Macedonian border closure that occurred as part of the Kosovo crisis in 1999, the sealing of borders by Pakistan and Afghanistan's other neighbours from November 2000 through to 2002, and the Kenya-Somalia border closure, on-going since January 2007, considering the specific motivations, responses and policy implications in each case.

35.   The final part of the paper considers what common characteristics can be identified in all these border closures, and how these thematic similarities might be used to develop a typology of border closures. The paper ends by making a number

of conclusions and recommendations to UNHCR as regards how it might strengthen its response to future border closures.

Part I: Legal frameworks and political interests

36.   The development of the post-1951 refugee protection regime – centred on the Convention Relating to the Status of Refugees – was directly influenced by the experiences of the 1930s, in which the nascent asylum regime collapsed and borders were closed to huge numbers of refugees fleeing fascism in both Spain and Germany.

37.   Civil war broke out in Spain in July 1936. The conflict left at least 300,000 dead, including 120,000 civilians. Fearing the prospect of a mass refugee influx from Spain as General Franco's army advanced, France closed the border to Spanish refugees between January and March 1938, and then again between June 1938 and February 1939.

38.   The French decision to close their border with Spain in 1938-9 can be explained above all by two factors. Firstly, the French were deeply anxious about the potential burden placed on their material resources by a mass influx of destitute refugees, a concern deepened by a parallel refugee crisis on the French-German border which was complicated by domestic anti-Semitism and the extent of political division within France between right and left (there were four different French administrations during the three years of the Spanish Civil War). In this sense, the decision to close the Spanish border was directly related to the economic burden of protracted asylum upon the host state.

39.   Proposals to establish a 'safe zone' within Spain to avoid any mass influx were indicative of the state's fear of such an outcome, as too was the urgent emphasis on early repatriation of the refugee population. Secondly, the growing power of Nazi Germany fed into the French state's desire to preserve its neutrality in the Spanish conflict as part of a wider European policy of appeasement designed to limit German encroachment and preserve the French state.

40.   In this sense, the closing of the border in 1938 can be primarily cast as a political act intended to demonstrate French neutrality, with the effects on refugees' ability to enter into France a secondary consequence. The political and economic costs associated with asylum were now seen as too high to support.

41.   France opened its border on 27 January 1939 following the fall of Barcelona on the conditional understanding that now the war had ended, there would be a rapid repatriation. Between 27 January and 4 February 1939, 240,000 Spanish civilian refugees crossed the border (followed from 5 February by defeated republican soldiers) to face temporary internment in French concentration camps before returning to Spain. It is estimated that some 340,000 refugees had returned to Spain by the time of the French state's collapse in May 1940.

The collapse of the asylum regime

42.   If the closure of the French border with Spain reflected the economic and political realities of 1930s Europe trumping humanitarian concern, the failure of the international community to adequately respond to the Nazi German state's expulsion of its Jewish citizens made clear the humanitarian consequences of refusing asylum in the name of national self-interest.[2] From 1933, European states used a number of strategies to avoid offering asylum to Germany's Jewish population, including redoubling visa restrictions to prevent arrivals at the border and physical sealing of borders.

43.   Switzerland was among the most stringent in applying new restrictions to prevent German Jewish entry, motivated by both anti-semitism and concern to protect the Swiss state from German wrath. In August 1942, the Swiss-German border was hermetically sealed to prevent the incursion of Jewish refugees. A month later, federal authorities sealed the French-Swiss border, asking the Vichy government to reinforce its own border surveillance.

44.   These decisions were taken in the light of Swiss political conviction that the state could not cope with additional Jewish influx, but was – in the words of Swiss politician Edouard von Steiger – an "overcrowded lifeboat" (Bergier 1999: 95). There are 24,000 documented rejections of refugees by the Swiss authorities during the war, including at least 5,000 that occurred during the period of tightest restriction between August 1942 and autumn 1943.

45.   In 2002, the Bergier report – detailing the extent of Swiss collaboration with Nazi Germany and researched and written by an independent commission of experts – was unequivocal in its condemnation of Switzerland's failure to keep its border open:

There is no indication that opening the border might have provoked an invasion by the Axis of caused insurmountable economic difficulties. Nevertheless Switzerland declined to help people in mortal danger. A more humane policy might have saved thousands of refugees from being killed by the Nazis and their accomplices (Bergier 1999: 271).

46.   Yet the Swiss did not act in isolation in responding to the German Jewish exodus by closing their borders. Instead, their actions reflected a wider collapse in the institution of asylum. Hungary and Yugoslavia closed their borders in the wake of the German-Austrian *Anschluss*.

47.   Other states across Europe introduced visa and quota restrictions in a similar vein to those developed by Switzerland. In one of the most notorious cases, the S.S. St. Louis, a ship carrying 930 Jewish refugees, was refused entry by Cuba, the U.S. and several other Latin American states and was forced to return to Europe.

48.   The Evian conference, held in July 1938 and organized by the Roosevelt administration, was ostensibly intended to "facilitate the immigration from Germany and presumably from Austria of political refugees", but in reality its participants were concerned with pacifying domestic political opinion and *preventing* the agreement of any further commitments to German refugees seeking asylum.

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[2] In November 1941, the German state banned Jewish emigration and state-sanctioned expulsion ceased. Persecution forcing flight, of course, continued.

49.   This is echoed in Marrus' assessment that "Evian simply underscored the unwillingness of the Western countries to receive Jewish refugees ... the 1930s saw a colossal failure of international collaboration that resulted in effective *de facto* border closings by several states"(Marrus 1985: 172).

50.   Border closures were just one symptom of a much more fundamental collapse in asylum protection during the 1930s. Even within European liberal states – theoretically committed to the protection of liberal humanitarian ideals – national interests triumphed. These national interests were three-fold. Firstly, the refugee load was politically and nationally suspect because it was a *Jewish* refugee load, a minority group in a political system now organized around territorial nation-states.

51.   Secondly, the threat of German power to the rest of Europe – and the perceived need to pursue a policy of appeasement, even up to 1939 undoubtedly fed into state's calculation regarding refugee policy in not only the Jewish but also the Spanish case.

52.   Thirdly, the economic growth of the 1920s which had allowed asylum needs to converge with immigration requirements had disappeared with the global economic depression of the 1930s. National interests - political and economic – persuaded states that asylum could not be offered to refugees: their suffering was not universal, but *Jewish*.

Impact on the 1951 Convention

53.   The strategies used by states during the 1930s to deter asylum seekers bear striking parallels to those employed in contemporary border closures – narrowing the definition of a 'political refugee', expanding bureaucratic procedures to provide more opportunities for rejection or deportation of irregular entrants, intercepting refugees at sea, and in the final case resorting to formally closing borders.

54.   This suggests that formal border closures are best understood as an extreme symptom of longer-term serious political breakdown of the asylum regime. In the 1930s, these were strategies in which the majority of states were at least tacitly complicit, and represented the near-total breakdown of an asylum system that had been designed to redress the worst excesses of the 'unmixing of peoples', but which found itself unable to challenge state sovereignty.

55.   The post-World War II refugee protection regime was drafted in the shadows of the 1930s and in response to the failure of liberal states to protect refugees fleeing from Nazi Germany. The recognition that the failure of European states to offer asylum in the 1930s to Germany's Jewish population had led to humanitarian catastrophe provided new impetus for states to agree to a normative obligation not to return refugees to territories where their lives of freedoms would be threatened, *non-refoulement*.

56.   It is not an exaggeration to conclude that it was in part because of the consequences of the border closures of the 1930s that *non-refoulement* was placed at the heart of the post-war refugee protection regime, central to the "very purpose of the Convention" (UNHCR 1994: travaux). This has important implications for understanding the contemporary legal relationship between *non-refoulement* and state border control.

The legal framework[3]

57.   The legal principle most obviously limiting states' ability to close their borders so as to prevent a refugee entering territory is the norm of *non-refoulement*. The concept of *non-refoulement* is expressed in Article 33 of the 1951 Convention: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

58.   This article is one of only two articles in the Convention to which contracting states are permitted to make no reservations, which underlines the extent to which this norm was considered by the Convention's drafting states in 1951 to be a fundamental component of the international refugee protection regime. This article makes very clear that a refugee cannot be removed from one territory and moved or returned to another in which they would be at continued risk of persecution.

59.   UNHCR considers the principle of *non-refoulement* has acquired a normative character and constitutes a rule of international customary law (UNHCR 1994: 38). Certainly, in the years since 1951, additional international legal instruments have repeatedly confirmed the normative importance of *non-refoulement*, including the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Latin American Cartagena Declaration on Refugees.

60.   The protection offered by *non-refoulement* have also been extended through the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which prohibits absolutely the return of *any* person (including non-refugees) to a state where they may be at risk of torture.

61.   The principle of *non-refoulement* can therefore be seen as a cornerstone of international refugee and human rights law. However, in connecting this norm to the legal framework regulating – or prohibiting – border closure, two particular issues need to be addressed. The first is whether *non-refoulement* applies to rejection of the asylum seeker at the frontier. The second is whether *non-refoulement* is a non-derogable obligation even in cases of mass influx.

Rejection at the frontier

62.   This question of the applicability of *non-refoulement* to rejection at the frontier has been the subject of considerable legal discussion since 1951 [4]. Yet it is difficult not to agree with Goodwin-Gill's assessment that:

> Little is to be gained today by further analysis of the meaning of
> words in 1951 ... states in their practice and in their recorded views,
> have recognized that *non-refoulement* applies to the moment at which

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[3] This section is not intended to offer a strict legal analysis of *non-refoulement* or border closures. It instead sketches out some of the key legal and political dilemmas surrounding this framework.
[4] For a useful summary of this debate, see Goodwin-Gill and McAdam, 2007.

asylum seekers present themselves for entry, either within a State or at its border (Goodwin-Gill and McAdam 2007: 207).

63.   In contemporary legal terms, it is very clear that *non-refoulement* has been extended to include rejection at the frontier: in other words, borders should not be closed to prevent the entry of refugee flows. The OAU Convention and Cartagena Declaration both explicitly link *non-refoulement* to non-rejection at the frontier. UNHCR has repeatedly expressed its view that "in all cases the fundamental principle of *non-refoulement* involving non-rejection at the frontier must be scrupulously observed" (UNHCR Excom 1981: II.2).

64.   However, powerful states in the post-Cold War period have argued that *non-refoulement* does not apply in the case of refugees and asylum seekers who have not already entered a state's territory. Most notoriously, the US Supreme Court's majority decision in the 1993 Sale vs. Haitian Councils Centre confirmed the legality of the US practice of intercepting and forcibly returning Haitians at sea.

65.   The majority opinion claimed that Article 33 was "completely silent" on the question of its extra-territorial applicability: "In spite of the moral weight of that argument, both the text and the negotiating history of Article 33 affirmatively indicate that it was not intended to have extra-territorial effect" (Supreme Court 1993: 178).

66.   The conclusion thus reached was that while "the human crisis is compelling, there is no solution to be found in a judicial remedy" (Supreme Court 1993: 188). This decision provides an insight into the political calculations governing asylum protection in protection. States have a clear interest in curtailing the applicability of *non-refoulement*, because an obligation to admit a refugee, even temporarily, is perceived as being very close to a far more onerous obligation to grant asylum.

67.   The Sale vs. Haitian Councils Centre judgment has since been dismissed as "wrongly decided" by the UK House of Lords (Hathaway 2005: 339). The broad weight of the evidence makes clear that *non-refoulement* norms oblige states not to reject those asylum seekers arriving at their borders. By extension, international law prohibits arbitrary border closures that prevent would-be refugees from seeking asylum.

Mass influxes and international burden-sharing

68.   A second contentious area in relation to *non-refoulement* is the question of whether the principle applies in all cases of mass influx, and if so what if any caveats are attached to it. Clearly, the 1951 Convention makes no explicit provision for states to derogate from the principle of *non-refoulement* due to the pressures of a mass refugee influx.

69.   However, the drafting records demonstrate that some states were concerned about the prospect of "extraordinary influx", and voiced their belief that the provisions of Article 33 should be restricted to exclude any large groups of refugees.

70.   In particular, at the reading of the Draft Convention, the Netherlands put on record their interpretation that "the possibility of mass migrations across frontiers or attempted mass migrations was not covered by Article 33." This echoed earlier

comments by the Swiss government that "states were not compelled to allow large groups of persons claiming refugee status to cross their frontiers" (E/AC.23/SR.40 in UNHCR 1994).

71.   While the placing of these views on record should not be taken to represent an 'official' interpretation of the application of Article 33 to mass influxes, this exchange is certainly proof of states' anxiety about this prospect that observing *non-refoulement* could require a state to admit large numbers of refugees (at least temporarily).

72.   Clearly, large influxes post a particular threat to a state's capacity to absorb refugees. A mass influx into a poor state is likely to present a significant challenge. This is particularly so in the case of multi-ethnic national states, where an influx is likely to challenge the balance between the constituent parts of society.

73.   As Part II demonstrates, states that have closed their borders in the post-Cold War period have often done so because of these particular ethno-national fears which cannot be addressed through simple material burden-sharing. In the Turkish and Macedonian cases, for example, the refusal to admit Kurdish and Kosovar refugees respectively was heavily influenced by concerns about the impact of these influxes upon majority-minority relations.

74.   In addressing *non-refoulement* in cases of mass influx, principles collide with politics. Mass influxes may result in significant strains being placed upon a host state, and the abrogation of a duty to protect by a state of origin places a burden on the international community as a collective whole.

75.   However, international burden-sharing mechanisms can in theory be invoked to square the principles of refugee protection with the politics of state interest, redressing the accidents of geography that distribute refugee populations unevenly. The importance of international burden-sharing to the refugee protection regime has been repeatedly recognized.

76.   The preamble to the 1951 Convention, for example, states 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."

77.   The Excom Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, agreed in 2004, also focuses specifically on the question of how to balance refugees' rights against the security and capacity questions surrounding mass influx.

78.   It aimed to encourage "more effective and predictable responses to mass influx situations" and "to improv[e] responsibility-sharing arrangements to share the burdens of first asylum countries." It reiterated the normative principle that "persons who arrive as part of a mass influx seeing international refugee protection should always receive it at least on a temporary basis."

79.   However, in addressing practical responses to burden-sharing the Conclusion underlines the continued reluctance of states to share the physical realities – rather than simply the financial costs – of refugee crises. Of the nine initiatives listed in the

Conclusion, only the last relates to the resettlement or emergency evacuation from a first country of asylum overwhelmed by a mass influx.

80.   Yet (as the cases discussed in Part II demonstrate) material capacity is not the barrier to open borders. In 1988, for example, Thailand refused a US offer to construct and maintain new refugee camps to house new Indo-Chinese refugees, insisting on their resettlement to a third country. It is political interest that has often motivated states to close their borders to mass refugee flows – namely, to assert state sovereignty over national membership and entry into national territory.

81.   It is difficult to agree with the claims of legal scholars such as Hathaway that there is a legal basis for restricting *non-refoulement* if a state's basic national survival is threatened by a mass influx (Hathaway 2005: 367). Instead, there is a presumption that in this case – in order to balance the rights of the refugees against the state's security – the burden will be shared between states.

82.   The problem is that this is a presumption rather than a legal obligation, leaving us with another lopsided commitment shoring up the contemporary refugee protection regime. Just as a refugee has a right to seek asylum, but no state has the obligation to grant it, a host state has the legal obligation to protect all members of a mass influx from *refoulement* while the international community has no legal obligation to burden-share.

83.   Ultimately, this means political mediation must weld together the gaps in the legal framework. The norm of *non-refoulement* cannot be calculated against the number of refugees arriving. Yet under certain exceptional circumstances states – particularly fragile and poor states motivated by political fear with limited capacity – will act to prevent the entry of refugee flows. As Hathaway argues, "it is absolutely untenable to suggest that there is anything approaching near-universal respect among states for the principle of *non-refoulement*" (Hathaway 2005: 364).

84.   International burden-sharing can reconcile the normative impetus of *non-refoulement* with the political reality of state border closure: but at present this is a calculation of politics rather than an obligation in law. This analysis helps to underline both the importance of the contemporary legal refugee protection framework – built around the fundamental norm of *non-refoulement* – while also underlining the limits of law, and the need for UNHCR to understand and engage with the politics –as well as the principles – of border closure.

The right to seek asylum

85.   The obligation not to *refoule* refugees provides one very clear injunction against arbitrary border closure. However, refugees also have rights to leave their country of origin and to seek asylum, as detailed in the Universal Declaration of Human Rights:

> 13(2)   Everyone has the right to leave any country, including his own, and to return to his country...

> 14(1)   Everyone has the right to seek and to enjoy in other countries asylum from persecution.

86.   The right to leave one's country is also enshrined in the International Covenant on Civil and Political Rights, which records that: "Everyone shall be free to leave any country, including his own."

87.   Border closures clearly infringe on a refugees' ability to exercise their right to leave their country, and their ability to seek and enjoy international asylum. This is an important point, because the right to seek asylum is not simply analogous to the norm of *non-refoulement. Non-refoulement* prohibits unsafe return: it does not guarantee a right to seek asylum outside the borders of a country of origin.

88.   In contrast, the right to seek asylum abroad would appear to demand that borders remain open. As Part II will show, this distinction is extremely relevant in assessing international responses to border closures which have used safe zones or IDP protection frameworks to claim that conditions of *non-refoulement* can be met by actions other than opening a border.

89.   However, an often remarked-upon discrepancy in the international refugee and human rights law framework is that while the right to seek asylum is recognized, there is no obligation for a state to grant asylum: similarly, the right to leave is not matched by a similar right of entry.

90.   This creates an obvious ambiguity, particularly relevant when considering the international legal framework governing states' rights to close their borders to refugee flows. If refugees have a right to exit their state of origin, and a right to seek asylum, do they have a right to at least be admitted temporarily across a frontier in order that their claim to international protection may be assessed?

91.   While UNHCR Excom conclusions show UNHCR's support for such a position (UNHCR Excom 1981, 2004), it is clear that states are far more reticent to fully embrace this position, The right to seek asylum is deliberately lopsided because states have always been reluctant to accept any explicit obligation to admit refugees, seeing this as perilously close to an obligation to grant asylum.

92.   As a result, while a very strong legal and moral consensus has been constructed around *non-refoulement*, as the case studies in Part II show, the extent to which any positive right to seek asylum is acknowledged by states is considerably less certain, and open to creative political practice.

Part II: Border-closure in practice

93.   Political interests and the legal framework surrounding formal, physical border closures are delicately balanced. Clearly, the international community has a vested interest in preventing states from engaging in "arbitrary burden sharing" (Einarsen 2001) with its attendant risks of regional instability and its potential humanitarian consequences for refugees unable to seek asylum. UNHCR – with its legally-mandated responsibility to uphold the provisions of the 1951 Convention – has a special responsibility to persuade states to open their borders to refugee flows, and to work with states to devise appropriate burden-sharing mechanisms.

94.   Recent guidelines issued by UNHCR's division of International Protection in April 2010 provide some indication of the different strategies that may be pursued by the organization in the case of *refoulement* (this includes, but is of course not limited to, border closure). Preventative actions should be taken where possible.

95.   Formal protests may be made to the state by UNHCR staff. Public media appeals may be made. These operating procedures are clear that "UNHCR never, under any circumstances, supports, assists or facilitates actions by others that would lead to refoulement or would compromise the Office's ability to uphold the principle of *non-refoulement*" (UNHCR: DIP 2010).

96.   In the case of a border closure actually occurring, a programme for burden-sharing may be organized by the international community. This may involve resettlement or temporary evacuation of a refugee population: or it may involve the establishing of safe zones or protected IDP camps. These actions have significant implications for state sovereignty and for the long-term future of the concept of asylum. As a result, they also have significant implications for UNHCR.

97.   However, to date there has been virtually no systematic analysis of the politics of border closure in practice. Given that there have been at least five major refugee-related border closures since 1991, this is a surprising omission.

98.   Part II of this paper now turns to consider these five border closures in practice, considering the factors shaping UNHCR's and the international community's responses and the attendant policy implications.

Case study one: Turkey/Iraq border, 1991

Background to crisis

99.   In April 1991, 400,000 mostly Kurdish Iraqis fled Northern Iraq for Turkey. Another 1.3 million fled to Iran during the same three week period. This mass flight was triggered by fear of Iraqi state reprisals against the Kurdish population following a failed uprising against Saddam Hussein in the aftermath of Hussein's Gulf War defeat in February 1991 at the hands of a US-led 'Coalition of the Willing'. The Turkish state responded to this influx by closing the border, leaving the refugees stranded.

100.   The April 1991 outflow was not an isolated incident, but was rather the latest episode in a long history of regional Kurdish conflict. In the nation-state making of the early-twentieth century, the region and people Kurdistan were split across the states of Turkey, Iraq, Syria and Iran. The Kurdish population in Turkey struggled against Ataturk's imposition of a Turkish national state (with the consequent suppression of Kurdish language and culture) and by 1978 the Kurdish Workers' Party (PKK) had declared an armed struggle against the Turkish state.

101.   In Iraq, civil war broke out in 1961, which led to the signing of an armistice in 1970 that offered Kurdish autonomy within an Iraqi state. However, the agreement was never implemented and in 1975 the Kurdish revolt was defeated. Thus, for both Turkey and Iraq (as well as Iran and Syria), the 'Kurdish Problem' was one which struck at the heart of state-sovereignty and national-state identity. Kurdish refugee flows were thus a political and not just a humanitarian problem for the Turkish state.

102.   Turkey had already employed border closures to prevent the entry of Kurdish refugees to its territory. In July 1974, Turkey closed its border to the Kurdish rebels and it remained closed through 1975 despite the escalation of Iraqi reprisals against the Kurds, which included the use of napalm and phosphorous. In 1988, following Saddam Hussein's chemical weapons attack at Halabja and the escalation of the brutal Al-Anfal campaign against the Kurdish population, around 50,000 Kurds fled to Turkey.[5]

103.   Writing in March 1991 (before the mass influx), UNHCR's Ankara Branch Office (BO) described the Iraqi Kurdish refugee problem as the "most contentious issue in our relations with Turkey" because of "the political and international sensitivities surrounding the Kurdish question" (UNHCR Archives Geneva). The reluctance to accommodate the Kurds was political rather than capacity-based, as evidenced by the willingness of the Turkish state to receive 350,000 Bulgarian Turks for permanent settlement in 1989.

104.   In March 1991, BO Ankara issued a warning that underlined these tensions and spoke directly to the prospects of Kurds being able to claim asylum in Turkey:

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[5] Turkey continues to maintain the European geographical reservation attached to the 1951 Convention, offering only temporary asylum to non-European refugees.

A post-war struggle for power in Iraq may adversely affect the minority population in northern Iraq –four million Kurds, 400,000 Turkmen and 640,000 Christians. Turkish authorities appear to be worried at the prospect of a mass influx and their willingness to open their borders to such an influx cannot be taken for granted (UNHCR Archives Geneva).

105.   This is particularly important as it contradicts the post-border closure assertions by donor states that "none foresaw the magnitude of the civil conflict" (Lyman 1991). International planning certainly focused on an anticipated mass movement which would be triggered the Coalition offensive in Iraq from January 1991, and which did not materialize (Crisp *et al*. 2001: para. 66).

106.   However, given evidence that in 1990 Turkey was already using border control and possible *refoulement* as a means of restricting the numbers of asylum seekers arriving from Iraq and Iran, and the long history of Turkish-Kurdish political conflict, the April 1991 border closure in the face of a massive Kurdish influx should not have been unexpected.

International response

107.   By 3 April 1991, more than 200,000 Kurdish refugees were strung across the mountainous Turkish-Iraqi border area, trapped in appalling conditions. On 7 April, the Turkish foreign ministry announced that 1,500 refugees had died from exposure in the past three days. This was an undoubted humanitarian crisis.

108.   The initial UNHCR response was to attempt to persuade the Turkish government to open is borders. Sadako Ogata, the new High Commissioner (who had taken up her post only a month before the Gulf Crisis began), wrote to the Turkish government: "I am sure you share my concern for the well-being of these victims of internal strife and that your government will continue to allow these asylum seekers to cross the border into Turkey, so that they can be afforded safety and shelter" (UNHCR Archives Geneva; Ogata 2005:30).

109.   However, the strategic importance of the Turkish border to the US-led Coalition meant that within days, UNHCR's efforts to encourage Turkey to open its borders were sidelined by inter-state negotiations that reflected the US and its allies' reluctance to condemn the Turkish border closure. The UNHCR Ankara Representative was reduced to interpreting "oblique references" from NATO ambassadors regarding their governments' intentions:

In the conference call on Friday 5 April…I indicated that there was in my view evidence of a tendency on the part of several governments and the Government of Turkey towards a cross border relief operation, designed to keep the Iraqi refugees on Iraqi territory to the maximum extent possible ... Ambassadors did not speak out in favour of opening Turkey's border to refugees. The absence of such statements was notable ... It would appear, but I cannot confirm this, that the US plans a relief border operation which ... is based primarily on a cross border operation to provide assistance inside of Iraq (UNHCR Archives Geneva: 7 April 1991).

110.   The prospect of a 'cross-border' operation posed a considerable dilemma for UNHCR, a dilemma complicated by the fact that the humanitarian rescue agenda was being driven directly by powerful Western states. On the one hand, a recognition of UNHCR's powerlessness and of the humanitarian imperative to assist the Kurdish refugees demanded pragmatic UNHCR involvement in a cross-border operation:

> We will not be able to change Turkish policy on this matter in the next 24 hours, especially if the US and other major donor governments favour a cross border approach ... should UNHCR prevent, or seek to prevent, assistance from reaching desperate people?(UNHCR Archives Geneva)

111.   Yet on the other hand, UNHCR could not ignore the risk that a *de facto* recognition of Turkish exceptionalism could seriously damage the principles governing asylum protection. This was clearly reflected in the Representative's assessment on 5 April:

> UNHCR cannot support directly or indirectly cross border operations which keep asylum seekers in their country of origin, in danger of persecution or attack by the government of that country. Cross-Border operations must be seen as the antithesis of the first principle of admission. Programmes designed to keep people in their country of origin are also programmes designed to keep them out of a country of asylum. (UNHCR Archives Geneva).

112.   The political power of interested Western states can be seen in the almost total absence of public or private discussion of the border closure by states controlling the relief operations. UN Security Resolution 688, which authorized a multilateral relief effort ('Operation Provide Comfort') characterised the refugee flows themselves as a threat to international peace and security, but there was no mention of the closed border. US officials and the media described a 'humanitarian catastrophe', but did not expand on the reasons why a cross-border relief effort was necessary.

113.   On 16 April, US President Bush announced a plan for Coalition forces that had been based at the Turkish border to extend their presence into Northern Iraq, constructing camps within a safe zone that would allow the Kurdish population to return to Iraq and the international community to provide relief *in situ*.

114.   The concept of a safe area within a country of origin was particularly difficult to reconcile with the fundamental right to seek asylum outside a country of persecution, blurring the distinctions between the 'right to remain' and the 'obligation not to leave'. Yet it was equally clear by 9 April that the USA would proceed with this operation, regardless of UNHCR's concerns, characterising the movement of such large number of refugees as a threat to international peace and security and presenting the creation of militarised buffer zones as a first step towards repatriation.

115.   In order to circumvent the very clear mandate concerns felt by UNHCR over the development of Operation Provide Comfort, the UN Secretary-General appointed Prince Sadruddin Aga Khan as his Executive Delegate (OED) for humanitarian assistance in the region. On 18 April Aga Khan signed a memorandum of understanding with the Iraqi government in Baghdad, allowing for the establishment of UN humanitarian centres within the country.

116.   Given the complex and overlapping responsibilities which had already been granted to other UN agencies, this added to a confused decision-making structure and created additional tensions between UN agencies. Within Turkey, UNDP was reluctant to take issue with the government over refugee protection issues in case this jeopardized its traditionally close working relationship with the Turkish authorities, resulting in the Turkish government bypassing UNHCR.

117.   The OED's priorities also differed from UNHCR's, "placing primary emphasis on the need to facilitate and accelerate such a [repatriation] movement", while UNHCR was initially reluctant to support the organized repatriation. As UNHCR's own evaluation in March 1992 concluded, "at a crucial point in the operation, the pragmatism of one UN body clashed directly with the principles of another".

118.   Towards the end of April, attention turned to the prospects for a mass 'voluntary' repatriation of Kurds from the border areas. Informal notes in the archives from a meeting held between US military and NGOs underline the extent to which this operation was being driven by American military and political power:

> Q: Will movements not happen until there is an agreement with Iraq?
>
> A: Do not under estimate Bush. He will act .
>
> Q: What if they do not want to go back Iraq?
>
> A: Good question. A Gamble. There is no right answer. Persuade them that they will be safe. A protection issue. USA to coordinate. We must feed the people. Bring the people off the mountain ... we will have to resort to violence to solve the human issue. Feeding is not possible on the mountains. They must come down the mountain. (UNHCR Archives Geneva: 25 April 1991).

119.   UNHCR's own response continued to be shaped by the on-going dilemma of whether the organization could justify participating in a humanitarian operation that clearly violated the principles of asylum, and it remained at arms-length from initial preparations for the safe haven operations. On 24 April 1991, a high-level confidential briefing paper was circulated which considered whether UNHCR should participate in the planned organized repatriation and the potential policy implications.

120.   The decision – shaped by the recognition that the Turkish border would not be opened, and that for the refugees to remain on the border left them struggling for physical survival – was to join the multilateral operation as a reluctant but pragmatic partner. Ogata would later describe and justify this as the "realistic humanitarian course," given the easier terrain and access available to UNHCR on the Iraqi side of the border (Ogata 2005: 38).

121.   In making this decision, UNHCR moved its focus away from questioning the Turkish border closure's impact on asylum in order to present Operation Provide Comfort as a form of voluntary repatriation. This also reflected a broader contemporary shift within UNHCR operations and the international community towards the use of repatriation to provide solutions in the post-Cold War period. [6] Yet

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[6] This shift has been well-documented. See Loescher 2001; Long 2009.

there was clear disquiet within the organization about the extent to which a 'voluntary' repatriation could be offered through securing militarized safe zones or without the alternative prospect of asylum outside the state of persecution.

122.   Even if a return to securitized safe havens could be characterized as respecting the basic tenets of *non-refoulement* because refugees' lives and freedoms would be protected by an international force within Iraq, this did not address the question of refugees' rights to leave their own country and to seek asylum. Furthermore, it meant that this repatriation could not be characterised as a secure and sustainable solution, as it remained contingent on continued Coalition military presence. This was neatly summarized by BO Ankara in June 1991:

> The repatriation from Turkey to Northern Iraq is a false repatriation
> in a sense. People did not return because it is safe in their country of
> origin: they returned because they were protected from the
> government of their country of origin (UNHCR Archives Geneva).

123.   The implication was clear: this 'solution' to the Kurdish refugee problem depended upon continued US-led military presence (though the Coalition itself intended to withdraw within a matter of months). Otherwise there was a risk of a second massive displacement, which Ankara was clear would be met by another Turkish border closure, justified by precedent.

124.   This assessment proved accurate. Operation Provide Comfort was followed by Operation Provide Comfort II, a primarily military operation that placed Coalition forces between the Iraqi state and the Kurdish region between 1991 and 1997. Enforcement of the no-fly zone over Northern Iraq continued until the US-led invasion of Iraq in 2003.

Policy implications

125.   The events along the Iraqi-Turkish border in April 1991 had significant implications for UNHCR and the wider international community, particularly in terms of advancing a doctrine of humanitarian intervention. Assessing the wider ramifications of Operation Provide Comfort is beyond the scope of this paper: so too is any consideration of the logistical or operational challenges faced, covered in detail in the March 1992 evaluation (Crisp *et al.* 2001). However, there are specific consequences of the politics surrounding the international response to the border closure itself which remain relevant in considering UNHCR's reactions to border closures today.

126.   Firstly, Turkey closed its border because it viewed the Kurdish refugee population as an ethno-national threat and feared its "Palestinianization" (UNHCR Archives Geneva: 24 April 1991). It was a political response to a political problem, complicated by the Turkish state's uncertain hold over its own Kurdish population. The USA – and other Western states – made clear in early April that they would not pressure Turkey into opening its borders to the Kurdish refugees.

127.   This was once again for political and military reasons: Turkey was an important strategic ally, its airbases playing a crucial role in furthering coalition aims of containing the Iraqi state. In Bill Frelick's words "Turkey, the good ally, was

essentially let off the hook with the creation of a 'safe haven zone' inside Iraq" (Frelick 1992: 26).

128. The cross-border operations, which developed into the establishment of safe zones within Iraq from 18 April onwards, fundamentally compromised UNHCR's ability to insist upon the need for the Turkish state to grant the Kurds first asylum. Attention was successfully diverted by the Coalition states (led by the USA, UK and France) and the Government of Turkey away from the failure of Turkey to open its borders, with the Iraqi operations presented as a form of accelerated 'voluntary' repatriation.

129. The international media projected the operations as a "highly successful humanitarian mission" that had averted the risk that the Kurdish refugees "would become a disaster like the Palestinian problem" (The New York Times, Kinzer, S. 1991). UNHCR's mandate was lost in the shadow of a state-driven operation motivated primarily by political interests and financed by huge military budgets.

130. In humanitarian terms, the operation can be judged to have been largely successful: within six weeks of the initial announcements about the construction of the safe zone, the vast majority of the refugees had been able to leave the mountains and return to Iraq where it was easier to provide international relief. As the High Commissioner's Special Envoy argues in a personal communication, "the outcome for the refugees was better than the alternatives, and arguably better than asylum in Turkey, had it been an option."

131. Given the limited ability of UNHCR to influence the wider political setting, the decision to focus efforts on securing a 'least-worst' humanitarian outcome for the Kurdish refugees – in this case through ensuring that the choice to repatriation was an informed one – appears a justifiable if imperfect operational response.

132. The decision to encourage the refugees to leave the border area and return to securitised camps within Northern Iraq also highlights the connections between border closures by reluctant host states, sanctioned by donor states, and an increased interest in both the notion of early 'voluntary repatriation' and IDP protection. By projecting the operation as a repatriation, the international community could present their response to the Kurdish *refoulement* at Turkey's border as the 'best' solution, a return 'home' (Aga Khan in Lyman 1991).

133. Similarly, a letter from leading US senators to President Bush in May 1991 (among the signatories are Bob Dole, Al Gore, John Kerry, Joe Biden and George Mitchell) underlined a growing interest in the notion of 'internal protection'. Recognizing that Operation Provide Comfort was only a short-term response, the Senators urged the President to take a leadership role in moving to incorporate "displaced people who are dislocated within their own borders" into the 1951 Convention (UNHCR Archives Geneva).

134. The growth in the interest in IDP protection (in 1992 Francis Deng was appointed the Secretary-General's Special-Representative) can thus be directly connected the reality of border closure, and states' interests in circumventing rather than openly challenging the effect of such closures on refugees' rights to asylum and international protection.

135.   As Bill Frelick argued at the time of the crisis, even as Iraqi sovereignty was compromised by Operation Provide Comfort, the move to locate protection activities outside of Turkey was in fact designed to *reinforce* the concept of state sovereignty at the expense of humanitarian protection.

136.   Resolution 688 condemns Saddam Hussein's regime not in terms of its persecution and repression of its own citizens, but in terms of states' fears of the flight this persecution has caused and its destabilizing political effects. The 'refugee problem' was explicitly framed in state-based terms as flight itself, rather than the suffering caused by the Iraqi state's persecution of it Kurdish minority.

137.   Ultimately, perhaps the key policy implication for UNHCR was that it had little ability in April 1991 to effect events once the border had closed. Instead, the organization was faced with a choice between continuing to resist the plans already determined upon by its key donor states – who were also the key military actors – in the interests of sticking to its mandate principles, and participating reluctantly in a major humanitarian operation than nonetheless had significant and concerning implications for fundamental protection principles.

138.   Operation Provide Comfort also represented a significant militarization of humanitarian aid provision, seriously eroding the humanitarian principles of impartiality, independence and neutrality.

139.   Although UNHCR assumed overall responsibility for relief protection and assistance on 6 May, two weeks into Operation Provide Comfort, at the height of the operation (which saw the return of 200,000 refugees in 2 weeks) the operation involved 20,000 military personnel. UNHCR's eventual participation in Operation Provide Comfort – despite the organizational and logistical shortcomings later documented – was a response to a *fait accompli* that reflected powerful states' deliberate decision to allow Turkey to close her border to Kurdish refugees.

Case study two: Tanzania/Burundi border, 1995

Background to crisis

140.   The Tanzanian/Burundian border closure that began in March 1995, and culminated in a UNHCR-sanctioned involuntary return of Rwandese from Tanzania in December 1996, was one part of the much wider Great Lakes emergency.

141.   The Rwanda genocide in April 1994, the advance of the Tutsi-exile dominated Rwandan Patriotic Forces to Kigali in July 1994 and the subsequent exodus of up to two million Hutus to neighbouring states, created a massive regional emergency. In Tanzania, 250,000 Rwandese arrived in 24 hours between 28 and 29 April 1994. By early May, there were around 700,000 refugees at Benaco camp in Ngara District: the camp had grown into the second largest city in Tanzania.

142.   Tanzania – traditionally understood to be a generous and welcoming host state – granted these refugees immediate entry and successfully appealed to donors for help and aid provision. In the early stages of this emergency, "Tanzania's response was exemplary" (Rutinwa 1996); UNHCR Archives Geneva).

143.   Tanzania had anticipated that the Rwandese exile would be temporary. However, by the beginning of 1995 it was clear that the Rwandese refugees did not plan an imminent return to their country of origin. Their reluctance to return was motivated by concerns over security, and in particular fear over the possibility of reprisals being taken by the new RPF-led state against the refugees, who had in some cases participated in the genocide.

144.   This led to a double security issue. On the one hand, the Rwandese refugees were involved in a "silent mobilization" of Hutu forces, intent on launching a guerrilla war against the RPF (Rutinwa 1996: 297). On the other hand, the refugees' presence in Tanzania represented a domestic security threat – it was estimated that refugees had killed 67 Tanzanians and stolen more than 150 million shillings worth of livestock and other property.

145.   Tanzania also faced a capacity burden in hosting the Rwandan refugee population. The transformation of a few hills sparsely populated by subsistence farmers into the second largest city in Tanzania resulted in severe pressure being placed upon local resources.

146.   A UNHCR report in April 1995 detailed the environmental and social problems caused by the mass influx, which included a fall in the surface water table level, deforestation and consequent soil erosion and the inflation of prices charged for local produce, particularly affecting the livelihoods of the local middle class (UNHCR Archives Geneva).

147.   Despite the fact that there was little imminent prospect of the refugees' repatriation, international relief assistance declined as the refugee-crisis was seen to enter a post-emergency phase and media attention drifted away from the Great Lakes. A regional summit in Nairobi January 1995 had led to an agreement between regional governments intended to reinforce domestic security by screening refugee

populations and separating *genocidaires*, and by arranging for 'safe corridors' through which to accelerate repatriation. But its effect on the ground was limited and Tanzania's growing frustrations with the failure of the international community to resolve the refugee crisis became increasingly apparent.

148.   A particular problem was the lack of asylum-hosting capacity in other regional states. Burundi's own on-going civil conflict – also involving Hutu-Tutsi division – meant that Rwandese refugees were particularly insecure in Burundian camps[7]. In March 1995, a shooting at Mayuri camp, carried out by the Burundian (predominantly Tutsi) army, killed 15 refugees and injured 20.

149.   More significantly, however, it acted as trigger for a mass organized exodus of around 40,000 Rwandese refugees from Ngara camp towards the Tanzanian border. In response, on 31 March 1995 the Tanzanian government closed its border, justifying this action on the grounds that the movement was "contrary to established international customary practice where refugees are not readily allowed to seek re-migration to a country other than the first country of asylum" (UNHCR Archives Geneva).

150.   Tanzania's motives for closing the border were thus complex, involving local, regional and international political calculations. Domestically, the policy played well to Tanzanian nationals, hostile to the Rwandese refugee population already in Tanzania because of the strain placed on local resources.

151.   This dynamic was given added significance due to the impending Tanzanian general elections scheduled for October 1995, and the increasing pressure from the Tanzanian parliament for a mass *refoulement* in response to popular agitation. Kigoma – the region next to the Burundian border – was a key strategic battleground between the ruling elite and the opposition.

152.   By early May, UNHCR had already made the assessment that "the prospects for the reopening of the Tanzania border in the near future are not encouraging, the team does not see any such likelihood until after the general elections in October this year" (UNHCR Archives Geneva). The politics of democratization – as in so many more developed states – had created a political imperative for the government (as a political part standing for re-election) to be *seen* to respond to concerns over asylum. The border closure provided an obvious means of achieving this aim.

153.   The Tanzanian decision to close the border also spoke to more serious concerns about the failure of international burden-sharing mechanisms. Tanzania understood the incoming Rwandese refugee influx to be a question of 'onward migration' rather than 'asylum', and in closing the Burundian border claimed to be trying to reinforce the principles of burden-sharing through adherence to the 'country of first asylum' principle.

154.   This ignored clear evidence that there were Burundian refugees within the asylum flow, and eyewitness accounts of Rwandese refugees being mistreated by Burundian soldiers following their rejection at the border (UNHCR Archives Geneva). However, it did provide a powerful means through which to express Tanzanian

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[7] In October 1993, the first elected Burundian Hutu President, Melchior Ndadaye, was assassinated, triggering a twelve year ethno-national civil war that killed an estimated 300,000.

frustration at the break-down of international cooperation in dealing with the Great Lakes refugee crisis while continuing to meet its obligations by hosting Tanzania's own 'first asylum' cases. Developed states' own asylum policies were also used to justify the closure.

155.   The Minister for Foreign Affairs directly compared Tanzania's actions to those of the USA in relation to Haitian refugees, and argued that "it was a double standard to expect weaker countries to live up to their humanitarian obligations when major powers did not do so whenever their own national rights and interests were at stake" (Rutinwa 1996: 298).

156.   Assessing the reasons behind Tanzania's border closure in early April, UNHCR's Tanzania BO stressed "the lack of recognition by the international community of Tanzania's sacrifices as reflected in the dearth of financial and other support from the donor countries ... lack of political will on the part of the international community and the opposition political forces in Burundi and Rwanda to embark on serious negotiations towards durable solutions" (UNHCR Archives Geneva).

157.   In this sense, the border closure can be seen as an attempt at leveraging the international community into action, particularly in terms of securing the conditions for a mass repatriation. In a meeting with the High Commissioner's Special Envoy, the President of Tanzania had argued the need for an internationally-mandated safe zone to be created, modelled on the French Zone Turquoise Operation that had taken place in August 1994, and indicated Tanzania's willingness to participate in such an effort (UNHCR Archives Geneva).

158.   Border closure in March 1995 therefore had for the Tanzanian state a much wider meaning than simply – or even primarily – being intended to prevent the entry of Rwandese refugees from Burundi. Instead, it was a warning that Tanzania would not support Rwandese refugees on its territory indefinitely, and that the international community needed to share its burden if it was interested the preservation of asylum as a practice rather than just a principle.

International response

159.   UNHCR's initial response to the Tanzanian border closure was to appeal to Tanzania's historic reputation as a generous host state and to ensure the continued protection of the million refugees already inside Tanzania's borders (UNHCR Archives Geneva). The need to ensure that Tanzania's frustration with the lack of a foreseeable resolution to the Rwanda crisis did not escalate into a full-scale *refoulement* clearly influenced UNHCR's response to the border closure.

160.   Protests were diplomatic, and focused on reasserting the principles of asylum (and therefore the need for open borders) whilst also aiming to reassure – rather than condemn – Tanzania. This is reflected in the discussions between the Tanzania BO and Geneva regarding the content of a proposed letter from High Commissioner Ogata to the Tanzanian Head of State, which was delivered on 7 April:

> Our main objective at this stage should be to lend in a *discrete manner*
> repeat *discrete manner* an additional voice to the call for Tanzania to go

the extra kilometre and in so doing enhance her reputation as a country with a long and proud humanitarian tradition. What we do not want to portray is a lack of understanding and concern over the wider problems faced by the country, its gravity, nor in particular, the vulnerability of Tanzania, as a last (sic) developed country, to forever receiving influx of uprooted victims of the sub-regional political instability and violence (UNHCR Archives Geneva: my emphasis).

161.   The international community was also relatively quiet in its response. Diplomatic representations were made, but as UNHCR's Representative in Tanzania reported, "Ambassadors of main locally represented donor countries fully briefed about the situation as of 31 March 1995 ... There is general sympathy for the Tanzanian government position." Concerns were couched in terms of the welfare of refugees arriving at the border, and focused upon the rights of Burundian asylum seekers within the influx.

162.   This reflected the added complication that the Rwandese refugees *had* been granted asylum in Burundi – despite later fleeing due to fear of local violence – which made it easier for the Tanzanian government to claim that in rejecting this influx and the frontier, there was no *refoulement.* As a result, while there was certainly diplomatic consternation at the border closure, there was relatively little concrete action – the EU Ambassadors, for example, wished to "send a message expressing concern", but had "no intention" of making a high-level intervention (UNHCR Archives Geneva).

163.   Despite these difficulties, UNHCR's initial reaction was to assume that the Burundian border closure was a short-term incident rather than a significant policy shift. A private briefing paper at the end of April remarked that:

> We are confident, a propos, that UNHCR's (BO/Geneva) diplomatic representation to GOT, the persuasive dialogue and the continuing diplomatic effort will yield relaxation of the opening of the border. We expect the border reopening with or without official announcements, to enable fleeing refugees to obtain asylum.

164.   Others, including the High Commissioner's Special Envoy in the Great Lakes were less optimistic, and recognized that the re-opening of the border would require considerable international collaboration:

> Our very first priority should be to obtain that the Tanzanian border be re-opened for Burundian asylum seekers. This implies assurances from the international community that i. financial support will be forthcoming; and ii. that acceptable solutions will be found in Burundi or through repatriation to Rwanda for the estimated 200.000 Rwandese refugees from whom Burundi is a first country of asylum (UNHCR Archives Geneva).

165.   The international community did not provide such concrete assurances: the border did not reopen. In fact, there is some evidence to suggest that donors actually used Tanzania's closure of the border to justify *withdrawing* aid from the Great Lakes region. The Tanzania BO, in assessing the likely donor shortfall in 1996, noted that "the closure of the Tanzanian border and abrogation of Refugee Convention

responsibilities are unfortunate additional reasons for donors' disengagement from the Great Lakes refugee crisis" (UNHCR Archives Geneva).

166. While Tanzania continued to press for international commitment to establishing safe zones in Rwanda (akin to those established in Northern Iraq in 1991), the international community - and in particular powerful donor states - simply had no strategic interest in committing financial, military and political support to such an effort.

167. By the end of April, there is evidence that at least some UNHCR staff – particularly those in the field responding the humanitarian consequences of the closed border – were increasingly frustrated by the soft approach taken at higher diplomatic levels. The Tanzania BO wrote to Geneva on 27 April that:

> I do not feel our strategy of quiet diplomacy has worked or will work without more pressure on the government. Every day they become bolder in their actions. Can wholesale push backs from Kitali hills camp be considered impossible? I don't think so (UNHCR Archives Geneva).

168. Other assessments were equally bleak:

> The approach to the highest levels of Government has been discrete, intensive and consistent ... the results of our efforts have however been insignificant and will remain so as long as the perception exist (sic.) that the internal political advantages in keeping the border shut outweighs the disadvantages (UNHCR Archives Geneva).

169. Faced with diplomatic *impasse* and a lack of international response, UNHCR field staff were forced to develop an *ad hoc* response to the border closure. Although UNHCR did not intervene at the border posts controlled by Tanzanian military, it was generally agreed that any refugee reaching a transit centre within Tanzania would be considered under the protection of UNHCR and allowed to continue to a refugee camp.

170. The long, porous Tanzanian/Burundian border allowed many refugees to cross undetected, while others were able to obtain entry by recourse to smugglers or bribery. However, UNHCR field staff were consistently called to respond to military violations of even this limited understanding of *non-refoulement* arrangements. By June, field officers in Ngara openly questioned the ability of UNHCR to meet its protection mandate under these conditions:

> We have serious concerns that our Protection Mandate is being slowly and surely eroded ... we are no longer even able to carry out monitoring functions. The Army refuses to meet with us to discuss their role, or even their view of our role ... UNHCR must ask itself are we able to assure ourselves that we are able to fulfill our basic mandate under the present circumstances. If not, then our own quiet acceptance of the present situation giving credibility to an unacceptable policy by Tanzania – and if we continue as now, will it ultimately contribute to increasingly insecurity in the area (UNHCR Archives Geneva).

171. In January 1996, following the October general election campaign, the Tanzanian government relaxed its border closure policy. Although the border remained officially closed, Burundian asylum seekers were to be allowed in on humanitarian grounds.

172. A special Presidential dispensation allowed the entry of a mass influx in February. By March 1996, a year after the border's formal closure, UNHCR was able to establish an informal agreement with the Tanzanian military, under which it was able to access the border area and retrieve asylum seekers in the area.

173. This was an *ad hoc* arrangement: the reluctance of UNHCR to approach Tanzania in order to formalize the agreement suggests significant timidity, with the Ngara sub-office explaining "as long as this informal system for allowing refugees in to Tanzania works well, I would prefer to let it operated quietly and not call special attention to it" (UNHCR Archives Geneva). The assessment was effectively being made that *de facto* protection space could only be secured by tolerating *de jure* disregard for the principles of *non-refoulement*.

174. Even this *ad-hoc* opening proved temporary. In May, access to the border was again denied, although asylum seekers found within Tanzania would not be *refouled*. Asylum had become a prize for those strong enough – or wealthy enough – to physically cross the border, rather than a universal protection provided on the basis of need. Frustration within UNHCR Tanzania was increasingly evident, with staff arguing that "UNHCR's passivity [at Tanzanian policy] is untenable and is exposing the office to criticism and cheap accusations" (Power 2008: 199).

175. The international community and UNHCR failed to respond to the Burundian border closure in a manner that effectively secured either adequate regard for the principles of asylum-based protection or Burundian refugees' access to effective protection.

176. The wider politics fuelling Tanzania's Burundian border closure culminated in one of the most notorious of UNHCR protection failures: the 'voluntary' repatriation of all Rwandese by Tanzania in December 1996. This return of 500,000 Rwandese from Tanzania – some 35,000 forcibly rounded-up by the Tanzanian military as they fled to avoid return – in effect amounted to a UNHCR-endorsed *refoulement*: senior UNHCR staff recall this episode as the "nadir" of UNHCR protection policy (Interview, UNHCR staff: March 2008).

177. While there is no guarantee that a more robust and public condemnation of the Burundian border closure would have prevented the *refoulement* of December 1996, it is clear that the border closure was an early warning sign. The international community's decision to tacitly acquiesce rather than to confront the root causes of Tanzanian frustration by developing more effective burden-sharing mechanisms contributed to the 1996 protection crisis that remains a serious stain on UNHCR's protection record.

178. Within UNHCR the lack of a co-ordinated high level response meant that field staff were left to develop *ad-hoc* operational procedures that could not on their own adequately respond to either humanitarian or protection needs of those attempting to seek asylum and being refouled by the Tanzanian military.

Policy implications

179.   The Burundi-Tanzania border closure – as well as the wider Great Lakes emergency – offer few positive policy lessons for UNHCR in relation to balancing protection principles against humanitarian needs. However, while there can be little doubt that UNHCR's response to the Burundian closure was inadequate, considering the factors constraining UNHCR's ability to act – as well as the political dilemmas surrounding the border closure – does have important implications for developing a general policy framework through which to respond to border closure.

180.   The Burundi border closure was just one aspect of an extremely complex series of emergencies in the Great Lakes region which occurred after 1994. It cannot be excised from this wider context. It is also important to note that Tanzania continued to act as a first country of asylum for Great Lakes refugees during and after the border closure, including to some 90,000 Zairean refugees who fled between November 1996 and April 1997, even as the Rwandese refugee population was *refouled*. However, the closure nonetheless has several important policy implications

181.   Firstly, the Burundi border closure highlights the difficulties inherent in dealing with the onward movement of refugees and asylum seekers. The influx which triggered the Tanzanian border closure was a secondary movement of Rwandan refugees. They were fleeing their first country of asylum in fear of violent attack: but they were nonetheless under international protection in Burundi. Since 1995, UNHCR has developed a clear and expansive understanding that refugees may need to move from a first country of asylum in order to secure 'effective protection' (UNHCR 2007a).

182.   However, the continuing interests of states in eradicating onward secondary movements of asylum seekers suggest that UNHCR's understanding is considerably more generous than the prevalent view among states, and that political persuasion and international support mechanisms are necessary in order to ensure that borders remain open to onward-moving asylum seekers fleeing an unstable host state, as well as first-country asylum seekers from the original host state, in this case Burundi.

183.   The Tanzanian case also highlights the importance of understanding the wider political context of a border closure. There is a real danger in seeing border closures as just requiring an emergency response to the mass influx which is likely to have triggered the decision to seal the borders. Clearly, the Burundian influx in March 1995 did represent a significant emergency protection challenge, but this was not the root cause of Tanzania's action.

184.   Tanzania was responding to the very real risk that the Rwandese refugee situation could become a complex and protracted one, its needs (and Tanzania's burden) ignored by the international community. This was recognized by UNHCR staff in Tanzania: but the international community failed to turn this recognition into resolution.

185.   The lack of international political interest in burden-sharing played a major role in prompting the border closure. On a humanitarian level, the failure of donor states to offer Tanzania adequate relief aid with which to meet the needs of its existing refugee population, and a further decline in aid post-closure meant that there was little incentive for Tanzania to open its borders to a new influx.

186.   Similarly, the reluctance of the international community to engage seriously in finding a solution to the Rwandese refugee population was a serious failure and underlines the extent to which continued respect for asylum may be politically contingent on finding 'durable solutions'. The almost total absence of any serious international engagement with the border closure seriously limited UNHCR's ability to persuade Tanzania to reverse its policy.

187.   The problem of finding a durable solution for the existing Tanzanian refugee population was further compounded by a global focus on 'voluntary' repatriation as *the* solution to *all* refugee crises, reflected in Tanzania's repeated and constant insistence that the *only* solution for the refugees was a return to Rwanda.

188.   UNHCR's own global commitment to voluntary repatriation in the mid 1990s meant that the logic of voluntary repatriation was in the ascendant. Rwanda could not be judged to be a safe country of return in 1995 (particularly given the Kibeho massacre in April, a month after the border closed).

189.   However, the failure of the international community to intervene to stop the genocide a year earlier, coupled with the RPF-state's deep suspicion of any international plan that could be viewed as protecting *genocidaires* within Rwandan territory a la Zone Turquoise in 1994 meant that there would have been no political space for any Rwandese 'safe zone', even if there had been international political interest in meeting the costs involved.

190.   The involvement of Sergio Vieira de Mello in the Tanzanian return – he signed off on the joint Tanzanian-UNHCR communiqué issued in December 1996 and even offered UNHCR funds to transport and pay the Tanzanian forces to be used to dislodge refugees from the camps as "he doubted the refugees would move budge without some form of coercion" (Power 2008: 212-215) – also underlines the role that individuals with UNHCR played in pushing such policies forward. There is little doubt that Vieira de Mello's stance was strongly opposed by other senior UNHCR figures (Power 2008: 212-215).

191.   Ultimately, although UNHCR's relative lack of action in Tanzania must be placed in this wider international context, there was also a clear failure within the organization to use what space it had available to more vigorously protest against Tanzanian border closure, particularly as it became clear that the closure would last several months. Field staff were left to improvise *ad hoc* protection responses that were unable to either fully respect protection principles or meet humanitarian needs.

192.   A more direct use of the media to combat anti-refugee popular opinion and stronger and more public advocacy of an open border would not have been likely to result in a reversal of Tanzania's border policy without significant international involvement. However, such actions – refuting any suggestion of a tacit acquiescence with anti-asylum Tanzanian policy – could have helped to prevent UNHCR becoming involved in the still more serious protection failures that arose from the December 1996 return.

Case study three: Macedonia/Kosovo border, 1999

Background to Crisis

193.   In April 1999, the Macedonian state closed its border with Kosovo in order to prevent the entry of several thousand Kosovar Albanian refugees massed at Blace border-crossing. The refugee exodus was a consequence of a "classic secessionist struggle" between the Serbian state led by Milosevic and Kosovar separatists (Suhrke et al. 2000: 5). The Rambouillet peace negotiations had seen a proposed agreement laying out terms for Kosovar autonomy within Serbia rejected by the Serbian delegation on 18 March (who objected to the proposed presence of a NATO force within the autonomous region).

194.   This rejection – coupled with evidence that the Serbian state had authorized an ethnic cleansing campaign designed to remove or eliminate the majority Albanian population within Kosovo – caused NATO to take military action against the Serbian state. The air campaign, beginning on 24 March 1999, prompted an acceleration of Serbian action against Kosovar Albanians, causing an escalation of violence on the ground and large refugee flows that included organized expulsions.

195.   Although the majority of refugees fled to Albania, a substantial minority arrived at the Macedonian border. Macedonia admitted refugees until 30-31 March, but from this point onwards deliberately obstructed the refugees' entry.

196.   Border guards first slowed down admission by meticulously checking arrivals, and when 25,000 Kosovar refugees arrived in six trains on 1 April, only the first 3,000 were permitted to enter Macedonia. The remainder were left in a field at the Blace border post without access to adequate shelter or food, until a NATO-negotiated settlement saw the borders opened on 4 April. By 6 April, Blace field was empty.

197.   The circumstances surrounding Macedonia's closure of its Kosovar border bore a striking similarity to those surrounding the border closure in Northern Iraq in 1991. Ethnic-national concerns were at the heart of Macedonian reluctance to permit the Kosovars to cross the border. Macedonia is a fragmented nation state, with significant ethno-political divisions: ethnic Albanians constitute the largest ethnic minority in Macedonia, some 20-25 percent of the total population).

198.   Macedonian Albanian political grievances – also centring on demands for a large degree of community autonomy – were already a source of considerable political tension in 1999, and erupted into violent separatist insurgency two years later. The Macedonian state therefore feared that an ethnic Albanian influx from Kosovo would fragment the fragile Macedonian political community and radicalize an already restless Albanian minority.

199.   The decision to close the border was thus motivated by political, national concerns, and understood the Kosovar influx not as individuated refugees in search of asylum from persecution and in need of humanitarian aid, but as a collective threat to the integrity of the Macedonian state based upon their ethnic group identity.

200.   The Macedonian refusal to open the border to Kosovo refugees was not motivated by lack of capacity. NATO's interest in containing the refugee crisis (evident in the speed with which NATO was able to build Brazda camp near Blace once authorization had been provided) meant that international material aid was not a concern.

201.   NATO's budgets for providing 'humanitarian' assistance dwarfed those available to UNHCR and other agencies: the UNHCR's special envoy during the crisis, for example, recalls a NATO commander asking whether there were any urgent needs "as he had a $100 million or so spare in his budget" (Interview, ex-UNHCR staff, April 2010)

202.   Furthermore, the majority of Kosovar Albanians were not housed in camps, but accommodated with Macedonian host families, effectively self-settling. Amnesty International's estimated in June 1999 were that there were 108,400 refugees in camps and 148,600 living with host families. Closing the border was a question of political security, not one of material capacity.

203.   The Macedonian border closure was not unexpected. The Macedonian government had publicly announced that in the event of an influx, it would receive only 20,000 refugees from Kosovo.

204.   As the post-emergency evaluation also made clear, reports from the Special Envoy predicted a border closure from 1998 onwards and anticipating a border 'delay' was an integral part of UNHCR contingency planning, although the scale of the influx – some 300,000 over the course of the crisis – was not anticipated with UNHCR instead predicting a rise in the number of IDPs, about which "there was little to be done" (Suhrke et al. 2000: 17). As the evaluation reported, "for years local media and politicians in FYR Macedonia were saying that the border would be closed in the event of a mass refugee flow from Kosovo" (Suhrke et al. 2000: 102).

205.   In placing these limits on its ability to offer asylum Macedonia clearly signposted that it would not adhere to traditional first country of asylum principles, but expected international burden-sharing. In May 1998, Zvonimir Jankuloski – a Macedonian human rights activist – outlined at a workshop in Oxford the dilemma Macedonia would face if required to respond to a Kosovar refugee crisis, and argued that this should be met by co-ordinated international action:

> How to open the border and host the refugees from Kosovo without disrupting the fragile peace in Macedonia? A reasonable solution might be through offering temporary protection for a limited number of refugees from Kosovo, or the use of a predetermined Macedonian territory as a transit area ... I am afraid that states which are unwilling to host refugees within their territories (mostly European and much richer than Macedonia) will support the Macedonian government's efforts to accept and host a respectable number of refugees from Kosovo. I believe they will support Macedonia both politically and financially even though it could increase internal ethnic tensions and undermine its peace and stability (Jankuloski 1998).

206.   Nearly a year before the Kosovar refugee crisis materialized, Macedonia was therefore already publicly advocating for an international response to the influx that would allow refugees to leave Kosovo but only to transit through Macedonia, and suggesting that this could be carried out "with the help of UN or NATO troops" (Jankuloski 1998).

International response

207.   The international response to the Macedonian border closure crisis was extraordinarily swift. Indeed, it is important to stress the very short nature of the Kosovar refugee crisis – the entire refugee crisis lasted only over eleven weeks, ending in a massive and rapid spontaneous repatriation once a framework for peace was established in mid-June.

208.   The main border closure phase of the emergency was even shorter, lasting a little over one week, although Macedonia did briefly close its border again in early May in attempt to establish a balance between the number of refugees leaving Macedonia and the number entering.

209.   Why did the international community react so quickly to the Macedonian border closure? The answer lies in the convergence of NATO states' military interests in securing access to Macedonian airspace, and their political interests in being seen to publicly address a humanitarian crisis that had at the very least been accelerated – albeit it not caused – by NATO's military engagement with Serbia. Western European leaders were also keen to prevent the Kosovar crisis from resulting in mass flows to Western Europe.

210.   The media also played a crucial role. UNHCR staff involved in the crisis remember a 'media circus' with no less than six CNN crews filming at Blace (Interview, ex-UNHCR staff, April 2010: Ogata would later write about "NATO's aggressive media campaign overshadowing UNHCR" (Ogata 2005: 151).

211.   NATO leaders, led by Tony Blair, visited Blace, understanding the refugee crisis as an opportunity to demonstrate a political commitment to humanitarian action. Given these strategic and political considerations, questions of principle – in particular, the commitment of Macedonia and the wider international community to the principle of unconditional entry of refugees to the country of first asylum – were not prioritized.

212.   The solution to the Blace impasse was therefore negotiated by NATO, led by the USA, and not by UNHCR. It reflected US acceptance of the government's premise that the refugees represented a national security threat and could therefore only be granted conditional first asylum, a response largely aimed at securing Macedonian co-operation during the NATO military campaign. On 3 April, an agreement was secured by which the border would be re-opened and the refugees transferred to NATO-constructed camps, with the promise of the evacuation of some of the refugees and economic assistance.

213.   The USA had begun to develop this plan as early as 27 March, having been approached by the Macedonian government and asked to resettle some of the incoming refugee population. Fearful that a failure to address Blace and the political

threat of the Kosovar influx as perceived by the Macedonian state, US allies were persuaded to offer temporary protection. On 3 April, with Turkey offering 25,000 places for temporary protection and Norway 6,000, Macedonia was persuaded to open the border (UNHCR Archives Geneva).

214.   UNHCR played little role in these high-level diplomatic negotiations. This was at least in part due to the organization being trapped – as in Northern Iraq – between principle and pragmatism. NATO's involvement in humanitarian operations also had obvious implications for the politicization and militarization of humanitarian space.

215.   Ogata was initially reluctant to endorse NATO's construction of Brazda, persuaded only after two days of high-level discussion with NATO's then Secretary-General Javier Solana. Similarly, although the planned Humanitarian Evacuation Programme (HEP) did not directly compromise refugees' right to leave their country and seek asylum, it did compromise UNHCR's commitment to the principle of unconditional first-country asylum.

216.   Although the Indochinese refugee crisis had also been resolved on the premise of conditional first country asylum, this was understood to represent an exceptional case involving a number of non-signatory states. In contrast, the Macedonian HEP was initiated and developed by powerful Western states, and as a result represented a far more significant challenge to this norm. HEP would also remove refugees from the region of origin, which went against UNHCR operational guidelines (UNHCR, Protection Guidelines: Kosovo Situation, 9 April 1999, in Suhrke et al 2000: 91-92).

217.   In the three months till June, over 90,000 refugees were evacuated as part of the NATO-initiated HEP upon which continued Macedonian willingness to receive incoming refugees was contingent. The programme was effective in relieving political pressure on Macedonia, and to this extent ended the immediate protection emergency at Blace.

218.   As UNHCR's former Special Envoy for Former Yugoslavia and Albania has remarked "the immediate crisis at Blace was resolved and lives saved. That a deal was necessary for this, and that asylum became conditioned on other actions, was a price that had to be paid even if it created problems later" (Email correspondence, April 2010).

219.   However, the HEP operation itself was extremely chaotic. UNHCR was left attempting to "keep control" in order to prevent "abuses or misuses" by either states or refugees and establish protection criteria for the evacuation. This was extremely difficult: "staff spend most of their day fending off questions from irate refugees waving guarantee letters and various other papers in numerous languages in our faces." (UNHCR Archives Geneva).

220.   Field reports by the middle of May reported that a growing number of delegations "choose to go their own way with little regard for UNHCR established priorities which attempt to focus on vulnerability" (UNHCR Archives Geneva).

221.   Detailed evaluations of the logistical and operational challenges faced by UNHCR in co-ordinating HEP in Macedonia was produced shortly after the crisis: this paper does not intend to repeat these findings (e.g. Suhrke et al. 2000; Amnesty International 1999 etc.) However, given that HEP was a direct response to the politics

of Macedonian border closure, it is important to note the border closure's key implications for refugee protection.

222. Firstly, HEP was never intended to provide a solution for all Macedonian refugees – only around a third of those who entered Macedonia eventually entered the HEP. Although many states did use UNHCR criteria for selecting refugees for evacuation, some delegations did not .

223. The lack of unified criteria for evacuation was amplified by the varied standards of protection offered post-evacuation: the USA and Canada put a programme in place which accorded with the requirements of the Refugee Convention, while Germany granted only three months temporary protection and prohibited employment.

224. HEP had helped to negate the politics of border closure: it also underlined the significant inequalities between the different forms of 'temporary protection' that states – offering selective assistance out of generosity rather than universal protection out of Convention obligation – provided.

225. Finally, as the crisis continued into May (longer than had been initially anticipated by either NATO or UNHCR, HEP became perceived by refugees as a desirable alternative because of overcrowding and other protection failures within the Macedonian camps, with field staff reporting that: "refugees are now desperate to 'get out' via the HE programme regardless as to what their destination may be" (UNHCR Archives Geneva).

226. HEP occurred alongside HTP. HTP began as a bilateral operation, agreed between the Macedonian government and the Albanian and Turkish states and facilitated by the USA. These arrangement attracted significant criticism, not least due to reception conditions in Albania (already dealing within some 200,000 first-asylum Kosovar refugees itself).

227. The Albanian government was in fact "profoundly irritated" by the comments of President Gligorov of Macedonia on 5 April that Albania should take all refugees from Kosovo, triggering a serious diplomatic incident only resolved by late-night shuttle diplomacy (UNHCR Archives Geneva). UNHCR also had serious protection concerns regarding the standards attached to HTP, but had little input into developing the HTP:

The first transfer of reportedly some 15,000 Kosovar refugees from Macedonia to Albania ... was carried out bilaterally by the concerned authorities without prior knowledge of UNHCR. There is no indication as yet whether, when and how frequently further movements would be organized. NATO seems to have this option incorporated into its plan and has been openly and actively promoting it (UNHCR Archives Geneva).

228. NATO was prepared to provide direct support for HTP, building new sites in Albania with a capacity to hold 29,000 refugees. Yet UNHCR remained extremely wary: "UNHCR should be cautious before supporting this option. Otherwise, the same critical situation would simply be repeated in Albania where the inferior logistics infrastructure could be more easily overwhelmed" (UNHCR Archives Geneva).

229.   This created another point of tensions between UNHCR and NATO, with the US ambassador expressing his "strong concern" UNHCR's failure to adequately support the bilateral HTP arrangements, despite the clear protection concerns these unannounced movements raised (UNHCR Archives Geneva). This criticism was controversially echoed in the independent review commissioned by UNHCR after the crisis (Suhrke et al. 2000: 96-97).

230.   However, UNHCR staff present during the crisis felt a clear obligation to attempt to protect the principles of first asylum and Albanian refugees' right to refuse transfer if not voluntary. These principles thrown into stark relief by the reluctance of the Kosovar refugees arriving in Macedonia to participate in HTP and by UNHCR's conviction that conditions in Albania were extremely challenging.

231.   Burden-sharing to break the border closure – facilitated by the political context of the Kosovar refugee flow and the huge investment of Western leaders in the outcome – nevertheless remained precarious. The *ad hoc* solution almost broke down in early May, when slowing rates of evacuation prompted the Macedonian government to again authorize a temporary border closure, preventing further Kosovar influx.

232.   UNHCR documents record a "severely acrimonious" meeting between the Macedonian government and international donors, at which Macedonia berated the international community for its alleged failure to cooperate politically and financially with the government.

233.   It was at this point that UNHCR's reluctance to fully endorse HTP became most politically contentious, with NATO anxious to secure Macedonia's open border whilst preventing any escalation of ethnic instability within Macedonia and – perhaps most importantly – ensuring Macedonia's political acquiescence to continued NATO air strikes. However, NGOs were equally angry, arguing that the Macedonian government was "using the lives of Kosovar refugees to effectively blackmail aid agencies and Western governments" (The New York Times).

234.   By the end of May, the rapid and chaotic processes of HEP and HTP had effectively slowed to a halt because of NATO's eventual military victory against the Serbian state. By the end of June, a massive spontaneous repatriation of 300,000 Kosovar refugees had occurred, leaving only a small residual caseload.

235.   The repatriation was argued by many UNHCR staff to be premature (due to mines and UXO): it also created significant protection challenges within Kosovo, not least the consequent displacements within Kosovo of the Serbian minority population on the Albanian population's return. However, the refugees' return did resolve the Macedonian border crisis.

Policy implications

236.   The policy implications for UNHCR of the international response to the Macedonian crisis were extremely significant. This fact was recognized at the time, and reflected in the independent evaluation carried out for UNHCR shortly after the crisis ended (Suhrke et al. 2000). While many of the concerns of this detailed evaluation are beyond the scope of this paper, the report's conclusions on protection

policy were extremely controversial, and speak directly to the politics of border closure.

237.   The key issue arising from the Macedonian border closure for UNHCR was the extent to which humanitarian evacuation – facilitated as a result of powerful military and political interests – fundamentally compromised the principle of unconditional entry into a country of first asylum.

238.   The Macedonian decision to open the border was made conditional upon burden-sharing by the international community. While this was akin to the solution negotiated to the Indochinese refugee crisis in south-east Asia in the 1980s, which had also prompted scrutiny of the principle of first asylum, the potential effect of Macedonia's action on the asylum-protection regime was more severe because Macedonia was a signatory to both the 1951 Convention and the 1967 Protocol.

239.   Should UNHCR develop a policy recognizing that in some cases, meeting *non-refoulement* and ensuring borders remain open to refugee flows is dependent upon international burden-sharing mechanisms being put in place? Suhrke and Barutciski, the authors of the independent evaluation, argued that this was a more realistic policy, and thus would be ultimately a far more effective means of ensuring that protection standards were met.

240.   Their conclusion was that HEP and HTP were "extraordinary measures that generally enhanced protection by contributing to unblock the impasse at the Kosovo-FYR Macedonia border" (Suhrke et al. 2000: 97), and that UNHCR's hesitation in embracing these strategies was unhelpful. The evaluation continued:

> FYR Macedonia's fears of destabilization, which were shared by some states, point to the need for further examination of the principle of first asylum in situations of mass influx. The issue of whether first asylum should be considered as an absolute and unconditional legal obligation consistent with the 1951 Refugee Convention should be examined within the context of UNHCR's efforts on promoting burden sharing (Suhrke et al. 2000: 141).

241.   The authors were particularly critical of UNHCR's reluctance to accept the use of HTP as a means of burden-sharing, pointing out that this contradicted UNHCR's stated preference for keeping refugees within their region of origin in order to facilitate later repatriation, recommending that such strategies be developed as HTP was likely to be "one of the few options available in future similar scenarios" (Suhrke et al. 2000: 103).

242.   The independent evaluation argued that the principle of first asylum was not an end in itself, but rather a means to the end of securing international protection. Recognizing political reality, the authors in effect argued that in situations of mass influx, first asylum was not an effective method to employ: nor was it a principle defensible for its own sake.

243.   Securing practical protection for refugees required a more innovative and flexible approach to asylum: the implication was that UNHCR should recognize the limits of first asylum, acknowledging that Macedonia's border-opening was indeed

conditional on an international burden-sharing scheme being developed, and concentrate its efforts on securing such protection arrangements.

244.   Suhrke and Barutciski's recommendations were not adopted by UNHCR. In particular, senior protection officers in Geneva proved extremely resistant to the suggestion that the relationship between burden-sharing and first-asylum be reconsidered, rejecting this proposal out of hand (Email correspondence, May 2010). The report was also extremely controversial outside of UNHCR, and was heavily criticized by NGOs and advocacy groups.

245.   The European Council on Refugees and Exiles' (ECRE) statement reflected these concerns:

> The author has failed to provide a cogent justification for his view that the principle of first asylum needs to be re-examined at all ... his view that, by insisting on the admission of refugees to FYR, UNHCR was simply being dogmatic is a misunderstanding of UNHCR's protection mandate ... the failure to provide cogent historical or legal justification for the recommendation fatally undermines the protection part of the evaluation (ECRE 2000).

246.   UNHCR's comments on the report's findings, detailed in an Excom report, highlighted the threat that it was perceived HEP could pose to asylum in the long-term:

> UNHCR is concerned that contingency planning which assumes that States will not comply with their responsibilities to receive and host new arrivals, particularly in mass influx situations, runs the risk of becoming a self-fulfilling prophecy. At a time when the commitment of States to the institution of asylum appears to be in decline, that risk is real and dangerous (UNHCR Excom , Standing Committee 2000).

247.   The politics of pragmatism and the principles of asylum pulled UNHCR in opposite directions. One of the major difficulties in moving forward from the Macedonian crisis to develop burden-sharing as part of a protection framework was the extent to which particularly HEP but also HTP had depended upon American and NATO involvement in the Kosovar crisis. As the evaluation recognized: "HEP is a political option that will probably rarely present itself, given the limited public support for receiving refugees from more distant continents and the likelihood that Western states will be less implicated in other conflicts."

248.   Thus, while burden-sharing had worked to open the Macedonian border, this was not burden-sharing based on any universal framework: it was not a new innovation intended to render the international refugee protection regime more effective, but an exceptional, political act dependent upon donor states interests in facilitating an open border. It offered no clues as to how UNHCR could effectively respond in cases where America and its allies did *not* wish to open the border (as would become very clear in the post-2001 border closures in Afghanistan and Kenya analyzed below).

249.   International burden-sharing at the Macedonian border could not seriously be advanced as a new global protection model not because of principle – as discussed,

the place of burden-sharing in the international protection regime has long been recognized – but because in practice it underlined the extraordinary fragility of the asylum system.

250.   The burden-sharing was dependent on political interest and was at least partly motivated by Western European states' concerns to burden-shift and avoid any prospect of a mass influx of asylum seekers seeking entry at their own borders. However, Barutciski is convinced that the failure to act following the Macedonia-Kosovo crisis was a lost opportunity for UNHCR:

> New opportunities to rethink protection approaches are relatively rare and I think UNHCR didn't take advantage of the opening that followed the Kosovo crisis. Instead it promoted initiatives that presented even more problematic interpretations of *non-refoulement* and first asylum (e.g. Global Consultations), as well as ill-conceived attempts at implementing burden-sharing (e.g. Convention Plus) (Email correspondence: May 2010).

251.   UNHCR faced other protection dilemmas in Macedonia too. Of particular concern was how 'voluntariness' could be defended in light of state pressure to accelerate HTP and transfer refugees to Albania. UNHCR staff were appalled by the conditions in Albania (Interviews, UNHCR and ex-UNHCR staff, April 2010) and determined to ensure that refugees understood their right to refuse transfer, building up a doctrine of voluntariness that was subject to various interpretations, from requiring refugees' active choice to simply demanding their non-dissent.

252.   Given that HTP did not break principles of *non-refoulement*, and allowed refugees to seek asylum, the dilemma faced by UNHCR can be best characterised as humanitarian: to what extent should refugees be able to *choose* their country of asylum, given the evident inequalities between the levels of protection and assistance available in different states?

253.   This problem was arguably complicated by the contemporary debates over the meaning and importance that should be attached to voluntariness in repatriation, a far longer established protection principle (see Long 2009). Such debate also exposed a fundamental ambiguity at the heart of HTP. On the one hand, HTP offered a means of providing international protection to the Kosovar refugees and meeting Macedonia's security needs, a form of regional burden-sharing.

254.   On the other hand, HTP was arguably in fact a form of burden-*shifting*. It relied upon the particular ethnic sympathies of Albania for the Kosovar Albanian refugees for its facilitation, along with international fiscal aid that reduced the need for the West to accommodate the physical presence of refugees. It reinforced – rather than reduced – the inequalities of the asylum system.

255.   The border-specific dilemmas that arose from the Kosovar refugee crisis must also be placed in a wider context: in particular, the role of Kosovo in NATO states' development of the doctrine of humanitarian intervention. Much has been written elsewhere regarding the effect of such militarized efforts on the delivery of humanitarian aid, the safety of humanitarian aid workers and the protection of universal principles from political contamination (e.g. IASC 2008).

256.   However, the Kosovo campaign arguably remains the most significant articulation of this doctrine in practice, and state responses to the refugee crisis underline the difficulties this posed for protecting asylum principles and humanitarian space.

257.   Notes from a meeting of EU Heads of State in late April 1999 reveal the extent to which the political, the military and the humanitarian were now connected, and the struggle of the UN system in general to contain this creeping trend. As the UN Secretary-General was led to implore: "humanitarian efforts should not be militarized. UNHCR was being pushed aside, and the Secretary-General would ask for the help of those present in ensuring that this did not happen" (UNHCR Archives Geneva).

258.   For UNHCR, the policy implications of a shift towards a NATO-negotiated operation designed to clear the border and meet Macedonian security concerns were not merely confined to protection-related issues, but brought into question the standing of UNHCR itself in humanitarian emergencies. UNHCR attracted considerable – largely unwarranted – criticism from NATO and the international media for its hesitation in clearing the Macedonian border and was pushed to the political margins of the Macedonian border crisis.

259.   UNHCR's claim to be protecting vital protection principles that, if eroded in Macedonia, could seriously threaten the future of the asylum regime, was dwarfed by NATO's inexorable drive towards HEP and HTP. NATO's facilitation of HEP and HTP broke Macedonian resistance and prevented a long-running Kosovo refugee emergency at the border as occurred in Northern Iraq. However, it did so through political bargaining rather than by shoring up of international burden-sharing on principle.

Case study four: Afghanistan's borders, 2000-2001

Background to crisis

260.   The successive waves of violence and instability that have wracked the Afghan state since 1978 have resulted in one of the most long-running and complex of all refugee crises. The Afghan refugee population peaked in 1990 at 6.22 million, a number which represented around forty percent of the entire Afghan population. In 2000 UNHCR estimated that Pakistan alone was hosting two million Afghan refugees, 1.2 million sheltered in refugee villages (US Committee for Refugees and Immigrants 2001).

261.   In the early years of the crisis, Pakistan (and Iran, hosting the second largest number of Afghan refugees) pursued an 'open door' policy which offered refugees "unparalleled generosity" and significant prospects for local integration (Schmeidl 2002: 18). Ethnic affinity between Afghan and Pakistani Pushtun (especially given historical transnational networks) meant that there was local support for the policy, given added strength because of Islam codes of hospitality; this was further enhanced by the Pakistani state's support for the Afghan *mujahedin* fighting the Soviet occupation of Afghanistan.

262.   However, in the 1990s the relationship between the Pakistan state, local hosting communities and the Afghan refugee population changed. The relationship between local hosts and the refugee population cooled. Afghan refugees no longer fled a Soviet occupation but civil conflict, endemic social instability and the rise of the Taliban from 1994 onwards: the result was new and non-Pushtun influxes that found local integration more challenging.

263.   Without American political interest in using the *mujahedin* to fight against Soviet troop aid was less politically relevant and by the mid 1990s, UNHCR and WFP, faced with large funding shortfalls for their relief activities, ended food aid to camp-based refugees and reduced or curtailed many of their other assistance programmes.

264.   The withdrawal of food aid triggered a mass migration of refugees to Pakistani cities, further exacerbating host-refugee tensions as refugees were blamed "for Pakistan's growing social and economic ills ... crime, drug addiction and drug trafficking, and illegal trade" (Ruiz 2002).

265.   The result was a hardening of Pakistan's attitude to Afghan asylum seekers, detected in the increased harassment of Afghans in Pakistan. In 1999, local authorities in Baluchistan pushed 300 Afghan asylum seekers back across the border and forced Afghan asylum seekers living in Quetta to move into securitized camps.

266.   Declining tolerance for the continuation of the Afghan refugee situation – with little prospect of a durable solution and with a marked decline in international aid – had hardened Pakistan's willingness to host any new Afghan refugee influx. However, in 2000, there was a marked increase in the number of Afghans arriving in Pakistan, a trend exacerbated by serious drought and heavy fighting in northern

Afghanistan. It is estimated that 350,000 Afghans were displaced during the course of 2000: around half crossed the border and entered Pakistan.

267. For the Pakistani state, this new influx was seen as a final outrage. On 9 November 2000, the border was closed to new Afghan arrivals, except those arriving with valid passports and visas. Tajikistan also closed its borders to Afghan arrivals at the same time.

268. The act of closing the border signalled a cumulative frustration with the failures of international refugee policy, akin to Tanzania's response in 1995. Pakistan's interior minister claimed that this action had been taken because Pakistan did not "have the resources to absorb another wave of refugees" (van Selm 2002). Burden-sharing – upon which refugee hosting depended – had failed.

269. However, it is important to note that the border closure was not effectively enforced. Around 70 Afghan families a day were able to cross the border, using informal and isolated paths to avoid the Pakistani authorities, or bribing border guards. A porous border and weak state authority allowed *de facto* entry. However, Pakistan's failure to recognize new arrivals' rights to claim international protection as refugees, as well as the continued threat of deportation or *refoulement*, represented serious protection failures that continued through 2000 and the first part of 2001.

270. The Afghan border closure thus first occurred within the politics of a protracted refugee situation and a host state frustrated with the failure of donor states to maintain their interests in refugee assistance once their political goals of removing Soviet troops from Afghanistan had ostensibly been met by the mujahedin victory. However, the impact of 9/11 was to fundamentally shift the politics of Afghan border closure, placing it in a political-security framework in which refugee movement was incidental to the interests of American policy.

271. As the USA prepared to begin a military campaign in Afghanistan in September 2001, all six of Afghanistan's neighbouring states closed their borders at the request of the USA and in the interests of preventing Taliban flight (Ferris 2008; Tait 2001). Refugee flows were now associated with the fear of terrorist infiltration.

272. The President of Tajikistan, for example, argued that his country would not take refugees in even following a US air strike because "we cannot allow the penetration of a single refugee from Afghanistan into Tajikistan because there could be emissaries of different terrorist organizations among them" (Tait 2001). Chinese officials explained their decision to close the Chinese-Afghan border as a symbol of new US-Chinese "co-ordination and co-operation for anti-terrorism" (China News 2001).

273. Security fears were not unfounded. In particular, North-Western frontier province in Pakistan (NWFP) was the setting for a considerable Taliban retrenchment, as journalists described the Taliban "quietly colonising the wild, sun-baked plains of Baluchistan province [which offer] a sanctuary from the bombing" (The Guardian).

274. However, while official closure policies reduced the ability of the international community to respond to the humanitarian needs of the population fleeing conflict – and forced Afghan refugees to take additional risks by using isolated and difficult

border-crossing points or paying to be smuggled across the border – the border closure did not prevent a significant influx.

275.   By 1 November 2001, UNHCR estimated that 130,000 Afghans had arrived since the international terrorist crisis erupted, but added that camps in NWFP and Baluchistan were largely empty, with many refugees deliberately choosing to avoid formal recognition because they were fearful of deportation. The situation on the Pakistan border remained unclear into November, with the Pakistan government claiming that the border crossing at Chalman was open to emergency cases, but UNHCR claiming admissions had been suspended.

276.   The Afghan refugee crisis in 2000-2001 was ultimately caused by the implosion of the Afghan state, leaving its people unable to withstand either drought or civil conflict. The regional Afghan border closures were initially a result of the failure of international burden-sharing, but from September 2001 became entangled in the securitized discourse surrounding Taliban-sponsored terrorism.

277.   With the signing of the Bonn Agreements in December 2001, the interim Afghan government moved to normalize relations with its neighbours, and in December 2002 all six states bordering Afghanistan signed a 'good neighbour' agreement. However, intermittent border closures have continued, reflecting continued regional insecurity, weak state authority and a determination – particularly on the part of the Pakistani and Iranian states – to focus on returning and removing their sizeable Afghan refugee populations.

International response

278.   The international response to the border closure can be divided into two phases. The first phase, from November 2000 to September 2001, was characterised by donor state indifference and largely ineffective protest, as well as some remedial actions by UNHCR within Pakistan.

279.   The second phase – arguably more significant in terms of understanding the broader politics of border closure – saw the development of an IDP-focused strategy that circumvented the asylum principles violated by the US-instigated sealing of all Afghanistan's borders.

280.   The closure of the Pakistani border in November 2000 was accompanied by a refusal to allow UNHCR to carry out any verification exercises to determine refugee status, and a refusal to provide more land with which to relieve overcrowding in Pakistan's refugee camps. The UN attempted to respond to Pakistan's complaints over border-sharing shortfalls: as the Secretary-General reported in April 2001 "the UN understands these concerns and has committed itself to raising significant resources to care for refugees and assist their return to Afghanistan where possible."

281.   Importantly, emphasis was placed upon IDP provision and the refugees 'right to remain' – "with emphasis on assistance for people *in situ*, in order to avoid any further involuntary displacement" (United Nations Secretary-General 2001). However, without state interest in financing significant aid programmes, implementation of such a policy – designed to then improve protection standards for those Afghans already in Pakistan – was slow.

282.   There was little response to the Secretary-General's plea for donor states to recognize the need for their assistance in addressing Afghanistan's endemic fragility:

> While donor fatigue may appear to be an understandable reaction after so many years of war in Afghanistan, it should not be forgotten that the international community, having failed to remain engaged in Afghanistan following the departure of the forces of the former Union of Soviet Socialist Republics, bears a large share of responsibility for Afghanistan's current plight (United Nations Secretary-General 2001).

283.   As a result, Pakistan refused UNHCR permission to build new camps to ease over-crowding and prevented adequate assistance being offered to new influxes of refugees who gathered at Jalozai camp, insisting instead that refugees should now return home. This stance was complicated by the complex and overlapping causes of successive waves of distinct Afghan refugee movements, which meant that even as 172,000 Afghans arrived in Pakistan, around 76,000 repatriated.

284.   9/11 changed both the tenor and the urgency of the international response to Afghan refugee outflows, which assumed a new and immediate significance in the light of US plans for a military retaliation against the Taliban in response to the Twin Tower terror attack. However, unlike on the Macedonia/Kosovo border two years earlier, US military and political interests in Afghanistan lay in requesting neighbouring states to *close* their borders, rather than in negotiating for the borders to be opened to allow refugees entry.

285.   The result was to effectively prevent UNHCR's appeals for the border to be opened for having any real impact, despite contingency planning for a major humanitarian emergency. In response to humanitarian appeals, Pakistan allowed women, children and the elderly to cross the border, but refused to accede to then-High Commissioner Ruud Lubbers' request that they also allow men fleeing forced conscription to claim asylum.

286.   In Iran, Lubbers failed to convince officials to open the border at all, despite promising UNHCR assistance to the Iranian government. These negotiations underline the limited power of UNHCR: the organization was left to negotiate group-based access for those judged to fall into 'vulnerable' categories, rather than defend the principle of a universal and individual right to asylum.

287.   Assessing the international response to the border closure is complicated by the fact that the border closures were largely ineffective in terms of halting Afghan movement, and up to 200,000 Afghans did cross into Pakistan in the months after 9/11. This meant that Afghans did reach Pakistan: however, it is also very clear that the nature of the influx created serious obstructions to the provision of adequate aid and protection to the new population.

288.   Much of the new influx avoided official registration and remained with friends and relatives, fearful of deportation but also unable to access international aid programmes. Even more seriously, some Afghans were undoubtedly prevented from leaving Afghanistan. This created a problematic intersection between the need to protect IDPs and the importance – in terms of protection principles – of allowing Afghans to seek asylum by crossing an international border.

289.   Ferris is clear that the six border closures were in part responsible for NGOs' focus on preparing for an IDP rather than a refugee crisis (Ferris 2008). By focusing on IDP numbers, NGOs were on the one hand responding pragmatically to the politics of border closure, which dictated that Afghanistan's borders would not be formally reopened.

290.   On the other hand, the impact of this strategy was – particularly in the early weeks of the crisis – to distract from the US sealing-in of the Afghan population in the light of imminent military conflict. NGOs did urge the USA to open up borders, stressing the importance of meeting Convention obligations and providing effective humanitarian corridors through which aid could be delivered to those with Afghanistan.

291.   However, a joint statement of 18 NGOS working in Afghanistan issued on 5 October 2001 (two days before US air strikes began) provides one example of the extent to which the humanitarian community simultaneously embraced an IDP and 'home' centred discourse:

> Above all we want to prevent, if humanly possible, the population of Afghanistan becoming refugees by addressing their needs inside the country ... we are seriously concerned that the most immediate problem – the needs of people inside Afghanistan – is not being adequately addressed ... It must be remembered that these potential refugees are currently trapped inside a closed country. All borders are closed and will probably remain so until the start of the conflict ... if they flee to Afghanistan's borders, our distribution systems will be seriously disrupted (Joint NGO statement 2001).

292.   Regional state actors were also keen to encourage IDP camps. Iran, in particular, repeatedly stated that it believed the Afghan refugee population should be cared for in camps located on Afghan territory: the Iranian Red Crescent Society established two camps in Afghan territory.

293.   UNHCR was extremely critical of such efforts, not least because the camps were located in Taliban-controlled territory and could not be considered to in any way represent a safe zone within Afghanistan such as had been established in Northern Iraq in 1991, with many arrivals being considered at risk of forcible recruitment by the Taliban.

294.   Above all, it is important to stress the extent to which responses to the extended Afghan border closures from September 2001 were conditioned by the extraordinary political context of Al-Quaeda's 9/11 attacks. The US perception that America was now under attack meant that security was prioritized without question, even if in practice nominal border closures provided little additional security and were unlikely to prevent Taliban or Al-Quaeda movements.

295.   The refugee discourse in the region was securitized to the point where there was relatively little meaningful discussion about states' obligations to allow refugees to seek asylum, and reflected a broader swift and severe clampdown on the rights of migrants in Western states. In the aftermath of 9/11, the balance to be struck between national security and human rights was to be subject to wholesale renegotiation. This

had significant implications for UNHCR that were to stretch well beyond the politics of border closure.

Policy implications

296.   Arguably the most important policy implication of the international response to the closure of Afghanistan's borders is the extent to which an assistance discourse centred on the needs of IDPs emerged among both states and NGOs. This reflected a significant development from the previous use of safe zones in Northern Iraq.

297.   This shift was influenced the development since 1991 of a broad protection framework for IDPs that recognized the relationship between international and external displacement, as demonstrated by the agreement of the Guiding Principles for the Protection of IDPs in 1998. However, the relationship between IDP and the international community's commitment to protecting the right to seek asylum was made very clear in the case of the Afghan border closure.

298.   Although preparing to meet the needs of IDPs was an important humanitarian response, the need for such a focus represented a protection failure. This was particularly problematic for UNHCR.

299.   Although the link between internal displacement and refugee populations is well-established, there is no comparable protection framework that provides rights to IDPs akin to those refugees may claim. This inequality in access to protection is made palatable by the concept that IDPs have the right to seek asylum and demand the protection of *non-refoulement*. However, in the Afghan case, this link was broken. The borders were formally sealed.

300.   This development in IDP discourse – used by states and – albeit for somewhat different motives – by many NGOs to circumvent the obligations of asylum and provide a route to deliver aid to need populations – has significant implications for UNHCR. Unlike NGOs, UNHCR has a legal mandate to protect refugees. It is not simply a humanitarian aid organization .

301.   For this reason, the question of borders – and the right for refugees to leave their country – are central to UNHCR's unique purpose. The Afghan border closure therefore posed a question which remains relevant to UNHCR's current operations. The need to ensure that the provision of IDP protection does not result in, or appear to condone, the erosion of asylum space has formed an important caveat to UNHCR's involvement in the Cluster Approach (See Ferris 2008, UNHCR 2007b).

302.   The closing of neighbouring states' borders with Afghanistan also highlighted another political factor driving states to seal their borders: a securitization discourse that linked refugee flows to terrorism. The 'refugee warrior' debate was not a new one and had, as discussed above, played a role in Tanzania's decision to close its borders in 1995-6 (see Zolberg et al. 1989).

303.   However, security fears relating to Afghan refugees did not directly revolve around ethno-national concerns (such as in Turkey or Macedonia). Instead, they were qualitatively different: and connected to a much broader supra-national fear of fundamentalist, illiberal Islamic terrorism.

304. This led to a familiar liberal paradox with difficult political implications: if refugees were perceived as culturally affiliated to communities that attacked liberal democracy, did they deserve to benefit from access to an asylum protection regime founded on such a liberal value system?

305. Defending the rights of the (supposedly) illiberal to liberal asylum provided a new impetus for restrictions on international movement from fragile (especially Islamic) states that, while it did not provoke the border crisis, made it difficult to persuade donor and host states to agree to open borders, particularly in Pakistan.

306. As in Northern Iraq and in Macedonia, events determining Afghanistan's border closures were driven after September 2001 by the American military and political agenda, radicalized in response to the 9/11 terror attacks. The Afghan experience, however, underlines the dangers inherent in abandoning a universal framework to allow *ad hoc* responses to border closure that rely on political interest and undermine legal obligation, as occurred in Macedonia. In the Afghan case, the USA *requested* that Afghan's neighbours close their borders, because military, strategic and political interests demanded this response.

307. However, it is important not to forget that the initial Pakistan border closure in November 2000 was motivated not by emergency security concerns, but by a cumulative frustration with an indifferent international response to the continuing Afghan refugee situation that appeared to offer no political or strategic value to donor states.

Case study five: Kenya/Somalia border, 2007

Background to crisis

308.   On 3 January 2007, the Kenyan government announced the closure of its long and porous border with Somalia, trapping around 4,000 Somalis at the Somali border town of Dhobley and *refouling* around 360 refugees who were waiting at UNHCR's transit camp, Liboi, for transfer to Dadaab. To date, the Kenya/Somalia border remains officially closed.

309.   The motives for the Kenyan government's action were complex, bringing together concerns over both capacity and security. The border closure reflected a combination of long-term frustration at the inadequacy of international burden sharing and the lack of any prospects of durable solutions for the 200,000 Somali refugees Kenya was already hosting, as well as fears of infiltration by Somali militants.

310.   The January 2007 border closure was not unexpected. Kenya had previously closed its border with Somalia on at least two occasions in order to prevent asylum seekers entering Kenya. In July 1999, Kenyan President Daniel Arap Moi gave a public speech linking refugees to crime and illicit arms proliferation, leading the Government to close its border with Somalia.

311.   In 2001, the government again closed its border with Somalia on the grounds that rising numbers of refugees were responsible for increasing levels of violent crime. The border closure in 2007 therefore fit a broader pattern of Kenyan response to the problems posed by the collapse of the Somali state after 1991 and the consequent large-scale flight of its citizens.

312.   The trigger for the January 2007 closure was the resurgence of armed conflict between the Ethiopian-backed Transitional Federal Government of Somalia, and the Council of Somali Islamic Courts that in 2006 held much of Southern Somalia (including Mogadishu).

313.   Kenya – fearful of the spread of Islamist terrorism beyond Somalia, having already been the setting for Al-Quaeda attacks in Nairobi in 1998 – explained the border closure on the grounds that many Somali refugees were in fact Somalia militants. Foreign Minister Raphael Tutu argued that "there is no evidence that anybody who is not a combatant is in danger ... We are not able to ascertain whether these people are genuine refugees or fighters and therefore it's best that they remain in Somalia" (Agence France Presse).

314.   Kenya's concerns about an Islamist threat were combined with more general security concerns about the porous nature of the 1,200 kilometre Kenya-Somali border and its effects on organized crime, as demonstrated in a statement made by Kenya's Deputy Interior Minister: "We are not going to allow the entry of refugees ... we have a problem of large refugee camps where a lot of small arms have found their way and these arms have been used to cause insecurity in this country … Kenya is overburdened ... Europe and America do not give us enough aid to support these refugees" (Agence France Presse).

315. Some observers, however, consider that other factors were also at play: "There may be some feelings that other countries should take more Somali refugees, but this would be mainly motivated by a desire to reduce the Somali percentage of the population." (Email correspondence).

316. This comment underlines the importance of placing Kenya's Somali refugee policy in the context of its own domestic 'Somali problem'. Although ethnic Somali citizens constitute only a small percentage of Kenya's population, some observers believe that the concern to halt the flow of Somalis across the border is motivated by a fear of the growing size of the ethnic Somali population in Kenya as a whole, and connected fears that this may lead to a resurgent separatist movement in north-east Kenya, with the local population aided by well-trained militiamen crossing the Somali border.

317. Kenya also used the border closure to call for Somali refugees to be treated as IDPs, drawing attention to the failure of the Somali state and the international community to secure safe humanitarian space within Somalia's borders. This IDP discourse was advanced by the Kenyan government immediately following the border closure arguing that "it's not a written rule that when there is fighting in Somalia, people should run to Kenya" and that "UNHCR has provisions ... to set up camps anywhere, including inside Somalia" (Agence France Presse).

318. Kenya's motives for promoting an IDP discourse (arguably the same as those of the some members of the donor community in Afghanistan in 2001) are thus not only to enhance the protection and assistance available to Somalis, but also meet Kenya's political interests.

International response

319. In assessing both national and international responses to the flight of Somali refugees, it must first be noted that the border closure has had relatively little impact on the rate of entry to Kenya. UNHCR statistics show that the rate of entry in fact rose dramatically following the border closure, as Somalis fled the worsening insecurity in south-central Somalia.

320. Between January 2007 and mid-March 2010, 140,000 Somali refugees were registered in the Dadaab camps, and NGOs estimated that at least the same number have moved through the border region to Nairobi without registering. Kenyan officials have acknowledged that the border closure has had minimal if any impact on the number of Somalis entering Kenya, and in that respect it has not met Kenya's security concerns.

321. In terms of refugees' human rights and the international community's ability to offer effective protection to Somali refugee, however, the impact of the border closure has been more significant. Studies by Human Rights Watch, Oxfam and Amnesty International all highlight the protection threats associated with the border closure. According to these organizations, the Kenyan police have taken advantage of the border closure to demand payments from new arrivals, who have also been subjected to harassment, detention and exploitation by smugglers.

322.   The High Commissioner registered his immediate and serious concern about the border closure, but also acknowledged the need to address Kenya's security concerns and to distinguish between genuine refugees and militants

> We fully appreciate that the situation in neighbouring Somalia is a serious concern to the Kenyan authorities and that governments have a responsibility to ensure border security in such situations ... but Kenya also has a humanitarian obligation to allow civilians at risk to seek asylum on its territory. Most of those in Liboi are women and children and they should not be sent back to a very uncertain situation. To do so would be a transgression of the principle of non-*refoulement* as defined under the 1951 Refugee Convention (Daily Nation 2007).

323.   In fact, prior to the border closure (from September 2006) UNHCR had already been involved in discussions with the Kenyan government over how to best meet its security concerns, considering the possibility of screening and separating militants from civilian refugees at the border in order to protect the civilian character of refugee camps. These discussions failed to reach agreement, however, and this failure has been directly cited by one UNHCR staff member a major reason why Kenya chose to close its border.

324.   Following this initial statement, UNHCR has generally been cautious in making public statements about the border closure. On a visit to Kenya in August 2009, the High Commissioner instead focused on "the need to adequately screen people coming into Dadaab to improve safety for the refugees and locals," and called for a "comprehensive strategy for decongestion, rehabilitation and security in Dadaab" (UNHCR 2009).

325.   The stance taken by UNHCR in this context can be explained by a number of factors. First, and as explained already, the Somalia-Kenya border has remained extremely porous, and in that respect, the closure of the border has not prevented a significant growth in the number of Somalis arriving in Kenya.

326.   Second, UNHCR needs to maintain an effective working relationship with the Kenyan government in order to address the continued needs of the 300,000 plus Somali and Sudanese refugees that Kenya already hosts.

327.   In that respect, some senior UNHCR staff suggest that the organization's position has been strongly influenced by the ongoing discussion with the Kenyan government over the possibility of releasing more land, so as to ease the serious overcrowding that now characterizes the situation in Dadaab. They also point to the fact that Nairobi is a vital regional telecommunications and logistics hub for all of UNHCR's East African and Great Lakes operations.

328.   Third, the Kenyan border closure must be seen in a broader geo-political context. And in this respect the security concerns of the USA and other donor states appear to have played a role.

329.   Given the nature of the armed conflict in Somalia, the Islamist attacks that have taken place in East Africa, as well as the proximity of the region to other flashpoints such as Yemen, the refugee issue has become inseparable from that of the

so-called 'war on terror'. In this context, it is not difficult to understand why donor states should support Kenya's efforts to meet its security concerns, saying little about the closure of the border and instead focusing on the less contentious but equally urgent issue of improving conditions for those Somalis who have been able to enter the country.

330.   While some commentators consider that inadequate international attention has been given to Kenya's decision to close its border with Somalia, others have questioned the real significance and impact of this action.

331.   The border closure has evidently not prevented the reality of a refugee influx, and it is unclear whether a formal opening of the border would actually lead to a significant growth in the number of new arrivals. Indeed, according to some reports, the obstacles to cross-border flight are increasingly to be found on the Somali side of the border, where the militant group Al-Shabaab appears to be preventing the departure of young men and forcibly recruiting them for military service.

Policy implications

332.   The on-going Kenya-Somalia border closure raises several policy dilemmas for UNHCR. How should UNHCR respond to a long-term border closure that is in practical terms ineffective at preventing movement into Kenya and is tacitly supported by major donor states, but which has serious implications for the international refugee protection framework and has created new protection risks for Somalis entering Kenya?

333.   As discussed previously in this paper, UNHCR had already begun to engage with the Kenyan government prior to the border closure in an attempt to meet the government's security concerns. Hence the organization's efforts to initiate a screening process and its repeated attempts to reassure the Kenyan government that it understands the need to protect Kenyan territory from infiltration.

334.   Such measures do not contravene international refugee law. In fact, protecting the civilian character of refugee groups is a recognized obligation (see Excom Conclusion No.94). Moreover, it has a particular resonance in this part of Africa following the experiences of the international community in the Great Lakes emergencies between 1994 and 1996, when the civilian Rwandan refugee population remained under the control of *genocidaires*.

335.   However, there is equally a clear danger that excessively rigorous or politically motivated pre-emptive screening, particularly if governments control the processes being used and have an interest in reducing numbers, may result in effective *refoulement* of refugees with a valid claim to asylum.

336.   Another question to confront UNHCR in the Kenyan context has been to determine an appropriate level of public protest in relation to border closures which are aimed to prevent or at least limit the arrival of people with a *prima facie* claim to refugee status. In Northern Iraq and Macedonia, alternative means were found of providing protection to such people (Operation Provide Comfort in the former, and the HEP and HTP initiatives in the latter).

337.   In the Kenyan context, there has never been any real prospect of finding such alternative solutions. It is difficult to think of other countries that would agree to admit significant numbers of Somalis, and it is equally difficult to envisage a large-scale and international military operation that would provide protection to people within Somalia.

338.   While this paper was being prepared (and at a time when the situation in Somalia continued to deteriorate) issued two public statements that, while not explicitly citing the Kenya-Somali border closure, reiterated the importance of observing *non-refoulement* in relation to all Somali refugees. In the words of the High Commissioner's spokesperson, "UNHCR appeals to all states to uphold their international obligations with regard to *non-refoulement*. Returns to central and southern Somalia must only take place on a strictly voluntary basis" (Fleming 2010).

339.   As well as upholding the principle of *non-refoulement* (even if it lacks the means to enforce it in practice), UNHCR has adopted a sceptical stance with respect to the suggestion that IDP protection can be an effective substitute for asylum in another state. While the notion of 'in-country' protection is an attractive one for host and donor states alike, it poses an evident threat to UNHCR's core mandate and for the integrity of the international refugee protection regime. In the context of a country such as Somalia, it is also an entirely impracticable approach.

Part III: Towards a policy-response framework

Categories of border closure

340.   While border closures are clearly conditioned by particular geographical, political and historical circumstances, some common trends and universal policy implications for UNHCR can be detected in the five case studies examined in this paper. Drawing upon those case studies, this section sets out a brief typology of border closures and policy responses.

341.   Formal border closures intended to prevent refugees entering a state fall into two broad categories. The first is that of *security-driven border closures*, which are motivated primarily by fear about the collective demographic impact of a refugee influx, particularly if the flow is likely to exacerbate existing minority tensions within a host state.

342.   Security-driven border closures are most likely to be emergency responses to sudden mass influxes resulting from escalating conflict in a country of origin. The Turkish, Macedonian and Kenyan border closures all clearly fall into this category: post-2001, the Afghan border closures were also motivated by security concerns.

343.   The second category is that of *burden-spreading border closures*. These border closures are a response to cumulative saturation rather than an emergency influx. There is less likely to be even the perception that a significant political threat to national integrity exists, but instead an influx may trigger a border closure due to a gradual build-up of frustration that the international community has failed to adequately share the burden of hosting a refugee population, particularly in protracted refugee situations.

344.   There is also a connection between burden-spreading border closures and a host state's insistence on the need for the international community to provide a solution to refugees' exile, generally through facilitating the repatriation of refugees to their place of origin. The Tanzania and Pakistan border closures (in 2000) are clear examples of this type of border closure. Burden-sharing concerns may also exacerbate a border closure primarily triggered by security concerns (as in Kenya).

345.   Both types of border closure are to a considerable extent foreseeable. Host-state media and politicians tend to speculate on the possibility of a border closure for some time before a decision is taken to physically seal the border. In all of the cases studied in this paper, the border closure was predicted by knowledgeable independent observers.

346.   In the case of security-driven border closures, a state prevents the entry of refugees with the aim of securing national stability. As a result, solutions need to focus on removing the security threat posed by a mass influx, either by screening out militants from refugee populations (as demanded by Tanzania and Kenya) or by ensuring that the refugees do not exacerbate ethnic tension by offering other forms of international protection that do not require territorial asylum (as in Turkey and Macedonia).

347.   In the case of burden-spreading border closures, the state's interest in sealing the border is to attempt to leverage a fairer settlement between the host state and the wider international community, in response to an ongoing protracted refugee situation. Solutions to these border closures therefore need to focus on offering prospects for sustainable solutions, particularly to long-term exile (as Pakistan and Tanzania both demanded) and on developing better models for international burden-sharing.

348.   A well-established legal and normative framework preventing *refoulement* and confirming the right of all people to seek asylum is to be found in instruments such as the Universal Declaration of Human Rights, the 1951 Refugee Convention and the 1969 OAU Convention. As this study has shown, however, both host and donor states are prepared to divert from this framework when they consider it necessary or in their interest to do so, often explaining their actions in terms of the 'exceptional' circumstances that confront them.

Policy responses

349.   In each of the cases examined in this paper, UNHCR's initial position has been to insist on the right of refugees to seek asylum in another state and the need for states to adhere to the principle of *non-refoulement*.

350.   This insistence upon the principle of non-rejection at the frontier has in some cases resulted in severe criticism by the states concerned. It has also proved to be rather limited in its consequences. While UNHCR can certainly call upon its moral and legal authority in its efforts to uphold refugee protection principles, experience demonstrates that the organization cannot oblige host countries to keep their borders open, especially when the interests of those countries coincide with those of major Western, NATO and donor states.

351.   In practice, therefore, UNHCR has felt it necessary to cooperate with states in the formulation and implementation of some alternative and interrelated approaches to the issue of refugee protection, most notably:

- the creation of safe zones in countries of origin;

- strengthened efforts to provide protection and assistance to displaced populations in countries of origin; and,

- the establishment of international burden-sharing arrangements.

While a full examination of these approaches goes beyond the scope of this paper, some of their principal characteristics and shortcomings can be identified.

352.   The establishment of a safe zone in Northern Iraq in 1991 followed a period of intense suffering for the many thousands of displaced people who made their way to the mountainous area where Turkey (with the support of its allies) had closed its border to new arrivals. It depended entirely on US and NATO military strength, was based on a questionable interpretation of the notion of 'voluntary repatriation', and raised a wide range of difficulties and dilemmas (many of them relatively new at that time) in relation to the militarization and politicization of humanitarian action.

353.   Although in principle the concept of a safe zone does not present a challenge to the norm of *non-refoulement* norms, the establishment of such zones is highly problematic in situations where potential refugees are unable to seek asylum in other states. Given the huge expense and practical challenges involved in the establishment of safe zones, as well as the failure of this approach in the Balkans (most notoriously in relation to the Srebrenica massacre), this response seems unlikely to be developed further in relation to future border closures.

354.   In the post-Cold War period, one of the most notable humanitarian developments has been the emergence of an IDP protection framework, coupled with a considerable increase in the financial and material support available for IDP assistance. This is in most respects a very welcome development. As advocates argued throughout the 1980s and 1990s, while IDP numbers grew exponentially in the post-Cold War period, the international community's efforts to uphold their rights and meet their needs proved to be far from adequate.

355.   While considerable efforts have been made to address this situation during the past decade, there is a clear danger that IDP protection and assistance will be regarded as a substitute for, rather than a complement to, the protection and assistance that has more traditionally been provided to refugees (see UNHCR 2007b for a statement of the organization's policy on this matter).

356.   As with the safe zone concept, states may (and indeed have) argued that there is no need for people to exercise their right to seek asylum in another state if they can be supported in their own country. This is a dangerous development, especially when it is combined with the closure of borders by potential host states and continued human rights violations in the country of origin.

357.   The third approach with which UNHCR has cooperated is that of international burden-sharing, involving the transfer of refugee populations either direct from the border or from camps in a host state to a third country. In the Kosovo crisis of 1999, this approach took two specific forms: humanitarian evacuation (HEP) and humanitarian transfer (HTP).

358.   In some respects, both HEP and HTP appear to meet basic protection standards. They do not involve *refoulement* and provide a means for refugees to find safety in another state. However, such arrangements ultimately rely on politically-contingent agreements between states with common strategic concerns, rather than on established legal obligations or normative principles.

359.   If the opening of a border is conditional open the establishment of such arrangements, then the principle of asylum, a lynch-pin of the international refugee protection regime, may well be undermined. There is also a potential contradiction between the supposed universality of state obligations to refugees and the selective application of burden-sharing arrangements to displaced populations based on their ethnic or political affinity.

360.   As the case of Kosovo demonstrates (and, in an earlier era, the international response to the movement of Indo-Chinese 'boat people'), burden-sharing may provide an effective means of keeping borders open and preventing *refoulement*,. But it depends to a very significant extent on the political interests of the states concerned.

Recommendations

361.   As stated earlier, border closures – and international responses to them – are complex political events. UNHCR is just one of the actors involved and has relatively little autonomy or influence in comparison to states. Nevertheless, UNHCR has an important role to play in responding to border closures and in defending the international protection regime that emerged in 1951 as a direct response to the failure of states to open their borders to refugees fleeing Nazi persecution in the 1930s.

362.   Defending the principles of protection, however, must be based upon a sense of pragmatism and should not rule out innovation. What follows are a number of recommendations that could form the basis of a policy toolkit for UNHCR and its partners.

UNHCR's public stance

363.   UNHCR has a unique legal mandate as the guardian of the 1951 Refugee Convention. The organization thus has a duty to insist that states, whether or not they are signatories, continue to respect the rights that are specified in the Convention. UNHCR should never be perceived as condoning or even tacitly accepting border closures as an acceptable state policy.

364.   In accordance with this principle, and even at the risk of public criticism, UNHCR must publicly condemn all instances of border closure as a breach of the fundamental human right to seek asylum and the normative obligation not to *refoule* refugees to territories where life or liberty may be threatened. In doing so, moreover, the organization must call on the support of other influential stakeholders, including the UN Secretary-General, the Emergency Relief Coordinator, UN High Commissioner for Human Rights, the International Committee of the Red Cross and the NGO community.

North-South equity

365.   At the same time, UNHCR should ensure that its condemnation is not limited to states (usually in the developing world) that physically obstruct access to their territory. As noted earlier in this paper, the industrialized states are also responsible for preventing, deterring and restricting the arrival of people who are in need of protection, but are able to attain this objective by a wide range of administrative and technological devices.

366.   UNHCR's protests against border closures in the South (where the vast majority of the world's refugees are to be found) will carry more weight if the organization is equally persistent in drawing attention to the restrictive asylum practices of Northern countries which have a much greater capacity to provide protection to the much smaller number of refugees and asylum seekers reaching their territory.

Engagement in IDP protection

367.   In some situations where borders are closed, UNHCR may be called upon to offer its competence and capacity in the formulation of alternative approaches to actual or potential refugee influxes, normally in the form of providing protection and assistance to IDPs. If such solutions do not meet the basic normative principles governing refugee protection (because the border remains closed and refugees cannot seek asylum), UNHCR should exercise great caution before lending its support to such initiatives. Other humanitarian organizations with mandates different from that of UNHCR may be better placed to engage in such situations.

368.   UNHCR has already underlined its determination to become involved in IDP protection only where such protection is not being used as a substitute for asylum, and has expressly made this a condition of its involvement in the Cluster Approach (UNHCR 2007b). IDP protection should continue to be embraced only where it offers a complementary or supplementary form of protection. Any use of IDP protection frameworks by states to effectively mask pre-emptive *refoulement* must be explicitly and publicly repudiated.

Burden-sharing arrangements

369.   While this paper has drawn attention to the difficulties and dangers associated with the establishment of international burden-sharing arrangements, this approach to the prevention and resolution of border closures is worthy of further consideration. While many states appear reluctant to go much beyond their minimum refugee protection obligations, UNHCR has an important role to play in advocating on behalf of this approach, particularly in situations of mass influx.

370.   In accordance with principles set out elsewhere in this paper, such burden-sharing arrangements should not be linked to the establishment of safe zones or the confinement of displaced people to IDP camps or border areas of the country of origin.

Security concerns and screening

371.   UNHCR should consider how it can meet state security concerns in situations where refugee influxes might also involve the arrival of combatants, terrorists or *genocidaires*. The establishment of effective screening mechanisms, as well as efforts to maintain the civilian character of refugee camps, may in some cases be enough to persuade states to refrain from closing their borders.

Negative consequences of border closures

372.   UNHCR should reinforce its efforts to persuade states that border closures are often ineffective if intended to prevent refugee entry (rather than denying their rights by making such entry 'illegal'). The organization must underline the fact that closing borders does not necessarily reduce movement, but instead increases smuggling, police corruption and irregular migration, with negative consequences not only for refugees but also for the host state and community. Border closures also have the effect of disrupting trade and other commercial activities, and thereby have a negative impact on local populations.

Protracted refugee situations

373.   Finally, it must be recognizes that if they were not confronted with the grim reality of protracted refugee situations, with all of the pressures that they impose on host states, actual and potential countries of asylum might be less likely to close their borders to new arrivals.

374.   UNHCR's current efforts to focus international attention on the prevention and resolution of such protracted situations must thus be regarded as an essential component of the effort to address the problem of border closures.

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