

Refugees, Citizenship and State Sovereignty

by

Seunghwan Kim

B.A., Hanyang University, 2002

LL.M., University of Nottingham, 2005

Master of International Law, University of Sydney, 2008

A Dissertation Submitted in Partial Fulfillment
Of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

in the Faculty of Law

© Seunghwan Kim, 2016
University of Victoria

All rights reserved. This dissertation may not be reproduced in whole or in part, by photocopy or other means, without the permission of the author.

Supervisory Committee

Refugees, Citizenship and State Sovereignty

by

Seunghwan Kim

B.A., Hanyang University, 2002

LL.M., University of Nottingham, 2005

Master of International Law, University of Sydney, 2008

Supervisory Committee

Professor Donald C. Galloway (Faculty of Law)

Supervisor

Dean Jeremy Webber (Faculty of Law)

Academic Unit Member

Dr. Scott Watson (Department of Political Science)

Outside Member

Abstract

Supervisory Committee

Professor Donald C. Galloway, Faculty of Law

Supervisor

Dean Jeremy Webber, Faculty of Law

Academic Unit Member

Dr. Scott Watson, Department of Political Science

Outside Member

This dissertation examines two different perspectives on refugee status and state sovereignty respectively, and their bearings on refugee protection regimes. It reveals how dominant views of refugee status and state sovereignty have contributed to establishing restrictive refugee law and policy associated with various forms of external migration controls in the 21st century, and provides alternative views that may contribute to creating more “just” refugee protection regimes.

When refugees came to be regarded as those who fled from various push factors, such as persecution, distress and wars etc. (the persecution perspective), refugee policies were developed to provide “push factors-free” environments. These have not necessarily included surrogate political membership in the country of asylum (particularly, in developed countries). Instead, developed countries have endorsed humanitarian assistance schemes that aim to provide aid to refugees in regions of their origin rather than providing settlement in their own territories. Moreover, in refugee law, the fear of “persecution”, as a push factor, has become a critical factor in determining refugee status. As a parallel, governments have developed various forms of deterrence policies based on a traditional concept of state sovereignty that allows states to implement migration polices at their own discretion. Under these circumstances, refugees find it difficult to reach developed countries, and many of them end up being “contained” in refugee camps or other facilities in regions of their origin for a long time.

This dissertation calls into question these views of refugee status and state sovereignty, by providing alternative views: the protection perspective and an account of sovereignty that requires “responsible” border control. The protection perspective regards the ruptured protection relationship between a state and a citizen (thus, the lack of state protection) as the core element of refugee status. According to this view, refugee status is inextricably associated with systemic failure of the nation-states system (not merely with push factors) that is designed to secure political membership for each individual in the international state system. Therefore, as a matter of justice, the ultimate remedy for refugeehood is to provide surrogate political membership in the country of asylum or to restore original political membership in the home country. This project also proposes a concept of “responsible” border control, according to which, a state should exercise state sovereignty in relation to border control within institutional frameworks in which multiple authorities, including human rights norms, have been institutionalized. In this way, the dissertation aims to provide a more “just” framework in which to propose, adopt and

implement refugee law and policy. From this alternative perspective, refugees are perceived as those who have right to political membership in the country of asylum rather than mere humanitarian assistance in refugee camps or somewhere else.

Table of Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	v
Abbreviations	ix
Acknowledgments	x
Dedication	xi
Introduction: Two Perspectives and Two Solutions	1
Introduction	1
Methodology	7
Part I: Perspectives on Refugee Status	8
Part II: Perspectives on State Sovereignty	14
Conclusion	19
Chapter 1 The “Persecution Perspective” and Refugee Law and Policy*	20
Introduction	20
Origin: The “Push-Pull” Model of Migration	23
Persecution as the Core Element of Refugee Status in International Refugee Law	25
The Persecution Perspective and Refugee Policies	32
The Policy Shift from Asylum to Humanitarian Relief: Toward Regional Containment	35
Conclusion	44
Chapter 2 Refugee Status and Citizenship: The Interdisciplinary Roots of an Alternative Perspective on Refugee Status	46
Introduction	46
Refugee Status and the Emergence of a Nation-States System: Historical Analysis of Refugee Status	49
Refugee Status, Citizenship and State Sovereignty: International Relations Perspectives on Refugee Status	54
Refugee Status and Loss of Political Membership or Citizenship	58
A. Convention Refugees and Other Refugees	60
B. Political Harm inflicted by Non-State Actors and Social Contract Theory	63
C. Permanent Nature of Political Harm	68
The Protection Perspective and Case Law	72
Conclusion	83
Chapter 3 Refugees, Citizenship, and Cosmopolitan Justice	86
Introduction	86
Hospitality, Mutual Aid and Humanitarianism	90
Cosmopolitanism	95

Institutional Cosmopolitan Justice	98
Refugees, the Protection Perspective, and Institutional Cosmopolitanism.....	102
Critique on Schemes of Humanitarian Assistance.....	106
Conclusion: Toward “Just” Refugee Protection Regime.....	111
Chapter 4 Refugee Camps, Repatriation and the EU Regional Protection Schemes.....	113
Introduction.....	113
Refugee Camps and Reparation.....	115
Repatriation.....	118
The European Regional Protection Scheme and the Policy of Resettlement	122
Conclusion	130
Chapter 5 Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada*	132
Introduction.....	132
The Legal Status of North Koreans	134
A. The Implication of South Korean Nationality for North Korean Asylum Seekers.....	137
B. Controversy: Access to South Korean citizenship.....	139
The Status of North Korean Refugees in Canada	145
The Status of North Korean refugees in Australia.....	149
The “Persecution Perspective” vs the “Protection Perspective”	152
A. The Protection Perspective and Effective Nationality	153
B. The Protection Perspective and Canadian cases	158
Challenging the Decision of the RAD	159
Conclusion	161
Chapter 6 Pluralism, Institutional Theory and State Sovereignty: Toward the “Responsible” Border Control	163
Introduction.....	163
The Dominant View of State Sovereignty in relation to Border Control	165
Constraints on State Sovereignty	170
The Institutional Perspective and Pluralism: Opposing a Hierarchical View of Authority in relation to State Sovereignty.....	172
Beyond Institutional Constraints: An Alternative View of State Sovereignty in relation to Border Control	181
Case Study	187
Conclusion	191
Chapter 7 Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*	193
Introduction.....	193

The Meaning of Jurisdiction in Human Rights Law.....	195
Case law of the ECtHR.....	197
Banković.....	197
Issa v. Turkey.....	200
The Continuing Debate on the Meaning of Jurisdiction in Case Law after <i>Banković</i>	201
<i>Al-Skeini</i> : Clarifying the Meaning of Jurisdiction?.....	203
Hirsi Jamaa and Others v. Italy.....	206
The Emerging Practice of Interdiction at Sea.....	210
State Responsibility and Complicity.....	213
A. As a Co-author of <i>Refoulement</i>	214
B. Complicity under Article 16 of ARSIWA.....	215
C. Positive Due Diligence Obligations.....	218
An Approach based on the Jurisprudence of the ECtHR.....	219
Conclusion: Beyond Europe.....	222
Chapter 8 The Extraterritorial Reach of the Principle of <i>Non-Refoulement</i> : State Sovereignty and Migration Controls on the High Seas through a Canadian Lens.....	224
Introduction.....	224
The Extraterritorial Reach of the Principle of <i>Non-Refoulement</i>	228
A. In General.....	228
B. The Canadian Context.....	232
The Principle of <i>Non-Refoulement</i> and the <i>Charter</i>	236
Jurisdiction in Human Rights Law: The Canadian Context.....	239
R. v. Hape.....	239
Khadr.....	243
Amnesty International Canada v. Canada (Canadian Forces).....	244
Citizenship as a Nexus Requirement in the Human Rights Exception.....	246
Extraterritorial Jurisdiction of the <i>Charter</i> and Refugees on the High Seas.....	249
A. Exceptional Cases under International Law.....	249
B. The Consent-based Test (Enforcement Jurisdiction).....	250
C. The Human Rights exception.....	253
Conclusion.....	254
Conclusion: Beyond Surrogate Political Membership.....	256
Introduction.....	256
The Tension Between Ethnically-Based Citizenship and the Institution of Asylum.....	258
Integration as a Path to a Full Political Member in a New Country.....	261

Beyond Ethnic Nationality.....	265
Conclusion	271
Bibliography	273
Legislation and Regulations.....	273
Jurisprudence	273
Secondary Material.....	278
International Documents.....	296

Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CERD	Committee on the Elimination of Racial Discrimination
CRDD	Convention Refugee Determination Division of the Immigration and Refugee Board
DPRK	Democratic People's Republic of Korea (North Korea)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Persons
IR	International Relations
IRB	Immigration and Refugee Board of Canada
IRPA	Immigration and Refugee Protection Act
R2P	Responsibility to Protect
RAD	Refugee Appeal Division of the Immigration and Refugee Board of Canada
RIR	Responses to Information Requests
ROK	Republic of Korea (South Korea)
RPD	Refugee Protection Division of the Immigration and Refugee Board of Canada
RPPs	EU Regional Protection Programmes
RRT	Australian Refugee Review Tribunal
UNHCR	United Nations High Commissioner for Refugees
UNLOSC	Convention on the Law of the Sea

Acknowledgments

I would like to thank my supervisor, Professor Donald Galloway, for his wonderful supervision, encouragement, and guidance. Without his generous mentorship, this work could not have been produced. I really appreciate his detailed feedback on chapters and assistance with English expressions and idioms. I also extend my sincere appreciation to the members of my committee: Dean Jeremy Webber and Dr. Scott Watson. I am sincerely grateful for the Faculty of Law that ensured providing necessary funding for my doctrinal studies. Finally, I must give special thanks to my family members for their support, care and love: Yoonseon, Yushin, Esther, Hannah and Yuchan.

Dedication

This dissertation is dedicated to my wife.
Yoonseon Yoo

Introduction: Two Perspectives and Two Solutions

Introduction

I came to Tanzania in 1996 with four children after my husband and three other children were killed. I thought my situation would be better in Tanzania, but the conditions here are so bad. So I'm going home to see whether I can restart my life. I paid for my ticket here from my daughter's bride price (dowry). For me, it's better to die from a bullet than to die from hunger.¹

In 2004, some Congolese refugees attempted to return to their country of origin in spite of a “well publicised massacre” in their home country. Oxfam identified the host government's encampment policy as the main push factor for such a return. This encampment policy allegedly included the denial of “opportunities to earn an independent income; the negative attitudes of local and national officials [...]; inadequate food rations; and bleak prospects for a durable solution through local integration or third-country resettlement.”²

The predicament of these refugees raises some basic questions, “Why were they ‘contained’ in the refugee camp for such a long time?” “Why couldn't they settle in a country of asylum?” “Were there any solutions other than returning to their home country?” According to the UNHCR statistics, by 2014, about 14.3 million people were designated as refugees, and about 3.5 million refugees have been reported to live in “planned/managed refugee camps”.³ James Milner has noted that, by 2013, the average duration of a refugee crisis may have been

¹ David McKeever, Jessica Schultz & Sophia Swithern, *Foreign Territory: The Internationalisation of EU Asylum Policy* (Oxford: Oxfam, 2005) at 61.

² *Ibid* at 61-2.

³ United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2014: Chapter 5 - Demographic and Location Data*, online: UNHCR <<http://www.unhcr.org/56655f4c16.html>> at 66: “[o]ut of the 12.0 million refugees where information on accommodation type was available by the year's end, 7.6 million (63%) resided in individual accommodation types, indicating that this category is the preferred residence for refugees. [...] Overall, 3.5 million (29%) of the global refugee population under UNHCR's mandate resided in planned/managed camps at the end of 2014 [...]”

extended up to 20 years.⁴ These statistics show that refugee camps have become “permanent homes” for many refugees without foreseeable hope of relocation. These phenomena cannot be explained by simply stating that refugees accidentally happen to stay in the camps and unfortunately reside there for a long time. Rather, the “containment” of refugees in the camps are incidents of refugee law and policy of individual countries, particularly developed countries, on a systemic level.

In this dissertation, I highlight two key policies that are primarily responsible for such containment of refugees: humanitarian assistance in regions of refugee origin (“humanitarian assistance schemes”) and policies of deterrence. It is important that humanitarian assistance schemes be considered in conjunction with “deterrence” policies because of their combined effect. Humanitarian assistance schemes are closely related to encampment policies that basically aim at “containing” refugee flows in camps or other type of facilities located in regions of refugee origin by providing necessary humanitarian assistance until refugees may return to their countries of origin or find local settlement or resettlement elsewhere. Deterrence policies are generally designed to reduce the flow of refugees into the territories of developed countries – pre-screening at the port of departure and interdiction on the high seas are typical examples of deterrence policies.⁵ For example, the U.S Coast Guard is reported to have interdicted 52,481 undocumented migrants on the sea for the period from 2004 to 2013.⁶ Thomas Gammeltoft-Hansen also observes that, in the United Kingdom, “the Home office [...] claims to have ‘assisted in preventing nearly 180,000 inadequately documented passengers from boarding

⁴ James Milner, “Protracted Refugee Situations” in Elena Fiddian-Qasmiyeh, ed, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 151 at 153.

⁵ Ninette Kelley, “International Refugee Protection Challenges and Opportunities” (2007) 19:3 Int'l J Refugee L 401 at 419-25. For example, the U.S Coast Guard is reported to have interdicted 52,481 undocumented migrants on the sea for the period from 2004 to 2013: *Migrant Interdiction (CG-MLE-3)*, online: U.S. Department of Homeland Security <<http://www.uscg.mil/hq/cg5/cg531/amio/FlowStats/FY.asp>>.

⁶ *Migrant Interdiction (CG-MLE-3)*, *supra* note 5.

planes' in the period 2003-7."⁷ Deterrence policies may be implemented by way of complicit rather than direct involvement. For example, Australia is reported to have assisted the Sri Lankan government to intercept 4500 Sri Lankans who attempted to leave for Australia for the period of 2012 to 2014.⁸

Humanitarian assistance schemes and policies of deterrence operate in a way that ensures that refugees find it difficult to reach the territories of developed countries to claim refugee status and are channeled towards refugee camps or other types of accommodations located in regions of their origin where they may find "temporary" humanitarian assistance. The starting point of this dissertation is this background of "restrictive" external migration controls that have multiplied in the 21st century – "restrictive" in the sense that refugees' options are severely restricted, e.g., limited access to the institution of asylum in developed countries.

At this early juncture, it is important to emphasize that even though serious drawbacks in encampment policies have been identified,⁹ humanitarian assistance schemes has gained significant momentum as a settled mode of refugee treatment. Moreover, in state practice,

⁷ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011) at 131 [footnote omitted]. The original quote is found at House of Lords Hansard, Vol. 693 (Part No.107), WA 104 (35 June 2007) (Baroness Scotland of Asthal), online: Lords Hansard

<<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70625w0006.htm#07062539000040>>.

⁸ Human Rights Law Centre, *Can't Flee, Can't Stay: Australia's interception and return of Sri Lankan asylum seekers* (March 2014), online: Human Rights Law Centre <http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf> at 3: "Australian Federal Police, Defence, and Australian Customs and Border Protection Service (Customs) maintain a presence on the ground in Sri Lanka to share information with, and develop the capacity of, Sri Lankan authorities to intercept boats. Australia provides around \$2 million in materiel support for the Sri Lanka Navy every year and has gifted critical resources such as patrol boats for the Sri Lanka Navy and Coast Guard. Sri Lanka Police did not have an 'illegal migration' surveillance capacity until Australia established one for them." This type of external migration control is an emerging practice among developed countries, and this will be examined in detail in Chapter 7.

⁹ The main drawback in encampment policies is that refugees are likely to stay at the camps indefinitely with bare respect for their human rights: see Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 177; Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, "Crisis and cure: a reply to Hathaway/Neve and Schuck" (1998) 11 Harv Hum Rts J 295 at 302; Brij Maharaj, "Ethnic Identities, Political Boundaries, and the Quest for Durable Solutions" in Uma A. Segal & Doreen Elliott, eds, *Refugees Worldwide*, vol.1(California: ABC-CLIO, 2012) 123 at 139.

deterrence policies appear to have become entrenched, with heavy reliance being placed on arguments that refugees are not abandoned by interdiction policies, since their needs can be met in regions of their origin.¹⁰

What are the normative justifications for restrictive refugee law and policy? Refugee scholarship has pointed to various factors such as changing political, economic, social and cultural environments that have prompted the emergence of humanitarian assistance schemes and deterrence policies. However, little literature has seriously considered the normative justifications that derive from the very concept of refugee status and state sovereignty. It is important to note that, in general, refugee law and policy could not have gained momentum without a strong theoretical support that could act as both the driving force behind them and their underlying justifications. For example, emphasis on the fear of persecution within the legal definition of a refugee provided political momentum for the West to implement a more liberal refugee policy toward refugees fleeing from communist states.¹¹ This being the case, the general aim of this dissertation is to illustrate the ways in which a set of dominant normative commitments have shaped humanitarian assistance schemes and deterrence policies respectively, while also presenting a set of alternative accounts of both concepts of refugee status and state sovereignty.

The dominant and the alternative accounts offer competing perspectives and present two radically different solutions for refugee crises. At this introductory stage, it will suffice to say that the alternative perspective on refugee status aptly develops a historical and institutional

¹⁰ See generally Parliamentary Assembly of Council of Europe, *Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers*, online: Council of Europe Parliamentary Assembly, <<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11557&Language=EN>> at para 20; see generally Madeline Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" (2006) 18:3-4 Int'l J Refugee L 601 at 620-21.

¹¹ See generally Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) at 24.

explanation of refugee status, connecting the predicament of refugees to institutional or systemic failures rather than to personal misfortune. Furthermore, in parallel, the alternative perspective on state sovereignty will be introduced and elaborated with a view to proposing a possible reconfiguration in the concept of state sovereignty in relation to border control, and the treatment of refugees. The alternative account of state sovereignty adequately locates the concept of sovereignty within institutional frameworks, developing the conception of “responsible” or “accountable” border control rather than “unilateral” or “unconditional” border control. Part I of this dissertation addresses humanitarian assistance schemes, while Part II deals with deterrence policies.

More specifically, this dissertation will argue that the alternative account of refugee status and sovereignty provides a more meaningful normative basis upon which to discuss a “just” remedy for refugeehood. This argument is closely associated with “institutional” cosmopolitanism as will be analyzed in Chapter 3. Revitalizing the discourse of justice with respect to global refugee crises is important, as it accommodates the discourse of “right” (justice) rather than “charity” (humanitarianism). Justice is something to do with “what we owe” to refugees (thus, refugees have right to it), while humanitarianism with “what we should give”.¹² The former is a matter of “right” and the latter a matter of “charity”. Two different perspectives have two different solutions. The “justice” approach proposes surrogate political membership as an ultimate solution for refugeehood, whereas the humanitarian approach accommodates various methods of protection, including, but not limited to surrogate political membership. This dissertation will find most compelling account of remedy for refugee status in the former perspective.

¹² See Sharon Anderson-Gold, “Cosmopolitan Justice” in Deen K Chatterjee, ed, *Encyclopedia of Global Justice* (New York: Springer, 2011) 203 at 203.

The “justice” approach is significant because it gives due weight to the remedy of surrogate political membership that has been increasingly neglected in contemporary refugee protection regimes. This dissertation does not aim to undermine the benefits of other solutions such as local integration and repatriation; rather, it brings to the fore the original meaning of refugee status and highlights the significance of the “justice” approach in a context in which humanitarian approaches to refugee protection are prevalent. The “justice” approach calls into question contemporary humanitarian approaches that turn refugee solutions into something akin to humanitarian relief operations, while also emphasizing the necessity of surrogate political membership as an ultimate refugee solution.

It is important to note that this dissertation is developed within a nation-state framework. As such, it does not normatively consider the benefits of an open-border policy. However, as will be demonstrated in this dissertation, normative arguments of both institutional cosmopolitan justice and the “responsible” border control render national borders near open to genuine refugees who are entitled to have surrogate political membership.

With regard to the benefits of political membership or citizenship offered for refugees under the “justice” approach, the dissertation focuses on the protection of *individual* human rights of refugees rather than collective or communitarian rights such as the right of a group to its identity or the group right to territorial integrity. Although communitarian aspects of citizenship provide another important dimension of citizenship, this dissertation set its parameter within an individual-based rights approach. This is not because individual right-based views are more normatively sound than communitarian views of citizenship, but because the individual rights of refugees have been undermined by proponents of humanitarian assistance schemes whose arguments are significantly based on communitarian view of citizenship (as is discussed in

Chapter 3 and 4). This dissertation argues that an overemphasis on communitarian accounts of citizenship has, in no small way, contributed to consolidating humanitarian assistance schemes. In response, this dissertation revitalizes the discourse of individual-based rights approach in relation to refugee protection regimes.

Methodology

As the topic demands theoretical explanations and empirical evidences of state practices, major scholars' works relating to both the concept of refugee status and state sovereignty have been selected. I deal with these issues from an interdisciplinary vantage point – sociology, political science, international relations and law. This dissertation canvasses major publications selected from the interdisciplinary fields, and will provide relevant critique on the concept of refugee status and sovereignty contained in the publications. I will deal with issues in a thematic way, exploring both descriptive and normative elements of scholarly views. The literature reviews help us understand a framework in which the interplay between perspectives of refugee status and sovereignty and refugee law and policy has occurred in the context of the international state system.

With respect to the empirical part of the project, comparative research will be conducted on the refugee laws and policies of major refugee-intake developed countries, i.e. European states, Canada, and Australia, showing commonality and discrepancy among them, with a result to present the current address of alternative perspectives on refugee status and sovereignty in state practice. Domestic legislation, directives, court cases, and decisions of refugee tribunals will be analyzed through relevant text books, case search engines, government policy documents, explanatory notes on legislation, local UNHCR publications, relevant NGO publications, foreign policy documents and so forth. International sources will also be researched, such as

international conventions, UNHCR handbooks, UNHCR Executive Committee Conclusions, the UN treaty database, the UNHCR database, the decisions of the International Court of Justice and the European Court of Human Rights, UN resolutions, discussion papers and other documents from the UN, international and regional organizations, authoritative textbooks and so on.

Part I: Perspectives on Refugee Status

Who is a refugee? What is the core element of refugee status? Though this question sounds like an old cliché, it is a critical question that must be asked in order to find a rightful remedy for refugeehood. There are two competing views on refugee status. One is to see a refugee as a person who flees from various types of distresses including persecution. Here, distress functions as a push factor which make a refugee flee from the country of origin (the “persecution” model).¹³ The other is to see a refugee as a person who has lost *de jure* or *de facto* political membership, thus experiencing lack of state protection in the international state system (the “protection” model). Admittedly, the persecution model is more dominant than the protection model, at least on the policy level.

Even in a legal term, the “push factor” model has considerably influenced the concept of refugee status. The most frequently cited legal definition of a refugee is that found in the *Refugee Convention*, according to which a “refugee” is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country.”¹⁴ Signatory countries have developed different interpretations of the particulars in the definition, such as the well-

¹³ See Chapter 1

¹⁴ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 at art 1A(2) [“*Refugee Convention*”].

foundedness of fear; however, there is widespread agreement that the core element of definition is the fear of persecution.¹⁵ The UNHCR Handbook states that “the phrase ‘well-founded fear of being persecuted’ is the key phrase of the definition.”¹⁶

This dominant view of refugee status has been relatively unchallenged. However, as will be shown in Chapter 3, the excessive emphasis placed on the concept of persecution as a push factor has rendered invisible some integral aspects of refugee status such as ruptured protection relationship between a refugee and a state, which in turn has determined the thrust of current refugee law and policy.¹⁷ It is worth noting that the persecution perspective has created a powerful image of the Convention refugee as one who, like the non-Convention refugee, needs humanitarian assistance such as temporary shelters, food and daily necessities (humanitarian remedy) rather than asylum (political remedy). This is because, at least on a policy level, the “political” notion of persecution (that is, persecution has something to do with the ruptured protection relationship between a refugee and a nation-state, as will be discussed in details in Chapter 2) began to be understood in terms of “social” push factors such as distress and conflict, which has rendered a “political” concept of refugee status more or less old-fashioned or outdated; instead, refugees began to be understood as those who suffer from various push factors such as persecution, distress, conflict, natural disasters and economic crises.¹⁸ However, such a

¹⁵ James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 99; UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011) at para 37.

¹⁶ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 15.

¹⁷ See generally T Alexander Aleinikoff, “State-Centered Refugee Law: From Resettlement to Containment” (1992) 14 *Mich J Int'l L* 120 at 123 (footnote 14). In case law, from time to time, excessive emphasis on the fear of persecution has ironically led to the denial of status to genuine claimants. This aspect will be discussed in Chapter 5 in relation to the case law concerning North Korean refugees.

¹⁸ See *Refugee*, online: Oxford English Dictionary <<http://www.oed.com/view/Entry/161121?rskey=pG6mEV&result=1&isAdvanced=false#eid>>.

concept of a refugee may not sit comfortably within the meaning of refugee status found in the *Refugee Convention* which entails peculiar political connotation, as will be seen in Chapter 2.

More importantly, the collapse of the distinction between two types of refugees has substantially influenced the discourse on the proper remedy for refugeehood. If the core element of refugee status is defined by reference to persecution as a mere push factor, the remedy for refugeehood would be providing a “persecution-free” environment to refugees, which does not necessarily mean a place of asylum, that is, settlement in the country of asylum. In any event, in refugee camps, a refugee may not fear persecution that he or she suffered in the country of origin. In this sense, humanitarian assistance in regions of refugee origin may be proposed as a preferred option than providing asylum to refugees in “our” territories. This being so, the persecution model has considerably diminished the significance of the institution of asylum.

Against this background, a growing number of refugee scholars have challenged the dominant view of refugee status, arguing that the core element of refugee status is not the fear of persecution but the lack of state protection.¹⁹ This alternative view sees persecution as a mere symptom of an underlying cause, i.e., the ruptured protection relationship between a refugee and a nation-state. From this alternative view, a refugee is one who has lost *de jure* or *de facto* political membership or citizenship in his or her nation-state owing to the irrevocably ruptured protection relationship between the refugee and the state, which is manifested in the form of persecution. Without citizenship in the nation-states system, a person cannot but experience lack of state protection.²⁰ From this alternative perspective, the ultimate solution for refugee status is

¹⁹ Andrew E Shacknove, “Who Is a Refugee?” (1985) 95:2 *Ethics* 274; Katy Long, “Refugees, repatriation and liberal citizenship” (2011) 37:2 *History of European Ideas* 232; Matthew E Price, *supra* note 11.

²⁰ Non-citizens may be protected their human rights in foreign countries; however, it should be noted that, compared with full state protection owed to citizens, non-citizens enjoy state protection in a very limited sense: see Chapter 3 footnote 74.

to provide surrogate membership, i.e. citizenship, to refugees rather than providing humanitarian assistance to refugees in regions of origin.²¹

The main goal of this part of the dissertation is to contrast the two perspectives in terms of their underlying values and their proposed remedies for refugeehood. Each perspective reveals important aspects of refugee status, and each attempts to lay out a logical ground for its own proposed remedy. However, as noted, this dissertation will defend the alternative perspective as a more meaningful approach toward refugee protection, as it provides a richer and more accurate account of refugee status by illuminating historical and institutional aspects of refugeehood and preparing a path toward the “justice” approach toward refugee protection. Furthermore, in case law, this perspective could give rise to a new juridical approach to interpreting the definition of a refugee found in the *Refugee Convention* so as to enlarge the scope of eligibility for refugee protection under the Convention – this will be seen in Chapter 5.

In this dissertation, I introduce institutional cosmopolitanism alongside the protection model. Until now, institutional cosmopolitanism has been proposed primarily to deal with the issue of global poverty by addressing the necessity of revitalizing “just” economic baseline in the global economic system – this will be discussed in detail in Chapter 3. This dissertation argues that the principles derived from institutional cosmopolitanism may offer a unique account of cosmopolitan justice in relation to refugeehood. The main thesis of institutional cosmopolitanism is that global economic institutional arrangements should reflect the cosmopolitan value of “equal concern and respect” for each individual.²² In keeping with the alternative perspective, refugee status is closely associated with global institutional arrangements, that is, the nation-states system in which each individual holds at least one citizenship which entitles him or her

²¹ See Price, *supra* note 11 at 164.

²² See Sharon Anderson-Gold, *supra* note 12.

state protection with regard to human rights.²³ However, a refugee is a person who does not hold *de jure* or *de facto* political membership or citizenship. From the institutional cosmopolitan view, this is a systemic failure of ensuring the institutional arrangements of the nation-states system in a way that reflects “equal concern and respect” for each individual. This being so, institutional cosmopolitanism focuses on restoring “just” institutional arrangement of the nation-states system by providing citizenship to refugees. In this way, the institutional cosmopolitanism is conducive to the discourse of the “justice” approach toward refugee protection.

The following summary presents a guide to Part I of this dissertation which is divided into five chapters. Chapter 1 addresses the dominant account of refugee status and its impact on the refugee policies of developed countries, generally referred to as humanitarian assistance schemes. It illustrates how far the dominant perspective has penetrated the processes of refugee decision-making. Specifically, this chapter presents an account of how the concept of persecution has lost its political connotation, and is aligned with the “social” concept of a push factor, and analyzes the implications for decision-makers. It also presents and discusses normative arguments put forward by proponents of humanitarian assistance schemes.

Chapter 2 canvasses the alternative view on refugee status from the vantage point of interdisciplinary research – law, history, political philosophy and international relations theory. It highlights a historical and theoretical account of refugee status that probes deeper than the dominant account and reveals certain political facets of refugee status as essential. This chapter illuminates the tripartite relationship between refugee status, the loss of citizenship and lack of

²³ In this dissertation, the term, “human rights” (by virtue of human beings), is used interchangeably with “civil rights” (by virtue of citizenship). In the nation-states systems, generally, human rights have become civil rights in the sense that a human being should be a citizen in a nation-state in order to enjoy effective state protection with regard to human rights: see Chapter 2 and 3; See Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1979) at 293-94.

state protection, and demonstrates that this view has been recognized in certain areas of refugee law. In particular, this chapter draws attention to the proposed remedy under the alternative view, that is, surrogate political membership or citizenship.

Chapter 3 holds a pivotal position in this dissertation. It critically examines the merits of the two competing perspectives, arguing that refugee protection should be based on the alternative account of refugee status. In particular, it introduces institutional cosmopolitanism as a normative standard by which it assesses the two perspectives. This chapter presents how the alternative perspective and cosmopolitan justice theory work together to define a normative foundation for refugee law and policy. In the light of this proposed normative groundwork, Chapter 3 discloses the fundamental shortcomings of humanitarian assistance schemes. Finally, it confirms the necessity of providing surrogate political membership or citizenship as the ultimate remedy for refugeehood.

Chapter 4 offers empirical evidence to further disclose shortcomings of humanitarian assistance schemes. It canvasses empirical research that reveals the reality of refugee camps and the practice of repatriation. Empirical evidence will support the argument that once refugees are located in the Global South, they tend to be “contained” there for a protracted period of time without enjoying substantive human rights. Moreover, although it is argued that locating refugees in regions of origin facilitates smooth implementation of the policy of repatriation (due to the fact that refugees are placed nearby their home country), the policy of repatriation had mixed results. In many reported cases, the returned refugees have suffered serious harm rather than enjoyed their new life in the country of origin. Against this background, this chapter pays attention to the conception of “just” return advocated by Megan Bradley, which requires full

restoration of political membership in all dimensions (not just simple return).²⁴ Finally, this chapter will examine practice of the EU Regional Protection programmes (RPPs) with a view to analyzing practical implications of humanitarian assistance schemes in relation to refugee protection.

Chapter 5 introduces a case study concerning North Korean refugees. It aims to show how the two different perspectives on refugee status can produce different outcomes in refugee determination in case law. It provides comparative analysis of jurisprudence of Australia, the United Kingdom and Canada, on questions relating to dual nationality and refugee status. This chapter reveals that the alternative perspective has pervaded case law at least in relation to defined areas of refugee law.

Part II: Perspectives on State Sovereignty

Deterrence policies provide another foundation for the externalization of migration controls. Without deterrence policies in place, a central purpose of humanitarian assistance schemes would be frustrated, as refugees may find relatively easy access to asylum systems in developed countries. Thus, the two policies reinforce each other and limit opportunities for refugees to take advantage of asylum systems in developed countries.

Deterrence policies basically aim at discouraging or impeding irregular migrants from arriving at the territories of developed countries. A state may implement such a policy in different fashions. For example, a state may directly engage in interdiction program on the high seas by using its own personnel, aircraft or vessels; it may be complicit in interception activities of a foreign state within the latter's territory by providing a variety type of assistance such as

²⁴ Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge: Cambridge University Press, 2013) at 54, 59.

human and material resources. In state practice, deterrence policies appear to have become a legitimate exercise of border controls, as long as they are genuinely combatting irregular migration. In fact, international law has authorized interdiction or interception activities of a state in certain situations. For example, the *Smuggling Protocol* permits a state to take a certain action against people on board on the high seas, if the vessel is believed to be implicated in people smuggling.²⁵

Yet it is nonetheless the case that, along with humanitarian assistance schemes, deterrence policies have been subject to constant criticism owing to their possible inconsistency with human rights norms.²⁶ For example, in the case of interdiction of refugees on the high seas, it has often been observed that refugees neither have a genuine opportunity to put forward their claim for refugee status on the interdicting vessel, nor are they appropriately protected in a country to which they are returned.²⁷ The risk of *refoulement* has always been present in the deterrence policy. That's why scholars have strong reservation about legitimacy of current practice of deterrence policies.²⁸ However, only rarely have the policies been legally constrained. On the contrary, domestic courts have often endorsed schemes of deterrence.²⁹ One may wonder what underpins such a controversial deterrence policy. On what legal basis have

²⁵ *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507, UKTS 2006 No 16 at art 8 [emphasis added] [*Smuggling Protocol*]. See Chapter 7 and 8 for more details about interception operations under the *Smuggling Protocol*.

²⁶ See generally Guy S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23:3 Int'l J Refugee L 443 at 456; see Stephen. H. Legomsky, "USA and the Caribbean Interdiction Program" (2006) 18 Int'l J Refugee L 677 at 686; see generally Kees Wouters & Maarten Den Heijer, "The Marine I Case: A Comment" (2010) 22:1 Int'l J Refugee L 1 at 13.

²⁷ See generally Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, online: FAS <www.fas.org/sgp/crs/row/RS21349.pdf> at 4-5.

²⁸ For example, Stephen H. Legomsky remarks "[...] in theory a fair refugee status determination could possibly be made outside the country's territory [...] however, the practical obstacles to a fair procedure in conjunction with interdiction are formidable": Legomsky, *supra* note 26 at 686 (footnote 58).

²⁹ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 at 2563 (1993).

domestic courts upheld the interdiction policy that may constitute a breach of law, if it is implemented within their own jurisdiction?

In Part Two of this dissertation, I show how an established perspective on state sovereignty has provided a normative basis for deterrence policies. Under this established view, nation states have claimed unfettered sovereign power with respect to border control. A state is represented as having the highest authority (a hierarchical view of authority) to implement its own entry or exclusion policies intact from any institutional constraints. Deterrence policies, implemented outside national territories, are regarded as defensible exercises of state sovereignty as long as they do not interfere or come into conflict with authorities of other sovereign powers.

On the other hand, an alternative perspective on state sovereignty highlights a pluralistic view of authority. This perspective contends that state sovereignty in relation to border control is not “unfettered” or “unconditional” power, but it is subject to multiple authorities within complex institutional frameworks, giving rise to check and balance of powers. Put another way, the exercise of state sovereignty in relation to border control is an accountable or responsible act of a state (the “responsible” border control).

In fact, the conception of “responsible” exercise of state sovereignty has been duly recognized in so-called “humanitarian intervention” or the “responsibility to protect” (R2P), which is an aspect of state sovereignty that is coming to be recognized in state practice.³⁰ In 2001, the Report of the International Commission on Intervention and State Sovereignty proposed the concept of sovereignty as “responsibility”,³¹ and defended the view that

³⁰ See Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) at 72, 201; See Alexander Betts, *Forced Migration and Global Politics* (Chichester, West Sussex: Wiley-Blackwell, 2009) at 47-54.

³¹ Gareth J Evans et al, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), online: ICISS <http://www.idrc.ca/EN/Resources/Publications/openebooks/960-7/index.html#page_11>.

sovereignty implies 1) responsibility toward citizens in terms of protection and welfare, 2) responsibility not only toward citizens but also to the international community, and 3) that agents of states are “accountable for their acts of commission and omission”.³² This perspective on state sovereignty attempts to re-characterize the concept of sovereignty “from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties”.³³

In this Part, I argue that the conception of state sovereignty as “responsibility” may also be found within the migration context, albeit differently nuanced. While the conception of the “responsibility to protect” (R2P) primarily concerns protecting one’s own citizens within one’s own territorial boundaries, the conception of “responsible” border control aims at implementing “responsible” migration policies *toward non-citizens within or outside* one’s own borders. This being so, the “responsible” border control is to respect and ensure human rights of migrants including refugees. It is important to note that increasing recognition of the “responsible” border control began to undermine the normative claim of sovereignty as “unfettered” border control, offering a plausible normative basis upon which to argue for the accountability of authorities where their conduct involves breaches of human rights.

Moreover, the discourse of “responsible” border control may provide momentum to the discourse of cosmopolitan justice in Chapter 3. Although institutional cosmopolitan justice reasonably requires asylum as an ultimate remedy for refugeehood, the dominant view of state sovereignty as “unconditional” control may frustrate such a request in a legitimate way – after all, it is an individual state that decides who should be admitted on its own criteria.³⁴ However,

³² *Ibid* at 13 (para 2.15).

³³ *Ibid* at 13 (para 2.14).

³⁴ The Supreme Court of Canada in *Chiarelli* stated that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”: *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 S.C.R. 711 at para 24; “Liberals Accused of Trying to Rewrite History”, *ABC Lateline* (21 November 2006) online: ABC

under the alternative view, a state should exercise state sovereignty in relation to refugees in a responsible manner. If a state simply deters the flow of refugee movement on the high seas without any consideration of fates of refugees, it would be certainly irresponsible exercise of border control. This being the case, the alternative view of sovereignty in relation to border control provides a meaningful theoretical basis for furthering the discourse of cosmopolitan justice in relation to refugeehood.

Chapter 6 presents the two competing perspectives on state sovereignty. The established view of sovereignty as control, or stronger form as “unconditional” control, has been widely recognized in various fields: e.g., neorealism and neoliberalism in international relations theory, domestic or international jurisprudence, and state practice. The alternative view has taken root in institutional theory found in international relations, politics and sociology. This chapter contains both descriptive and normative content. It delineates core arguments put forward by proponents of each perspective, and examines their reasonableness and validity in the light of current state practice in relation to human rights protection. Importantly, this chapter proposes a pluralistic view of authority as a theoretical background for the alternative view.

Chapter 7 is a pivotal chapter in this part. It demonstrates the expansion of the concept of sovereignty as “responsibility” in the migration context. It provides detailed analysis of case law that shows how the alternative perspective on state sovereignty has influenced decisions of the European Court of Human Rights. In particular, Chapter 7 scrutinizes how the principle of *non-refoulement* has become a legal constraint on the deterrence policy of European countries when it has been implemented on the high seas. It concentrates on the intersection between the developing concept of jurisdiction in human rights law and the principle of *non-refoulement* that

<<http://www.abc.net.au/lateline/content/2001/s422692.htm>>: “We will decide who comes to this country and the circumstances in which they come.”

is embedded in Article 3 of the European Convention on Human Rights.³⁵ Recent case law of the European Court of Human Rights has successfully extended the scope of jurisdiction in human rights law beyond state territories. As jurisdiction is a core element of state sovereignty,³⁶ the changing concept of jurisdiction in human rights law inevitably has affected the concept of state sovereignty as well.

Chapter 8 compares and contrasts European and Canadian jurisprudence. It assesses how far the alternative perspective on state sovereignty has influenced the decisions of Canadian courts. More specifically, this chapter examines the extraterritorial jurisdiction of human rights law in Canadian law with special attention to the *Canadian Charter of Rights and Freedoms* (the *Charter*).³⁷ Because the shift in the concept of jurisdiction in human rights law necessarily affects the concept of state sovereignty, the analysis of Canadian case law on the extraterritorial applicability of the *Charter* will also address the Canadian position on the concept of state sovereignty.

Conclusion

³⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, 4 November 1950, ETS 5.

³⁶ Malcolm N Shaw, *International law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 572 [footnote omitted]: “[j]urisdiction concerns the power of the state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs”; Federica Gioia, “State Sovereignty, Jurisdiction, and International Law: The Principle of Complementarity in the International Criminal Court” (2006) 19:04 *Leiden J Int’l L* 1095 at 1096 [footnote omitted]: “[i]ndeed, it is common knowledge that every state traditionally conceives the jurisdictional function (the function of *jus dicere*, ‘to tell the law’), either civil or criminal, as one of the expressions of its sovereignty, the exercise of which is to be protected from external interference”; Ian Brownlie, *Principles of public international law*, 7th ed (Oxford: Oxford University Press, 2008) at 289 [footnote omitted]: “[t]he principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.”

³⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

A perspective provides a lens through which we can see, examine and evaluate matters. A perspective provides a critical foothold upon which we make decisions and suggest solutions for problems. This dissertation introduces the dominant perspectives on refugee status and state sovereignty as important aspects of a critical background for externalization of migration controls with regard to refugees. Currently, genuine refugees have experienced increasing difficulty in reaching the territories of developed countries that have the most resources to cope with the global refugee crisis. Instead, they have been located in regions of origin for an extended period of time with tiny hope of repatriation, settlement or re-settlement.

This dissertation offers principled alternatives to the dominant views of refugee status and state sovereignty that have contributed to this difficulty. By relying on the protection perspective and theories of cosmopolitan justice, it offers a context for assessing the adequacy of remedies for the predicament of being a refugee. It highlights the fact that refugee status is a product of institutional failure of ensuring the “just” baseline of the nation-states system – each individual has at least one political membership or citizenship by which he or she is entitled to have human rights protection.³⁸

Moreover, the conception of “responsible” border control offers a countervailing account of authority that reveals the shortcomings of the dominant view on state sovereignty, that, a nation-state can do whatever it wishes to prevent refugees from arriving at its own territory. In recent state practice, the shift of the concept of sovereignty in relation to migration controls has become evident, especially in conjunction with the developing concept of human rights jurisdiction. The concept of “responsible” border control is not just a theoretical assertion; it began to take a root in state practice, providing a meaningful context for furthering the discourse

³⁸ See Chapter 2. See also Aleinikoff, *supra* note 17 at 120; Charles B Keely, “How Nation-States Create and Respond to Refugee Flows” (1996) 30:4 Int'l Migration Rev 1046 at 1051, 1057.

of cosmopolitan justice in relation to refugees. By examining both dominant and alternative perspectives on refugee status and state sovereignty, this dissertation aims at providing both hindsight on contemporary state practice in relation to refugee law and policy, and foresight on how to revitalize the refugee protection regime by providing more open access to the institution of asylum.

Chapter 1 The “Persecution Perspective” and Refugee Law and Policy*

Introduction

Throughout history, there have always been individuals or groups of people who have sought protection from various threats – religious persecution, unjust punishment, violence, oppression, discrimination, wars, natural disasters, etc. They have often attempted to obtain necessary protection by traveling to different places, regions, countries and even continents. Yet, it was not until the early 20th century that the international community became aware of the necessity to provide international protection to such people and began to officially categorize them as refugees.¹ Dr. Nansen was first appointed as High Commissioner for Russian refugees in 1921 under the auspices of the League of Nations – later, Armenians and other groups were included in Nansen’s mandate.² At this time, refugee status was established by two conditions: a person was “(a) outside their country of origin and (b) without the protection of the government of that State.”³ Put simply, the core element of refugee status was the lack of state protection.

* Parts of this chapter – parts of the Section, “Persecution as the Core Element of Refugee Status in International Refugee Law” in this chapter (pp.25-7) – is a modified version of a pre-copyedited, author-produced PDF of an article accepted for publication in *International Journal of Refugee Law*, following peer review. The version of record, Seunghwan Kim, “Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada” (2016) 28:1 *International Journal of Refugee Law* 85, is available online at <http://ijrl.oxfordjournals.org/content/28/1/85.full.pdf+html>.

¹ See Erika Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 *Wash U JL & Pol’y* 129 at 130.

² *Ibid.* At this time, “Nansen passport (or certificate)” was issued to those who were categorized as refugees; it provides refugees with “legal and juridical status” and “the right to return to the country issuing it”: Louise W. Holborn, “The League of Nations and the Refugee Problem” (1939) 203 *Annals of the American Academy of Political and Social Science* 124 at 126.

³ Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 16. Russian refugees referred to “[...] [a]ny person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality”: *Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations, Treaty Series, Vol. LXXXIX, No. 2004, online: Refworld <<http://www.refworld.org/docid/3dd8b5802.html>> at para 2. It is worth noting that this definition reflects the group-based determination approach for refugee status; by way of contrast, since the conclusion of the *Refugee*

Since the adoption of the *Refugee Convention* in 1951, the perception of refugee status as a legal term has experienced a major shift.⁴ Refugee status came to be defined primarily by reference to a “well-founded fear of persecution” rather than a “lack of state protection”.⁵ Even though lack of state protection is considered in the definition of a refugee as expressed in Article 1A(2) of the Convention,⁶ “fear of persecution” has attracted primary attention in defining refugee status. Put differently, refugee status began to be defined primarily by reference to “what causes a person to flee involuntarily” (persecution) rather than “what a person lacks” (state protection). In this dissertation, the former is called the “persecution perspective” and the latter the “protection perspective”. While this chapter covers the persecution perspective, Chapter 2 deals with the protection perspective. Identifying the shift in perspective is significant, as it not only influences refugee law but also refugee policy on a broader scale.

The persecution perspective refers to a viewpoint in which various *push factors*, such as persecution, distress, generalized violence and conflicts, are considered as integral elements of refugee status on a policy level – in a legal sense, it exclusively refers to persecution as a core element of refugee status. It is important to note that, from the persecution perspective, the

Convention, the individual-based determination approach (case-by-case determination) has become dominant: see generally Goodwin-Gill & McAdam, *ibid* at 16, 23.

⁴ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 [“*Refugee Convention*”]. As of today, 145 states are parties and 19 states are signatories to the *Refugee Convention*; See James C Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33:2 Int’l Comp LQ 348 at 371-75.

⁵ See generally James C Hathaway, *supra* note 4.

⁶ According to Article 1A(2) of the *Refugee Convention*, a refugee is a person who “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” The 1967 Protocol removes the time limits, i.e., “events occurring before 1 January 1951” in Article 1A(2) of the *Refugee Convention*; the 1967 Protocol also removes the geographical limits that qualifies the events as ones occurring in Europe as found in Article 1B(1) of the *Refugee Convention: Protocol relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, Can TS 1969 No 29 at art I (2). As of today, 146 states are parties to the Protocol.

traditional remedy of asylum may have become redundant. If a refugee is a person who flees from a variety of push factors, it is a corollary that governments should address and deal with the specific push factors rather than provide political membership or citizenship to the refugee in the country of asylum. Thus, international communities may be justified in providing only humanitarian assistance, e.g., temporary shelters and daily necessities, to refugees who are located in refugee camps so long as the refugees do not suffer from the distress that they have experienced in the country of origin.

This chapter canvasses aspects of the persecution perspective and presents their implications for refugee policy. It traces the origin of the persecution perspective to the “Push-Pull” migration model, and highlights that, in its development, it has diminished the significance of providing a legal remedy of asylum to a refugee in the country of asylum. More specifically, the Chapter reveals that the persecution perspective is inextricably bound up with schemes of humanitarian assistance which aim to provide relief to refugees in their country or regions of origin rather than in a country of asylum (particularly, developed countries).

Scholars have suggested a variety of background conditions for the emergence of schemes of humanitarian assistance; however, little literature has identified refugee status as a theoretical basis for such schemes. In fact, research on the impact of the persecution perspective on refugee policy has been slim in comparison with legal research analyzing case law that has focused on the definition of refugee status based on fear of persecution. This chapter attempts to remedy this situation by examining the relationship between the familiar definition of refugee status found in the Convention and the extended meaning of refugee status developed and implemented by policy makers in developed countries. The chapter contends that the persecution

perspective has indeed provided a principled basis on which to propose, support and consolidate schemes of humanitarian assistance.

Origin: The “Push-Pull” Model of Migration

On a policy level, one can trace the origin of the persecution perspective to a particular model of migration: the “Push-Pull” model. The “Push-Pull” migration model primarily concerns factors which influence migrations movement. The model has been well recognized in various disciplines such as economics and sociology.⁷ It is basically premised on cost-benefit analyses of various factors. Peter Kivisto and Thomas Faist explain the model as follows:

The assumption is that migrations occur as a consequence of two complementary processes. First, they commence when the weight of the factors pushing people out of one place are more powerful than those keeping them there. [...] second, it occurs when the weight of factors pulling people into another locale are more powerful than those deterring entry [...].⁸

Stephen Castles and Mark J. Miller suggest that “[p]ush factors’ include demographic growth, low living standards, lack of economic opportunities and political repression, while ‘pull factors’ include demand for labour, availability of land, good economic opportunities and political freedoms.”⁹ The model has been transplanted from general studies of migration to studies of refugee movement. For example, according to the Oxford English Dictionary, a refugee is defined as “a person who has been forced to leave his or her home and seek refuge elsewhere, esp. in a foreign country, from war, religious persecution, political troubles, the effects of a natural disaster, etc.”¹⁰ In this definition, a refugee is described as a person who

⁷ Stephen Castles & Mark J Miller, *The Age of Migration: International Population Movements in the Modern World*, 4th ed (New York: Guilford Press, 2009) at 22.

⁸ Peter Kivisto, *Beyond a Border: The Causes and Consequences of Contemporary Immigration* (Los Angeles: Pine Forge Press, 2010) at 35.

⁹ Stephen Castles & Mark J Miller, *supra* note 7 at 22.

¹⁰ See *Refugee*, online: Oxford English Dictionary <<http://www.oed.com/view/Entry/161121?rskey=pG6mEV&result=1&isAdvanced=false#eid>>.

moves involuntarily out of his or her country of origin because of adverse social and physical environments (push factors).

Writing from a sociological perspective, Tom Kuhlman also defines refugees as “involuntary international migrants”.¹¹ Kuhlman suggests that “involuntary migrants” can be described by reference to “distress”: “either they are physically forced to leave, or a serious crisis in their place of origin has promoted them to go; the same circumstances make it dangerous for them to return, a condition which does not normally apply to voluntary migrants.”¹² In a similar manner, the Blackwell Encyclopedia of Sociology defines refugee movement as “the involuntary migration of people across international borders as a result of generalized conflict and disorder, or of more particularized threats of persecution and physical insecurity.”¹³ In sum, an emphasis on push factors, such as distress and persecution, appears to be commonplace in contemporary accounts of refugee status.

Even though the “Push-Pull” model, particularly as adopted in economic theories of migration, has been seriously challenged for its lack of consideration of specific material factors including human networks, “historical causes of movements” and “the role of the state”,¹⁴ this chapter argues that, in relation to refugee movement, the model appears to have been highly influential in policy decision making. Decision makers have often implemented refugee law and policy in response to various push or pull factors. For example, legislation to penalize people smugglers, fines on airlines or vessels that bring undocumented migrants are all examples of responses to pull factors. Similarly, as a response to push factors, international communities have

¹¹ T Kuhlman, *Towards a Definition of Refugees* (Amsterdam: VU University Amsterdam, Faculty of Economics, Business Administration and Econometrics, 1990) at 6.

¹² *Ibid* at 8.

¹³ Courtland Robinson, *Refugee Movement*, online: The Blackwell Encyclopedia of Sociology <http://www.sociologyencyclopedia.com/public/toctnode?query=refugee&widen=1&result_number=2&from=search&id=g9781405124331_yr2015_chunk_g978140512433124_ss1-39&type=std&fuzzy=0&slop=1>.

¹⁴ Kivisto, *supra* note 8 at 36-42; Castles & Miller, *supra* note 7 at 27.

provided humanitarian relief to the country of refugee origin in order to stabilize any social disorder which may have contributed refugee movement.

In addition, the “Push-Pull” model also appears to have influenced the interpretation of a legal definition of a refugee as found in Article 1A (2) of the *Refugee Convention*. In particular, the fear of persecution as a *push factor* has become a critical element in interpreting the definition of a refugee. A cursory examination of both historical and legal accounts reveals the impact of the persecution perspective on the legal definition of refugee status by showing how it provides legitimacy to refugee policies.

Persecution as the Core Element of Refugee Status in International Refugee Law

According to the *Refugee Convention*, a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country.”¹⁵ The UNHCR

Handbook analyses this definition as follows:

The phrase “well-founded fear of being persecuted” is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of “fear” for a relevant motive.¹⁶

Since the mid-20th century, the fear of persecution has come to be recognized as a core component of refugee status.¹⁷ A foundation for the persecution perspective has been traced by

¹⁵ *Refugee Convention*, *supra* note 4 at Article 1A(2).

¹⁶ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011), online: Refworld <<http://www.refworld.org/docid/4f33c8d92.html>> at para 37.

¹⁷ See generally Castles and Miller, *supra* note 7 at 22–3; Hathaway, *supra* note 4 at 375; Jane McAdam, “Rethinking the Origins of ‘Persecution’ in Refugee Law” (2013) 25:4 Int'l J Refugee L 667 at 669; See generally Alexander Betts, “From Persecution to Deprivation: How Refugee Norms Adapt at Implementation” in Alexander

James Hathaway who explains how the concept of persecution has become such an important element in defining refugee status.¹⁸ According to Hathaway, refugee status can be defined by reference to juridical terms (1920-1935), social terms (1935-1939), or individualist terms (1938-1950).¹⁹ Under the judicial and social terms, refugee status can be defined by reference to lack of *de jure* state protection (juridical terms) or *de facto* state protection (social terms) respectively.²⁰ However, Hathaway argues that, during the period between 1938 and 1950, “the determination of refugee status on the basis of a broadly defined lack of protection came to an end”,²¹ instead, the concept of persecution began to be emphasized in order to show “valid objections” to returning to the country of origin.²² In other words, if a person could show a “valid objection” to returning to his or her country of origin, he or she could fall into the category of a refugee. Importantly, according to *Constitution of the International Refugee Organization*, the “valid objection” is deeply associated with the concept of fear of persecution.²³

The background of this shift has been explained traditionally in the following manner: 1) massive refugee movement during this period necessitated narrowing down the scope of refugee status in order to “assist the ‘most deserving’ among the multitude of displaced and suffering persons” and 2) refugee law should contextually reflect the United Nations’ general maneuver in protection of individual human rights during this period, which is expressed in the UN Charter

Betts and Phil Orchard, eds, *Implementation and World Politics: How International Norms Change Practice* (Oxford: Oxford University Press, 2014) 29 at 29.

¹⁸ Hathaway, *supra* note 4.

¹⁹ *Ibid* at 349-50.

²⁰ *Ibid* at 358, 368.

²¹ James C Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 31 Harv Int’l LJ 129 at 139; See James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 5.

²² Hathaway, *supra* note 4 at 375.

²³ See generally *ibid*. The IRO constitution stipulated what might constitute the “valid objection” in its Annex I as follows: “(i) persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations”: *Constitution of the International Refugee Organization*, 15 December 1946, 18 UNTS 3, Can TS 1946 No 47 at Annex I, Pt. I, section C(1)(a)(i).

and other international human rights instruments.²⁴ Hathaway states that “[t]he modern [Refugee] Convention [...] made persecution the exclusive benchmark for international refugee status.”²⁵

Refugee tribunals in numerous countries have adopted the definitional constraint imposed by Article 1A(2) of the *Refugee Convention* that a person must show a well-founded fear of persecution in order to be recognized as a Convention refugee. For example, the Immigration and Refugee Board of Canada states that “[c]laimants must establish that they have a subjective fear of persecution and also that the fear is well-founded in an objective sense, that is, it is justified in light of the objective situation [...]”.²⁶ The centrality of inquiry into persecution in the refugee determination process has long been recognized by highest courts in various jurisdictions. La Forest J. in *Canada (Attorney General) v. Ward* stated that the focus of the definition of the Convention refugee as found in Canadian law was “on establishing whether the fear is ‘well-founded’”.²⁷ La Forest J. further endorsed the bipartite test of fear of persecution: “(1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an

²⁴ Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 21 at 140-43. However, Hathaway critiques these explanations by stating that “[...] the pre-1950 refugee accords and arrangements established protection regimes which compromised humanitarian instincts with protectionism, and concern for the promotion of human rights with the advancement of political goals”: *ibid* at 143. With regard to human rights issues, Hathaway argues that “[t]he prevailing notion of human rights only addressed a narrow aspect of human dignity: the civil and political rights firmly rooted in Western political thought and consistent with Western political goals. The economic, social, and cultural goals promoted by the socialist bloc were not regarded as rights enforceable by law and the developmental needs of the Third World were largely excluded from the scope of human rights protection”: *ibid* at 141 [footnotes omitted].

²⁵ Hathaway, *The Law of Refugee Status*, *supra* note 21 at 99; see also Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 21 at 139. Interestingly, Jane McAdam has pointed out the fact that the concept of persecution had already been found in refugeehood, stating that “[...] when persecution came to be included in post-war refugee instruments, it did not signify the dramatic shift described by Hathaway, but rather was a natural progression. Indeed, its express inclusion was a logical consequence of the move away from defined categories of refugees to a more universal concept and the need to articulate what made a refugee non-returnable”: McAdam, *supra* note 17 at 692.

²⁶ Immigration and Refugee Board of Canada, “CHAPTER 5 - WELL-FOUNDED FEAR”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx>> at 5 [footnotes omitted].

²⁷ *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 at para 25 [*Ward*].

objective sense.”²⁸ The High Court of Australia in *Guo* proposed four key elements of the definition of a refugee as found in the Convention, focusing primarily on persecution— in paraphrase, a refugee is a person who is located outside his or her country of origin and has a well-founded fear of persecution for a Convention reason.²⁹ The House of Lords in the United Kingdom made a similar claim that “the critical words in article 1A(2) of the Convention are ‘well-founded fear’ of being persecuted for what may compendiously be called ‘a Convention reason’.”³⁰ Hathaway and Foster have remarked that it is the general principle that “a person is a refugee so long as she has a well-founded fear of being persecuted for a Convention reason, whatever her other goals or ambitions [...]”.³¹

The significance of the fear of persecution in the refugee determination process is also found in credibility assessments. It is noteworthy that decision makers have more and more relied on credibility assessments in rejecting refugee claims. Jenni Millbank aptly observes that “[c]redibility assessment has always been a major issue in refugee determinations and its importance increases in the context of widespread introduction of ‘fast-track’ processes and the manifest trans-national trend to truncate (or indeed remove) avenues for review.”³² Importantly, in order to meet the credibility requirement, a refugee claimant has to present a “‘plausible’ account of persecution” in his or her story, and then, decision-makers decide its “truthfulness” on

²⁸ *Ibid* at para 47.

²⁹ *Minister For Immigration and Ethnic Affairs v Guo and Another* (1997) 144 ALR 567 at 575: “[t]he definition of ‘refugee’ in art 1A(2) of the Convention contains four key elements:

- (1) the applicant must be outside his or her country of nationality;
- (2) the applicant must fear ‘persecution’;
- (3) the applicant must fear such persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’; and
- (4) the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons.”

³⁰ *R v Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals (UN High Commissioner for Refugees intervening)* [1988] 1 All ER 193 at 195, Lord Keith of Kinkel.

³¹ James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 139 [footnote omitted].

³² Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21:1 Int’l J Refugee L 1 at 2 [footnote omitted].

the basis of materials presented to them.³³ If a claimant's story is not credible, it is likely for tribunals to reach a negative conclusion regarding refugee claims.

Furthermore, Hathaway and Foster also observe “the growing practice of equating lack of credibility with absence of subjective fear, and hence with disqualification from refugee status.”³⁴ For example, the Immigration and Refugee Board of Canada states that “[w]here a claimant is found to be lacking in credibility, the RPD[Refugee Protection Division] can legitimately find that there is no subjective basis for the claim.”³⁵ In *Amaniampong*, the majority of the Federal Court of Appeal upheld the decision of the Board not to grant refugee status due to the claimant's failure to establish subjective fear of persecution.³⁶ More specifically, Hugessen J. endorsed the Board's finding of absence of subjective fear in terms of credibility, stating that

Unfortunately for the applicant, the Board was not satisfied that he had met the subjective branch of the test. In particular it identified what it described as the ‘four major elements’ of the claim and specifically found three of them to be implausible. [...] It also found weaknesses in other ancillary aspects of the applicant's testimony and concluded that he was not a credible witness.³⁷

Tremblay-Lamer J in *Kamana* also stated that “[t]he lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the

³³ See Jane Herlihy, Kate Gleeson & Stuart Turner, “What Assumptions about Human Behaviour Underlie Asylum Judgments?” (2010) 22:3 Int'l J Refugee L 351 at 351.

³⁴ Hathaway and Foster, *supra* note 31 at 100. Furthermore, Hathaway and Foster refer to case law that treats a variety of objective factors as ones that indicate the absence of subjective fear – e.g., “the applicant's delay in fleeing the country of origin”, “the applicant's failure to claim asylum in an intermediate country”, and “an applicant's delay in claiming refugee status after arrival in the asylum country”: Hathaway and Foster, *supra* note 31 at 96-100. However, they argue that the objectification of subjective fear is risky as “none of the mechanism typically employed by courts objectively to discern the existence of subjective fear can be relied upon to achieve that goal”: Hathaway and Foster, *supra* note 31 at 100. In fact, they reject the bipartite approach (subjective and objective fear), proposing that “the existence of a ‘well-founded fear’ of being persecuted requires only that there be a forward-looking apprehension of risk, thus mandating a purely objective inquiry”: Hathaway and Foster, *supra* note 31 at 105.

³⁵ Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx#n1>> at para 2.1.4.

³⁶ *Amaniampong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 443, [1989] A.C.F. No 443.

³⁷ *Ibid* (Hugessen J.)

claim, since both elements of the refugee definition--subjective and objective--must be met.”³⁸

This being so, it may be said that, in credibility assessments, *the fear of persecution* has received primary attention.

The fear of persecution is not only a primary concern in determining refugee status. It also plays a vital role in determining when refugee status may come to an end. Article 1C of the *Refugee Convention* circumscribes conditions where refugee status may cease. In particular, Article 1C(5) reads as follows: “[h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality [...]”³⁹ According to UNHCR Handbook, “[c]ircumstances’ refer to fundamental changes in the country, which can be assumed to *remove the basis of the fear of persecution*.”⁴⁰ Here, one can see clear connection between the cessation of refugee status and the fear of persecution.⁴¹ It is important to note that case law has developed in a way that emphasizes the absence of the fear of persecution as a critical denominator of the cessation of refugee status.⁴² For example, the Federal Court of

³⁸ *Kamana v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1695 at para 10, [1999] A.C.F. no 1695

³⁹ The Refugee Convention, *supra* note 4 at Article 1C(5).

⁴⁰ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011), online: Refworld <<http://www.refworld.org/docid/4f33c8d92.html>> at para 135 [emphasis added].

⁴¹ Goodwin-Gill and McAdam concur with UNHCR’s interpretation, stating that “[t]he ‘change of circumstances’ anticipated is clearly intended to comprehend fundamental changes in the country which remove the basis of any fear of persecution”: Goodwin-gill and McAdam, *supra* note 3 at 139. It is worth noting that UNHCR, in its 2003 guideline, contemplated a border concept of change of circumstance, which is not limited to simple absence of fear of persecution: UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, HCR/GIP/03/03 (February 2003), online: UNHCR <<http://www.unhcr.org/3e637a202.pdf>>. I will revisit this view in Chapter 2: See the section, “Protection Perspective and Case Law” in Chapter 2.

⁴² See Immigration and Refugee Board of Canada, *CHAPTER 7 - CHANGE OF CIRCUMSTANCES AND COMPELLING REASONS*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx>> at para 7.1.1.

Appeal of Canada in *Yusuf v. Canada (Minister of Employment and Immigration)* stated as follows:

[...] A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. [...] the only test, is that derived from the definition of Convention Refugee in s.2 of the Act: does the claimant now have a well founded fear of persecution? [...].⁴³

One can see a principle that *the absence of fear of persecution* may bring refugee status to an end under Article 1C(5). Hathaway and Foster have observed that this principle has been applied in various jurisdictions such as Australia, Japan and Europe.⁴⁴ For example, they cite an important European case, *Abdulla*, where the Court of Justice of the European Union clearly endorsed the aforementioned principle.⁴⁵ The Court stated as follows:

The change of circumstances will be of a “significant and non-temporary” nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there *are no well-founded fears of being exposed to acts of persecution* amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive.⁴⁶

In sum, the aforementioned case law points to “well-founded fear of persecution” as the most important aspect of refugee status. Both substantive and procedural matters in relation to

⁴³ *Yusuf v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35 at para 2, [1995] A.C.F. no 35, Hugessen J. [emphasis added].

⁴⁴ Hathaway and Foster, *supra* note 31 at 479-80; Hathaway and Foster cite several cases that are closely associated with the concerned principle such cases as *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH OF 2004 and Another* (2006) 92 ALD 513 and *NBGM v. Minister for Immigration and Multicultural Affairs*, (2006) 231 CLR 52. They also pay attention to the Qualification Directive Article 11(2) which reads: “[i]n considering points (e) and (f) of paragraph 1 [the cessation clauses due to change of circumstances], Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee’s fear of persecution can no longer be regarded as well-founded”: *Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9 [“Qualification Directive”].

⁴⁵ Hathaway and Foster, *supra* note 31 at 480; *Aydin Salahadin Abdulla and others v Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, [2010] ECR I-01493 [*Abdulla*].

⁴⁶ *Abdulla*, *supra* note 45 at para 73 [emphasis added].

refugee law are premised upon the conception of a well-founded fear of persecution. More significant is the observation that case law appears to deal with the fear of persecution primarily as a “push factor” rather than as one inextricably linked with the phenomenon of lack of state protection *in the first place*. This is because, in case law, the issue of lack of state protection may have become a secondary issue in some respects, as refugee tribunals would not engage in examining unwillingness or inability of a state to provide adequate protection to a refugee claimant, if they cannot find the fear of persecution *in the first place*. Further implications of the persecution perspective on the legal definition will be dealt with in detail in Chapter 5. The remainder of this chapter will focus on its ramifications on general policies.

The Persecution Perspective and Refugee Policies

Part of the reason why the EU leaders could safely make statements about receiving Afghanistan’s refugees without actually contemplating the reality [...] was that the public imagination had not been fired to think about these refugees as people in need of more than tents, blankets and food parcels.⁴⁷

The prevalent perception of refugee status necessarily affects policy making processes. As mentioned in the Introduction, a theoretical view on refugee status functions as both a driving force of and a justification for refugee policy through providing legitimacy to it. Thus, it is important to identify and analyze the full range of impacts that the persecution perspective has had on refugee policies.

First, the persecution perspective has broadened the scope of refugee status on a policy level. The broad meaning of a refugee is well illustrated by the UNHCR, which has adopted a conception of refugee status that refers to various push factors. In its Note on the Mandate of the High Commissioner for Refugees and His Office, the UNHCR has endorsed *inter alia* this broad

⁴⁷ Janne Van Selm, *Perceptions of Afghan Refugees*, online: Migration Policy Institute <<http://www.migrationpolicy.org/sites/default/files/publications/VanSelmTerrorism22%5B1%5D.pdf>> at 265.

meaning of refugees, stating that “[t]he High Commissioner’s core mandate covers refugees, that is, all persons outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as a result, require international protection.”⁴⁸ According to this definition, refugee status is defined by reference to a variety of push factors, which are not limited to persecution.

In fact, it is a general trend to define a refugee as broadly as possible. Alexander Betts observes that more people leave their country of origin due to “human rights deprivations” rather than for the fear of political persecution.⁴⁹

Over time, [...] the nature of human displacement has changed while the international regime has remained relatively constant. There has been a gradual shift in the circumstances under which people cross international borders in search of protection. Rather than simply fleeing persecution many people cross international border because of a very serious threshold of basic human rights deprivations [...].⁵⁰

With this shift in circumstances, while the narrow concept of refugee status has become less meaningful, the extended concept has become more prominent since it better captures the new reality.

Second, the persecution perspective has in no small way contributed to the shift in the conception of the Convention refugees adopted by policy makers. With overemphasis on push factors, Convention refugees came to be considered alongside groups of people who have fled from “human rights deprivation”, such as “food insecurity, environmental change, and livelihoods failure”.⁵¹ This has occurred because, under the influence of the persecution model,

⁴⁸ UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office* (October 2013), online: UNHCR <<http://www.unhcr.org/526a22cb6.html>> at 3.

⁴⁹ Betts, *supra* note 17 at 29. Betts states that “[...] the flight of Zimbabweans from Robert Mugabe’s regime between 2000 and 2012. It provides a context in which the overwhelming majority of people were not fleeing ‘persecution’ in the terms of the 1951 Refuge Convention. Instead, the over 2 million people fleeing were seeking sanctuary as a result of large-scale human rights deprivations for which they had not access to a domestic remedy”: Betts, *supra* note 17 at 30.

⁵⁰ *Ibid* at 29.

⁵¹ *Ibid* at 29-30.

the political concept of persecution in the definition of a Convention refugee began to be aligned with a range of push factors, rendering it detached from any political connotation. Put another way, the concept of persecution has been rendered *one of the social phenomena of distress*, which attracts humanitarian relief designed for a broader concept of a refugee. This social concept of persecution may have brought about a significant change in refugee policies: asylum to humanitarian relief. As will be seen in Chapter 2, a narrower political concept of persecution focuses on the ruptured protection relationship between a refugee and a state, which is manifested in the form of loss of political membership; thus, the discourse on remedy for refugee status necessarily concerns political membership.

Third and most importantly, the persecution perspective has greatly diminished the importance of providing political membership to refugees in the country of asylum through collapsing the boundary between Convention refugees and other refugees. B.S. Chimni has noted the significance of the distinction, forcefully arguing that “[t]he inclusive and indeterminate character of so-called humanitarian practices has led to the blurring of legal categories, principles, and institutional roles. These practices are threatening legitimate boundaries between international refugee law, human rights law and humanitarian law.”⁵² In other words, the prevalent mood of humanitarianism has tended to redefine refugee law as a branch of human rights law, thus diminishing the importance of settlement (in the form of political membership) as a unique and appropriate remedy for refugeehood.

In fact, there are basically two different solutions made available to two different categories of refugees. Goodwin-Gill and McAdam have noted as follows:

[...] both the activities of UNHCR and the responses of States with regard to refugees in the broad sense may be limited to the provision of refuge and material

⁵² B S Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 J Refugee Stud 243 at 244-45.

assistance, and the pursuit of voluntary repatriation. Only the refugee who has been determined to have a well-founded fear of persecution, perhaps, enjoys the full spectrum of protection and the expectations of a lasting solution in a country of asylum or resettlement, although that presumption also may be questioned today in light of recent State practice.⁵³

From the persecution perspective, the Convention refugee is a person who “merely” flees on account of a *push factor* of persecution. As a corollary, a solution for refugeehood is to simply provide the “persecution-free” environment which does not necessarily refer to providing surrogate political membership or citizenship to refugees in the country of asylum. This simplified interpretation of refugee status has made it possible on a theoretical level that Convention refugees, like others fleeing from a source of distress, may end up with only “the provision of refuge and material assistance” in regions of origin until he or she may be repatriated to the country of origin; in fact, this has become a reality in state practice.⁵⁴ The schemes of humanitarian assistance mirrors the language of the persecution perspective in a significant way. In what follows, I will sketch core justifications for schemes of humanitarian assistance (particularly, regional assistance schemes) and show the intricate relationship between these schemes and the persecution model.

The Policy Shift from Asylum to Humanitarian Relief: Toward Regional Containment

Aleinikoff has observed that the basic tenets of refugee policy have changed over time. Formerly they revealed an “exilic bias”, and now they present a “source-control bias”.⁵⁵ Policies exhibiting the “exilic bias”, offer refugees political membership in the form of settlement in a country of asylum or resettlement in a third country. This solution was preferred to other durable solutions

⁵³ Goodwin-Gill and McAdam, *supra* note 3 at 32.

⁵⁴ *Ibid*; See Chapter 4.

⁵⁵ T Alexander Aleinikoff, “State-Centered Refugee Law: From Resettlement to Containment” (1992) 14 Mich J Int’l L 120 at 121.

for European refugees in the period right after the end of World War II and during the Cold War.⁵⁶ As noted in Introduction Chapter, the emphasis on the fear of persecution within the legal definition of a refugee provided necessary momentum for the West to grant asylum to individuals fleeing from communist states during the Cold War.⁵⁷ Charles B Keely observes that, during the Cold War period, the settlement or resettlement of refugees was not only a feasible policy – the number of refugees remained low – but also a political strategy against the communist states.⁵⁸

In the face of massive influx of non-European refugees, however, states' policies began to show a “source-control bias” by emphasizing the need for protection in countries of origin rather than in countries of asylum, mainly Western states.⁵⁹ Aleinikoff remarks that “[t]his new orientation focuses attention on countries of origin, supporting repatriation and human rights monitoring before and after return.”⁶⁰ In a broad sense, the “source-control” refugee policy refers to humanitarian assistance both in the countries of refugee origin and in regions of refugee origin. Aleinikoff succinctly summarizes factors that drove the transition in refugee protection regime from an “exilic bias” to a “source-control bias”⁶¹: 1) “a sharp rise in the number of asylum-seekers”, 2) “cultural differences between refugees and their host countries”, 3) “large

⁵⁶ *Ibid* at 125; See also Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 21 at 142, 169; James Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 119 (footnote 7).

⁵⁷ In this respect, some even unwarrantedly argue that the inclusion of the concept of persecution in the definition of refugee status was a political product of the Cold War: See generally Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) at 24. However, McAdam plausibly argues that the concept of persecution had already been embedded in the concept of refugee status much earlier than the mid-20th century: McAdam, *supra* note 17 at 670, 690.

⁵⁸ Charles B Keely, “How Nation-States Create and Respond to Refugee Flows” (1996) 30:4 Int’l Migr Rev 1046 at 1058.

⁵⁹ See Aleinikoff, *supra* note 55 at 121. In 2012, major refugee-source countries are Democratic Republic of the Congo (54,100), Afghanistan (50,000), Syrian Arab Republic (32,300), Pakistan (30,700), Eritrea (30,200) and Somalia (29,700): UNHCR, *UNHCR Statistical Yearbook 2012: Table of Contents, Main Findings, Introduction*, online: UNHCR <<http://www.unhcr.org/52a722559.html>> at 6.

⁶⁰ Aleinikoff, *supra* note 55 at 121.

⁶¹ *Ibid*.

increases in outlays for refugee support programs and adjudication procedures”, 4) “an end to the Cold War, which removed the ideological attractiveness of liberal resettlement policies.”⁶²

Humanitarian schemes encompass two policies: 1) “preventive measures” in countries of refugee origin or 2) humanitarian assistance in regions of refugee origin. “Preventive measures” entail policies that may prevent outbreak of human displacement in the country of origin, e.g. “monitoring and early warning, diplomatic intervention, economic and social development, conflict resolution, institution building, the protection of human and minority rights and the dissemination of information to prospective asylum seekers.”⁶³ The UNHCR has considered preventive measures to be an emerging trend and strategy in refugee protection, stating that “[w]hereas the older paradigm can be described as reactive, exile-oriented and refugee-specific, the one which has started to emerge over the past few years can be characterized as proactive, homeland-oriented and holistic.”⁶⁴ It has further commented that even in cases of failure of preventive measures, it would be possible to contain the movement of refugees within their countries of origin by providing *inter alia* humanitarian assistance such as relief and rehabilitation assistance.⁶⁵ This approach stresses a “right to remain” or a “right not to be displaced” whereas the traditional refugee regime emphasizes a “right to leave one’s own country”.⁶⁶ The UNHCR has remarked that this approach “could save millions of people from the trauma and hardship of exile and enable millions more to resume a settled life within their own country.”⁶⁷

⁶² *Ibid* at 129.

⁶³ United Nations High Commissioner for Refugees, *The State of the World’s Refugees 1995: In Search of Solutions* (New York: Oxford University Press, 1995) at 43.

⁶⁴ *Ibid* at 15.

⁶⁵ *Ibid* at 16.

⁶⁶ *Ibid* at 17.

⁶⁷ *Ibid* at 21.

Humanitarian assistance schemes (or regional “protection” schemes) refers to a refugee policy that aims at providing humanitarian assistance to refugees, such as providing temporary shelters, daily necessities, minimum medical service, education for children etc., in regions of refugee origin until they may find durable solutions such as voluntary repatriation, settlement in the regions or resettlement somewhere else.⁶⁸ Jeff Crisp outlines the advantages suggested by proponents of regional “protection” regimes as follows:

[...] the “protection in regions of origin” approach could [...] avert the need for refugees and asylum seekers to make difficult, dangerous, and costly journeys to distant parts of the world with unfamiliar cultures. In doing so, [...] this approach would simultaneously deprive human smugglers of their customers, reduce the pressures currently placed on the asylum and social welfare systems of the industrialized states, and thereby discourage the kind of xenophobic sentiments that have emerged in many parts of the developed world. This, in turn, would enable a less frenzied and more rational debate on the refugee policies and immigration needs of the world's more prosperous countries.⁶⁹

The concept of regional “protection” was well explained in James Hathaway and Alexander Neve’s proposal of “solution-oriented temporary protection of refugees”.⁷⁰ They outlined a regime in which a group of states that share common responsibility in relation to refugee crises (“interest-convergence group”) assume different forms of responsibilities (the authors label this “common but differentiated responsibility”).⁷¹ Put another way, member states of the group provide protection in various forms according to their capabilities and domestic circumstances; for example, one state may provide physical protection for refugees while another provides funding.⁷² The “protection” provided under this scheme is basically temporary in nature.⁷³ Thus, a refugee is supposed to be assisted in regions of origin until he or she may find a chance of

⁶⁸ See generally Hathaway & Neve, *supra* note 56; Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 21.

⁶⁹ Jeff Crisp, *Refugee Protection in Regions of Origin: Potential and Challenges*, online: Migration Policy Institute <<http://www.migrationpolicy.org/article/refugee-protection-regions-origin-potential-and-challenges>>.

⁷⁰ Hathaway & Neve, *supra* note 56 at 118.

⁷¹ *Ibid* at 143–44.

⁷² *Ibid*.

⁷³ See *Ibid* at 140.

being repatriated to the country of origin. Furthermore, if a refugee reaches the territory of a developed country which belongs to an “interest-convergence group”, the developed country may relocate the refugee in another state of the same group, e.g., developing country, which may provide physical protection; in this case, the developed country normally provide adequate funding to the developing country.⁷⁴

Hathaway and Neve proposed this regime for various reasons. First, contemporary refugee regime is malfunctioning due to unfair burden sharing of refugee crises and conflicting interests of states in relation to migration controls.⁷⁵ Second, they observe a fear that the reception of refugees whose backgrounds are different from the host community may negatively impact on “the make-up of an asylum state’s community.”⁷⁶ Hathaway and Neve have stressed the relevancy of cultural commonality in the process of reception of refugees. They state that “[t]he existence of ethnic, religious, or other bonds between refugees and the population of a particular host state is often indicative of a situation in which refugees are most likely to be most readily accepted.”⁷⁷ A similar rationale is found in another article by Hathaway in which he proposes “regional and interest-driven alternatives.”⁷⁸ In this article, Hathaway recognizes that “Western states by and large see the admission of refugees of divergent political and social characteristics as presenting threats to their own domestic harmony.”⁷⁹ In this context, he proposes a regional refugee “protection” regime in which a refugee is “protected” in regions of origin rather than in the countries of asylum, particularly, developed countries. Hathaway remarks that “refugees would not have the liberty to seek asylum in the state of their choice but

⁷⁴ See generally *Ibid* at 144-47.

⁷⁵ *Ibid* at 116.

⁷⁶ *Ibid* at 138.

⁷⁷ *Ibid* at 204.

⁷⁸ Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 21 at 183.

⁷⁹ *Ibid* at 179 [footnote omitted].

would rather be afforded protection within a culturally, racially, politically, or otherwise affiliated state.”⁸⁰

Third, the refugee protection regime is a “palliative regime that protects desperate people until a fundamental change of circumstances allows them to go home safely.”⁸¹ As such, the refugee protection system should not be understood as one that obliges individual states to receive unwanted refugees on a permanent basis; rather, repatriation should always be considered a “viable” solution.⁸² Notably, for the sake of the successful repatriation of refugees, Hathaway and Neve regard it critical for the refugee communities to preserve their “social, political, and cultural identity” during the exile.⁸³ In this regard, temporary assistance in regions of origin coupled with the policy of repatriation is preferred. They contend that “geographical proximity between the state of asylum and the country of origin is desirable to allow for ongoing contact between refugee and stayee communities, and ultimately to facilitate repatriation.”⁸⁴

Fourth, a utilitarian concern of expenditure on refugee protection has promoted the regional protection model. It is noted that each year developed countries spend billions of dollars to cope with a small number of refugees who reach their territories while spending only US \$ 1.2 billion to handle more than 80 percent of refugees outside of their territories.⁸⁵ This being the case, Hathaway and Neve argue that “[u]nder a system of common but differentiated

⁸⁰ *Ibid* at 182. This proposal is presumed on two basic propositions: 1) if states in regions of refugee origin (normally underdeveloped states) “were to be guaranteed a sufficient level of financial and material assistance to both meet the needs of the refugees and enhance the standard of living of the host population”, and were to be subject to international supervision that only verifies the “reasonable flow-through” of the assistance to the refugees, they would cooperate by providing physical protection to the refugees on a temporary or long-term basis, and 2) Western states are willing to provide necessary supports for the project as it “would insulate them from the flow of asylum seekers from other regions”: *ibid* at 182-183.

⁸¹ See Hathaway & Neve, *supra* note 56 at 140.

⁸² *Ibid*.

⁸³ *Ibid*.

⁸⁴ *Ibid* at 204.

⁸⁵ *Ibid* at 153.

responsibility, the net resources available for refugee protection would be maximized by calling on states to contribute in ways that correspond to their relative capacities and strengths.”⁸⁶

Peter H. Schuck has also proposed a regional “protection” regime featuring a market system of “refugee protection quota.”⁸⁷ Under this “refugee protection quota in market” regime, a state has a “refugee protection quota” allocated by an international agency and the state may discharge the quota either by providing physical protection to refugees or transfer the quotas to other states by paying the latter states. In other words, a state may purchase “a discharge of its obligation from transferee.”⁸⁸ For example, given domestic hostility toward refugees, a rich state may discharge its quota by paying another state in form of cash, “credit, commodities, development assistance, technical advice” and even weapon.⁸⁹ In this way, this proposal aims at achieving double goals: respecting national interests and providing humanitarian “protection” for refugees.

The legacy of the regional “protection” scheme proposed by Hathaway, Neve and Schuck has continued within academia and the halls of government. In 2003, against the background of UK’s proposal of regional processing schemes, Alexander Betts, in a UNHCR Working Paper, introduced an “inter-state quasi-markets approach to asylum policy, through the separation of purchasing state from providing state”.⁹⁰ This approach basically refers to an outsourcing

⁸⁶ *Ibid* at 211.

⁸⁷ Peter H Schuck, “Refugee Burden-Sharing: A Modest Proposal” (1997) 22:2 Yale J Int’l L 243 at 282.

⁸⁸ *Ibid* at 284.

⁸⁹ *Ibid*.

⁹⁰ Alexander Betts, *The Political Economy of Extra-Territorial Processing: Separating “Purchaser” from “Provider” in Asylum Policy*, UNHCR Working Paper No. 91 (2003), online: UNHCR <<http://www.unhcr.org/3efc0ea74.pdf>> at 1-2. Ronald C. Smith remarks that “[t]he UK proposal prompted Betts to write because it attempts to ‘separate the concept of protecting asylum-seekers, to which the convention binds them [states], from that of admitting them to the country they want to go to.’ If this split can be made, a nation can meet its obligations under international law while handing asylum-seekers over to another safe country for processing purposes”: Ronald C. Smith, “Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea” (2004) 14:1 Journal of Transnational Law & Policy 137 at 140 (the original quote is from Betts, *supra* note 90 at 3).

policy.⁹¹ For example, with regard to the United Kingdom’s various social reforms since 1988, Betts observes that “[w]hile the reforms were broad and diverse, their central feature was for the state to stop being both the funder and the provider of services. Instead, it was to become primarily a funder, purchasing services from alternative and independent producers, whether private, voluntary or public.”⁹² Betts sees that this logic of “quasi-markets” underpins the UK’s proposal of regional processing schemes.⁹³ This being the case, Betts interprets the implication of the UK’s proposal as follows: the extraterritorial processing scheme is to “allow, at its most simple, one state to pay another to provide basic asylum services on its behalf, subject to a contractual relationship.”⁹⁴ Betts neither endorses nor rejects the UK’s proposal; rather, he suggests that the “quasi-markets” approach may be applicable to international refugee protection regimes.⁹⁵ It is important to note that, as of today, the idea of a regional “protection” scheme has been put into practice in the European context, to varying degrees. The European Model of regional “protection” will be examined further in Chapter 4.

More recently, in 2011, Christopher Wellman proposes a very similar approach to Schuck’s market system of refugee quota. Wellman argues for the necessity of an international authority that may assign “shares” (quota) of refugees to be admitted to each state.⁹⁶ Under this approach, a state is not required to open its border to receive the assigned quota; instead, it may

⁹¹ Betts, *supra* note 90 at 7.

⁹² *Ibid.*

⁹³ *Ibid* at 1. The details of the UK’s proposal will be presented in Chapter 4. At this juncture, it would suffice to comment that the UK’s proposal resonates with Hathaway, Neve and Schuck’s proposals of regional “protection” regimes.

⁹⁴ *Ibid* at 9.

⁹⁵ *Ibid* at 15: “[a]ssuming no asymmetric power relations existed between the ‘purchasing’ and the ‘providing’ state, and if enough purchasers and providers entered into a web of agreements, a form of market could be created in which this price would be set by an asylum market clearing process that would allocate asylum claimants to where the net marginal perceived cost of processing the claim was lowest in relation to the valuation of the financial compensation received in development aid. The market incentives inherent in such a system would induce participation by allowing each state to maximise its own perceived interests.”

⁹⁶ Christopher Heath Wellman & Phillip Cole, *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford: Oxford University Press, 2011) at 127, 132.

consider paying another state so that the latter state actually admits refugees who have been assigned to the former state.⁹⁷ Wellman remarks that “the trading of carbon emissions” under the Kyoto Protocol may be in parallel with his approach toward refugee protection.⁹⁸ Under the Kyoto Protocol, a state may transfer (sell) “emission reduction units or any part of an assigned amount” to another state, or may acquire (buy) them from another state.⁹⁹ Wellman comments that there is “nothing inherently wrong with” these mechanisms, as the purpose of the Protocol is not to curb an emission amount from a particular state, but is to “limit total emissions” on a global level.¹⁰⁰ Likewise, he argues, there is nothing inherently wrong with a quota system with the option to transfer refugees to another state for protection, as, after all, refugee polices are to “solve the global refugee problem”.¹⁰¹

In sum, it seems clear that the persecution perspective has provided significant momentum to these regional “protection” schemes by providing a theoretical basis. First, from the persecution perspective, the concept of a refugee has largely divorced from legal concept of refugee status on a policy level; likewise, under the regional “protection” scheme, refugees are offered humanitarian assistance rather than legal status. Second, the persecution perspective sees a refugee as one who flees from various push-factors including persecution, and proposes “push factors-free” environment as a solution for refugeehood. In a similar manner, regional “protection” schemes basically aim to providing a “push factors-free” environment on a temporal basis until refugees may be repatriated to their home country. Third, the persecution perspective may offer support to regional “protection” schemes in spite of their serious shortcomings. As

⁹⁷ *Ibid* at 130.

⁹⁸ *Ibid*.

⁹⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162, UKTS 2005 No 6 at art 3(10)-(11).

¹⁰⁰ Wellman, *supra* note 96 at 131.

¹⁰¹ *Ibid* at 132.

will be discussed in Chapter 4, the most serious challenge against such schemes is that many refugees tend to stay in regions of origin for such a long time without hint of repatriation or resettlement. However, according to the persecution model, protracted refugee situations may not undermine the humanitarian assistance scheme (or the regional “protection” scheme) itself at least on a theoretical sense, as refugees are at least free from distress (particularly, persecution) that they have suffered from in their country of origin. After all, large populations in the world are living in poverty and hardship.¹⁰² Without a strong normative claim against the persecution perspective, some form of regional “protection” schemes may prevail more and more over legal protection in the country of asylum.

Conclusion

Brian Barry observed:

The need for *humanitarian aid* would be reduced in a world that had a basically just international distribution. It would be required still to meet special problems caused by crop failure owing to drought, destruction owing to floods and earthquakes, and similar losses resulting from other natural disasters. It would also, unhappily, *continue to be required to cope with the massive refugee problems that periodically arise from political upheavals*.¹⁰³

The persecution perspective has become a dominant viewpoint on refugee status; it underlies schemes of humanitarian assistance that aim at providing “protection” to refugees in regions of origin as, ostensibly, a “complementary” solution to the institution of asylum under the *Refugee Convention*. Under the widespread influence of the persecution perspective, the political concept of refugee status has significantly diminished, at least on a policy level, to the extent that

¹⁰² According to the World Bank, “[...] in 2011, just over one billion people lived on less than \$1.25 a day, compared with 1.91 billion in 1990, and 1.93 billion in 1981. Even if the current rate of progress is to be maintained, some 1 billion people will still live in extreme poverty in 2015 – and progress has been slower at higher poverty lines”: The World Bank, *Poverty Overview*, online: World Bank < <http://www.worldbank.org/en/topic/poverty/overview#1>>.

¹⁰³ Brian Barry, “Humanity and Justice in Global Perspective” in John W Chapman & J Roland Pennock, eds, *Ethics, Economics, and the Law* (New York: New York University Press, 1982) 219 at 250 [emphasis added].

Convention refugees are treated like other refugees who need some forms of humanitarian relief. From the persecution perspective, governments are not required to provide surrogate political membership or citizenship to refugees. Instead, they are justified in providing the “survival-oriented” refugee policy in regions of origin. Refugees are treated with humanitarian assistance (“survival”) rather than legal protection (“settlement”). In this way, the persecution perspective has made refugee protection a matter of charity, benevolence, or goodwill rather than a matter of legal justice. In response, scholars have mounted a sustained challenge to this analysis. The next Chapter will examine these alternative perspectives on refugee status.

Chapter 2 Refugee Status and Citizenship: The Interdisciplinary Roots of an Alternative Perspective on Refugee Status

Introduction

In Chapter 1, the persecution perspective was presented as a dominant view on refugee status that provides the grounding for a humanitarian approach toward refugees. Even in case law, the persecution perspective has attained such prominence that many tribunals tend to look exclusively for a well-founded fear of persecution in upholding refugee claims. On a policy level, the concept of persecution has been aligned with various *social* push factors such as distress and conflict, and has lost all political connotation. The persecution perspective has created a powerful image of a refugee as a person who is in need of protection from various forms of distress, but not necessarily in need of political membership.

However, a number of legal scholars, historians, political philosophers and international relations theorists have begun to challenge this view.¹ In this Chapter, I focus on their work. These critics have argued that the persecution perspective overlooks the essential element of refugee status, that is, lack of state protection *in the context of the international state system*.² In this dissertation, this view is called the “protection perspective”. The protection perspective basically illuminates the historical and theoretical meaning of refugee status against the

¹ Andrew E Shacknove, “Who Is a Refugee?” (1985) 95:2 *Ethics* 274; Katy Long, “Refugees, Repatriation and Liberal citizenship” (2011) 37:2 *Hist Eur Ideas* 232; Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009); See generally Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008); See generally Charles B Keely, “How Nation-States Create and Respond to Refugee Flows” (1996) 30:4 *Int'l Migr Rev* 1046.

² It is worth noting that refugee status used to be defined by reference to lack of *de jure* or *de facto* state protection toward a certain group, which represents “international anomalies” in the international state system: see James C Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33:2 *Int'l Comp LQ* 348 at 379; Alexander Betts, *Forced Migration and Global Politics* (Chichester, West Sussex: Wiley-Blackwell, 2009) at 44.

background of the nation-states system.³ It takes into account both the role of the state and the international state system as a whole when defining refugee status.⁴ Under the current international state system, the “nation-state” is “the normative basis of a state’s claim to legitimacy”;⁵ everyone must belong to a nation-state and the nation-state should protect its own citizens.⁶ Essentially, the failure of states to uphold their responsibility to provide protection leads to the loss of political membership or citizenship.⁷ This being the case, the core element of refugee status is a ruptured protection relationship (lack of state protection) between a refugee and her nation-state – thus, the loss of *de facto* or *de jure* citizenship – which is manifested in the form of “persecution”.⁸

At this early juncture, it may be helpful to employ Jean-François Durieux’s categorization of three paradigms of refugees: “the Admission Paradigm”, “the Rescue Paradigm”, and “the Non-Return Paradigm”.⁹ He argues that the concept of a refugee does not refer to one reality; rather it denotes “three distinct realities”.¹⁰ In Durieux’s three paradigms, each paradigm refers to a distinct mode of refugeehood, which requires a unique remedy. First, a Convention refugee belongs to the Admission Paradigm in which he or she receives “admission and inclusion into a new community” as a remedy– that is, surrogate political membership.¹¹ He even argues that “[c]ontrary to an emerging trend in refugee scholarship, I hold that the principle

³ See generally T Alexander Aleinikoff, “State-Centered Refugee Law: From Resettlement to Containment” (1992) 14 Mich J Int’l L 120 at 120; Keely, *supra* note 1 at 1051, 1057.

⁴ See generally Andrew E Shacknove, *supra* note 1; see Long, *supra* note 1; see Haddad, *supra* note 1; see Keely, *supra* note 1; see Price, *supra* note 1.

⁵ Keely, *supra* note 1 at 1049.

⁶ Aleinikoff, *supra* note 3 at 120; Keely, *supra* note 1 at 1051, 1057.

⁷ See generally Haddad, *supra* note 1 at 4.

⁸ See generally Aleinikoff, *supra* note 3 at 123 (footnote 14). See generally *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 at para 89: “[...] the rationale underlying international refugee protection is to serve as ‘surrogate’ shelter coming into play only upon failure of national support.”

⁹ Jean-François Durieux, “Three Asylum Paradigms” (2013) 20:2 Int’l J Minor Group Rts 147.

¹⁰ *Ibid* at 152.

¹¹ *Ibid* at 153.

of non-refoulement is not the foundation of refugee status under the 1951 Convention. Rather, *the Convention's focus is on admission as a positive duty.*"¹² Second, the Rescue Paradigm deals with the dominant image of refugees "as victims of disaster, or people in distress" whether man-made or natural.¹³ The paradigm focuses on "saving lives" of refugees rather than providing surrogate political membership to them.¹⁴ Third, those who are protected against *refoulement* under human rights law (rather than refugee law) are considered as refugees under the Non-Return Paradigm. These are neither Convention refugees nor those who suffer from disaster; however, if returned, they may be subject to "arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment."¹⁵ These are people who receive so-called "complementary protection".¹⁶ Each paradigm does not completely independent; rather it overlaps in a certain degree.¹⁷ In any event, his analysis on three different types of refugees is inspirational in illuminating the importance of asylum as the remedy for Convention refugees.

The protection perspective pays particular attention to the political nature of persecution with regard to Convention refugees. For example, Matthew E. Price comments that "persecution is not just another type of harm against which protection is needed. It is a *political* harm that effectively expels victims from their political communities, and it calls for a political response."¹⁸ Seen in this way, refugeehood is clearly distinguishable from other humanitarian emergencies where people are in need of various types of aid. In addition, the ultimate remedy

¹² *Ibid* at 155 [emphasis added] [footnote omitted].

¹³ *Ibid* at 159.

¹⁴ *Ibid* at 159-160 [footnote omitted].

¹⁵ *Ibid* at 168.

¹⁶ *Ibid*.

¹⁷ *Ibid* at 152.

¹⁸ Price, *supra* note 1 at 167.

for refugee status is to provide surrogate political membership or citizenship rather than to provide mere humanitarian assistance.¹⁹

In this chapter, I explore and assess theoretical arguments that underlie the protection perspective in various scholarly fields. Interdisciplinary research shows a pattern of thinking in which the concept of refugee status is formulated as inextricably associated with 1) loss of political membership or citizenship 2) in a particular historical background or on a theoretical level. In particular, this chapter examines the argument that refugees, because they suffer from exclusion from their political community and are in need of surrogate political membership, are a categorically distinctive group of people from those who need humanitarian assistance.

After conducting detailed analysis of various arguments, I will conclude that the protection perspective provides a plausible and balanced account of the meaning of refugeehood and offers insight into what should be an adequate form of remedy. The protection perspective illuminates a forgotten aspect of refugee status (being expelled from a political group), and buttresses the claim for surrogate political membership or citizenship as an ultimate remedy for refugee status. Furthermore, it is worth noting that the protection perspective uses the language of “relationship” in defining refugee status. It is not a social push factor that unilaterally drives a refugee out of her country, but instead it is the broken relationship between a refugee and her nation-state that entitles her to seek asylum in other countries. In this regard, the protection perspective goes much deeper into the underlying cause of refugeehood than the persecution perspective.

Refugee Status and the Emergence of a Nation-States System: Historical Analysis of Refugee Status

¹⁹ See *ibid* at 168.

A prominent feature of the protection perspective is its proposal that the concept of refugeehood has emerged against the background of formation of the nation-states system.²⁰ This historical account gives much deeper meanings to refugee status by drawing our attention to the issue of “belonging” in a nation-state. In this historical analysis of refugee status, modern refugees are qualitatively different from so-called “ancient refugees” and other types of refugees in history.²¹ There is no doubt that in ancient and medieval times, there were fugitives who crossed boundaries to seek asylum. However, modern refugees are qualitatively different on account of the emergence of well-defined political and jurisdictional borders founded on conceptions of national self-determination.²² Emma Haddad recognizes that “although the forced displacement of peoples is not new, it was only in the twentieth century that the refugee figure was invented as one particular sub-category due to the international system of separate sovereign states that creates her.”²³

In medieval times or in the empire era, people’s movement was relatively free, as there was no concept corresponding to the contemporary political borders through which states monopolize control over the movement of people.²⁴ Haddad observes that “[j]urisdictional boundaries in the medieval world were more porous and overlapping than the rigid, impenetrable

²⁰ See generally Aleinikoff, *supra* note 3 at 120; see Keely, *supra* note 1 at 1051, 1057.

²¹ In ancient Greece, a person might enter into certain places, e.g. a temple, in order to seek asylum (“the rite of *hiketeia* or supplication”), as the places were commonly regarded as inviolable places: Price, *supra* note 1 at 26. Price stresses that “[h]iketeia’s international political importance [...] stemmed less from the refuge it afforded to local criminals, or to exiles who had been forced to leave their home states, than from the shelter it gave to fugitives who had fled abroad and were sought for extradition”: Price, *supra* note 1 at 27-8. In this regard, Price argues for two purposes in the original institution of asylum: 1) the protection of fugitives who suffer from political harms and 2) the expression of judgment over the unjust regime which demands the extraction of a fugitive: Price, *supra* note 1 at 25–6, 57.

²² Haddad, *supra* note 1 at 63-4.

²³ *Ibid* at 65.

²⁴ See *ibid* at 51, 64–65; John Torpey rightly argues that states have successfully monopolized “the legitimate means of movement” of people: John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State*, Cambridge studies in law and society (Cambridge: Cambridge University Press, 2000) at 7. Here, the empires refer to those that had existed in the late 19th century and early 20th century, such as the Ottoman Empire, Russia and Austria-Hungary: See generally Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press, 2013).

borders of the modern world.”²⁵ However, in the current international state system, everyone must live within well-defined political and jurisdictional boundaries set up by nation-states.

According to the *Refugee Convention*, a refugee is a person who crosses established political and jurisdictional boundaries. Scholarship has observed that such boundaries are the product of the late 19th century or the early 20th century.²⁶ During this period, nation-states became “the global norm for political organization.”²⁷ Katy Long has argued that the origin of the modern refugee concept can be traced back to the time of collapse of empires and emergence of nation-states in the early 20th century when “unmixing” of peoples within the collapsed empires was a norm in order to secure “durable peace in Europe” through making “homogeneous nation-states.”²⁸

A growing number of historians support the thesis that refugee status originated from historical events in the late 19th and early 20th century. For example, Charles B. Keely locates the origin of modern refugees in the emergence of nation-states as “the mode of geopolitical organization”.²⁹ Keely states that “[n]ation-building that seeks to manage or change multinational reality is likely to produce refugees, as shown by 500 years of history from the expulsion of Moors and Jews from Spain in 1492 to recent ethnic cleansing in Bosnia.”³⁰ He identifies “three sources of refugee production”: “multinational realities that conflict with the nation-state norm, ideological disagreement, and state failure.”³¹ Importantly, under the nation-state model, individuals are supposed to be protected by their own states. The absence of such

²⁵ Haddad, *supra* note 1 at 51. Similarly, Jennifer Hyndman observes that “[b]efore the twentieth century, little attention was paid to the precise definition of a refugee, since most of those who chose not to move to the so-called New World were willingly received by rulers in Europe and elsewhere”: Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 6.

²⁶ Haddad, *supra* note 1 at 69; Hyndman, *supra* note 25 at 6.

²⁷ Keely, *supra* note 1 at 1051.

²⁸ Long, *supra* note 1 at 236–38.

²⁹ Keely, *supra* note 1 at 1056.

³⁰ *Ibid* at 1054.

³¹ *Ibid* at 1052.

protection would trigger refugee movements which may in turn undermine or threaten the international states system itself.³² Similarly, Panikos Panayi has observed that the origin of modern refugees is located in both the collapse of empires and uprising of nationalism under the nation-states system.³³ Panayi points out that “the rise of nationalism in the nineteenth century acts as a key to the ethnic cleansing and refugee creation which followed the collapse of the Ottoman Empire.”³⁴

Peter Gatrell arrives at similar conclusions when examining the meaning of refugee status from a broader institutional perspective. He observes that the refugee crisis in the 20th century differs from previous refugee movements in that “[t]wentieth-century displacement was unprecedented by virtue of being linked to the collapse of multi-national empires, the emergence of the modern state with a bounded citizenship, the spread of totalizing ideologies that hounded internal enemies, and the internationalization of responses to refugee crises.”³⁵ Thus, the emergence of nation-states has arguably created “even more favourable conditions for the persecution of minorities who did not meet the criteria of political membership.”³⁶ In this regard, Gatrell critiques an excessively humanitarian focus on refugee issues without investigating underlying causes of displacement; he laments that “history was kept out of the picture; it was an unnecessary distraction and an unwelcome complication.”³⁷ With respect to the sufferings of Russian and Armenian refugees in the early 20th century, Gatrell argues that “while impressive humanitarian efforts addressed their material needs, little attempt was made to understand the

³² See *ibid* at 1057.

³³ Panikos Panayi, “Imperial Collapse and the Creation of Refugees in Twentieth-Century Europe” in Panikos Panayi & Pippa Virdee, eds, *Refugees and the End of Empire: Imperial Collapse and Forced Migration in the Twentieth Century* (New York: Palgrave Macmillan, 2011) 3 at 17.

³⁴ *Ibid.*

³⁵ Gatrell, *supra* note 24 at 2 [footnote omitted].

³⁶ *Ibid* at 3.

³⁷ *Ibid* at 284.

root causes of their displacement during the course of history.”³⁸ Importantly, Gatrell gives a hint as to why nation-states began to concentrate on developing a humanitarian approach to refugee issues in the early 20th century. He argues that “[m]ember states insisted that the League of Nations should keep ‘political’ questions out of refugee relief. This encouraged a sense that refugees were miserable flotsam and jetsam.”³⁹

Aristide R. Zolberg and his co-authors present the idea that the origin of the word, “refugee”, can be traced back to as early as the 17th century and applied to the Huguenots who were “persecuted Calvinists from France.”⁴⁰ Their work covers religious and political refugees in the 17th and 18th century, and national minorities and the stateless from the late 19th century to the middle of 20th century. Even though their analysis of concept of a refugee is traced to these roots, they also point out “the dynamics of absolutist state-formation” as the underlying cause of refugee status. Importantly, they observe that the collapse of empires brought about by World War I and the concomitant emergence of nation-states provided a background condition for creating national minorities and the stateless. Zolberg and his co-authors forcefully argue that “[t]he proliferation of stateless persons, of whom the most prominent were the Jews, was the culmination of the nation’s conquest of the state.”⁴¹

In sum, the historical analysis of refugee status demonstrates that the modern concept of refugee status is a product of both the collapse of empires and emergence of nation-states system. It is significant to acknowledge that this analysis conceives a refugee to be a person who has become “stateless”, thus has lost “belonging” and “protection”, in the nation-states system. In the

³⁸ *Ibid* at 54.

³⁹ *Ibid*.

⁴⁰ Aristide R Zolberg, Astri Suhrke & Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989) at 5.

⁴¹ *Ibid* at 13

empire era, different nations lived together relatively in peace under the powerful institutional governance represented by an emperor.⁴² However, in the nation-state era, the issue of belonging to a political community came to the fore, as, inevitably, some began to be excluded from a particular political community, wandering across the borders, looking for another political community. The historical research brings to the fore this issue of belonging in relation to refugee status, deepening the concept of refugee status from *mere* “*helplessness*” to the issue of “*belonging*” (*that is, citizenship*).

This being so, what is clear from this historical perspective is that refugee status should be defined in terms of the ruptured protection relationship between a refugee and a nation-state rather than mere push factors. The relational terms, such as belonging, state protection, political membership or citizenship (rather than persecution per se), are given primacy in relation to the concept of refugee status. Certain international relations theorists have recently begun to pay attention to this relational language of refugee status, and have further developed the ideas suggested in the historical analysis.

Refugee Status, Citizenship and State Sovereignty: International Relations Perspectives on Refugee Status

In general, the dominant schools of international relations (IR) have treated the concept of refugee status as pre-given along with the conceptions of citizenship and state sovereignty.⁴³ Put another way, refugee status is regarded as an “ahistorical” concept, which explains why refugee scholarship has tended to focus on how to deal with refugees in a more humanitarian way within the international state system in which the implication of state sovereignty is fixed, and states’

⁴² See generally Gatrell, *supra* note 24 at 71.

⁴³ See Betts, *supra* note 2 at 43.

interests and identities are also fixed.⁴⁴ In mainstream IR, there has been little room for critical analysis of the relationship among the concepts of “citizenship”, “state sovereignty” and “a refugee”. However, an alternative view within IR – provided by the English School and by Constructivists – has proposed a different view.⁴⁵

The thesis of the alternative view is that the concept of refugee status is a historical and relational concept to be understood against the background of the emergence of nation-states. In this regard, refugeehood has much deeper meanings in a historical and theoretical sense. The views proposed by two prominent scholars, Alexander Betts and Emma Haddad, are worthy of particular note, as their analyses are inspirational in illustrating this alternative view on refugee status. Haddad proposes a hybrid of English School and Constructivism in which she highlights a historical and institutional account of the refugee concept. By contrast, Betts canvasses various international relations theories that shed light on different aspects of refugee status.

Haddad argues that in order to address contemporary refugee issues, it is necessary to address the fundamental relationship between the concepts of refugee status, citizenship and state sovereignty.⁴⁶ She critiques the tendency to see refugee flows as unique crises by observing that “[r]efugee flows are too often seen as isolated events, removed from the context which gives rise to them. This gives impression that refugees are only created when things go wrong.”⁴⁷ Instead,

⁴⁴ *Ibid.*

⁴⁵ With regard to the English school, two key features – its historical and institutional approach – are worth of attention. Haddad states that “[t]he English school perspective provides a convincing account of the historical origins of the international states system and the main institutional framework of international society, which is important for demonstrating the existence of the refugee as a concept”: Haddad, *supra* note 1 at 13. This chapter presents the historical approach and Chapter 6 will provide the institutional approach in relation to state sovereignty. Constructivism basically “[...] emphasizes the *social* and *relational* construction of what states are and what they want”: Ian Hurd, “Constructivism” in Christian Reus-Smit & Duncan Snidal, *The Oxford Handbook of International Relations* (Oxford, Oxford University Press, 2008) 298 at 299 [emphasis in original]. Chapter 6 will present core arguments of constructivism. It may not be possible to demarcate a clear-cut boundary between English school and Constructivism, as the former has elements of the latter, or vice versa: see Betts, *supra* note 2.

⁴⁶ Haddad, *supra* note 1.

⁴⁷ *Ibid* at 4.

she locates the concept of a refugee within a historical context of emerging states endowed with Westphalian sovereignty and a national self-consciousness.⁴⁸

First, state sovereignty, a central feature of the Westphalian state system, has developed in a way that “expresses the border between inside and outside, citizen and non-citizen, that frames the contemporary understanding of political space and the international states system as a whole.”⁴⁹ Second, a national self-consciousness that had arisen out of the French revolution contributed to the formation of the nation-states system.⁵⁰ Haddad remarks that “[a]s the rights of man came to be superseded by the rights of nations, so a national consciousness began to emerge and take hold among the peoples of Europe. Dynastic principles of legitimacy gave way to nationalism and popular politics, which were accompanied by the concepts of democracy and citizenship.”⁵¹ Put another way, during the emergence of the modern state system, some residents who had lived peaceably with neighbors began to be designated as outsiders, being expelled from their own political communities. It was the institution of state sovereignty that enabled a state to legitimately expel them in the international state system, and it was nationalism that provided normative standard by which to choose who should be included or excluded.⁵²

Accordingly, it may be argued that the modern state system – with its principal features, citizenship and state sovereignty – is the origin of the modern concept of a refugee.⁵³ The development of the modern state system reinforced the constitutive relationship among “the state-citizen-territory hierarchy” while defining refugees as outsiders from this hierarchy.⁵⁴ Haddad even argues that “[...] the refugee is not the consequence of a breakdown in the system

⁴⁸ *Ibid* at 49, 53, 209.

⁴⁹ *Ibid* at 51.

⁵⁰ *Ibid* at 53.

⁵¹ *Ibid*.

⁵² *Ibid* at 55.

⁵³ See Haddad, *supra* note 1.

⁵⁴ *Ibid* at 55.

of separate nation-states, rather she is an inevitable if unintended part of international society.”⁵⁵

Haddad’s view on refugee status well illuminates the historical and relational characteristic of refugee status. Historically, refugees emerged during the formation of the nation-states system, and, relationally, they are inextricably associated with the ruptured relationship between the individual and the state – that is, the loss of political membership or citizenship.

In a similar vein, Betts duly recognizes both a historical and relational account of refugee status. He observes that, within the English School, “the very concept of a refugee cannot be seen in isolation from the historical creation of the contemporary system of nation-states.”⁵⁶ With respect to a relational aspect of refugee status, Betts plausibly remarks that “[c]oncepts such as ‘refugee’ and ‘IDP’ exist in relation to sovereignty and the state. Their legal definitions are entirely relational to the state system. The notions of a ‘refugee’ or ‘IDP’ only make sense insofar as they describe a relationship between the concepts of citizen, state, and territory that comprise the nation-state.”⁵⁷ Put another way, the concept of a refugee emerged within the modern state system, and, as such, it is essentially a “state-centered” concept rather than a humanitarian concept.⁵⁸ Betts argues that “[i]ndeed the state system is premised upon an unproblematic nexus between state, citizen, and territory. However, the existence of refugees and IDPs represent anomalies to this.”⁵⁹ The implication is that refugee status is deeply connected with *systemic failure rather than individual misfortune*. Betts rightly observes that “[...] the categories of forced migration and the state system are two sides of the same coin.”⁶⁰

⁵⁵ *Ibid* at 209.

⁵⁶ Betts, *supra* note 2 at 31.

⁵⁷ *Ibid* at 44.

⁵⁸ See also Aleinikoff, *supra* note 3 at 122.

⁵⁹ Betts, *supra* note 2 at 44.

⁶⁰ See generally Betts, *supra* note 2 at 56.

This novel idea of IR reinforces the thesis of the protection perspective that a refugee is one who is designated as an outsider, being judged as an incompatible person with her nation-state (by state sovereignty), losing *de facto* or *de jure* citizenship, thus enjoying no state protection in the nation-states system. The protection perspective provides this balanced view of refugee status by squarely locating the issue of refugee status in the discourse of citizenship.

Refugee Status and Loss of Political Membership or Citizenship

The core insight of the protection perspective is that refugee status is primarily related to the loss of political membership or citizenship rather than persecution per se. Long, in *Refugees, repatriation and liberal citizenship*, has remarked that “[a]ll three ‘durable solutions’ developed by the international community in the twentieth century – repatriation, resettlement and local integration – are intended to restore a refugee’s access to citizenship, and through citizenship the protection and expression of their fundamental human rights.”⁶¹ She specifically pays attention to “repatriation”, stating that repatriation has been a preferred solution, as it not only provides legal citizenship to refugees but also restore a sense of “belonging” which encompass ethno-cultural elements of citizenship.⁶² Long also draws attention to the political nature of refugeehood, stating that “refugeehood must be viewed as a political state, requiring a political remedy and not just a humanitarian response.”⁶³ For Long, “refugees are those who have been unjustly expelled from their political community.”⁶⁴ Accordingly, it is imperative to restore political membership or citizenship to refugees.

⁶¹ Long, *supra* note 1 at 232 (abstract).

⁶² *Ibid* at 234.

⁶³ *Ibid* at 233.

⁶⁴ *Ibid* at 232 (abstract).

The protection perspective illuminates this indispensable relationship between refugee status, loss of citizenship and lack of state protection. This tripartite relationship is vital. Refugee status is a relational concept. Long remarks that “the relationship between a refugee and the country of his nationality is, under normal circumstances, governed by the obligations of ‘protection’, under the broad terms of some form of social contract or political trust.”⁶⁵ Here, “protection” is meant to be much more than simple personal safety; it refers to all the protection privileges that are ensured by a state through the institution of liberal citizenship.⁶⁶ Therefore, refugee status is the manifestation of a breach of “social contract or political trust” with a state – thus, the loss of political membership – which has rendered a person without state protection in the international states system. In this context, Long forcefully argues that:

Recent interpretations of the definition [of the Convention refugee] have tended to focus on debates surrounding the notion of “persecution” as the requisite standard for determining refugee status. Yet arguably the more important concept, at least in terms of political philosophy, is that of “protection”.⁶⁷

From this protection perspective, an appropriate remedy for refugeehood is to provide a “liberal” citizenship.⁶⁸ Refugee status reflects *de facto* or *de jure* “statelessness” rather than mere “helplessness”.⁶⁹

This political aspect of refugeehood has been noted by numerous other scholars. Among the most prominent is Matthew Price who presents refugees as victims expelled from “their

⁶⁵ *Ibid* at 233.

⁶⁶ *Ibid*. Long also argues that “[...] contemporary politics does connect refugeehood to a loss of liberal citizenship. Within this understanding citizenship is specifically understood as a form of active political membership, ensure protection against the arbitrary deprivation of liberal political rights. However, it is clear that citizenship and protection should not be seen as interchangeable terms: instead, liberal citizenship is a specific model of state-based protection”: *ibid*.

⁶⁷ *Ibid* at 233.

⁶⁸ *Ibid*.

⁶⁹ See *ibid* at 239: “[t]he status of ‘refugee’ [...] was connected to the idea of statelessness, or the deprivation of citizenship rights by the state.”

political communities”.⁷⁰ He too argues for the necessity of providing political membership as an ultimate remedy for refugeehood.⁷¹ Price does not deny all the benefits that may derive from a policy of humanitarian aid; instead, he attempts to maintain the political root of the institution of asylum intact from an emerging trend of humanitarian assistance.⁷² He substantiates such a claim through historiographical analysis. Price observes that formerly the institution of asylum used to have two purposes: 1) the protection of fugitives who suffer from political harms and 2) an expressive “posture of condemnation” over the unjust regime that demands extradition of a fugitive under international criminal law.⁷³ In this regard, Price makes a point that “for most of its history, asylum has been viewed in political, rather than humanitarian, terms.”⁷⁴

A. Convention Refugees and Other Refugees

Price’s analysis of refugee status takes an important segment of the protection perspective, demarcating the political concept of refugee status and other types of refugees. Price is adamant that the political conception of persecution should be distinguished from other types of harms.⁷⁵ In explicating this point, Price uses “John Rawls typology of ‘burdened societies’ and ‘out-law states’” and “Arendt’s distinction between a deprivation of rights and ‘the calamity of the rightless’”.⁷⁶ In “burdened societies” where there is a “deprivation of rights”, people may suffer from various push factors such as natural disasters, civil wars, and a state’s emergency measure

⁷⁰ Price, *supra* note 1 at 168, 191.

⁷¹ *Ibid* at 168.

⁷² In fact, Price argues for an optimal mixture of various refugee policies, e.g., asylum, resettlement and humanitarian protection: *ibid* at 182.

⁷³ *Ibid* at 25-6, 57, 167, 191.

⁷⁴ *Ibid* at 25. Price observes that the institution of asylum has extended its scope of applicability from criminal law to migration law with the emergence of “closed borders”, and he remarks that “in a world of closed borders, refuging admittance was functionally equivalent to extradition: either case, the foreigner was returned to his state of origin”: *ibid* at 52.

⁷⁵ *Ibid* at 74.

⁷⁶ *Ibid* at 72-4.

of limiting citizens' rights.⁷⁷ In such a case, a state is not able to provide protection owing to force majeure, even though it is willing to provide it. As such, people at least retain their original political membership "in what Rawls calls a 'people' and what Arendt calls a 'community'".⁷⁸ In this case, it would suffice to provide some humanitarian assistance or relief even on a temporary basis.⁷⁹

On the other hand, in either "out-law states" or "the calamity of the rightless", people suffer from a lack of protection rather than being the victims of mere push factors; in this case, mere humanitarian assistance may not be a solution.⁸⁰ Price argues that "[...] to be persecuted is to have one's rights go unprotected because they are unrecognized."⁸¹ In the international state-based system, such a recognition is possible only through securing one's right to political membership or citizenship. Notably, the basic premise of Price's arguments is that a state's unwillingness to protect (not, a state's inability to protect) brings about refugee status.⁸² Later in this section, I will revisit Price's distinction between a state's unwillingness and inability to protect its citizens.

Andrew E. Shacknove also put forwards similar arguments. Basically, he argues that the core element of refugeehood is "neither persecution nor alienage", but "the absence of state protection of the citizen's basic needs".⁸³ What is significant in Shacknove's analysis is that, like

⁷⁷ *Ibid* at 74-5.

⁷⁸ *Ibid* at 75.

⁷⁹ *Ibid* at 74-5, 159, 191. Price argues that "[t]he appropriate stance of outsiders to burdened societies is to lend assistance, not to condemn their failures": *ibid* at 73.

⁸⁰ *Ibid* at 73.

⁸¹ *Ibid* at 75.

⁸² Price's approach calls into question jurisprudence of common law countries such as Canada and the United Kingdom in which courts do not distinguish the two conceptions – a state's "inability to protect" and "unwillingness to do so" in refugee-decision making – as long as a refugee claimant has a well-founded fear of persecution for a Convention reason; such jurisprudence, according to Price, has unnecessarily broadened the scope of refugees, thus being "inconsistent with the political conception of asylum": *ibid* at 146, 153-159. In this regard, Price makes a distance from Shacknove's idea of refugee status below.

⁸³ Shacknove, *supra* note 1 at 277.

proponents of the protection perspective, he connects the concept of refugee status to the phenomenon of “the severing of the normal social bond” between a citizen and a state.⁸⁴ The social bond refers to a “bond of trust, loyalty, protection, and assistance between the citizen and the state.”⁸⁵ In this regard, refugeehood is a political rather than a humanitarian concept. However, Shacknove’s concept of refugee status differs from the protection perspective in that the absence of protection is not exclusively associated with the loss of citizenship. Instead, the concept of “basic needs” refers to “physical security, vital subsistence, and liberty of political participation and physical movement.”⁸⁶ As such, this idea of refugee status is sufficiently broad to cover non-Convention refugees.⁸⁷ Even though Shacknove argues that refugeehood “is exclusively a political relation between the citizen and the state”,⁸⁸ his view on refugeehood ironically promotes the persecution perspective in a variety of ways.

Matthew Lister has pointed out these shortcomings in Shacknove’s arguments. Lister critiques Shacknove’s concept of refugee status as one that blurs the distinction between Convention refugees and other “refugees”. Lister squarely demarcates Convention refugees and non-Convention refugees in terms of what we owe to them. First, he examines the case of those whose “basic needs” are not met due to poverty. In such case, he argues that “it is highly

⁸⁴ *Ibid.* For Shacknove, “the normal bond between the citizen and the state can be severed in diverse ways, persecution being but one”: *ibid* at 276.

⁸⁵ *Ibid* at 275.

⁸⁶ *Ibid* at 281. See also *ibid* at 281(footnote 18): “[b]y ‘vital subsistence’ is meant unpolluted air and water, adequate food, clothing, and shelter, and minimal preventative health care [...] The reason for accepting political participation and liberty of movement as basic needs is that both are necessary if effective institutions for self-protection, the ultimate barrier against the deprivation of security and subsistence, are to be built and maintained [...]”

⁸⁷ *Ibid* at 278. Shacknove attempts to circumscribe this broad concept of refugee status by stating that “[r]efugee status should only be granted to persons whose government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible”: *ibid* at 284.

⁸⁸ *Ibid* at 283; see also *ibid* at 277-78: “With the proponents of the current conception of refugeehood, I take as my point of departure the assumption that morally (if not in fact) a normal, minimal bond of trust, loyalty, protection, and assistance has always existed between virtually every human being and some larger collectivity-be it clan, feudal manor, or modern state-and that the refugee is spawned when these minimal bonds are ruptured.”

plausible that we may best meet their needs not by allowing asylum in other countries, but rather by helping these people ‘in place’, by providing, first, emergency assistance, and in the long run by promoting both economic and political development.”⁸⁹ On the other hand, with respect to those whose “basic needs” are not met due to Convention reasons, he is adamant that “[i]n the large majority of such cases the only plausible solution to the problem is to provide these persons with a new state, and the only plausible way to do this is to allow them to enter and remain in an existing state.”⁹⁰ Lister pays attention to the fact that, in the case of those who are persecuted on account of the Convention reasons, “their state has not just failed to meet their needs but has actively turned against them.”⁹¹ This being the case, the protection perspective makes a clear distinction between Convention refugees and non-Convention refugees on a normative basis, propelling a different direction toward “rightful” remedy for the Convention refugees, that is, surrogate political membership or citizenship.

B. Political Harm inflicted by Non-State Actors and Social Contract Theory

At this juncture, one may point out that the protection perspective appears to be premised on the proposition that a state should be the agent of persecution whether by its active participation (as suggested by Lister) or through its unwillingness to protect (as suggested by Price). However, this is in stark contrast to jurisprudence of major refugee-intake countries such as Canada and the United Kingdom.⁹² For example, in *Ward*, the Supreme Court of Canada duly acknowledged that the state does not need to be the agent of persecution. La Forest J. stated as follows:

[...] I find that state complicity is not a necessary component of persecution, either under the “unwilling” or under the “unable” branch of the definition. A subjective fear of persecution combined with state inability to protect the claimant creates a presumption

⁸⁹ Matthew Lister, “Who are Refugees?” (2013) 32:5 Law and Phil 645 at 660 [footnote omitted].

⁹⁰ *Ibid* at 662.

⁹¹ *Ibid* at 661-662 [footnotes omitted].

⁹² See generally Price, *supra* note 1 at 153-159.

that the fear is well-founded.[...] As long as this persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area [...].⁹³

Put another way, the Court in *Ward* duly acknowledged that state inability to protect its citizens in the case of persecution by non-state actors may render a person entitled to be recognized a Convention refugee. It is noteworthy that Price, in his proposed distinction between a state's unwillingness and inability to protect, is averse to such jurisprudence, as he believes that it "expands eligibility for asylum in a manner that is inconsistent with the political conception of asylum."⁹⁴ As shown above, according to Price, one of core aspects of asylum is its expressive posture of condemnation over a state that unjustly persecutes its own citizen. For Price, state inability to protect is not something to blame, but to be assisted with humanitarian assistance or relief.⁹⁵

However, the protection perspective as proposed in this dissertation embraces the case where a state is *unable to protect* its citizen who suffer persecution by non-state actors. While fully acknowledging the political root of asylum as proposed by Price, on the basis of aforementioned research from history and international relations theory, I propose that a certain form of social contract theory may provide a more solid ground to base an adequate account of refugee status in political philosophy. If modern refugee status emerged during the formation of the international state system, it would be appropriate to examine the meaning and purpose of a state through a lens of relevant political theory. Social contract theory, despite its shortcomings

⁹³ *Ward*, *supra* note 8 at para 52.

⁹⁴ Price, *supra* note 1 at 146.

⁹⁵ *Ibid* at 159.

and outdated features, would illuminate important aspects of statehood; John Locke's concept of "trust" is still particularly relevant in liberal political thinking.⁹⁶

Social contract theory is primarily concerned with political legitimacy of governments.⁹⁷ Free and equal individuals look for an political mechanism through which to realize their political goals such as peace, preserving life and maintaining equality in relation to one another.⁹⁸ When it comes to the debate on "a state's inability to protect" in refugee determination process, the views of two political philosophers are worth noting – Thomas Hobbes and John Locke. The key observation accepted by both is that a state is the one that is able to provide adequate protection without leaving a sphere of society uncontrolled by its sovereign power.⁹⁹ The purpose of contract, whether historical or hypothetical, is that a state is to be able to protect its citizens; otherwise, the contract is deemed broken.

For example, for Hobbes, free and equal individuals confer "all their power and strength upon one man or upon one assembly of men" to overcome a warlike state of nature and to reach "the common peace and safety".¹⁰⁰ Hobbes states that "[t]his done, the multitude so united in one person is called a COMMONWEALTH [...] And he that carryeth this person is called SOVEREIGN, and said to have *sovereign power*, and every one besides, his SUBJECT."¹⁰¹ In the Hobbesian vision, a state is supposed to exercise its absolute sovereign power over all matters within its political boundary; otherwise, it cannot secure peace from the state of nature,

⁹⁶ See John Locke, *The Second Treatise of Civil Government: and A Letter Concerning Toleration*, J. W. Gough, ed. (Oxford: Basil Blackwell, 1946) at xxiv, xxxii (Introduction by Gough).

⁹⁷ See Michael H Lessnoff, ed, *Social Contract Theory* (Oxford, UK: Basil Blackwell, 1990) at 3.

⁹⁸ See *ibid.*

⁹⁹ The meaning of sovereignty differs among theorists. For example, Hobbes envisaged absolute sovereign power; Locke, a sovereign power limited by the purposes that gave rise to it (I appreciate Dr. Jeremy Webber's comments on Locke's vision).

¹⁰⁰ Thomas Hobbes, *Leviathan*, A. P. Martinich, ed. (Peterborough, Ontario: Broadview Press, 2002) at paras 8, 13.

¹⁰¹ *Ibid* at paras 13-4.

that is, war.¹⁰² Vicente Medina rightly comments that “[a]ccording to Hobbes, political authority or sovereignty is granted by the people as a ‘gift’ to the sovereign only if and so long as the sovereign protects them.”¹⁰³

For Locke, the necessity of a state lies in protecting each individual’s natural rights, that is, preserving one’s “life, liberty and estate”.¹⁰⁴ A state functions as “a judge on earth with authority to determine *all* the controversies and redress the injuries that may happen to *any* member of the commonwealth [...]”.¹⁰⁵ Peculiar to Locke’s concept of social contract is that he introduces the concept of “trusteeship” when addressing the relationship between a society and a state.¹⁰⁶ Locke states as follows:

[...] To this end it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature.¹⁰⁷

Put another way, in Locke’s vision, a state is entrusted by a society to perform its duty to protect members of a society according to established law. As a corollary, if governments fail to perform the entrusted duties, the governments are deemed non-existent.¹⁰⁸ Locke has remarked that

¹⁰² See *ibid* at para 1: “[t]he final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves (in which we see them live in commonwealths) is the foresight of their own preservation and of a more contented life thereby, that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent [...] to the natural passions of men, when there is no visible power to keep them in awe and tie them by fear of punishment to the performance of their covenants and observation of those laws of nature set down in the fourteenth and fifteenth chapters”; See also Vicente Medina, *Social Contract Theories: Political Obligation or Anarchy?* (Savage, Maryland: Rowman & Littlefield, 1990) at 19.

¹⁰³ Medina, *supra* note 102 at 18.

¹⁰⁴ Locke, *supra* note 96 at paras 87-88. See also *ibid* at para 134: “[t]he great end of men’s entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society: the first and fundamental positive law of all common wealths, is the establishing of the legislative power [...]”.

¹⁰⁵ *Ibid* at para 89 [emphasis added].

¹⁰⁶ *Ibid* at xxiv (in Gough’s Introduction); Lessnoff, *supra* note 97 at 11; See also Locke, *supra* note 96 at para 142: “[t]hese are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government.”

¹⁰⁷ Locke, *supra* note 96 at para 136.

¹⁰⁸ *Ibid* at para 215.

“[w]here there is no longer the administration of justice, for the securing of men’s rights, nor any remaining power within the commuting to direct the force, or provide for the necessities of the public, there certainly is no government left.”¹⁰⁹ In this case, Locke continues to state that “[...] the people are at liberty to provide for themselves by erecting a new legislative, differing from the other, by the change of persons, or form, or both, as they shall find it most for their safety and good.”¹¹⁰

In the Lockean vision of statehood, it may be argued that partial legislative or executive power is anomalous and contrary to the idea of a state, especially to the concept of trusteeship – rather, a state is envisaged to exercise its legislative or executive power over *all* matters. Applying this principle to the current debates on state inability to protect, a citizen will need surrogate political membership in the case where a state is unable to protect its citizen from persecution inflicted by non-state actors – in this case, the citizen’s political trust with the original state is broken. Put another way, where the protection relationship under a social contract or trust is ruptured due to a state’s inability to protect, it gives rise to the necessity of establishing a new state or finding surrogate political membership in another state.

Hobbes and Locke’s views may shed light on another important aspect of refugeehood – that is, why natural disasters are not recognized by the *Refugee Convention*. The social contract or trust aims at designing legitimate political authority that may protect citizens primarily in relation to *one another*. It concerns political mechanism that enables citizens to pursue their own interests in a predictable, stable and peaceful way. As such, the social contract or trust is broken when a state is unwilling or unable to ensure such a political mechanism by failing to protect from discrimination or persecution, or where the state itself turns against its citizens. It is

¹⁰⁹ *Ibid* at para 219.

¹¹⁰ *Ibid* at para 220.

noteworthy that international refugee law, unlike international human rights law, propose a unique remedy of *settlement*.¹¹¹ This reinforces the argument that refugee status encompasses something beyond simple violations of human rights or unmet basic needs due to natural disasters.¹¹² The protection perspective illuminates this aspect of refugee status, and provide a convincing and plausible account of refugee status against the background of state formation.

C. Permanent Nature of Political Harm

Some may argue that in a case where the protection relationship has not been irrevocably ruptured by persecution for reason of a Convention reason, some temporary solutions would suffice. However, it is imperative to understand the nature of political harm to which the protection perspective points. The harm comes from the broken relationship; once broken, it requires a “new” relationship. Unfolding Locke’s social contract theory, in particular, “the supposed right of emigration as a means of withdrawing consent”,¹¹³ Long states:

[...] what both [refugee community’s] *flight and deportation signal is the end of all pre-existing political arrangements* which are no longer capable of offering viable protection to refugee-citizens. Thus it is possible to recognize a historical moment at which either the refugee community’s or the state’s (or both group’s) presumed consent to the existing structures of political society was explicitly withdrawn and the social contract broken.¹¹⁴

¹¹¹ See Aleinikoff, *supra* note 3 at 122; See generally B S Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 J Refugee Stud 243 at 244-45.

¹¹² In this regard, it may be argued that, in general, the issues relating to environmental refugees should be discussed in the light of the principle of humanitarianism rather than obligations under international refugee laws per se. See also See James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 176 [footnote omitted]: “[b]ecause refugee law is concerned only with protection from persecution tied to a claimant’s race, religion, nationality, membership of a particular social group, or political opinion, those impacted by natural calamities, weak economies, civil unrest, and even generalized failure to adhere to basic standards of human rights are not by that fact alone entitled to refugee status.”

¹¹³ Long, *supra* note 1 at 235. Concerning the right of emigration, Long cites Lock’s statements as follows: “the obligation [...] begins and ends with the Enjoyment; so that whenever the Owner, who has given nothing but such a tacit Consent to the Government, will, by Donation, sale or otherwise quit the said possession, he is at liberty to go and incorporate himself into any other Commonwealth”: John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988) at 149 (para 121).

¹¹⁴ Long, *supra* note 1 at 235 [emphasis added].

Put differently, once a social contract of protection between a citizen and a state is broken, it is the end of the contract – after all, refugees are those who have been designated as “outsiders” by their nation-states. A refugee needs a new contract. Long suggests that “repatriation can be seen as the use of the physical act of return to *signify explicit consent to a new contract* of rights and duties preserving the liberal freedoms and duties of state, nation and refugee-citizens.”¹¹⁵ The need for a permanent remedy is closely related to the distinctive form of political harm that refugees suffer.

Matthew Lister also illustrates well the distinctive nature of the harm. He draws attention to the Convention reasons such as race and religion, stating that “[...] from a theoretical and normative perspective, these grounds cover aspects of our lives that are, in many ways, central to our identities – they pick out features that we cannot change [...] or should not have to change [...].”¹¹⁶ In other words, persecution – that is, political harm envisaged in the concept of refugee status – has something to do with our very central being. Refugee status is an ontological as well as a relational concept. If people flee from their country of origin due to shortage of food or economic hardship, the temporary solutions would suffice until the distress has settled down.¹¹⁷ However, the political harm that a refugee has suffered may neither be expected to end within a short period of time nor be easily cured even by voluntary repatriation, much less temporary humanitarian assistance.¹¹⁸ Megan Bradley remarks that “the restoration of the *status quo ante* is

¹¹⁵ *Ibid* [emphasis added].

¹¹⁶ Lister, *supra* note 89 at 669. La Forest J. in *Ward* also stated a similar view, endorsing three possible categories of “a particular social group”: “(1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence”: *Ward*, *supra* note 8 at para 70.

¹¹⁷ See Lister, *supra* note 89 at 668.

¹¹⁸ See *ibid* at 669; See Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge: Cambridge University Press, 2013) at 189. Lister states that “[i]n the case of refugees, however, we cannot usually predict that the danger will be relatively short lived. To some degree this is a consequence of the fact that we have no duty to directly end the root cause of the danger directly or immediately, even if we do have a duty to promote

often impossible: Many of the crimes associated with displacement, such as torture, rape and murder simply cannot be undone.”¹¹⁹ In this context, the protection perspective posits that refugee status by its definition commends a permanent remedy rather than a temporary one.

In fact, the drafters of the *Refugee Convention* contemplated a permanent remedy for refugee status. Although paragraphs of Article 1C of the *Refugee Convention* circumscribe the conditions that may terminate refugee status, the Article also states that “[p]rovided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke *compelling reasons* arising out of previous persecution for refusing to return to the country of his former habitual residence.”¹²⁰ This exception is only applicable to a particular category of a refugee under section A (1), that is, “statutory refugees”.¹²¹ However, it has been observed that some states have extended its applicability to all Convention refugees.¹²² This

just conditions when possible. Because of this we must suppose that the danger in question is of indefinite duration, and so we must grant similar lengths of protection to refugees. [...] As we cannot expect refugees [...] to return to their home society in a short period of time, and as continued residence in a society is what most plausibly makes one a member of it [...]”: Lister, *supra* note 89 at 669.

¹¹⁹ Bradley, *supra* note 118 at 189.

¹²⁰ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 at art 1C [emphasis added].

¹²¹ “Statutory refugees” basically refers to a group of people who had been already recognized as refugees under particular agreements at the time of the conclusion of 1951 Refugee Convention: UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011), online: Refworld <<http://www.refworld.org/docid/4f33c8d92.html>> at para 136.

¹²² Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 145-47; See Hathaway and Foster, *supra* note 112 at 492. For example, Goodwin-Gill and McAdam noted that, in section 108(4) of Immigration and Refugee Protection Act, there is no distinction between refugees, which reads as follows: “Paragraph (1)(e) [a cessation clause due to the change of circumstances] does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment”: *Immigration and Refugee Protection Act*, SC 2001, c 27, section 108(4). Hathaway and Foster have also noted recent change in Europe that has made no distinction between refugees with regard to the applicability of the cessation clauses: Hathaway and Foster, *supra* note 112 at 492; See also *Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9 [“Qualification Directive”] at art 11(3): “[p]oints (e) and (f) of paragraph 1 [the cessation clauses due to the change of circumstances] shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.”

being the case, it is important to examine the meaning of “compelling reasons”. The UNHCR handbook highlights various factors that should be considered when determining whether there is a compelling reason, such as suffering “under atrocious forms of persecution”, the attitude of local people in country of origin, and “the mind of the refugee”.¹²³ Canadian jurisprudence has endorsed the test of “atrocious” or “appalling” mistreatment that may indicate there is a compelling reason.¹²⁴ Hugessen J in *Obstoj* stated as follows:

It is hardly surprising, therefore, that it should also be read as requiring Canadian authorities to give recognition of refugee status *on humanitarian grounds* to this special and limited category of persons, i.e. those who have suffered *such appalling persecution* that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.¹²⁵

On the other hand, James C Hathaway and Michelle Foster argue very plausibly that, when considering “compelling reasons”, “compelling psychological or comparable challenge to successful re-establishment in the country or origin” should be considered.¹²⁶ Their proposal, in fact, encompasses the core element of the protection perspective. They argue as follows:

[...] if the asylum state adduces evidence of a substantial and significant change in the country of origin that has taken hold and eradicated the basis for the risk once faced by the refugee concerned, the Convention authorizes an inquiry into whether that change has enabled the refugee to *resume a positive relationship with her country of origin*.¹²⁷

¹²³ UNHCR, *supra* note 121 at 136: “[...] It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. [...] it is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.”

¹²⁴ *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 208, at para 34, [2004] D.S.P.R. no 208; *Canada (Minister of Employment and Immigration) v. Obstoj (C.A.)*, [1992] 2 F.C. 739, para 19, [1992] F.C.J. No. 422 [*Obstoj*].

¹²⁵ *Obstoj*, *supra* note 124 at para 19, Hugessen J. Like Canadian jurisprudence, Goodwin-Gill and McAdam consider the “compelling reasons” in terms of “the humanitarian exceptions”: Goodwin-Gill & McAdam, *supra* note 122 at 148.

¹²⁶ Hathaway and Foster, *supra* note 112 at 494; *ibid* at 493-94: “[b]y focusing squarely on compelling reasons arising out of past persecution, the drafters sought to take particular account of the psychological hardship that might be faced by the victims of persecution were they to be returned to the country responsible for their maltreatment.”

¹²⁷ *Ibid* at 494 [emphasis added].

If refugee status is a ruptured protection relationship between a refugee and a state, it is a corollary that compelling reasons have something to do with re-establishing a “positive relationship” with the home country. The relationship between the cessation clauses and the protection perspective will be analyzed more in details below. In any event, whether “compelling reasons” are based on humanitarian concerns or physiological reasons, it may be argued that the drafters of the Convention and subsequent state practice have duly recognized the characteristic of an irrevocably ruptured relationship between a refugee and a state.

The Protection Perspective and Case Law

At this juncture, it is significant to observe that recognition of the protection perspective has not been limited to the abovementioned scholarly views on refugee status. In fact, the protection perspective has been duly recognized by tribunals and courts in various jurisdictions with respect to certain areas of refugee law. Especially notable are three areas of refugee laws: dual nationality, the cessation of refugee status, and the meaning of a well-founded fear of persecution.

First, as will be outlined in detail in Chapter 5, in the case of dual nationality of a refugee, apart from a well-founded fear of persecution, tribunals have often examined availability of protection from each country of nationality as a legal requirement to meet the definition of the Convention refugee.¹²⁸ If case law were to exclusively apply the persecution perspective, the tribunals would primarily look into whether an individual has a well-founded fear of persecution in *each country of nationality*; if no such persecution is found, the individual would not be granted refugee status. However, in refugee decision making, the concept of effective nationality

¹²⁸ See Chapter 5.

or availability of state protection has often been invoked in conjunction with “nationality” found in Article 1A(2).¹²⁹

From the protection perspective, even though it is found that a refugee claimant has fear of persecution only in one country of nationality, but not the other, this does not necessarily negate the possibility of being granted refugee status. It is more important to examine whether the other country of nationality provides meaningful protection to refugees. In fact, it is critical to examine whether there is protection relationship between a refugee and an alleged country of nationality. If there is no such a protection relationship, the alleged country of nationality would not be counted as “nationality” in the meaning of Article 1A(2).

This stance reflects the proposition that the nationality of a refugee as found in the *Refugee Convention* is a legal term embodying a protection relationship between the individual and the state. This position is arguably endorsed by the Supreme Court of Canada. In *Ward*, La Forest J recognizes a presumption that a country of nationality is “capable of protecting its nationals.”¹³⁰ He states that “an underlying premise of this presumption [...] is that citizenship carries with it certain basic consequences. One of these [...] is the right to gain entry to the country at any time.”¹³¹ While it is unclear whether the Court in *Ward* adopts the protection perspective as a whole, it at least appears to endorse the protection perspective in cases of dual nationality.¹³² In fact, with respect to Ward’s dual nationality (Irish and British), the Court

¹²⁹ Article 1A(2) of the *Refugee Convention* prescribes a circumstance where a person with one or more nationality may not claim refugee status: “[...] In the case of a person who has more than one nationality, the term ‘the country of his nationality’ shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

¹³⁰ *Ward*, *supra* note 8 at para 95.

¹³¹ *Ibid* at paras 95-96.

¹³² See Chapter 5. The Federal Court of Australia in *Jong Kim Koe* rightly observes that, even though La Forest J. in *Ward* applies the general principle that a refugee applicant has to show a well-founded fear of persecution in each country of nationality (the persecution perspective), “[...] as his Lordship's judgment proceeds to recognise, there is

considered it legally necessary for the Board to determine “whether Ward can be afforded protection in Great Britain.”¹³³

In Australia, just before the concept of effective nationality was abandoned through legislation in 1999,¹³⁴ the Federal Court of Australia had even stated that “‘effective nationality’ is a nationality that provides all of the protection and rights to which a national is entitled to receive under customary or conventional international law.”¹³⁵ In a similar manner, the tribunals of the United Kingdom have looked beyond the simple fact of dual nationality, examining state practice in dealing with the putative citizens.¹³⁶ All these examples point to the reality that refugee decision making does not completely cling to the persecution perspective. The protection perspective may not be the dominant view; nevertheless, it has been frequently recognized in case law.¹³⁷

Second, the protection perspective also has been recognized in varying degrees in relation to the cessation of refugee status. Article 1C of the *Refugee Convention* enumerates situations where refugee status may come to an end.¹³⁸ Especially, Article 1C(5)-(6) circumscribe cases

an exception, at least in the case where the second country of nationality does not offer protection to the applicant”: *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 21 at 31.

¹³³ *Ward, supra* note 8 at para 94. Although the Court did not rule over the issue whether the presumption of protection can be rebutted in this case, it was pointed out that Ward may be prohibited from entering into Britain due to specific legislation such as Prevention of Terrorism (Temporary Provisions) Act 1989. La Forest J. has remarked that “[s]uch evidence might serve to rebut the presumption by demonstrating a lack of protection afforded by Great Britain. *Denial of admittance* to the home territory is offered by the UNHCR in its Handbook, at paragraph 99, as a possible example of what might amount to a *refusal of protection*”: *Ward, supra* note 8 at para 96 [emphasis added].
¹³⁴ Andrew Wolman, “North Korean Asylum Seekers and Dual Nationality” (2012) 24:4 Int’l J Refugee L 793 at 812.

¹³⁵ *Lay Kon Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681 at 692.

¹³⁶ *KK and others vs The Secretary of State for the Home Department* [2011] UKUT 92 (IAC); *GP and others (South Korean citizenship)* [2014] UKUT 00391 (IAC).

¹³⁷ See generally James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 59; See Wolman, *supra* note 134 at 810.

¹³⁸ Goodwin-Gill and McAdam comment that “[i]n practice, States have rarely had recourse to cessation, particularly if recognition of refugee status has exhausted itself in the grant of permanent or indefinite residence, but provision for termination is often included in municipal legislation and the policy re-alignment in some States towards refugee protection as a *temporary* mechanism may see this increase”: Goodwin-Gill & McAdam, *supra* note 122 at 142.

where refugee status cease to exist due to the change of circumstances. Article 1C(5) reads as follows: “[h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality [...]”.¹³⁹ Article 1C(6) contain same conditions with Article 1C(5) in the case of the stateless: “[b]eing a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.”¹⁴⁰

A key controversial legal issue connected with Article 1C(5)-(6) is whether the absence of fear of persecution is a necessary and sufficient condition upon which to invoke the change of circumstances, giving rise to terminating refugee status, or there is something more required to meet the conditions set out in Article 1C(5)-(6). As examined in Chapter 1, the persecution perspective appears to be dominant when contemplating the application of Article 1C(5)-(6) in various jurisdictions.¹⁴¹ However, the protection perspective has not become obsolete in case law.

Hathaway and Foster have arguably based some of their arguments on the protection perspective, relying on recent case law. For example, with regard to Article 1C(5), a majority of the Full Federal Court of Australia in *QAAH* stated that in order for the cessation clause to apply, there has to be “fundamental and durable changes in the refugee’s country of nationality”.¹⁴²

¹³⁹ The *Refugee Convention*, *supra* note 120 at art 1C(5).

¹⁴⁰ *Ibid* at art 1C(6).

¹⁴¹ See Chapter 1, Section of “Persecution as the core element of refugee status in International Refugee Law”.

¹⁴² *QAAH OF 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 494 [*QAAH* (2005)] at para 60. Notably, the High Court of Australia in *QAAH* overturned the decision of the Full Court. In this regard, Hathaway and Foster have noted that “[a] majority in the High Court of Australia suggested that cessation due to change of circumstances requires only the absence of a relevant well-founded fear [...]”: Hathaway & Foster, *supra* note 112 at 479; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH OF 2004 and Another* (2006) 92 ALD 513 [*QAAH* (2006)]. In the meantime, it is noteworthy that Kirby J., in his dissent, endorsed the views of the full Court, stating that “[...] Art 1C(5) of the Convention cannot apply to a person who has not previously been recognised as a refugee. Nor can Art 1A(2) apply to a person who has already been so

Importantly, the court duly considered Lord Brown's statement in *Hoxha*, UNHCR documents, and Hathaway's proposal of three tests in relation to Article 1C(5),¹⁴³ all of which arguably set out conditions much more than mere absence of fear of persecution. For example, Lord Brown in *Hoxha* comments that "[...] the approach to the grant of refugee status under art 1A(2) does not precisely mirror the approach to its prospective subsequent withdrawal under art 1C(5)."¹⁴⁴ Article 1A(2) defines refugee status on the basis of a well-founded fear of persecution for a Convention reason, as has been examined in Chapter 1. In this regard, Lord Brown's comment may be taken to mean that exclusive application of the persecution perspective is not warranted in relation to Art 1C(5).

Two UNHCR documents were considered in this case: the UNHCR's guidelines on International Protection and UNHCR's Note on the Cessation Clauses.¹⁴⁵ Although the UNHCR in its early guidelines connected the cessation clause with the absence of fear of persecution, it qualified conditions of the cessation clause by stating that "[f]or this cessation clause to be applicable, there must be *fundamental* changes in the country of origin which can be assumed to remove the basis of the fear of persecution. The changes must be *major, profound or substantial*."¹⁴⁶ Importantly, in more recent guidelines, to which the *QAAH* Court referred, the UNHCR envisages more comprehensive change of circumstances in the country of origin in relation to the cessation of refugee status. The Court noted *inter alia* the following paragraph in the guidelines:

recognised. It follows that the approach to the *grant* of 'refugee' status under Art 1A(2) cannot 'mirror' or be 'symmetrical to' the approach to *cessation* of refugee status under Art 1C(5). The language of the Convention, its structure and apparent scheme, deny such an interpretation": *QAAH* (2006), *ibid* at 101.

¹⁴³ *QAAH* (2006), *supra* note 142 at para 60.

¹⁴⁴ *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 at para 65, [2005] UKLR 19.

¹⁴⁵ *QAAH* (2005), *supra* note 142 at paras 36-41.

¹⁴⁶ UNHCR, *The Cessation Clauses: Guidelines on Their Application* (April 1999), online: Refworld <<http://www.refworld.org/docid/3c06138c4.html>> at para 25 [emphasis added].

In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include *the existence of a functioning government and basic administrative structures*, as evidenced for instance through *a functioning system of law and justice*, as well as *the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood*.¹⁴⁷

These conditions set out in the guidelines certainly go beyond the mere absence of fear of persecution so far as to cover general political, economic and social situations of the country of origin.¹⁴⁸ Notably, in its early guideline, the UNHCR also emphasizes that such a change must be “durable”, and seriously considered general human rights situations as a critical element in determining the durability of the change.¹⁴⁹

Lastly, the so-called “three-prong ‘Hathaway test’” articulates three conditions to be met in order to invoke the cessation clause: “substantial political significance”, “truly effective”, “durable”.¹⁵⁰ The significance of this test lies in the fact that it prescribes conditions more than simple absence of persecution as legal requirements to be met in order to invoke the cessation

¹⁴⁷ UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, HCR/GIP/03/03 (February 2003), online: UNHCR <<http://www.unhcr.org/3e637a202.pdf>> at 15 [emphasis added].

¹⁴⁸ See also Hathaway & Foster, *supra* note 112 at 488.

¹⁴⁹ UNHCR, *The Cessation Clauses: Guidelines on Their Application*, *supra* note 146 at para 28 [emphasis added]: “[a]n evaluation as to the durability of change can be made within a relatively short time period where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change in the regime which *respects fundamental human rights and where there is relative political and economic stability in the country*. On the other hand, a longer period of time will be required to test durability of change where the changes are violent in nature involving the overthrow of a regime. Under the latter circumstances, *the human rights situation needs to be especially carefully assessed*”; See also UNHCR, *Note on Cessation Clauses*, EC/47/SC/CRP.30 (May 1997), online: UNHCR <<http://www.unhcr.org/3ae68cf610.html>> at para 20: “[i]n determining whether changes in the country of origin are fundamental, and reliably can be said to remove the need for international protection in a durable manner, all relevant facts must be taken into consideration. A complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basic legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services [...]”

¹⁵⁰ Hathaway, *supra* note 137 at 200-203; See Immigration and Refugee Board of Canada, *Chapter 7 – Chance of circumstances and compelling reasons*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx>> at footnote 5.

clause.¹⁵¹ As such, the test, in truth, reflects the core meaning of refugee status envisaged by the protection perspective. More recently, Hathaway and Foster have further developed this view of the cessation clauses in line with core argument of the protection perspective.

In our view, neither the equation of “ceased to exist” with the absence of a well-founded fear nor the assumption that protection exists (or, in the case of a stateless refugee, that return is possible) simply because the once well-founded fear has dissipated can be reconciled to the text of Art. 1(C)(5)-(6) interpreted in light of its context, object, and purpose.¹⁵²

According to literal meaning of Article 1C(5)-(6), they argue, there are two requirements in Article 1C(5)-(6). First, there should be a change of circumstances; second, it should be determined “whether that precipitating event has also led to the restoration of *protection* [...]”¹⁵³ They argue that “‘ceased to exist’ is a more demanding standard than risk below a well-founded fear; and the additional requirement of ability to access *protection* (or to return for stateless refugees) limits cessation to cases in which there is evidence of access to *an affirmative relationship with the home country*, not simply the absence of a negative.”¹⁵⁴ The thesis of the protection perspective – an individual should have at least political membership in the nation-

¹⁵¹ However, this test has not been actively applied by courts. For example, Canadian courts have rejected the application of Hathaway’s test in favor of the persecution perspective: See IRB, *supra* note 150 at para 7.1.1; See *Yusuf v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35 at para 2, per Hugessen J, [1995] A.C.F. no 35: “[w]e would add that the issue of so-called ‘changed circumstances’ seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant’s country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal ‘test’ by which any alleged change in circumstances must be measured. The use of words such as ‘meaningful’ ‘effective’ or ‘durable’ is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s.2 of the Act: does the claimant now have a well founded fear of persecution? [...]” Goodwin-Gill and McAdam may concur with Hathaway that the change of circumstances should be “significant”, “effective”, and “durable”; however, they did not consider it in terms of legal requirements (“prescriptive”), rather they regard it as merely “illustrative” facts: Goodwin-Gill & McAdam, *supra* note 122 at 140-43. Goodwin-Gill and McAdam affirm that “[t]he central issue remains that of risk, the assessment of which is a matter of fact; no other *legal* condition is required, such as any degree of permanence, or the holding of elections. Whether the change is significant, effective, durable or substantial is merely another way of describing its evidential weight”: Goodwin-Gill & McAdam, *supra* note 122 at 143 [footnote omitted].

¹⁵² Hathaway and Foster, *supra* note 112 at 481.

¹⁵³ *Ibid* at 487.

¹⁵⁴ *Ibid* at 478 [emphasis added] [footnotes omitted].

states system, thus enjoying state protection – is arguably recognized in this statement. Without confirming the restored protection relationship, a refugee cannot be returned to the country of origin, although a fear of persecution may have subsided.

Third, it is significant to note that, in case law, tribunals tend to use the concept of availability of state protection as a criterion by which to assess the objective aspect of “a well-founded fear of persecution”.¹⁵⁵ For example, La Forest J. in *Ward* states that “[h]aving established that the claimant has a fear, the Board is, in my view, entitled to presume that persecution will be likely, and *the fear well-founded, if there is an absence of state protection.*”¹⁵⁶ This statement is critical in that an absence of state protection may establish both persecution and well-foundedness of fear in an objective sense. It also illuminates the fact that “persecution” in refugee law has a different connotation from “persecution” as a simple push factor. The former has a deeper meaning that is only to be understood against the background of lack of state protection. In a similar manner, the House of Lords in *Horvath* endorsed two tests which must be satisfied in order to establish refugee status in the context of serious harm incurred by non-state actors: “the fear test” and “the protection test”.¹⁵⁷ Importantly, with respect to the relationship between the tests, Lord Hope of Craighead states as follows:

The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is “persecution” within the meaning of

¹⁵⁵ Goodwin-Gill and McAdam have remarked that “[f]ear of persecution and lack of protection are themselves interrelated elements, as article 1A(2) of the 1951 Convention makes clear. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear”: Goodwin-Gill & McAdam, *supra* note 122 at 92 [footnote omitted].

¹⁵⁶ *Ward*, *supra* note 8 at para 45[emphasis added]. La Forest J. in *Ward* also states “[...] the well-foundedness of a claimant's fear of persecution can be grounded in the concept of ‘inability to protect’, assessed with respect to each and every country of nationality”: *ibid* at para 94.

¹⁵⁷ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 497. Hathaway and Foster also comment that “[s]ince ‘being persecuted’ is itself a bifurcated notion, comprising the twin elements of serious harm and a failure of state protection, the well-founded fear test logically applies to each of the elements of serious harm and failure of state protection”: James C Hathaway & Michelle Foster, *supra* note 112 at 318 [footnote omitted].

the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy.¹⁵⁸

Here, the issue of lack of state protection in terms of a state's unwilling or inability to protect, has become a focal point in determining whether a particular act of violence may correspond to "persecution" in refugee law. Hathaway and Foster concur with this view, stating that "[...] failure of state protection is an integral element of a determination of whether a person is at risk of *being persecuted*."¹⁵⁹ In this regard, it may be argued that the availability of state protection determines whether there is persecution on an objective sense. Hathaway and Foster conclude that "[i]nsofar as it is established that national protection is available to the claimant, a *fear of being persecuted* cannot be said to exist."¹⁶⁰

At this juncture, it is worth noting that an inquiry into lack of state protection is vital in determining 1) existence of the objective element of fear and 2) whether a particular harm amount to persecution. Immigration and Refugee Board of Canada rightly notes that "[t]he issue of state protection goes to the objective portion of the test of fear of persecution [...]."¹⁶¹ Here comes an important issue in relation to the idea of fear. It is interesting to note that Hathaway and Foster have recently contended that a subjective element of fear – that is, one of key aspects of refugee status from the persecution perspective – is not only redundant but also misleading in determining refugee status. They argue as follows:

[...] the object and purpose of the Convention as adumbrated by senior courts strongly support an interpretation of "fear" that emphasizes its anticipatory rather

¹⁵⁸ *Horvath, supra* note 157 at 501. Hope of Craighead also stated that "[...] the two tests are nevertheless linked to each other by the concepts which are to be found by looking to the purposes of the Convention. The surrogacy principle which underlies the issue of state protection is at the root of the whole matter. There is no inconsistency between the separation of the definition into two different tests and the fact that each test is founded upon the same principle": *ibid* at 497.

¹⁵⁹ Hathaway & Foster, *supra* note 112 at 297.

¹⁶⁰ *Ibid* at 293 [emphasis in original] [footnote omitted].

¹⁶¹ Immigration and Refugee Board of Canada, *Chapter 6 – State Protection*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef06.aspx>> at para 6.1 [footnote omitted].

than emotive qualities. The substantive consideration of subjective fear as part of the ‘well-founded fear’ inquiry is inconsistent with established protection principles, and is otherwise out of keeping with the goals of refugee law.¹⁶²

Their argument to this effect strongly indicates that the only relevant criterion in determining “well-foundedness” of fear is an objective fear.¹⁶³ How is a fear established on an objective sense? As shown above, an absence of state protection may suffice to establish a fear on an objective sense. Importantly, Hathaway and Foster remark that “[i]ndeed, [...] a well-founded fear may be established *entirely* on the basis of pertinent country of origin information.”¹⁶⁴ What kind of information is included in the “country of origin information”? It concerns about country conditions in general and human rights situations in particular,¹⁶⁵ and as such, it is inextricably associated with an inquiry into state protection in the country of origin. For example, in 2015, the Federal Court of Canada in *Hassankiadeh* considered a variety of country information, which suffice to establish an objective risk if applicants were returned to Iran.¹⁶⁶ The information

¹⁶² Hathaway and Foster, *supra* note 112 at 110.

¹⁶³ *Ibid* at 106-107: “[i]mportantly, and in contrast to the dominant common law jurisprudence, this subjective element is not treated as an essential element of refugee status independent of the objective inquiry into risk. It rather shapes and contextualizes that objective inquiry. As such, claims to refugee status are not dismissed on the basis that there is insufficient evidence of subjective fear. When courts find the evidence of risk compelling, refugee status is routinely recognized without an inquiry into the applicant’s emotional state, even where the applicant’s behavior might have aroused suspicion that he or she was not in fact subjectively fearful.” Hathaway and Foster cite several French cases in support of their view: see *ibid* at 106 (footnote 92).

¹⁶⁴ *Ibid* at 122 [emphasis added] [footnotes omitted].

¹⁶⁵ Hathaway and Foster acknowledges that “[i]nformation about the country of origin’s human rights record is ordinarily of central importance in the assessment of well-founded fear”: *ibid* at 122 [footnote omitted]; See Immigration and Refugee Board of Canada, *Policy on Country-of-Origin Information Packages in Refugee Protection Claims*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolOrigin.aspx>> at para 3.

¹⁶⁶ *Hassankiadeh v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1284, [2015] F.C.J. No. 1348. In this case, on account of credibility issues, the IRB denied refugee status to two Iranian applicants who purported to have been Christians – this may be taken to mean that they also failed to establish subjective element of fear. Subsequently, they failed to obtain a favourable decision in Pre-removal risk assessment (PRRA), and applied for judicial review of the decision of a PRRA officer. The Court held that the decision of the PRRA officer was unreasonable. In this case, the Court paid attention to the country information from various sources, which manifested present risk and danger that Christians may face in Iran. The court observed that “[a]postasy is punishable by death. Moreover, even if Christians and Christian converts have been released in Iran without having been charged, a danger of persecution still exist for them”: *ibid* at para 26.

presents human rights situations of Christians or Christian converts in Iran, which basically demonstrates *lack of state protection* for Christians in Iran.¹⁶⁷

This being the case, if subjective element of fear is completely excluded in the conception of well-founded fear, it may be argued that an absence of state protection is the *sole* necessary and sufficient condition that establishes a well-founded fear of persecution. In this regard, the absence of state protection in the country of origin may give rise to recognition of refugee status, dispensing with the idea of fear at the outset. It is unclear whether Hathaway and Foster intend to give this effect to their argument. However, such a conclusion is a logical and reasonable consequence, if unintended, when subjective element of fear is completely removed from refugee determination process.

Taking stock, the availability of state protection has been a critical aspect of refugee law. This is because it is closely associated with the overarching purpose of refugee protection, that is, surrogate protection.¹⁶⁸ Various jurisdictions have acknowledged that international refugee protection is in nature surrogate protection.¹⁶⁹ La Forest J in *Ward* famously stated that “[...] the rationale underlying international refugee protection is to serve as ‘surrogate’ shelter coming into play only upon failure of national support. When available, home state protection is a claimant’s

¹⁶⁷ *Ibid* at paras 17: “[t]he Iranian Constitution recognises Christians, Jews and Zoroastrians as protected religious minorities. However the state does discriminate against them on the basis of religion or belief, as all laws and regulations are based on unique Shi’a Islamic criteria. It is difficult for many Christians to live freely and openly in Iran. Such discrimination is prevalent throughout Iran [...]”; *ibid* at para 26: “[b]y the time the case goes to court, or the accused may be released without charges, there will have been a substantial risk of ill-treatment or torture while in incarceration. It should not be underestimated what can happen from the time of arrest up until a court hearing [...]”; see also *ibid* at paras 18, 25.

¹⁶⁸ Hathaway and Foster have observed that “[t]here is widespread academic agreement that the failure of state protection is an integral consideration in the determination of refugee status”: Hathaway & Foster, *supra* note 112 at 288 (footnote 2).

¹⁶⁹ *Canada (Minister of Citizenship and Immigration) v. Williams*, 2005 FCA 126 at para 20, [2005] F.C.A. 126; see *Ward*, *supra* note 8 at 88-89; *Horvath*, *supra* note 157 at 495: “the general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.”

sole option.”¹⁷⁰ Hathaway and Foster also concur with idea of surrogate protection, stating that “[...] the Refugee Convention’s overarching goal is to provide a *new national home* to persons driven from their own country by the risk of being persecuted.”¹⁷¹ More importantly, Hathaway and Foster, like proponents of protection perspectives, point to the international state system as providing a background condition for refugeehood.

This commitment to providing surrogate or substitute national protection is grounded both in the basic commitment of *the interstate system to ensuring that all individuals have a nationality in the legally recognized form of citizenship, and are thus effectively ‘allocated’ to a state*, and also in the recognition that nationality provides the essential means by which individuals are able to avail themselves of the full range of protection established by international law.¹⁷²

Conclusion

The protection perspective provides a critical alternative to the dominant view of refugee status. It underscores that the concept of refugee status has emerged against the background of the emergence of nation-states system, and it is deeply associated with a refugee’s loss of political membership or citizenship in a nation-state, thus experiencing lack of state protection. The implication of loss of citizenship is enormous as it implies that a person has no protector of his or her human rights in the international state system. Refugeehood touches the much deeper reality of the international state system. “Persecution” is a mere symptom of loss of citizenship and state protection. The protection perspective illuminates the forgotten baseline that refugee status is both political and relational concept – rather than humanitarian concept – which reflects hidden reality of the international state system. When this reality is covered with rhetoric of humanitarian “protection” or assistance, refugee status is turned into more popular image of the

¹⁷⁰ *Ward, supra* note 8 at para 89.

¹⁷¹ Hathaway & Foster, *supra* note 112 at 288 [emphasis added] [footnote omitted].

¹⁷² *Ibid* at 289 [footnote omitted].

helpless rather than the *de facto* or *de jure* “stateless”. The protection perspective attempts to restore the original meaning of refugeehood, proposing that what refugees mostly need is “belonging” (political membership or citizenship) in nation-states system rather than humanitarian assistance per se.

Chapter 3 Refugees, Citizenship, and Cosmopolitan Justice

Introduction

In the 21st century, developed countries appear to have focused more on developing and implementing refugee policies that aim at ensuring “survival” rather than those that aim at “settlement” of refugees. Thousands of refugees are “contained” in refugee camps in regions of their origin, sometimes for up to 20 years or beyond, without a hint of hope of repatriation or other resolution.¹ Refugee policies that used to provide a “settlement kit” (repatriation, settlement, and resettlement) have now resorted to a “survival kit” (meeting basic needs of refugees) under the umbrella of humanitarianism. This is not to say that a policy of settlement of refugees in the country of asylum has ceased to exist; however, the value of the traditional institution of asylum has significantly diminished to the extent that offering surrogate political membership or citizenship to refugees has become the “reluctant” last resort.

The concept of “humanity” rather than “justice” appears to hold a key post in current refugee policy-making. The Oxford English Dictionary defines humanity as “the quality of being kind to people and animals by making sure that they do not suffer more than is necessary; the quality of being humane.”² As such, “humanity” is clearly associated with a branch of international ethics that is distinct from the realm of justice. In particular, in the context of prevalent discourse, humanitarianism has emerged as a powerful “ideology” that occupies

¹ See James Milner, “Protracted Refugee Situations” in Elena Fiddian-Qasmiyeh, ed, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 151 at 153.

² *Humanity*, online: Oxforddictionaries

<<http://www.oxforddictionaries.com.ezproxy.library.uvic.ca/us/definition/learner/humanity>>.

pivotal position of theoretical forums for refugee law and policy.³ Humanitarianism is generally defined as “the beliefs and practices of people who are concerned with reducing suffering and improving the conditions that people live in.”⁴ Humanitarianism has enabled governments to adopt such refugee policies as “preventive protection” in the country of origin and humanitarian assistance in regions of origin (the regional “protection” scheme).⁵ What should be emphasized here is that, under humanitarianism, the policy of settlement or resettlement of refugees through providing surrogate citizenship is but one of several “solutions” rather than an ultimate one.

As I have already argued, the persecution perspective has accelerated and strengthened the humanitarian approach toward refugee protection.⁶ As previously outlined, the persecution perspective is a viewpoint in which various *push factors*, such as persecution, distress, generalized violence and conflict, are considered as vital elements of refugee status. Persecution is conceived as the determinative factor in defining the legal status.⁷ As long as refugee status is defined in terms of push factors, a policy that aims at providing a “push factors-free” environment is normatively justified. Under the persecution perspective, surrogate political membership may be contemplated as one possible durable solution; however, it is not considered an essential remedy for refugee status. After all, in refugee camps, a refugee may not experience

³ B.S. Chimni defines humanitarianism as “the ideology of hegemonic states in the era of globalization marked by the end of the Cold War and a growing North-South divide”: B S Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 J Refugee Stud 243 at 244.

⁴ *Humanitarianism*, online: Oxforddictionaries <<http://www.oxforddictionaries.com.ezproxy.library.uvic.ca/us/definition/learner/humanitarianism>>.

⁵ For the “preventive protection”, see Chapter 1, Section of “The Policy Shift from Asylum to Humanitarian Relief: Toward Regional Containment”.

⁶ See generally James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 99; see also James C Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 31 Harv Int’l LJ 129 at 139; See generally James C Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33:2 Int’l Comp LQ 348 at 375; See generally, Stephen Castles & Mark J Miller, *The Age of Migration: International Population Movements in the Modern World*, 4th ed (New York: Guilford Press, 2009) at 22-3; See generally Alexander Betts, “From Persecution to Deprivation: How Refugee Norms Adapt at Implementation” in Alexander Betts and Phil Orchard, eds, *Implementation and World Politics: How International Norms Change Practice* (Oxford: Oxford University Press, 2014) 29 at 29.

⁷ See Chapter 1; Hathaway, *The Law of Refugee Status*, *supra* note 6 at 99.

the persecution that he or she has suffered in the country of origin. In this regard, the persecution perspective has rendered the institution of asylum normatively redundant.

In this dissertation, I argue that humanitarianism bolstered by the persecution perspective has failed to provide an adequate account of refugee status; neither does it provide a rightful remedy for refugeehood on a normative basis. Humanitarianism is underpinned by the concept of charity or benevolence. Predicaments of refugees across the world certainly call for charitable responses. However, by referring back to an alternative perspective on refugee status (the protection perspective) – lack of state protection is presented as a core element of refugee status,⁸ refugeehood should not be regarded as something that simply calls for our benevolence or charity. Instead, it is deeply associated with an institutional failure to secure political membership for each individual in the nation-states system. Revitalizing the discourse of justice rather than humanitarianism in relation to refugee crises is of paramount importance, as it squarely illuminates two inherent aspects of refugeehood: the right of a refugee to political membership and the duty of a nation-state to provide surrogate political membership.

What does it mean to hold political membership or citizenship in the nation-states system? Why is it identified as a matter of justice rather than charity for refugees? Why should a duty to provide political membership to refugees be recognized? The answers to these questions may be summed up as follows: the institution of citizenship is so essential for human wellbeing in the international state system; without it, human beings lose their “humanness” (who they are as a human being). International communities have concluded a variety of human rights

⁸ Andrew E Shacknove, “Who Is a Refugee?” (1985) 95:2 *Ethics* 274; Katy Long, “Refugees, Repatriation and Liberal citizenship” (2011) 37:2 *Hist Eur Ideas* 232; Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009); See generally Emma Haddad, *The Refugee in International Society: Between Sovereigns*(Cambridge: Cambridge University Press, 2008); See generally Charles B Keely, “How Nation-States Create and Respond to Refugee Flows” (1996) 30:4 *Int'l Migr Rev* 1046.

conventions that have attempted to secure essential elements of “humanness” for individuals or minority. However, without state protection, the discourse of human rights degenerates into an empty claim. After all, in the international state system, it is the nation-state that primarily provides human rights protection to individuals, more accurately, its citizens. This being the case, providing surrogate political membership to refugees should not be regarded as a matter of charity, but should be considered in terms of justice. In the realm of charity, we decide how much and in what way we should contribute to alleviating the suffering of refugees; however, in the realm of justice, we owe something to refugees who have a right to it, that is, political membership.⁹

This chapter explores an account of cosmopolitan justice that may illuminate a forgotten baseline from which refugee law and policy should proceed – the baseline refers to the normative axiom that each individual should have at least one state membership within the nation-states system. The “justice” approach toward refugee protection goes beyond the ethical posture that is based on humanitarianism, and even beyond the discourse of distributive justice of political membership that seeks a “just” criterion, according to which political membership may be distributed on a global level. Instead, the version of institutional cosmopolitanism that I develop brings home the core element of refugee status – that is, the loss of political membership or citizenship – to the forefront. Rather than focusing on individual suffering, it connects refugee status to a global institutional failure to secure the *protective baseline* for all persons in the international state system. This chapter will conclude that institutional cosmopolitanism can renew normative discourse by providing a solid theoretical alternative to humanitarianism in refugee law and policy.

⁹ See Sharon Anderson-Gold, “Cosmopolitan Justice” in Deen K Chatterjee, ed, *Encyclopedia of Global Justice* (New York: Springer, 2011) 203.

Hospitality, Mutual Aid and Humanitarianism

Migration scholars have long recognized the treatment of strangers, whether at home or abroad, as a matter of hospitality rather than justice.¹⁰ What is the core element of hospitality? Is it a moral obligation? or a legal duty? or just a favour? In general, hospitality is taken to mean “[t]he reception and entertainment of guests, visitors, or strangers, with *liberality* and *goodwill*.”¹¹ As such, it is closely related to the concept of favour, benevolence and charity. In the realm of hospitality, the host is *at liberty* to show his or her goodwill to strangers – it is not a moral duty in a strict sense.¹² As such, the scope of hospitality depends on the host’s *discretion* – such as forms, duration, and extent of hospitality.

However, in political philosophy, the concept of hospitality is nuanced and more layered with ideas of moral obligation. Heidrun Friese notes that “[h]istorically, hospitality was a religious and ethical duty, a commandment to generosity, aid and charity”¹³ For example,

¹⁰ Heidrun Friese, “The Limits of Hospitality: Political Philosophy, Undocumented, Migration and the Local Arena” (2010) 13:3 Eur J Soc Theory 323 at 324: “[o]ne of the most vital challenges of our time is how to hospitably welcome migrants, the exiled and refugees.” Friese also states that “[h]istorically, hospitality has been a religious and ethical duty, a sacred commandment of charity and generosity to assign strangers an – albeit ambivalent – place in the community. With the development of the modern nation state, these ethical obligations have been inscribed into the procedures of public political deliberation, legal procedures and administered law that determine rights and duties and thus, the social spaces of ‘aliens, residents and citizens’ [...] and we might wonder if the nation state is the requisite vehicle for enacting the virtues of hospitality”: *ibid* [footnote omitted]; See generally Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) at 21-36, 177.

¹¹ *Hospitality*, online: Oxford English Dictionary

<<http://www.oed.com/view/Entry/88730?redirectedFrom=hospitality#eid>> [emphasis added]; See also Michael W Apple, Stephen J Ball & Luis Armando Gandin, eds, *The Routledge International Handbook of the Sociology of Education* (London, UK: Routledge, 2009) at 51: “[i] broad terms, hospitality refers to the relationship between a guest and a host. It also refers to the act or practice of being hospitable, of welcoming guests, visitors or strangers, with liberality and goodwill.”

¹² In Ancient times, the concept of hospitality encompassed a sense of duty. Vattel observes that “[h]ospitality was in great honour among the ancients, and even among barbarous nations, such as the Germans. Those savage nations who treated strangers ill, that Seythian tribe who sacrificed them to Diana, were universally held in abhorrence; and Grotius justly says that their extreme ferocity excluded them from the great society of mankind”: Mer de Vattel, *The Law of Nations: or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London: G.G. and J. Robinson, 1797) at B.II.Ch.VIII s 104.

¹³ Friese, *supra* note 10 at 326.

Immanuel Kant's conception of hospitality certainly goes beyond the simple charity or goodwill.

Kant contributed an interesting definition as follows:

[...] hospitality (a host's conduct to his guest) means the *right* of a stranger not to be treated in a hostile manner by another upon his arrival on the other's territory. If it can be done without causing his death, the stranger can be turned away, yet as long as the stranger behaves peacefully where he happens to be, his host may not treat him with hostility.¹⁴

Kant's concept of hospitality is basically a rights-based concept. It has been pointed out that Kant's concept of hospitality offers a right to visit, but not necessarily a right to reside, which would require an additional pact with the existing communities.¹⁵ Although the host retains *discretion* in turning away a migrant as long as it would not cause the death of the migrant, according to Kant, a stranger has a "right to visit, to which all human beings have a claim, to present oneself to society *by virtue of the right of common possession of the surface of the earth.*"¹⁶ The Kantian understanding of right of common ownership of the earth has given rise to discussion on distributive justice that focuses on setting the "just" terms and conditions upon which to distribute political membership.¹⁷ In other words, embedded in Kant's idea of hospitality is a rights-based concept of *justice*.¹⁸

What I highlight here is that, contrary to the general tendency to regard hospitality as simple charity or goodwill (rather than a matter of justice), there is a duty to show hospitality that

¹⁴ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Pauline Kleingeld, ed., Rethinking the Western tradition (New Haven: Yale University Press, 2006) at 82 [emphasis added].

¹⁵ See Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor, ed. (New York: Cambridge University Press, 1996) at 121; Kant, *supra* note 14 at 82; Michael Blake & Mathias Risse, "Immigration and Original Ownership of the Earth" (2009) 23 Notre Dame J L Ethics Pub Pol'y 133 at 135; Garrett W Brown, "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right: A Kantian Response to Jacques Derrida" (2010) 9:3 Eur J Pol Theory 308 at 309: "Kant limits the scope of cosmopolitan right to hospitality, in that any claim to residence (*Gastrecht*) must be secured through an additional contract with the local inhabitants."

¹⁶ Kant, *supra* note 14 at 82 [emphasis added].

¹⁷ See Blake & Risse, *supra* note 15; Mathias Risse, "The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth" (2009) 23:3 Ethics Int'l Aff 281.

¹⁸ See Blake & Risse, *supra* note 15 at 138; see also Risse, *supra* note 17 at 283: "[...] the idea of collective ownership of the earth also gives rise to a conception of *human rights*. In virtue of the fact that humanity collectively owns the earth, individuals possess a set of natural rights that characterize their status as co-owners."

is rights-based. In particular, the concept of justice has been manifested in the meaning of “hospitality” in relation to refugees. For example, according to Kant’s definition of hospitality above, it may be argued that, since a refugee is a person who may suffer from harm (including death) if he or she is turned away, the refugee has a “right to settle” (more than a right to visit) in another state on the basis of his or her right of “common possession of the surface of the earth”.¹⁹ Seyla Benhabib interprets this right of hospitality as referring to the principle of *non-refoulement* which has become the cornerstone of the refugee protection regime.²⁰ Admittedly, the right to hospitality may be tempered by discretion of the host; nevertheless, in the Kantian idea of hospitality, at least with regard to refugees, there is no incoherence in discussing hospitality within the framework of justice rather than a framework of charity or goodwill.

It is worth noting that the concept of hospitality is closely associated with a widely held view of mutual aid. Niraj Nathwani has noted that “[...] foreigners might *be entitled to hospitality*, assistance, and good will according to *the principle of mutual aid*.”²¹ The principle of mutual aid may refer to “the *duty* of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself.”²² Importantly, mutual aid has often

¹⁹ See generally Risse, *supra* note 17 at 284. Similarly, Vattel argues that “[...] it is necessary, in short, that there fugitives should find a retreat; and if every body rejects them, they will be justifiable in making a settlement in the first country where they find land enough for themselves, without depriving the inhabitants of what is sufficient for them”: Vattel, *supra* note 12 at B.II. Ch. IX. s 125. Vattel gives an example in which a nation may deny the entry of a stranger: “[t]hus a nation, whose lands are scarcely sufficient to supply the wants of the citizens, is not obliged to receive into its territories a company of fugitives or exiles”: Vattel, *supra* note 12 at B.I. Ch. XIX. s 231. However, the right of passage, when accompanied by necessity (such as refugee claims), can be said to be a matter of “justice” (not mere humanitarian concerns) in the light of Vattel’s claim that “every man has a right to dwell somewhere upon earth”: Vattel, *supra* note 12 at B.II. Ch. IX. s 125. Moreover, Garrett W. Brown aptly observes that “[...] Kant clearly states within *Perpetual Peace* that an individual cannot be ‘turned away’ if this could not ‘be done without causing his death’ [...] Kant has broadened the reasons that one could claim a right to asylum, which include cases where an individual will suffer imminent harm as a result of their deportation or refoulement”: Brown, *supra* note 15 at 317. Brown also contends that “[...] Kant actually provides for a *right to residence* in cases where rejecting a visitor will result in death and or imminent harm to body or property”: Brown, *supra* note 15 at 324.

²⁰ See Benhabib, *supra* note 10 at 35.

²¹ See generally, Niraj Nathwani, *Rethinking Refugee law* (Boston, Mass: Martinus Nijhoff Publishers, 2003) at 26.

²² John Rawls, *A theory of justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999) at 98 [emphasis added].

been regarded as an adequate basis for the moral obligation owed to foreigners including refugees. John Rawls states that “the natural duties [including mutual aid] are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to *persons generally*.”²³ Moreover, the “duty” of mutual aid constitutes a core aspect of humanitarianism that has set out basic tenets of the contemporary refugee law and policy. Mathew Gibney has defined humanitarianism as the principle holding that “states *have an obligation to assist* refugees when *the costs* of doing so are low.”²⁴ All these point out to the fact that the idea of *duty* underlies conceptions of hospitality, mutual aid and humanitarianism.

However, it is significant to note that, just as hospitality is generally contemplated within the framework of charity (in spite of the aforementioned historical meanings of hospitality), so both concepts of mutual aid and humanitarianism tend to be regarded as a matter of charity or goodwill at least on a practical level. This is because the conception of “cost” found in both definitions of mutual aid and humanitarianism is not squarely defined. It has been pointed out that calculation of the cost (discretion element) is susceptible to political manipulation due to the absence of any clear definition of mutual aid.²⁵ For example, states may, at any time, invoke

²³ *Ibid* at 98-9 [emphasis added]. Walzer regards the principle of mutual aids as a possible “external principle for the distribution of membership” and this principle “doesn’t depend upon the prevailing view of membership within a particular society”: Michael Walzer, *Spheres of Justice: a Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 33. However, Walzer argues that, in the case of a large number of victims who need such an aid, the community is “forced to *choose* among the victims, we will look, rightfully, for some more *direct connection with our own way of life*”: Walzer, *ibid* at 34, 49 [emphasis added].

²⁴ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (New York: Cambridge University Press, 2004) at 231 [emphasis added]. Matthew Gibney observes that the discretionary element of cost in humanitarianism may provide room for states “to protect other valued interests or obligations to which they attach significant value”: *ibid*. In this regard, he has noted that humanitarianism is a compromised product out of the conflict between “the right of a political community to provide for its own members, and the right of all human beings to equal concern and respect”: *ibid* at 194. Catherine Dauvergne expresses a similar view that “humanitarianism provides a stand-in for justice in the immigration realm while reinforcing the boundary between an ‘us’ group and a ‘them’ group”: Catherine Dauvergne, *Humanitarianism, Identity, and Nation Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 72.

²⁵ See generally Gibney, *supra* note 24 at 236. Michael Walzer observes that “given the indeterminate requirements of mutual aid, these decisions are not constrained by any widely accepted standard”: Walzer, *supra* note 23 at 34. James Fishkin also observes such indeterminate characteristics in the concept of mutual aids, stating that, except for the case where the cost is “clearly insignificant,” the concept of mutual aids leaves “considerable room for

“high” costs in terms of finance, resources and culture as a reason for inaction. In other words, the element of discretion may outweigh, to a large extent, the concerns for moral obligation. As a result, the duty of mutual aid or humanitarianism may be characterized as an ethical posture (“what we should do”) rather than a strict moral demand (“what we owe”) required by justice.²⁶

It is true that the rhetoric of moral obligation has often been invoked in relation to humanitarianism; nevertheless, such a sense of duty, as currently understood, does not amount to a duty *based on justice*. The conceptions of hospitality (as generally understood), charity, benevolence or goodwill are core tenets of humanitarianism. This understanding of humanitarianism illuminates the underlying proposition of contemporary refugee law and policy: we should help refugees, not because we owe a duty to them out of justice, but because we should help them out of our goodwill or charity – in this chapter, the humanitarianism to which I refer has these characteristics.²⁷

In this chapter, humanitarianism is juxtaposed with cosmopolitan justice, shedding light on two different approaches that suggest two different solutions for the global refugee crises. In particular, in sections that draw parallels between issues of global poverty and refugee issues, comparative analyses of the two approaches aims to articulate an important way of dealing generally with disenfranchised groups of people. When it comes to cosmopolitan justice, I will not argue that a refugee has a right to settle in another territory for the reason that the earth is common to all human beings, nor will I address the issue of distributive justice in the migration context – what are “just” terms and conditions may be subject to intense academic debates, and

discussion about the extent of our obligations for cases of greater risk or sacrifice”: James S Fishkin, *The Limits of Obligation* (New Haven: Yale University Press, 1982) at 3.

²⁶ See generally, Anderson-Gold, *supra* note 9 at 203: “Justice concerns the proper order of human relationships based upon what is ‘owed’ to each individual person by moral right.”

²⁷ In this chapter, I refer to humanitarianism that is premised upon the general understanding of hospitality, charity, goodwill, or benevolence rather an idea of a strict moral duty based on justice.

these fall beyond the scope of this dissertation.²⁸ Rather, I propose a version of cosmopolitan justice (institutional cosmopolitanism), to support the thesis that providing surrogate political membership or citizenship as an ultimate remedy for refugeehood should be contemplated as a matter of justice rather than humanitarianism.

Cosmopolitanism

Cosmopolitanism is a political theory that is mostly concerned with issues relating to global poverty and peace in the era of globalization.²⁹ What is the core element of cosmopolitanism? Tom Campbell has noted that cosmopolitanism has not reached “consensus on its constitutive key ideas and parameters” that clearly distinguishes it from other fields of philosophical theories.³⁰ For example, with regard to the cosmopolitan idea of equal worth, Campbell argues that “equal worth is the bedrock of all positions within moral philosophy that have a claim on our assent, including almost all consequentialist and deontological theories, including both utilitarianism and rights-based approaches to morality.”³¹ Nonetheless, generally speaking, it is conceded that the moral base of cosmopolitanism lies in the proposition that “the individual human being is the unit of moral evaluation deserving of equal concern and respect.”³² Thomas

²⁸ See generally Lea Ypi, “Justice in Migration: A Closed Borders Utopia?” (2008) 16:4 J Political Phil 391: “justice in *migration* therefore identifies permissible and impermissible restrictions on freedom of movement and articulates how benefits and responsibilities should be distributed between all affected parties (migrants, citizens of host societies and citizens of sending societies).” On the other hand, Benhabib argues that “migration rights cannot be subsumed under distributive-justice claims” and the rights to membership in political community “ought to be considered a human right”: Benhabib, *supra* note 10 at 73.

²⁹ See generally Tom Campbell, “Questioning Cosmopolitan Justice” in Stan van Hooft & Wim Vandekerckhove, eds, *Quest Cosmop* (Springer Netherlands, 2010) 121 at 123.

³⁰ *Ibid.*

³¹ *Ibid* [footnote omitted]

³² Anderson-Gold, *supra* note 9 at 203; Andrew Kuper, “More than Charity: Cosmopolitan Alternatives to the ‘Singer Solution’” (2002) 16:1 Ethics Int’l Aff 107 at 108: “Cosmopolitans broadly agree that the interests of all persons [...] must count equally in moral deliberation, and that geographical location and citizenship make no intrinsic difference to the rights and obligations of those individuals”; Stan van Hooft, *Cosmopolitanism: a Philosophy for Global Ethics* (Stocksfield: Acumen, 2009) at 4: “Cosmopolitanism is the view that the moral standing of all peoples and of each individual person around the globe is equal”; Thomas W Pogge,

W Pogge suggests three common features shared by cosmopolitans, all of which are based on equal worth of individuals: individualism (“the ultimate units of concern are human beings, or persons”), universality (“the status of ultimate unit of concern attaches to every living human being equally”), and generality (“this special status has global force. Persons are ultimate units of concern for everyone – not only for their compatriots, fellow religionists, or such like”).³³

In the past, some cosmopolitan thinkers contemplated the necessity of a world state that could enforce the cosmopolitan moral principle of equal concern and respect for all persons as a matter of justice; however, contemporary cosmopolitan thinkers favour “cosmopolitan justice that builds upon the concept of global governance through the development of international institutions with global jurisdiction”, and, in this cosmopolitan thought, an individual state plays an important role in establishing “institutions, standards, and regulations.”³⁴

Proponents of cosmopolitan justice have often highlighted the distinction between justice and charity (“humanity” or benevolence) in order to highlight the significance of the concept of justice in tackling global poverty. For example, Brian Barry remarks that “[...] the obligations of humanity are goal-based, whereas those of justice are rights-based.”³⁵ “Humanity” is a principle that obligates us “not to cause suffering and to relieve it” with focus on “what happens to people”, while justice is another principle that primarily tells us “how control over resources should be allocated.”³⁶ Barry does not necessarily advocate one over the other; instead, justice is

“Cosmopolitanism and Sovereignty” (1992) 103:1 *Ethics* 48 at 49: “[t]he central idea of moral cosmopolitanism is that every human being has a global stature as an ultimate unit of moral concern.”

³³ Pogge, *supra* note 32 at 48-9.

³⁴ Anderson-Gold, *supra* note 9 at 204.

³⁵ Brian Barry, “Humanity and Justice in Global Perspective” in John W Chapman & J Roland Pennock, eds, *Ethics, Economics, and the Law* (New York: New York University Press, 1982) 219 at 244. Here, humanity denotes “disposition to treat human beings and animals with consideration and compassion, and to relieve their distresses; kindness, benevolence”: Barry, *ibid* at 220 (cited in the text referring to Oxford English Dictionary).

³⁶ *Ibid* at 244.

explicated as a “baseline” upon which the discourse of humanity has become meaningful.³⁷

Barry has convincingly contended that “[...] we cannot sensibly talk about humanity unless we have a baseline set by justice. To talk about what I ought, as a matter of humanity, to do with what is mine makes no sense until we have established what is mine in the first place.”³⁸

In a similar manner, Sharon Anderson-Gold draws attention to the distinction between justice and charity (or benevolence), stating that “[j]ustice concerns the proper order of human relationships based upon what is ‘owed’ to each individual person by moral right”; on the other hand, “with benevolence there is latitude to decide on whom we will bestow our benefits and how much of our goods we will provide to others.”³⁹ The emphasis on the concept of justice in cosmopolitanism has proposed a different kind of cosmopolitanism. Anderson-Gold aptly observes two kinds of cosmopolitanism: moral cosmopolitanism and institutional cosmopolitanism.

Cosmopolitanism can take a purely moral form where institutions are merely instrumental to the achievement of universal human values. *But when the notions of cosmopolitanism and justice are combined we get the view that global institutions are necessary to secure the background conditions for settling the claims of justice.* This is sometimes called political or *institutional cosmopolitanism*. Institutional cosmopolitans reject the notion that the claims of the poor to a decent standard of living can be secured by charity alone. Rather, economic rights like all other rights are a matter of the rules of the basic institutional structure of the social order.⁴⁰

Put another way, in order to realize “equal concern and respect” for all individuals,⁴¹ it is a prerequisite to lay down “just” economic background conditions. A charity-based economic assistance programme is meaningful only where a “just” economic background (the baseline) is institutionalized on a global level. Within institutional cosmopolitanism, the “just” baseline is

³⁷ *Ibid* at 249.

³⁸ *Ibid*.

³⁹ Anderson-Gold, *supra* note 9 at 203.

⁴⁰ *Ibid* [emphasis added].

⁴¹ *Ibid*.

inextricably associated with human rights. Anderson-Gold observes that, in institutional cosmopolitanism, “[...] the global institutions that make up the basic structure of the global social order must be designed so as to achieve fundamental human rights.”⁴² Pogge’s institutional cosmopolitanism is also taken to mean that economic background rules should be formulated in light of social and economic human rights that are rooted in the cosmopolitan principles.⁴³ The significant implication of institutional cosmopolitanism is that it revitalizes the “justice” approach toward global poverty. In what follows, I will elaborate on core principles expounded in institutional cosmopolitanism and attempt to apply them to the current discussions of refugee protection.

Institutional Cosmopolitan Justice

The increasing attention to the global economic structure has facilitated theoretical forums in which to develop institutional cosmopolitan justice in a way that emphasizes justice over charity in relation to global poverty. For example, Andrew Belsey insists that “[f]amine relief is of course vital, but because it is treating the symptoms rather than tackling the underlying causes it is only amelioration and not a cure.”⁴⁴ Belsey identifies the underlying cause of world poverty as the global system based on unequal economic and political relationships, contending that the discourse of justice rather than charity is critical in dealing in a right manner with global poverty – justice tackles the structure while charity the symptoms.⁴⁵

⁴² *Ibid* [emphasis added].

⁴³ Here the conception of human rights is somewhat vaguely defined as “one that rules out truly severe abuses, deprivations, and inequalities while still being compatible with a wide range of political, moral, and religious cultures”: Pogge, *supra* note 32 at 49 (footnote 4).

⁴⁴ Andrew Belsey, “World Poverty, Justice and Equality” in Robin Attfield & Barry Wilkins, eds, *International Justice and the Third World: Studies in the Philosophy of Development* (London: Routledge, 1992) 33 at 34.

⁴⁵ *Ibid* at 35.

Institutional cosmopolitan theorists do not deny the necessity of charity in tackling poverty issues; rather, they argue for the “just” background conditions as a pre-requisite before discussing the need of humanitarian aid for the poor.⁴⁶ In this regard, they propose the “just” background structure as an ultimate remedy for poverty. Pogge argues that “we are confronted not by persons who are merely poor and starving but also by victims of an institutional scheme-impoverished and starved. There is an injustice in this economic scheme, which it would be wrong for its more affluent participants to perpetuate.”⁴⁷ Pogge’s institutional approach aims at establishing “a set of economic ground rules under which each participant would be able to meet her basic social and economic needs.”⁴⁸ Importantly, it targets “not how to distribute a given pool of resources or how to improve upon a given distribution, but rather, how to choose or design the economic grounds rules, which regulate property, cooperation, and exchange and thereby condition production and distribution.”⁴⁹

The sharp contrast between ethics-oriented approach and justice-oriented approach toward global poverty is well found in Andrew Kuper’s article, *Cosmopolitan Alternatives to the Singer Solution*.⁵⁰ Here, Kuper pinpoints the deficiency in the Singer’s ethics-oriented approach toward global poverty. Singer, in *Famine, Affluence, and Morality*, argues that the affluent have a moral obligation to provide humanitarian aid to the needy on a global level.⁵¹ Kuper identifies Singer’s approach more or less with an individualistic and practical ethics that focuses on charity featured with generous donation and sacrifice for the poor.⁵² By way of contrast to this position,

⁴⁶ *Ibid* at 45; Pogge, *supra* note 32 at 50.

⁴⁷ Pogge, *supra* note 32 at 56.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Kuper, *supra* note 32.

⁵¹ Peter Singer, “Famine, Affluence, and Morality” (1972) 1:3 *Phil Pub Aff* 229.

⁵² However, it should be noted that Singer’s argument is nuanced by a sense of duty. He remarks that “[f]rom the moral point of view, the prevention of the starvation of millions of people outside our society must be considered at least as pressing as the upholding of property norms within our society”: Singer, *supra* note 51 at 237. He also

Kuper contends that “[...] the amount of donating and the extent of sacrifice are not the central issue; the real set of issues is how to redeploy resources and energy to roles and institutions within an extremely complex division of labor.”⁵³ In tackling global poverty, Kuper’s primary concern lies at “creating, reforming, or participating in lifestyles and institutions that tend to generate resilient and ongoing inclusion in the benefits of cooperation.”⁵⁴ Kuper’s cosmopolitan way of dealing with global poverty certainly goes beyond the simple discourse of charity or benevolence.

The most salient cosmopolitan thesis may be found in Kok-Chor Tan’s recent book, *Justice without Borders*.⁵⁵ Tan’s cosmopolitan theory promotes awareness of the need for discourse on institutional cosmopolitan justice within the prevalent liberal nationalist or communitarian worldview. Tan identifies an undesirable tendency to think that one has only “humanitarian duties to foreigners.”⁵⁶ By contrast, she states that “[...] focusing on humanitarian duties as opposed to justice does not fully locate the source of global poverty, and hence falls short of offering a complete solution to it.”⁵⁷ In this regard, she argues for the necessity of institutional cosmopolitan justice rather than humanitarian assistance in tackling global poverty. Tan contends that humanitarians have largely ignored the structural or institutional background that has produced an “unjust” global distributive system.⁵⁸ Like the above noted scholars, she

argues that “[i]t follows [...] that we ought to give money away, rather than spend it on clothes which we do not need to keep us warm. To do so is not charitable, or generous. Nor is it the kind of act which philosophers and theologians have called ‘supererogatory’ – an act which it would be good to do, but not wrong not to do. On the contrary, we ought to give the money away, and it is wrong not to do so”: Singer, *supra* note 51 at 235.

⁵³ Kuper, *supra* note 32 at 119.

⁵⁴ *Ibid* at 120.

⁵⁵ Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004). Tan’s view of cosmopolitanism is based on Kantian idea of justice, in particular, the preposition that “we share ‘the earth’s surface’ in common”: Tan, *ibid* at 33-4.

⁵⁶ *Ibid* at 21.

⁵⁷ *Ibid* at 19.

⁵⁸ *Ibid* at 21-4.

contends that a humanitarian approach toward global poverty tends to address only symptoms, leaving the underlying injustice that is embedded in the international economic structure.⁵⁹ Tan remarks that “[a] crucial difference between humanitarian duties and justice is thus that of focus with respect to *the root of the problem*.”⁶⁰

The most salient trait of Tan’s institutional cosmopolitanism is her effort to reconcile cosmopolitan justice and communitarian values. She argues that “[...] cosmopolitan justice, properly understood, can provide the limiting conditions for nationalist aspirations and patriotic commitments, and that it can do so without denying the moral significance of such particular ties and obligations.”⁶¹ Put another way, cosmopolitan justice may inform and set the limit on a global structure, e.g., a *just international economy structure*, in which a nation-state may pursue economic interests in its own terms. Of course, the basic economic structure is to be formulated according to the cosmopolitan values: “individuals are the ultimate units of moral worth and are entitled to equal and impartial concern regardless of their nationality.”⁶² She admits that, even under a just structural framework, one state may suffer from economic hardship due to failure of domestic policies. In this case, another state may help the concerned state with humanitarian aid; however, she says, the assistance is not required by justice.⁶³ Tan states that “[w]hat is unjust, and what distributive justice aims to mitigate, is the background condition within which self-determination is exercised, not the outcome as such of self-determination.”⁶⁴

In summary, institutional cosmopolitan justice pursues a “just” economic background as a prior condition for realizing the cosmopolitan value of equal concern for each individual.

⁵⁹ *Ibid* at 28.

⁶⁰ *Ibid* at 21.

⁶¹ *Ibid* at 2-3.

⁶² *Ibid* at 94.

⁶³ *Ibid* at 71.

⁶⁴ *Ibid* at 72.

While fully recognizing merits of humanitarian assistance, without *prior* engagement in reforming the “unjust” baseline or background condition, the ethics-oriented approach based on charity would perpetuate rather than put an end to global poverty. By way of analogy, this core principle of cosmopolitan justice may bring home the core element of refugee status to us – that is, loss of a political member or citizenship, which is more a systemic failure rather than mere outcome of persecution in the nation-states system. This broader view of refugee status would indeed call into question the prevalent mood of humanitarian approach to refugee protection.

Refugees, the Protection Perspective, and Institutional Cosmopolitanism

The core principles of institutional cosmopolitanism and its analysis of background economic structures are applicable to the refugee context. To put it simply, as proponents of institutional cosmopolitanism have a specific interest in ensuring “just” background structures based on the cosmopolitan principle of equal concern and respect for all persons, so I argue that, in the context of refugee protection, cosmopolitan justice aims to ensure a “just” baseline for all persons that each person has at least one political membership or citizenship in the nation-states system. The language of justice with respect to the “baseline” makes political membership a pre-requisite rather than an option.

It is worth noting that governments appear to have adopted a very similar approach to the global refugee crises as they have to global poverty. Much as humanitarianism has become prevalent in tackling global poverty, so it pervades every aspect of refugee policy-making. Moreover, people tend to think that they have only humanitarian “duty” to refugees as well as to the poor. Under the humanitarian approach to refugee protection, we are obligated to help

refugees as long as the cost of helping is “low”.⁶⁵ As has been illustrated above, the element of “cost” has rendered humanitarianism aligning with charity or goodwill (rather than a strict duty).⁶⁶ Matthew Gibney has noted that “[i]n contrast to a right of free movement [...] humanitarianism mainly offers a *framework* within which a state is required to assess and defend its response to refugee.”⁶⁷ In practice, as examined in Chapter 1, states more and more use the framework of humanitarianism to provide humanitarian assistance to refugees outside their territories, because states have often considered it to be “high cost” in terms of political, economic, social and cultural sacrifice to host refugee population in their own territories.

Unfortunately, this humanitarian approach has largely ignored the institutional background against which the refugee concept has emerged. As I have identified in Chapter 2, the protection perspective well illustrates that a refugee is a person who experiences a ruptured protection relationship with his or her nation-state. In other words, a core element of refugee status is the severed bond between a refugee and a state, thus losing *de facto* or *de jure* political membership or citizenship. Therefore, refugee status is a manifested contradiction between a theoretical presupposition (everyone belongs to a nation-state for protection) and an empirical reality (some do not enjoy state protection). The protection perspective illuminates this essential aspect of refugee status that has been overlooked in the persecution perspective. It also promotes a sense of justice in that refugeehood is perceived as the outcome of systemic failure of securing the “just” baseline in the nation-states system.

⁶⁵ Gibney, *supra* note 24 at 231.

⁶⁶ See Chapter 3, Section of “Hospitality, Mutual Aid and Humanitarianism”.

⁶⁷ Gibney, *supra* note 24 at 236 [emphasis in original] Gibney also remarks that “[s]ignificantly, however, the acceptance of this framework places the onus on state officials to give a *reasoned* defence of why they believe that their current policies are satisfying humanitarianism’s requirement”: Gibney, *supra* note 24 at 236 [emphasis in original].

Following Tan’s logic above, it may be argued that, within the “just” nation-states system in which each one is duly protected by its nation-state, each nation-state is free to pursue its own national goals in relation to migration policies. However, refugeehood is evidence that reveals the “unjust” nation-states system in which some suffer deprivation of political membership. From a cosmopolitan perspective, all people should be respected regardless of their nationality; but, in reality, refugees wander between borders without protection, while citizens in affluent societies enjoy much of protection by their states.⁶⁸ The modern nation-states system has failed to provide protection for all people. In fact, as mentioned in Chapter 2, Haddad rightly comments that “[...] the refugee is not the consequence of a breakdown in the system of separate nation-states, rather she is an inevitable if unintended part of international society.”⁶⁹ In other words, the emergence of nation-states system itself is an underlying cause of the modern refugee movement.⁷⁰ Against this background, cosmopolitan justice demands restoring the “just” baseline in the nation-states system, that, each person holds at least one citizenship through which to enjoy human rights protection.

It is important to note that cosmopolitan justice is concerned not only with a fair and impartial starting point (each person has at least one citizenship in the global structure of nation-states) as the baseline, but also conceives the institution of citizenship itself as a human right –

⁶⁸ See generally Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1979) at 279.

⁶⁹ Haddad, *supra* note 8 at 209. Haddad also argues that “[t]he growth of the nation-state has implied the naming of certain peoples as outsiders, foreigners, unwanted. The designation of individuals as obstacles to the successful formation of the nation-state has become a fundamental aspect of nation-state creation, and refugee flows are a likely outcome. They are a truly modern phenomenon that would not exist without international society”: Haddad, *supra* note 8 at 69.

⁷⁰ See Chapter 2. See Haddad, *supra* note 8 at 51, 63-5; See generally John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State*, Cambridge studies in law and society (Cambridge: Cambridge University Press, 2000); see Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 6: “[b]efore the twentieth century, little attention was paid to the precise definition of a refugee, since most of those who chose not to move to the so-called New World were willingly received by rulers in Europe and elsewhere.”

citizenship and human rights protection go hand in hand in the international state system. The legal concept of citizenship has formalized the relationship between an individual and a state. Although different political traditions have placed emphasis on different aspects of the relationship,⁷¹ each tradition may concur that, as an essential element, citizenship requires the protection of human rights.⁷² It is generally agreed that human rights, whatever they are, are primarily guaranteed by a nation-state.⁷³ In order to enjoy human rights, a human being should be a citizen of a nation-state.⁷⁴ In this regard, citizenship may imply a “right to have rights” in Arendt’s terms under the nation-states system.⁷⁵ Put another way, citizenship is inextricably

⁷¹ For example, with regard to citizenship, the liberal tradition values “institutional safeguards for human rights, rule-governed civil freedom, and the promotion of individual autonomy”; the republican tradition emphasizes “collective self-rule, civic virtues, and immersion in shared social practices that build civic character”: Ronald Beiner, *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community* (Vancouver: UBC Press, 2003) at 65.

⁷² See generally Derek Benjamin Heater, *What is Citizenship?* (Cambridge, UK: Polity Press, 1999); See Beiner, *supra* note 71 at 30-31. There may be no difficulty in asserting the language of human rights protection in liberal tradition that views a state as “something that enforces the rule of law and acts as a protector of universal human rights”: Beiner, *supra* note 71 at 167. However, the republican view of citizenship is also closely associated with human rights protection, as the institution of citizenship is viewed as one that offers the opportunity for us to “realize ourselves as political animals” in the political community: See Beiner, *supra* note 71 at 168. The liberal, republican, communitarian and multicultural traditions share a basic vision of citizenship as a means to realize respective meanings of selfhood in terms of human rights – right to protection of universal human rights, right to participate in the political community, right to belong to cultural communities etc: Beiner, *supra* note 71 at 166-68.

⁷³ See Arendt, *supra* note 68 at 293-94.

⁷⁴ One may argue that citizenship is not an *exclusive* institution that ensures human rights protection. For example, a foreigner, as a non-citizen, may enjoy human rights protection in Canada according to Canadian laws: See *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177. David Jacobson also notes that, within the U.S. territory, what is protected under the U.S. Constitution is the rights of people, rather than those of citizens: See David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996) at 102. Saskia Sassen also has noted that “[u]nder human rights regimes states must increasingly take account of persons qua persons, rather than qua citizens. The individual is now an object of law and a site for rights, regardless of whether a citizen or an alien”: Saskia Sassen, “The de facto transnationalizing of immigration policy”, in Christian Joppke, ed., *Challenge to the Nation-State: immigration in Western Europe and the United States* (Oxford, England: Oxford University Press, 1998) 58 at 71. See also generally Jean L Cohen, “Changing Paradigms of Citizenship and the Exclusiveness of the Demos” (1999) 14:3 Int’l Soc 245 at 259, 266. However, non-citizens enjoy human rights protection in a very limited sense. For example, they have no right to enter into foreign countries, and they are at any time subject to deportation orders, if they overstay, breach terms of visas, or commit offences. When visas are expired, they cannot but leaving the country even against their will. This being the case, only the institution of citizenship in the nation-state system entitles individuals to have full and effective state protection with regard to their human rights.

⁷⁵ Arendt’s right to have rights implies a republic conception of citizenship in which a human being is viewed as “a political being, who derives his dignity from speech and action in community”: Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University Press, 2012) at 4. In this definition of selfhood, a human being, who cannot partake in community life, is a rightless person.

associated with a right to membership which embraces the right to claim human rights protection.

Hannah Arendt has pointed out that “[t]he Rights of Man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state.”⁷⁶ This being so, Arendt observes that one of the losses that refugees (the rightless) suffer is “the loss of government protection” or “the loss of legal status.”⁷⁷ With respect to Arendt’s claims, Alison Kesby succinctly summarizes that “Arendt believed that human rights flow from citizenship such that the right to have rights becomes the right to citizenship.”⁷⁸

In sum, it may be argued that providing surrogate citizenship to refugees amounts to securing both the baseline of and human rights protection in the nation-states system. As such, securing the baseline in the nation-states system should be not regarded as a matter of charity, but it certainly belongs to the realm of justice. Without securing the baseline, some may have no human rights protection, while others do. This is not to say that humanitarian approach is meaningless in terms of moral bases; instead, I argue that, like Barry above, without genuine discussion of cosmopolitan justice with regard to the background structure of the international state system, the humanitarian approach toward refugee protection only treat the ostensible symptoms without dealing with the underlying cause of refugeehood.⁷⁹

Critique on Schemes of Humanitarian Assistance

⁷⁶ Arendt, *supra* note 68 at 293.

⁷⁷ *Ibid* at 294.

⁷⁸ Kesby, *supra* note 75 at 5. Arendt’s claims have been contested on the ground that individuals may have human rights protection apart from the institution of citizenship: See *supra* note 74.

⁷⁹ For parallel arguments relating to global poverty, See Tan, *supra* note 55 at 28; See also Belsey, *supra* note 44 at 34.

In light of the foregoing discussion of the protection perspective and cosmopolitan justice, I conclude that the humanitarian approach toward refugee protection has many serious flaws. The most serious challenge against the schemes of humanitarian refugee assistance, and more particularly against regional refugee “protection” schemes, would be that they overlook or at least makes light of the essential element of refugee status, i.e., the loss of citizenship in the context of the nation-states system. Proponents of the humanitarianism tend to de-emphasize the traditional remedy of asylum. Hathaway, for example, argues that “a universal system for the protection of refugees that is premised on the right to exile must surely fail” in the context of nation-states in which each nation-state pursues national interests through migration controls.⁸⁰

However, from the protection perspective, providing surrogate citizenship is still considered as an ultimate remedy for refugee status. Aleinikoff rightly observes the followings:

It is commonly said that there are three “durable solutions” for refugees: voluntary return to their countries of origin, settlement in the country of asylum, and resettlement in a third country. The underlying reasoning is straight-forward. If refugee status constitutes dissolution of “social bonds,” then unmaking refugees demands the creation or reestablishment of “social bonds”-either in the country of origin or elsewhere. In short, a durable solution repairs the tear in the state system fabric by ensuring that *no individual lacks membership in some state*.⁸¹

The humanitarian approach toward refugee protection does not seriously consider this fundamental aspect of refugee status when proposing solutions for refugeehood. Rather, it gives more prominence to the idea that refugees are to be assisted in the country of origin or regions of origin. Aleinikoff duly recognizes that “source-control strategies might be viewed as a dramatic reformulation of refugee law, *replacing an emphasis on states and membership with a humanitarianism concerned with persons, not borders.*”⁸² In this way, humanitarianism turns a

⁸⁰ Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law”, *supra* note 6 at 181.

⁸¹ T Alexander Aleinikoff, “State-Centered Refugee Law: From Resettlement to Containment” (1992) 14 Mich J Int’l L 120 at 125 [emphasis added] [footnote omitted].

⁸² *Ibid* at 131-32 [emphasis added].

blind eye to the baseline of the nation-states system, that is, “no individual lacks membership in some state”.⁸³

Second, the humanitarian approach toward refugee protection tends to undermine legal protection under international refugee law.⁸⁴ Deborah Anker, Joan Fitzpatrick and Andrew Shacknove recognize that under the humanitarian approach, “asylum-seekers would largely be removed from the realm of law and consigned to the realm of political bargaining.”⁸⁵ It is questionable whether developed states may keep their promises of providing humanitarian assistance to developing or underdeveloped countries that provide physical protections for refugees.⁸⁶ Matthew Price warns that “[i]t is dangerous to place refugees at the mercy of politicians who like to cut costs without offending their constituents and can do so without violating any international legal obligation [...]”.⁸⁷ On the other hand, the traditional remedy of asylum is a legal process by which an asylum seeker may ascertain refugee status. Although political consideration may not be entirely excluded in the refugee determination process, an asylum seeker at least challenges an adverse decision before a court. Anker and others rightly state that “[a]t least in developed democracies, asylum claimants have access to legal procedures and defined rights to protection.”⁸⁸ In a similar manner, Price contends that the institution of asylum is “an uncapped, judicially enforceable form of protection that is rooted in an international legal obligations”, while humanitarian protection is “susceptible to downward budgetary pressures and political manipulation.”⁸⁹

⁸³ *Ibid* at 125.

⁸⁴ See generally Chimni, *supra* note 3 at 244-45.

⁸⁵ Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, “Crisis and Cure: A Reply to Hathaway/Neve and Schuck” (1998) 11 *Harv Hum Rts J* 295 at 305.

⁸⁶ *Ibid* at 305.

⁸⁷ Price, *supra* note 8 at 190.

⁸⁸ Anker, Fitzpatrick & Shacknove, *supra* note 85 at 304.

⁸⁹ Price *supra* note 8 at 165.

Third, humanitarianism (coupled with the persecution perspective) renders the discourse of justice redundant. People began to think of the refugee issues in terms of charity or benevolence (we can or should help refugees) rather than justice (we owe something to refugees). Accordingly, refugee law and policy come to be underpinned by such conceptions as charity and goodwill, which has legitimized a state's own *discretion in deciding a form of* refugee protection.⁹⁰ It is worth noting that, in state practice, humanitarianism has its focus more or less on “survival” rather than “settlement” of refugees. On the other hand, institutional cosmopolitanism highlights the forgotten baseline (an individual should have at least one political membership) in the nation-states system, revitalizing the discourse of justice in relation to “just” remedy for refugeehood. From institutional cosmopolitanism, the remedy of “settlement” for refugees is not one of options, but a sense of justice has compelled the settlement to be an ultimate solution for refugeehood.

Lastly, humanitarianism underestimates *realpolitik*. The proponents of the regional “protection” regime tend to presuppose that a policy of repatriation will accompany and complement the humanitarian approach toward refugee protection. In fact, “repatriation” has long been recognized as one of important durable solution by way of restoring refugees’ original political membership.⁹¹ Long has remarked that repatriation has been a preferred solution as it not only provides legal citizenship to refugees, but also because it restores a sense of “belonging” which encompass ethno-cultural elements of citizenship.⁹² That being said, in *realpolitik*, humanitarian assistance schemes may degenerate into “*humanitarian containment*” policies.⁹³

⁹⁰ See generally Anderson-Gold, *supra* note 9 at 203; See generally, Nathwani, *supra* note 21 at 26.

⁹¹ Long, *supra* note 8 at 233-34.

⁹² *Ibid.*

⁹³ Aleinikoff expresses his concern that “[u]ltimately, *source-control* measures may end up being more about *containment* of migration than about improved protection of refugees”: Aleinikoff, *supra* note 81 at 121.

It is not uncommon to witness refugees being “contained” in refugee camps indefinitely without hope of repatriation.⁹⁴ In any event, a state is not legally bound by humanitarianism to facilitate a refugee’s repatriation. Aleinikoff observes that “[i]t should hardly be surprising, then, to find literally millions of refugees around the world languishing in ‘temporary’ arrangements, not forced to return to their countries of origin but denied permanent resettlement in countries of asylum.”⁹⁵ Anker and others also argue that in reality “once refugees are contained in the South, the interests of the North will not be sufficiently implicated to produce the large cash transfer payments” to the South, which will render more refugees contained in the South without meaningful protection.⁹⁶ Ironically, overt emphasis on an individual right to be returned to a home country may give more momentum to the policy of containment. B.S. Chimni remarks that:

Once repatriation is presented as a solution whose denial implies the violation of human rights, it justifies its pursuit in all circumstances [...] Thus, human rights discourse was once again placed in the service of a policy of containment. [...] the ideology of humanitarianism used the vocabulary of human rights to distract attention from involuntary return.⁹⁷

In Chapter 4, empirical research on the realities of refugee camps and the practice of repatriation will support this argument, posing a serious question to the practice of schemes of humanitarian assistance.

⁹⁴ See Anker, Fitzpatrick & Shacknove, *supra* note 85 at 302; See Brij Maharaj, “Ethnic Identities, Political Boundaries, and the Quest for Durable Solutions” in Uma A. Segal & Doreen Elliott, eds, *Refugees Worldwide*, vol.1(California: ABC-CLIO, 2012) 123 at 139.

⁹⁵ Aleinikoff, *supra* note 81 at 125.

⁹⁶ Anker, Fitzpatrick & Shacknove, *supra* note 85 at 300. They also point out other drawbacks such as “an enhanced risk of *refoulement*,” the deprivation of legal rights of refugees in the countries of asylum, deteriorating conditions of refugees’ regions of origin, and “dehumanizing” or “commodification” of refugees: Anker, Fitzpatrick & Shacknove, *supra* note 85 at 303, 305-6. They argue that “[u]nder the Hathaway/Neve and Schuck proposals, asylum-seekers would largely be removed from the realm of law and consigned to the realm of political bargaining”: Anker, Fitzpatrick & Shacknove, *supra* note 85 at 305.

⁹⁷ Chimni, *supra* note 3 at 255 [footnote omitted]. Chimni also points out that “UNHCR is being transformed from a refugee to a humanitarian organization. Its growing involvement with internally displaced persons (IDPs) and its focus on preventive protection and repatriation has led it to concern itself with human rights activities and returnee integration in the country of origin [...]”: Chimni, *supra* note 3 at 256-7 [footnotes omitted].

Conclusion: Toward “Just” Refugee Protection Regime

Humanitarianism and the persecution perspective have permeated every aspect of refugee law and policy. However, they are deeply problematic insofar as they run counter to the historical and theoretical meaning of refugee status and undervalue the institution of asylum.

Humanitarianism has promoted a “survival-oriented” refugee policy rather than a “settlement-oriented” one. However, the core element of refugee status is the lack of state protection due to the loss of *de facto* or *de jure* citizenship.

This dissertation does not argue that providing citizenship in the country of asylum is the sole remedy for refugee status. Instead, it argues that refugee policies (asylum, resettlement, repatriation or any other forms of solutions) should reflect the protection perspective so as to set the ultimate priority of providing citizenship to refugees as a matter of justice. On a normative basis, institutional cosmopolitanism plausibly locates the issue of refugee crises in the framework of cosmopolitan justice, and presents citizenship as both the “just and impartial” starting point (baseline) for all persons and right to have human rights protection in the nation-states system.

Chapter 4 Refugee Camps, Repatriation and the EU Regional Protection Schemes

Introduction

In Chapter 3, I pointed out some serious shortcomings of humanitarian assistance schemes. I based my critique on normative arguments found within institutional cosmopolitanism, and it was buttressed by principles recognized within the protection perspective. As an extension of Chapter 3, this chapter offers empirical evidence to contextualize core arguments that underpin humanitarian assistance schemes. Humanitarian schemes aim to provide relief in refugee camps or other facilities in regions of origin *on a temporal basis* until refugees may be (first of all) *repatriated* to their country of origin or, should that alternative not be available, are locally settled or resettled elsewhere. In this Chapter, empirical research is examined to determine whether such goals are achieved in practice. It aims to capture the actual consequences brought about by the underlying policies of encampment and repatriation. It considers critical issues arising in both policies, and evaluates them against normative claims of cosmopolitan justice. The combined analyses in Chapters 3 and 4 will provide a more coherent basis for evaluating humanitarian assistance schemes.

It is true that not all refugees reside in refugee camps. UNHCR statistics show that, out of 12 million refugees, 63 percent live in “individual or private accommodation”, 29 percent in “planned/managed camps”, 4 percent in “self-settled camps”, and 2.5 percent in “collective centres”.¹ The recent refugee crisis in Syria has increased refugees who stay in “individual and private accommodation” – many of Syrian refugees are reported to rent apartments “in urban

¹ United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2014: Chapter 5 - Demographic and Location Data*, online: UNHCR <<http://www.unhcr.org/54cf9a8f9.html>> at 66.

agglomerations across the Middle East”.² This being said, this chapter focuses on the large numbers who are located in various types of camps.

Empirical research has identified that the encampment policy contributes to the following non-exhaustive list of negative externalities: 1) isolation from local community 2) deprivation of human rights, e.g., no right to work in the local community 3) protracted residency which has rendered the camps virtually “home” 4) unstable management due to the possible budget cuts from donor states.³ Among these, scholars point to the protracted nature of refugee protection as the most serious problem of the encampment policy.⁴ If the encampment policy leads to long term “containment” in practice, it seriously undermines the underpinnings of humanitarian assistance.

² United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2013: Chapter 6 - Demographic and Location Data*, online: UNHCR <<http://www.unhcr.org/54cf9a8f9.html>> at 63-4; See also UNHCR, *supra* note 1 at 66: “[a]t the end of 2012, two-thirds of all Syrian refugees in Turkey were residing in camps and one-third in residences classified as individual accommodation. By the end of 2014, this situation had reversed, with only 15 per cent of the more than 1.5 million registered Syrian refugees living in camps and the other 85 per cent in individual accommodations. Overall, 3.5 million (29%) of the global refugee population under UNHCR’s mandate resided in planned/managed camps at the end of 2014, with overall camp residence by refugees having seen a reverse trend since 2012.” Like the case of refugees in the camps, Syrian refugees, who rent apartments, have experienced significant hardship as follows: “[a] key point to note is that to find work legally in Jordan, Syrians must purchase a work permit (\$388), which is out of the reach of most. Only illegal work, at low pay, is possible, and in most of the assessment locations there are few opportunities. Refugees indicated a limited range of income sources, with work/wages consistently ranked lower than aid/charity; Aid/charity, which as a category could consist of re-sold aid, cash aid, or gifts from individuals or the local community, was reported as the main income source in all locations [...]”: International Federation of Red Cross and Red Crescent Societies and the Jordan Red Crescent, *Syrian Refugees living in the Community in Jordan*, online: UNHCR <<https://www.google.ca/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Syrian+Refugees+living+in+the+Community+in+Jordan+assessment+report>> at 24.

³ See Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 183; See Alexander Betts & James Milner, *The Externalisation of EU Asylum Policy: The Position of African States*, Working Paper No. 36, (Oxford, UK: University of Oxford, Centre on Migration, Policy and Society (COMPAS), 2006) at 4-5; See also Liza Schuster, *The Realities of a New Asylum Paradigm*, Report No. WP-05-20 (Oxford, UK: University of Oxford, Centre on Migration, Policy and Society (COMPAS), 2005) at 19.

⁴ Hyndman, *supra* note 3 at 177; Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, “Crisis and Cure: A Reply to Hathaway/Neve and Schuck” (1998) 11 Harv Hum Rts J 295 at 302; Brij Maharaj, “Ethnic Identities, Political Boundaries, and the Quest for Durable Solutions” in Uma A. Segal & Doreen Elliott, eds, *Refugees Worldwide*, vol.1(California: ABC-CLIO, 2012) 123 at 139.

A second pillar is the policy of repatriation. As seen in Chapter 1, Hathaway and Neve argue that a viable policy of repatriation can “counter the perception of refugee protection as an unwanted and externally imposed immigration system” and it is desirable to locate refugees in regions of origin as this facilitates both refugees’ contact with their home communities and repatriation.⁵ However, empirical research reveals mixed outcomes throughout history. For example, returned refugees may fail to reintegrate themselves into the community of the country of origin. It has been reported in major repatriation events that the returnees often suffer from serious harms such as violence and deprivation of property rights.⁶ In addition, under certain circumstances, sending back refugees to the country of origin have aggravated rather than heal the harm refugees suffered.⁷

Moreover, in this chapter, regional “protection” schemes in Europe will be analyzed with a view to examining state practice of humanitarian assistance schemes as expounded in Chapter 1. This will show that, in state practice, as argued in Chapter 3, humanitarian assistance schemes may not be conducive to more efficient protection of refugees, because they are subject to political discretion, especially, in relation to funding issues. In reality, humanitarian assistance schemes may end up being “humanitarian containment” schemes. This being the case, empirical research on the realities of refugee camps, the practice of repatriation, and regional “protection” schemes would seriously question the validity of humanitarian assistance schemes.

Refugee Camps and Reparation

⁵ James Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 140, 204.

⁶ Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge: Cambridge University Press, 2013) at 111, 124, 129-30.

⁷ See *ibid* at 124, 129-30.

In *Managing Displacement*, Jennifer Hyndman, a former UNHCR field officer in the camps in Kenya describes vividly the reality of refugee camps.⁸ She maintains that refugee camps maintain only a minimum level of facilities in order to discourage other refugees from crowding into the camps – she refers to this as a policy of “humane deterrence.”⁹ Generally, refugee camps are segregated from local communities and the design of camps prioritizes security concerns in relation to UN staff rather over concerns relating to the refugees.¹⁰ Having observed that, within camps, “a significant amount of time is spent performing the tasks that allow basic subsistence and survival in the camps”, Hyndman even contends that “the camps are anything but an attempt to ‘conserve to the extent possible the original community from the country of origin within the new site’.”¹¹ There is a constant danger of assault, rape and other violence outside the camps.¹² In this context, Hyndman concludes that “[s]patial segregation of and material assistance to refugees in camps provides no medium or long-term solution to their situation.”¹³ Hyndman further points out that “[i]ronically, these camps, which are intended to provide asylum and uphold certain human rights, suspend other basic entitlements such as the right to work, to move freely, and to establish an independent livelihood.”¹⁴

The most problematic feature of managing refugee camps is that refugees tend to stay at the camps indefinitely in conditions that do not protect their human rights.¹⁵ Hyndman remarks as follows:

⁸ Hyndman, *supra* note 3.

⁹ *Ibid* at 24.

¹⁰ *Ibid* at 114.

¹¹ *Ibid* at 109 [footnote omitted].

¹² *Ibid* at 177. Similarly, concerning the refugee camps set up in Mexico in 1980s during the civil war in Guatemala, Megan Bradley comments that “[c]onditions in the camps were highly insecure: the Mexican government documented more than 60 incursions by the Guatemalan army onto Mexican territory, some of which resulted in the murder of refugees”: Bradley, *supra* 6 at 100-1.

¹³ Hyndman, *supra* note 3 at 177.

¹⁴ *Ibid* at 183.

¹⁵ *Ibid* at 177; see Anker, Fitzpatrick & Shacknove, *supra* note 4 at 302; see Maharaj, *supra* note 4 at 139.

The most important criticism of the camps, then, is neither their design nor their management but their very conception as potentially long-term segregated safe spaces for refugees [...] They can provide short-term safety, but they also institutionalize long-term exclusion, marginalization, and waste of both human and financial resources. Many refugees have been living in Kenyan camps for several years. Only a tiny proportion of refugees— fewer than 1 percent— are permanently resettled in countries like the United States, Canada, and Australia. And these numbers are declining.¹⁶

Alexander Betts and James Milner have also pointed out serious shortcomings in African encampment policy. First, they have observed that refugees are kept “in isolated and insecure camps, cutting them off from local communities and making them fully dependent on international assistance.”¹⁷ Second, there are serious issues with funding. Encampment policies in Africa rely heavily on funding from the international community, as most African states are not economically strong enough to supply basic necessities; in this regard, budget cuts of donor countries inevitably affect encampment policy.¹⁸ Betts and Milner remark as follows:

As a result of diminished donor engagement, most refugee assistance programmes in Africa have been required to cut 10-20% of their budgets. The case of Tanzania provides one example of the implications of these budget cuts. In 2001, UNHCR was forced to reduce its budget in Tanzania by some 20%. In 2002, it was reported that the agency was required to “implement critical budget cuts, including US\$ 1 million each in the months of June and November” out of a total budget of approximately US\$ 28 million. Again, in 2003, UNHCR reported that it “struggled to maintain a minimum level of health care, shelter and food assistance to the refugees in the face of reduced budgets.”¹⁹

Third, Betts and Milner point out the protracted situations of refugee crises in Africa. They have observed that “[...] over 80% of refugees in Africa are in protracted refugee situations. UNHCR estimates that the average duration of major refugee situations has increased from 9 years in 1993 to 17 years in 2003.”²⁰ Recently, Milner even argues that, in 2013, “the

¹⁶ Hyndman, *supra* note 3 at 177-178.

¹⁷ Betts & Milner, *supra* note 3 at 4; See Schuster, *supra* note 3 at 19.

¹⁸ Betts & Milner, *supra* note 3 at 5-6.

¹⁹ *Ibid* at 5.

²⁰ *Ibid*.

average duration of a refugee situation is now closer to 20 years”.²¹ With the protraction of refugee crisis, refugee camps have become no longer temporary arrangements; rather, it has become “homes” for many. Milner further observes that “[...] several generations of the same family can now be found in many refugee camps. For example, in the Dadaab camps in Kenya, there are some 10,000 third-generation Somali refugees, born to refugee parents who were themselves born in the camps [...]”.²²

In sum, empirical analysis reveals serious drawbacks of humanitarian assistance schemes. The blueprint of short-term encampment has developed into long-term containment, depriving refugees of the right to political membership or citizenship in the international state system.

Repatriation

As mentioned in Chapter 1, proponents of regional “protection” schemes have argued that the policy of repatriation compensates for internal shortcomings. However, the policy of repatriation in practice has not escaped criticism. Empirical research has shown that returnees may suffer from discrimination, violence, even persecution, if there is no continued supervision from the international community. In this regard, the concept of repatriation should be conceptualized not only as an act of return but also as the act of restoring full rights of political membership.²³

Against this background, Megan Bradley argues for “just” return.

Bradley contends that “return must be discussed as an issue of justice because first and foremost, return is a human right; respecting rights is not simply a question of decency, but a matter of justice.”²⁴ Bradley describes three conditions for a just return: its voluntary character,

²¹ James Milner, “Protracted Refugee Situations” in Elena Fiddian-Qasmiyeh, ed, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 151 at 153.

²² *Ibid* [footnote omitted].

²³ See Bradley, *supra* note 6 at 54, 59.

²⁴ *Ibid* at 48.

return in safety and dignity, and redress.²⁵ The voluntary character of repatriation is important as “many host states have abused this right by prematurely terminating protection for refugees”; safety means “physical, legal and material safety” and dignity implies the “full restoration of their [returnees] rights”.²⁶ In other words, repatriation should ensure the restoration of citizenship in all dimensions. Redress is also an important element in the process of repatriation; in particular, Bradley highlights remedies such as “property restitution, compensation, apologies and truth commissions.”²⁷

In addition, the UNHCR *Handbook for Repatriation and Reintegration Activities* interprets and applies “the 4Rs” approach to the field, that is, “Repatriation, Reintegration, Rehabilitation and Reconstruction”.²⁸ The 4Rs approach is designed “to bring together humanitarian and development actors, create a conducive environment in countries of origin to prevent the recurrence of mass outflows and facilitate sustainable repatriation and reintegration.”²⁹ It requires that, in the field, *repatriation and reintegration* should go together. Sending back a refugee to a country of origin should involve the continued supervision by international agents for the full reintegration of refugees to their country of origin.³⁰ Brij Maharaj also has noted that “[...] the UNHCR has emphasized that the ‘end state’ of reintegration is the universal enjoyment of full political, civil, economic, social, and cultural rights.”³¹ Having considered core arguments of the protection perspective (Chapter

²⁵ *Ibid* at 54, 59.

²⁶ *Ibid* at 54, 58-9; United Nations High Commissioner for Refugees, *Handbook on Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996), online: UNHCR <<http://www.unhcr.org/3bfe68d32.html>> at 11.

²⁷ Bradley, *supra* note 6 at 240.

²⁸ United Nations High Commissioner for Refugees, *Handbook for Repatriation and Reintegration Activities* (Geneva: UNHCR, 2004) at 6, 8.

²⁹ *Ibid* at 6.

³⁰ Bradley, *supra* note 6 at 54, 59; UNHCR, *Handbook on Voluntary Repatriation: International Protection*, *supra* note 26 at 11.

³¹ Maharaj, *supra* note 4 at 137.

2) that refugeehood manifests a ruptured bond between a refugee and her state, it is corollary to affirm that reparation has to do with full restoration of a refugee's relationship with her state (not just "return").

At this juncture, a theoretical problem should be addressed. In the current international state system, the principle of non-interference with the domestic affairs of a sovereign state is a recognized norm. Even though the doctrine of humanitarian intervention in cases of massive human rights violations has become an emerging trend since the late 20th century, the principle of non-interference has endured as a cornerstone of the current international state system.³² In this regard, Aleinkoff expresses his concern that "[...] the emphasis on repatriation and root causes will help developed states justify the new strategies adopted to 'solve' their asylum 'crises,' yet deeply entrenched practices of non-intervention will prevent serious measures to improve human rights situations in countries of origin."³³ Thus, Aleinkoff argues that "[...] refugee scholars and advocates would do well to stay off the repatriation bandwagon until there are far stronger reasons to believe that the international regime stands ready and able to keep its human rights commitments to returnees and other victims of persecution."³⁴ Repatriation, if not properly supervised, is tantamount to abandoning refugees in their countries of origin.³⁵

The failure of ensuring full integration of returned refugees to their country of origin has been evident over history. Bradley's comprehensive analysis of the aftermaths of major repatriation events in the late 20th century presents both the merits and shortcomings of

³² James F. Hollifield, "The politics of international migration" in Caroline B. Brettell & James F. Hollifield, eds, *Migration Theory: Talking across Disciplines*, 2nd ed (New York: Routledge, 2008) 161 at 198.

³³ T Alexander Aleinikoff, "State-Centered Refugee Law: From Resettlement to Containment" (1992) 14 Mich J Int'l L 120 at 134.

³⁴ *Ibid.*

³⁵ See *ibid.*

repatriation policy on the basis of empirical evidences. For example, with respect to repatriation case of Bosnia and Herzegovina, Bradley points out that “[m]any minority returnees faced institutionalised discrimination that relegated them to second-class citizenship.”³⁶ Bradley provides specific examples of the reality that “[m]any returnees suffered shootings, beatings, police intimidation, rape, the destruction of homes and the desecration of holy sites”; in a particular region, state authorities were unwilling to prosecute a violence done to returnees.³⁷ Significantly, the permanent employment rate (not unemployment rate) among the minority returnees is recorded as low as 3% among returnees.³⁸ Bradley concludes that “at the most basic level, the possibility of a just return for displaced Bosnians was thwarted by the preponderance of ethno-nationalistic hatred in post-conflict Bosnia, which undercut refugees’ safety, dignity, and their ability to negotiate effective forms of redress.”³⁹

In the case of Guatemalan repatriation, although Bradley has recognized its positive contribution to peace-making process in Guatemala,⁴⁰ she also highlights its shortcomings as follows:

The Guatemalan repatriation clearly falls short of the conditions of a just return [...] insofar as the process failed to create a legitimate relationship of rights and duties between the state and its returning citizens. Rather than upholding accountability for the crimes at the root of displacement, the state buttressed the privileged position of elite landowners at the expense of returning refugees seeking equal treatment as citizens.⁴¹

Bradley takes land claims as “the thorniest problems” which puzzled the returnees. She observes that “[...] it would take over 800 years to ensure access to land for all of Guatemala’s landless

³⁶ Bradley, *supra* note 6 at 124.

³⁷ *Ibid* at 129–30.

³⁸ *Ibid* at 130.

³⁹ *Ibid* at 143. Bradley also mentions that “...reparation efforts in Bosnia have focused predominantly on property restitution and high-level criminal trials”: *ibid* at 144.

⁴⁰ *Ibid* at 106

⁴¹ *Ibid* at 117.

and land-seeking citizens”, which rendered many returnees internally displaced people.⁴² In this context, Bradley further remarks that “[...] within 2 years of the end of the official repatriation process, more than 500 former refugee families returned to Mexico, claiming that they were the victims of ‘economic violence’ [...] testified, ‘We are not being killed by bullets, we are being starved to death’ [...]”⁴³

Bradley’s comprehensive research shows that the policy of repatriation has had mixed outcomes. In certain cases, repatriation may bring about more harm than good to refugees. As already mentioned in Chapter 2, she rightly comments that “the restoration of the *status quo ante* is often impossible: Many of the crimes associated with displacement, such as torture, rape and murder simply cannot be undone.”⁴⁴

The European Regional Protection Scheme and the Policy of Resettlement

In this section, European models of regional protection schemes will be introduced in order to address current state practice of humanitarian assistance schemes and to analyze their practical implications in relation to refugee protection regimes. The theoretical maneuver of regional “protection” has successfully put policy into practice in the European context. In particular, Hathaway and Neve’s proposal appears to have attracted attentions from several European countries.⁴⁵

In 2003, the United Kingdom proposed a “new vision” in relation to “asylum claim process and protection”; the new vision basically aims at creating “regional protection zones”

⁴² *Ibid* at 111 [footnote omitted].

⁴³ *Ibid* at 102 [footnote omitted].

⁴⁴ *Ibid* at 189.

⁴⁵ See generally Gregor Noll, “Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones” (2003) 5 *Eur J Migr L* 303.

and “transit processing centres”.⁴⁶ The regional protection zones are designed to 1) “prevent the conditions which cause population movements”, 2) “ensure better protection in source region”, 3) develop “more managed resettlement route” from regions of refugee origin to European countries and 4) raise “awareness and acceptance of state responsibility to accept returns” through readmission agreements or any equivalents.⁴⁷ The transit processing centres are basically extraterritorial asylum processing centres that are located *en route* to European countries. It is said that “[t]hose intercepted *en route* to the EU or identified as having a ‘manifestly unfounded’ claim upon arrival within the EU would be sent to the centres to have their asylum claims assessed.”⁴⁸

The rationales behind the proposal echo Hathaway and Neve’s arguments. For example, the UK proposal argues that the current refugee protection regime is failing for unfair distribution of resources – those who reach the European territories receive “support and legal costs exceeding \$10,000 a year, whereas the UNHCR spends an average of only \$50 a year on each refugee [...]”.⁴⁹ A similar point was made by a Dutch representative of the Ministry for Foreign Affairs, stating that, in 2002, the Dutch government spent \$1.4 billion on “81,000 asylum seekers”, whereas the UNHCR spent \$1 billion on “20 million people of concern”.⁵⁰ It should be noted that “the Netherlands, Denmark, Italy, and Spain had given a ‘cautious

⁴⁶ See Chapter 1, Section of “The Policy Shift from Asylum to Humanitarian Relief: Toward Regional Containment”; The United Kingdom Home Office, *New International Approaches to Asylum Processing and Protection*, Online: Statewatch, <<http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>>; Parliamentary Assembly of Council of Europe, *Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers*, online: Council of Europe Parliamentary Assembly, <<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11557&Language=EN>> at para 20.

⁴⁷ The United Kingdom Home Office, *supra* note 46 at 4-5.

⁴⁸ Parliamentary Assembly of Council of Europe, *supra* note 46 at para 20; See Silvia Morgades, *The Externalisation of the Asylum Function in the European Union*, online: Universitat Pompeu Fabra <http://www.upf.edu/gritim/_pdf/GRITIM_WP4_Spring10.pdf> at 26.

⁴⁹ The United Kingdom Home Office, *supra* note 46.

⁵⁰ Schuster, *supra* note 3 at 7.

welcome' to the UK's proposal [...]."⁵¹ In 2005, Germany also proposed a similar vision of migration control. The proposal was a combination of two key policies of external migration controls: interdiction of asylum seekers on the high sea and "the establishment of reception facilities in North Africa."⁵² Otto Schilly, a German Minister for Home Affairs, stated that "[t]he problems of Africa should be solved with the help of Europe *in Africa*, they cannot be solved in Europe"⁵³

The most controversial feature in the foregoing discussions of regional protection schemes would be that those who have already reached the territories of European countries or those who have been interdicted *en route* to Europe might be returned to regions of refugee origin. This feature in fact mirrors the language of Hathaway and Neve's proposal, especially in relation to returning asylum seekers to regions of origin. Luis Peral notes that "[...] the principal aim of the [UK] proposal was the transfer of asylum seekers in countries supporting the scheme, without even first having their claims processed, to one of the areas in the corresponding region."⁵⁴ In fact, the UK proposal indicates that even though it is legally uncertain whether those who have already reached the territories of European states could be returned to the regional protection zones, "[i]n principle [...] better regional protection should allow more equitable management of flows of irregular migrants who want to come to Europe."⁵⁵ Those who

⁵¹ David McKeever, Jessica Schultz & Sophia Swithern, *Foreign Territory: The Internationalisation of EU Asylum Policy* (Oxford: Oxfam, 2005) at 60.

⁵² Madeline Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" (2006) 18:3-4 *Int'l J Refugee L* 601 at 621. Madeline Garlick pinpoints that "the proposal concentrated specifically on the need to take measures in international waters to intercept would-be irregular entrants to the EU, before their boats enter EU territorial waters": Garlick, *ibid* at 620.

⁵³ Alan Travis, "EU Revives Blunkett's Asylum Camp Plan" *The Guardian* (20 September 2004), online: The Guardian <<http://www.theguardian.com/politics/2004/sep/20/eu.immigration>> [emphasis added].

⁵⁴ Luis Peral, *EU Protection Scheme for Refugees in the Region of Origin: Problems of Conditionality and Coherence*, online: European Society of International Law <<http://www.esil-sedi.eu/sites/default/files/Peal.PDF>> at 2.

⁵⁵ The United Kingdom Home Office, *supra* note 46 at 5.

have reached Europe, but have failed to obtain refugee status, might be returned to regional protection areas if they cannot be removed immediately to their country of origin.⁵⁶

In the end, the UK proposals “were rejected by other EU states at the Thessaloniki European Council in June 2003.”⁵⁷ Madeline Garlick has observed that “[t]he idea of removing from EU territory people who had reached a Member State and claimed asylum was attacked vigorously on the grounds of incompatibility with the 1951 Convention.”⁵⁸

However, the concept of regional protection has not faded away. In a 2004 Communication, the EC Commission proposed a regional protection programme coupled with a resettlement scheme.⁵⁹ This programme was regarded as “a key policy tool to address protracted refugee situations globally”.⁶⁰ Controversial elements found in the UK or German proposals were not included in the programme.⁶¹ Instead, the programme included the following: “[a]ction to enhance protection capacity” of regions of origin, “an EU-wide Resettlement Scheme”, “[a]ssistance for improving the local infrastructure”, “[a]ssistance in regard to local integration of persons in need of international protection in the third country”, etc.⁶²

The European Council welcomed the Communication and invited the Commission to further develop “EU-Regional Protection Programmes in partnership with the third countries

⁵⁶ *Ibid* at 5-6. Gregor Noll observes that the UK’s proposal was inspired by both the Danish government’s idea of “reception in the region” and interdiction policies of the U.S and Australia: See generally Noll, *supra* note 45 at 304. Importantly, Noll remarks that “[b]y the end of May 2003, UK Prime Minister Tony Blair’s representative to the Convention on the Future of Europe proposed to the Convent on the Future of Europe to alter Article 11 of the Draft Constitutional Treaty. If adopted, the proposed alteration would gear the Common European Asylum System towards *processing and protecting in the region of origin rather than within the Union*, thus introducing a paradigm shift in EU asylum and migration policies”: Noll, *ibid* at 307 [footnotes omitted] [emphasis added].

⁵⁷ Parliamentary Assembly of Council of Europe, *supra* note 46 at para 20.

⁵⁸ Garlick, *supra* note 52 at 617 [footnote omitted]; see also Schuster, *supra* note 3 at 7; see Morgades, *supra* note 48 at 26.

⁵⁹ EC, Commission, *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin “Improving Access to Durable Solutions”*, 4 June 2004, COM(2004) 410 final.

⁶⁰ *Ibid* at paras 25, 59.

⁶¹ Garlick, *supra* note 52 at 618.

⁶² Commission of the European Communities, *supra* note 59 at para 51.

concerned and in close consultation with UNHCR.”⁶³ With respect to funding, it is said that “EU policy should aim at assisting third countries, in full partnership, *using existing Community funds* where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration [...]”⁶⁴ The language in this statement reflects Hathaway and Neve’s idea of “common but differentiated responsibility” to a certain degree – European countries provides funding and resources; countries in regions of refugee origin provide actual “protection” to refugees.⁶⁵

In the 2005 Communication on Regional Protection Programmes, the EC Commission further developed the idea of a regional protection programme, stating that “regional protection programmes should enhance the capacity of areas close to regions of origin to protect refugees. The aim should be to create the conditions for one of the three Durable Solutions to take place – repatriation, local integration or resettlement.”⁶⁶ In other words, the objective of the regional protection programme is to build up a “protection” environment in regions of origin or transit

⁶³ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, [2005] OJ, C53/1 at 5 (para 1.6.2).

⁶⁴ *Ibid* at 5 (para 1.6.1) [emphasis added].

⁶⁵ Hathaway & Neve, *supra* note 5 at 143–44. See generally Betts & Milner, *supra* note 3 at 2.

⁶⁶ EC, Commission, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, 1 September 2005, COM (2005) 388 final at para 5. This document includes the details of EU Regional Protection Programmes in paragraph 6 as follows:

- (1) Projects aimed at improving the general protection situation in the host country.
- (2) Projects which aim at the establishment of an effective Refugee Status Determination procedure which can help host countries better manage the migration implications of refugee situations thereby allowing them to better focus resources on the core refugee population.
- (3) Projects which give direct benefits to refugees in the refugee situation, by improving their reception conditions.
- (4) Projects which benefit the local community hosting the refugees, for example by addressing wider environmental concerns which affect both refugees and the host community and by disseminating information on the positive impact of refugees.
- (5) Projects aimed at providing training in protection issues for those dealing with refugees and migrants.
- (6) A registration component, building on UNHCR’s Project Profile for persons of concern to UNHCR in the area, which could assist in measuring the impact of Regional Protection Programmes.
- (7) A resettlement commitment, whereby EU Member States undertake, on a voluntary basis, to provide durable solutions for refugees by offering resettlement places in their countries.

regions in order that asylum seekers may find a place to stay until finding durable solutions “there”. The programme includes plans for pilot Regional protection programmes in transit regions, such as “the Western Newly Independent States(Ukraine/Moldova/Belarus)”, and regions of origin, such as “Great Lakes/East Africa” (e.g. Tanzania).⁶⁷ Four Regional Protection Programmes are currently in place.⁶⁸ Most recently, a new “EU regional development and protection programme for refugees and host communities in Lebanon, Jordan and Iraq” was proposed in 2013.⁶⁹ For this project, the EU would contribute €12.3 million, and three European countries (the United Kingdom, Denmark and the Netherlands) would provide additional funding.⁷⁰ The proposed programme includes support for vitalisation of regional economy and developing social infrastructure; importantly, it also aims at enhancing “protection” capacity for refugees by “promoting improved access to basic rights and appropriate legal assistance” and providing “training to local and national authorities and civil society groups who are active in the field of asylum and refugees.”⁷¹

From the outset, the European model of regional “protection” has repeatedly emphasized its complementary characteristic to the *Refugee Convention*.⁷² Thus, at least on a theoretical level, the regional protection programme is “protection-oriented”, aiming to providing more humanitarian assistance to refugees in regions of origin besides legal protection to refugees

⁶⁷ *Ibid* at para 10.

⁶⁸ Regional Protection Programmes are in “the Great Lakes Region”(Tanzania), “the Western Newly Independent States”(Belarus, Moldova and Ukraine), “the Horn of Africa”(Djibouti, Kenya and Yemen), and “Eastern North Africa”(Egypt, Libya and Tunisia): European Resettlement Network, *Regional Protection Programmes*, online: European Resettlement Network <<http://www.resettlement.eu/page/regional-protection-programmes>>; The EC Home Affairs, *External Aspect: Regional Protection Programmes*, online: Home Affairs <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm>.

⁶⁹ European Commission, *New EU Regional Development and Protection Programme for Refugees and Host Communities in Lebanon, Jordan and Iraq* (Brussels, 16 December 2013), online: European Commission <http://europa.eu/rapid/press-release_IP-13-1253_en.htm>.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² Garlick, *supra* note 52 at 612; EC, Commission, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, *supra* note 66 at para 14.

under the *Refugee Convention*. In response, Emma Haddad argues that the EU regional “protection” regime is a balanced protection-oriented refugee policy, which reflects both concerns of border control and humanitarian duty: “the desire to increase control and security inside and the fostering of a more liberal, humanitarian approach outside.”⁷³ Whether the regional “protection” scheme has achieved its intended goals is a critical issue to be examined.

At this juncture, the EU resettlement policy should be mentioned. In the EU Regional Protection Programme, the EU resettlement scheme is said to be “an important factor in demonstrating the partnership element of Regional Protection Programmes to third countries.”⁷⁴ Nevertheless, it should be noted that, in reality, the resettlement numbers under the Regional Protection Programmes are very small.⁷⁵ According to a 2009 Study on Evaluation of Pilot Regional Protection Programmes prepared by GHK, during the period of 2004-2008, the EU states resettled 434 from Tanzania, whereas US, Canada and Australia resettled 12,471.⁷⁶ Therefore, the European Resettlement Network has noted that “[v]oluntary repatriation and local integration are the primary durable solutions considered within RPPs[Regional Protection Programmes] with resettlement to a third country considered when *neither of these options are feasible*.”⁷⁷ This being the case, having considered the reality of protracted refugee situations as

⁷³ Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) at 165, 187. Haddad states that “[b]y offering protection outside the territorial confines of EU international society, protection has in effect been decoupled from sovereignty. Current practices of controlling refugees in Europe are strategies that attempt to place refugees in areas of ‘protection’ that are no longer dependent on state borders. The borders of EU Member States now extend further than ever, far from the state’s territorial jurisdiction and its physical borders”: Haddad, *ibid* at 186.

⁷⁴ EC, Commission, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, *supra* note 66 at para 7.

⁷⁵ European Resettlement Network, *supra* note 68.

⁷⁶ GHK, *Evaluation of Pilot Regional Protection Programmes*, online: Europa <<http://ec.europa.eu/smart-regulation/evaluation/search/download.do;jsessionid=1Q2GTTWJ1m0pM7kSWQ90h1v1CBzxjvJpV2CLp0BgQxQv8zyGqQ3j!1601440011?documentId=3725>> at 97.

⁷⁷ European Resettlement Network, *supra* note 68 [emphasis added].

outlined above, it is doubtful whether the EU Regional Protection Programmes are genuine “protection-oriented” polices, even though they really do achieve limited “protection” in-region.

It is important to remember that regional protection schemes are implemented within a framework of humanitarianism rather than justice. They are basically political in nature. Their political nature has many implications, especially in relation to funding.⁷⁸ As noted above, in general, African countries and the UNHCR have struggled to manage camps as a result of considerable budget cuts from donor states.⁷⁹ Regional Protection programmes appear to have similar issues with funding. The 2010 European Commission Report notes that:

An external evaluation of Regional Protection Programmes concluded that they are a first and successful mechanism to provide more protection for refugees close to regions of origin, but that *their impact was limited* due to limited flexibility, *funding*, visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries.⁸⁰

Elsbeth Guild and Violeta Moreno-Lax also point out that “the extremely limited amount of funding allocated to RPPs – relative to their ambitious goals and the far greater amounts of humanitarian and development funding devoted to the same geographical regions in unrelated projects – also undermined their potential impact.”⁸¹

Moreover, it is doubtful whether RPPs can function as a complementary protection to the *Refugee Convention*. Betts and Milner highlight the rationale behind the policy of the regional

⁷⁸ Matthew Price aptly comments that “budgets may be slowly chipped away over time, leaving refugees with nothing in the end”: Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) at 191. See also Betts & Milner, *supra* note 3 at 5.

⁷⁹ Betts & Milner, *supra* note 3 at 5.

⁸⁰ European Commission, *Report from the Commission to the European Parliament and the Council*, 6 May 2010, COM (2010) 214 final, online: EUR-Lex <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0214&from=EN>> at 6 [emphasis added].

⁸¹ Elsbeth Guild & Violeta Moreno-Lax, *Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Co-operation with the UNHCR*, Directorate-General For External Policies of the Union, EXPO/B/DROI/2012/15 (December 2013), online: EU <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT%282013%29433711_EN.pdf> at 22.

“protection” programs in the European context: “[...] to provide refugee protection in the South *wherever possible* by, where necessary, underwriting the basic financial costs of doing so.”⁸² As will be seen in Chapter 7, European countries have implemented rigorous interdiction programs on the high seas or territorial waters of African states along with RPPs. Convention refugees who have failed to reach European territories, owing to interdiction programs, end up in refugee camps or other facilities in the South. Those refugees who are “contained” in the South cannot claim refugee status according to domestic refugee laws in Europe. In this regard, there is a strong nuance of “substitution” for (instead of complement to) the *Refugee Convention*.⁸³ After all, refugees who are located far from the developed countries may be forgotten from politicians who are more interested in domestic politics – “[...] by and large, out of sight is out mind.”⁸⁴

Conclusion

Although humanitarian assistance schemes may have originally been designed to provide more protection to refugees by complementing the international refugee law, it appears to function as a substitute for the legal regime.⁸⁵ This is due to the combined effect of regional “protection” regimes and deterrence policies. Refugees, who are denied access to the asylum systems of developed countries due to deterrence policies, may end up in being “contained” in regions of origin for a long time, with bare respect paid to their human rights. Liza Schuster rightly argues that “[t]here is a real danger that the existence of ‘protection areas’ in regions of origin would be used by states to shrug off their responsibilities for those who arrive in their territories and claim

⁸² Betts & Milner, *supra* note 3 at 2 [emphasis added].

⁸³ *Ibid* at 4: “[t]he European approach assumes that an external ‘refugee policy’ in Africa can be a substitute for an internal ‘asylum policy’ in Europe without any erosion of *non-refoulement*.”

⁸⁴ See Schuster, *supra* note 3 at 19-20

⁸⁵ See Betts & Milner, *supra* note 3 at 4,7.

asylum”.⁸⁶ Furthermore, notwithstanding that repatriation theoretically is meant to restore citizenship to refugees, repatriation has had mixed results over history. Repatriation cannot be a panacea for refugees.

Humanitarian assistance schemes (or regional “protection” schemes) based on the persecution perspective have not only failed to provide meaningful accounts of and remedies for refugee status on a normative basis, but have also ignored the weight of empirical evidence that amply refutes core assumptions.

Having examined the implications on humanitarian assistance schemes of the persecution perspective, it is equally important to remember that the persecution perspective has had a decisive impact on legal decision making. Chapter 5 introduces a case study of North Korean refugees in Canada to show how genuine refugees (under the protection perspective) may fail to obtain the Convention refugee status if their situation is considered only from the persecution perspective.

⁸⁶ Schuster, *supra* note 3 at 20.

Chapter 5 Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada*

Introduction

On July 31, 2013, the Refugee Appeal Division of the Immigration and Refugee Board of Canada (RAD) overturned a decision of the Refugee Protection Division of the Board (RPD) that had granted refugee protection to two North Koreans asylum seekers. The RAD held that since the respondents did not fit within the definitions found in either section 96 or section 97 of the *Immigration and Refugee Protection Act* (IRPA),¹ they were neither Convention refugees nor persons in need of protection.² The pivotal issue in the case was whether North Koreans should be recognized as having South Korean nationality. According to established case law on the definition of a Convention refugee found in s 96 of the Act, if recognized as dual nationals of the two countries, North Koreans would have to establish a well-founded fear of persecution in “each of their countries of nationality”.³ The RAD held that, according to the relevant South Korean laws, North Koreans are indeed South Korean nationals; therefore, the respondents had the burden of establishing a well-founded fear of persecution in the Republic of Korea (ROK or South Korea) as well as in North Korea (DPRK). In this case, the respondents before the RAD

* This chapter is a modified version of a pre-copyedited, author-produced PDF of an article accepted for publication in *International Journal of Refugee Law*, following peer review. The version of record, Seunghwan Kim, “Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada” (2016) 28:1 *International Journal of Refugee Law* 85, is available online at <http://ijrl.oxfordjournals.org/content/28/1/85.full.pdf+html>.

¹ *Immigration and Refugee Protection Act*, SC 2001, c 27.

² *RAD File No TB3-03406*, [2013] RADD No. 1 at para 2 [TB3-03406]. Section 96 of the Act incorporates into Canadian law the definition of a refugee found in the Convention on the Status of Refugees. Section 97 incorporates rights recognized in the Convention against Torture. In this chapter, the focus is solely on the applicability of s 96 of the Act to North Korean refugees

³ *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126, at para 20, [2005] FCR 126; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, paras 88-89; IRPA, *supra* note 1 at s 96.

were found to have failed to establish such a fear in South Korea.⁴ The decision is profoundly significant. In effect, it has closed the doors to North Korean refugees in Canada.⁵

The decision of the Canadian tribunal in 2013 to exclude North Korean refugees is not an isolated event. It was preceded by a decision of an Australian tribunal in 2010 that was justified on similar grounds. In this chapter, I assess the correctness and reasonableness of the reasoning behind these decisions by scrutinizing the relevant South Korean laws that define and circumscribe the status of North Korean defectors. I also examine two different perspectives on the meaning of refugeehood and explain their bearing on the Canadian and Australian decisions. I refer to these as the “persecution perspective” and the “protection perspective”. While the former is more dominant, emphasizing the fear of persecution as the element that defines the core of refugee status, a growing number of scholars have begun to challenge this view pointing instead to lack of state protection as the fundamental aspect of refugee status.⁶ From this protection perspective, the mere fact that a refugee has a second nationality does not per se preclude his or her application for refugee status; it is more important to determine whether the second nationality provides meaningful protection to the individual in question. The chapter submits that the decisions rejecting the claims of North Korean defectors are based on the persecution perspective; it defends the conclusion that, at least with respect to dual nationality or

⁴ *RAD File No TB-03406*, *supra* note 2 at para 65.

⁵ The acceptance rate of North Korean asylum seekers in Canada has dramatically dropped from 79% in 2012 to 0% in 2014: Immigration and Refugee Board of Canada, *Claims Referred and Finalized: North Korea* (IRB March 19, 2015). Priscilla Ki Sun Hwang offers this data which was retrieved through a request for access to information from the IRB: Priscilla Ki Sun Hwang, *Canada’s “Safe Countries” Bill Slams Doors on North Korean Defectors*, online: David McKie < <http://www.davidmckie.com/canadas-safe-countries-bill-slams-doors-on-north-korean-defectors/>>. The acceptance rate provided by the IRB is calculated by “dividing number of accepted claims by the number of all claims finalized (accepted, rejected, abandoned, withdrawn)”: *ibid.* See also Nicholas Keung, “When an appeal tribunal recently sided with Ottawa by overturning a North Korean’s refugee status, it sent shockwaves among others who have fled the regime” *The Toronto Star* (15 December 2013), online: The Toronto Star <http://www.thestar.com/news/immigration/2013/12/15/canada_closing_door_on_north_korean_refugees.html>.

⁶ Andrew E Shacknove, “Who Is a Refugee?” (1985) 95:2 *Ethics* 274; Katy Long, “Refugees, Repatriation and Liberal citizenship” (2011) 37:2 *Hist Eur Ideas* 232; Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009).

citizenship, the protection perspective should be adopted within the refugee determination process.⁷

The Legal Status of North Koreans

In 1996, the Supreme Court of the Republic of Korea (ROK) held that a North Korean respondent whose father was a subject of the Joseon Dynasty (the last dynasty of Korea) had become a South Korean national at the time of proclamation of the Constitution of Republic of Korea 1948;⁸ the Supreme Court also held that North Korean citizenship obtained by the respondent pursuant to North Korean laws could not affect the respondent's status as a South Korean national.⁹ This legal stance is grounded on an interpretation of Article 3 of the ROK Constitution and the Nationality Act of Republic of Korea.¹⁰

According to Article 3 of the Constitution, South Korea's sovereignty reaches to the whole Korean peninsula including the northern part of Korea (now "occupied" by North Korea).¹¹ The statehood of North Korea is not recognized; instead, the North Korean regime is defined in South Korean law as an anti-government organization.¹² Therefore, in a strict legal sense, North Korean citizenship endowed by the North Korean government is not recognized by

⁷ I use the terms "nationality" and "citizenship" interchangeably in this Chapter.

⁸ Constitution of the Republic of Korea, adopted on 17 July 1948, online: Legislative Office <<http://www.law.go.kr/lsInfoP.do?lsiSeq=61603&urlMode=engLsInfoR&viewCls=engLsInfoR#0000>>.

⁹ *Director of Seoul detention Centre v Lee Young Suen* (1996) Supreme Court of Republic of Korea, No. 96 Nu 1221.

¹⁰ Nationality Act (the Republic of Korea), Act No. 5431, Wholly Amended 13 Dec. 1997, adopted on 20 Dec 1948, online: Legislative Office <<http://www.law.go.kr/lsInfoP.do?lsiSeq=104818#0000>>; see also for English version of the Act, online: MOFAT

<http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDMQFjAD&url=http%3A%2F%2Fhrv.mofat.go.kr%2Fwebmodule%2Fcommon%2Fdownload.jsp%3Fboardid%3D8779%26tablename%3DTYPE_LEGATION%26seqno%3Df9dfd6ff202a05ffb802507f%26fileseq%3D06807afd1022f8903504802a&ei=L5sHVJydK5PjoASlmlIKoCg&usg=AFQjCNEdC1xQtOj_QGa6by5G5F0wcKr-CA&bvm=bv.74649129,d.cGU>.

¹¹ Constitution of the Republic of Korea, *supra* note 8 at art 3: "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands"; See generally No 96 Nu 1221, *supra* note 9.

¹² Seong Ho Jhe, "Legal Status of North Korean Defectors Abroad and Some Possible Solutions for Their Fair Treatment" (2002) 9 Seoul Int'l LJ 21, 27; Myung-Ki Kim, "Legal Theory of the Supreme Court Decision regarding the North Korean Inhabitants as the Republic of Korean Nationals" (1997) 30 The Justice 186.

the South Korean government.¹³ In addition, the Nationality Act defines who is a national of South Korea.¹⁴ Article 2(1) of the Act reads as follows:

Article 2 (Attainment of Nationality by Birth)
 (1) A person falling under any of the following subparagraphs shall be a national of the Republic of Korea at birth:
 1. A person whose father or mother is a national of the Republic of Korea at the time of the person's birth; [...].¹⁵

Thus, if the father or mother of a North Korean is a South Korean national, the North Korean is born with South Korean nationality. Importantly, North Koreans who lived in North Korea in 1948 were recognized as South Korean nationals under the ROK Constitution; therefore, their descendants in North Korea have also been born with South Korean nationality pursuant to the Nationality Act. This position has been widely supported by legal scholars in South Korea.¹⁶

Other countries such as Canada have recognized the statehood of North Korea.¹⁷ From the perspective of these countries, a North Korean has North Korean (DPRK) nationality according to the DPRK Nationality Act.¹⁸ This statute provides *inter alia* that those who had Joseon nationality under the Joseon Dynasty “before the founding of the [DPRK] republic” and

¹³ Myung-Ki Kim, *ibid* at 196-97.

¹⁴ *Constitution of the Republic of Korea*, *supra* note 8 art 2(1): “Nationality of the people of the Republic of Korea shall be prescribed by Act.”

¹⁵ Nationality Act (ROK), *supra* note 10 at art 2(1)1.

¹⁶ Myung-Ki Kim, *supra* note 12; Jhe, *supra* note 12 at 26-27; Ki Gab Park et al, “북한이탈주민(탈북자)의 법적 지위에 관한 연구 [Research on Legal Status of North Korean Defectors]” (1997) 17 *The Korean J Human L* 249; Eunjung Kim, “(국제법)북한이탈주민(탈북자)의 법적 지위와 보호 [Legal Status and Protection of North Korean Defectors]” (1998) 43 *Goshigye* 325; See Jeong-chan Cho, “북한 주민의 법적 지위에 관한 연구[Research on Legal Status of North Korean Residents]” (2001) 남북법제연구보고서[South-North Korea Legislation Studies], online: Ministry of Government Legislation <<http://moleg.go.kr/news/notice;jsessionid=beCb0LjbmW9nyzFbPMo6LeuDmYHtFACM4E02sR7QHLLrASpXRB Mk9v1SiZ7wmXdD?pstSeq=43465&brdSeq=3&pageIndex=8>> at 143.

¹⁷ *KK and others vs The Secretary of State for the Home Department* [2011] UKUT 92 (IAC) at para 18; Government of Canada, *Canada - Democratic People's Republic of Korea*, online: Government of Canada <http://www.canadainternational.gc.ca/korea-coree/bilateral_relations_bilaterales/canada-dpr_korea-rpd_coree.aspx?lang=eng>.

¹⁸ Nationality Act (DPRK), adopted on 9 October 1963. The text is available at Information Center on North Korea <http://unibook.unikorea.go.kr/?sub_num=53&recom=2&state=view&idx=49>. See also 1007662 [2011] RRT 76 (24 January 2011) at para 68.

their children are recognized as North Korean nationals, if they “do not abandon the nationality” (Article 2). A child who is born of North Korean parents obtains North Korean nationality (Article 5(1)). A child who is born of a North Korean parent and a foreign national obtains North Korean nationality when he or she is born in North Korea (Article 5 (2)).

Close comparative analysis of the ROK Nationality Act and the DPRK Nationality Act is important as it arguably supports the proposition that not all North Koreans have South Korean nationality even on a theoretical level. For example, according to the Temporary Regulation of Korean Nationality 1948 (ROK)(“Temporary Regulation”) and the decision of the Supreme Court of the Republic of Korea above, a North Korean may have obtained South Korean nationality in 1948 if he or she had Joseon nationality (was a subject of the Joseon Dynasty).¹⁹ Importantly, the Temporary Regulation only admitted the paternal line in relation to the acquisition of Joseon nationality by birth in general circumstances. Accordingly, if a person was born of a Joseon mother and a foreign father, the person was not regarded as having Joseon nationality; nor was he or she regarded as having South Korean Nationality in 1948, either. In contrast, the DPRK Nationality Act appears to have recognized both the maternal line as well the paternal line with regard to Joseon nationality (Article 2(1)).²⁰ In this case, some individuals who were not declared to be South Korean nationals in 1948 may arguably have obtained North Korean nationality according to the DPRK Nationality Act.

Moreover, it is interesting to note that the ROK Nationality Act did not recognize the maternal line until the 1997 amendments,²¹ whereas DPRK Nationality Act appears to have

¹⁹ See also 국적에관한임시조례 [The Temporary Regulation of Korean Nationality], adopted on 11 May 1948, at art 2(1): “조선인을 부친으로 하여 출생한 자[a person who is born of a Joseon father]”; See Jeong-chan Cho, *supra* note 16 at 132.

²⁰ See Jeong-chan Cho, *supra* note 16 at 136.

²¹ Nationality Act (ROK), *supra* note 10, Addenda art 7(1) (amended by Act No 6523, 19 December 2001).

recognized it from the outset.²² Accordingly, there is a possibility that a North Korean asylum seeker who has a foreign father may not have obtained South Korean nationality by birth. The 2014 Australian decision in *SZQYM* has dealt with this issue as will be seen later in this chapter.²³

A. The Implication of South Korean Nationality for North Korean Asylum Seekers

In 2013, nine North Korean youngsters aged between 15 and 23 attempted to seek asylum in the South Korean embassy in Laos via China with the help of a missionary, known as M.J.

Unfortunately, on a bus en route to the South Korea embassy in Laos, they were arrested by the local police for their illegal entry into Laos and were subsequently detained by Laotian immigration officials for more than two weeks. During the period of detention, it is alleged that M.J.'s wife repeatedly contacted the South Korean embassy for help, but South Korean embassy officials did not visit the North Korean youngsters.²⁴ Tragically, they were all sent back to North Korea via China.²⁵ Laos faced international criticism for sending back North Korean defectors to North Korea.²⁶ It is feared that nine youngsters may have been executed there.²⁷

²² See Jeong-chan Cho, *supra* note 16 at 136.

²³ *SZQYM v Minister for Immigration and Citizenship* [2014] FCA 427, 142 ALD 229.

²⁴ Paula Hancocks & KJ Kwon, "Defectors Agonizingly Close to Freedom Sent Back to North Korean Nightmare" *CNN World News* (3 October 2013), online: CNN <<http://www.cnn.com/2013/09/30/world/asia/north-korea-laos-defectors-hancocks/index.html>>.

²⁵ Damien Gayle, "Did North Korea Execute Children Who Defected? Group of Nine Who Endured Frostbite and Tuberculosis to Escape Were Forcibly Sent Back to Rogue State" *Mail Online* (1 October 2013), online: Mail Online News <<http://www.dailymail.co.uk/news/article-2440178/Did-North-Korea-execute-children-defecting.html>>.

²⁶ Jung-yoon Choi, "Laos assailed for sending young defectors back to North Korea" *Los Angeles Times* (2 June 2013), online: Los Angeles Times <<http://articles.latimes.com/2013/jun/02/world/la-fg-wn-laos-defectors-north-korea-20130602>>; Justin McCurry, "UN 'extremely concerned' for repatriated North Korean defectors" *The Guardian* (3 June 2013), online: The Guardian <<http://www.theguardian.com/world/2013/jun/03/un-repatriated-north-korean-defectors>>.

²⁷ Jessica Chasmar, "9 North Korean Defectors May Have Been Executed upon Return" *The Washington Times* (1 October 2013), online: The Washington Times <<http://www.washingtontimes.com/news/2013/oct/1/9-north-korean-defectors-may-have-been-executed-up/>>.

This story reveals an important aspect of South Korean nationality for North Koreans. In reality, North Korean defectors are treated as North Koreans rather than as South Korean nationals by the South Korean government.²⁸ This explains why South Korean embassy officials did not show up to protect the nine youngsters at the detention centre in a manner consistent with duty of diplomatic protection.

A similar reality is also found in *KK*,²⁹ a case in which a North Korean asylum seeker approached the South Korean embassy in London, U.K. in order to apply for South Korean citizenship. She was allegedly told that “South Korea was not prepared to give her citizenship unless her asylum application with the UK government was finished.”³⁰

Legal scholars who have addressed this issue have reached similar conclusions. Seong-Ho Jhe has argued that if North Koreans were considered to be South Korean nationals, they would have a constitutional right of protection overseas (diplomatic protection) according to Article 2(2) of the ROK Constitution.³¹ In cases of breach of duty of protection, such as the stories above, North Korean defectors would have a right to bring a legal action against the South Korean government for damages.³² Unfortunately, a right of protection and a right to bring a legal action exist only in theory.³³ In reality, North Korean defectors do not enjoy the substantive rights recognized and guaranteed in the ROK constitution.³⁴ In support of this view,

²⁸ See generally Jeong-chan Cho, *supra* note 16 at 148-49.

²⁹ *KK*, *supra* note 17.

³⁰ *Ibid* at para 45.

³¹ *Constitution of the Republic of Korea*, *supra* note 8 at art 2(2): “(2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act”; Jhe, *supra* note 12 at 29.

³² See Jhe, *supra* note 12 at 29.

³³ See *ibid* at 29, 37, 40, 61-62, 71-72. See generally Eunjung Kim, *supra* note 16 at 327; See, Park et al, *supra* note 16 at 253,263; See Myung-Ki Kim, *supra* note 12 at 199; See *Case No 0910048* [2010] RRT 911 (20 October 2010) at para 60 (Mr. Hwang's report); See *Case No 0909449* [2010] RRT 763 (7 September 2010) at para 101.

³⁴ See *Case No 0910048*, *supra* note 33 at para 60 (Mr Hwang's report).

Myung-Ki Kim has also concluded that in the context of diplomatic protection, North Koreans do not enjoy *de facto* nationality of South Korea.³⁵

The purely “theoretical” nature of North Korean’s citizenship rights is also confirmed in the opinion evidence submitted by legal experts in the Australian and UK cases. Pillkyu Hwang, a human rights lawyer practising in South Korea, indicates in his report that “South Korean law provides North Korean nationals [...] with a theoretical, automatic entitlement to citizenship [...] However, South Korean citizenship, of itself, carries little in the way of substantive rights and in particular, does not afford an automatic right to enter and reside in South Korea.”³⁶ Chulwoo Lee, a professor of Sociolegal Studies, Yonsei Law School in Seoul, South Korea, also concurs with Hwang, concluding that “North Koreans have, in effect, only ‘theoretical’ ROK nationality.”³⁷

B. Controversy: Access to South Korean citizenship

In *KK*, Christopher Bluth, Professor of International Studies at the University of Leeds, in his expert opinion, remarked as follows:

South Korean policy towards North Korean refugees/defectors reflects a profound contradiction between the principles of the constitution and the law [...] and [...] practice. [...] In principle, once a person is recognised as “Korean”, there is no discretion to refuse or grant ROK citizenship. However, in practice, acceptance of all persons claiming to be North Korean refugees/migrants is not automatic.³⁸

Importantly, Bluth points out that, as a matter of procedure, North Koreans have to apply for protection at the South Korean embassy or consulate in order to take advantage of South Korean citizenship.³⁹ The application for “protection” is governed by the North Korean Refugees

³⁵ Myung-Ki Kim, *supra* note 12 at 199.

³⁶ *Case No 0910048*, *supra* note 33 at para 60.

³⁷ *Case No 0909449*, *supra* note 33 at para 101.

³⁸ *KK*, *supra* note 17 at para 35 (sub-paras 5.2.1 and 5.4.3).

³⁹ *Ibid* at para 35 (sub-para 5.4.4.).

Protection and Settlement Support Act (ROK) (“The Protection Act”).⁴⁰ Hwang’s report also indicates that “the only legal avenue for a North Korean escapee to enter South Korea is to apply for ‘protection’.”⁴¹ However, it is important to note that the Protection Act applies only to those who express their intention to be protected by South Korea (Article 3), and that those who fall into specified categories, such as international criminal offenders and those who reside in a third country for 10 years and over, may not be granted protection under the Act (Article 9).⁴² In other words, not all North Koreans are eligible for protection under the Protection Act. It is at this stage that considerable confusion arises. The Protection Act is designed to assist North Korean defectors to settle in South Korea by providing political, financial and cultural support (Article 1) and has nothing to do with citizenship per se. However, according to Bluth and Hwang, the Protection Act appears to function like citizenship law for North Koreans.

This confusion has been identified by the Canadian and Australian Tribunals.⁴³ The Australian Tribunals have settled the controversy by referring to the opinion of Chulwoo Lee indicating that there are two alternative procedures to ascertain South Korean nationality other than applying for protection under the Protection Act: 1) the nationality adjudication process

⁴⁰ *North Korean Refugees Protection and Settlement Support Act*, Act No 12278, partial revision on 21 January 2014, adopted on 13 January 1997; for English version, see Statues of the Republic of Korea website <https://elaw.klri.re.kr/kor_service/lawView.do?hseq=32024&lang=ENG> [“The Protection Act”].

⁴¹ *Case No 0910048*, *supra* note 33 at para 60.

⁴² The Protection Act, *supra* note 40 at art 9.

Article 9 (Criteria for Protection Decision)

(1) In determining whether to provide protection pursuant to the main sentence of Article 8 (1), any of the following persons may not be designated as persons eligible for protection:

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.;
2. Offenders of nonpolitical and serious crimes, such as murder;
3. Suspects of disguised escape;
4. Persons who have earned their living for not less than ten years in their respective countries of sojourn;
5. Persons who have applied for protection when one year elapsed since their entry into the Republic of Korea;
6. Other persons prescribed by Presidential Decree as unfit for the designation as persons eligible for protection.

[...]

⁴³ *Case No 0909449*, *supra* note 33 at para 101; *RAD File No TB3-03406*, *supra* note 2 at para 57.

under the Nationality Act,⁴⁴ and 2) legal action in a court “for a declaratory judgment that s/he is a national of the Republic of Korea.”⁴⁵ According to this view, North Korean asylum seekers may ascertain South Korean nationality even though they are ineligible for protection under the Protection Act. Similarly, the Canadian Tribunal in *TB3-03406* recognizes that ineligibility for protection under the Protection Act cannot affect a person’s status as a South Korean national from birth.⁴⁶

However, both Tribunals miss significant procedural obstacles that transform the automatic nature of South Korean nationality for North Koreans into the discretionary grant of citizenship. First, North Korean defectors have often experienced practical difficulties in ascertaining their “theoretical” South Korean nationality. In most cases, the diplomatic missions are the first contact sites for North Korean defectors, and they consider the cases of the North Korean defectors only under the Protection Act.⁴⁷ Even where North Korean defectors directly enter South Korea without help from the diplomatic missions, they are supposed to apply for protection under the Protection Act in order to settle in South Korea, too. However, as examined above, not all North Koreans are eligible for “protection” under the Act. Importantly, the nationality adjudication procedure, mentioned as an alternative mode of ascertaining South Korean nationality, is available only to those who are in South Korea⁴⁸ and the number of

⁴⁴ Nationality Act (ROK), *supra* note 10 at art 20(1): “Where it is unclear whether a person has attained or is holding nationality of the Republic of Korea, the Minister of Justice may determine such fact upon review.”

⁴⁵ *Case No 0910048*, *supra* note 33 at para 70.

⁴⁶ *RAD File No TB3-03406*, *supra* note 2 at paras 62, 63.

⁴⁷ *KK*, *supra* note 17 at 35(sub-para 5.4.4.); *Case No 0910048*, *supra* note 33 at para 60; The Protection Act, *supra* note 40 at art 7(1): “[a]ny person escaping from North Korea who intends to be protected under this Act, shall apply for protection in person to the head of an overseas diplomatic or consular mission, or the head of any administrative agency[...];” Jeewon Moon, *Surrogate Protection in Canada and Potential Nationality in South Korea: Does a North Korean Asylum-Seeker have a “genuine link” to South Korea?*, online: Essay Contest CARFMS (2013) <<http://www.carfms.org/sites/default/files/North%20Korean%20Refugee%20Status%20In%20Canada%20%282013%20Essay%20Contest%20CARFMS%20web%29.pdf>> at 18-19.

⁴⁸ Seop Chung et al, “The Treatment of Stateless Persons and the Reduction of Stateless: Policy Suggestions for the Republic of Korea” (2010) 13 *Korea Rev Int’l Stud* 7 at 24.

applications under the procedure is negligible. From the period of 2004 to 2007, an average of 1,996 North Korean defectors per year settled in South Korea under the Protection Act,⁴⁹ whereas an average of 42 per year ascertained South Korea nationality under the nationality adjudication procedure.⁵⁰ In other words, about 98% settled in South Korea under the Protection Act, whereas, only about 2% under the nationality adjudication procedure.

Second, it is a misunderstanding that those who fail in the application for protection under the Protection Act can ascertain South Korean nationality in the nationality adjudication procedure. Ho Taeg Lee's empirical research⁵¹ on North Korean cases in the nationality adjudication procedure indicates that not all North Koreans are recognized as having South Korean nationality even under the nationality adjudication procedure. This research identifies five categories of individuals who are likely to fail to ascertain South Korean nationality in practice, due in large part to the difficulty of identifying the applicants as North Koreans: 1) those who have *huaqiao* ("Chinese people living outside of China")⁵² background, e.g. where a parent is *huaqiao* or where one has married a *huaqiao* spouse in North Korea;⁵³ 2) a holder of documents showing Chinese nationality regardless of whether it is forged or not; 3) those who live abroad (*jogyo*), in particular those who do so for a long time; 4) unaccompanied minors with

⁴⁹ Statistics Korea, *북한이탈주민 입국 현황* [Statistic on the Intake of Residents Escaping from North Korea], online: E-Country Index <http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1694>.

⁵⁰ Chung et al, *supra* note 48 at 25 (Table 1: Applications for Nationality Adjudication and Decisions). Data was obtained by Chung and others through a request for information from the Ministry of Justice

⁵¹ *Ibid* at 25-26.

⁵² *Huaqiao* is "*hwagyo* in Korean, meaning Chinese people living outside of China": *ibid* at 26.

⁵³ Bok-Hee Chang, "Legal Status of Stateless North Korean Refugees" (2009) 43 *Dong-A Law Review* 449 at 450; Kyu-Chang Lee, "Legal approach to protection for stateless North Korean defector" (2012) 21 *통일정책연구* [Unification Policy Studies] 213 at 229; "목숨걸고 온 탈북자에 '중국으로 돌아가라'" ["North Korean defectors who have risked life are told 'Go back to China'"] *NANCEN* (6 September 2010), online: NANCEN <<http://nancen.org/358>>.

lack of documentation supporting their identity; and 5) those who acquire Chinese citizenship.⁵⁴ The failure to ascertain South Korean nationality in the nationality adjudication procedure has given rise to the creation of stateless North Korean asylum seekers.⁵⁵ For example, Chun-II Kim, a North Korean defector, came to South Korea in 2004. According to Yonhap news, he failed to obtain South Korean citizenship on account of the fact that his father was Chinese. He was deported to China, but the Chinese government sent him back to South Korea as he was not recognized as Chinese. Therefore, he became a stateless North Korean defector.⁵⁶

Third, with respect to legal action in a court, there has been no case reported in which those who had failed in the nationality adjudication procedure challenged the decision before a Court.⁵⁷ Where a North Korean defector has failed in the nationality adjudication procedure, there is no practical benefit in his or her bringing legal action before a Court. Unless there was a gross error in the process of evaluating nationality, the negative decision is likely to be upheld by the Court. Chung and others argue as follows:

A person who is refused protection [under the Protection Act] or whose protection decision is revoked may still apply for nationality adjudication. But if one fails to be determined to be North Korean by nationality adjudication, he/she finds it virtually impossible to assert his/her Korean nationality and is likely to be *de facto* stateless.⁵⁸

The claim of legal experts that the Protection Act functions like citizenship law is based solely on the fact that almost every North Korean defector has ascertained their “theoretical”

⁵⁴ Chung and others note that the South Korean government examines the identity of a North Korean by asking about the details of life in North Korea. However, those who have lived outside North Korea for a long time may find it difficult to describe the life in North Korea: Chung et al, *supra* note 48 at 26.

⁵⁵ *Ibid* at 25.

⁵⁶ “‘무국적’ 탈북자, 보호장치 미비로 고통받아” [“stateless North Korean defectors’ suffer from lack of protection”] *DailyNK* (28 February 2008), online: DailyNK <<https://www.dailynk.com/korean/read.php?cataId=nk09000&num=53513>>.

⁵⁷ Chung et al, *supra* note 48 at 25.

⁵⁸ *Ibid*.

South Korean nationality under the Protection Act.⁵⁹ When a North Korean defector applies for protection under the Protection Act, he or she is required to go through identification processes and to receive education for social adaptation.⁶⁰ Once a favourable “protection” decision is made by the Minister of Unification, the Minister, acting on behalf of the applicant, applies for family relation registration to the Seoul Family Court (The Protection Act, Article 19); the successful applicant is also entitled to obtain a national identity number or resident registration number before the completion of education for social adaptation (The Protection Act, Article 19(3)).⁶¹ As a result, he or she can enjoy both *de jure* and *de facto* South Korean nationality.

However, the critical issue is that not all North Korean defectors are successful in the application for protection under the Protection Act. Besides the exclusion clauses in the Protection Act, the procedure under the Protection Act may involve political consideration such as diplomatic relations, in particular when North Korean defectors are outside South Korea. In-ho Song of the Somyoung Law Firm in Seoul states that:

Officially, there is no different policy towards North Koreans applying for citizenship from abroad. However [...] diplomatic officers are controlling the number of the entry of North Koreans into South Korea [...] Therefore, *a person who are expected to be refused protection will be refused of even entering into the country.*⁶²

⁵⁹ See *Case No 0910048*, *supra* note 33 at para 60; See *KK*, *supra* note 17 at para 35(sub-para 5.4.11).

⁶⁰ The identity determination process for a North Korean defector is said to take one to three months, during which time he or she is placed in the detention centre in South Korea: *Case No 0909931* [2010] RRT 842 (13 September 2010) at para 50; *KK*, *supra* note 17 at para 35 (sub-para 5.4.5); Ministry of Unification, *북한이탈주민 거주지 정착지원 매뉴얼* [The 2014 Settlement Support Manual for Residents Escaping from North Korea], online: Ministry of Unification <<http://www.unikorea.go.kr/content.do?cmsid=1566&mode=view&page=&cid=33381>> at 14.

⁶¹ The 2014 Settlement Support Manual for Residents Escaping from North Korea, *supra* note 60 at 21-22.

⁶² *KK*, *supra* note 17 at para 55 [emphasis added]. In-ho Song has remarked that “[i]n strict legal perspective, it is a wrong interpretation which is against the Protection Act, the Nationality Act, and the Constitution. However, since the authorities and particularly diplomatic offices are operating in such a way, a person refused protection applying from abroad cannot submit the application forms to the Minister of Unification or, in case of the nationality decision, to the Minister of Justice, because of the interference of the diplomatic offices”: *KK*, *supra* note 17 at para 55.

Unless diplomatic personnel send the protection application to the home country, there is no way that North Korean defectors can ascertain their South Korean nationality.⁶³ Thus, even Bluth argues that “[t]he policy of the South Korean government has been to discourage defections and limit the number of North Koreans seeking protection in the South, without violating the constitution.”⁶⁴ If a political consideration overrides a legal entitlement, South Korean nationality for North Koreans cannot be said to provide any meaningful protection. In this regard, Hwang rightly comments that “South Korean citizenship is a theoretical construct and political declaration only, and that it has little relevance to ‘nationality’ or ‘citizenship’ as normally understood.”⁶⁵ Having examined the implication of South Korean nationality for North Koreans, the decisions of the Canadian and Australian Tribunals with respect to dual nationality of North Koreans will be assessed.

The Status of North Korean Refugees in Canada

Canadian jurisprudence on dual nationality in the context of the refugee determination process is founded on two cases: *Bouianova* and *Williams*. Décary JA in *Williams* fully endorsed the opinion expressed by Rothstein J in *Bouianova*, that, “the condition of not having a country of nationality must be one that is beyond the power of the applicant to control.”⁶⁶ In this test, if the acquisition of nationality is merely a matter of formalities, e.g. a simple application guarantees the acquisition of nationality, the applicant is deemed to have control over the process of obtaining nationality; in such a case, the applicant must seek protection in each country of

⁶³ *Ibid* at para 54.

⁶⁴ *Ibid* at para 35 (subpara 5.4.10). Bluth has pointed out the reasons for this policy, such as avoiding “hostile reactions from the North Korean government”, “a security risk” and “a financial burden on the state”: *ibid*.

⁶⁵ *Case No 0909449*, *supra* note 33 at para 101.

⁶⁶ *Williams*, *supra* note 3 at para 22; *Bouianova v Canada (Minister of Employment and Immigration)*, 67 FTR 74, [1993] FCJ No 576; See *Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 720 at paras 5, 19-23, [2010] FCJ No 870.

nationality.⁶⁷ If the outcome of application is not predictable, e.g. there are discretionary elements in the process of obtaining citizenship, the applicant does not have control over the acquisition of nationality; in such a case, the applicant cannot be said to have a country of nationality within the meaning of s.96 of the IRPA.⁶⁸

The leading case with respect to the dual nationality of North Koreans is *Kim* in 2010. Following the *Williams* approach, the Court in *Kim* examines whether the acquisition of South Korean nationality by North Korean applicants is “a matter of ‘mere formalities’ or ‘within the control’ of the applicant.”⁶⁹ Hughes J states as follows:

In the present case I find, on the best evidence, that it is by no means “automatic” or “within the control” of the Applicants that they will receive South Korean citizenship. In a “Responses to Information Requests” [RIR] received by the Board on June 3, 2008, it was stated that perhaps on a strict reading of the south Korean constitution, North Koreans could[sic] obtain South Korean citizenship; however, North Koreans are not automatically accepted, a “will and desire” to live in South Korea must be established and persons who have “resided in a third country for an extended period of time are not eligible (the Applicants have lived in China and Canada).⁷⁰

Accordingly, North Koreans should not be recognized as having South Korean nationality in the context of refugee determination. It is notable that both the requirement of expressing “will and desire” and ineligibility for citizenship on account of staying overseas for a considerable time are found in the Protection Act as examined above. The decision in *Kim* created a friendly legal setting for North Korean refugees in Canada. It may not be a coincidence that the number of North Korean refugees surged in 2011.⁷¹ However, in 2013, the Refugee Appeal Division (RAD) changed this friendly mood.

⁶⁷ See *Ward*, *supra* note 3.

⁶⁸ See *Kim*, *supra* note 66 at paras 5-7, 15.

⁶⁹ *Ibid* at paras 5, 8.

⁷⁰ *Ibid* at para 15.

⁷¹ The number of finalized claims surged from 20 in 2010 (19 positive decisions) to 175 in 2011 (117 positive decisions): Sean Rehaag, 2011 Refugee Claim Data and IRB Member Recognition Rates, online: Canadian Council for Refugees <<http://cerweb.ca/en/2011-refugee-claim-data>>.

In *TB3-03406*, the RAD overturned the positive decision of the RPD with respect to two North Korean asylum seekers. In 2011, the principal respondent fled to China along with her husband and a son for the fear of persecution in North Korea. In 2012, she gave a birth to a child (minor respondent) in China. During their stay in China, her family was arrested by the Chinese authorities. Her husband was sent to prison; her son managed to escape but it is not known where he took refuge. The principal respondent and her infant were able to leave China and arrived in Canada in 2013 with the help of a smuggler. They claimed refugee protection in Canada. The RPD accepted their claim as “there was nothing to distinguish the Respondents’ claims from the facts in *Kim*.”⁷² However, relying on new evidence, the RAD overturned the decision of the RPD. The RAD states that “[e]ven if the RIR [Response to Information Request] was accurate in 2008, it is not consistent with very recent information which comes directly from South Korean officials.”⁷³ The new evidence includes the following:

According to the Constitution and other domestic laws of the Republic of Korea, North Korean-born persons are deemed nationals of the Republic of Korea. Therefore, there is no separate procedure needed for North Korean-born persons to obtain the nationality of Republic of Korea after entering the Republic of Korea.⁷⁴

The RAD states that the new evidence “either corrects or supersedes the older evidence.”⁷⁵

According to the new evidence, North Korean respondents are recognized as having South Korean nationality; therefore, they are required to establish a well-founded fear of persecution in South Korea.⁷⁶ On the surface level, it is surprising to note that South Korean officials present two seemingly conflicting views concerning the status of North Koreans. As recorded in the 2008 RIR, the South Korean Embassy Officials communicated that “North Koreans are not

⁷² *RAD File No TB3-03406, supra* note 2 at para 7.

⁷³ *Ibid* at para 59.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at para 61.

⁷⁶ *Ibid* at para 65.

automatically accepted as South Korean citizens” for the reasons stipulated in Hughes J’s statement in *Kim* above.⁷⁷ However, in 2013, the same government delivered the apparently conflicting view that “North Korean-born persons are deemed nationals of the Republic of Korea.”⁷⁸

The RAD questioned the credibility of the 2008 RIR by exposing the conflation of two concepts in the RIR, that is, citizenship and protection. The RAD pointed out that “[i]t is [...] remarkable that the list of those ‘ineligible for South Korean citizenship’ seems to be based on the list of exclusions set out in the Protection Act—where such individuals are excluded from refugee support programs, *but not necessarily citizenship*.”⁷⁹ The RAD also referred to the jurisprudence of Australia, the U.S and the UK with respect to North Korean refugees, and concluded that the Tribunals in three countries recognized that North Koreans are in principle born with South Korean citizenship.⁸⁰ In particular, the RAD found that, in 2010, the Refugee Review Tribunal of Australia (RRT) also critiqued the conflation of citizenship under the Nationality Act and protection under the Protection Act as will be seen later.⁸¹

However, it should be said that the RAD failed to read or understand the nuance of the new evidence provided by the South Korean embassy. In fact, the new evidence is nothing but confirmation of the scholarly view that North Koreans in general are born with South Korean nationality on a theoretical level, which was duly recognized by the Court in *Kim*. The new evidence concerned the strict or theoretical legal position of North Koreans according to South Korean laws. By way of contrast, the 2008 RIR outlines practice or policy, specifically the policy

⁷⁷ *Ibid* at para 56.

⁷⁸ *Ibid* at para 59.

⁷⁹ *Ibid* at para 57 [emphasis added].

⁸⁰ *Ibid* at para 53.

⁸¹ *Ibid* at para 51.

relating to the status of North Koreans who are outside South Korea. The dilemma surrounding North Korean refugees is that they are South Korean nationals in law, but they are not treated as such in practice, in particular, when they approach the diplomatic missions. If “nationality” in s 96 of the IRPA is concerned only with a strict legal status, most North Korean refugees are no longer eligible for refugee status in Canada. However, if the meaning of nationality in s 96 reflects the policy or practice of the South Korean government in dealing with North Korean defectors, the doors have not yet closed to North Korean refugees in Canada. This point will be addressed below after examining the Australian jurisprudence.

The Status of North Korean refugees in Australia

The analysis of Australian cases is significant as the Canadian Tribunal appears to follow the rationale offered by the Australian Tribunals in relation to the issue of dual nationality of North Korean refugees. Formerly, Australia rejected applications for a protection visa (refugee status) lodged by North Korean refugees under the Migration Act (MA) s 36(3) on account of their alleged right to enter South Korea.⁸² However, since 2010, the Australian Tribunals have offered different reasons for rejecting North Korean refugee claims; Tribunals no longer refer to a right to enter South Korea, but rather directly to the dual nationality of North Korean refugees under MA s.91N and s91P.⁸³ Under MA s.91N and 91P, a person who has 2 or more nationalities

⁸² *NBLC* [2005] FCAFC 272 at paras 40, 44, 48, 63; *SYG2208 of 2005* [2005] FMCA 1740; *N05/50475* [2005] RRT 387 (24 Feb 2005); See Savitri Taylor, “Protection Elsewhere/Nowhere” (2006) 18 Int’l J Refugee L 283 at 307–08; see Andrew Wolman, “North Korean Asylum Seekers and Dual Nationality” (2012) 24 Int’l J Refugee L 793 at 803. Migration Act 1958 (Cth) s 36(3) states: “Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.”

⁸³ Wolman, *supra* note 82 at 803. Migration Act 1958 (Cth) s 91N(1) states: “[t]his Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries”; s 91P states: “Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas.”

cannot make a valid application for a protection visa unless the Minister intervenes under MA s.91Q.

In September 7, 2010, the Refugee Review Tribunal of Australia (RRT) held that a North Korean applicant who had dual nationality at the time of application was prevented from lodging a valid application for a protection visa according to MA s.91P.⁸⁴ Interestingly, in this case, the RRT examined the 2008 RIR cited in *Kim* above. The RRT, like the RAD, critiqued the RIR on the ground that it conflated two distinct concepts, citizenship and protection.⁸⁵ The RRT also points out the same conflation in the Australian Department of Foreign Affairs and Trade (DFAT) Report 2005 which contains similar information as the 2008 RIR. The RRT accepted the strict legal position of North Koreans that “North Koreans have South Korean citizenship and that, even for those who are ineligible for settlement assistance [...] there are alternative procedures for them to have their existing South Korean citizenship confirmed.”⁸⁶

The RRT briefly considered the concept of effective nationality. However, it remarked that, under Migration Act s. 91N and 91P, “the Tribunal must determine only whether the applicant has South Korean nationality, and it is not permitted to make an assessment of the effectiveness of that nationality [...]”⁸⁷ This statutory interpretation has been upheld by the Federal Court of Australia. In 2012, the Federal Court in *SZOAU* endorsed the view that those who have dual nationality such as North Korean refugees are precluded from applying for a protection visa unless the Minister intervenes.⁸⁸ The Court also held that the meaning of “national” in s.91N(1) “has its ordinary meaning” and “no additional inquiry into the non-

⁸⁴ *Case No 0909449*, *supra* note 33 at para 102.

⁸⁵ *Ibid* at para 101.

⁸⁶ *Ibid* at para 100.

⁸⁷ *Ibid* at para 101.

⁸⁸ *SZOAU v Minister for Immigration and Citizenship and Another* (2012) 125 ALD 404 at paras 4, 36.

citizen's ability to avail himself or herself of protection is to be made, beyond the fact of nationality.”⁸⁹ Therefore, in Australian jurisprudence, nationality in the refugee determination process is defined purely on a legal level regardless of its effectiveness.⁹⁰ Surprisingly, under MA s 91N(1) and 91P(2), unless the Minister intervenes, those who have dual nationality may not apply for a protection visa even though they may have a fear of persecution in each country of nationality.⁹¹

Importantly, in certain circumstances, MA s 91N may not be applicable to North Korean asylum seekers. In 2014, the Federal Court of Australia held that “[w]hatever the content of South Korean nationality law, it is plain that the mere fact that the appellants claimed to be North Korean nationals is not enough to engage the operation of [MA] s 91N.”⁹² The decision is significant in that the Court at least acknowledged a possibility that a North Korean asylum seeker may not have South Korean nationality in a strict legal sense. In this case, two North Korean asylum seekers had fathers whose nationality was uncertain. The ROK Nationality Act had not recognized the maternal line in relation to the acquisition of South Korean nationality by birth until the 1997 amendments; the 2001 amendments allowed 20 years of retrospective benefit of the 1997 amendments.⁹³ Both appellants did not enjoy the benefit as they were born before the

⁸⁹ *Ibid* at para 61, Robertson J.

⁹⁰ Notably, according to the UNHCR statistics, the acceptance rate of North Korean asylum seekers in Australia dropped from 75% (6 positive out of 8 decisions) in 2011 to 0% (2 negative out of 2 decisions) in 2012: United Nations High Commissioner for Refugees (UNHCR), *Asylum Applications and Refugee Status Determination*, online: UNHCR Population Statistics <http://popstats.unhcr.org/PSQ_RSD.aspx>.

⁹¹ *SZOAU*, *supra* note 88 at para 4, Buchanan J: “[t]he effect of the operation of ss 91N(1) and 91P(1), to which I have referred, is that a genuine claim for protection from a true refugee who holds dual nationality may not even be considered on its merits unless the minister, in a non-compellable and substantially unreviewable exercise of discretion under s 91Q of the Act, makes a formal determination permitting consideration of the application on the ground that it is in the public interest to do so.” See also Migration Review Tribunal & Refugee Review Tribunal (Australia), *Guide to Refugee Law in Australia: Chapter 2*, online: MRT & RRT <<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=a3fe3e77-1d4d-47f8-b1a3-448295730fb6>> at 2-9.

⁹² *SZOYM*, *supra* note 23 at para 68.

⁹³ Nationality Act (ROK), *supra* note 10 at Addenda article 7(1).

beneficial period. Therefore, the nationalities of the appellants' fathers were at issue in determining whether the appellants are South Korean nationals.⁹⁴

In the first instance, the Federal Magistrates Court of Australia upheld the minister's decision that two North Korean asylum seekers had dual nationalities which rendered their applications for a protection visa invalid.⁹⁵ However, in 2014, Federal Court of Australia overturned the decision, holding that, on the balance of probabilities, it was not satisfied that the appellants are South Korean nationals.⁹⁶ The Court pointed out that there was insufficient evidence to ascertain *inter alia* the nationalities of the fathers. The decision has great implications for refugee decision making. It highlights a practical difficulty in tracing the paternal line for the purpose of ascertaining nationality. It also reveals a theoretical difficulty in interpreting South Korean laws with respect to legal status of a North Korean who has a foreign father.

The “Persecution Perspective” vs the “Protection Perspective”

At this juncture, in order to assess fully the reasonableness and correctness of decisions of the Canadian and Australian Tribunals, I consider two different perspectives on the concept of refugee status, as discussed in Chapters 1 and 2. From the persecution perspective (Chapter 1), North Korean refugees must establish a well-founded fear of persecution in South Korea as they are regarded as having South Korean nationality. On the other hand, from the protection perspective (Chapter 2), it is more important to examine whether South Korean citizenship could provide meaningful protection to North Koreans refugees. More fundamentally, it is critical to examine whether there is a *meaningful* and *pre-existing* protection relationship between North

⁹⁴ *SZQYM v Minister for Immigration and Citizenship; SZQYN v Minister for Immigration and Citizenship* [2012] FMCA 1116 (Unreported Judgements Federal circuit court of Australia, 20 October, 7 December 2012) at para 32.

⁹⁵ *Ibid* at para 71.

⁹⁶ *SZQYM*, *supra* note 23 at para 69.

Koreans with “theoretical” South Korean nationality and the Republic of Korea. As already examined above, South Korean nationality for North Koreans exists only in theory, in particular when they are outside South Korea.⁹⁷ There is neither a meaningful protection relationship between North Koreans and the Republic of Korea, nor do North Koreans enjoy any substantive right under the South Korean nationality. This being the case, the protection perspective, if applied to case law, may destabilize the decisions of both the Canadian and Australian tribunals.

A. The Protection Perspective and Effective Nationality

The protection perspective has outlasted the influence of the persecution perspective in certain areas of refugee law. For example, the protection perspective underlies the discourse on effective nationality in the context of dual nationality. Prominent refugee law scholars and the UNHCR have endorsed the relevancy of effective nationality in refugee determination process in the case of dual nationality.⁹⁸ James Hathaway whose work, as noted above, has traced the ongoing of the persecution perspective, has promoted the protection perspective in his discussion of cases of dual nationality by stating the following:

The major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure *effective*, rather than merely formal, nationality. It is not enough, for example, that the claimant carries a second passport from a non-persecutory state if that state is not *in fact* willing to afford protection against return to the country of persecution.⁹⁹

Here, Hathaway connects the concept of effective nationality to the principle of *non-refoulement*.

The UNHCR goes beyond Hathaway’s comment, in offering a broader role for the concept of effective nationality. The UNHCR Handbook states as follows:

In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the

⁹⁷ See Eunjung Kim, *supra* note 16 at 327; *Case No 0910048*, *supra* note 33 at para 60 (Mr Hwang’s report).

⁹⁸ See Wolman, *supra* note 82 at 810.

⁹⁹ James C Hathaway, *The Law of Refugee Status* (Butterworth, 1991) at 59 [emphasis in original]. Hathaway, *The law of refugee Status*, above n 102, 59 (emphasis in the original).

legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but *such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals*. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status.¹⁰⁰

Furthermore, in case law, domestic Courts have in varying degrees developed and applied the concept of effective nationality; for example, the principle of effective nationality was applied by Australian Courts before the introduction of MA ss 91N and 91P.¹⁰¹ Andrew Wolman cites several Australian cases in which the concept of effective nationality was actively applied with respect to East Timorese asylum seekers who were formally considered as Portuguese by birth but without any enforceable right to live in Portugal.¹⁰² In *Jong Kim Koe*, having observed both the UNHCR Handbook and Hathaway's comment above, the Full Court states that "[...] a person has dual nationalities but lacks a well-founded fear of persecution in one of the countries of nationality will not necessarily preclude a finding that the person is a refugee."¹⁰³ In particular, the Court points out the error of the Tribunal by stating that "it failed to recognise the necessity, in applying the definition of 'refugee' in circumstances of dual nationality, of considering the 'effectiveness' of his Portuguese nationality as a distinct issue."¹⁰⁴ In this case, the Court did not define the scope of effectiveness; however, the Court mentioned Jong's ability or inability to be admitted into

¹⁰⁰ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011), online: Refworld <<http://www.refworld.org/docid/4f33c8d92.html>> at para 107 [emphasis added]. Other refugee law scholars also support the view that effective nationality is a relevant concept to be considered in relation to a person who has dual nationality in the refugee determination process: See Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 67; See Wolman, *supra* note 82 at 809-813.

¹⁰¹ Wolman, *supra* note 82 at 810.

¹⁰² *Ibid.*

¹⁰³ *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 21, 30-31.

¹⁰⁴ *Ibid* at 32.

Portugal as a relevant matter to be considered.¹⁰⁵ In *Lay Kon Tji*,¹⁰⁶ the Court attempted to define the scope of the effectiveness. Finkelstein J stated that:

In my view, conformably with the views expressed in the United Nations Handbook and conformably with the purpose and object of the Refugees Convention, ‘effective nationality’ is a nationality that provides all of the protection and rights to which a national is entitled to receive under customary or conventional international law.¹⁰⁷

Wolman observes that the application of the concept of effective nationality had been prohibited by legislation in 1999 in response to the decision in *Lay Kon Tji*.¹⁰⁸

In the United Kingdom, the concept of effective nationality appears to have been rejected but it is not clear that the protection perspective has been denied altogether.¹⁰⁹ The law has been developed in a trilogy of cases involving North Korean refugees: *KK*, *SP* and most recently *GP*.¹¹⁰ In *KK*, all the North Korean appellants had lived for more than ten years outside Korea. The Tribunal duly acknowledged the practice that if a North Korean defector resides in a foreign country for 10 or more years, the person is not likely to be recognized as a South Korean national.¹¹¹ Even though the Tribunal found this as being in flat contradiction to South Korean laws, the Tribunal simply accepted that the “ten-year rule” appeared to be effective in practice, holding that “[t]he appellants are therefore all persons with one nationality only, that of North

¹⁰⁵ *Ibid.*

¹⁰⁶ *Lay Kon Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681.

¹⁰⁷ *Ibid* at 692.

¹⁰⁸ Wolman, *supra* note 82 at 812.

¹⁰⁹ See generally *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289 (CA). The Court of Appeal in *MA* did not endorse the Asylum & Immigration Tribunal’s distinction between *de jure* and *de facto* nationality; instead, Elias LJ stated in para 42 that “[t]he issue in asylum cases is always whether the applicant has a well founded fear of persecution on return, and she will have that well founded fear if there is a real risk that she will face persecution.”

¹¹⁰ *KK*, *supra* note 17 at para 90; *Secretary of State for the Home Department v SP (North Korea) and others* [2012] EWCA Civ 114 (CA); *GP and others (South Korean citizenship)* [2014] UKUT 00391 (IAC) at para 101.

¹¹¹ *KK*, *supra* note 17 at paras 86, 91. For general discussion on the meaning of nationality in *KK*, see para 90. Wolman also provides a detailed analysis of the meaning of nationality as shown in *KK*: Wolman, *supra* note 82 at 806-807.

Korea.”¹¹² The Tribunal did not connect this practice to the list of exclusions set out in the Protection Act.¹¹³

Subsequently, in *SP*, the Court of Appeal held that “[i]t may also be that the ‘ten years’ has been influenced by the provision of art 9(4) of the Protection Act but it does not follow that the South Korean authorities are directly applying art 9(4) as if it was part of South Korea's basic nationality law.”¹¹⁴ Significantly, the Court of Appeal has remarked that “[w]hat matters is that, as rationally found by the Tribunal [in *KK*], *in practice*, a ten year absence from North Korea will be treated by the authorities in a manner equivalent to one who has lost his South Korean nationality as a result of acquiring another nationality.”¹¹⁵

On 28 August 2014, in *GP*, the Upper Tribunal (Immigration and Asylum Chamber) endorsed a strict legal position of North Koreans according to South Korean laws, that, “[a]ll North Korean citizens are also citizens of South Korea [...]”¹¹⁶ Thus, the Upper Tribunal concluded that, according to the Readmission Agreement between the United Kingdom and South Korea,¹¹⁷ North Korean refugees are to be returned to South Korea.¹¹⁸ However, it is worth noting that, as in the *KK* case, the Upper Tribunal examined the *practice* of the South Korean government in dealing with North Korean refugees, in addition to South Korean nationality *per se*. It noted that “[...] *in practice* South Korea will not reject any returning person from the Korean Peninsula unless they have acquired another nationality since leaving the Korean Peninsula [...]”¹¹⁹ Interestingly, this observation of the South Korean government’s dealings

¹¹² *KK*, *supra* note 17 at paras 86, 91, 92.

¹¹³ *Ibid* at para 88.

¹¹⁴ *SP (North Korea)*, *supra* note 110 at para 23.

¹¹⁵ *Ibid* [emphasis in original].

¹¹⁶ *GP*, *supra* note 110 at para 127(3).

¹¹⁷ *Agreement Between the UK and Korea concerning the Readmission of Persons* (The United Kingdom– The Republic of Korea), 20 December 2011, UKTS 2012 No 23.

¹¹⁸ *GP*, *supra* note 110 at para 127(5).

¹¹⁹ *Ibid* at para 125 [emphasis added].

with North Korean refugees appears to be in conflict with the previous findings by the Upper Tribunal in *KK*.

The conflicting analysis of practice in relation to North Koreans who spent 10 or more years outside Korea may be explained by reference to the Readmission Agreement, which was concluded after the decision of *KK* and to which reference is made in *GP*.¹²⁰ In any event, even though British jurisprudence appears to deny the concept of effective nationality, the Court arguably endorses the protection perspective by looking at *practice* in relation to dual nationality.¹²¹

Taking stock, the protection perspective has not lost its standing in refugee law. Having noted “the precedence of national protection over international protection” in the international refugee regime, the Court in *Jong Kim Koe* rightly stated that “[t]hat precedence has no obvious relevance where national protection is not effective.”¹²² Unfortunately, in Australia, current legislation (MA s.91N and 91P) coupled with the statutory interpretation endorsed by the Federal Court precludes the application of the protection perspective.¹²³ What about in Canada? Wolman argues that even though there is no statutory restriction in Canada, the discourse of effective nationality has been off the table.¹²⁴ To return it to its rightful place, one must examine the meaning of nationality found in s 96 of the IRPA.¹²⁵

¹²⁰ *Ibid* at para 8. To assess the correctness of the Tribunal’s conclusions with respect to the impact on the refugee determination process of the Readmission Agreement requires an in-depth analysis of the Readmission Agreement, South Korean domestic laws and foreign policies, which is outside the scope of this chapter.

¹²¹ See Wolman, *supra* note 82 at 809: “[...] by looking at South Korean practice [...] the court appears to be smuggling an effective nationality analysis in through the back door”; See generally *KK*, *supra* note 17 at para 41.

¹²² *Jong Kim Koe*, *supra* note 103 at 30.

¹²³ Wolman, *supra* note 82 at 812; *SZOAU*, *supra* note 88 at para 61.

¹²⁴ Wolman, *supra* note 82 at 813.

¹²⁵ IRPA, *supra* note 1 at s 96: “A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.”

B. The Protection Perspective and Canadian cases

As examined above, with respect to dual nationality, the Canadian jurisprudence appears to have developed in a way that examines the mode of obtaining nationality (e.g. whether it is within the control of applicants) – the “control principle” – rather than assessing the effectiveness of nationality.¹²⁶ In line with the jurisprudence, the Immigration and Refugee Board of Canada has provided the following interpretation of the term “nationality” found in s 96 of the Act:

The term “countries of nationality”, in section 96(a) of *IRPA*, includes potential countries of nationality. Where citizenship in another country is available, a claimant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his or her power to acquire that other citizenship.¹²⁷

However, it is significant to note that the Supreme Court of Canada in *Ward* has provided a different view. In *Ward*, La Forest J., writing for a unanimous Court, states that “[i]n considering the claim of a refugee who enjoys nationality in more than one country, the Board must investigate whether the claimant is unable or unwilling to avail him- or herself of the *protection* of each and every country of nationality.”¹²⁸ In other words, in the context of dual nationality, it is important to examine availability of protection in each country of nationality beyond the simple fact of nationality. Referring to Article 1(A)(2) of the *Refugee Convention*, La Forest J. indicates that “the rationale underlying international refugee protection is to serve as ‘surrogate’ shelter coming into play only upon failure of national support. When *available*, home state protection is a claimant’s sole option.”¹²⁹ The word, “available”, should be emphasized here.

¹²⁶ See *Kim*, *supra* note 66 at paras 19-23; *Williams*, *supra* note 3; *Bouianova*, *supra* note 66.

¹²⁷ Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef02.aspx#n211>> at para 2.1.3 [footnotes omitted].

¹²⁸ *Ward*, *supra* note 3 at para 89 [emphasis added].

¹²⁹ *Ibid* [emphasis added].

A second Canadian case offers further support. In *O.M.*,¹³⁰ the applicant had dual nationality – that of El Salvador and Belize. He had established a well-founded fear of persecution in El Salvador; however, he was denied refugee protection by the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD), as he had failed to establish a well-founded fear of persecution in Belize.¹³¹ The application for judicial review was dismissed as the Court found no reviewable error on the part of CRDD; nevertheless, in this case, Gibson J appears to have endorsed the concept of effective nationality by referring to the opinion of Hathaway as quoted above.¹³² Gibson J states that “ [...] while *a more careful assessment of the difficulties that the Applicant might face if required to returned to Belize would have been appropriate*, the mere failure by the CRDD to recite the evidence before it and the argument made to it on this issue is not a reviewable error.”¹³³ In other words, in principle, additional assessment of effectiveness of nationality is an appropriate legal inquiry in the refugee determination process. Even though Gibson J appears to follow the persecution perspective in the end, the reference made to the concept of effective nationality is a significant addendum to the *Ward* analysis.

Challenging the Decision of the RAD

In light of the foregoing discussion, I believe that the decision of the RAD should be revisited or quashed. The reasons may be summarized as follows.

First, South Korean nationality cannot be effective nationality for North Korean asylum seekers. It should be remembered that North Koreans who are outside South Korea cannot be

¹³⁰ *OM (Designated representative) v Canada (Minister of Citizenship and Immigration)*, 114 FTR 113, para 5, [1996] FCJ No 790.

¹³¹ *Ibid.*

¹³² *Ibid* at para 14.

¹³³ *Ibid* at para 15 [emphasis added].

said to have a legal right to enter South Korea under their purely theoretical South Korean nationality.¹³⁴ Their lack of right to enter, as La Forest J recognizes in *Ward*, may be tantamount to a denial of protection, which gives rise to a refugee status for North Koreans.¹³⁵ In addition, as illustrated in the story of North Korean youngsters above, North Korean defectors cannot enjoy substantive legal rights that South Koreans enjoy such as diplomatic protection. Therefore, South Korean nationality for North Koreans cannot be the nationality contemplated in international law.¹³⁶

Second, North Korean asylum seekers have no control over the process to obtain South Korean nationality. Even though they are regarded as having South Korean nationality in law, they have to apply for “protection” under the Protection Act in order to have their nationality confirmed. However, their applications may be turned down for political reasons as well as under the list of exclusions set out in the Protection Act. Even in the nationality adjudication procedure in South Korea, they may fail to ascertain South Korean nationality. Unless their South Korean nationality is confirmed through the relevant procedures, they are but North Koreans who cannot enjoy any substantive right including the right to enter South Korea.

Third, arguably, not all North Koreans have South Korean nationality even on a theoretical level. Besides the examples suggested in section 2 and in *Szqym* above, it is also uncertain whether a foreigner who had resided in North Korea in 1948 and then later obtained

¹³⁴ See *Case No 0910048*, *supra* note 33 at para 60.

¹³⁵ La Forest J. remarked that “[d]enial of admittance to the home territory is offered by the UNHCR in its Handbook, at paragraph 99, as a possible example of what might amount to a refusal of protection”: *Ward*, *supra* note 3 at para 96.

¹³⁶ The concept of nationality as found in Canadian refugee law should be understood in conformity to international law according to the principle expounded in *R. v Hape*, 2007 SCC 26, para 53, [2007] 2 SCR 292. Importantly, with respect to the meaning of nationality, the International Court of Justice (ICJ) in *Nottebohm* stated that “[a]ccording to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”: *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 23.

North Korean nationality according to procedures set out by DPRK Nationality Act, should be regarded as having South Korea nationality. According to the analyses provided in section 2, as the foreigner did not have Joseon nationality in 1948, arguably, he or she may not have obtained South Korean nationality.

Therefore, the conclusion should be that North Korean refugees in Canada are the Convention refugees to whom Canada has international responsibility in spite of their theoretical South Korean citizenship.

Conclusion

The issue of dual nationality of North Korean refugees is situated at the heart of debates about whether the fear of persecution or the lack of protection should constitute the pivotal aspect of refugee status. Excessive emphasis on the fear of persecution in defining refugee status has led to undervaluing a fundamental aspect of refugee status. The protection perspective rightly reminds us that a ruptured protection relationship between a nation-state and a citizen is the essential aspect of refugeehood. Persecution is meaningful in defining refugee status only if there is a pre-existing meaningful protection relationship between a refugee and his or her country of nationality. However, there is no meaningful or effective protection relationship between North Koreans and the Republic of Korea.

South Korean nationality for North Koreans is premised upon the non-recognition of the statehood of North Korea. However, recognizing dual nationality of North Koreans by the Australian or Canadian Tribunals does not necessarily mean that the Australian or Canadian government deny the statehood of North Korea.¹³⁷ In this regard, the Australian and Canadian Tribunals fail to recognize the political nature of South Korean nationality for North Koreans.

¹³⁷ See generally Government of Canada, *supra* note 17; see generally Australian Government Department of Foreign Affairs and Trade, *Democratic People's Republic of Korea Country Brief*, online: Australian Government

The strict interpretation of law with respect to North Koreans' constitutional right to South Korean nationality may not be honored in practice. Even on a theoretical level, ascertaining South Korean nationality may involve a complex process of tracing the paternal line over 60 years. Complex relationship among law, policy and politics of South Korea with respect to North Korean defectors should not be a subject matter for which the Australian or Canadian Tribunals can decide on the basis of its own standard of correctness and reasonableness.

In *Kim*, Hughes J rightly remarks that “[t]he right to claim citizenship in a foreign country is [...] a matter of the law, practice, jurisprudence, and politics of that country that is best proved by the opinion(s) of those persons qualified in the law of that country having expertise in that area of law.”¹³⁸ Influential South Korean legal experts concur that South Korean nationality for North Koreans exists only in theory, which does not resemble the concept of nationality understood in international law.¹³⁹ It has its unique status of “nationality” *only within* the broader context of Korean history. In this regard, in future cases relating to genuine North Korean refugees in Canada, it is urged that they should not be regarded as having South Korean nationality in the refugee determination process.

<<http://dfat.gov.au/geo/democratic-peoples-republic-of-korea/Pages/democratic-peoples-republic-of-korea-north-korea-country-brief.aspx>>.

¹³⁸ *Kim*, *supra* note 66 at para 12.

¹³⁹ See, Eunjung Kim, *supra* note 16 at 327; See, Park et al, *supra* note 16 at 253, 263; Myung-Ki Kim, *supra* note 12 at 199; see *Case No 0910048*, *supra* note 33 at para 60 (Mr Hwang's report); *Case No 0909449*, *supra* note 33 at para 101.

Chapter 6 Pluralism, Institutional Theory and State Sovereignty: Toward the “Responsible” Border Control

Introduction

In chapter 3, I highlighted the relevance of theories of institutional cosmopolitan justice to refugee crises. These theories squarely underscore the need to revitalize the “forgotten” baseline of the nation-states system – that an individual have at least one political membership or citizenship in the system of nation-states. As a matter of justice, a refugee should be offered a surrogate political membership as a remedy. That being said, it is critical to observe that such justice discourse may be in conflict with the concept of state sovereignty. While justice may demand the grant of asylum to refugees, a nation-state may claim to legitimately exercise state sovereignty by denying the admission of refugees into its own territory. State sovereignty has been regarded as an indispensable privilege vested in a nation-state in the current international state system.¹ While the validity and effectiveness of the so-called “right to exclude” may be a subject of considerable debate, it cannot be denied that such a right has been widely recognized in state practice.²

This being the case, some may argue that the institution of asylum as a “just” remedy for refugee status should be outweighed or qualified by the widely recognized prerogative of a state to control its own borders. The tension between claims of cosmopolitan justice and the concept of state sovereignty has ever become evident in the era of globalization. Catherine Dauvergne

¹ Michael S. Teitelbaum, “The Role of the State in International Migration” (2002) 3(2) *Bro J World Aff* 157 at 162: “No sovereign government has ever renounced its right, under the global system of states, to deploy such measures to control the entry of non-nationals across its borders. There are only two forms of exception: international agreements that prohibit states from returning refugees to persecution, and bilateral or multilateral treaties such as those of the European Union in which states agree not to control migrations between or among them.”

² See generally Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Abingdon, Oxon: Routledge, 2012) at 29-30.

has noted that “[a]s nations have seen their powers to control the flows of money or ideas and to set economic or cultural policies slip away, they seek to assert themselves as nations through migration laws and policies which assert their ‘nation-ness’ and exemplify their sovereign control and capacity.”³ In other words, while the strong concept of sovereignty in general has been diminished, state sovereignty in relation to border control has become stronger. In this circumstance, governments have claimed an “unbridled” prerogative to control their borders in terms of sovereignty. In fact, with minor exceptions, this view has been regarded a hegemonic view of sovereignty in relation to border control.

In this Chapter, I challenge this understanding of state sovereignty by arguing that, in modern public international law, which regards the protection of human rights as a fundamental value, a new conception of state sovereignty is developing, manifesting a shift from “unbridled” prerogative to “responsible” or “accountable” privilege. When state sovereignty is understood as “responsible” or “accountable” control over migration, a state cannot simply exclude refugees from its own territory with a view to “containing” them in regions of refugee origin – without further justification, this is simply “irresponsible”. Under the “responsible” concept of state sovereignty, the right to exclude may be outweighed by consideration of institutional cosmopolitan justice, which informs our conception of responsibility. As will be discussed, the concept of “responsible” border control is based not only on moral claims but also on various social authorities, including law, which mandate that a state should be *sincerely* involved in the process of providing a refugee with a surrogate political membership or citizenship.

The implication of this conception of “responsible” border control with respect to refugees is significant, as, in this approach, institutional cosmopolitan justice may find its

³ Catherine Dauvergne, “Sovereignty, Migration and the Rule of Law in Global Times” (2004) 67:4 Mod L Rev 588 at 595.

“rightful” place even in the face of a widely recognized right of a state to exclude non-citizens in the international state system. This being so, in this Chapter, I consider the application of two competing views of sovereignty to border control, and illustrate how the reconfiguration of the concept of state sovereignty from “unconditional” control to “responsible” control has become possible. More specifically, I propose a version of institutional pluralism as a normative underpinning that supports the concept of “responsible” border control. For this purpose, especially, I will introduce Neil MacCormick’s theory of law as an “institutional normative order”⁴ and Douglas North’s “path-dependence” theory,⁵ both of which point to a pluralistic view of authority (that supports the concept of “responsible” border control) rather a hierarchical view of authority (that underpins the concept of “unconditional” border control).

The Dominant View of State Sovereignty in relation to Border Control

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests [...].⁶

In political thought, the concept of state sovereignty has been associated with the idea of supremacy, which entails a hierarchical view of authority: “[...] sovereignty is power not subject to limitation by higher or coordinate power, held independently over some territory.”⁷ Neil

⁴ Neil MacCormick, *Institutions of Law: an Essay in Legal Theory* (Oxford: Oxford University Press, 2007) at 11.

⁵ Douglass Cecil North, *Institutions, Institutional Change, and Economic Performance*, Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990) at 44. Path-dependence refers to the phenomenon, that, “the consequence of small events and chance circumstances can determine solutions that, once they prevail, lead one to a particular path”: North, *ibid* at 94.

⁶ *Attorney-General for Canada v Cain* [1906] AC 542 at 546. Lord Atkinson cites with approval Vattel’s Law of Nations, Book 1, s 231 and Book 2, s 125.

⁷ Neil MacCormick, *Questioning sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 129.

MacCormick traces the origin of such an idea back to the 16th and 17th century in Europe.⁸ The turbulent historical events such as Reformation and religious wars in Europe had led political thinkers to propose a state with supreme power of authority to keep peace and order.⁹ In this regard, MacCormick remarks that “[t]he absolute power of the sovereign state has been the foundational doctrine for political theory and practice.”¹⁰

As noted by Dauvergne above, the concept of state sovereignty as supreme power has become weaker in the era of globalization; however, it is important to note that it has not been on the wane in relation to border control. Rather, border control has come to be regarded as “the last bastion of sovereignty”.¹¹ Stephen H. Legomsky has observed that “[...] two [powers] have stood out as the last bastions of national sovereignty – the powers of a state to decide, first, who its own nationals are and, second, which foreign nationals shall be granted physical access to its territory.”¹² In state practice, state sovereignty is frequently presented by governments as “unconditional” control of border. In other words, there is no higher authority than state sovereignty when addressing policies in relation to border control. For example, a former Australian Prime Minister, John Howard, during the 2001 federal election campaign, famously stated that “[w]e will decide who comes to this country and the circumstances in which they come.”¹³

⁸ *Ibid* at 129.

⁹ See *ibid* at 123-29.

¹⁰ *Ibid* at 124.

¹¹ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 182.

¹² Stephen H. Legomsky, *The Last Bastions of State Sovereignty: Immigration and Nationality Go Global*, online: Washington University Law <http://law.wustl.edu/centeris/Papers/globalization/LEGOMSKY_PAPER2003.pdf> at 2.

¹³ “Liberals accused of trying to rewrite history” *ABC Lateline* (21 November 2001), online: ABC <<http://www.abc.net.au/lateline/content/2001/s422692.htm>>.

On a legal level also, state sovereignty in relation to border control has been understood as a state's inherent right not to admit non-citizens into its own territory.¹⁴ For example, H el ene Lambert observes that “[i]t has long been a principle of international customary law that states are free to control the entry and residence of aliens into their territory.”¹⁵ Michael S. Teitelbaum also states that the right to control borders has never been renounced by states and the right has remained as “fundamental to their sovereignty”.¹⁶ Moreover, the conception of “unconditional” border control has been recognized in international law. Judge Read in *Nottebohm* invoked the term, “unfettered right”, in relation to border controls, stating as follows:

When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an *unfettered right* to refuse admission. That does not mean that it can deny the alien's national status or refuse to recognize it. But by refusing admission, the State prevents the establishment of legal relationships involving rights and obligations, as regards the alien, between the two countries. On the other hand, by admitting the alien, the State, *by its voluntary act*, brings into being a series of legal relationships with the State of which he is a national.¹⁷

This strong concept of sovereignty has become hegemonic in state practice, despite the proliferation of human rights in the 21st century. While state sovereignty in relation to border control has been “increasingly limited under contemporary international law, in particular by treaties and principles of general international law in the areas of human rights and economic

¹⁴ See Ian Brownlie, *Principles of public international law*, 7th ed (Oxford ; New York: Oxford University Press, 2008) at 520; Schotel, *supra* note 2 at 30; Alina Kaczorowska-Ireland, *Public International Law* (Oxon: Routledge, 2015) at 474; Eric Fripp, ed, *Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Oxford: Hart Publishing, 2014) at 30: “[...] the view that there was an absolute or near-absolute right to exclude or expel is well established, and the practical effect of it is now sufficiently mitigated by developments in human rights and other laws [...]”

¹⁵ H el ene Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2001) at 11 [footnote omitted]: “[t]he absence of any duty to admit aliens in classical international law is supported by the practice of most states and by states' immigration laws, and finds its origins in the principle of sovereignty or territorial supremacy.”

¹⁶ Teitelbaum, *supra* note 1 at 162, 166. Teitelbaum recognizes two exceptions to this rule, stating “[t]here are only two forms of exception: international agreements that prohibit states from returning refugees to persecution, and bilateral or multilateral treaties such as those of the European Union in which states agree not to control migrations between or among them”: Teitelbaum, *supra* note 1 at 162; See generally Schotel, *supra* note 2 at 29-30.

¹⁷ *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] ICJ Rep 4 at 46, Judge Read (Dissenting Opinion) [emphasis added].

integration”, H el ene Lambert accurately observes that “[...] such express guarantees on freedom of movement have never extended to the ‘right’ to immigrate to a country other than one’s own, including the right to asylum, which remains governed primarily by national legislation.”¹⁸ In other words, the sovereign power to allocate membership to non-citizens including refugees has remained as an “intact” prerogative of a state.

International relations theory provides helpful frameworks to understand this strong view of state sovereignty. Particularly salient are two prominent approaches: the “actor-oriented” approach and the sociological approach.¹⁹ Neorealism and neoliberalism adopt the former perspective in which states are understood as “autonomous actors” that create institutions; in this actor-oriented approach, states may change their strategies concerning state policies, but their preferences or “underlying desires” remain intact from any institutional influence.²⁰ It is the “actor-oriented” approach that supports current state practice.²¹ By way of contrast, the English School promotes the sociological approach in which “a set of institutional structures” defines the role of states.²²

From the actor-oriented perspective, a state on its own initiative exercises sovereignty in relation to border control without external interference. Under this view, a state is technically

¹⁸Lambert, *supra* note 15 at 11.

¹⁹ Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999) at 43-44.

²⁰ *Ibid.*

²¹ For more general discussion on the actor-oriented approach, Stephen D. Krasner classifies four types of sovereignty: “international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty”: *ibid* at 3-4. Westphalian sovereignty refers to independent political organization from external interference, and international legal sovereignty connotes *de jure* “mutual recognition” among states; domestic sovereignty refers to “political authority” to control within a given territory, and interdependence sovereignty relates to transborder controls with respect to people, goods and others: *ibid* at 3-4. According to Krasner, as far as Westphalian sovereignty and international legal sovereignty are concerned, the “actor-oriented” approach cannot provide a full account of state practice as they have often been transgressed by “conventions, contracts, coercion, and imposition” over history: *ibid* at 24-25, 42; See also Stephen D Krasner, “Sovereignty” (2001) 122 *Foreign Pol’y* 20 at 21.

²² Krasner, *supra* 19 at 44.

justified in excluding refugees from entering into its territory so long as it does not breach international obligations that the state has agreed to uphold, e.g., the principle of *non-refoulement*.²³ However, in state practice, even international obligations may be subtly dishonoured by governments or manifestly rescinded through domestic legislation.²⁴ For example, as the BC Court of Appeal stated in *Appulonappa* that domestic law may conflict with international law: “[...] while Parliament is presumed to legislate in conformity with international law, this presumption is rebuttable if unambiguous legislative language demonstrates an intent to ignore an international obligation.”²⁵

It is important to note that these various political, legal and international analyses of border control point to one grand principle that there is no higher authority than decision-makers in a nation-state with regard to migration policies. Put another way, a hierarchical view of authority provides a theoretical underpinning of the conception of “unconditional” border control. Various sources of authority such as customs, morality, values, identity, and international ethics are subordinate to one supreme source of authority.

²³ See generally Schotel, *supra* note 2 at 30; See generally Kaczorowska-Ireland, *supra* note 14 at 474.

²⁴ International obligations may be overridden by domestic legislations. The Supreme Court of Canada once stated that “[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, *unless the wording of the statute clearly compels that result*”: *R. v. Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [emphasis added].

²⁵ *R. v. Appulonappa*, 2014 BCCA 163 at para 119, [2014] B.C.J. No. 762. In *Appulonappa*, the critical legal issue was whether section 117 of IRPA infringed section 7 of the *Charter* due to its overbreadth. Section 117 of IRPA penalizes *inter alia* those who aid human smuggling into Canada; thus, on a theoretical level, it could penalize humanitarian aid workers or family members who assist undocumented migrants, including refugees, coming into Canada. The Court of Appeal stated that “[...] the unambiguously broad language of s. 117 strongly supports the view that, if an international obligation to exempt humanitarians and family members from prosecution for human smuggling does exist, Parliament, in enacting s. 117, *exercised its sovereign right to ignore it*”: *Appulonappa*, *ibid* at para 119. However, this decision was overturned by Supreme Court in *R. v. Appulonappa* (2015) SCC 59, [2015] 3 SCR 754

In sum, the exercise of an “unconditional” right of border control has long been regarded as “legitimate” and “lawful” state practice buttressed by the hierarchical concept of authority and the “actor-oriented” perspective on state sovereignty.

Constraints on State Sovereignty

Interestingly, Michael S. Teitelbaum comments that “though no sovereign states have ever renounced its[sic] right to control entry, there is great variation over time and place in their effectiveness in exercising this right”.²⁶ This observation is critical as it demonstrates that the actor-oriented approach may not provide a full picture of state practice in relation to border control. Teitelbaum continues to argue that “[i]nternational human rights conventions constrain state adoption of harshly restrictive measures on immigrants or their dependents, *especially in countries with independent judiciaries and strong protections for individual rights.*”²⁷ In fact, governments’ attempts to implement restrictive policies against refugees who already resided in the national territories have often been frustrated by courts’ decisions in developed countries.

In line with these arguments, a group of scholars has duly recognized constraining factors on state sovereignty in relation to migration controls.²⁸ In these writings, empirical research has been conducted in ways that illustrate how a particular institution has functioned to constrain the State’s behaviour within the institutional context.²⁹ For example, Christian Joppke asks why the

²⁶ Teitelbaum, *supra* note 1 at 165.

²⁷ *Ibid* [emphasis added].

²⁸ Christian Joppke, ed, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford:Oxford University Press, 1998) at 15–16,138; Catherine Dauvergne, *supra* note 11 at 69; Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 310; David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996); Saskia Sassen, “The de facto transnationalizing of immigration policy”, in Christian Joppke, ed., *Challenge to the Nation-State: immigration in Western Europe and the United States* (Oxford, England: Oxford University Press, 1998) 58.

²⁹ Joppke, *supra* note 28; Dauvergne, *supra* note 11; Jacobson, *supra* note 28; Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995); Stephen D Krasner, “Sovereignty An Institutional Perspective” (1988) 21:1 Comp Political Stud 66.

liberal democratic state continues to receive refugees even though it may conflict with the interests of the existing community.³⁰ Joppke has found the answer in the existence of domestic constraints on sovereignty, stating “internally, the sovereignty of liberal states has always been limited by the rule of law, divided powers, federalism, or the autonomous functioning of societal subsystems, such as the capitalist economy.”³¹ In particular, Joppke emphasizes *inter alia* a judicial system as a key constraint on sovereignty.³² Joppke remarks that “the self-limitation [“self-limited sovereignty”] after entry is most developed in states with written constitutions, where independent courts control the executive by means of judicial review.”³³

In a similar manner, Saskia Sassen argues that “the extension of rights, which has taken place mostly through the judiciary, has confronted states with a number of constraints in the area of immigration and refugee policy.”³⁴ In fact, once non-citizens enter into territories of developed states, the non-citizens enjoy protection of human rights under domestic laws to a certain degree. In this regard, David Jacobson observes that “migration” sovereignty in the United States has been limited due to the fact that the United States Constitution guarantee rights of people rather than those of citizens within the U.S territory.³⁵

Paul Craig also provides helpful insights on the different levels of constraints on state sovereignty, i.e. regional legal constraints, in a more general manner. Craig states that both the “supremacy of EU law” and the ability of an individual within a member state to bring a lawsuit in their national courts on the basis of EU laws (“direct effect”) have greatly contributed to

³⁰ Christian Joppke, “Why Liberal States Accept Unwanted Immigration” (1998) 50:2 World Pol 266.

³¹ Joppke, *supra* note 28 at 138.

³² *Ibid* at 15-16. Joppke also emphasizes client politics as another key constraining force on sovereignty. The client politics means that certain organized groups of people – e.g., “employers, ethnic groups, and civil rights advocates” – exert their influence to “shape immigration policy in liberal states” toward more inclusive policy: *ibid* at 16.

³³ *Ibid* at 18-19.

³⁴ Sassen, *supra* note 28 at 58.

³⁵ Jacobson, *supra* note 28 at 102.

changing the constitution of the United Kingdom.³⁶ In case of conflicts between member states' laws and EU laws, EU laws have supremacy over member states laws.³⁷ Craig does not take these two features as a "dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament" as the parliament voluntarily accepted such limitation.³⁸ Guy S. Goodwin-Gill and Jane McAdam, however, clearly see this phenomenon as one imposing "significant limitations on sovereign powers".³⁹

Taking stock, state sovereignty in relation to border control has been challenged and conceded throughout history. Significantly, the aforementioned arguments pose a serious question regarding the validity of the actor-oriented view of state sovereignty in relation to border control in which a state can exercise state sovereignty in relation to border control *unilaterally* with the *highest authority*. Without denying the significance of state sovereignty in relation to border control, Eric Fripp succinctly summarizes the current status of a state's right to exclude non-citizens, stating that "[...] the view that there was an absolute or near-absolute right to exclude or expel is well established, and *the practical effect of it is now sufficiently mitigated* by developments in human rights and other laws that enquiry into the earlier position may be academic."⁴⁰ In this regard, it may be argued that the "unfettered" or "unconditional" concept of state sovereignty has diminished significantly in effectiveness.

The Institutional Perspective and Pluralism: Opposing a Hierarchical View of Authority in relation to State Sovereignty

³⁶ Paul Craig, "Britain in the European Union" in Jeffrey Jowell & Dawn Oliver, eds, *The Changing Constitution* (Oxford: Oxford University Press, 2011) 113; See also Craig, *ibid* at 122.

³⁷ *Ibid* at 118.

³⁸ *Ibid* at 115.

³⁹ Goodwin-Gill & McAdam, *supra* note 28 at 310.

⁴⁰ Fripp, *supra* note 14 at 30 [emphasis added].

What is a plausible view of sovereignty that may provide an adequate account of constraining factors on state sovereignty? Put another way, what is a theoretical alternative that complements or replaces the hierarchical view of authority? In this section, I argue that an institutional account of state sovereignty (the sociological approach), which is underpinned by pluralism, provides a plausible alternative account of state sovereignty in relation to border control. In what follows, in this section, I present various institutional perspectives that undermine the hierarchical view of authority.

First, it is worth noting a legal theory that supports a pluralistic view of sovereignty. Neil MacCormick convincingly connects an institutional perspective, pluralism and state sovereignty, endorsing a pluralist view of authority in relation to sovereignty. He states that “[...] this institutionalist way of looking at legal and political order opens up possibilities about pluralism. It makes possible, though not necessary, a degree of opposition to traditional centralizing theories about sovereignty, its absoluteness and its essential quality for securely established law.”⁴¹ Although MacCormick’s idea of institutionalization is primarily associated with “formalized” normative orders (as opposed to “informal normative order”, that is, the order that primarily depends “on community of usage and practice among interacting individuals, and upon their mutual beliefs”),⁴² his analysis of law as an “institutional normative order” suggest a pluralistic view of authority.⁴³

MacCormick contends that “[t]he theory of law as institutional normative order has built into an inherently pluralistic conception of legal system. Distinct systems can co-exist without

⁴¹ MacCormick, *supra* note 7 at 78.

⁴² MacCormick, *supra* note 4 at 11, 32. MacCormick does not completely demarcate formal and informal orders, as he fully recognizes that the “informal normative order” can be formalized so as to become “institutional normative order”: Neil MacCormick, “Institutions and laws again” (1999) 77:6 Tex L Rev 1429 at 1431.

⁴³ MacCormick, *supra* note 4 at 11.

any one having to deny either the independence or the normative character of another.”⁴⁴ For MacCormick, state-law is not the only source of law. He duly recognized other laws such “law between states, international law, and law of organized association of states such as the EC/EU, law of churches and other religious unions or communities, laws of games, and laws of national and international sporting associations.”⁴⁵ A distinctive feature of MacCormick’s institutionalism is that, while recognizing tensions between institutionalized normative orders, he leaves open conflicts as they are, rather than imposing a higher authority over the other in order to resolve the conflict. He has remarked as follows:

[...] the present theory can fully endorse the normative quality of any particular system of law and yet still allow for a radical pluralism such that objectively valid normative orders may give conflicting answers to the same point without there necessarily being any specifically legal method for eliminating the conflict – it is perfectly possible that conflicts will simply go unresolved, or that the resolution may be a matter for political rather than legal processes.⁴⁶

In this pluralistic view of authority, MacCormick provides support for criticism of hierarchical views of authority in relation to state sovereignty when it is exercised within national boundaries. He emphasizes that “all power holders are subject to some legal or some political checks or controls. In that case, there is no single sovereign internal to the state, neither a legal nor a political sovereign.”⁴⁷ Especially, given that European states are under political and legal constraints in the context of European Community, he is adamant that “[...] sovereignty whether as a legal or as a political concept, it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community.”⁴⁸

⁴⁴ MacCormick, *supra* note 7 at 75; MacCormick, Institutions and Laws again, *supra* note 42 at 1432.

⁴⁵ MacCormick, *supra* note 7 at 114.

⁴⁶ MacCormick, Institutions and Laws again, *supra* note 42 at 1432.

⁴⁷ MacCormick, *supra* note 7 at 129.

⁴⁸ *Ibid* at 132.

It is important to note that scholars in other fields have proposed a variety of institutional accounts that undermine a hierarchical view of authority. The key argument made by institutional theorists is that institutionalized norms and principles affect an actor's behaviour.⁴⁹ For example, political institutionalists, James G. March and Johan P. Olsen claim that "action is often based more on identifying the normatively appropriate behavior [...]."⁵⁰ For them, behaviour is "governed by rules" and "rules" refers to "routines, procedures, conventions..." and "beliefs, paradigms, codes, cultures [...]."⁵¹ In this regard, March and Olsen introduce the concept of "logic of appropriateness."⁵² In an institutional framework, March and Olsen insist that "political actors associate specific actions with specific situations by rules of appropriateness."⁵³ The term, "appropriateness" is closely associated with the idea of "legitimacy".⁵⁴ For example, Guy Goodwin-Gill once expressed a similar view to March and Olsen's "logic of appropriateness" in the context of state practice of interdiction of irregular migrants on the high seas by stating that "[a] better approach, in my view, would be to begin with a clear understanding of the applicable law – the prohibition of discrimination, of *refoulement*, of inhuman or degrading treatment – and then to see what can be done by working

⁴⁹ John W. Meyer, John Boli, & George M. Thomas, "Ontology and Rationalization in the Western Cultural Account" in George M. Thomas, John W. Meyer, Francisco O. Ramirez & John Boli, eds, *Institutional Structure* (London: Sage Publications, 1987) at 22-23; Paul J DiMaggio & Walter W Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48:2 Am Soc Rev 147 at 148-153; James G March & Johan P Olsen, *Rediscovering Institutions: the Organizational Basis of Politics* (New York: Free Press, 1989) at 22; See North, *supra* note 5 at 3-4,6; See generally Tim Dunne, "The English School" in Christian Reus-Smit & Duncan Snidal, eds, *Oxford Handbook of International Relation* (Oxford University Press, 2008) 267.

⁵⁰ March & Olsen, *supra* note 49 at 22.

⁵¹ *Ibid* at 21-2.

⁵² *Ibid* at 23.

⁵³ *Ibid*.

⁵⁴ See *ibid* at 23.

within the rules.”⁵⁵ Put another way, migration policies should be implemented within a “framework of legitimacy”.

Institutionalists in sociology also concur that actors are not autonomous; rather, actors perform activities in a manner consistent with the identity or meaning that is given by cultural rules or institutions, and in doing so, obtain *legitimacy*.⁵⁶ In the migration context, this sociological emphasis on legitimacy may well be illustrated in the United States’ withdrawal of interdiction policies in 1994 directed at Haiti asylum seekers, in spite of the fact that the Supreme Court of the United States had endorsed the interdiction policy.⁵⁷ Stephen H Legomsky observed that “President Clinton finally ended the no-screening policy in May 1994, entering into agreements with nearby Caribbean island nations [...] to conduct full refugee status determinations (not just screening interviews) on those countries’ territories.”⁵⁸ What brings about such change in interdiction policy? It is likely that the Clinton administration considered the issue of legitimacy that was not exclusively based on the decision of the court. In this regard, the U.S government’s withdrawal of interdiction policy alludes to different dimensions of authority – beyond the hierarchical.

In a similar manner, Stephen Krasner argues that sovereignty in general shows the basic characteristics of an institution, i.e. institutionalization and persistence – a certain behavior conforms to “institutional structures, that is with some set of principles, norms, and rules”(institutionalization) and it “persists over time in the face of changing

⁵⁵ Guy S Goodwin-Gill, “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement” (2011) 23:3 Int’l J Refugee L 443 at 446.

⁵⁶ Meyer, Boli, & Thomas, *supra* note 49 at 12.

⁵⁷ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 at 2259-2567 (1993).

⁵⁸ See Stephen H Legomsky, “USA and the Caribbean Interdiction Program” (2006) 18 Int’l J Refugee L 677 at 679–680; Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, online: FAS < www.fas.org/sgp/crs/row/RS21349.pdf > at 4.

conditions”(durability or persistence).⁵⁹ Once institutionalized, it is never easy to change.⁶⁰ Krasner takes the QWERTY keyboard as an example. The QWERTY keyboard system, once established, has remained as the standard for generations though there was an allegation that QWERTY was not the most efficient arrangement of touch keys.⁶¹ In this regard, Krasner observes that “for actor-oriented arguments the actors create the institutions; for sociological arguments *institutions generate agents*.”⁶² Krasner has plausibly argued as follows:

This idea of supreme power was compelling, but irrelevant in practice... In the United States, the Founding Fathers established a constitutional structure of checks and balances and multiple sovereignties distributed among local and national interests that were inconsistent with hierarchy and supremacy. The principles of justice, and especially order, so valued by Bodin and Hobbes, have best been provided by modern democratic states whose organizing principles are antithetical to the idea that sovereignty means uncontrolled domestic power.⁶³

This view calls the conception of “unconditional” border control into question. This also runs counter to the idea that sovereignty in relation to border control is an autonomous power of a state.⁶⁴ From the sociological approach, a state cannot implement restrictive refugee laws and policies overnight, ignoring “institutional structures”, as sovereignty is located within deeply entrenched patterns or structures in which it must be exercised.⁶⁵ This approach is potentially detrimental to the hierarchical view of authority.

In economics, Nobel prize winner Douglas North adds voice to institutional perspectives. North has recognized the vast *divergence* among states in economic performances and structures

⁵⁹ Krasner, *supra* note 19 at 56. Krasner introduces the concept of different levels of institutionalization and durability whether high or low. The English School represents both high institutionalization and durability, while the “actor-oriented approach” represents either low institutionalization and durability (neorealism) or high institutionalization but low durability (neoliberalism): *ibid* at 58.

⁶⁰ Krasner, *supra* note 29 at 73.

⁶¹ Krasner, *supra* note 19 at 62.

⁶² *Ibid* at 63 [emphasis added].

⁶³ Krasner, *supra* note 21 at 21

⁶⁴ See Krasner, *supra* note 29.

⁶⁵ See generally Krasner, *supra* note 29.

as well as political behaviour in the context of *common* economic circumstances.⁶⁶ This finding is in stark contrast with the hypothesis that “[...] over time economies, as they traded goods, services, and productive factors, would gradually converge.”⁶⁷ North finds the source of the divergence in institutional constraints.⁶⁸ It is significant to note that the constraints, which structure and guide “human interrelations”, could be either formal (e.g. rules) or informal (e.g. “conventions and codes of behavior”).⁶⁹ North contends that even though the same formal constraints were adopted across different countries, the outcomes would be different depending on informal constraints within the countries. For example, many Latin American countries adopted the U.S constitution (formal constraints); however, the outcomes were not the same as in the United States. North claims that “although the rules are the same, the enforcement mechanism, the way enforcement occurs, the norms of behavior, and the subjective models of the actors are not.”⁷⁰

In particular, North stresses the path-dependence characteristic of informal institutional constraints that “come from socially transmitted information and are a part of heritage that we call culture.”⁷¹ He states that “[t]he long-run implication of the culture processing of information that underlies informal constraints is that it plays an important role in the incremental way by which institutions evolve and hence is a *source of path dependence*.”⁷² In other words, the informal constraints will not change easily – instead, they remain as paths to be followed and

⁶⁶ North, *supra* note 5 at 6. North’s institutional theory is not entirely antithetical to rational actor-oriented approach, as the emphasis is still on choices which are given or narrowed down by the institutions: North, *ibid* at 98.

⁶⁷ *Ibid* at 6.

⁶⁸ For North, institutions are “the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction”: *ibid* at 3.

⁶⁹ *Ibid* at 3-4.

⁷⁰ *Ibid* at 101.

⁷¹ *Ibid* at 37.

⁷² *Ibid* at 44. Path-dependence refers to the phenomenon, that, “the consequence of small events and chance circumstances can determine solutions that, once they prevail, lead one to a particular path”: *ibid* at 94.

may show resistance to change of formal constraints such as legislation and case law. North states:

[T]he informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for the way economies change [...].⁷³

Applying North's hypothesis concerning informal constraints to the migration context, it may be argued that, in spite of states' common interests of combatting irregular migration and similar legislations concerning migration controls, the outcomes of migration policies would be different according to informal constraints in individual states. Krasner may illustrate this point. Krasner notes that the United States has not been willing to introduce "a system of identity cards to control illegal migration because this would conflict with *liberal values that are deeply enshrined in individual beliefs* and embedded in the legal system."⁷⁴ Another example would be the aforementioned case of interdiction policy of Haitians implemented during the Clinton's administration in the U.S. This case manifests the inherent conflict between a formal constraint (Court's decision endorsing interdiction policy of the government)⁷⁵ and an informal constraint (liberal democracy, anti-racism etc.). Joppke has observed the following:

But it [the court's decision] did not diminish the domestic dilemma of asylum in a liberal state, particularly in a state both open to interest group pressure and paralysed by the spectre of race. Haitians, after all, are black, and tough action against them is not well received by black American citizens. Moved by a widely publicized hunger strike by the leader of the Transafrica Forum, a black civil rights group, Clinton temporarily stepped back from strict interception and granted Haitian exiles asylum hearings at sea.⁷⁶

⁷³ *Ibid* at 45. North argues that "[a]lthough formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies": *ibid* at 6. North also comments that "[e]ven the Russian Revolution, perhaps the most complete formal transformation of a society we know, cannot be completely understood without exploring the survival and persistence of many informal constraints": *ibid* at 37.

⁷⁴ Krasner, *supra* note 29 at 76 [emphasis added].

⁷⁵ Sale, *supra* note 57 at 2563.

⁷⁶ Joppke, *supra* note 28 at 121 [footnote omitted].

According to the aforementioned institutional theories, state sovereignty in relation to border control is not an “unconditional” right of a state. Rather, a state, as a political institution, constantly seeks legitimacy, and stays on the existing path of norms, customs and principles in implementing migration policies. This phenomenon points to a deeper reality: authoritative power (state sovereignty) does not exist in a hierarchical structure, but in a pluralist framework.

Institutional perspectives point to pluralism as their theoretical underpinnings. The meaning of pluralism may differ in various disciplines; however, they may concur at least with the thesis that a hierarchical view of authority is not feasible in relation to state sovereignty. For example, legal pluralism refers to “the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system.”⁷⁷ The co-existence of an indigenous legal system alongside common law in some Western countries may be a good example of legal pluralism. In politics, according to the Encyclopedia Britannica, pluralism is defined as the view that “[...] in liberal democracies power is (or should be) dispersed among a variety of economic and ideological pressure groups and is not (or should not be) held by a single elite or group of elites.”⁷⁸ Both disciplines squarely reject a hierarchical view of authority, proposing alternative view of authority.

Having examined the relationship between institutional theory and pluralism, in this chapter, I propose an “institutional” pluralism as an alternative normative basis for state sovereignty in relation to border control. Institutional pluralism basically refers to the idea of a pluralist account of authorities. A state’s right to border control is subject to various forms of

⁷⁷ Margaret Davies, “Legal Pluralism” in Peter Cane & Herbert M. Kritzer, eds, *The Oxford Handbook of Empirical Legal Research*, online: Oxford Handbooks Online <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199542475.001.0001/oxfordhb-9780199542475-e-34>>.

⁷⁸ *Pluralism*, online: Encyclopaedia Britannica <<http://www.britannica.com/topic/pluralism-politics>>.

authorities interwoven into one organic body. In this vision of pluralism, one authority is to be exercised *in relation to* other authorities within the organic body. In other words, no particular authority is placed over other authorities; rather, they are interwoven into one organic body in which a decision is to be reached through *an interactive process* between authorities. Interactions may occur in various forms (e.g., cooperation or objection) and at various levels (e.g. formal and informal, formal and formal, and informal and informal institutions). In any event, a critical condition of institutional pluralism is that an institution (whether formal or informal) should be highly institutionalized (path-dependence). It is important to note that this pluralist view of authority hints at a different conception of state sovereignty in relation to border control to which I now turn.

Beyond Institutional Constraints: An Alternative View of State Sovereignty in relation to Border Control

In this section, I will expand the conceptions of “path dependence” and pluralism found in institutional theory in a way that illustrates that the essential character of state sovereignty is changing rather than continuing essentially unchanged except for the presence of side constraints. My claim is that when certain constraints on sovereignty are deeply embedded in institutional frameworks – thus, creating “path-dependence” in a pluralist environment, it may be reasonably stated that state sovereignty itself is changing rather than simply being constrained.

Proponents of the English School and Constructivism in international relations theory well illustrate the changing characteristic of state sovereignty on a theoretical level. At first glance, the arguments found in the English School appear to be very similar with those

expounded above in institutional theories in politics, sociology and economics. However, it goes well beyond the mere discourse of constraints.⁷⁹

In the English School view, states' behaviour is not independent; it is affected, constrained or enabled by prevailing institutions such as the principle of non-intervention.⁸⁰ English School scholars have argued that “[s]ince states are part of a society of states, their behavior, like that of people in a society, will be shaped by social norms. One of the reasons why states will adhere to social norms is that, like people, they pursue legitimacy.”⁸¹ In the English School, a state is “a moral international agent” which has “ideas of rights and wrong.”⁸² This description certainly resonates with arguments found in aforementioned institutional theory. Within the English School, there are two competing groups: pluralists and solidarists.⁸³ They share the common concept of institutionalism; however, they differ in “the *content* of the values and *the character* of the rules and institutions.”⁸⁴

For pluralists, international order is a priority; thus, “the sovereignty and juridical equality of all member states,” and non-intervention are emphasized. Generally, human rights discourse is left off the table.⁸⁵ On the other hand, for solidarists, there is a shift of governing

⁷⁹ The English school is known for its institutional approach as well as historical approach— Chapter 2 has already shown its historical approach: See Alexander Betts, *Forced Migration and Global Politics* (Chichester, West Sussex: Wiley-Blackwell, 2009) at 31. This chapter is primarily concerned with the institutional approach.

⁸⁰ Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (Oxford: Oxford University Press, 1984) at 434; Betts, *supra* note 79 at 31; Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) at 13.

⁸¹ Betts, *supra* note 79 at 31.

⁸² Haddad, *supra* note 80 at 12. Hedley Bull and Adam Watson states that “[b]y an international society, we mean a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements”: Bull & Watson, *supra* note 80 at 1.

⁸³ Dunne, *supra* note 49 at 10.

⁸⁴ *Ibid* at 11 [emphasis added].

⁸⁵ Bull & Watson, *supra* note 80 at 434; Betts, *supra* note 79 at 31; Haddad, *supra* note 80 at 13; Adam Watson, “European International Society and Its Expansion,” in Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (Oxford: Oxford University Press, 1984) 13; Ian Brownlie, “The Expansion of International Society: The Consequences for the law of nations” in Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (Oxford: Oxford University Press, 1984) 357 at 360.

institutions or norms; justice rather than order has begun to be emphasized, and sometimes overrides the traditional concept of state sovereignty.⁸⁶ Humanitarian intervention is a typical example of solidarism in the English school. It is significant to note that humanitarian intervention or the concept of responsibility to protect (R2P) has highlighted the changing characteristic of state sovereignty from “unconditional” to “accountable” in the case of human rights abuse.⁸⁷ Nicholas J Wheeler argues that humanitarian intervention under Chapter VII of the UN Charter in the case of gross human rights violation within the boundaries of a state was not contemplated in the past, e.g., during the Cold War; however, this has changed. For example, Wheeler contends that “[t]he US intervention in Somalia is historic, because it is the first time that the Security Council authorized a Chapter VII intervention—without the consent of a sovereign government—for explicitly humanitarian reasons.”⁸⁸ Put another way, the concept of state sovereignty underpinned by the norm of non-intervention began to change when it began to reflect human rights norms. Wheeler even states that “[o]nce established, norms will serve to constrain even the most powerful states in the international system.”⁸⁹ This rhetoric points to “path-dependence” as a relevant factor.

Constructivism is also useful in illustrating the changing concept of state sovereignty.⁹⁰ The proponents of constructivism basically argue that states’ patterns of interaction, interests, priorities and even identities are socially constructed through norms, values, ideas, etc.⁹¹ For

⁸⁶ Brownlie, *supra* note 85 at 368; Betts, *supra* note 79 at 30; Nicholas J Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (New York: Oxford University Press, 2003) at 17, 38, 302.

⁸⁷ See Haddad, *supra* note 80 at 72, 201; See Betts, *supra* note 79 at 47–54.

⁸⁸ Wheeler, *supra* note 86 at 172.

⁸⁹ *Ibid* at 7.

⁹⁰ Haddad states that constructivism is “useful and complementary tool that lends itself well to an examination of the role of norms and identity in refugee politics”: Haddad, *supra* note 80 at 15.

⁹¹ See Ian Hurd, “Constructivism” in Christian Reus-Smit & Duncan Snidal, *The Oxford Handbook of International Relations* (Oxford, Oxford University Press, 2008) 298 at 300-304; See Haddad, *supra* note 80 at 15; See Klotz, *supra* note 29 at 9.

example, in the context of refugee protection, Emma Haddad states that “[...] state perceptions of the refugee ‘problem’ are influenced by ‘inter-subjective practices’, which include norms and ideas, that *socialise* states and impact on states’ *interests and identities*.”⁹² What should be emphasized here is the argument that those socially constructed “interests and identities” do change over time.⁹³

An important contribution to Constructivism is Audie Klotz’s book, *Norms in International Relations: the Struggle against Apartheid*, which describes not only how the norm of racial equality affects international politics but also how it constitutes the very interests or identities of states. Klotz basically argues that “a norm of racial equality plays crucial roles in defining identity and interest, rather than simply functioning as a weak constraint on more fundamental strategic or economic interests”⁹⁴ Klotz emphasizes that many countries adopted sanctions against the apartheid regime in South Africa, contrary to their strategic or economic interests.⁹⁵ This “unrealistic” approach can be explained in terms of changing interests or identities of states through a norm. Klotz remarks that “the global diffusion of a norm of racial equality motivated domestic, transnational, state, and intergovernmental actors to protest South Africa’s system of *domestic* racial segregation.”⁹⁶ In other words, a norm of racial equality may have socialized states so that the norm has constituted the very identities of states, or it at least

⁹² Haddad, *supra* note 80 at 15 [Emphasis added].

⁹³ *Ibid*: “Behaviour, interests and relationships are *socially constructed*; thus *they can, and do, change*”; Hurd, *supra* note 91 at 300: “[...] sovereignty is a social institution in the sense that a state can be sovereign only when it is seen by people and other states as a corporate actor with rights and obligations over territory and citizens (and they act accordingly). The practice of sovereignty has changed over time, and the powers and identities of actually existing states have changed as well [...]”

⁹⁴ Klotz, *supra* note 29 at 9.

⁹⁵ *Ibid* at 16.

⁹⁶ *Ibid* at 165 [emphasis added].

may have functioned as “identity constraint”.⁹⁷ In the face of changing interests or identities of states, the age-old principle of non-interference had to be revisited, giving rise to a reconfiguration of the concept of state sovereignty.

The English school and Constructivism provide a theoretical lens through which to understand how the concept of state sovereignty has changed from exclusively a “control”-based concept to a “responsible”-based concept. The change has been brought by the proliferation of human rights norms that have been highly institutionalized, thus creating “path-dependence”, within institutional frameworks, whether domestically or internationally. These analyses of changing concept of state sovereignty in general are inspirational in critically assessing the concept of state sovereignty in relation to border control.⁹⁸ The most significant finding of the analyses would be that, as prevailing norms and values change, so the concept of state sovereignty that depends on them would also change. The concept of state sovereignty is not ahistorical, but it has been subject to change in its meaning and scope throughout history.⁹⁹

However, one should not understand this as meaning that one norm (responsibility) has completely replaced the other (control); rather, in a pluralist environment, the human rights norms have been added into a body of authorities that compete with the traditional notion of

⁹⁷ For example, an actor may consider its “nonracist identity” in the process of “cost and benefit calculation” with regard to its foreign relations; in this regard, an identity may function as a constraint on state sovereignty: see Klotz, *supra* note 29 at 168.

⁹⁸ Betts rightly describes that “[t]he English school sheds light on the historical emergence and development of norms. Constructivism highlights the role of practice in shaping norms”: Betts, *supra* note 79 at 59.

⁹⁹ For example, the concept of sovereignty originally emerged to legitimize “the rights of kings and princes to assert centralized authority over the numerous entities and communities”: Barbara Delcourt, “Sovereignty” in Mark Bevir, ed, *Encyclopedia of Governance*, vol 1 (Thousand Oaks, California: Sage Publications, 2007) at 911. However, its meaning has been reconfigured from “the source of legitimacy” to “the scope of activity”: Thomas J Biersteker & Cynthia Weber, *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996) at 14. Regarding the “scope of state authority”, particularly in the context of globalization, Stephen D. Krasner suggests three implications of modern state sovereignty: autonomous and independent entity, “control over trans-border movement”, and “political authorities [that] can enter into international agreements”: Krasner, *supra* note 21 at 21.

“control”. Put another way, a growing interest in the conception of “responsible” exercise of sovereignty has arisen out of interactions between various norms. Applying this to border control, it may be argued that migration policies are the outcomes of interactions between two competing notions of sovereignty, giving rise to the conception of “responsible” control.

Taking stock, the concept of state sovereignty as “unconditional” border controls is a historical and a social construct, that is subject to change over time. The concept of state sovereignty *itself* may change from “unconditional” control to “responsible” control, reflecting more human rights concerns. For example, in the context of the refugee protection regime, Alexander Betts observes arguments put forward by English school theorists that “[a]lthough a concern with global order has certainly motivated the emergence and principle of the refugee regime, this has been *tempered* by values relating to justice.”¹⁰⁰ In other words, the norm of state sovereignty has undergone change from reflecting pluralistic views to exhibiting solidarist views *as well*. Betts aptly remarks that “[i]ndeed, international recognition of the plight of refugees and IDPs has been at the heart of the gradual shift away from absolute and unconditional state sovereignty toward recognition of the need for states to earn sovereignty through their respect for human rights.”¹⁰¹

This being the case, the last section of this chapter examines state practice. How far has the concept of “responsible” border control with respect to refugees been recognized in state practice? A study of recent Australian case law shows that the “responsible” border control has become more like a norm rather than a mere academic assertion. Although the concept of “unconditional” border control has been dominant in Australian refugee law and policy, in particular, relating to external migration controls, recent decisions of the High Court of Australia

¹⁰⁰ Betts, *supra* note 79 at 41 [emphasis added].

¹⁰¹ *Ibid* at 44.

have successfully challenged certain aspects of such practices, underscoring the concept of “responsible” border control with respect to asylum seekers and refugees. This case study by no means provides an overview of Australian legal system in relation to border control; however, it at least points to a reality that there has been constant tension between the conception of “unconditional” and “responsible” border control in Australia.

Case Study

In Australia, an individual, who has arrived by boat without valid visa at “an excised offshore place” or “any other place” of Australia (an “unauthorized maritime arrival”), cannot make a valid application for protection visa (refugee status) unless the minister intervenes.¹⁰² Instead, unauthorized maritime arrivals may be removed from the mainland of Australia to a country designated by the Minister (now so-called “regional processing country”) for refugee status determination there.¹⁰³ In July, 2011, the Australian government entered into an agreement with the Malaysian government, according to which Australia could remove up to 800 unauthorized

¹⁰² *Migration Act 1958 (Cth) Sections 5AA and 46A*; See Xanthe Emery, *Excision of the Australian mainland for Boat Arrivals*, online: Immigration Advice & Rights Centre Inc.

<http://www.iarc.asn.au/_blog/Immigration_News/post/excision-of-the-australian-mainland-for-boat-arrivals/>.

¹⁰³ The Minister used to declare a country to which asylum seekers might be sent on the basis of certain criteria. However, the relevant section (s 198A) was amended. See now *Migration Act 1958(Cth) s 198AB* as follows:

- (1) The Minister may, by legislative instrument, designate that a country is a *regional processing country*.
[...]
- (2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.
[...]
- (3) In considering the national interest for the purposes of subsection (2), the Minister:
 - (a) must have regard to whether or not the country has given Australia any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
 - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and
 - (b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

maritime arrivals to Malaysia.¹⁰⁴ Then, the minister declared Malaysia as a country to which unauthorized maritime arrivals could be removed.

In August, 2011, two unauthorized maritime arrivals were faced with a removal order to Malaysia, and they brought a legal action against it in the High Court of Australia. The Court held that the minister's declaration was *ultra vires* and invalid.¹⁰⁵ The majority pointed out that Malaysia did not meet the criteria, which are indispensable for the declaration, set out in the relevant section of the Migration Act.¹⁰⁶ It is significant to note that the criteria refer basically to human rights norms – e.g., the specified country *inter alia* “provides protection for persons seeking asylum, pending determination of their refugee status” and “meets relevant human rights standards in providing that protection”.¹⁰⁷ The decision of *Plaintiff M70/2011* delivers an important message that the Australian government's migration policy is *accountable* for breach of institutionalized human rights norms. Put another way, it has set out the parameters within which the Australian government should exercise its power when removing asylum seekers to a third country. This clearly points to a deeper reality that a state's right to border control is to be exercised within *institutional frameworks* – in other words, it is *not* a *unilateral* right of a state.

Another case has clearly illustrated adoption of the concept of “responsible” control in relation to detention policy. Since the *Al-Kateb* case,¹⁰⁸ Australian detention policy has been an

¹⁰⁴ *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 at para 101.

¹⁰⁵ *Ibid* at paras 59, 68, 136.

¹⁰⁶ *Ibid* at paras 67, 68, 134.

¹⁰⁷ *Ibid* at para 11 (s 198A(3)(a)(i)-(iv) of the Migration Act -repealed). Unfortunately, the relevant sections have been considerably amended. Currently, Sections 198AB(2), (3)(a)(i)-(ii) of Migration Act (*supra* note 103) govern the mechanism. Furthermore, in 2014, the High Court of Australia endorsed the constitutional validity of the Minister's designation of Manus Island in Papua New Guinea as a regional processing country on the basis of Section 198AB: See also *Plaintiff S156/2013 v Minister for Immigration and Border Protection and another* (2014) 309 ALR 29 at paras 40-42, 45.

¹⁰⁸ *Al-Kateb v Godwin and others* (2004) 219 CLR 562 [*Al-Kateb*]. In this case, Ahmed Ali Al-Kateb, who was a stateless person, brought a legal action in the High Court of Australia with regard to the validity of his detention. The High Court held that, according to section 196 (duration of detention) of Migration Act 1958(Cth), his detention was

exemplar of the “unconditional” border control. However, in 2014, the High Court of Australia in *Plaintiff S4/2014* delivered an important verdict concerning the Australian detention policy.¹⁰⁹ Although the Australian government’s detention policy per se was not a legal issue, the court, in its unanimous decision, defined legal limits to the policy in *obiter dicta*.¹¹⁰ The Court stated as follows:

[...] because immigration detention is not discretionary, but is an incident of the execution of particular powers of the executive, it must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes.¹¹¹

The court made it clear that “the purposes [of detention] must be pursued and carried into effect *as soon as reasonably practicable*”¹¹² In this regard, the Court stated that “[d]eparture from that requirement would entail departure from the purpose for his [the plaintiff’s] detention and could be justified only if the Act were construed as permitting detention at the discretion of the executive. The Act is not to be construed as permitting detention of that kind.”¹¹³

Chia pays attention to the fact that the court applied the principle set out in *Chu Kheng Lim* to this matter.¹¹⁴ Brennan, Deane and Dawson JJ in *Chu Kheng Lim* stated as follows:

[...] the two sections [of Migration Act (Cth)] will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, *if the detention which those sections require and authorize is not so limited*, the authority which they purportedly confer upon the Executive cannot properly be seen as an

valid even though it was unlikely for him to be released in a foreseeable future: *Al-Kateb*, *ibid* at 581. In fact, this decision endorsed an unlimited period of detention on a theoretical level.

¹⁰⁹ *Plaintiff S4/2014 v Minister for Immigration and Border Protection and Another* (2014) 312 ALR 537.

¹¹⁰ *Ibid* at para 26. See Joyce Chia, “High Court Verdict Spells the End for Australian Immigration Detention as We Know It” *The Guardian* (11 September 2014), online: The Guardian <<http://www.theguardian.com/commentisfree/2014/sep/11/high-court-verdict-spells-the-end-for-australian-immigration-detention-as-we-know-it>>; Joyce Chia, “Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention” (2015) 38:2 Univ New South Wales LJ 628 at 649.

¹¹¹ *Plaintiff S4/201*, *supra* note 109 at para 29.

¹¹² *Ibid* at para 28.

¹¹³ *Ibid* at para 34.

¹¹⁴ *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 110 ALR 97.

incident of the executive powers to exclude, admit and deport an alien. In that event, *they will be of a punitive nature and contravene Ch.III* [of the Constitution]’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.¹¹⁵

The decision in *Plaintiff S4/2014* may have significant implications for Australian detention policy. Joyce Chia describes this decision as the court’s imposition of “constitutional limits”.¹¹⁶ Chia even anticipates that “[i]t will throw into doubt the legality of detention of thousands of people in Australia, potentially spelling the end for Australia’s mandatory detention regime as we know it.”¹¹⁷ Yet, at this point, it would be more reasonable to state that the exact effect of this case will be determined in the near future due to conflicting precedents in case law, e.g., *Al-Kateb*.¹¹⁸ In the meantime, it would be safe to argue that the tension between the “unconditional” border control and the “responsible” border control is manifested in this case. Furthermore, the court’s unanimous statement, albeit being in *obiter dicta*, conveys the idea that a state has to exercise state sovereignty in relation to border control *in a responsible manner within the given institutional limits or parameters*.

Having said that, one may argue that such a concept has come to an end in the face of robust external migration controls in the 21st century. In fact, many developed countries have adopted several pre-emptive measures against the flow of “unwanted” migrants (deterrence policy). Thomas Gammeltoft-Hansen rightly observes that states tend to “bring the different layers of migration control closer and closer to the sites of departure.”¹¹⁹ The primary motif of such external migration controls is to implement migration policies *outside of domestic*

¹¹⁵ *Ibid* at 118-19 [emphasis added].

¹¹⁶ Chia, “High court verdict spells the end for Australian immigration detention as we know it”, *supra* note 110.

¹¹⁷ *Ibid*.

¹¹⁸ Chia duly recognized that “[i]ts significance may well be underestimated [...], because *Plaintiff S4* carefully omits any discussion of the controversies raised in the preceding jurisprudence”: Chia, “Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention”, *supra* note 110 at 650; *Al-Kateb*, *supra* note 108.

¹¹⁹ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011) at 126.

institutional constraints.¹²⁰ For example, there is a widespread presumption that states can interdict refugees on a boat on the high seas without any institutional constraints.¹²¹

However, this dissertation argues that the conception of “responsible” border control has survived and has extended its application even beyond national borders. Chapter 7 will present how state sovereignty in relation to external migration controls has become a subject of legal scrutiny under regional human rights norms, thus rendering it *accountable* for breach of human rights even outside of national borders in state practice. Chapter 7 is a pivotal one to demonstrate the “responsible” border control in the context of external migration controls in state practice.

Conclusion

It is now a commonplace to observe that the European Convention on Human Rights (ECHR) has transformed the landscape of European domestic policy-making, becoming the *operative constraint* in fields from education policy to national security while deepening its perceived *institutional legitimacy*.¹²²

From an institutional perspective, a state seeks legitimacy in implementing refugee laws and policies by reference to prevailing institutions or norms for which the state is expected to be accountable. Moreover, when a certain constraint has become “path-dependent”, it has set a parameter or framework within which a state should exercise its sovereign power in relation to border control. In this regard, state sovereignty in relation to border control is not supreme or “unconditional”. The institutional perspective presents a compelling theoretical account of

¹²⁰ See, Mariagiulia Giuffrè, “State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?” (2012) 24:4 Int’l J Refugee L 692 at 693; Gammeltoft-Hansen, *supra* note 119 at 77; Niels Frenzen, “US Migrant Interdiction Practices in International and Territorial Waters” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 375 at 393.

¹²¹ See *Executive Order 12807 – Interdiction of Illegal Aliens*, online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=23627>>; Legomsky, *supra* note 58 at 68.

¹²² Sarah Miller, “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention” (2009) 20:4 EJIL 1223 at 1224 [emphasis added].

pluralism in which norms relating to state sovereignty are interactively engaging each other, creating the concept of the “responsible” border control.

The reconfiguration in the conception of state sovereignty from “unconditional” to “responsible” control is of paramount importance in relation to the discourse of cosmopolitan justice, as it has lifted a significant theoretical obstacle of a widely recognized right of a state to exclude non-citizen at its own discretion. In this regard, state sovereignty and cosmopolitan justice are not antithetical concepts in the migration context; rather, they may mutually support each other. The cosmopolitan justice may be realized within the framework of an international state system characterized by its adoption of a concept of state sovereignty as responsibility even in the migration setting.

Chapter 7 Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*

Introduction

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 [...].¹

The principle of *non-refoulement* has long been recognized as the central principle of international refugee law. Regrettably, major refugee-intakes countries have denied its extraterritorial applicability in the conduct of external migration controls such as interdiction or interception of refugees on the high seas.² However, the European Court of Human Rights (ECtHR) in *Hirsi* has successfully challenged such state practices by expanding the scope of application of the *non-refoulement* obligation beyond state territory.³

The principle of *non-refoulement* is enshrined in various European instruments. Typical examples are Article 19(2) of the *Charter of Fundamental Rights of the European Union* and Article 78(1) of the *Treaty on the Functioning of the European Union*.⁴ In the context of joint-

* Chapter 7 has been accepted for publication and will appear in a revised form, subsequent to editorial input by Cambridge University Press, in the *Leiden Journal of International Law* published by Cambridge University Press. Copyright © 2016 Foundation of the *Leiden Journal of International Law*

¹ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 at art 33(1) [the Refugee Convention].

² Justice A M North, “Extraterritorial Effect of Non-Refoulement” (International Association of Refugee Law Judges World Conference, Bled, Slovenia, 7 September 2011), online: Federal Court of Australia <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-north/north-j-20110907>>; See *Executive Order 12807 – Interdiction of Illegal Aliens* (May 24, 1992), online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=23627>> at para (2): “(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States [...]”

³ *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, [2012] II ECHR 97, 55 EHRR 21 [Hirsi].

⁴ *Charter of Fundamental Rights of the European Union*, European Union, [2012] OJ, C326/391; *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C326/01; Susan Saliba, *Non-refoulement, push-backs and the EU response to irregular migration*, online: European Parliamentary Research Service Blog <ephinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/>.

maritime operations at sea coordinated by Frontex, the EU Regulation 656/2014 also ensures respect for the principle of *non-refoulement*.⁵ Moreover, the principle of *non-refoulement* is regarded as binding in the course of EU military operations against human smuggling or trafficking in the southern central Mediterranean (EUNAVFOR MED), launched in June 2015.⁶ This Chapter exclusively focuses on the principle of *non-refoulement* under the *European Convention on Human Rights* (ECHR).⁷

It examines how the shift in judicial analysis of the principle of *non-refoulement* under the ECHR has occurred. The shift may be attributable to the recent development of the concept of jurisdiction in human rights law. The point of departure is Article 1 of the ECHR which reads as follows: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”⁸ In the relevant cases, the ECtHR has duly recognized that jurisdiction within the meaning of Article 1 of the ECHR is established even beyond state territory in cases of physical custody of persons by state agencies. Since physical custody is implicated in interdiction operations at sea, the jurisprudence of the ECtHR has not only challenged the traditional concept of jurisdiction and state sovereignty, but it has also made a significant breakthrough in the protection of refugees intercepted by European states on the high seas.

In order to fully appreciate the developing concept of jurisdiction and its relevance in expanding the scope of application of the *non-refoulement* obligation, it is necessary to canvass

⁵ *European Parliament and of the Council Regulation (EU) No 656/2014 of 15 May 2014 on establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, [2014] OJ, L189/93 at para 10.

⁶ See *Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)*, [2015] OJ, L122/31 at para 6.

⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, 4 November 1950, ETS 5 [ECHR].

⁸ *Ibid* at art 1.

the case law of the ECtHR that has recognized a wide range of accounts of jurisdiction beyond state territory. In particular, the *Hirsi* case is scrutinized as a case that, more than any other, has expanded the scope of application of the *non-refoulement* obligation even to the high seas in the context of the developing concept of jurisdiction in the ECHR. Furthermore, new potential to expand further the scope of application of the *non-refoulement* obligation is considered through an examination of the concept of state responsibility in public international law and the principles derived from the case law of the ECtHR. Before analyzing the case law of the ECtHR, it is important to acknowledge academic debates on the meaning of jurisdiction in human rights law. Because these debates provided a necessary context in which to read the case law of the ECtHR, this Chapter begins there.

The Meaning of Jurisdiction in Human Rights Law

In public international law, jurisdiction, as a core element of state sovereignty, has in general been regarded as being “closely related to the national territory”.⁹ Simply stated, the concept of jurisdiction has traditionally been regarded as territorial in nature.¹⁰ Two components of jurisdiction have been recognized: prescriptive and enforcement jurisdiction.¹¹ Malcolm N. Shaw explains the two components as follows:

It is particularly necessary to distinguish between the capacity to make law, whether by legislative or executive or judicial action (prescriptive jurisdiction or the jurisdiction to prescribe) and the capacity to ensure compliance with such law whether by executive action or through the courts (enforcement jurisdiction or the jurisdiction to enforce).¹²

⁹ Malcolm N Shaw, *International law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 572-73; Rick Lawson, “Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights” in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 83 at 87.

¹⁰ Shaw, *supra* note 9 at 573; Lawson, *supra* note 9 at 87.

¹¹ Malcolm N Shaw, *International law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 645-46.

¹² *Ibid.* Shaw also states that “[j]urisdiction, although primarily territorial, may be based on other grounds, for example nationality, while enforcement is restricted by territorial factors”: *ibid* at 646.

In human rights law, including the ECHR, the meaning of jurisdiction has been the subject of considerable debate among scholars. In particular, scholars diverge in their opinions as to whether the notion of jurisdiction in human rights law is essentially territorial as found in general international law. On the one hand, it has been argued that the concept of jurisdiction found in human rights law should be distinguished from that found in general international law. For instance, Anja Klug and Tim Howe point out two different objectives of jurisdiction in general international law and human rights law.

The objective of the traditional notion of State jurisdiction [...] is to delineate the spheres of different sovereign States in a way that it respects the sovereignty of each State. [...] Jurisdiction in the context of human rights law, however, [...] defines the applicability of human rights obligations, and thus opens the possibility to assess State responsibility under human rights law.¹³

By the same token, Conall Mallory has remarked that “[h]uman rights law jurisdiction does not deal with a State’s rights, but with its responsibilities and obligations to which it has committed through accession to an international treaty.”¹⁴ Marko Milanovic also argues that “[...] the notion of jurisdiction in human rights treaties relates essentially to a question of fact, of actual authority and control that a state has over a given territory or persons. ‘Jurisdiction’, in this context, simply means actual power, whether exercised lawfully or not – nothing more, and nothing less.”¹⁵ Significantly, Klug and Howe suggest that in international human rights law, jurisdiction may be established by “factual control (over territory or person), *de jure* jurisdiction, or ‘a personal link’.”¹⁶ From this perspective, the notion of jurisdiction in human rights law is not

¹³ Anja Klug & Tim Howe, “The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 69 at 98.

¹⁴ Conall Mallory, “I. European Court of Human Rights *Al-Skeini and Others v United Kingdom* (Application no 55721/07) Judgment of 7 July 2011” (2012) 61:01 Int’l Comp LQ 301 at 309.

¹⁵ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011) at 41.

¹⁶ Klug and Howe, *supra* note 13 at 76. The “personal link” refers to the “cause-and-effect” approach in which jurisdiction may be established on the basis of “‘personal link’ between the State and the victim through the State’s

primarily territorial, but it is established by factual evidence such as effective control over persons even outside states' territories.

On the other hand, other scholars argue for the necessity of retaining a territorial notion of jurisdiction in human rights law. Dominic McGoldrick argues that “[t]he meaning(s) of extraterritorial application have to be within a general framework of jurisdictional analysis in public international law. They are questions of law, not of philosophy or ethics, although those disciplines may have affected the relevant law.”¹⁷ The primacy of the territorial notion of jurisdiction in the context of human rights law has often been proposed against the background of “potential clashes with foreign territorial jurisdictions.”¹⁸ This perspective does not deny the notion of extraterritorial jurisdiction *per se*; however, it accepts extraterritorial jurisdiction only in exceptional cases.

Case law of the ECtHR

Banković¹⁹

In *Banković*, the applicants were citizens of the Federal Republic of Yugoslavia (FRY) who brought an action against NATO states on behalf of themselves and their deceased family

action”: Klug and Howe, *supra* note 13 at 87. For example, Klug and Howe observe in the *Alejandro* case (the Inter-American Commission case) that “[i]n the absence of any territorial or physical personal control exercised by Cuba, it was the sheer act of bombing which established the “personal link” and brought the victims under the authority of Cuba”: Klug & Howe, *supra* note 13 at 87-8; *Alejandro Jr., et al. v. Cuba*, (1999), Inter-Am Comm HR, No. 86/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106.

¹⁷ Dominic McGoldrick, “Extraterritorial Application of the International Covenant on Civil and Political Rights” in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 41 at 42.

¹⁸ See generally Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011) at 112. Mactavish J in *Amnesty International Canada v. Canada (Canadian Forces)* stated that “a ‘control of the person’ test would be problematic in the context of a multinational military effort. [...] Indeed, it would result in a patch work of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis”: *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336 at para 274, [2008] F.C.J. No. 356.

¹⁹ *Banković and Others v. Belgium and Others* [GC] (dec), No. 52207/99, [2001] XII ECHR 333, (2007) 44 EHRR SE5 [*Banković*].

members, arguing that NATO's air strike on Radio Televizije Srbije (RTS) and the concomitant deaths of their family members during the Kosovo crisis were, *inter alia*, breaches of the right to life (Article 2 of the ECHR).²⁰ The critical issue in this case was whether the extraterritorial activities of air strikes by NATO could trigger the application of the ECHR for NATO countries. Regarding jurisdiction, the Grand Chamber stated:

In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.²¹

The Court flatly rejected “cause-and-effect” concept of jurisdiction as proposed by the applicants.²² The Court recognized four exceptional cases to territorial jurisdiction:²³ 1) extradition or expulsion 2) “effective control” over a territory by military action,²⁴ 3) activities of “diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State”; and 4) effects produced outside by an action inside the territories.²⁵ Having said that, the Court held that the case was inadmissible due to the failure to establish jurisdiction.

In the ensuing academic debates, Milanovic has argued that the Court's reasoning that notion of jurisdiction found in Article 1 of the ECHR is essentially territorial is not only

²⁰ *Ibid* at para 28.

²¹ *Ibid* at para 67.

²² *Ibid* at para 75. With respect to the “cause-and-effect” approach proposed by the applicants, the Court states that “[...] the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to ‘jurisdiction’”: *ibid* at 75. See also *supra* note 16.

²³ See Mariagiulia Giuffrè, “Watered-Down Rights on the High Seas: Hirsi Jamma and Others v Italy (2012)” (2012) 61:03 Int'l Comp LQ 728 at 732.

²⁴ *Banković*, *supra* note 19, at paras 68-71. The court relies on *Loizidou* case in which Turkey exercised “effective overall control” over the concerned place by military actions which involved 30,000 army personnel: *Case of Loizidou v. Turkey* (preliminary objections), No.15318/89 (23 March, 1995), online: European Court of Human Rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920>>; *Case of Loizidou v. Turkey* [GC], No, 15318/89 (18 December, 1996), online: European Court of Human Rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007>>.

²⁵ *Banković*, *supra* note 19 at paras 68-73.

“unsupported by anything produced by the Court” but also is in contradiction with “the Court’s own established jurisprudence.”²⁶ Milanovic grapples with models of extraterritorial jurisdiction found in the jurisprudence of the ECtHR along with other human rights treaties, *which are not essentially territorial in nature*:

First, there is what I will call the *spatial model* of jurisdiction – a state possesses jurisdiction whenever it has *effective overall control of an area* [...]. Secondly, there is the *personal model* of jurisdiction (or “state agent authority”) – a state has jurisdiction whenever it exercises *authority or control over an individual*.²⁷

Milanovic’s critique on the decision of the *Banković* court is persuasive as case law before and after *Banković* appears to have been inconsistent with the territorial principle set out by the *Banković* court, or at least it gives such an impression.²⁸ The *Issa* case below stands at the heart of such an impression.²⁹

On the other hand, Sarah Miller remarks that the *Banković* court introduced the primarily territorial notion of jurisdiction as a general thread found in both international law and the jurisprudence of the ECtHR, while fully recognizing exceptional cases to such a territorial notion of jurisdiction whether under public international law, e.g., the flag state jurisdiction, or in case law of the ECtHR.³⁰ With respect to critique of seemingly inconsistent case law relating to the concept of jurisdiction before and after *Banković*, Miller argues as follows:

The European Court’s seemingly inconsistent treatment of exceptions to territorial jurisdiction becomes a coherent body of law when these cases are viewed as manifestations of a territorially centred rule. [...] By extending extraterritorial jurisdiction only to cases where a signatory state is essentially exercising functional

²⁶ Milanovic, *supra* note 15 at 22.

²⁷ Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23:1 EJIL 121 at 122 [emphasis in original].

²⁸ See generally Sarah Miller, “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention” (2009) 20:4 EJIL 1223 at 1225; Mallory, *supra* note 14 at 304; *See also R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 at para 67, Lord Rodger: “[t]he problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice.”

²⁹ *Case of Issa and Others v. Turkey*, no.31821/96 (16 November 2004), online: European Court of Human Rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460>> [*Issa*].

³⁰ Miller, *supra* note 28, at 1232-34.

sovereignty abroad, the Court strikes a balance between the twin, competing purposes of the Convention as a regional, European instrument and as a universalist charter for human rights.³¹

In this regard, Miller highlights the requirement of “a strong nexus to state territory” in establishing jurisdiction of the ECHR.³²

Issa v. Turkey³³

In many respects, this case is as controversial as the *Banković* case. The fact that it was decided after *Banković* makes the concept of jurisdiction all the more confused. In 2004, the Chamber in *Issa* dealt with the alleged killings of Iraqi shepherds by Turkish soldiers. There are three distinctive features in this judgment that are recognized and highlighted by Lord Brown in *Al-Skeini*.³⁴ First, the court in *Issa* adopts a more or less flexible concept of control.³⁵ Second, and importantly, the court relies on the decisions of international bodies such as the Inter-American Commission of Human Rights and the Human Rights Committee (HRC), whose jurisprudence has developed a conception that is closely related to a “personal model” of jurisdiction in Milanovic’s terms.³⁶ Thirdly, the court focuses on “the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction,”³⁷ which gives the

³¹ *Ibid* at 1245. As for the concept of functional sovereignty, Miller suggests that “[i]n ‘effective control’ cases, this functional sovereignty takes the form of *de facto* control over another state’s territory. In diplomatic and consular cases, it takes the form of quasi-sovereign functions within an embassy or in relation to a signatory state’s own citizens [...]”: *ibid* at 1245.

³² See *ibid* at 1236.

³³ *Issa*, *supra* note 29.

³⁴ *Al-Skeini* [UK case], *supra* note 28.

³⁵ *Issa*, *supra* note 29 at para 74: “[t]he Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq [...]”. See also *Al-Skeini* [UK case], *supra* note 28 at para 80.

³⁶ *Issa*, *supra* note 29 at paras 71- 75; *Al-Skeini* [UK case], *supra* note 28 at para 75; See Milanovic, *supra* note 27 at 122.

³⁷ *Al-Skeini* [UK case], *supra* note 28.

impression that the court in *Issa* may have confused jurisdiction with state responsibility, a distinction that is discussed below.³⁸

Although Milanovic has argued that the *Issa* court “endorsed the personal model of jurisdiction in addition to the spatial one”,³⁹ Miller vehemently opposes this view of the *Issa* court, stating that “[u]nder the logic of *Issa*, jurisdiction is not primarily territorial; a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home. This premise is diametrically opposed to the Court’s conclusions in *Banković* [...]”⁴⁰ The stark discrepancy in opinions regarding the concept of jurisdiction between Milanovic and Miller is hardly surprising, having regard to so a wide range of decisions of the ECtHR below.

The Continuing Debate on the Meaning of Jurisdiction in Case Law after *Banković*

In 2005, in *Öcalan v. Turkey*,⁴¹ the Grand Chamber held that:

It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish *authority* and therefore within the ‘jurisdiction’ of that State [...] even though in this instance Turkey exercised its *authority* outside its territory.⁴²

It appears that the Court endorsed the “personal model” adopted by the *Issa* court above.⁴³ In 2009, the ECtHR in *Al-Saadoon* held that the UK government should prohibit the transfer of the

³⁸ See Malcolm D Evans, “State Responsibility and the European Convention on Human Rights: Role and Realm,” In Malgosia Fitzmaurice and Dan Sarooshi, eds, *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 139 at 140; See Marko Milanovic, *Grand Chamber Judgment in Catan and Others*, online: EJIL:Talk! <<http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/>>.

³⁹ Milanovic, *supra* note 15 at 183.

⁴⁰ Miller, *supra* note 28 at 1228.

⁴¹ *Case of Öcalan v. Turkey* [GC], No. 46221/99, [2005] IV ECHR 47, 41 EHRR 45 [*Öcalan*].

⁴² *Ibid* at para 91 [emphasis added].

⁴³ Milanovic, *supra* note 15 at 167 .

applicants in Iraq, over whom it exercised “exclusive control”, to the Iraqi authorities.⁴⁴ In this case, the Court found a jurisdictional linkage as follows:

The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction [...].⁴⁵

The main issue in another important case, *Medvedyev*, is closely related to that of maritime interception.⁴⁶ In 2010, a Cambodia-registered ship, the *Winner*, was intercepted on the high seas by a French frigate for the purpose of implementing anti-drug measures under the agreement with the Cambodian government. Later, crew members brought an action against France, arguing that they suffered the deprivation of liberty while being detained on the *Winner* by French authorities. The Grand Chamber in *Medvedyev* held that:

[...] as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention [...].⁴⁷

In other words, *de facto* effective control over persons and the vessel is sufficient to establish a jurisdictional link without *de jure* jurisdiction, e.g. the flag state jurisdiction.⁴⁸

In light of these cases, it does appear that, after *Banković*, the ECtHR has not emphasized the territorial nature of jurisdiction as much as it did previously. In this regard, Lawson proposes a “gradual approach to the notion of jurisdiction” under which the obligation to uphold the rights of the ECHR depends on the degree of effective control over territory or persons.⁴⁹ In contrast,

⁴⁴ *Case of Al-Saadoon and Mufdhi v. The United Kingdom* (dec), no. 61498/08 (30 June, 2009), online: European Court of Human Rights < [⁴⁵ *Ibid* at para 88.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?%22itemid%22:[%22001-93398%22]}> .</p>
</div>
<div data-bbox=)

⁴⁶ *Case of Medvedyev and Others v. France* [GC], No. 3394/03, [2010] III ECHR 61, 51 EHRR 39.

⁴⁷ *Ibid* at para 67.

⁴⁸ Milanovic, *supra* note 15 at 162.

⁴⁹ Lawson, *supra* note 9 at 84.

Miller has argued that “[t]he European Court has never found jurisdiction in cases involving a state’s extraterritorial actions absent some preceding or subsequent nexus to the state’s physical territory.”⁵⁰ Miller points out that the applicants in *Öcalan* were forced to return to the territory of Turkey and this fact gives rise to territorial nexus.⁵¹ In fact, in *Medvedyev*, the concerned crew members also had been taken to the territory of France where they were convicted for drug-related charges.⁵²

***Al-Skeini*: Clarifying the Meaning of Jurisdiction?**

In 2011, the Grand Chamber of the ECtHR in *Al-Skeini* attempted to clarify the issue of jurisdiction.⁵³ In brief, the court acknowledged all the case law that is seemingly inconsistent. It confirmed that jurisdiction under Article 1 of the ECHR is “primarily territorial”.⁵⁴ The court also recognized “a number of exceptional circumstances” outside of territorial boundaries, which could give rise to the establishment of jurisdiction.⁵⁵ The court acknowledged two critical exceptional categories: “state agent authority and control” and “effective control over an area.”⁵⁶

Relevant to the current focus on external migration controls, under the title of “State agent authority and control”, the court importantly recognized:

[...] in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad.⁵⁷

⁵⁰ Miller, *supra* note 28 at 1236.

⁵¹ *Ibid*; See Michael O’Boyle, “The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life after Bankovic’” in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 125 at 134.

⁵² *Medvedyev*, *supra* note 46 at paras 15-26.

⁵³ *Case of Al-Skeini and Others v. The United Kingdom* [GC], No. 55721/07, [2011] IV ECHR 99, 53 EHRR 18 [*Al-Skeini*].

⁵⁴ *Ibid* at para 131.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* at paras 133-40.

⁵⁷ *Ibid* at para 136.

The court explicitly endorses the *Issa*, *Al-Saadoon* and *Medvedyev* cases; all three cases share the fact that states exercised “total” or “full” or “exclusive” control over persons and places.⁵⁸

The most significant statement of the court in *Al-Skeini* is that “[w]hat is decisive in such cases is the *exercise of physical power and control over the person in question*.”⁵⁹ In this statement, there is no nexus to the physical territory of a state. In addition, the court emphasized that the exceptions “must be determined with reference to the particular facts.”⁶⁰ In other words, ECtHR jurisprudence regarding jurisdiction is primarily based on facts rather than on a generalizable principle.⁶¹

In *Al-Skeini*, the claimants were relatives or family members of six Iraqi people who were allegedly killed or died due to mistreatment by British forces personnel. When this case was heard in the House of Lords in the United Kingdom, five alleged victims were held not to have been under the jurisdiction of the U.K. Lord Rodger stated that the U.K troops did not exercise “effective control” over those who were killed in the course of military operations of British forces, even in the sense of *Issa*.⁶² On the other hand, the Secretary of State conceded that the victim, Mr. Mousa, was within the ambit of jurisdiction of the ECHR as he was detained and severely beaten in a British military base in Iraq, which caused his death.⁶³

However, the ECtHR overruled the decision of the House of Lords, even finding jurisdiction in relation to the applicants other than Mr. Mousa.

[...] the United Kingdom (together with the United States) assumed in Iraq the *exercise of some of the public powers normally to be exercised by a sovereign*

⁵⁸ *Ibid.*

⁵⁹ *Ibid* [emphasis added].

⁶⁰ *Ibid* at para 131.

⁶¹ O’Boyle, *supra* note 51 at 128.

⁶² *Al-Skeini* [UK case], *supra* note 28 at para 83.

⁶³ *Ibid* at para 61.

government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised *authority and control* over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.⁶⁴

“Authority and control” over persons is qualified by the circumstances in which the United Kingdom exercised the functions of “the public powers normally to be exercised by a sovereign government.”⁶⁵ Milanovic rightly remarks that “the Court applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied.”⁶⁶

The decision in *Al-Skeini* may be interpreted as nothing but confirming all the case law in the past. In fact, the *Banković* court fully recognized the extraterritorial jurisdiction in the case where a contracting state “exercises all or some of the public powers normally to be exercised by that Government” through “the consent, invitation or acquiescence of the Government of that territory.”⁶⁷ However, significantly, the court at least clarifies two things in relation to the scenario of interdiction of refugees at sea: 1) jurisdiction is not necessarily associated with a territorial nexus in the case of custody of a person on the vessel by a contracting state 2) additional exceptional cases to the territorial nature of jurisdiction can be established according to facts (e.g. the level of control or influence) rather than fixed principles (e.g. territorial nature), which opens a door for a possibility of establishing jurisdiction in the case of a contracting

⁶⁴ *Al-Skeini*, *supra* note 53 at para 149 [emphasis added].

⁶⁵ *Ibid.*

⁶⁶ Milanovic, *supra* note 27 at 130 [emphasis in original].

⁶⁷ *Banković*, *supra* note 19 at para 71 [footnotes omitted].

state's indirect involvement in interdiction of refugees within the territorial waters of a third state .

Hirsi Jamaa and Others v. Italy

The *Hirsi* case provides a meaningful point of contact between the developing concept of jurisdiction in the ECHR and the extraterritorial reach of the principle of *non-refoulement*.⁶⁸ It is the *Hirsi* court's analysis of the concept of jurisdiction that has made it possible to expand the scope of the obligation of *non-refoulement* found in Article 3 of the ECHR. As the ECHR applies extraterritorially, so the *non-refoulement* obligation, which is embedded in Article 3 of the ECHR does also.

In 2009, about 200 migrants, including alleged asylum seekers and refugees, attempted to leave Libya for Italy by boat. On the high seas, however, they were intercepted by Italian coastguard and police vessels, and then were transferred onto Italian military ships. In the end, they were returned to Tripoli, Libya, without any process of identification, nor any attempt to determine claims for refugee status that may have been forthcoming. Later, 24 people of African origin who were among the returned group brought claims against Italy in the ECtHR, arguing that Italy had breached the ECHR and its Protocol by failing to secure their rights and freedoms, even though they were within its jurisdiction.⁶⁹

The court held that Italy was liable for breaching Article 3 and 13 of the ECHR and Article 4 of Protocol No.4, as a result of the interdiction and its subsequent push-back activities that occurred on the high seas.⁷⁰ With respect to the jurisdictional issue, the court held that

⁶⁸ *Hirsi*, *supra* note 3.

⁶⁹ *Ibid.*

⁷⁰ The ECHR, *supra* note 7 at art 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"; art 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an

factual evidence established jurisdiction within the meaning of the ECHR in that “the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.”⁷¹ The court considered the fact that the applicants were transferred onto vessels flying Italian flags, which established *de jure* jurisdiction on the high seas according to international maritime law and the relevant domestic Italian laws.⁷² Furthermore, the court also recognized *de facto* jurisdiction based on factual evidence of exclusive control of the applicants by Italian military personnel.⁷³ Significantly, in this case, the court did not require a territorial nexus in establishing jurisdiction; the interdicted migrants were not brought to the territory of Italy, but were pushed back to Libya from the high seas. In fact, the purpose of interdicting of migrants on the high seas is to “escape” from such a territorial connection in order to circumvent domestic legal constraints.⁷⁴

effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”; art 4 of Protocol No. 4: “Collective expulsion of aliens is prohibited.”

⁷¹ *Hirsi*, *supra* note 3 at paras 81, 146, 148, 156-58. Notably, James Crawford has critiqued the decision of the ECtHR in relation to the extraterritorial applicability of Article 4 of Protocol No. 4 (“Prohibition of collective expulsion of aliens”). Crawford is adamant that Article 4 of the Protocol No. 4 has a “territorial limitation” on the basis of the plain meaning of “expulsion”, “the drafting history” of the provision of Article 4, “important norms of international law” including Article 33 of the *Refugee Convention*, and the definition of “expulsion” provided by International Law commission: James Crawford, *Chance, Order, Change: The Course of International Law, Collected Courses of the Hague Academy of International Law*, vol 365 (Brill, 2013) at paras 347-353. Crawford is averse to the idea that the scope of applicability of Article 4 of Protocol No. 4 is exclusively defined by Article 1 of the ECHR, and, in particular, he contends that “[...] collective expulsion of aliens is a serious breach of international law, and Article 4 is expressed as an absolute and non-derogable prohibition. As such, it must be interpreted narrowly and precisely. If any measure preventing groups of aliens from entering the territory of a Contracting State is prohibited, then the words of Article 4 cease to have meaning”: Crawford, *ibid* at 349-350. In general, the concept of “limited jurisdiction” has been endorsed by various arbitral tribunals; for example, in the *Eurotunnel* case, an arbitral tribunal (that consists of 5 members, including Crawford himself) held that “the Tribunal’s jurisdiction is limited to claims which implicate *the rights and obligations of the Parties under the Concession Agreement [...]*”: *Eurotunnel (The Channel Tunnel Group Ltd and France-Manche S.A v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l’équipement, des transports, de l’aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française)*, Partial Award, 132 ILR 1 (2007) at para 153 [emphasis added]; see Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2015) at 102-3.

⁷² *Hirsi*, *supra* note 3 at paras 77-78.

⁷³ *Ibid* at para 80.

⁷⁴ See generally Mariagiulia Giuffré, “State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?” (2012) 24:4 Int’l J Refugee L 692 at 693; Gammeltoft-Hansen, *supra* note 18 at 77; Niels Frenzen, “US Migrant Interdiction Practices in International and Territorial Waters” in Bernard Ryan & Valsamis Mitsilegas,

Equally significant is the Court's analysis of the principle of *non-refoulement* which it identified as an essential aspect of Article 3 of the ECHR.⁷⁵ In relation to alleged breach of Article 3 of the ECHR, the court states that “ [...] the Court's task is [...] to ascertain whether there were sufficient guarantees that the parties concerned would not be arbitrarily returned to their countries of origin, where they had an arguable claim that their repatriation would breach Article 3 of the Convention.”⁷⁶ Judge Pinto De Albuquerque in the concurring opinion also recognized that “ [...] the *non-refoulement* obligation can be triggered by a breach or the risk of a breach of the essence of any European Convention right, such as the right to life, the right to physical integrity and the corresponding prohibition of torture and ill-treatment [...].”⁷⁷

In order to ascertain whether there was breach of Article 3, the Court in *Hirsi* examined various documents, including those of the UNHCR and various human rights bodies, and held that:

[...] the Court considers that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from *the risk of being arbitrarily returned to their countries of origin*, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.⁷⁸

eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 375 at 393.

⁷⁵ See also *Case of Chahal v. The United Kingdom*, no. 22414/93 (15 November 1996), online: European Court of Human Rights <[http://www.refworld.org/pdfid/45f17a1a4.pdf](http://hudoc.echr.coe.int/eng#{%22appno%22:[%2222414/93%22],%22itemid%22:[%22001-58004%22]}> at para 80; See generally UN High Commissioner for Refugees, <i>Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol</i>, January 2007, online: UNHCR < at 9 (footnote 42).

⁷⁶ *Hirsi*, *supra* note 3 at para. 148. The court identified two aspects relating to alleged violation of art 3: 1) whether the applicants had been exposed to “the risk of inhuman and degrading treatment in Libya” 2) whether the applicants had been exposed to “the risk of arbitrary repatriation to Eritrea and Somalia”: *Hirsi*, *supra* note 3 at paras 84-85, 138-39.

⁷⁷ *Ibid* at 61 (Concurring Opinion of Judge Pinto De Albuquerque) [footnote omitted].

⁷⁸ *Ibid* at para 156 [emphasis added].

In this regard, Italy was liable for breach of the principle of *non-refoulement*. The principle of *non-refoulement* was initially codified under Article 33 of the UN *Convention on the Status of Refugees* (The *Refugee Convention*) which provides that: “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.”⁷⁹ Major refugee-intake countries such as the United States and Australia have denied that this provision has extraterritorial application to the scenario of interdiction on the high seas.⁸⁰

The decision in *Hirsi* offers a challenge to such state practice by removing the principle of *non-refoulement* from its original context “in the framework of international refugee law”, and placing it within the context of human rights law relating to the high seas.⁸¹ In human rights law, the scope of application of the *non-refoulement* obligation is not limited to states’ territories. Since the principle is considered to be “the cornerstone of asylum and of international refugee law,” its extraterritorial application is of paramount significance in an era of restrictive external migration controls.⁸² Moreover, the doctrine of jurisdiction in human rights law may expand the scope of application of the *non-refoulement* obligation to the extent that it may cover an

⁷⁹ The *Refugee Convention*, *supra* note 1 at art 33(1).

⁸⁰ North, *supra* note 2. The Supreme Court of the United States in *Sale* stated that “[...] both the text and negotiating history of Article 33 [of the *Refugee Convention*] affirmatively indicate that it was not intended to have extraterritorial effect”: *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 at 2563 (1993).

⁸¹ See generally Klug & Howe, *supra* note 13 at 70.

⁸² UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, online: UNHCR <<http://www.unhcr.org/refworld/docid/438c6d972.html>>; See UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, Online: UNHCR <<http://www.unhcr.org/refworld/docid/437b6db64.html>> at para 2; See Gammeltoft-Hansen, *supra* note 18 at 100.

emerging trend of interdiction or interception practice within the territorial waters of a third country.

The Emerging Practice of Interdiction at Sea

So far, this Chapter has shown that the ECtHR case law has developed the concept of jurisdiction to apply to cases where state agencies exert extraterritorial physical control over a person. As a result of *Hirsi*, a jurisdiction linkage within the meaning of Article 1 of the ECHR will exist where a state attempts to interdict or intercept refugees on the high seas by using its own personnel and vessels. If it is determined that breach of the *non-refoulement* obligation occurred, the interdicting states will be held to be legally responsible for their conduct under Article 3 of the ECHR. Therefore, the enforceable rights under Article 3 of the ECHR, coupled with developing concept of jurisdiction, has made it possible that the principle of *non-refoulement* reaches extraterritorially in a way that legally constrains interdiction practice of European states on the high seas.

However, the Grand Chamber's decision in *Hirsi* should not be understood as putting an end to interdiction policy altogether. Interdiction policy does not, in and of itself, breach the principle of *non-refoulement*. In fact, although the general rule is that no state may exercise its jurisdiction over a ship on the high seas except for the flag state, in exceptional cases, a state may implement interdiction operations on another flag vessel on the high seas in a legitimate manner.⁸³ For example, a state may take appropriate measures in relation to people on board under Article 8 of the *Smuggling Protocol*, if it is believed that the vessel is implicated in human

⁸³ See generally R. R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd ed (Manchester, UK: Manchester University Press, 1999) at 208; *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 2, UKTS 1999 No 81 at art 92 [emphasis added] [UNCLOS].

smuggling.⁸⁴ The scope of the measures depends on the content of flag state's authorization.⁸⁵ In the case of stateless vessels, a warship may visit the vessels on the high seas under Article 110 of *Convention on the Law of the Sea* (UNCLOS), though it is not clear whether it authorizes the arrest of crew on board.⁸⁶ Moreover, bilateral agreements may provide a legal basis for interception or interdiction. In fact, legal bases of Italy's interdiction operation on the high seas in *Hirsi* were bilateral agreements concluded between Italy and Libya in the period of 2007 to 2009.⁸⁷

This being the case, two conditions must be met in order to hold a contracting state of the ECHR liable for its interdiction policy. First and foremost, it should be determined that jurisdiction under Article 1 of the ECHR is established. Even though there may be breach of the *non-refoulement* obligation under Article 3 of the ECHR, without the establishment of jurisdiction under Article 1, the ECtHR will declare a case inadmissible. Second, an actual breach of the *non-refoulement* obligation should be found in the process of interdiction. The absence of adequate identification procedure for refugees in the process of interdiction may give rise to a breach of the *non-refoulement* obligation. Goodwin-Gill remarks that relevant authorities should "identify all those intercepted, and keep records regarding nationality, age, personal circumstances and reasons for passage."⁸⁸ In a similar manner, Stephen H. Legomsky

⁸⁴ *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507, UKTS 2006 No 16 at art 8 [emphasis added] [*Smuggling Protocol*].

⁸⁵ *Ibid.*

⁸⁶ See Natalie Klein, "The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation" (2008) 35:2 *Denv J Int'l L&Pol'y* 287 at 298-302; See generally Churchill & Lowe, *supra* note 83 at 214. In cases of piracy and unauthorized broadcasting, the UNCLOS Article 105 and 109 respectively authorize a seizure of the vessel and arrest of persons on board.

⁸⁷ *Hirsi*, *supra* note 3 at para 19.

⁸⁸ Guy S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23:3 *Int'l J Refugee L* 443 at 456.

argues that “[i]f interdiction must be used...adequate provision for full and fair refugee status determinations is critical.”⁸⁹

At this juncture, it is important to examine a different type of interdiction practice, joint patrol, which may not involve physical custody of a person by a contracting state of the ECHR. It appears that this practice has become another trend of external migration controls at sea. Paula García Andrade succinctly summarizes the emerging practice of joint patrol conducted by both a European state and an African state.

As regards the exercise of specific powers in the framework of joint sea patrols, a coastal State could authorize a third State, Spain in this case, to perform surveillance and interception activities, either by allowing the presence of Spanish agents on board the coastal State’s ships, or by permitting the deployment of surveillance operations undertaken by Spanish State ships. In any case the powers of the authorised State’s agents depend on the scope of the authorisation given by the agreement or memorandum signed for that purpose, and in any event national agents of the African countries involved should be on board, since the latter are entitled to enforce the third country internal legislation on border control with regard to vessels intercepted inside its territorial waters.⁹⁰

According to the extract, Spain is *indirectly* involved in the interdiction or interception of asylum seekers within the territorial waters of an African state – in this case, it is the coastal state that enforces the law within its territorial waters, not Spain. In fact, several contracting states of the ECHR have concluded bilateral agreements with northern African countries to such an effect.⁹¹

With respect to characteristics of the agreements, Evelien Brouwer argues that “[t]hese

⁸⁹ Stephen. H. Legomsky, “USA and the Caribbean Interdiction Program” (2006) 18 Int’l J Refugee L 677 at 678-79. Legomsky is skeptical about the possibility of having a fair refugee status determination process on board. He states that “[...] in theory a fair refugee status determination could possibly be made outside the country’s territory. [...] however, the practical obstacles to a fair procedure in conjunction with interdiction are formidable”: *ibid* at 686, footnote 58.

⁹⁰ Paula García Andrade, “Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 311 at 320 [footnote omitted].

⁹¹ Evelien Brouwer, “Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 199 at 211.

agreements must be considered the result of intense bargaining between the European states and the ‘countries of transfer’, exchanging economical and development aid for cooperation at the sea borders, and within the third state, activities preventing persons to leave the latter state.”⁹²

In these circumstances, can a contracting state of the ECHR be held responsible for a breach of the *non-refoulement* obligation under Article 3 of the ECHR? In other words, can the jurisdiction in Article 1 of the ECHR be established in relation to European states’ *indirect* involvement in the interdiction of refugees within the territorial waters of African states? As examined in the case law above, the establishment of jurisdiction in the context of interdiction demands physical custody. The simple argument that refugees are sent back to the country of origin by indirect support of a contracting state of the ECHR without proving physical custody may not be sufficient to establish a jurisdictional linkage. In this regard, Mariagiulia Giuffré may be right in stating “EU member states that cooperate with third countries in patrolling external maritime borders are not always responsible under human rights treaties.”⁹³ Thus, even if a breach of the *non-refoulement* obligation is found, a European state that cooperates with a third country may not be held liable for the breach.

State Responsibility and Complicity

Having observed a gap in human rights protections in these cases, some scholars look to the help of the public international law concept of state responsibility. For example, Giuffré introduces the International Law Commission (ILC)’s *Draft Article on State Responsibility* (ARSIWA)⁹⁴ in order to “provide a remedy because of a lack of the ‘jurisdictional link’ between the state and the

⁹² *Ibid.*

⁹³ Giuffré, *supra* note 74 at 733.

⁹⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, GA 56th Session, UN Dos A/56/10 Supplement No. 10 (2001), online: UN Office of Legal Affairs <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> [ARSIWA].

individuals concerned.”⁹⁵ Under the concept of state responsibility, a state engaged in joint patrolling within the territorial waters of another state may be responsible for the breach of the principle of *non-refoulement* on three accounts: a) “as a co-author of *refoulement*” under Article 47 of ARSIWA; b) for providing “aid or assistance in the commission of an internationally wrongful act” under Article 16; c) for a breach of a principle of international law, i.e., “positive due diligence obligations”.⁹⁶ As joint maritime patrols encompass various forms of participation from European states (e.g., deployment of naval or air forces, and ship-riders agreement), the scope of state responsibility necessarily varies in specific cases.⁹⁷ This Chapter especially pays attention to two scenarios: 1) interception by European vessels under the authority of enforcement officers on board from the coastal state (“significant” contribution), and 2) interception by the coastal state’s vessels with help of agents on board from European states (“limited” contribution).

A. As a Co-author of *Refoulement*

Article 47 of ARSIWA copes with a situation where several states are involved in the same internationally wrongful act whether independently or cooperatively, e.g., concerted military attacks.⁹⁸ The ILC Commentary remarks that “[...] in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.”⁹⁹ Such a co-

⁹⁵ Giuffr , *supra* note 74 at 694; see Gammeltoft-Hansen, *supra* note 18 at 139-140.

⁹⁶ I thank an anonymous reviewer for the comments in relation to three accounts. For more details on the concept of due diligence as a principle of international law, See Robert P. Barnidge, “The Due Diligence Principle Under International Law” (2006) 8:1 Int’l Community L Rev 81.

⁹⁷ I thank an anonymous reviewer for the comments in relation to different fashions of joint-patrolling.

⁹⁸ See generally James Crawford, *State Responsibility: the General Part* (New York: Cambridge University Press, 2013) at 334-335; Article 47(1) of ARSIWA (*supra* note 94): “[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.”

⁹⁹ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002) at 272.

authorship may be found in the case of “direct” participation in or “sufficiently significant” contribution to an internationally wrongful act.¹⁰⁰ The scenario 1 (“significant” contribution) above may be the case.

However, it should be remembered that participating European states have no legal authority to interdict irregular migrants;¹⁰¹ technically, they are “merely” providing “aid or assistance” to a coastal state’s *own* patrolling activities. In this context, it may be difficult to demarcate co-authorship and complicity in relation to European participation in joint maritime patrols. Ian Brownlie has pointed out that the provision of “aid or assistance” in the context of aggression may not give rise to joint-responsibility unless it is accompanied with “the specific purpose of assisting an aggressor.”¹⁰² However, as will be demonstrated below, such an “intent” element is more problematic than helpful in finding state responsibility in relation to European states’ participation in the joint patrolling.

B. Complicity under Article 16 of ARSIWA

Article 16 of ARSIWA is often invoked in relation to states’ indirect involvement (complicity) in an internationally wrongful act. Article 16 provides:

- A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
 - (b) the act would be internationally wrongful if committed by that State.¹⁰³

¹⁰⁰ Crawford, *supra* note 98 at 405. It is worth noting the statement of Nikolai Ushakov who circumscribed the scope of complicity in relation to state responsibility: “[...] participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity”: “1519th Meeting: State Responsibility” (UN Doc A/CN.4/307) in *Yearbook of the International Law Commission 1978*, vol 1 (New York: UN, 1979) at 238 (para 11) (UNDOC.A/CN. 4/ SER. A/ 1978).

¹⁰¹ Andrade, *supra* note 90 at 320, 322.

¹⁰² Ian Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford: Clarendon Press, 1983) at 191.

¹⁰³ ARSIWA, *supra* note 94 at art 16.

Relying on this article, Giuffré argues that “a state may be responsible for violation of the principle of *non-refoulement* where it knowingly assists another state to return refugees to a place where their life or liberty might be threatened.”¹⁰⁴ However, a careful reading of Article 16 may not warrant such a view. Although there has been a growing acceptance that Article 16 is reflective of customary international law,¹⁰⁵ Maarten den Heijer rightly observes that “[t]he international law concept of aiding and assisting, or complicity, is not without controversial elements.”¹⁰⁶ In other words, it is not a settled area of law. In particular, since no definition of “aid or assistance” is provided in ARSIWA, neither the forms of complicity (e.g., whether it should be active, thus excluding omission), nor the nexus elements (e.g., whether it requires substantial contribution or mere participation), nor the subjective requirements (e.g., whether intent of the accomplice matters) are clear-cut.¹⁰⁷

Nevertheless, a bottom-line understanding of the meaning and scope of “aid or assistance” in current state practice may be suggested as follows: 1) the act of complicity should be “significant” contribution to outcomes, albeit not necessarily in the form of essential or “indispensable” contribution,¹⁰⁸ 2) the act of complicity needs to be “in the form of a positive act”, thus excluding “active incitement” or “mere omission”,¹⁰⁹ 3) controversially, the act of

¹⁰⁴ Giuffré, *supra* note 74 at 725.

¹⁰⁵ See generally Miles Jackson, *Complicity in international law* (Oxford: Oxford University Press, 2015) at 150-13. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), [2007] ICJ Rep 43 at para 420 [The *Bosnian Genocide*].

¹⁰⁶ Maarten den Heijer, “Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 169 at 194 [footnote omitted].

¹⁰⁷ Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011) at 197, 219; Crawford, *supra* note 98 at 402-405; see generally Jackson, *supra* note 105.

¹⁰⁸ Aust, *supra* note 107 at 197, 212; Crawford, *supra* note 98 at 402-403; Jackson, *supra* note 105 at 158.

¹⁰⁹ Aust, *supra* note 107 at 209, 219, 226-230; Crawford, *supra* note 98 at 403, 405; See generally Jackson, *supra* note 105 at 155-157. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 105 at para 432. Jackson questions this dominant view by paying attention to the concept of “culpable omissions”, stating that “the other elements of a complicity rule will pull into the ambit of complicity particularly culpable omissions that contribute significantly to the commission of the harm and exclude those that do not”: Jackson, *supra* note 105 at 157.

complicity has to be accompanied with “intent” as well as “actual knowledge” of “the circumstances of the internationally wrongful act”,¹¹⁰ 4) a complicit state must be bound by the same primary obligation that another state has breached (Article 16(b), the *Pacta Tertiis* rule).¹¹¹

In the case of scenario 1, it may be forcefully argued that there is a positive act on the part of a European state which significantly contributes to maritime patrolling of a coastal state. On the other hand, the “aid or assistance” in scenario 2 may not meet the requirement of “significant contribution”. With scenario 1, then, the subjective element, i.e., intent, is a critical issue. This requirement of intent, though controversial, appears to have been recognized at least in state practice.¹¹² In fact, commentary on ARSIWA states that “Article 16 deals with the situation where one State provides aid or assistance to another with *a view to facilitating* the commission of an internationally wrongful act by the latter.”¹¹³

Accordingly, for a European state to be held responsible, it arguably must have provided aids such as patrolling vessels “with a view to facilitating” a breach of the principle of *non-refoulement*. However, it should be noted that joint patrolling programs, in which the European border agency, Frontex, has been involved, have been operated ostensibly for the purpose of combating irregular migration.¹¹⁴ Even if it is conceded that a lesser stringent standard of

¹¹⁰ Aust, *supra* note 107 at 267; Crawford, *supra* note 98 at 405-408; Crawford, *supra* note 99 at 148; See generally Jackson, *supra* note 105 at 159-161. However, Jackson argues that there is no consensus among scholars about the requirement of intent. Instead, Jackson prefers “a standard of knowledge”, that is, the “awareness with something approaching practical certainty as to the circumstances of the principal wrongful act”: *supra* note 105 at 160-161.

¹¹¹ For the *pacta tertiis* rule, see art 34 and 35 of *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

¹¹² Aust, *supra* note 107 at 267. Crawford remarks that “[...] this second element [intent] is sufficient to eclipse entirely the requirement of knowledge, as an overt intention to assist presupposes knowledge of assistance. It has arguably been accepted into the customary ambit of complicity by the International Court [...]”: Crawford, *supra* note 98 at 407.

¹¹³ Crawford, *supra* note 99 at 148.

¹¹⁴ Alessia di Pascale, “Migration Control at Sea: The Italian Case,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 281 at 289-292. For more details on operation of Frontex in relation to migration controls at sea, See Anneliese Baldaccini, “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea,” in Bernard Ryan & Valsamis

knowledge should be adopted in the place of the controversial requirement of “intent”, it is important to recognize that the International Court of Justice (ICJ) has connected such knowledge with “the specific intent of the principal perpetrator”.¹¹⁵ In other words, a European state must be aware of *the coastal state’s intention* to violate the principle of *non-refoulement* in the course of joint maritime patrols. Accordingly, it goes back to the issue of “intent”. This being the case, it may be argued that the “intent” element, whether it is required from a complicit party or a primary perpetrator, has rendered it difficult to hold a European state complicit in the breach of the principle of *non-refoulement* under Article 16 of ARSIWA.

C. Positive Due Diligence Obligations

Some may argue that a complicit European state may be held responsible for the breach of positive due diligence obligations. International law has duly recognized positive due diligence obligations in various fields of law, most prominently in international environmental law.¹¹⁶ For example, Miles Jackson has observed that “[...] many instances of state participation in the harms caused by nonstate actors are swept up by broader positive obligations imposed on states to protect against harms to other states or individuals.”¹¹⁷ On a European level, positive obligations have also been recognized in relation to rights set out in the ECHR, whether independently or in conjunction with Article 1 of the ECHR.¹¹⁸

Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 229.

¹¹⁵ The *Bosnian Genocide*, *supra* note 105 at para 421: “[...] there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.”

¹¹⁶ See Barnidge, *supra* note 96 at 121; See Jackson, *supra* note 105 at 130.

¹¹⁷ Jackson, *supra* note 105 at 129 [footnote omitted].

¹¹⁸ Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Belgium: Council of Europe, 2007) at 8.

However, it is significant to note that positive due diligence obligations are normally contemplated as duties of states *within* their territories; in other words, the due diligence obligations “retain their territorial character.”¹¹⁹ Accordingly, in the context of external migration controls, it is not that breach of positive obligations incurs state responsibility, but that extraterritorial jurisdiction should give effect to the positive obligations so as to trigger the issue of state responsibility. After all, it goes back to the issue of jurisdiction rather than state responsibility.

An Approach based on the Jurisprudence of the ECtHR

The state responsibility approach certainly has some merits in the case of complicity; however, ambiguous or controversial elements have rendered it much less applicable and effective in relation to holding a complicit European state responsible under ARSIWA, at least in the context of joint maritime patrols. More fundamentally, the ECtHR has been adamant that, in order for the ECHR to apply to a particular case, the first threshold is to establish jurisdiction under Article 1 of the ECHR, not attribution under State Responsibility.¹²⁰ The ECtHR has not adopted the attribution concept as a legitimate means to establish “jurisdiction”.¹²¹ Michael O’Boyle plausibly argues that “[t]he [state responsibility] approach [...] only makes sense as regards a treaty which has no limiting ‘jurisdiction’ clause [...]”.¹²² Thus, in the European context, the requirement of establishing jurisdiction under Article 1 of the ECHR cannot be circumvented by way of introducing the concept of state responsibility under ARSIWA.

¹¹⁹ Jackson, *supra* note 105 at 129-131.

¹²⁰ Miller, *supra* note 28 at 1235.

¹²¹ *Banković*, *supra* note 19 at para.75.

¹²² O’Boyle, *supra* note 51 at 131.

This being the case, instead of relying on the concept of state responsibility, the focus should be shifted to the ECtHR's own case law – *de jure* or *de facto* jurisdiction. In relation to the scenario 1 above, Andrade raises an interesting question in relation to joint-patrolling by Spain and Senegal:

The situation envisaged would be more complicated if the person stopped had gone on board the Spanish ship which participated in the joint patrol. In that case, could we consider that, since the person would be under Spanish jurisdiction, the return to Senegalese territory would imply a violation of the “non-refoulement” principle by Spain?¹²³

It is probable that, in scenario 1, European states still have *de jure* jurisdiction (the flag state jurisdiction) over matters on their vessels even within the territorial waters of a third country.

Richard A Barnes states that “[f]lag States enjoy prescriptive and enforcement jurisdiction over ships flying their flag wherever the vessel is located. When a ship is within internal waters, port, or the territorial sea, jurisdiction is concurrent with the port/coastal State.”¹²⁴ Debates may arise concerning the characteristic of coastal state jurisdiction— whether the coastal state has “plenary jurisdiction” or whether it can only exercise jurisdictional power over certain matters in a limited way.¹²⁵ In any event, it appears that flag state jurisdiction is not forfeited simply by a ship's entry into the territorial waters of a third country.

Significantly, it is probable that European states (flag states) may enjoy immunity from the coastal state's enforcement jurisdiction under Article 32 of the UNCLOS which reads “[w]ith such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-

¹²³ Andrade, *supra* note 90 at 322 [footnote omitted].

¹²⁴ Richard A. Barnes, “The Operation of Flag State Jurisdiction”, in Donald Rothwell, ed, *The Oxford handbook of the law of the sea* (Oxford: Oxford University Press, 2015) 310 at 311 [footnote omitted].

¹²⁵ *Ibid*; Churchill & Lowe, *supra* note 83 at 92 – 100.

commercial purposes.”¹²⁶ The European vessels engaged in the interdiction operations are government-operated patrol ships which certainly are within the ambit of “warships and other government ships operated for non-commercial purposes”.¹²⁷

Furthermore, it also may be argued that European states can exercise effective control over intercepted migrants, thus *de facto* jurisdiction, on the grounds that they are held in custody on European vessels by joint crews that are made up of European crews and the coastal states’ crews.¹²⁸ Therefore, in the light of jurisprudence of the ECtHR in relation to extraterritorial jurisdiction as examined above, such findings may arguably establish jurisdiction of a European state within the meaning of Article 1 of the ECHR.

Once jurisdiction is established, as shown above in *Hirsi*, the standard of knowledge required for holding a state responsible for the breach of the *non-refoulement* obligation under Article 3 of the ECHR is “actual” or “constructive” knowledge (“should have known”).¹²⁹ Here, the jurisprudence of the ECtHR clearly differs from the controversial requirement of Article 16 of ARSIWA, that is, “intent” of a participating state.

In relation to the scenarios 2, the analysis is more complicated. There is neither *de jure* jurisdiction by virtue of flag state jurisdiction nor *de facto* jurisdiction by way of effective control over persons. In this circumstance, it seems to be hard to establish jurisdiction of a

¹²⁶ UNCLOS, *supra* note 83 at art 32; See Churchill & Lowe, *supra* note 83 at 99; See also Barnes, *supra* note 124 at 312.

¹²⁷ With regard to the definition of “other government ships operated for non-commercial purposes”, See James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford: Oxford University Press, 2011) at 248.

¹²⁸ The 2007 bilateral cooperation agreement between Italy and Libya stated that “[m]ixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships”: *Hirsi*, *supra* note 3 at para 19. Furthermore, the 2009 agreement stipulated that “[t]he two countries undertake to organize maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills [...]”: *Hirsi*, *supra* note 3 at para 19.

¹²⁹ *Hirsi*, *supra* note 3 at para 156; See generally Crawford, *supra* note 98 at 406.

European state in relation to the ECHR under the current jurisprudence of the ECtHR. That being said, having regard to the progressive characteristic of the jurisprudence of the ECtHR in relation to extraterritorial jurisdiction,¹³⁰ we do hope to see the court's finding a way to establish extraterritorial jurisdiction in the case of complicity so that it may uphold the principle expressed in *Issa*: "Article 1 of the Convention[ECHR] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."¹³¹

Conclusion: Beyond Europe

Jurisdiction is a core element of state sovereignty that previously had been understood as essentially a territorial concept.¹³² Furthermore, it has generally been thought that the concept of state sovereignty as it relates to border control is founded on the "unconditional" power of a state.¹³³ However, this began to change in Europe. Case law of the ECtHR has in significant ways modified our understanding of the concepts of jurisdiction and state sovereignty.

State sovereignty has begun to reflect human rights concerns such as the principle of *non-refoulement*, even beyond states' territories. In this regard, the concept of state sovereignty in relation to external migration controls has undergone a paradigm shift from "unconditional"

¹³⁰ Arguably, the decision in the *Catan* case supports the claim that a broader conception of complicity (based on the provision of significant "background support" such as political, economic and military support) may be used to establish extraterritorial jurisdiction of the ECHR: *Case of Catan and Others v. The Republic of Moldova and Russia* [GC], No. 43370/04 18454/06 8252/05 (19 October, 2012), online: European Court of Human rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114082>> [*Catan*].

¹³¹ *Issa*, *supra* note 29 at para 71.

¹³² See Shaw, *supra* note 9 at 572-73; See Lawson, *supra* note 9 at 87.

¹³³ For example, a former Australian Prime Minister, John Howard, once stated that "[w]e will decide who comes to this country and the circumstances in which they come": "Liberals Accused of Trying to Rewrite History", *ABC Lateline* (21 November 2001) online: ABC <<http://www.abc.net.au/lateline/content/2001/s422692.htm>>.

sovereignty to “accountable” sovereignty, at least within the European context.¹³⁴ The challenge is based on a liberal interpretation of the term, “jurisdiction”, found in Article 1 of the ECHR.

Importantly, on the international level, the *non-refoulement* principle is also found in many international treaties such as in Articles 7 of *International Covenant on Civil and Political Rights* (ICCPR) and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.¹³⁵ International human rights bodies, such as the Human Rights Committee (HRC) of ICCPR and the Committee against Torture, also have confirmed extraterritorial application of these human rights instruments.¹³⁶ The rulings of international human rights bodies may not have been as effective as the decisions of the ECtHR in domestic courts; however, it certainly gives momentum to furthering discourse on extraterritorial application of the *non-refoulement* principle in other jurisdictions. The “forgotten” principle of *non-refoulement* in an era of restrictive external migration controls has revived in Europe. This change of state practice in Europe, coupled with decisions of international human rights bodies, may give rise to worldwide impact on refugee laws and policies.

¹³⁴ See Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) at 201: “[w]ith the emerging human rights culture, a shift can be witnessed from an international society framed by sovereign impunity to an international society based on national and international accountability.”

¹³⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 [ICCPR]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 [CAT]; Cordula Droege, *Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, online: ICRC <www.icrc.org/eng/assets/files/other/irrc-871-droege2.pdf> at 671-72; See UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, *supra* note 82.

¹³⁶ *Delia Saldias de Lopez v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979 (29 July 1981), UN Human Rights Committee, online: UNHCR <<http://www.unhcr.org/refworld/docid/4028d4954.html>> at para 12.3; Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, CAT, 2006, UN doc CAT/C/USA/CO/2 (Advance unedited version), online: U.S. Department of State <<http://www.state.gov/documents/organization/133838.pdf>> at para 20; See generally *J.H.A. v. Spain*, CAT/C/41/D/323/2007 (21 November 2008), UN Committee against Torture, online: UNHCR <<http://www.unhcr.org/refworld/docid/4a939d542.html>>.

Chapter 8 The Extraterritorial Reach of the Principle of *Non-Refoulement*: State Sovereignty and Migration Controls on the High Seas through a Canadian Lens

Introduction

In 2010, 490 Tamil migrants aboard the MV Sun Sea arrived in Victoria, BC, Canada. They came to Canada without valid visas or permits. The Canadian authorities knew in advance that their vessel was heading toward Canada, long before it entered into Canadian territorial waters; moreover, the Canadian government was of the view that some of those on board “were ‘suspected human smugglers and terrorists’.”¹ However, it did not stop the vessel. The arrival of the MV Sun Sea attracted dramatic responses from the media. In fact, it triggered considerable debates on whether Canada was in need of more effective external migration controls, particularly on the high seas.

For example, CTV News published an article, entitled “Why didn’t Canada just send the migrants back?”,² in which experts cited by the author expressed their grave concern about the fate of refugees who could be among the group of migrants. The experts stated that “sending the ship away would have violated international law, and that’s why Ottawa now appears to be seeking other channels to prevent further ships setting their sights here.”³ Here, the “other channels” are closely associated with external migration controls outside Canadian territories. Of particular note was Heather Johnson’s observation that “[c]omparisons with Australia were

¹ Tamsyn Burgmann, “Why didn’t Canada just send the migrants back?”, *CTV News* (15 August 2010), online: CTV News < <http://bc.ctvnews.ca/why-didn-t-canada-just-send-the-migrants-back-1.542419>>.

² *Ibid.*

³ *Ibid.*

almost immediate after the arrival of the Sun Sea, as both commentators and public officials asked whether Canada should look towards Australia as a policy model.”⁴

The Australian approach to boat arrivals has two key features: interdiction or interception policy at sea and regional processing centres. Those who are intercepted or interdicted by Australian authorities at sea, or those who reach Australian territories by boat may be transferred to a regional processing center located in a third country where their claims for refugee status are assessed.⁵ In addition, the Australian model is also associated with the indirect involvement (complicity) in a third country’s interception policy within the latter’s territorial waters through providing material assistance. For example, Tamara Wood and Jane McAdam duly observe that the former Labor Government had provided “extensive funding to third countries (notably Indonesia and Papua New Guinea) for the interception, detention and management of asylum seekers in an effort to prevent them from seeking protection in Australia.”⁶

In fact, it appears that Canada may already have been complicit in maritime migration controls. Sharryn J Aiken reported that, in 1998, 192 Tamil migrants were intercepted in the territorial waters of Senegal by Senegal authorities; the Canadian government was reported to have provided the funding for chartering an airplane by which the intercepted Tamils were sent

⁴ Heather L. Johnson, “Intercepting boat arrivals: What the Australian policy model means for Canadian asylum policy”, *Canada-Asia Agenda* (9 December 2010), online: Asia Pacific Foundation of Canada <<https://www.asiapacific.ca/sites/default/files/filefield/australiamigrationpolicy.pdf>> at 1. Johnson argues that “[w]hile Canadian policymakers have been examining Australia as a model for Canada’s asylum seeker determination system, [...] Australia’s pursuit of offshore processing and interception, facilitated by both bilateral and regional relationships, has undermined the international refugee regime”: *ibid* at 2.

⁵ See generally Thomas Gammeltoft-Hansen, *Access to asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011) at 128; *Migration Act* 1958 (Cth) Sections, 5AA, 46A; See Xanthe Emery, “Excision of the Australian mainland for boat arrivals”, *Immigration Advice & Rights Centre Inc* (16 July 2013), online: IARC <http://www.iarc.asn.au/_blog/Immigration_News/post/excision-of-the-australian-mainland-for-boat-arrivals/>.

⁶ Tamara Wood & Jane McAdam, “III. Australian Asylum Policy all at Sea: An analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia–Malaysia Arrangement” (2012) 61:01 Int’l Comp LQ 274 at 278 [footnote omitted].

to Colombo.⁷ It was alleged that without a meaningful interview with the Tamils, they were sent to Colombo where “all the men were arrested and detained and subsequently one individual was re-arrested and brutally tortured.”⁸

In the wake of the MV Sun Sea incident, external migration controls outside Canadian territory, including on the high seas, may in the near future become an even more attractive option.⁹ As highlighted in the media, the Canadian government spent \$25 million dollars in dealing with the Tamil migrants who arrived on the MV Sun Sea.¹⁰ The emphasis on the costs associated with hosting asylum seekers in Canada and the proposal of a regional processing centre may eventually prompt the government to seriously consider the adoption of the Australian model in relation to maritime arrivals.¹¹

Against this background, this Chapter poses the following question: in a possible scenario of interdiction of a refugee on the high seas by Canadian authorities (whether directly or indirectly), can a refugee be protected against *refoulement* on the basis of Canadian laws? As

⁷ Sharryn J Aiken, *National Security and Canadian Immigration: Deconstructing the Discourse of Trade-Offs*, online: SSRN <<http://ssrn.com/abstract=2494987>> at 5; see Sharryn Aiken, “New Directions for Refugee Determination and Protection in Canada” (1999) 18:1 *Canada’s Journal on Refugees* 12, online: <<http://pi.library.yorku.ca/ojs/index.php/refuge/article/view/22001>>.

⁸ Aiken, *National Security and Canadian Immigration*, *supra* note 7; Stephen H Legomsky, “The USA and the Caribbean Interdiction Program” (2006) 18 *Int’l J Refugee L* 677 at 678: “[w]ith only two isolated exceptions known to the author, Canada has not interdicted vessels at sea since the Second World War. One exception was Canada’s interdiction, off the African coast, of a vessel smuggling Sri Lankan Tamils in the late 1990s [...] The other exception was the interception of five Chinese boats in 1999; in that case, however, the passengers were brought to Canada for full refugee status determinations [...]”

⁹ It is undeniable that external migration control has become a norm in many Western countries, including Canada. In 2007 alone, 4,500 undocumented migrants were intercepted in lands outside Canada by the effort of Canadian officials who were deployed overseas: *It’s my day - Profiles - Geoff Greenfield - Canada Public Service Agency*, online: *It’s My day (Canada’s Public Service eMagazine)* <http://itsmyday.gc.ca/1008/profiles-profiles-eng/geoff_greenfield.asp>.

¹⁰ “Migrant ship arrival cost Canada \$25M”, *CBC News Online* (9 February 2011), online: *CBC News Online* <<http://www.cbc.ca/news/canada/migrant-ship-arrival-cost-canada-25m-1.1095432>>.

¹¹ MP Keith Martin proposed that “Ottawa convince the UN High Commission for Refugees to open regional processing centers for claimants from Sri Lanka to give them a legitimate, local route to apply to other countries”: Burgmann, *supra* note 1. Johnson also observes that “Collacott [the former High Commissioner to Sri Lanka] made a similar suggestion on CBC’s ‘The Current’: that Canada look to Australia as a policy model in examining options for the offshore processing of asylum seekers and the development of regional partnerships in migration control”: Johnson, *supra* note 4 at 2.

discussed in Chapter 7, interdiction activity in and of itself is a legitimate act of a state.¹² What's at stake is that interdiction policy should be implemented in a way that respects the right of a refugee, in particular, a right not to be *refouled* to the country of persecution.¹³ In this regard, the principle of *non-refoulement*, as a legal constraint, would play a significant role in providing protection to refugees outside national territories.

In this Chapter, I first undertake an assessment of the applicability of Article 33 of the *Refugee Convention*,¹⁴ as incorporated into Canadian law in section 115 of the *Immigration and Refugee Protection Act* (IRPA),¹⁵ to the scenario of interdiction on the high seas. The principle of *non-refoulement* as found in Article 33 of the *Refugee Convention* prohibits a state from sending a refugee back to their country of origin if he or she may face persecution there; however, it does not explicitly address the question whether the principle is applicable to the interdiction of refugees on the high seas. Subsequently, I examine the incorporation of the principle of *non-refoulement* into Canadian law as expressed in section 115 of the IRPA and conclude that the scope of the *non-refoulement* obligation as found in Canadian legislation is much narrower than that of the international instrument. I then examines the extraterritorial applicability of the *Canadian Charter of Rights and Freedoms*.¹⁶ Arguably, the principle of *non-*

¹² UNHCR, "Conclusion on Protection Safeguards in Interception Measures" (10 October 2003) UNHCR Executive Committee Conclusions No.97 (LIV), online: UNHCR <<http://www.unhcr.org/3f93b2894.html>>: "[s]tates have a legitimate interest in controlling irregular migration, as well as ensuring the safety and security of air and maritime transportation, and a right to do so through various measures [...]."

¹³ See *ibid.* It is also encouraged to "share more detailed information on interception, including numbers, nationalities, gender and numbers of minors intercepted...": *ibid.*

¹⁴ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 at art 33(1) [Refugee Convention]: "[n]o 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."

¹⁵ *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

refoulement has been embedded in some *Charter* rights such as section 7 and 12;¹⁷ accordingly, the extraterritorial applicability of the *Charter* is closely related to the extraterritorial reach of the *non-refoulement* obligation.

Especially, this chapter contrasts Canadian jurisprudence on the extraterritorial jurisdiction of the *Charter* with jurisprudence of the European Court of Human Rights (ECtHR) relating to the extraterritorial jurisdiction of the *European Convention on Human Rights*(ECHR).¹⁸ As discussed in Chapter 7, recent jurisprudence of the ECtHR has endorsed the extraterritorial applicability of the *non-refoulement* obligation as expressed in Article 3 of the ECHR.¹⁹ Through comparative research, the Chapter argues that Canadian jurisprudence has developed a “super” territorial notion of jurisdiction in relation to the *Charter*; accordingly, it is unlikely that the principle of *non-refoulement* as found in the *Charter* will be applied beyond Canadian territory. This being the case, I argue that law reform is required to rectify this deficiency in the protection of refugees against *refoulement*.

The Extraterritorial Reach of the Principle of *Non-Refoulement*

A. In General

¹⁷ Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Danger of Torture*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ProtectTorture.aspx>> at para 2.2.1; See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 119-121, [2002] 1 S.C.R. 3; the *Charter*, *supra* note 16 at s 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” and s 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.

¹⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, 4 November 1950, ETS 5 [“ECHR”].

¹⁹ *Hirsi Jamaa and Ohters v. Italy* [GC], No. 27765/09, [2012] II ECHR 97, 55 EHRR 21[*Hirsi*].

The principle of *non-refoulement* is widely regarded as the most significant norm in refugee protection.²⁰ The United Nations High Commissioner for Refugees (“UNHCR”) has stated that “the essence of the principle is that a State may not oblige a person to return to a territory where he may be exposed to persecution.”²¹ However, there is considerable discrepancy among academic, judicial and political views on the extraterritorial applicability of the principle.²²

On the one hand, the UNHCR has expressed the opinion that the *non-refoulement* principle “applies where a State exercises *jurisdiction*, including at the frontier, on the high seas or on the territory of another states.”²³ In other words, the principle of *non-refoulement* is essentially “applicable wherever States act.”²⁴ In a similar manner, prominent refugee scholars have duly recognized the extraterritorial application of the principle of *non-refoulement*.²⁵ For example, Goodwin-Gill has argued that “[...] it applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones, including the high seas.”²⁶

²⁰ UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, Online: UNHCR <<http://www.unhcr.org/refworld/docid/437b6db64.html>> at para 2; Gammeltoft-Hansen, *supra* note 5 at 100.

²¹ UNHCR, *The Principle of Non-Refoulement*, *supra* note 20.

²² Justice A M North, “Extraterritorial Effect of Non-Refoulement” (International Association of Refugee Law Judges World Conference, Bled, Slovenia, 7 September 2011), online: Federal Court of Australia <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-north/north-j-20110907>>; See Gammeltoft-Hansen, *supra* note 5 at 46-95.

²³ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, online: UNHCR <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> at para 24 [emphasis added].

²⁴ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, online: UNHCR <<http://www.unhcr.org/refworld/docid/438c6d972.html>>.

²⁵ Guy S Goodwin-Gill, “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement” (2011) 23:3 Int'l J Refugee L 443; Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 248; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 339: “[i]n line with the views of both the European Court of Human Rights and the International Court of Justice, the duty to respect these rights [some Convention rights including Article 33 of the *Refugee Convention*] inheres wherever a state exercises effective or de facto jurisdiction outside its own territory [...] There can therefore be little doubt that interception by United States military vessels in international waters easily qualifies as an exercise of de facto jurisdiction abroad.”

²⁶ Guy S Goodwin-Gill, *supra* note 25 at 444.

On the other hand, as far as state practice is concerned, many states appear to believe that they may interdict a refugee on the high seas without any *legal* constraint from the principle of *non-refoulement*.²⁷ The most extreme example of this view is found in the statements of former president, George W. Bush, of the United States during the Haiti refugee crisis: “I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore, and that message needs to be very clear, as well, to the Haitian people”²⁸ Ruth Ellen Wasem has reported that, “[i]n 2005, only nine of the 1,850 interdicted Haitians received a credible fear hearing and, of those, one man was granted refugee status.”²⁹

The norm of *non-refoulement* has been viewed as merely a political or moral consideration in relation to state action on the high seas. Domestic courts have on occasion endorsed this view. In 1993, the Supreme Court of the United States in *Sale* held that neither section 243(h) of the *Immigration and Nationality Act* of 1952 nor Article 33 of the *Refugee Convention* – both of which deal with the principle of *non-refoulement* – applies extraterritorially to interception activities of the Coast Guard on the high seas.³⁰

In 2005, in the United Kingdom, Lord Bingham in the House of Lords stated that, according to the proper interpretation of the principle of *non-refoulement* as found in the *Refugee*

²⁷ See *Executive Order 12807 – Interdiction of Illegal Aliens* (May 24, 1992), online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=23627>>: “(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States [...]”; See Stephen H Legomsky, “USA and the Caribbean Interdiction Program” (2006) 18 Int’l J Refugee L 677 at 686-89.

²⁸ Christopher Marquis, “France Seeks U.N. Force in Haiti and the Resignation of Aristide”, *The New York Times* (26 February 2004), online: The New York Times <<http://www.nytimes.com/2004/02/26/world/france-seeks-un-force-in-haiti-and-the-resignation-of-aristide.html>>.

²⁹ Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, online: FAS <www.fas.org/sgp/crs/row/RS21349.pdf> at 5. Wasem also reports that in the period between 1981 and 1990, 22,940 Haitians were interdicted at sea by the U.S. authorities; however, among the interdicted groups, only 11 Haitians were found to qualify for asylum in the U.S: Wasem, *supra* note 29 at 4.

³⁰ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 at 2259-2567 (1993).

Convention, the principle should be understood to be applicable only to those who “had already entered a country but were not yet resident there.”³¹ In the case in which this opinion was expressed, the claimants argued that the pre-clearance operations of the United Kingdom at Prague Airport, which were primarily targeting Roma asylum seekers, were *inter alia* in breach of the UK’s international obligations under the *Refugee Convention*. However, Lord Steyn stated that “[t]he appellants never left the Czech Republic and are therefore not ‘refugees’ under article 1 of the Refugee Convention. They also never presented themselves at the frontier of the United Kingdom and properly construed the non-refoulement obligation under article 33 is not engaged.”³²

In a similar manner, the High Court of Australia appears to support the position that the principle of *non-refoulement* has no extraterritorial application in the context of the *Refugee Convention*.³³ Justice A M North, an Australian Federal Court Judge, cited two important cases in relation to this issue.³⁴ In *Haji Ibrahim*, regarding the scope of the *Refugee Convention*, Gummow J stated that “[t]he provisions of the Convention ‘assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State’.”³⁵ In *Khawar*, McHugh and Gummow JJ also stated that “[...] the protection

³¹ *Regina (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55 at para 17, Lord Bingham of Cornhill. Lord Hope, Baroness Hale and Lord Carswell agreed on this statement: *ibid* at paras 48, 72, 108. Lord Bingham also noted that “[t]here would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, *whether at the frontier of the second state or from within it*, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear [...]”: *ibid* at para 26.

³² *Ibid* at para 43.

³³ Andreas Fischer-Lescano, Tillmann Löhr & Timo Tohidipur, “Border Controls at Sea: Requirements under International Human Rights and Refugee Law” (2009) 21:2 Int’l J Refugee L 256 at 266; *Regina*, *supra* note 31 at para 17; Justice A M North, *supra* note 22.

³⁴ Justice A M North, *supra* note 22.

³⁵ *Minister for Immigration and Cultural Affairs v Haji Ibrahim* (2000) 175 ALR 585 at para 136, Gummow J. The quote is from Joan Fitzpatrick, “Revitalizing the 1951 Refugee Convention” (1996) 9 Harv Hum Rts J 229 at 245.

obligations imposed by the Convention upon contracting states concern the status and civil rights to be afforded to refugees who are *within contracting states*.³⁶ Justice A M North rightly comments that “[t]he judgment of the final appellate courts in the US, the UK and Australia [...] is a considerable barrier to the acceptance of the views of the expert scholars and UNHCR.”³⁷

B. The Canadian Context

In the Canadian context, there has been no case that has dealt directly with the issue of extraterritoriality in relation to section 115 of IRPA, the section which incorporates Article 33 of the *Refugee Convention* into Canadian law. However, principles of statutory interpretation point to the principle of *non-refoulement* having no extraterritorial applicability in the Canadian context. Whereas the principle of *non-refoulement* found in Article 33 of the *Refugee Convention* stipulates the prohibition of *refoulement* “*in any manner whatsoever* to the frontiers of territories”,³⁸ section 115(1) of IRPA qualifies the principle as follows:

A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed *from Canada* to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.³⁹

Zofia Przybytkowski argues that section 115 “targets individuals already recognized as refugees [...] the Act meant to include non-refoulement in its oldest sense, that is, non-removal of persons who already benefit from refugee status, without applying it to other persons whose

³⁶ *Minister for Immigration and Cultural Affairs v Khawar and Others* (2002) 187 ALR 574 at para 42 [emphasis added].

³⁷ Justice A M North, *supra* note 22. See also Maarten den Heijer, “Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 169 at 181.

³⁸ The *Refugee Convention*, *supra* note 14 [emphasis added].

³⁹ IRPA, *supra* note 15 at 115 (1) [emphasis added]. Section 115 also incorporates rights recognized in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36.

status determination is pending.”⁴⁰ In this Chapter, I will examine whether the inclusion of “from Canada” rather than “in any manner whatsoever” in section 115 is designed to exclude altogether the possibility of the extraterritorial application of the principle of *non-refoulement*.

At this juncture, it is necessary to grasp the relationship between international law and Canadian legislation, as the section 115 incorporates international refugee law.⁴¹ Recent case law, dealing with the role of international law in the formation or interpretation of domestic legislation, appears to have developed in a way that reveals a strong concept of state sovereignty.

The authoritative case in this regard is *Hape* where the Supreme Court states:

It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, *unless the wording of the statute clearly compels that result*.⁴²

Applying this to the matter at hand, it may be argued that section 115 of IRPA should be interpreted in light of the presumption that it conforms to Article 33 of the *Refugee Convention*. Nevertheless, the last clause in the extract above indicates that the Parliament does have sovereign power to override any international obligation that Canada has agreed to uphold and the courts should respect a clear exercise of this power.⁴³

⁴⁰ Zofia Przybytkowski, *Enforcing Idealism: The Implementation of Complementary International Protection in Canadian Refugee Law* (LLM Thesis, Dalhousie University, 2010), online: Dalhousie Repository <<http://dalspace.library.dal.ca/handle/10222/13070>> at 78.

⁴¹ In the Canadian context, even though Canada has ratified international conventions, the conventions should be incorporated into domestic legislation for them to be legally effective: See generally *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at paras 68-70. Majority in *Baker* also held in paras 68-70 that “[...] the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review [...]”

⁴² *R. v. Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*].

⁴³ The BC Court of Appeal in *R. v. Appulonappa* stated that “[...] as described in *Hape*, while Parliament is presumed to legislate in conformity with international law, this presumption is rebuttable if unambiguous legislative language demonstrates an intent to ignore an international obligation”: *R. v. Appulonappa*, 2014 BCCA 163 at para 119, [2014] B.C.J. No. 762.

Section 3(3)(f) of IRPA is also relevant when considering the impact of international human rights law on section 115. This provision states:

3(3) This Act is to be construed and applied in a manner that
 [...]
 (f) complies with international human rights instruments to which Canada is signatory.⁴⁴

The exact meaning of the section is not clear-cut. In *de Guzman v. Canada (Minister of Citizenship and Immigration)*,⁴⁵ Evans JA held that its meaning could be ascertained only by distinguishing binding human rights instruments from non-binding ones. On the one hand, binding human rights instruments, such as conventions that have been ratified or have been only signed by Canada in the case where ratification was not required, have a “determinative” effect on interpretation and application of the provisions in IRPA.⁴⁶ On the other hand, non-binding human rights instruments to which Canada is only signatory (such as those not yet ratified) may have “persuasive and contextual” influence on the interpretation of IRPA.⁴⁷ In any event, as Canada acceded to the *Refugee Convention*, the Convention has a “determinative” effect on the interpretation of section 115 of IRPA. However, Evans JA also confirmed a strong concept of state sovereignty, by acknowledging that “[...] a legally binding international human rights instrument to which Canada is signatory is determinative of how IRPA must be interpreted and applied, *in the absence of a contrary legislative intention.*”⁴⁸

It is worth noting that, from an international law perspective, the extraterritorial applicability of the principle of *non-refoulement* remains an unsettled area of law due to state

⁴⁴ IRPA, *supra* note 15.

⁴⁵ *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 [de Guzman].

⁴⁶ *Ibid* at para 87.

⁴⁷ *Ibid* at para 89.

⁴⁸ *Ibid* at para 87.

practice contrary to the favorable opinions expressed by the UNHCR and scholars. In this regard, it is uncertain whether the Canadian courts would acknowledge the extraterritorial application of the principle so as to have a determinative effect on the interpretation of section 115. Even if it be conceded that the principle of *non-refoulement* should have extraterritorial application in international law, critics would forcefully argue that, in light of principles expounded in *Hape* and *de Guzman*, by inserting the unambiguous phrase, “from Canada”, in section 115 of IRPA, the Parliament has exercised sovereign power to explicitly set the territorial limit of the principle of *non-refoulement* even to the extent that it may be in conflict with the *Refugee Convention*.⁴⁹ Moreover, it is also justifiable to conclude that the Canadian legislature, by explicitly including removals *from Canada* in section 115(1) of IRPA, expressed its intention to exclude returns made outside Canada – *expressio unius est exclusio alterius*.⁵⁰

Therefore, it can be concluded that the *non-refoulement* obligation as found in section 115 of the *Charter* has no extraterritorial application. It is unfortunate to observe that Canadian jurisprudence impliedly supports the narrow interpretation of scope of the *non-refoulement* obligation as expounded by the courts in the United States, Australia and the United Kingdom. Although Canada is known as a country having “strong voice for the protection of human rights”,⁵¹ Canadian laws appears to be unsupportive of the border view on the scope of the *non-refoulement* obligation as suggested by the UNHCR and scholars above. If it were not for the inclusion of “removed from Canada” in section 115, there could have at least a possibility that

⁴⁹ International legal scholars and UNHCR have opined that the principle of *non-refoulement*, as found in Article 33 of the *Refugee Convention*, has no territorial limitation in its application: UN High Commissioner for Refugees, *The Principle of Non-Refoulement supra* note 20 at para 24; UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement, supra* note 24; Goodwin-Gill, *supra* note 25 at 444.

⁵⁰ I thank Professor Donald Galloway for his comments on this point.

⁵¹ Foreign Affairs Trade and Development Canada Government of Canada, *Democracy & Human Rights*, online: Government of Canada <<http://www.canadainternational.gc.ca/eu-ue/policies-politiques/democracy-democratie.aspx?lang=eng>>.

courts might consider the extraterritorial applicability of the *non-refoulement* principle. In this regard, as law reform, I propose that the phrase, “in any manner whatsoever”, should replace the phrase, “from Canada”, in section 115 so as to provide a foothold to discuss the extraterritorial applicability of the principle of *non-refoulement*.

At this juncture, it is relevant to observe that the principle of *non-refoulement* is not only found in section 115 of IRPA; it is also embedded in some *Charter* rights. As the principle of *non-refoulement* has expanded from international refugee law to more general human rights law on an international level,⁵² so, in Canadian case law, more discussion of *non-refoulement* may be found in relation to the *Charter* rights than in the context of the *Refugee Convention*. In this regard, the extraterritorial applicability of human rights law (extraterritorial jurisdiction), such as the *Charter*, may be a significant alternative for the protection of refugees.

The Principle of *Non-Refoulement* and the *Charter*

The principle of *non-refoulement* is considered to be found in the *Canadian Charter of Rights and Freedoms*. The Canadian Association for Refugee and Forced Migration Studies (CARFMS) suggests that “[...]the Canadian Charter of Rights and Freedoms in Section 2, 7, 9, 11, 12 and 15 grants protection of rights to everyone, every person and every individual, including non-Canadian citizens in Canada, *rights which can be used to further justify the use of the principle of*

⁵² Marco Sassòli & Marie-Louise Tougas, “International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan” (2011) 56:4 McGill LJ 959 at 992: “[n]owadays, it is well established that the prohibition of *refoulement* includes the risk not only of torture but also of cruel, inhuman, or degrading treatment”; See generally Gammeltoft-Hansen, *supra* note 5 at 53; Anja Klug & Tim Howe, “The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 69 at 70.

non-refoulement.”⁵³ In particular, section 7 and 12 of the *Charter* are identified as relevant to the principle of *non-refoulement* in the case of torture.⁵⁴

It should be conceded that the clear language of section 7 or 12 does not include prohibition of “return” a person to a place where he or she may be deprived of rights set out in section 7 or 12. Nevertheless, the Supreme Court of Canada in *Suresh* considered the principle of *non-refoulement* in conjunction with section 7 of the *Charter* in the context of returning the concerned person to a risk of torture.⁵⁵ In this case, the Court reaffirmed the principle enunciated in *Burns*⁵⁶ in relation to section 7 that:

[...] the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected.⁵⁷

Originally, in *Burns*, this principle was stated in the context of extradition; however, the *Suresh* court has extended its application to the context of *refoulement*.⁵⁸ Thus, expulsion of a refugee to a risk of torture may violate section 7 as long as “there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.”⁵⁹

Furthermore, it is notable that the court also dealt with a similar interpretative issue relating to *International Covenant on Civil and Political Rights* (ICCPR),⁶⁰ stating as follows:

[...] While the provisions of the ICCPR [*International Covenant on Civil and Political Rights*] do not themselves specifically address the permissibility of a

⁵³Canadian Association for Refugee and Forced Migration Studies & Online Research and Teaching Tools (CARFMS-ORTT), *Non-Refoulement*, online: CARFMS – ORTT <<http://rfmsot.apps01.yorku.ca/glossary-of-terms/non-refoulement/>> [emphasis added].

⁵⁴ IRB, *supra* note 17 at para 2.2.1; See *Suresh*, *supra* note 17 at paras 119-121, [2002] 1 S.C.R. 3; the *Charter*, *supra* note 16 at ss 7 and 12.

⁵⁵ *Suresh*, *supra* note 17 at para 54.

⁵⁶ *United States of America v. Burns*, 2001 SCC 7, [2001] S.C.J. No. 8 [*Burns*].

⁵⁷ *Suresh*, *supra* note 17 at para 54.

⁵⁸ *Ibid* at paras 54-58.

⁵⁹ *Ibid* at para 55.

⁶⁰ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 [ICCPR].

state's *expelling* a person to face torture elsewhere, General Comment 20 to the ICCPR makes clear that Article 7 is intended to cover that scenario [...]

We do not share Robertson J.A.'s view that General Comment 20 should be disregarded because it "contradicts" the clear language of Article 7. In our view, there is no contradiction between the two provisions. *General Comment 20 does not run counter to Article 7; rather, it explains it [...]*.⁶¹

In a similar way, James Yap points to an interpretative presumption, which may imply that section 7 of the *Charter* protects the right of a refugee against *refoulement*, that is, "the presumption established in *Slaight Communications Inc. v. Davidson* [...], that 'the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified'."⁶² Yap has also observed that this presumption was recently confirmed in *Health Services and Support*.⁶³ In this case, the Supreme Court of Canada concluded that the right to "freedom of association" under section 2(d) of the *Charter* also protects the right to collective bargaining.⁶⁴ To support such a conclusion, the Court relied *inter alia* on the presumption above, stating that "[...] collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees."⁶⁵ In the light of this analysis of the *Charter*

⁶¹ *Suresh*, *supra* note 17 at paras 66-7, [2002] 1 S.C.R. 3; UN Human Rights Committee, *CCPR General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRC, 1992, UN Doc HRI/GEN/1/Rev.6 at 151 (2003) at para 9: "[i]n the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement [...]" ; ICCPR, *supra* note 60 at Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [...]."

⁶² James Yap, *The principle of non-refoulement and the Charter in Gavrilu*, online: The Court <<http://www.thecourt.ca/2009/12/03/the-principle-of-non-refoulement-and-the-charter-in-gavrila/>>. The quote is found in *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at para 59, Dickson CJ, and it is reiterated in *Slaight Communications Incorporated (operating as Q107 FM Radio) v. Ron Davidson* [1989] 1 S.C.R. 1038 at para 23, Dickson CJ.

⁶³ Yap, *supra* note 62; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 70, [2007] 2 S.C.R. 391: "Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference* [...] the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

⁶⁴ *Health Services and Support*, *supra* note 63 at para 20.

⁶⁵ *Ibid.* See also *ibid* at 71: "The sources most important to the understanding of s. 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ('ICESCR'), the *International*

rights, it may be argued that the principle of *non-refoulement* – that is, the principle widely recognized in international law – informs the meaning of section 7 and 12 of the *Charter*.

Having concluded that the principle of *non-refoulement* is embedded in some *Charter* rights, the remaining question to be considered is whether the *Charter* may apply extraterritorially. If the *Charter* applies extraterritorially, the embedded principle of *non-refoulement* does also. This being the case, the analysis of case law is necessary. Donald J. Rennie and Ramona Rothschild cite several important Canadian cases in which Canadian courts examined extraterritorial applicability of the *Charter*.⁶⁶ This Chapter examines these cases and more recent cases, and applies the principles derived from them to a scenario of interdiction on the high seas.

Jurisdiction in Human Rights Law: The Canadian Context

R. v. Hape

In *R. v. Hape*,⁶⁷ the Supreme Court of Canada dealt extensively and authoritatively with the issue of extraterritorial application of the *Charter*, and relied heavily on the concept of jurisdiction.

The point of departure was section 32 of the *Charter*.⁶⁸

S. 32 (1) This Charter applies
 (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 [...]

Covenant on Civil and Political Rights, 999 U.N.T.S. 171 ('*ICCPR*'), and the International Labour Organization's (ILO's) *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, 68 U.N.T.S. 17 ('*Convention No. 87*'). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold."

⁶⁶ Donald J. Rennie & Ramona Rothschild, "The Canadian Charter of Rights and Freedoms and Canadian Officials Abroad" (2009) 47 *Sup Ct L Rev* 127.

⁶⁷ *Hape*, *supra* note 42.

⁶⁸ *Ibid* at para 33.

In section 32 of the *Charter*, there is no express territorial limit in relation to “all matters within the authority of Parliament”. Thus, it is left to the court to interpret “the jurisdictional reach and limits of the *Charter*.”⁶⁹ The Court notes that jurisdiction is considered as “the quintessential feature of sovereignty”; state sovereignty is presented as a territorial concept pursuant to the international legal order and international comity in which non-intervention and equality among states are emphasized.⁷⁰ Therefore, jurisdiction is understood to be primarily territorial as well.⁷¹ Heeding the primarily territorial notion of jurisdiction, the Court held that, in most cases, the *Charter* has no extraterritorial application.⁷²

In this case, the appellant, a Canadian businessman, had been convicted of money laundering activities. In the proceedings, he argued that the documentary evidence, which had been adduced by the Crown, should be excluded as it was obtained in the Turks and Caicos Island by Canadian agencies in breach of section 8 of the *Charter*.⁷³ However, the majority of the Court held that section 8 of Charter does not apply to the conducts of Canadian agencies outside Canadian territory since “[a] criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad.”⁷⁴ In other words, the unavailability of enforcement jurisdiction has become a determinative factor in setting the jurisdictional reach of the *Charter*.⁷⁵

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at paras 34, 41, 43.

⁷¹ *Ibid* at para 59.

⁷² *Ibid* at para 113.

⁷³ The *Charter*, *supra* note 16 at s 8: “Everyone has the right to be secure against unreasonable search or seizure.”

⁷⁴ *Hape*, *supra* note 42 at para 94; see also *ibid* at paras 69, 88.

⁷⁵ See John H Currie, “Khadr’s Twist on Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter” (2008) 46 Can YB Int’l L 307 at 315-16.

In this case, the Court identified three types of jurisdiction which have been recognized in international law – prescriptive, enforcement, and adjudicative jurisdiction – as follows:

[...] Prescriptive jurisdiction[...] is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities [...] Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld [...] Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force [...].⁷⁶

Among the three types of jurisdiction, the court paid particular attention to the enforcement jurisdiction. Importantly, in a very limited sense, the court did recognize exceptional cases where the *Charter* may have extraterritorial applicability. The Court stated that “it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law.”⁷⁷ No exceptions were held to be applicable to this case.

The decision in *Hape* has met significant criticism not only for its failure to offer constraints on the conduct of Canadian agencies abroad but also for a logical flaw of the judgment itself.⁷⁸ First, John Currie critically argues that “[...] the majority [in *Hape*] repeatedly conflates them [prescriptive jurisdiction and enforcement jurisdiction], culminating in its flawed conclusion that defining the prescriptive reach of the Charter to encompass Canadian governmental action abroad would be tantamount to enforcing it abroad.”⁷⁹ The minority in *Hape* also raised a question about the requirement of enforcement jurisdiction. Justice Bastarache stated that “[t]he fact that Canadian law is not enforced in a foreign country does not

⁷⁶ *Hape*, *supra* note 42 at para 58.

⁷⁷ *Ibid* at para 65.

⁷⁸ Currie, *supra* note 75 at 316; Chanakya Sethi, “Does the Charter follow the Flag? Revisiting Constitutional Extraterritoriality after *R v Hape*” (2011) 20 Dal J Legal Stud 71; Kent Roach, “*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad” (2007) 53 Crim LQ 1.

⁷⁹ Currie, *supra* note 75 at 318.

mean that it cannot apply to a Canadian government official. I would note in particular that some Canadian laws apply on the basis of nationality wherever the crime is committed [...].”⁸⁰

Second, the court set an extremely high threshold to be crossed in relation to the “consent-based” exception. According to the majority, the host State must have consented to the enforcement of the Canadian law to the criminal investigation activities by Canadian state agencies in its territory – this is more than mere consent to help criminal investigations.⁸¹ Amir Attaran also observes as follows:

Confusion arises [...] because the majority omitted to define what it meant by “consent.” Does it require the foreign sovereign to consent to the Canadian enforcement action generally; or to consent to the *Charter*’s application specifically; or perhaps even to consent to the exact section or subsection of the *Charter* that arises in a case? Nowhere in its reasons did the majority answer these questions, and thus what constitutes a valid “consent” remains a cipher for the lower courts to crack.⁸²

Third, unlike the ECtHR, as discussed in Chapter 7, the Supreme Court did not provide substantive examples of exceptional cases under international law such as flag state jurisdiction,⁸³ instead, it introduced in *obiter dicta* a paradoxical human rights exception to the territorial nature of jurisdiction.⁸⁴ LeBel J who wrote the judgment on behalf of the majority stated as follows:

I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.⁸⁵

⁸⁰ *Hape*, *supra* note 42 at para 160.

⁸¹ *Ibid* at paras 106-107.

⁸² Amir Attaran, “Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008) *Can Bar Rev* 513 at 510 [footnote omitted].

⁸³ Rennie & Rothschild, *supra* note 66 at 145–46.

⁸⁴ Attaran, *supra* note 82 at 520; See *Hape*, *supra* note 42 at paras 101.

⁸⁵ *Hape*, *supra* note 42 at para 101; the *Charter*, *supra* note 16 at Section 24(1): “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

In post-*Hape* cases, applicants have exclusively looked to this human rights exception as the consent-based test is hard to pass. Amir Attaran rightly comments that “the precedential weight of the formerly *obiter dicta* exception has now overtaken the rest of *Hape*!”⁸⁶

Khadr⁸⁷

Omar Khadr, a Canadian citizen, was detained for 6 years by U.S. authorities at Guantanamo Bay on charges relating to murder and terrorism-relating offences. He brought an action based on section 7 of the *Charter* in a Canadian court to have all the relevant documents in the hands of the Crown disclosed, including the content of the interviews conducted by Canadian Security Intelligence Service at Guantanamo Bay.⁸⁸ The Canadian government argued that “the *Charter* does not apply to the conduct of the Canadian agents operating outside Canada.”⁸⁹ The central issue in this case was whether the human rights exception to territorial jurisdiction as discussed in *Hape* might be applicable to this case.

The Supreme Court of Canada unanimously held that “if Canada was participating in a process that was violative of Canada’s binding obligations under international law, the *Charter* applies to the extent of that participation.”⁹⁰ In this case, the Court noted the decision of the Supreme Court of the United States, that, “the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*.”⁹¹ Accordingly, the Canadian State agencies had participated in the “illegal” process of the Guantanamo Bay, which was in breach of international obligations.⁹²

⁸⁶ Attaran, *supra* note 82 at 520.

⁸⁷ *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 [*Khadr*].

⁸⁸ *Ibid* at paras 7-8.

⁸⁹ *Ibid* at para 17.

⁹⁰ *Ibid* at para 19.

⁹¹ *Ibid* at para 21.

⁹² *Ibid* at para 25.

Under these circumstances, requirements of international comity such as deference to the U.S. domestic law had ended, and the *Charter* would apply to the conduct of the Canadian State agencies on a foreign soil to the extent that “the conduct of Canadian officials involved it in a process that violated Canada's international obligations.”⁹³ This decision appears to be a landmark case in relation to the extraterritorial applicability of the *Charter*. However, in later cases, an added requirement of a nexus between the individual and the state has prevented the *Charter* from applying extraterritorially to the operations of the Canadian government which deals with non-citizens.

Amnesty International Canada v. Canada (Canadian Forces)

In *Amnesty International Canada v. Canada (Canadian Forces)*, the legal issues were “whether the *Canadian Charter of Rights and Freedoms* applies to the conduct of Canadian Forces personnel in relation to individuals detained by the Canadian Forces in Afghanistan, and the transfer of those individuals to the custody of Afghan authorities.”⁹⁴ For present purposes, this case is significant in that Justice Mactavish compared Canadian jurisprudence on extraterritorial jurisdiction with that of the ECtHR, the U.K. and the U.S., concluding that the *Charter* does not apply to foreign detainees in Afghanistan, even though they were detained by Canadian authorities.⁹⁵

In this case, the applicants, citing decisions from the U.K., the U.S. and international human rights bodies such as Human Rights Committee and Committee Against Torture, argued

⁹³ *Ibid* at para 26; See *Hape*, *supra* note 42 at para 101, LeBel J: “[b]ut the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights.”

⁹⁴ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336 at para 1, [2008] F.C.J. No. 356 [*Amnesty International*].

⁹⁵ *Ibid* at para 3.

that “the Charter should apply as soon as the Canadian Forces bring an individual within their *effective control*, whether by detention or transfer.”⁹⁶ By proposing the “effective control” concept in the context of extraterritorial jurisdiction of human rights law, the applicants attempted to bring this case in line with the current developing concept of extraterritorial jurisdiction in human rights law. Had they succeeded, this case would have been a landmark case.

However, Mactavish J flatly rejected the application of the “effective control” test.

Preferring the “consent-based” test found in *Hape*, Mactavish J stated:

[T]he practical result of applying such a ‘control of the person’ test would be problematic in the context of a multinational military effort [...]. Indeed, it would result in a patch work of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis.⁹⁷

Mactavish J further states that “[...] the majority decision of the Supreme Court of Canada in *Hape* specifically rejected the control-based test that had been advocated by Justice Bastarache in *Cook* as a means of grounding the extraterritorial application of the Charter.”⁹⁸ Here, Canadian jurisprudence regarding extraterritorial jurisdiction in human rights law deviates significantly from the developing concept of jurisdiction established in Europe.

Furthermore, with respect to the human rights exception recognized in *Hape*, Justice Mactavish emphasized that “[i]t is...difficult to see how the conduct of the Canadian Forces in Afghanistan [...] would have an impact on Charter rights in Canada.”⁹⁹ One sees here the

⁹⁶ *Ibid* at para 196 [emphasis added].

⁹⁷ *Ibid* at para 274.

⁹⁸ *Ibid* at para 282.

⁹⁹ *Ibid* at paras 326. The applicants alleged that the transfer of the detainees to the custody of the Afghan government or third countries would expose them to “a substantial risk of torture”; this, they argued, gave rise to the application of the human rights exception recognized in *Hape* as “fundamental human rights norms are at stake”: *ibid* at paras 7, 308.

introduction of a nexus requirement. Significantly, Justice Mactavish paid considerable attention to citizenship.¹⁰⁰ In fact, Canadian citizenship as a nexus with the impact on “*Charter* rights in Canada” has become a focal point in subsequent cases.

The Court of Appeal in *Amnesty International Canada* upheld the decision of the trial judge.¹⁰¹ The Court of Appeal stated that the *Khadr* decision did not change the territorial concept of jurisdiction.¹⁰² Like Justice Mactavish, it sought a nexus such as Canadian citizenship between the State and the individual. The Court explained as follows:

Khadr stands therefore as a case where a *Canadian citizen* obtained disclosure of documents held *in Canada* and produced by Canadian officials for a breach of his rights under section 7 of the Charter by Canadian officials participating in a foreign process that violated Canada's international human rights obligations.¹⁰³

In this regard, the Court of Appeal distinguished the case from *Khadr*, stating that “[t]he factual underpinning of this decision is miles apart from the situation where foreigners, with no attachment whatsoever to Canada or its laws, are held in CF [Canadian Force] detention facilities in Afghanistan.”¹⁰⁴ Accordingly, the violation of international human rights obligation does not trigger the extraterritorial application of the *Charter*.¹⁰⁵ In addition, the Court of Appeal found no error in the judgment of Mactavish J that the “effective control” test is “problematic” in establishing jurisdiction of the *Charter*.¹⁰⁶

Citizenship as a Nexus Requirement in the Human Rights Exception

¹⁰⁰ See *ibid* at para 238.

¹⁰¹ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FCA 401, [2008] F.C.J. No. 1700 [*Amnesty International*].

¹⁰² *Ibid* at para 9.

¹⁰³ *Ibid* at para 13 [emphasis added].

¹⁰⁴ *Ibid* at para 14.

¹⁰⁵ *Ibid* at para 20.

¹⁰⁶ *Ibid* at para 34.

As seen in *Amnesty International Canada*, Canadian jurisprudence has attached a nexus requirement to the human rights exception. Subsequent case law indicates that non-citizens, who are outside Canada, will find it almost impossible to establish a meaningful nexus to Canada since courts have continued to identify Canadian citizenship as the vital connector.

In *Slahi v. Canada*, the material facts are almost the same as the *Khadr* case except for the fact that the applicants were not Canadian Citizens.¹⁰⁷ The Applicant, Slahi, is a Mauritanian national who resided in Montreal about 2 months with landed immigrant status. The other applicant, Mr. Zemiri is an Algerian citizen. Mr. Zemiri obtained a permanent resident status in 1996 and resided in Canada for about 7 years. His wife and child resided in Canada at the time of proceeding. Mr. Zemiri was charged for the allegation *inter alia* that he “provided \$1,000 and a camera to one Ahmed Ressam, later convicted as a perpetrator of the ‘Millenium Plot’ bombing conspiracy.”¹⁰⁸

Once again, the main issue was whether the applicants had “sufficient connection to Canada”.¹⁰⁹ Blanchard J highlighted the fact that “[u]nlike Mr. Khadr, the applicants are not Canadian citizens. This application will therefore essentially turn on whether the Applicants, as non-Canadians, can assert section 7 Charter rights in these circumstances.”¹¹⁰ Having considered case law in this regard, Blanchard J summarized the scope of section 7:

[...] the jurisprudence of the Supreme Court teaches that section 7 Charter protections may be available to non-Canadians when they are physically present in Canada or subject to a criminal trial in Canada, and that Canadian citizens, in certain circumstances, may assert their section 7 Charter rights when they are outside Canada [...].¹¹¹

¹⁰⁷ *Slahi v. Canada (Minister of Justice)*, 2009 FC 160 at para 32, [2009] F.C.J. No. 141 [*Slahi*].

¹⁰⁸ *Ibid* at para 13.

¹⁰⁹ Rennie & Rothschild, *supra* note 66 at 142.

¹¹⁰ *Slahi*, *supra* note 107 at para 38.

¹¹¹ *Ibid* at para 47. The Supreme Court of Canada in *Singh* held that section 7 of the *Charter* applied to the refugee claimants who stayed in Canada: *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177. The Supreme Court of Canada in *Cook* held that the *Charter* applied extraterritorially to the non-citizen in a foreign

The applicants failed to establish such a nexus, and appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and basically upheld the decision of the Applications Judge (Justice Blanchard).¹¹² The Court of Appeal stated that “*Khadr* is distinguishable on the ground that Mr. Khadr is a Canadian citizen, whereas the appellants are not. Further, there are no proceedings pending in Canada against the appellants which might provide a nexus to Canada.”¹¹³

Padraic Ryan has rightly concluded that “direct comparison of *Khadr* I and *Slahi* yields the conclusion that the only criterion for nexus is citizenship.”¹¹⁴ In fact, in recent case law, the citizenship requirement has trumped the *Charter* claims of non-citizens outside Canada. For example, in *Toronto Coalition*,¹¹⁵ Mr. George Galloway, a highly controversial British politician who had participated in various protests against wars in Iraq and others, was invited on a speaking tour in Canada, but prior to arrival was deemed inadmissible. He and others challenged *inter alia* the inadmissibility decision. With respect to the *Charter* claims, the court stated that “[t]he rights and freedoms protected under section 2 of the *Charter* could not have been invoked on Mr. Galloway's behalf *as he is not a Canadian citizen*, was outside of Canada at the time the impugned actions took place and lacks any ‘nexus’ to Canada.”¹¹⁶

country in the context of criminal proceedings in Canada for an alleged crime committed in Canada. Majority in the *Cook* stated, “[t]he impugned actions were undertaken by Canadian governmental authorities in connection with the investigation of a murder committed in Canada for a process to be undertaken in Canada. The appellant, the rights claimant herein, was being compulsorily brought before the Canadian justice system. This situation is far different from the myriad of circumstances in which persons outside Canada are trying to claim the benefits of the *Charter simpliciter*”: *R. v. Cook*, [1998] 2 S.C.R. 597 at para 53 [*Cook*].

¹¹² *Slahi v. Canada (Minister of Justice)*, 2009 FCA 259, [2009] F.C.J. No. 1120. The application for leave to appeal was refused: *Slahi v. Canada (Minister of Justice)*, [2009] S.C.C.A. No. 444.

¹¹³ *Ibid* at para 4; see *Cook*, *supra* note 111.

¹¹⁴ Padraic Ryan, *After Khadr: The Role of Citizenship in Extra-Territorial Constitutional Claims*, online: SSRN <<http://ssrn.com/abstract=1754029>> at 20.

¹¹⁵ *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, [2012] 1 F.C.F. 413.

¹¹⁶ *Ibid* at para 81[emphasis added].

In *Kinsel*, the court explicitly endorsed the decision in *Slahi*, stating that “[t]he applicants lack standing to bring a *Charter* challenge [...] because they are not *Canadian citizens* or residents”.¹¹⁷ The word, “residents”, appears to refer to being physical present in Canada. Likewise, in *Zeng*, the court endorsed three exceptional cases that have been proposed by the *Slahi* court above: “[...] an applicant must establish a nexus to Canada by being present in Canada, by there being criminal proceedings in Canada, or by *Canadian citizenship*.”¹¹⁸ In addition, referring to recent three cases above, Justice Rennie in *Tabingo* duly recognized that “*non-citizens outside of Canada* generally do not hold *Charter* rights [...]”¹¹⁹

Extraterritorial Jurisdiction of the *Charter* and Refugees on the High Seas

So far, this Chapter has shown that Canadian jurisprudence has recognized exceptional cases to the territorial concept of jurisdiction in a very limited sense. They can be categorized as 1) exceptional cases under international law, 2) the consent-based exception (enforcement jurisdiction), and 3) the human rights exception. The concept of “effective control” over areas or persons, as found within Europe, has no place in Canadian jurisprudence. On the basis of these findings, this section assesses extraterritorial applicability of the *Charter* in a scenario of interdiction of refugees on the high seas by the Canadian naval forces – this ultimately examines the extraterritorial reach of the *non-refoulement* obligation, which is embedded in some *charter* rights.

A. Exceptional Cases under International Law

¹¹⁷ *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515 at para 47, [2014] 2 F.C.R. 421.

¹¹⁸ *Zeng v Canada (Attorney General)*, 2013 FC 104 at para 72, 50 Admin. L.R. (5th) 210 [emphasis added].

¹¹⁹ *Tabingo v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 377 at para 75, 362 D.L.R. (4th) 166 [emphasis added]; See also *Jia v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 596 at para 108, 26 Imm. L.R. (4th) 1.

In *Hape*, the Supreme Court of Canada duly recognized exceptional cases to the territorial concept of jurisdiction under international law; however, the court did not specify cases like those decided by the ECtHR above. In this regard, Rennie and Rothschild remark that it is unclear whether the Charter may apply “within a Canadian embassy or consulate”.¹²⁰ Likewise, in Canadian jurisprudence, it is also uncertain whether flag state jurisdiction is recognized as an exceptional case. Notably, Mactavish J in *Amnesty International* observed that international law has recognized exceptions to the territorial notion of jurisdiction such as embassies, consulates, and flag state jurisdiction.¹²¹ However, Mactavish J did not explicitly consider these exceptions in the context of extraterritorial jurisdiction of the *Charter*. Rather, Mactavish J acknowledged these exceptions in the course of analyzing the issues relating to extraterritorial jurisdiction in other countries such as the United Kingdom. Therefore, whether flag state jurisdiction is recognized in Canadian *Charter* jurisprudence still lacks confirmation.

Suppose that flag state jurisdiction were recognized in relation to the scope of jurisdiction of the *Charter*, the *Charter* would apply to interdiction operations in a case where naval forces transferred asylum seekers onto Canadian flag vessels.¹²² However, if interdicting authorities did not transfer asylum seekers onto the Canadian flag vessels, but merely pushed back the vessel itself, the *Charter* might not become applicable.

B. The Consent-based Test (Enforcement Jurisdiction)

The “consent-based” test requires that the flag state should consent to the enforcement of Canadian law on its own vessel (enforcement jurisdiction). On the high seas, a flag state has

¹²⁰ Rennie & Rothschild, *supra* note 66 at 145–46.

¹²¹ *Amnesty International*, *supra* note 94 at paras 259-62.

¹²² See generally *Hirsi*, *supra* note 19 at paras 77-78.

generally “the exclusive right to exercise legislative and *enforcement jurisdiction* over its ships on the high seas.”¹²³ Therefore, in general circumstance, the Canadian authorities cannot exercise enforcement jurisdiction over the persons on the ship flying another flag. However, Malcolm N. Shaw has remarked that there are “exceptions to the exclusivity of flag-state jurisdiction.”¹²⁴ He provides such exceptions as “piracy”, “the slave trade”, “unauthorized broadcasting”, etc.¹²⁵

More specifically, in relation to maritime migration context, Alessia di Pascale states that “[f]oreign ships on the high sea could not be stopped, inspected or seized, unless pursuant to a bilateral agreement, or with the flag State’s authorization under the Smuggling Protocol (For States party to it).”¹²⁶ Put another way, as discussed in Chapter 7, a state may exercise enforcement jurisdiction over a vessel on the high seas, as long as this has been agreed on a multilateral or bilateral basis. For example, Article 8 of the *Smuggling Protocol*, to which Canada is a party state, allows *inter alia* Canada to board, search the vessel with “appropriate measures with respect to the vessel and persons and cargo on board, *as authorized by the flag state*”, if the concerned vessel is believed to be involved in “smuggling of migrants by sea”.¹²⁷

In this case, the content of authorization is critical in determining whether it amounts to the flag state’s consent to the enforcement of Canadian law on its vessel. In light of the *Hape* decision, Canadian jurisprudence appears to require more than a right to board or to search the

¹²³ R. R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd ed (Manchester, UK: Manchester University Press, 1999) at 208; *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 2, UKTS 1999 No 81 at art 92 [emphasis added] [UNCLOS].

¹²⁴ Malcolm N Shaw, *International law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 548 [emphasis added].

¹²⁵ *Ibid* at 548-60.

¹²⁶ Alessia di Pascale, “Migration Control at Sea: The Italian Case,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 281 at 287.

¹²⁷ See Chapter 7, Section of “The Emerging Practice of Interdiction at Sea”; *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507, UKTS 2006 No 16 at art 8 [emphasis added] [*Smuggling Protocol*].

vessel.¹²⁸ In *Hape*, the foreign state's consent to help criminal investigations of Canadian agencies on its own soil was not regarded as consent to the enforcement of Canadian law. By analogy, the flag state's authorization to board or to search the vessel without a power to seize the vessel or arrest crew members may only amount to an act of helping investigations on the matters relating to its own-flagged vessels. In this regard, the authorization should at least include the power to seize a vessel or arrest the persons on board.¹²⁹ The fact that the content of authorization may vary case by case has made it difficult to predict that the *Charter* may apply extraterritorially to the operations under the *Smuggling Protocol*.

In cases of vessels without nationality (non-flag vessels), as often is the case with refugees on board, it is at least arguable that there would be no breach of state sovereignty by stopping and seizing such a vessel.¹³⁰ As discussed in Chapter 7, *Convention on the Law of the Sea* (UNCLOS) Article 110 (1)(d) allows a warship to have right of visit to a ship without nationality.¹³¹ Nevertheless, R. R Churchill and A. V. Lowe have remarked that “[t]heir ‘statelessness’ will not, of itself, entitle each and every State to assert jurisdiction over them. For there is not in every case any recognised basis upon which jurisdiction could be asserted over stateless ships on the high seas.”¹³² Instead, they point out the necessity of a “jurisdictional

¹²⁸ *Hape*, *supra* note 42 at paras 106-107.

¹²⁹ See generally Natalie Klein, “The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation” (2008) 35:2 *Denv J Int'l L&Pol'y* 287 at 298-302; See also the UNCLOS, *supra* note 123 at articles 105, 109. In the discussion of the extraterritorial applicability of the *Charter* to the scenario of interdiction of foreign fishing vessels by Canadian agencies on the high seas, Drew Tyler considered enforcement actions in a more broad sense so that it included “the boarding, inspection, arrest, seizure, and prosecution of a foreign-flagged fishing vessel”: Drew Tyler, “Does the Charter Float - The Application of the Canadian Charter of Rights and Freedoms to Canada's Policing of High Seas Fisheries” (2010) 48 *Can YB Int'l L* 179 at 201.

¹³⁰ See generally Tyler, *supra* note 129 at 204.

¹³¹ See the *Smuggling Protocol*, *supra* note 127 at art 8(7); UNLOSC, *supra* note 123 at art 110 1(d).

¹³² Churchill & Lowe, *supra* note 123 at 214.

nexus” (e.g. cases of piracy and unauthorized broadcasting) in order for a state to exercise jurisdiction over people on board the vessel without nationality.¹³³

Furthermore, there is no explicit right to prosecute people on board the non-flag vessels under Article 110 of UNCLOS. In fact, Article 110 permits the right of visit for the sole purpose of verifying the nationality of the vessel (Article 110(2)). In this regard, Natalie Klein distinguishes “right to board” from “the right to seize the vessel and arrest the crew”.¹³⁴ Unlike the cases of piracy under Article 105 or unauthorized broadcasting under Article 109 of UNCLOS, both of which authorize the right to seize the vessel and arrest persons on board,¹³⁵ Article 110 does not explicitly contain an enforceable right to arrest crew on board, which render the status of vessels without nationality all the more unclear in relation to enforcement jurisdiction.¹³⁶ In this regard, the consent-based test¹³⁶ appears to be hard to pass even in relation to a vessel without nationality on the high seas.

C. The Human Rights exception

Technically, the *Charter* may apply extraterritorially to the conduct of Canadian naval forces, where they participate in activities that violate international obligations. In such a case, it would be required that the breach of international human rights obligations have “an impact on Charter rights in Canada”,¹³⁷ which has been interpreted as indicating the establishment of a nexus to Canada. However, the analysis of recent case law has demonstrated that, in most cases, non-citizens cannot establish a meaningful nexus to Canada within the meaning of “an impact on Charter rights in Canada”. As shown above, in *Slahi*, Mr. Zemiri had obtained a permanent

¹³³ *Ibid.*

¹³⁴ Klein, *supra* note 129 at 299.

¹³⁵ *Ibid* at 298-302.

¹³⁶ See *ibid* at 302; See generally, Churchill & Lowe, *supra* note 123 at 214.

¹³⁷ *Amnesty International*, *supra* note 94 at paras 325-26.

resident status, and his wife and child resided in Canada at the time of proceeding.¹³⁸ However, such circumstantial facts were insufficient to establish the required nexus. According to the principle expounded in *Slahi*, non-citizens should be either in Canada or be subject to pending criminal trials in Canada in order to enjoy the protection offered by section 7 of the *Charter*.¹³⁹ Under this “nexus” requirement, it is unlikely that refugees who are non-citizen may claim the *Charter* rights outside Canadian territory.

Conclusion

Kent Roach rightly comments that “[...] while most Canadians would not expect an imperialistic imposition of the Charter on foreign officials, they would expect that the basic values of the Charter would apply to our officials when they act abroad [...]”.¹⁴⁰ It would be surprising for Canadians to face the reality that their officials might breach the principle of *non-refoulement* outside Canadian territory without any responsibility whatsoever in terms of Canadian laws.

In Canadian jurisprudence, neither the explicitly incorporated principle of *non-refoulement* in section 115 of IRPA nor the principle of *non-refoulement* embedded in the *Charter* may have extraterritorial application to the conduct of migration controls outside Canadian territory in relation to asylum seekers or refugees. This Canadian stance contrasts starkly with European one. Ironically, Canada had a chance to be a herald in developing extraterritorial jurisdiction in human rights law.¹⁴¹ Attaran aptly argues that “what Bastarache J. wrote in *Cook* is strikingly similar to the best practices of the international jurisprudence a decade later, in cases such as *Ilascu, Issa* and the *Security Wall*.”¹⁴² In *Cook*, Justice Bastarache stresses the necessity of

¹³⁸ *Slahi*, *supra* note 107 at paras 12-15.

¹³⁹ *Ibid* at para 47.

¹⁴⁰ Roach, *supra* note 78 at 4.

¹⁴¹ See Attaran, *supra* note 82 at 547.

¹⁴² *Ibid*.

determining *the degree of control* in the context of “joint or cooperative investigations” for the purpose of establishing jurisdiction of the *Charter*.¹⁴³ Furthermore, the minority of the *Hape* court stated that “[s]ection 32(1) of the *Charter* defines *who* acts, not *where* they act”.¹⁴⁴ However, the *Hape* case choked the potential.

Currently, Canada lags behind emerging approaches to extraterritorial jurisdiction in human rights law. It is urgent that attention should be paid particularly to the emerging European concept of jurisdiction in human rights law as well as other international analyses;¹⁴⁵ otherwise, Canada’s leadership position in human rights protection will be at serious risk in an era of restrictive external migration controls.

¹⁴³ *Cook*, *supra* note 111 at para 126.

¹⁴⁴ *Hape*, *supra* note 42 at para 161. It should be noted that the Court decision was split 5-3-1.

¹⁴⁵ In 2008, the Supreme Court of the United States in *Boumediene v Bush* also recognized extraterritorial jurisdiction of the U.S. Constitution, stating that “[e]ven when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution’”: *Lakhdar Boumediene, et al. v. George W. Bush* 553 U.S. 723 at 765, 128 S. Ct. 2229 (2008). The Secretary of State of United Kingdom also conceded that jurisdiction of the ECHR “extends to a military prison in Iraq occupied and controlled by agents of the United Kingdom”: *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 at para 97. Moreover, as discussed in Chapter 7, international or regional human rights bodies have duly recognized extraterritorial jurisdiction in various cases. For example, the Human Rights Committee (HRC) of ICCPR endorsed extraterritorial jurisdiction in relation to the ICCPR: See *Delia Saldias de Lopez v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979 (29 July 1981), UN Human Rights Committee, online: UNHCR <<http://www.unhcr.org/refworld/docid/4028d4954.html>>.

Conclusion: Beyond Surrogate Political Membership

Introduction

Christopher Wellman has drawn an analogy between a baby abandoned on the doorstep and a refugee, arguing that, just as a homeowner must help the baby without necessarily adopting her, so a state may help a refugee in other ways without admitting her into its own territory.¹ This view exactly reflects current account of humanitarianism coupled with the persecution perspective. Refugees are seen as those who are in distress; as such, their “survival” depends on “our” hospitality, goodwill, charity or benevolence. We can choose a form or type of help according to “our” own political consideration. To put it bluntly, under the persecution perspective, refugees are nothing but those who need humanitarian assistance; their need should be provided in regions of their origin, not in “our” territories. Jean-François Durieux rightly observes that refugees “as victims of disaster, or people in distress” have become “the dominant refugee image in today’s world.”² He remarks as follows:

This is, statistically, the dominant refugee image in today’s world, since, with very few exceptions, every new refugee situation is born as an “emergency”, *i.e.*, a “situation in which the life or well-being of refugees will be threatened unless immediate and appropriate action is taken”. The practice of states in responding, both individually and collectively, to refugee emergencies reveals a number of features that are common to disaster response in general, including the imperative of speed and the absolute priority on saving lives.³

However, it is important to note that the dominant image fails to reflect core elements of refugee status, thus being unable to promote adequate remedies for it. In fact, it is an utter failure

¹ Christopher Heath Wellman & Phillip Cole, *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford: Oxford University Press, 2011) at 122-24.

² Jean-François Durieux, “Three Asylum Paradigms” (2013) 20:2 Int’l J Minor Group Rts 147 at 159.

³ *Ibid* [footnote omitted]. The quote is from UNHCR, *Handbook for Emergencies*, 3rd ed (Geneva: UNHCR, 2007) at 4.

in distinguishing Convention refugees from other refugees. The collapse of boundaries between them may have brought an era of “end” of Convention refugees in the 21st century, at least on a policy level. Convention refugees, like non-Convention refugees, have been contained in regions of origin without their “rightful” remedy. Worse, as soon as they are in the territories of developed countries, their pitiful status may be changed into “bogus refugees,” “illegal immigrants,” “terrorists,” “competitors for jobs, housing and public goods,” “queue jumpers,” “asylum shoppers,” and a burden to “our” welfare State etc.⁴

By way of contrast, institutional cosmopolitanism bolstered by the protection perspective reveals a different reality of refugeehood. A refugee is not an abandoned baby on the doorstep of a house, but is a person who has been deprived of political membership or citizenship, enjoying no state protection in the nation-states system. An abandoned baby is certainly a vulnerable being but the baby at least has a state which can provide human rights protection if it is able and willing to do so. However, without surrogate political membership or citizenship, a refugee is a person who is stripped of meaningful human rights protection in the current nation-states system. In this regard, restoring the broken baseline in the international state system – that is, each individual does not lack political membership – is a matter of justice rather than humanitarian concern. Humanitarianism should proceed from the “just” baseline, not vice versa.

⁴ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (New York: Cambridge University Press, 2004) at 95, 193, 216; Joppke, Christian, ed, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1998) at 120; Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009) at 233; Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 27; Maharaj, Brij. “Ethnic Identities, Political Boundaries, and the Quest for Durable Solutions” in Uma A. Segal & Doreen Elliott, eds, *Refugees Worldwide*, vol.1(California: ABC-CLIO, 2012) 123 at 126; Stephen Castles, *Global Workforce, New Racism and the Declining Nation State*, online: University of Wollongong < <http://ro.uow.edu.au/cmsocpapers/21/>> at 15.

By arguing for surrogate political membership as an ultimate remedy for refugee status, this dissertation does not necessarily deny the benefits of other refugee solutions; rather, it urges a renewed attention to the necessity of surrogate political membership as a significant remedy for refugee status. The “justice” approach, as has been developed in this dissertation, has provided a principled normative argument that supports the necessity of surrogate political membership for refugees. Although the “justice” approach is developed within a nation-state framework (thus, not an open border approach), its normative arguments coupled with the concept of the “responsible” border control renders national borders virtually open to genuine refugees.

The Tension Between Ethnically-Based Citizenship and the Institution of Asylum

With respect to political membership or citizenship, this dissertation has highlighted individually-based rights rather than collectively-based ones for refugees in order to provide a balanced approach toward refugee protection regimes in the face of prevalent humanitarianism in relation to refugee protection, which is in no small way premised on communitarian concept of citizenship as discussed in Chapter 3 and 4. In this concluding Chapter, it may be beneficial to discuss possible conflicts between individually-based rights of refugees and collectively-based rights of the host communities.

In December 2015, Donald Trump, a business man and a Republican politician – at the time of writing, he is running for the 2016 Republican presidential nomination – proposed that all Muslims and refugees should wear badges within the U.S., so they are “easily identified and tracked if necessary”.⁵ He also called for “a ban on all Muslims attempting to enter the United States.”⁶ Behind these provocative statements is a communitarian view of citizenship that

⁵ Darius Rubics, “Donald Trump Introduces Plan Requiring All Muslims & Refugees to Wear Badges” *Fox News* (8 December 2015), online: Fox News <<http://foxnews.com/hk/donald-trump-introduces-plan-requiring-all-muslims-refugees-to-wear-badges/>>.

⁶ *Ibid.*

presupposes the existence of an American way of life (national culture). Those whose backgrounds are different from this way of life, such as Muslims, cannot be true citizens of the U.S. Surprisingly, an opinion poll released on April 29, 2016, shows that Trump is the leading Republican candidate.⁷ Trump's "popularity" may not be a matter of chance; rather, it may provocatively reflect an undercurrent of "ethnic" nationality.

According to the Concise Encyclopedia of Sociology, "[e]thnic groups are fundamental units of social organization which consist of members who define themselves by a sense of common historical origins that may also include religious beliefs, a distinct language or a shared culture."⁸ Here one finds source of tension between the remedy of citizenship for refugees and the concept of citizenship based on ethnicity. In particular, countries that are comprised of a dominant ethnic majority and very small ethnic minorities may hold a strong view of ethnic nationality. For example, South Korea is said to be composed of near-homogenous ethnic group. Gi-Wook Shin highlights a strong ethnic nationality with regard to South Korea as follows:

Ethnic national identity has been a crucial source of pride and inspiration for people during the turbulent years of Korea's transition to modernity that involved colonialism, territorial division, war, and authoritarian politics. It has also enhanced collective consciousness and internal solidarity against external threats and has served Korea's modernization project as an effective resource.⁹

Shin has even argued that ethnic national identity of Korea has become "a totalitarian force in politics, culture, and society", overriding "other competing identities", ending up constraining "cultural and social diversity and tolerance in Korean society".¹⁰ In the 2006 periodic report

⁷ "2016 National Republican Primary: Poll Chart" *Huffington Post* (29 April 2016), online: Huffington Post <<http://elections.huffingtonpost.com/pollster/2016-national-gop-primary>>.

⁸ George Ritzer & J Michael Ryan, eds, *The Concise Encyclopedia of Sociology* (Malden, MA: Wiley-Blackwell, 2011) at 195.

⁹ Gi-Wook Shin, *Korea's Ethnic Nationalism Is a Source of Both Pride and Prejudice*, online: Stanford FSI <http://aparc.fsi.stanford.edu/news/koreas_ethnic_nationalism_is_a_source_of_both_pride_and_prejudice_accordin_g_to_giwook_shin_20060802>.

¹⁰ *Ibid*; see also The Republic of Korea, *Reports Submitted by States Parties Under Article 9 of the Convention*, CERD, 2006, Addendum, UN doc CERD/C/KOR/14 at paras 43: "[a]s an ethnically homogeneous State, the

submitted by Republic of Korea to the Committee on the Elimination of Racial Discrimination, the tensions arising out of ethnic nationality are described as follows:

The principle of the “pure-blooded”, based on the Republic of Korea’s pride in the nation’s ethnic homogeneity, has incurred various forms of discrimination, largely invisible and not illegal, against so-called “mixed-bloods” in all areas of life including employment, marriage, housing, education and interpersonal relationships. This is particularly serious since such practices are passed down from one generation to the next.¹¹

This being the case, ethnic nationality may give rise to discrimination or indifference to refugees who have settled in the country of asylum, which, in turn, hinders their becoming genuine members of a new political community. Put another way, although refugees may have become *de jure* citizens of a new country, they may still wander between borders in their mind and heart, sincerely seeking a place of “real” belonging.

Having considered the implications of ethnic nationality in relation to refugees, I devote this conclusion to addressing the issues of ethnic nationality and the integration of refugees into the host community. An ultimate solution for refugeehood cannot be the simple act of granting a certificate of citizenship to refugees. It needs to go beyond citizenship per se and entails refugees’ becoming *full* political members in all dimensions. The idea of full political membership may be hinted in “the 4Rs” approach suggested by the UNHCR in the case of repatriation, as shown in Chapter 4.¹² If the ultimate solution for refugeehood is to restore the original home, or to provide a new home, the principles, which are applicable to the former, may be equally applicable to the latter, *mutatis mutandis*.

Republic of Korea has been traditionally unfamiliar with the problems of ethnic minorities. However, the dynamic exchange of human resources between countries and an increase in the number of interracial marriages have recently raised a range of concerns involving ethnic minorities.”

¹¹ CERD, *supra* note 10 at para 44.

¹² United Nations High Commissioner for Refugees, *Handbook for Repatriation and Reintegration Activities* (Geneva: UNHCR, 2004) at 8.

Integration as a Path to a Full Political Member in a New Country

It is important to remember the 4Rs approach: “Repatriation, Reintegration, Rehabilitation and Reconstruction”.¹³ The conception of reintegration is of critical importance to refugees who have settled down in the country of asylum, as the country of asylum may not be in need of reconstruction as can be the case with the countries of origin.¹⁴ Reintegration may refer to “the ability of returning refugees (as well as IDPs and others) to secure the necessary political, economic, legal and social conditions to maintain their life, livelihood and dignity.”¹⁵ When applying this definition to the context of settlement in the country of asylum, integration may entail refugees’ *full* integration into a new political community – particularly, in four dimensions, i.e., political, economic, legal and social – which gives rise to a sense of dignity of their life.¹⁶

Jennifer Hyndman aptly remarks as follows:

If refugee “resettlement is protection plus” [...], then *integration is settlement plus*. Refugees who are resettled in safe third countries like Canada are provided with a “durable solution” to their protection needs, including legal status in their new host country. Feeling at “home” in these places of settlement and becoming full-fledged participants in economic, social, and political activities are quite another matter. Where they occur, such relations of interaction and connectivity in a new country point to “integration” and a path to *full* citizenship, one aim of refugee resettlement.¹⁷

The significance of the policy of integration has been widely recognized in the context of immigration. The so-called “integration indicators” have been referred to, when measuring the degree of integration of migrants into the host community; these are also applicable to the

¹³ *Ibid* at 6, 8.

¹⁴ According to the UNHCR, rehabilitation may mean “the restoration of social and economic infrastructure (e.g. schools, clinics, water points, public facilities and houses) destroyed during conflict in areas of return to enable communities to pursue sustainable livelihoods [...]”: *ibid* at 8. Reconstruction may refer to “the (re)establishment of political order, institutions and productive capacity to create a base for sustainable development [...]”: *ibid* at 8.

¹⁵ *Ibid* at 8.

¹⁶ For more discussions on integration in the refugee context, see Jennifer Hyndman, *Research Summary on Resettled Refugee Integration in Canada*, online: UNHCR <<http://www.unhcr.org/4e4123d19.html>> at 5-9.

¹⁷ *Ibid* at vi [emphasis added].

refugee cases.¹⁸ Especially, the UNHCR observes four core indicators that have been discussed on a European level: employment, education (and language), “social inclusion” and “active citizenship”.¹⁹ The UNHCR has also noted that there are refugee-specific indicators such as “family unity, reception conditions and the asylum process, documentation, and the transition period immediately after recognition”.²⁰ The UNHCR considers, *inter alia*, the issue of employment as a key concern for refugees due to the presence of “specific barriers”: “[c]hallenges [...] include loss of identity documentation and qualification certificates, non-acceptance of qualifications or educational attainment, trauma and uncertainty, anxiety over family separation, the long period of inactivity in the asylum system, and limited social networks.”²¹

Besides the issue of employment, it is worth noting that refugees’ genuine attempts to become full political members have often been frustrated by discrimination or indifference that is often rooted in ethnically-based citizenship. In this regard, the issue of “social integration” (“social inclusion”) or “active citizenship”²² has come to the fore. It should be noted that even

¹⁸ See United Nations High Commissioner for Refugees, *Measuring Resettlement Outcomes by Looking at Integration Indicators* (Geneva: UNHCR, 2009), online: UNHCR <<http://www.unhcr.org/4fbcfbcc9.html>>; See Hyndman, *supra* note 16 at 11-30.

¹⁹ United Nations High Commissioner for Refugees, *A New Beginning: Refugee Integration in Europe* (UNHCR, 2013), online: UNHCR <<http://www.unhcr.org/52403d389.pdf>> at 35:

“Employment: employment rate, unemployment rate, activity rate;

Education: share of low achieving 15 year olds in reading, mathematics and science; share of 30-35 year olds with tertiary educational attainments; share of early leavers from education and training;

Social inclusion: median net income; at risk of poverty rate; health status (good/ poor); property/non-property owners;

Active citizenship: share of immigrants acquiring citizenship; share of immigrants holding long-term residency; share of immigrants among elected representatives.”

²⁰ *Ibid* at 9. The UNHCR has noted that “[r]efugees overwhelmingly felt the pressure to leave the reception centre immediately after granting of refugee status to be highly stressful regarding housing and can often drive refugees to poor housing in disadvantaged areas, to living temporarily with friends, or to homelessness”: *ibid* at 9.

²¹ *Ibid*.

²² *Ibid* at 96. With regard to “social integration and social inclusion”, the UNHCR has noted: “[w]hile it is usual for members of society to move in their own chosen circles rather than be connected with all parts of that society, it is widely accepted that it is important to empower migrants and refugees to access those parts of society that the individual wishes to participate in at the moments they wish to do so. Moreover, individuals should be encouraged to bridge *cultural, ethnic, and social divides* as a means to counter discrimination. In the understanding of

those, who have successfully established themselves in an economic sense, may find it difficult to integrate themselves fully into the host communities. For example, In-jin Yoon, a professor in sociology at Korean University, identifies various factors that deter the full integration of North Korean defectors (including those who are well paid for their work), into South Korean society, such as guilt for abandoning their family members in North Korea, phobia of terrorism by North Korean agencies in South Korea, prejudice and discrimination by South Koreans.²³ Among them, Yoon considers prejudice and discrimination, behind which are “negative and contemptuous attitudes” toward North Korean defectors, as critical deterrent factors.²⁴ As a result, it is not uncommon to observe that North Korean defectors find it difficult to make meaningful social connections within South Korean society, which gives rise to their isolation from the public, even leading to deviant behaviours or crimes.²⁵ The UNHCR has duly noted the importance of social integration as follows:

While it is usual for members of society to move in their own chosen circles rather than be connected with all parts of that society, it is widely accepted that it is

integration put forward by UNHCR this is referred to as a social and cultural process whereby refugees acclimatize and local communities accommodate the refugee to enable refugees to live amongst or alongside the receiving population without discrimination or exploitation, and contribute actively to the social life of their country of asylum”: *ibid* at 64 [emphasis added].

²³ In-Jin Yoon, “특집 : 탈북자들, 더 이상 숨을 곳 없다 ; 국내탈북자의 적응실태와 지원대책 – 통일과정의 시작, 사회통합 차원에서 이뤄져야 [Special Edition: North Korean defectors have no place in South Korean society; Real Condition of Adaptation of North Korean defectors and Measures of Support – The Beginning of Unification and Social Integration]” (2001) 212 *통일한국* [Unified Korea] 24 at 24.

²⁴ *Ibid* at 25. The “negative and contemptuous attitudes” toward North Korean defectors are expressed as follows: “[t]hey [North Korean defectors] only demand something from South Korean society without making any sincere effort”, “we cannot trust them as they may betray us (they have already betrayed [their own family in North Korea])”, “what kind of a person is he or she, who has escaped from North Korea, abandoning his or her family members there?”: *ibid* at 25 (the author’s translation.)

²⁵ *Ibid* at 24-25. Ironically, North Korean refugees, who have almost “same” ethnic background with South Koreans, find it difficult for them to settle in South Korea. Yoon observes that only a few of North Koreans have been “successfully” integrated into South Korean society, and they have different backgrounds from most North Korean refugees – they used to be international students in Eastern Europe or diplomats in North Korea missions or agents who have been involved in earning foreign currency – in other words, they have already had some experience with regard to capitalist economy: *ibid* at 25. Yoon argues that, in the context of preparing the unification of South and North Korea, settlement policies should aim at ensuring economic independence and social integration of North Korean settlers into South Korean society, which, in turn, makes them to be potential contributors to the successful unification in the future: *ibid* at 27.

important to empower migrants and refugees to access those parts of society that the individual wishes to participate in at the moments they wish to do so. Moreover, individuals should be encouraged to bridge *cultural, ethnic, and social divides* as a means to counter discrimination. In the understanding of integration put forward by UNHCR this is referred to as a social and cultural process whereby refugees acclimatize and local communities accommodate the refugee to enable refugees to live amongst or alongside the receiving population *without discrimination or exploitation, and contribute actively to the social life of their country of asylum*.²⁶

Without policies that aim at boosting refugees' political, economic, and social capabilities, they may find it difficult to integrate themselves into the host community, even ending up being "second-class" citizens.²⁷ This being the case, refugees who have settled in the country of asylum are in need of some "preferential" treatment, not formally equal treatment.

According to the 2014 Research on the Actual Condition of Life of North Korean Defectors in South Korea, North Korean defectors have experienced various types of disfranchisements. For example, unemployment rate for them is 6.2% (compared with 3.2% overall in South Korea), their monthly income remains 64% of average income of South Koreans.²⁸ A majority of North Korean defectors work in fields where expertise or professional skills are not required: 32.6% in simple labour and 23.1% in service sector. Notably, 19.8% of

²⁶ UNHCR, *supra* note 19 at 64 [emphasis added]. The UNHCR also notes: "[...] refugees are often more isolated and therefore face challenges forming friendships or connections with members of the receiving population. [...] this is related to language ability, cultural differences such as preferring not to socialize in pubs and bars, uncertainty of cultural norms, fear of rejection or experiences of racism, time and psychological limitations connected to concerns about finances, employment, housing and family separation, segregation in larger cities, and age. Poor emotional health, depression and anxiety can result from these factors and further impact an individual's ability to connect": UNHCR, *supra* note 19 at 125.

²⁷ See generally "그들은 왜 北으로 되돌아갔나? - 방황하는 탈북자들의 항변 '이유 없는 재입북은 없죠' [Why did they return to North Korea? North Korean Defectors Adrift in South Korea Claiming 'No Causes, no return to North Korea']" *중앙시사매거진* (17 May 2014), online: 중앙시사매거진 [Joongang Current Events Magazine] <<http://jmagazine.joins.com/monthly/view/301796>>.

²⁸ Hyo-Sook Shin et al, 2014 북한이탈주민 생활실태 조사 [2014 Research on the Actual Condition of life of North Korean Defectors in South Korea] (Seoul, Korea: Korea Hana Foundation, 2014) at 5, 44; "그들은 왜 北으로 되돌아갔나?" [Why did they return to North Korea?], *supra* note 27.

them work on a daily contract basis, which is 3 times higher than average South Koreans.²⁹ It is worth noting that a majority of North Korean defectors are middle-aged and above, who find it difficult to adjust their life to capitalist economy and competitive social environments in South Korea.³⁰ Furthermore, one out of four North Korean defectors have experienced discrimination or have felt slighted due to the simple fact that they are from North Korea.³¹

It should also be noted that some North Korean defectors, who have settled in South Korea, attempt to claim refugee status in other countries like Canada and the United Kingdom; surprisingly, some of them have returned to North Korea.³² The harsh reality that North Korean defectors face may not be unrelated to their “escape” from South Korea.³³ North Korean refugees are not “asylum shoppers”; they have simply failed to integrate themselves into South Korean society to the extent that they may enjoy *full* political membership in South Korea.

Beyond Ethnic Nationality

In this section, I do not propose a particular concept of citizenship as a definite alternative to ethnically-based citizenship; rather, I contend that ethnic nationality is neither a normatively nor empirically defensible concept against the claim for full integration of refugees into the host community.

First, a number of scholars have effectively pointed out that it is a forceful synthesis to combine normatively the element of *ethnos* and *demos* in citizenship.³⁴ For example, Seyla

²⁹ 2014 북한이탈주민 생활실태 조사 [2014 Research on the Actual Condition of life of North Korean Defectors in South Korea], *supra* note 28 at 5.

³⁰ See “그들은 왜 北으로 되돌아갔나?” [Why did they return to North Korea?], *supra* note 27.

³¹ 2014 북한이탈주민 생활실태 조사 [2014 Research on the Actual Condition of life of North Korean Defectors in South Korea], *supra* note 28 at 30.

³² “그들은 왜 北으로 되돌아갔나?” [Why did they return to North Korea?], *supra* note 27.

³³ See *ibid.*

³⁴ See Jean L. Cohen, “Changing Paradigms of Citizenship and the Exclusiveness of the Demos” (1999) 14:3 *International Sociology* 245 at 248. Jean Cohen critiques the view that “democratic citizenship requires a thick,

Benhabib argues that people have dual identities, reflecting “the *ethnos* and the *demos*”.³⁵ For Benhabib, the *ethnos* refers to “the community of shared fate, memories, and moral sympathies” and the *demos* means “the democratically enfranchised totality of all citizens who may or may not belong to the same *ethnos*.”³⁶ *Ethnos* and *demos* are not necessarily identical, as the legitimacy of the *demos* derives from the principle of universal human rights, which has “a context-transcending quality” applicable to all people including non-citizens.³⁷

In a similar manner, Jürgen Habermas sets apart the same two concepts: the *ethnos* and the *demos*. Habermas states that “only briefly did the democratic nation-state forge a close link between ‘*ethnos*’ and ‘*demos*’.”³⁸ He explains that a “socio-psychological connection” between the *ethnos* and the *demos* historically happened during the French Revolution, but the connection has never been made on a conceptual level.³⁹ Habermas even argues that “the nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the *praxis* of citizens who actively exercise their civil rights.”⁴⁰ In the European context, Habermas

shared, homogeneous, national cultural tradition that is given, not chosen [...]”: Cohen, *ibid* at 250. Instead, Cohen argues that “only if the various elements of the citizenship principle are disaggregated and reinstitutionalized on independent levels of governance with different powers articulating and backing them up will they be able to counter the flaws intrinsic to each of them and function productively as mutual counter-powers”: Cohen, *ibid* at 266. For example, a “non-citizen” may enjoy a legal element of citizenship on a supranational level like EU citizens, or she or he may enjoy a democratic element of citizenship in some degree on a local level in a country like the Netherlands, or a “citizen” may enjoy a membership element on a national level in the country of origin: Cohen, *ibid* at 259.

³⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) at 178, 211.

³⁶ *Ibid* at 211.

³⁷ *Ibid* at 124, 178. For Benhabib, human rights specifically refer to “communicative freedom”, which enables people to have a “right to membership”: *ibid* at 136. Communicative freedom makes it possible to embrace more inclusive membership for “aliens and strangers, immigrants and newcomers, refugees and asylum seekers”: *ibid* at 1. In this regard, Benhabib proposes “democratic iterations”, which refers to “complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned, throughout legal and political institutions, as well as in the associations of civil society”: *ibid* at 179, 212.

³⁸ Jürgen Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe” in Ronald Beiner, ed, *Theorizing Citizenship* (Albany: State University of New York Press, 1995) 255 at 259.

³⁹ *Ibid* at 258-59.

⁴⁰ *Ibid* at 258.

introduces “constitutional patriotism” to extend the scope of citizenship.⁴¹ What is required to be a citizen is to conform to or show patriotism towards the constitution of a nation-state, that is, to the political culture of the state in which universal human rights are contextualized within each state’s particular constitutional arrangements.⁴²

Michael Ignatieff also has noted that “[...] most western nation states now define their nationhood in terms of common citizenship and not by common ethnicity”⁴³ In this regard, he introduces the concept of “civic nationalism”.⁴⁴ According to Ignatieff, in civic nationalism, a binding force of a society is not ethnicity but law: “national belonging” can be based on “a form of rational attachment”.⁴⁵ He contends that “[...] what holds a society together is not common roots but law. By subscribing to a set of democratic procedures and values, individuals can reconcile their right to shape their own lives with their need to belong to a community.”⁴⁶ Although Ignatieff concedes that ethnic groups may offer more loyalty to “the ethnic units” than “the federation and the laws which hold the state together”, he also has convincingly argued that “[w]hat keeps ethnic and racial tension within bounds in the world’s successful modern multi-ethnic societies is a state strong enough to make its authority respected.”⁴⁷

The aforementioned scholarly arguments have at least a common ground that the *ethnos* alone do not account for the institution of citizenship. They do not appear to deny the

⁴¹ *Ibid* at 264.

⁴² *Ibid*.

⁴³ Michael Ignatieff, *Blood and Belonging* (Toronto, Ontario: Penguin Books Canada Ltd, 1993) at 4.

⁴⁴ *Ibid* at 3-4: “[o]ne type, civic nationalism, maintains that the nation should be composed of all those – regardless of race, colour, creed, gender, language or ethnicity- who subscribe to the nation’s political creed. This nationalism is called civic because it envisages the nation as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values.”

⁴⁵ *Ibid* at 4.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at 185. In this regard, he argues that Northern Ireland has not turned into “Bosnia” on account of presence of effective public authorities such as police forces and judiciary: *ibid* at 185.

significance of the *ethnos* altogether;⁴⁸ rather, they show that the concept of ethnic nationality *itself* has serious flaws in a normative sense.

Second, citizenship exclusively based on the *ethnos* is a fiction on an empirical level.⁴⁹ Ignatieff aptly remarks that “[t]he nationalist vision of an ethnically pure state [...] has the task of convincing ordinary people to disregard stubbornly adverse sociological realities, like the fact that most societies are not and have never been ethnically pure.”⁵⁰ For example, the Republic of Korea (ROK) and Japan are generally considered to be homogenous countries in terms of ethnicity in the world.⁵¹ However, a close examination of actual composition of population in both countries may disclose different realities. Lee O-young, former Minister of Culture of Republic of Korea, has noted:

We were originally a mix of marine people and equestrians because Korea is a peninsula. They coexisted and this is the power of Korea [...] The perception of “ethnic” actually didn’t exist for 19 centuries. However, under Japanese rule, we needed a strong national identity and started to stress that we are homogenous people. The division of the two Koreas has also driven us to emphasize we are analogous people.⁵²

According to the IOM Migration Research and Training Centre, as of August 2012, 1.4 million of immigrants resided in the ROK, and it is generally expected that more immigrants will

⁴⁸ For example, Habermas states that “[u]nlike the American variant, a European constitutional patriotism would have to grow out of different interpretations of the same universalist rights and constitutional principles which are marked by the context of different national histories”: Habermas, *supra* note 38 at 271.

⁴⁹ See Ignatieff, *supra* note 43 at 4, 76, 186; See generally Benhabib, *supra* note 35 at 211; See generally Habermas, *supra* note 38 at 258-59.

⁵⁰ See Ignatieff, *supra* note 43 at 186. In this regard, he even argues that “[n]ationalism on this reading, therefore, is a language of fantasy and escape”: Ignatieff, *supra* note 43 at 187.

⁵¹ See Max Fisher, “A revealing map of the world’s most and least ethnically diverse countries” *The Washington Post* (16 May 2013), online: The Washington Post <<https://www.washingtonpost.com/news/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/>>.

⁵² Shin-who Kang, “Is Korea Homogeneous Country?” *The Korea Times* (22 December 2008), online: The Korea Times <http://www.koreatimes.co.kr/www/news/special/2016/04/242_36575.html>.

come due to extremely low birth rate and concomitant shortage of workforce.⁵³ John Ibbitson in *The Globe and Mail* reports as follows:

According to Statistics Korea, the current population of 50 million will start to decline some time between 2020 and 2030; by 2060, it will have plummeted to somewhere between 34 million and 44 million. By then, South Korea will be a country full of old people. Half of the population will be over 60, while only a fifth will be under 30. There will be few workers available to pay taxes to support health care for the elderly, or to buy the cars and houses and other goods that drive an economy.⁵⁴

Having considered these facts, it is hard to maintain the claim of “homogenous” ethnic nationality in the ROK in a strict sense. Conversely, the ROK is in need of proposing a different concept of citizenship that embraces a variety of ethnic groups.

Like the ROK, a growing number of scholars has challenged the claim that Japan is a homogenous country.⁵⁵ For example, Debito Arudou identifies a political maneuver in such a claim, arguing that “[...] ruling elites in Japan are perfectly happy with Japan being portrayed as preternaturally intransigent [...] because they like Japan as it is. However, for the rest of the people living in Japan, this status quo is sending us down a road of obsolescence.”⁵⁶ It also is worth noting a UN document, the 2006 Report of the Special

⁵³ Seong Ii Park, *Korea's Migration Statistics Systems (Executive Summary)* (Goyang, ROK: IOM Research & Training Centre, 2012), online: IOM Research & Training Centre <http://iom-mrtc.org/business/business02_2.php?admin_mode=read&no=72#> at 10; see John Ibbitson, “A bleak future and population crisis for South Korea” *Globe Mail* (22 October 2014), online: *Globe Mail* <<http://www.theglobeandmail.com/news/world/a-bleak-future-and-population-crisis-for-south-korea/article21249599/>>.

⁵⁴ Ibbitson, *supra* note 53.

⁵⁵ Chris Burgess, “Maintaining Identities: Discourses of Homogeneity in a Rapidly Globalising Japan” (2004) *Electronic Journal of Contemporary Japanese studies 1*, online: ejcjs <http://www.japanesestudies.org.uk/articles/Burgess.html#_edn1>; Debito Arudou, “‘Homogeneous,’ ‘unique’ myths stunt discourse” *The Japan Times* (2 November 2010) online: *The Japan Times* <<http://www.japantimes.co.jp/community/2010/11/02/issues/homogeneous-unique-myths-stunt-discourse/#.VyP1Aj8iv-Z>>; See also Lee Hockstader, “Japan may soon have to open its doors to immigrants” *Guelph Mercury Tribune* (23 March 2010), online: *Guelph Mercury Tribune* <<http://www.guelphmercury.com/opinion-story/2726827-japan-may-soon-have-to-open-its-doors-to-immigrants/>>.

⁵⁶ Arudou, *supra* note 55.

Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance in Japan. It observes as follows:

[...] there is racial discrimination and xenophobia in Japan, and that it affects three circles of discriminated groups: the national minorities - the Buraku people, the Ainu and the people of Okinawa; people and descendants of former Japanese colonies - Koreans and Chinese; foreigners and migrants from other Asian countries and from the rest of the world. The manifestations of such discrimination are first of all of a social and economic nature. All surveys show that minorities live in a situation of marginalization in their access to education, employment, health, housing, etc. Secondly, the discrimination is of a political nature: the national minorities are invisible in State institutions. Finally, there is profound discrimination of a cultural and historical nature, which affects principally the national minorities and the descendants[sic] of former Japanese colonies.⁵⁷

Moreover, like the ROK, Japan has been reported to face “a demographic crisis”, that is, the “aging and shrinking” population.⁵⁸ Lee Hockstader observes that “[o]ver time, there will be too few workers to care for the millions of elderly citizens [...]”⁵⁹ According to World Economic and Social Survey 2004, during the period between 2000-2050, Japan would need 343,000 migrants per year to “maintain the size of the population constant”, or 647,000 migrants per year to “maintain the size of the working population”.⁶⁰ Based on this survey, it may not be an overstatement that Japan will be more like one of immigrant

⁵⁷ Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial discrimination, Xenophobia and related Intolerance*, UNESCOR, 2006, Addendum, UN doc E/CN.4/2006/16/Add.2.

⁵⁸ Hockstader, *supra* note 55.

⁵⁹ *Ibid.*

⁶⁰ The UN Department of Economic and Social Affairs, *World Economic and Social Survey 2004: International Migration*, UNESCOR, 2004, UN doc E/2004/75/Rev.1/Add.1 – ST/ESA/291/Add.1 (Sale No E.04.II.C.3) at 64. Mike Douglass and Glenda S. Roberts also observe that “[f]rom a devastated country at the end of the Second World War, Japan has seen its per capita incomes soar to levels which have created severe labor shortages in many low-wage sectors of the economy. In the process, the population has become highly urbanized, family sizes have decreased and birth rates fallen to such a level that, in addition to being unable to fill many low-wage occupations, the population and labor force are facing impending absolute declines due to birth rates that have fallen below replacement levels. At the same time, Japan faces an increasing economic and welfare burden on the working population owing to its rapidly aging population, which is also requiring a vast expansion of low-cost health services and health workers”: Mike Douglass & Glenda S. Roberts, eds, *Japan and Global Migration* (London: Routledge, 2000) at 7.

countries in the near future due to the shortage of workforce.⁶¹ If these are the realities of the countries that claim to have the most “homogenous” political members, it is safe to argue that the claim of citizenship that is exclusively based on the *ethnos* element, is an illusion in most of other countries.

By providing critiques of the claims of ethnic nationality, however, I do not disregard altogether the *ethnos* element in the concept of citizenship; for example, in the ROK, genuine historical and cultural elements of *ethnos* cannot be undone simply relying on such a conception as civic nationalism. Rather, I concur with the claim that citizenship that is exclusively based on the element of *ethnos* is illusionary on both a normative and empirical sense.⁶² This being so, I argue that, when one element (of *ethnos* or *demos*) does not trump the other, it is possible to hold a genuine discourse on the proper form of citizenship in a particular country; this will contribute to creating a more friendly mode of integration of refugees into the host community.

Conclusion

Generally speaking, without tackling the issue of integration, refugees who have obtained citizenship in the country of asylum, are, by analogy, like those North Korean refugees considered in Chapter 5, who have a theoretical South Korean citizenship, but cannot enjoy it in practice. Integration of refugees into the host community is not an option. The purpose of

⁶¹ Hidenori Sakanaka, a former director of the Tokyo Immigration Bureau, states that “we must welcome 10 million immigrants between now and 2050”: Robert Moorehead, *Only immigrants can save Japan*, online: JAPANSociology <<https://japansociology.com/2012/10/21/only-immigrants-can-save-japan/>>. By way of contrast, Chris Burgess observes “the still-dominant and pervasive discourse of ‘homogeneous Japan,’ which manifests itself in the policymaking domain as the ‘no-immigration principle’”, and he argues that “Japan has little prospect of becoming a ‘migrant nation’ anytime soon”: Chris Burgess, “Japan’s ‘no immigration principle’ looking as solid as ever” *The Japan Times* (18 June 2014), online: The Japan Times <<http://www.japantimes.co.jp/community/2014/06/18/voices/japans-immigration-principle-looking-solid-ever/>>.

⁶² See Ignatieff, *supra* note 43 at 4, 76, 186; See Benhabib, *supra* note 35 at 211; See Habermas, *supra* note 38 at 258-59.

providing surrogate political membership to refugees is not to locate them in new countries where they just endure various forms of discrimination or indifference. Instead, it involves full integration, which gives rise to a new *genuine protection relationship* between refugees and the country of asylum, in the nation-states system.

Refugees are rightful candidates for citizenship rather than a potential threat to communities. When our conception of citizenship can embrace refugees who are certainly “different” in the light of the *ethnos* element, then, international refugee protection regime may operate in a sincere manner. What refugees need is neither humanitarian assistance per se nor political membership per se, but *full* restoration of protection relationship with a nation-state in the international state system.

Bibliography

Legislation and Regulations

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Immigration and Refugee Protection Act, SC 2001, c 27.

Migration Act 1958 (Cth).

Nationality Act (DPRK), adopted on 9 October 1963.

국적법 [Nationality Act (ROK)], Act No. 5431, Wholly Amended 13 Dec. 1997, adopted on 20 Dec 1948.

국적에관한임시조례 (The Temporary Regulation of Korean Nationality), adopted on 11 May 1948.

대한민국 헌법 [The Constitution of the Republic of Korea], adopted on 17 July 1948.

북한이탈주민의 보호 및 정착지원에 관한 법률 [North Korean Refugees Protection and Settlement Support Act], Act No 12278, partial revision on 21 January 2014, adopted on 13 January 1997.

Jurisprudence

Alejandro Jr., et al. v. Cuba, (1999), Inter-Am Comm HR, No. 86/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106.

Al-Kateb v Godwin and others (2004) 219 CLR 562.

Amaniampong v. Canada (Minister of Employment and Immigration), [1989] F.C.J. No. 443, [1989] A.C.F. No 443.

Amnesty International Canada v. Canada (Canadian Forces), 2008 FC 336, [2008] F.C.J. No. 356.

Amnesty International Canada v. Canada (Canadian Forces), 2008 FCA 401, [2008] F.C.J. No. 1700.

- Case of Chahal v. The United Kingdom*, No. 22414/93 (15 November 1996), online: European Court of Human Rights
<<http://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2222414%2F93%22%5D%2C%22itemid%22:%5B%22001-58004%22%5D%7D%3E>>.
- Case of Issa and Others v. Turkey*, No.31821/96 (16 November 2004), online: European Court of Human Rights < <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460>>.
- Case of Loizidou v. Turkey*, No.15318/89 (23 March, 1995), online: European Court of Human Rights < <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920>>.
- Case of Loizidou v. Turkey*, No, 15318/89 (18 December, 1996), online: European Court of Human Rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007>>.
- Case of Medvedyev and Others v. France* [GC], No. 3394/03, [2010] III ECHR 61, 51 EHRR 39.
- Case of Öcalan v. Turkey* [GC], No. 46221/99, [2005] IV ECHR 47, 41 EHRR 45.
- Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 (1993).
- Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 110 ALR 97.
- De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655.
- Director of Seoul detention Centre v Lee Young Suen* (1996) Supreme Court of Republic of Korea, No. 96 Nu 1221.
- GP and others (South Korean citizenship)* [2014] UKUT 00391 (IAC).
- Hassankiadeh v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1284, [2015] F.C.J. No. 1348.
- Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.
- Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, [2012] II ECHR 97, 55 EHRR 21.
- Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.
- Hussain v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 208, [2004] D.S.P.R. no 208.
- Jia v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 596.

- Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 21.
- Kamana v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1695, [1999] A.C.F. no 1695.
- Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 720, [2010] FCJ No 870.
- Kinsel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515, [2014] 2 FCR. 421.
- KK and others vs The Secretary of State for the Home Department* [2011] UKUT 92 (IAC).
- Lakhdar Boumediene, et al. v. George W. Bush* 553 U.S. 723 at 765, 128 S. Ct. 2229 (2008).
- Lay Kon Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681.
- MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289 (CA).
- Minister For Immigration and Ethnic Affairs v Guo and Another* (1997) 144 ALR 567.
- Minister for Immigration and Cultural Affairs v Haji Ibrahim* (2000) 175 ALR 585.
- Minister for Immigration and Cultural Affairs v Khawar and Others* (2002) 187 ALR 574.
- Minister for Immigration and Multicultural and Indigenous Affairs v QAAH OF 2004 and Another* (2006) 92 ALD 513.
- N05/50475* [2005] RRT 387 (24 Feb 2005).
- NBLC* [2005] FCAFC 272.
- Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] ICJ Rep 4.
- OM (Designated representative) v Canada (Minister of Citizenship and Immigration)*, 114 FTR 113, [1996] FCJ No 790.
- Plaintiff M70/2011 v Minister for Immigration and Citizenship & Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
- Plaintiff S156/2013 v Minister for Immigration and Border Protection and another* (2014) 309 ALR 29.
- Plaintiff S4/2014 v Minister for Immigration and Border Protection and Another* (2014) 312 ALR 537.

QAAH OF 2004 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 223 ALR 494.

R. v. Appulonappa, 2014 BCCA 163, [2014] B.C.J. No. 762.

R. v. Appulonappa, (2015) SCC 59, [2015] 3 SCR 754.

R. v. Cook, [1998] 2 S.C.R. 597.

R. v. Hape, 2007 SCC 26, [2007] 2 SCR 292.

R v Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals (UN High Commissioner for Refugees intervening) [1988] 1 All ER 193.

R. (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26, [2008] 1 A.C. 153.

R (Hoxha) v Special Adjudicator [2005] UKLR 19, [2005] 1 WLR 1063.

RAD File No TB3-03406, [2013] RADD No 1.

Reference Re Public Service Employee Relations Act (Alta.) [1987] 1 S.C.R 313.

Regina (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening) [2004] UKHL 55, [2005] 2 AC 1

Secretary of State for the Home Department v SP (North Korea) and others [2012] EWCA Civ 114 (CA).

Singh v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.

Slahi v. Canada (Minister of Justice), 2009 FC 160, [2009] F.C.J. No. 141.

Slahi v. Canada (Minister of Justice), 2009 FCA 259, [2009] F.C.J. No. 1120.

Slahi v. Canada (Minister of Justice), [2009] S.C.C.A. No. 444.

Slaight Communications Incorporated (operating as Q107 FM Radio) v. Ron Davidson [1989] 1 S.C.R. 1038.

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3.

SYG2208 of 2005 [2005] FMCA 1740.

SZOAU v Minister for Immigration and Citizenship and Another (2012) 125 ALD 404.

SZQYM v Minister for Immigration and Citizenship [2014] FCA 427, 142 ALD 229.

SZQYM v Minister for Immigration and Citizenship; SZQYN v Minister for Immigration and Citizenship [2012] FMCA 1116 (Unreported Judgements Federal circuit court of Australia, 20 October, 7 December 2012).

Tabingo v. Canada (Minister of Citizenship and Immigration), 2013 FC 377, 362 D.L.R. (4th) 166.

Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness), 2010 FC 957, [2012] 1 F.C.F. 413.

Yusuf v. Canada (Minister of Employment and Immigration), [1995] F.C.J. No. 35, [1995] A.C.F. no 35.

Zeng v Camada (Attorney General), 2013 FC 104, 50 Admin. L.R. (5th) 210.

Secondary Material

Aiken, Sharryn J. *National Security and Canadian Immigration: Deconstructing the Discourse of Trade-Offs*, online: SSRN < <http://ssrn.com/abstract=2494987>>.

———. “New Directions for Refugee Determination and Protection in Canada” (1999) 18:1 *Canada’s Journal on Refugees* 12, online: <<http://pi.library.yorku.ca/ojs/index.php/refuge/article/view/22001>>.

Akandji-Kombe, Jean-François. *Positive obligations under the European Convention on Human Rights* (Belgium: Council of Europe, 2007).

Aleinikoff, T Alexander. “State-centered refugee law: from resettlement to containment” (1992) 14:1 *Mich J Int’l L* 120.

Anderson-Gold, Sharon. “Cosmopolitan Justice” in Deen K Chatterjee, ed, *Encyclopedia of Global Justice* (New York: Springer, 2011) 203.

Andrade, Paula García. “Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 311.

Anker, Deborah, Joan Fitzpatrick & Andrew Shacknove. “Crisis and Cure: A Reply to Hathaway/Neve and Schuck” (1998) 11 *Harv Hum Rts J* 295.

Apple, Michael W, Stephen J Ball & Luis Armando Gandin, eds. *The Routledge International Handbook of the Sociology of Education* (London, UK: Routledge, 2009).

Arendt, Hannah. *The Origins of Totalitarianism* (San Diego: Harcourt, Brace, 1979).

- Arudou, Debito. “‘Homogeneous,’ ‘unique’ myths stunt discourse” *The Japan Times* (2 November 2010) online: *The Japan Times* <<http://www.japantimes.co.jp/community/2010/11/02/issues/homogeneous-unique-myths-stunt-discourse/#.VyP1Aj8iv-Z>>.
- Attaran, Amir. “Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008) *Can Bar Rev* 513.
- Australian Government Department of Foreign Affairs and Trade. *Democratic People’s Republic of Korea Country Brief*, online: Australian Government <<http://dfat.gov.au/geo/democratic-peoples-republic-of-korea/Pages/democratic-peoples-republic-of-korea-north-korea-country-brief.aspx>>.
- Baldaccini, Anneliese. “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea,” in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 229.
- Barnes, Richard A. “The Operation of Flag State Jurisdiction”, in Donald Rothwell, ed, *The Oxford handbook of the law of the sea*, Oxford handbooks (Oxford: Oxford University Press, 2015).
- Barnidge, Robert P. “The Due Diligence Principle Under International Law” (2006) 8:1 *Int’l Community L Rev* 81.
- Barry, Brian. “Humanity and Justice in Global Perspective” in John W Chapman & J Roland Pennock, eds, *Ethics, Economics, and the Law* (New York: New York University Press, 1982) 219.
- Beiner, Ronald. *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community* (Vancouver: UBC Press, 2003).
- Belsey, Andrew. “World Poverty, Justice and Equality” in Robin Attfield & Barry Wilkins, eds, *International Justice and the Third World: Studies in the Philosophy of Development* (London: Routledge, 1992) 33.
- Benhabib, Seyla. *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004).
- Betts, Alexander. *Forced Migration and Global Politics* (Chichester, West Sussex: Wiley-Blackwell, 2009).
- . “From Persecution to Deprivation: How Refugee Norms Adapt at Implementation” in Alexander Betts and Phil Orchard, eds, *Implementation and World Politics: How International Norms Change Practice* (Oxford: Oxford University Press, 2014) 29.
- Betts, Alexander & James Milner. *The Externalisation of EU Asylum Policy: The Position of African States*, online: *Compass*

<https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2006/WP0636-Betts-Millner.pdf>.

- Biersteker, Thomas. J & Cynthia Weber. *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996).
- Blake, Michael & Mathias Risse. "Immigration and Original Ownership of the Earth" (2009) 23 *Notre Dame J L Ethics Pub Pol'y* 133.
- Bradley, Megan. *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge: Cambridge University Press, 2013).
- Brouwer, Evelien. "Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States" In Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 199.
- Brown, Garrett W. "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right: A Kantian Response to Jacques Derrida" (2010) 9:3 *Eur J Pol Theory* 308.
- Brownlie, Ian. *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008).
- . *System of the Law of Nations: State Responsibility Part I* (Oxford: Clarendon Press, 1983).
- . "The Expansion of International Society: The Consequences for the law of nations" in Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (Oxford: Oxford University Press, 1984).
- Bull, Hedley & Adam Watson, eds. *The Expansion of International Society* (Oxford: Oxford University Press, 1984).
- Burgess, Chris. "Japan's 'no immigration principle' looking as solid as ever" *The Japan Times* (18 June 2014), online: *The Japan Times* <<http://www.japantimes.co.jp/community/2014/06/18/voices/japan-immigration-principle-looking-solid-ever/>>.
- . "Maintaining Identities: Discourses of Homogeneity in a Rapidly Globalising Japan" (2004) *Electronic Journal of Contemporary Japanese studies 1*, online: *ejcjs* <http://www.japanesestudies.org.uk/articles/Burgess.html#_edn1>.
- Burgmann, Tamsyn. "Why didn't Canada just send the migrants back?", *CTV News* (15 August 2010), online: *CTV News* <<http://bc.ctvnews.ca/why-didn-t-canada-just-send-the-migrants-back-1.542419>>.

- Campbell, Tom. "Questioning Cosmopolitan Justice" in Stan van Hoofft & Wim Vandekerckhove, eds, *Questioning Cosmopolitanism* (Dordrecht: Springer Netherlands, 2010) 121.
- Canadian Association for Refugee and Forced Migration Studies & Online Research and Teaching Tools (CARFMS-ORTT). *Non-Refoulement*, online: CARFMS – ORTT <<http://rfmsot.apps01.yorku.ca/glossary-of-terms/non-refoulement/>>.
- Castles, Stephen. *Global Workforce, New Racism and the Declining Nation State*, online: University of Wollongong <<http://ro.uow.edu.au/cmsocpapers/21/>>.
- Castles, Stephen & Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*, 4th ed (New York: Guilford Press, 2009).
- Chang, Bok-Hee. "Legal Status of Stateless North Korean Refugees" (2009) 43 *Dong-A Law Review* 449.
- Chasmar, Jessica. "9 North Korean Defectors May Have Been Executed upon Return" *The Washington Times* (1 October 2013), online: The Washington Times <<http://www.washingtontimes.com/news/2013/oct/1/9-north-korean-defectors-may-have-been-executed-up/>>.
- Chia, Joyce. "Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention" (2015) 38:2 *Univ New South Wales LJ* 628.
- . "High Court Verdict Spells the End for Australian Immigration Detention as We Know It" *The Guardian* (11 September 2014), online: The Guardian <<http://www.theguardian.com/commentisfree/2014/sep/11/high-court-verdict-spells-the-end-for-australian-immigration-detention-as-we-know-it>>.
- Chimni, B S. "Globalization, Humanitarianism and the Erosion of Refugee Protection" (2000) 13:3 *J Refugee Stud* 243.
- Cho, Jeong-chan. "북한 주민의 법적 지위에 관한 연구 [Research on Legal Status of North Korean Residents]" (2001) 남북법제연구보고서[South-North Korea Legislation Studies], online: Ministry of Government Legislation <<http://moleg.go.kr/news/notice;jsessionid=beCb0LjbmW9nyzFbPMo6LeuDmYHtFACM4E02sR7QHLLrASpXRBMk9v1SiZ7wmXdD?pstSeq=43465&brdSeq=3&pageIndex=8>>.
- Choi, Jung-yoon. "Laos assailed for sending young defectors back to North Korea" *Los Angeles Times* (2 June 2013), online: Los Angeles Times <<http://articles.latimes.com/2013/jun/02/world/la-fg-wn-laos-defectors-north-korea-20130602>>.

- Chung, Seop et al. "The Treatment of Stateless Persons and the Reduction of Stateless: Policy Suggestions for the Republic of Korea" (2010) 13 *Korea Rev Int'l Stud* 7.
- Churchill, R. R. & A.V. Lowe. *The law of the sea*, 3rd ed (Manchester, UK: Manchester University Press, 1999).
- Cohen, Jean L. "Changing Paradigms of Citizenship and the Exclusiveness of the Demos" (1999) 14:3 *Int'l Soc* 245.
- Craig, Paul. "Britain in the European Union" in Jeffrey Jowell & Dawn Oliver, eds, *The Changing Constitution* (Oxford: Oxford University Press, 2011) 113.
- Crawford, James. *State Responsibility: The General Part* (New York: Cambridge University Press, 2013).
- . *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002).
- Crisp, Jeff. *Refugee Protection in Regions of Origin: Potential and Challenges*, online: Migration Policy Institute <<http://www.migrationpolicy.org/article/refugee-protection-regions-origin-potential-and-challenges>>.
- Currie, John H. "Khadr's Twist on Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter" (2008) 46 *Can YB Int'l L* 307.
- Dauvergne, Catherine. *Humanitarianism, Identity, and Nation Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005).
- . *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).
- . "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67:4 *Mod L Rev* 588.
- Davies, Margaret. "Legal Pluralism" in Peter Cane & Herbert M. Kritzer, eds, *The Oxford Handbook of Empirical Legal Research*, online: Oxford Handbooks Online <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199542475.001.0001/oxfordhb-9780199542475-e-34>>.
- Delcourt, Barbara. "Sovereignty" in Mark Bevir, ed, *Encyclopedia of Governance*, vol 1 (Thousand Oaks, California: Sage Publications, 2007).
- DiMaggio, Paul J & Walter W Powell. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48:2 *Am Soc Rev* 147.
- Douglass, Mike & Glenda S. Roberts, eds. *Japan and Global Migration* (London: Routledge, 2000).

- Droege, Cordula. *Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, online: ICRC <www.icrc.org/eng/assets/files/other/irrc-871-droege2.pdf>.
- Dunne, Tim. "The English School" in Christian Reus-Smit & Duncan Snidal, eds, *Oxford Handbook of International Relation* (Oxford University Press, 2008) 267.
- Durieux, Jean-François. "Three Asylum Paradigms" (2013) 20:2 Int'l J Minor Group Rts 147.
- Emery, Xanthe. *Excision of the Australian mainland for Boat Arrivals*, online: Immigration Advice & Rights Centre Inc. <http://www.iarc.asn.au/_blog/Immigration_News/post/excision-of-the-australian-mainland-for-boat-arrivals/>.
- European Resettlement Network. *Regional Protection Programmes*, online: European Resettlement Network <<http://www.resettlement.eu/page/regional-protection-programmes/>>.
- Evans, Gareth J et al. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).
- Evans, Malcolm D. "State Responsibility and the European Convention on Human Rights: Role and Realm," in Malgosia Fitzmaurice and Dan Sarooshi, eds, *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 139.
- Executive Order 12807 – Interdiction of Illegal Aliens*, online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=23627>>.
- Feller, Erika. "The Evolution of the International Refugee Protection Regime" (2001) 5 Wash U JL & Pol'y 129.
- Fischer-Lescano, Andreas, Tillmann Löhr & Timo Tohidipur. "Border Controls at Sea: Requirements under International Human Rights and Refugee Law" (2009) 21:2 Int'l J Refugee L 256.
- Fisher, Max. "A revealing map of the world's most and least ethnically diverse countries" *The Washington Post* (16 May 2013), online: The Washington Post <<https://www.washingtonpost.com/news/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/>>.
- Fishkin, James S. *The Limits of Obligation* (New Haven: Yale University Press, 1982).
- Fitzpatrick, Joan. "Revitalizing the 1951 Refugee Convention" (1996) 9 Harv Hum Rts J 229.
- Foreign Affairs Trade and Development Canada Government of Canada. "Democracy & Human Rights", *Government of Canada*, online: Government of Canada

<<http://www.canadainternational.gc.ca/eu-ue/policies-politiques/democracy-democratie.aspx?lang=eng>>.

- Frenzen, Niels. "US Migrant Interdiction Practices in International and Territorial Waters" in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010) 375.
- Friese, Heidrun. "The Limits of Hospitality: Political Philosophy, Undocumented, Migration and the Local Arena" (2010) 13:3 *Eur J Soc Theory* 323.
- Fripp, Eric, ed. *Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Oxford: Hart Publishing, 2014).
- Gammeltoft-Hansen, Thomas. *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).
- Garlick, Madeline. "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" (2006) 18:3-4 *Int'l J Refugee L* 601.
- Gatrell, Peter. *The Making of the Modern Refugee* (Oxford University Press, 2013).
- Gayle, Damien. "Did North Korea Execute Children Who Defected? Group of Nine Who Endured Frostbite and Tuberculosis to Escape Were Forcibly Sent Back to Rogue State" *Mail Online* (1 October 2013), online: Mail Online News <<http://www.dailymail.co.uk/news/article-2440178/Did-North-Korea-execute-children-defecting.html>>.
- GHK. *Evaluation of Pilot Regional Protection Programmes*, online: Europa <<http://ec.europa.eu/smart-regulation/evaluation/search/download.do;jsessionid=1Q2GTTWJ1m0pM7kSWQ90hlv1CBzxjvJpV2CLp0BgQxQv8zyGqQ3j!1601440011?documentId=3725>>.
- Gibney, Matthew J. *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (New York: Cambridge University Press, 2004).
- Gioia, Federica. "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court" (2006) 19:4 *Leiden J Int'l L* 1095.
- Giuffr , Mariagiulia. "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?" (2012) 24:4 *Int'l J Refugee L* 692.
- . "Watered-Down Rights on the High Seas: Hirsi Jamma and Others v Italy (2012)" (2012) 61:03 *Int'l Comp LQ* 728.

- Goodwin-Gill, Guy S. "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23:3 Int'l J Refugee L 443.
- Goodwin-Gill, Guy S & Jane McAdam. *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007).
- Government of Canada. *Canada - Democratic People's Republic of Korea*, online: Government of Canada <http://www.canadainternational.gc.ca/korea-coree/bilateral_relations_bilaterales/canada-dpr_korea-rpd_coree.aspx?lang=eng>.
- Guild, Elspeth & Violeta Moreno-Lax. *Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Co-operation with the UNHCR*, Directorate-General For External Policies of the Union, EXPO/B/DROI/2012/15 (December 2013), online: EU <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT%282013%29433711_EN.pdf>.
- Habermas, Jürgen. "Citizenship and National Identity: Some Reflections on the Future of Europe" in Ronald Beiner, ed, *Theorizing Citizenship* (Albany: State University of New York Press, 1995) 255.
- Haddad, Emma. *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008).
- Hancocks, Paula & KJ Kwon. "Defectors Agonizingly Close to Freedom Sent Back to North Korean Nightmare" *CNN World News* (3 October 2013), online: CNN <<http://www.cnn.com/2013/09/30/world/asia/north-korea-laos-defectors-hancocks/index.html>>.
- Hathaway, James C. "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31:1 Harv Int'l LJ 129.
- . "The Evolution of Refugee Status in International Law: 1920—1950" (1984) 33:2 Int'l Comp LQ 348.
- . *The Law of Refugee Status* (Toronto: Butterworth, 1991).
- . *The Rights of Refugees under International law* (Cambridge: Cambridge University Press, 2005).
- Hathaway, James C & Michelle Foster. *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014).
- Hathaway, James C & R Alexander Neve. "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection" (1997) 10 Harv Hum Rts J 115.
- Heater, Derek Benjamin. *What is citizenship?* (Cambridge, UK: Polity Press, 1999).

- Heijer, Maarten den. "Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control," in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 169.
- Herlihy, Jane, Kate Gleeson & Stuart Turner. "What Assumptions about Human Behaviour Underlie Asylum Judgments?" (2010) 22:3 Int'l J Refugee L 351.
- Hobbes, Thomas. *Leviathan*, A. P. Martinich, ed. (Peterborough, Ontario: Broadview Press, 2002).
- Hockstader, Lee. "Japan may soon have to open its doors to immigrants" *Guelph Mercury Tribune* (23 March 2010), online: Guelph Mercury Tribune <<http://www.guelphmercury.com/opinion-story/2726827-japan-may-soon-have-to-open-its-doors-to-immigrants/>>.
- Holborn, Louise W. "The League of Nations and the Refugee Problem" (1939) 203:1 *Annals of the American Academy of Political and Social Science* 124.
- Hollifield, James F. "The politics of international migration" in Caroline B. Brettell & James F. Hollifield, eds, *Migration Theory: Talking across Disciplines*, 2nd ed (New York: Routledge, 2008) 161.
- Hospitality*, online: Oxford English Dictionary <<http://www.oed.com/view/Entry/88730?redirectedFrom=hospitality#eid>>.
- Human Rights Law Centre. *Can't Flee, Can't Stay: Australia's interception and return of Sri Lankan asylum seekers* (March 2014), online: Human Rights Law Centre <http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf>.
- Humanity*, online: Oxforddictionaries <<http://www.oxforddictionaries.com.ezproxy.library.uvic.ca/us/definition/learner/humanity>>.
- Hurd, Ian. "Constructivism" in Christian Reus-Smit & Duncan Snidal, *The Oxford Handbook of International Relations* (Oxford, Oxford University Press, 2008).
- Hwang, Priscilla Kisun. *Canada's "Safe Countries" Bill Slams Doors on North Korean Defectors*, online: David McKie <<http://www.davidmckie.com/canadas-safe-countries-bill-slams-doors-on-north-korean-defectors/>>.
- Hyndman, Jennifer. *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000).
- Ibbitson, John. "A bleak future and population crisis for South Korea" *Globe Mail* (22 October 2014), online: Globe Mail <<http://www.theglobeandmail.com/news/world/a-bleak-future-and-population-crisis-for-south-korea/article21249599/>>.

Ignatieff, Michael. *Blood and Belonging* (Toronto, Ontario: Penguin Books Canada Ltd, 1993).

Immigration and Refugee Board of Canada. *Assessment of Credibility in Claims for Refugee Protection*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx#n1>>.

———. *CHAPTER 5 - WELL-FOUNDED FEAR*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx>>.

———. *CHAPTER 6 - STATE PROTECTION*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef06.aspx>>.

———. *CHAPTER 7 - CHANGE OF CIRCUMSTANCES AND COMPELLING REASONS*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx>>.

———. *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Danger of Torture*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ProtectTorture.aspx>>.

———. *Interpretation of the Convention Refugee Definition in the Case Law*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef02.aspx#n211>>.

———. *Policy on Country-of-Origin Information Packages in Refugee Protection Claims*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolOrigin.aspx>>.

International Federation of Red Cross and Red Crescent Societies and the Jordan Red Crescent. *Syrian Refugees living in the Community in Jordan*, online: UNHCR <<https://www.google.ca/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Syrian+Refugees+living+in+the+Community+in+Jordan+assessment+report>>.

It's my day - Profiles - Geoff Greenfield - Canada Public Service Agency, online: It's My day (Canada's Public Service eMagazine) <http://itsmyday.gc.ca/1008/profiles-profil-eng/geoff_greenfield.asp>.

Jackson, Miles. *Complicity in international law* (Oxford: Oxford University Press, 2015).

Jacobson, David. *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996).

Jhe, Seong Ho. "Legal Status of North Korean Defectors Abroad and Some Possible Solutions for Their Fair Treatment" (2002) 9 Seoul Int'l LJ 21.

Johnson, Heather L. "Intercepting boat arrivals: What the Australian policy model means for Canadian asylum policy", *Canada-Asia Agenda* (9 December 2010), online: Asia

- Pacific Foundation of Canada
 <<https://www.asiapacific.ca/sites/default/files/filefield/australiamigrationpolicy.pdf>>.
- Joppke, Christian, ed. *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1998).
- . “Why Liberal States Accept Unwanted Immigration” (1998) 50:2 *World Pol* 266.
- Kaczorowska-Ireland, Alina. *Public International Law* (Oxon: Routledge, 2015).
- Kang, Shin-who. “Is Korea Homogeneous Country?” *The Korea Times* (22 December 2008), online: The Korea Times
 <http://www.koreatimes.co.kr/www/news/special/2016/04/242_36575.html>.
- Kant, Immanuel. *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Pauline Kleingeld, ed., Rethinking the Western tradition (New Haven: Yale University Press, 2006).
- . *The Metaphysics of Morals*, Mary J. Gregor, ed (New York: Cambridge University Press, 1996).
- Keely, Charles B. “How Nation-States Create and Respond to Refugee Flows” (1996) 30:4 *Int’l Migr Rev* 1046.
- Kelley, Ninette. “International Refugee Protection Challenges and Opportunities” (2007) 19:3 *Int’l J Refugee L* 401.
- Kesby, Alison. *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University Press, 2012).
- Keung, Nicholas. “When an appeal tribunal recently sided with Ottawa by overturning a North Korean’s refugee status, it sent shockwaves among others who have fled the regime” *The Toronto Star* (15 December 2013), online: The Toronto Star
 <http://www.thestar.com/news/immigration/2013/12/15/canada_closing_door_on_north_korean_refugees.html>.
- Kim, Eunjung. “(국제법)북한이탈주민(탈북자)의 법적 지위와 보호 [Legal Status and Protection of North Korean Defectors]” (1998) 43 *Goshigye* 325.
- Kim, Myung-Ki. “Legal Theory of the Supreme Court Decision regarding the North Korean Inhabitants as the Republic of Korean Nationals” (1997) 30 *The Justice* 186.
- Kivisto, Peter & Thomas Faist. *Beyond a Border: The Causes and Consequences of Contemporary Immigration* (Los Angeles: Pine Forge Press, 2010).
- Klein, Natalie. “The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation” (2008) 35:2 *Denv J Int’l L&Pol’y* 287.

- Klotz, Audie. *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995).
- Klug, Anja & Tim Howe. "The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures," in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 69.
- Kraska, James. *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford: Oxford University Press, 2011).
- Krasner, Stephen D. *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).
- . "Sovereignty" (2001) 122 *Foreign Pol'y* 20.
- . "Sovereignty An Institutional Perspective" (1988) 21:1 *Comp Political Stud* 66.
- Kuhlman, T. *Towards a Definition of Refugees*, Serie Research Memoranda 36 (VU University Amsterdam, Faculty of Economics, Business Administration and Econometrics, 1990).
- Kuper, Andrew. "More than Charity: Cosmopolitan Alternatives to the 'Singer Solution'" (2002) 16:1 *Ethics Int'l Aff* 107.
- Lawson, Rick. "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights" in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004).
- Lee, Kyu-Chang. "Legal approach to protection for stateless North Korean defector" (2012) 21 *통일정책연구*[Unification Policy Studies] 213.
- Legomsky, Stephen H. *The Last Bastions of State Sovereignty: Immigration and Nationality Go Global*, online: Washington University Law <http://law.wustl.edu/centeris/Papers/globalization/LEGOMSKY_PAPER2003.pdf>.
- . "The USA and the Caribbean Interdiction Program" (2006) 18:3–4 *Int'l J Refugee L* 677.
- Lessnoff, Michael H, ed. *Social Contract Theory* (Oxford: Basil Blackwell, 1990).
- "Liberals Accused of Trying to Rewrite History", *ABC Lateline* (21 November 2001) online: ABC <<http://www.abc.net.au/lateline/content/2001/s422692.htm>>.
- Lister, Matthew. "Who are Refugees?" (2013) 32:5 *Law and Phil* 645.
- Locke, John. *The Second Treatise of Civil Government: and A Letter Concerning Toleration*, J. W. Gough, ed (Oxford: Basil Blackwell, 1946).

- Long, Katy. "Refugees, repatriation and liberal citizenship" (2011) 37:2 *Hist Eur Ideas* 232.
- MacCormick, Neil. *Institutions of Law: an Essay in Legal Theory* (Oxford: Oxford University Press, 2007).
- . "Institutions and laws again" (1999) 77:6 *Tex L Rev* 1429.
- . *Questioning sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).
- Maharaj, Brij. "Ethnic Identities, Political Boundaries, and the Quest for Durable Solutions" in Uma A. Segal & Doreen Elliott, eds, *Refugees Worldwide*, vol.1 (California: ABC-CLIO, 2012) 123.
- Mallory, Conall. "I. European Court of Human Rights *Al-Skeini and Others v United Kingdom* (Application no 55721/07) Judgment of 7 July 2011" (2012) 61:01 *Int'l Comp LQ* 301.
- March, James G & Johan P Olsen. *Rediscovering Institutions: the Organizational Basis of Politics* (New York: Free Press, 1989).
- Marquis, Christopher. "France Seeks U.N. Force in Haiti and the Resignation of Aristide", *The New York Times* (26 February 2004), online: The New York Times <<http://www.nytimes.com/2004/02/26/world/france-seeks-un-force-in-haiti-and-the-resignation-of-aristide.html>>.
- McAdam, Jane. "Rethinking the Origins of 'Persecution' in Refugee Law" (2013) 25:4 *Int'l J Refugee L* 667.
- McCurry, Justin. "UN "extremely concerned" for repatriated North Korean defectors" *The Guardian* (3 June 2013), online: The Guardian <<http://www.theguardian.com/world/2013/jun/03/un-repatriated-north-korean-defectors>>.
- McGoldrick, Dominic. "Extraterritorial Application of the International Covenant on Civil and Political Rights" in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 41.
- McKeever, David, Jessica Schultz & Sophia Swithern. *Foreign Territory: The Internationalisation of EU Asylum Policy* (Oxford: Oxfam, 2005).
- Medina, Vicente. *Social Contract Theories: Political Obligation or Anarchy?* (Savage, Maryland: Rowman & Littlefield, 1990).
- Meyer, John W, John Boli, & George M. Thomas. "Ontology and Rationalization in the Western Cultural Account" in George M. Thomas, John W. Meyer, Francisco O. Ramirez & John Boli, eds, *Institutional Structure* (London: Sage Publications, 1987).

- Migrant Interdiction (CG-MLE-3)*, online: U.S. Department of Homeland Security <<http://www.uscg.mil/hq/cg5/cg531/amio/FlowStats/FY.asp>>.
- “Migrant ship arrival cost Canada \$25M”, *CBC News Online* (9 February 2011), online: CBC News Online <<http://www.cbc.ca/news/canada/migrant-ship-arrival-cost-canada-25m-1.1095432>>.
- Migration Review Tribunal & Refugee Review Tribunal (Australia), *Guide to Refugee Law in Australia: Chapter 2*, online: MRT & RRT <<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=a3fe3e77-1d4d-47f8-b1a3-448295730fb6>>.
- Milanovic, Marko. “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23:1 EJIL 121 at 122.
- . *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011).
- . *Grand Chamber Judgment in Catan and Others*, online: EJIL:Talk! <<http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/>>.
- Millbank, Jenni. “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21:1 Int’l J Refugee L 1.
- Miller, Sarah. “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention” (2009) 20:4 EJIL 1223.
- Milner, James. “Protracted Refugee Situations” in Elena Fiddian-Qasmiyeh, ed, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 151.
- Ministry of Unification. *북한이탈주민 거주지 정착지원 매뉴얼* [The 2014 Settlement Support Manual for Residents Escaping from North Korea], online: Ministry of Unification <<http://www.unikorea.go.kr/content.do?cmsid=1566&mode=view&page=&cid=33381>>
- Moon, Jeewon. Surrogate Protection in Canada and Potential Nationality in South Korea: Does a North Korean Asylum-Seeker have a ‘genuine link’ to South Korea?, online: Essay Contest CARFMS (2013) <<http://www.carfms.org/sites/default/files/North%20Korean%20Refugee%20Status%20In%20Canada%20%282013%20Essay%20Contest%20CARFMS%20web%29.pdf>>.
- Moorehead, Robert. *Only immigrants can save Japan*, online: JAPANSociology <<https://japansociology.com/2012/10/21/only-immigrants-can-save-japan/>>.
- Morgades, Sílvia. *The Externalisation of the Asylum Function in the European Union*, Online: Universitat Pompeu Fabra <http://www.upf.edu/gritim/_pdf/GRITIM_WP4_Spring10.pdf>.
- Nathwani, Niraj. *Rethinking Refugee law* (Boston, Mass: Martinus Nijhoff Publishers, 2003).

- Noll, Gregor. "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones" (2003) 5 Eur J Migr L 303.
- North, A M. "Extraterritorial Effect of Non-Refoulement" (International Association of Refugee Law Judges World Conference, Bled, Slovenia, 7 September 2011), online: Federal Court of Australia <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-north/north-j-20110907>>.
- North, Douglass Cecil. *Institutions, Institutional Change, and Economic Performance*, Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990).
- O'Boyle, Michael. "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'" in Fons Coomans & Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 125.
- Panayi, Panikos. "Imperial Collapse and the Creation of Refugees in Twentieth-Century Europe" in Panikos Panayi & Pippa Virdee, eds, *Refugees and the End of Empire: Imperial Collapse and Forced Migration in the Twentieth Century* (New York: Palgrave Macmillan, 2011) 3.
- Park, Ki Gab et al. "북한이탈주민(탈북자)의 법적 지위에 관한 연구 [Research on Legal Status of North Korean Defectors]" (1997) 17 The Korean J Human L 249.
- Park, Seong Ii. *Korea's Migration Statistics Systems (Executive Summary)* (Goyang, ROK: IOM Research & Training Centre, 2012), online: IOM Research & Training Centre <http://iom-mrtc.org/business/business02_2.php?admin_mode=read&no=72#>.
- Parliamentary Assembly of Council of Europe. *Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers*, online: Council of Europe Parliamentary Assembly, <<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11557&Language=EN>>.
- Pascale, Alessia di. "Migration Control at Sea: The Italian Case," in Bernard Ryan & Valsamis Mitsilegas, eds, *Extraterritorial Immigration Control: Legal Challenges* (Boston: Martinus Nijhoff Publishers, 2010) 281.
- Peral, Luis. *EU Protection Scheme for Refugees in the Region of Origin: Problems of Conditionality and Coherence*, online: European Society of International law <<http://www.esil-sedi.eu/sites/default/files/Peal.PDF>>.
- Pluralism*, online: Encyclopaedia Britannica <<http://www.britannica.com/topic/pluralism-politics>>.
- Pogge, Thomas W. "Cosmopolitanism and Sovereignty" (1992) 103:1 Ethics 48.

- Price, Matthew E. *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009).
- Przybytkowski, Zofia. *Enforcing Idealism: The Implementation of Complementary International Protection in Canadian Refugee Law* (LLM Thesis, Dalhousie University, 2010), online: Dalhousie Repository <<http://Dalspace.library.dal.ca//handle/10222/13070>>.
- Rawls, John. *A theory of justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999).
- Rehaag, Sean. 2011 Refugee Claim Data and IRB Member Recognition Rates, online: Canadian Council for Refugees <<http://ccrweb.ca/en/2011-refugee-claim-data>>.
- Rennie, Donald J & Ramona Rothschild. “The Canadian Charter of Rights and Freedoms and Canadian Officials Abroad” (2009) 47 Sup Ct L Rev 127.
- Risse, Mathias. “The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth” (2009) 23:3 Ethics Int’l Aff 281.
- Ritzer, George & J Michael Ryan, eds. *The Concise Encyclopedia of Sociology* (Malden, MA: Wiley-Blackwell, 2011).
- Roach, Kent. “R. v. Hape Creates Charter-Free Zones for Canadian Officials Abroad” (2007) 53 Crim LQ 1.
- Robinson, Courtland. *Refugee Movement*, online: The Blackwell Encyclopedia of Sociology <http://www.sociologyencyclopedia.com/public/tocnode?query=refugee&widen=1&result_number=2&from=search&id=g9781405124331_yr2015_chunk_g978140512433124_ss1-39&type=std&fuzzy=0&slop=1>.
- Rubics, Darius. “Donald Trump Introduces Plan Requiring All Muslims & Refugees to Wear Badges” *Fox News* (8 December 2015), online: Fox News <<http://foxnews.com/hk/donald-trump-introduces-plan-requiring-all-muslims-refugees-to-wear-badges/>>.
- Ryan, Padraic. *After Khadr: The Role of Citizenship in Extra-Territorial Constitutional Claims*, online: SSRN <<http://ssrn.com/abstract=1754029>>.
- Saliba, Susan. *Non-refoulement, push-backs and the EU response to irregular migration*, online: European Parliamentary Research Service Blog <eprthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/>.
- Sassen, Saskia. “The de facto transnationalizing of immigration policy”, in Christian Joppke, ed, *Challenge to the Nation-State: immigration in Western Europe and the United States* (Oxford, England: Oxford University Press, 1998) 58.

- Sassòli, Marco & Marie-Louise Tougas. "International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan" (2011) 56:4 McGill LJ 959.
- Schotel, Bas. *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Abingdon, Oxon: Routledge, 2012).
- Schuck, Peter H. "Refugee Burden-Sharing: A Modest Proposal" (1997) 22:2 Yale J Int'l L 243.
- Schuster, Liza. *The Realities of a New Asylum Paradigm*, Report No. WP-05-20 (Oxford: University of Oxford, Centre on Migration, Policy and Society, 2005).
- Selm, Janne Van. *Perceptions of Afghan Refugees*, online: Migration Policy Institute <<http://www.migrationpolicy.org/sites/default/files/publications/VanSelmTerrorism22%5B1%5D.pdf>>.
- Sethi, Chanakya. "Does the Charter follow the Flag? Revisiting Constitutional Extraterritoriality after R v Hape" (2011) 20 Dal J Legal Stud 71.
- Shacknove, Andrew E. "Who Is a Refugee?" (1985) 95:2 Ethics 274.
- Shaw, Malcolm N. *International law*, 5th ed (Cambridge: Cambridge University Press, 2003).
- Shin, Gi-Wook. *Korea's Ethnic Nationalism Is a Source of Both Pride and Prejudice*, online: Stanford FSI <http://aparc.fsi.stanford.edu/news/koreas_ethnic_nationalism_is_a_source_of_both_pride_and_prejudice_according_to_giwook_shin_20060802>.
- Shin, Hyo-Sook et al. 2014 북한이탈주민 생활실태 조사 [2014 Research on the Actual Condition of life of North Korean Defectors in South Korea] (Seoul, Korea: Korea Hana Foundation, 2014).
- Singer, Peter. "Famine, Affluence, and Morality" (1972) 1:3 Phil Pub Aff 229.
- Smith, Ronald C. "Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea" (2004) 14:1 Journal of Transnational Law & Policy 137.
- Statistics Korea. *북한이탈주민 입국 현황* [Statistic on the Intake of Residents Escaping from North Korea], online: E-Country Index <http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1694>.
- Tan, Kok-Chor. *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004).
- Taylor, Savitri. "Protection Elsewhere/Nowhere" (2006) 18 Int'l J Refugee L 283.

- Teitelbaum, Michael S. "The Role of the State in International Migration" (2002) 3(2) *Bro J World Aff* 157.
- The United Kingdom Home Office. *New International Approaches to Asylum Processing and Protection*, Online: Statewatch, <<http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>>.
- Torpey, John. *The Invention of the Passport: Surveillance, Citizenship, and the State*, Cambridge studies in law and society (Cambridge: Cambridge University Press, 2000).
- Travis, Alan. "EU Revives Blunkett's Asylum Camp Plan" *The Guardian* (20 September 2004), online: The Guardian <<http://www.theguardian.com/politics/2004/sep/20/eu.immigration>>.
- Tyler, Drew. "Does the Charter Float - The Application of the Canadian Charter of Rights and Freedoms to Canada's Policing of High Seas Fisheries" (2010) 48 *Can YB Int'l L* 179.
- Vattel, Mer de. *The Law of Nations: or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London: G.G. and J. Robinson, 1797).
- Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).
- Wasem, Ruth Ellen. *U.S. Immigration Policy on Haitian Migrants*, online: FAS <www.fas.org/sfp/crs/row/RS21349.pdf>.
- Watson, Adam. "European International Society and Its Expansion," in Hedley Bull & Adam Watson, eds, *The Expansion of International Society* (Oxford: Oxford University Press, 1984).
- Wellman, Christopher Heath & Phillip Cole. *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford: Oxford University Press, 2011).
- Wheeler, Nicholas J. *Saving Strangers Humanitarian Intervention in International Society* (New York: Oxford University Press, 2003).
- Wolman, Andrew. "North Korean Asylum Seekers and Dual Nationality" (2012) 24:4 *Int'l J Refugee L* 793 at 812.
- Wood, Tamara & Jane McAdam. "III. Australian Asylum Policy all at Sea: An analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia-Malaysia Arrangement" (2012) 61:01 *Int'l Comp LQ* 274.
- Wouters, Kees & Maarten Den Heijer. "The Marine I Case: a Comment" (2010) 22:1 *Int'l J Refugee L* 1 at 13.

- Yap, James. *The principle of non-refoulement and the Charter in Gavrilu*, online: The Court <<http://www.thecourt.ca/2009/12/03/the-principle-of-non-refoulement-and-the-charter-in-gavrilu/>>.
- Yoon, In-Jin. “특집 : 탈북자들, 더 이상 숨을 곳 없다 ; 국내탈북자의 적응실태와 지원대책 – 통일과정의 시작, 사회통합 차원에서 이뤄져야 [Special Edition: North Korean defectors have no place in South Korean society; Real Condition of Adaptation of North Korean defectors and Measures of Support – The Beginning of Unification and Social Integration]” (2001) 212 *통일한국* [Unified Korea] 24.
- Ypi, Lea. “Justice in Migration: A Closed Borders Utopia?” (2008) 16:4 *J Political Phil* 391.
- Zolberg, Aristide R, Astri Suhrke & Sergio Aguayo. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989).
- “그들은 왜 北으로 되돌아갔나? - 방황하는 탈북자들의 항변 ‘이유 없는 재입북은 없죠’ [Why did they return to North Korea? North Korean Defectors Adrift in South Korea Claiming ‘No Causes, no return to North Korea’]” *중앙시사매거진* (17 May 2014), online: 중앙시사매거진 [Joongang Current Events Magazine] <<http://jmagazine.joins.com/monthly/view/301796>>.
- “목숨걸고 온 탈북자에 ‘중국으로 돌아가라’” [“North Korean defectors who have risked life are told ‘Go back to China’”] *NANCEN* (6 September 2010), online: NANCEN <<http://nancen.org/358>>.
- “‘무국적’ 탈북자, 보호장치 미비로 고통받아” [“ ‘Stateless North Korean defectors’ suffer from lack of protection”] *DailyNK* (28 February 2008), online: DailyNK <<https://www.dailynk.com/korean/read.php?cataId=nk09000&num=53513>>.
- “2016 National Republican Primary: Poll Chart” *Huffington Post* (29 April 2016), online: Huffington Post <<http://elections.huffingtonpost.com/pollster/2016-national-gop-primary>>.

International Documents

- Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations, Treaty Series, Vol. LXXXIX, No. 2004, online: Refworld <<http://www.refworld.org/docid/3dd8b5802.html>>.
- Agreement Between the UK and Korea concerning the Readmission of Persons* (The United Kingdom– The Republic of Korea), 20 December 2011, UKTS 2012 No 23.

Charter of Fundamental Rights of the European Union, European Union, [2012] OJ, C326/391.

Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, CAT, 2006, UN doc CAT/C/USA/CO/2 (Advance unedited version), Online: U.S. Department of State <<http://www.state.gov/documents/organization/133838.pdf>>.

Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance*, UNESCOR, 2006, Addendum, UN doc E/CN.4/2006/16/Add.2.

Consolidated Version of the Treaty on the Functioning of the European Union, [2012] O.J. C326/47.

Constitution of the International Refugee Organization, 15 December 1946, 18 UNTS 3, Can TS 1946 No 47.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36.

Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 2, UKTS 1999 No 81.

Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6.

Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), [2015] OJ, L122/31.

Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ, L 337/9 [“Qualification Directive”].

Delia Saldias de Lopez v. Uruguay, U.N. Doc. CCPR/C/13/D/52/1979 (29 July 1981), UN Human Rights Committee, online: UNHCR <<http://www.unhcr.org/refworld/docid/4028d4954.html>>.

EC, Commission, *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin “Improving Access to Durable Solutions”*, 4 June 2004, COM (2004) 410 final.

EC, Commission, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, 1 September 2005, COM (2005) 388 final.

- EC Home Affairs, *External Aspect: Regional Protection Programmes*, online: Home Affairs <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm>.
- European Commission, *New EU Regional Development and Protection Programme for Refugees and Host Communities in Lebanon, Jordan and Iraq* (Brussels, 16 December 2013), online: European Commission <http://europa.eu/rapid/press-release_IP-13-1253_en.htm>.
- European Commission, *Report from the Commission to the European Parliament and the Council*, 6 May 2010, COM (2010) 214 final, online: EUR-Lex <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0214&from=EN>>.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, 4 November 1950, ETS 5.
- European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, [2005] OJ, C53/1.
- European Parliament and of the Council Regulation (EU) No 656/2014 of 15 May 2014 on establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, [2014] OJ, L189/93.
- International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47.
- International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, GA 56th Session, UN Dos A/56/10 Supplement No. 10 (2001), online: UN Office of Legal Affairs <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.
- J.H.A. v. Spain*, CAT/C/41/D/323/2007 (21 November 2008), UN Committee against Torture, online: UNHCR <<http://www.unhcr.org/refworld/docid/4a939d542.html>>.
- Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162, UKTS 2005 No 6.
- Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507, UKTS 2006 No 16.
- Protocol relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, Can TS 1969 No 29.

The Republic of Korea, *Reports Submitted by States Parties Under Article 9 of the Convention*, CERD, 2006, Addendum, UN doc CERD/C/KOR/14.

UN Department of Economic and Social Affairs, *World Economic and Social Survey 2004: International Migration*, UNESCOR, 2004, UN doc E/2004/75/Rev.1/Add.1 – ST/ESA/291/Add.1 (Sale No E.04.II.C.3).

United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (January 2007), online: UNHCR <<http://www.refworld.org/pdfid/45f17a1a4.pdf>>.

———. *A New Beginning: Refugee Integration in Europe* (UNHCR, 2013), online: UNHCR <<http://www.unhcr.org/52403d389.pdf>>.

———. *Asylum Applications and Refugee Status Determination*, online: UNHCR Population Statistics <http://popstats.unhcr.org/PSQ_RSD.aspx>.

———. “Conclusion on Protection Safeguards in Interception Measures” (10 October 2003) UNHCR Executive Committee Conclusions No.97 (LIV), online: UNHCR <<http://www.unhcr.org/3f93b2894.html>>.

———. *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, HCR/GIP/03/03 (February 2003), online: UNHCR <<http://www.unhcr.org/3e637a202.pdf>>.

———. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (December 2011), online: Refworld <<http://www.refworld.org/docid/4f33c8d92.html>>.

———. *Handbook for Emergencies*, 3rd ed (Geneva: UNHCR, 2007).

———. *Handbook for Repatriation and Reintegration Activities* (Geneva: UNHCR, 2004).

———. *Handbook on Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996), online: UNHCR <<http://www.unhcr.org/3bfe68d32.html>>.

———. *Measuring Resettlement Outcomes by Looking at Integration Indicators* (Geneva: UNHCR, 2009), online: UNHCR <<http://www.unhcr.org/4fbcfbcc9.html>>.

———. *Note on Cessation Clauses*, EC/47/SC/CRP.30 (May 1997), online: UNHCR <<http://www.unhcr.org/3ae68cf610.html>>.

- . *Note on the Mandate of the High Commissioner for Refugees and his Office* (October 2013), online: UNHCR <<http://www.unhcr.org/526a22cb6.html>>.
- . *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, Online: UNHCR <<http://www.unhcr.org/refworld/docid/437b6db64.html>>.
- . *The Cessation Clauses: Guidelines on Their Application* (April 1999), online: Refworld <<http://www.refworld.org/docid/3c06138c4.html>>.
- . *The State of the World's Refugees 1995: In Search of Solutions* (New York: Oxford University Press, 1995).
- . *UNHCR Note on the Principle of Non-Refoulement*, November 1997, online: UNHCR <<http://www.unhcr.org/refworld/docid/438c6d972.html>>.
- . *UNHCR Statistical Yearbook 2012: Table of Contents, Main Findings, Introduction*, online: UNHCR <<http://www.unhcr.org/52a722559.html>>.
- . *UNHCR Statistical Yearbook 2013: Chapter 6 - Demographic and Location Data*, online: UNHCR <<http://www.unhcr.org/56655f4c16.html>>.
- . *UNHCR Statistical Yearbook 2014: Chapter 5 - Demographic and Location Data*, online: UNHCR <<http://www.unhcr.org/56655f4c16.html>>.

UN Human Rights Committee, *CCPR General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRC, 1992, UN Doc HRI/GEN/1/Rev.6 at 151 (2003).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

“1519th Meeting: State Responsibility” (UN Doc A/CN.4/307) in *Yearbook of the International Law Commission 1978*, vol 1 (New York: UN, 1979) at 238 (para 11) (UNDOC.A/CN.4/SER. A/ 1978).