

A Jurisprudential Analysis of the
Interpretation of “Persecution” under the 1951
Convention Relating to the Status of Refugees
at the Domestic Level.

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To my family

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ABSTRACT

This thesis considers the definition of persecution in international refugee law and how one might consider this definition at the domestic level. The theories of Robert Alexy's are adopted as a lens through which to reconstruct refugee law. The case for viewing human rights as worthy of special protection is put forward and the implications for refugee law are considered. It posits that the concept of human dignity dictates a special status for human rights that gives refugees' claims high priority. This rejects the notion that states have absolute discretion to control borders. This claim is strengthened when one considers the nature of the claim to human rights protection made by refugees: protection from persecution. This ties refugeehood to political legitimacy, a concept evolving through notions such as human dignity and Responsibility to Protect, to demand higher standards of human rights protection. This, in turn, requires the Refugee Convention to evolve to maintain its protective scope. This thesis will use notion of collective violence to demonstrate that article 1(2) is conceptually capable of supporting this required expansive notion of 'refugee' whilst retaining the boundary between 'refugee' and 'refugee-like.' It will show also how this reconstruction of refugeehood dismantles many of the obstacles to recognition facing female refugees.

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INTRODUCTION

The question 'who is a refugee?' escapes an easy answer. It can be approached from innumerate different angles with correspondingly varied answers. This thesis is concerned with the answer provided when one considers the definition through the prism of jurisprudential analysis of the key terms and underpinning concepts. At first glance international law provides a clear answer; a refugee is a person who fits the definition provided by article 1(2) of the Geneva Convention Relating to the Status of Refugees. A refugee is:

A person who owing to a 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.¹

Yet the issue of who is a refugee under international law remains unresolved to a great extent by article 1(2). There are claims both that article 1(2) is too narrow and obsolete, excluding many experiences of (post-)modern refugeehood², and that article 1(2) is being applied too broadly so as to include people who cannot be said to be refugees within the scope of the Refugee Convention.³ This thesis seeks the development of refugee law by critical reconstruction of article 1(2). It seeks, in some way, to address the

¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S 150 (Refugee Convention) article 1A(2).

² These claims are widely made but are focused in particular on the recognition of victims of wide-spread violence as refugees, for example, Kaelin 'Refugees and Civil Wars: Only a Matter of Interpretation' (1991) 3 International Journal of Refugee Law 435 and the victims of gendered persecution, see Macklin 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213

³ These will be discussed in greater detail below. Key advocates include Matthew Price [2004; 2006; 2009] and David Martin [1991; 1993].

need, revealed by the millions of people identified by the UHCR as in need of international protection⁴, for a principled basis for determining the scope of article 1(2) and the responsibility of contracting states to refugees.

This thesis seeks not to list types of refugees or circumstances that can be identified as being refugee-producing. This task would be as impossible as it would be pointless.⁵ Instead this thesis seeks to set out how one might approach refugee claims. It seeks to consider the foundations of the definition of refugee, particularly the persecution criterion, in order to set some guidelines for how to assess refugee claims. It draws on the foundations of refugee law, namely the concept of human dignity, the protective purpose of the Refugee Convention and the concepts of political legitimacy and collective violence to consider refugee law. It is necessary to consider the foundations of refugee law in order to identify the core principles that ought to guide interpretation of refugee law in determination of refugee case. It is also a recognition that refugee law does not stand in isolation. Refugee law overlaps considerably with human rights law and other facets of international law concerned with the protection of individuals against human rights violations. As Judge Cançado Trindade in the Inter-American Court of Human Rights has noted:

⁴ In 2011 the UNHCR estimated that there were 43.7 million people forcibly displaced from their homes. The figure includes 15.4 million refugees, 27.5 million internally displaced people and a further 840,000 people waiting to be given refugee status (assessed by the UNHCR as refugee but without protection). The populations of concern report 2012-13 estimates a rise on the current figures, see <http://www.unhcr.org/4ec230f516.html>.

⁵ This echoes Goodwin-Gill's statement that 'there being no limit to the perverse side of human imagination, little point is served by attempting to list all known measures of persecution' (The Status of Refugees in International Law (1991) 193). This sentiment was approved in Gashi [1996] UKIAT 13695.

when the sources [...] of human rights violations are so diverse [...]the juridical development of the obligations *erga omnes* of protection becomes all the more important, as do the convergences –at the normative, interpretational and operative levels- among the International Law of Human Rights, International Humanitarian Law and International Refugee Law.⁶

Such judicial pronouncements reveal a significant overlap between fields of international law. This overlap is to be found, or might be said to stem from, the common foundational principles. Judge Cançado Trindade identifies this in the obligations of *erga omnes*. The broader underlying obligations of human dignity and human rights are put forward here as the foundational principles and take centre stage in the discussion in chapter three.

It is not novel to identify issues of interpretation in relation to article 1(2). However only rarely are issues of interpretation addressed at the conceptual level, with the preferred focus, particularly in the case of those advocating a broader approach, on the empirical, political or legal sphere with little enquiry into the conceptual foundations of the refugee definition. It is argued here that consideration of the theoretical underpinnings of the concept of refugeehood is essential to the interpretational debates underway in refugee law. The interpretational confusion arises, it could be argued, not in the application of the definition (although it is here that the confusion is revealed) but at the conceptual level where unexplored and, therefore, unresolved theoretical questions remain. Terms with undetermined meanings are capable of

⁶ Concurring opinion in *Kankuamo Indigenous People* (November 2011) Inter American Court of Human Rights 4. See also *Concurring Opinions in the Matter of the Peace Community of San José de Apartadó* (2002) 19 and *Matter of The Communities of Jiguamiandó and Curbaradó* (2003) 5.

becoming little more than projection screens for ideological attitudes.⁷ The aim, then, is to elaborate the concept of refugeehood in order to give the terms 'refugee' and 'persecution' more determined meaning, within a human rights framework, to flesh out the abstract concept in order to allow it to be used with more clarity in refugee law. This builds on Ronald Dworkin's distinction between concepts (what something means) from a conception (a particular and more concrete specification of that concept.) Dworkin argues that such principles as fairness or the constitutional prohibition of cruel and unusual punishment have a settled although rather abstract meaning (the concept), even though what is to be construed as cruel and unusual punishment (the conception) may vary with time and circumstances.⁸

In international law the term 'refugee' is a term of art and one of considerable significance. It is by no means the only label attached to those on the move; from the plethora of categories, ranging from 'illegal alien', 'Internally Displaced Person' to 'humanitarian refugee', although hard to gain, once awarded 'Convention refugee' is amongst the more privileged labels. It was intended to give the bearer priority in regards to leave to remain and treatment in a host country when compared to other non-nationals. In addition, as Grahl-Madsen explains, "the definition in the Refugee Convention and Protocol is decisive for the convention-contractual obligations

⁷ For discussion of the domestic attempts to bring in a 'domestic version' of the Convention, see generally Alice Edwards, "Tampering with Refugee Protection: The Case of Australia" (2003) 15 IJRL 192, 202-204; Roz Germov & Francesco Motta, *Refugee Law in Australia* (Oxford, 2003) at 189-192. This thesis will assume, however, that the text of the Convention must prevail and only the Convention text will be addressed.

⁸ Dworkin 'Liberalism' in Hampshire, S ed. *Public and Private Morality* (Cambridge University Press 1978) 226.

of states parties to those instruments.”⁹ Thus, the content of the term is crucial, for allocation of resources cannot be undertaken or scheme of entitlements discussed, before determining who is included in the labels being used. A definition must be *useable* (and useful), i.e. it provides a clearly delineated category, and *representative*, i.e. it reflects what it seeks to describe. As Vernant observes, “[l]ike all definitions, if it is a good one it is not purely artificial.”¹⁰ We must be able to use article 1(2) to say who is and who is not a refugee and the definition of a refugee in international law ought to reflect experiences of refugeehood to be meaningful as a legal concept.

It is acknowledged in the Convention itself that article 1(2) does not encompass all experiences of what might be described as refugeehood. The drafting conference introduced the Convention in the hope that signatory states would consider it to have “value as an example exceeding its contractual scope and that all nations will be guided by it in granting [refugee status] so far as possible to persons in their territory...who would not be covered by the terms of the Convention.”¹¹ Why then continue to explore the parameters of the term ‘refugee’ if the Convention accepts that it will not include all experiences of refugeehood? The reason is this; in order to even begin to address the issue of reform the boundaries of the discussion must elucidated. Numerous different theoretical models of refugeehood have been proposed. What is often overlooked, however, is that these models largely employ different frames of reference and assumptions that, without a

⁹ Grahl-Madsen 'Identifying the World's Refugees' (1983) 467 *Annals of the American Academy of Political and Social Science* 11

¹⁰ Vernant *The Refugee in the Post-War World* (George Allen & Unwin London 1953) 5.

¹¹ Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (adopted July 25 1951), 189 U.N.T.S 138, 146, article IV(I).

common starting point, inevitably result in diverse, even contradictory, interpretations of the term 'refugee'. My intention is to explain the concept of refugeehood at a conceptual and analytical level. In order to do this the thesis considers the key notions underpinning refugee law, in particular, human rights, human dignity, state sovereignty and political legitimacy. The thesis will also put forward the notion of collective violence as a newly identified concept behind refugee law.

It is argued that it is the concept of refugeehood that provides the range of *plausible meanings* that the term 'refugee' can convey. The content of the concept sets the 'boundaries of sense' by placing limits on plausible usages of the word and criteria for application of the term. Without examining the normative content of the term 'refugee' it is difficult to assess competing interpretations of the term in any meaningful way.

Hathaway and Goodwin-Gill, amongst others, decry lack of formal status of human rights norms and refugee rights under the current system, arguing that there is no attempt to strike a balance between refugees' rights and the interests of states; instead formal priority is given to the latter as states are granted full discretion in applying international refugee law. It is often claimed, again by Hathaway, Garvey and others, that in order to achieve any real level of protection for refugees nothing short of complete overhaul of the current international law relating to refugees is required.¹² The practical difficulties in achieving a human rights centred refugee law in the present

¹² See, for example, Hathaway 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113 and Garvey 'Towards a Reformulation of International Refugee Law' (1985) 26 *Harvard International Legal Journal* 483.

political climate seems to result in a stand-off in which it is acknowledged that the current system is unable to provide meaningful protection for many refugees but with little hope of reform. This thesis argues that creative interpretation of the current refugee law will reveal more robust protective scope of refugee law.

Despite all of the various competing conceptions of refugeehood and asylum policy, there seems little question that the primacy of the demands of human rights protection underpins the Refugee Convention: this is explicitly accepted by all signatory states of the Refugee Convention. Yet, all too often, the aim of the Convention in protecting human rights becomes lost with states asserting absolute rights to determine who enters their territory. Reconstructing national refugee law along the lines of Alexy's structural theory¹³ shows the flaw in this, namely that if the primary importance of protecting human rights is acknowledged (which it is argued it must be to satisfy law's claim to correctness as human rights are moral rights *qua* correctness) then the balancing act which takes place in determining the claims of refugees (against the claims of the potential host state) must *prima facie* be resolved in favour of refugees with more modest deference given to national interests. The concept of human dignity, it is argued, bolsters this argument for the special priority to be given to refugees' rights. Human dignity also underpins a more expansive definition of refugeehood as will be set out in chapter three and, in terms of female refugees, in chapter six.

¹³ Alexy's theory is set out across a number of different works, including, his two major books *Theory of Constitutional Rights* (2002, Trans. Julian Rivers, Oxford University Press) and *The Argument from Injustice: A Reply to Legal Positivism* (2002, Oxford University Press, reprint 2010). Both of these, and many of Alexy's other works are referenced and discussed in chapter two.

It will be argued that the right to deny entry to territory (if such a right can even be said to exist) cannot outweigh the right to human rights asserted by refugees. Whether acknowledged by the international community formally or not, a commitment to protecting human rights must create a duty to assist refugees. This argument will be put forward by considering the background assumptions of refugee law and demonstrating the impact of these background assumptions and the limits these place on plausible interpretations. The background assumptions of refugee law might be summed up as a) human rights are a special category of rights producing positive duties to protect as well as negative duties of non-interference, b) states are presumed to have the primary role in protecting these key rights c) if these rights are not protected by the state then the international community, via host states, is called on to provide subsidiary protection. Closer examination of the structure of human rights and the way in which these particular fundamental rights generate international responsibility will reveal a range of different duties to refugees as those in danger of suffering human rights violations.

1 Working Assumptions

This thesis is based on several fundamental assumptions. First, international refugee law must contain a concept of human rights. It rejects the contention by some, such as McIntyre¹⁴, that human rights do not exist at all from the outset. International refugee law would not be required if this were the case as

¹⁴ *After Virtue: A Study in Moral Theory* (2nd edn University of Notre Dame Press 1984).

there would be no refugees to claim refugee status without basic acknowledgment that rights exist the (potential) violation of which is so heinous that it causes the victim to flee their country of origin. As will be set out in Chapter One, a refugee is a person who leaves the country of origin or residence primarily due to push rather than pull factors i.e. *involuntarily*. The push factor in the case of a refugee is the human rights violation and, as will be discussed in the following chapter, the lack of national protection against this human rights violation.

This does not directly address McIntyre's critique. It may seem appealing to follow Rorty and state that human rights have been sufficiently justified so as to no longer require further explanation in order to provide a solid foundation for refugee law.¹⁵ And to an extent, this thesis follows Rorty in arguing that human rights are a fact of the historical circumstances we now find ourselves in, as Rorty notes, whether justified philosophically or not, human rights are used and have uses in the modern world and are, in this sense, beyond debunking.¹⁶ For paradigmatic cases of persecution, based on torture, severe discrimination on Convention grounds or political imprisonment, for example, it might be enough to say that these are human rights violations without further explanation. However, for cases where the violation is of a newly emerging or less well-established human right, some mechanism is needed to provide sufficient determinacy of content to guide interpretation of

¹⁵ Rorty 'Human Rights, Rationality, and Sentimentality ' in a Shute, Hurley (eds) *On Human Rights* (Basic Books 1993).

¹⁶ For discussion of the continuing need for philosophical foundations of human rights, see for example Tasioulas 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10 *European Journal of Philosophy* 79.

international refugee law.¹⁷ Human Rights cannot be, therefore, beyond justification. If one entirely dismisses any discussion of the foundations of human rights, there seems to be no way of determining what is or is not an international human right, beyond recourse to international human rights treaties, which would render human rights static and very quickly as outdated as critics of the Refugee Convention allege.

Secondly, international refugee law assumes human rights to be universal in scope, without this assumption the violation of these rights in one jurisdiction would not allow another state to grant refugee status.¹⁸ As chapter one sets out, persecution (the heart of which is a human rights violation) is what allows the host state to deny the jurisdiction of the home state to their citizen. Thirdly, although this chapter will argue for a generous concept of human rights, it is accepted that there is a distinction between human rights and other rights. There must, therefore, be some limitation on the concept of human rights which separates these rights from other rights a person can claim (be they legal, civil, political or social). What is it, then, that makes human rights special, what justifies these rights giving rise to refugee status where the violation of other rights does not?

¹⁷ The charge levelled at Rorty by Griffin and Tasioulas is that he overlooks this problem of new or contested human rights, although the idea of human rights might be largely accepted and established, there is far from being a settled list of human rights.

¹⁸ To be applicable in a useful way for refugee law, human rights need not be proved to be universally held by all people in all times but they must, at least, be accepted as having what Nickel refers to as “temporally-constrained form of universality...within some specified historical context” and that within this historical context human rights are “possessed in virtue of being human” Nickel *Making Sense of Human Rights* (Blackwell 2007) 3.

It is noted that refugee law is not the only form of legal protection of human rights. Many states include the notion of 'humanitarian protection' within their immigration law. However, this form of protection is usually considerably more precarious than refugee status, involving more limited leave to remain, more conditions placed the leave and more limited access to citizenship applications. It should not, therefore, be used as a catch all for those who do not satisfy a strict interpretation of refugee law. For this reason an expansive definition of refugeehood is to be preferred to reliance on a secondary category of humanitarian protection.

2 Structure of the Thesis

The first chapter will consider the scope of the term 'persecution' and the historical foundations of refugee law. It will be argued that even if one considers persecution to be an inescapable feature of refugeehood it does not follow that this must represent an inherent limitation on the parameters of the term. The boundaries of the term are elastic enough to encompass 'new experiences' of refugeehood whilst retaining the distinction between 'refugee' and 'migrant.' It will be argued there is no conceptual reason why the boundaries of the term must be narrowly set and that the term 'refugee' can support an expansive interpretation without losing the distinction between 'refugee' and 'migrant'. Restrictive interpretations do not hold, then, as a matter of definition and must be justified against the underlying principles of refugee law which will be identified further as the thesis proceeds.

The second chapter sets out the framework for the thesis. The thesis takes Robert Alexy's 'principles theory'¹⁹ and 'correctness thesis' as the point of departure to address the place of human rights norms in international refugee law and in domestic refugee status determination cases. This chapter seeks to establish the first four basic propositions stated above.²⁰ First, Robert Alexy's principles theory will be adopted as providing a guideline on how to approach the issues of interpretation and responsibility in refugee law. It will be argued that this under utilised reconstruction of duties is capable of providing a system for thinking about the rights of refugees, which clearly elucidates the priority that ought to be given to these rights. Principles theory will be shown also to provide a framework for understanding both the process of admitting refugees and of adjudicating refugee status claims, particularly where competing claims of public interest are raised. In this sense, principles theory provides a framework for reconstructing how the rights of refugees work at an international and national level with particular emphasis on the law of balancing. Second, the argument for viewing fundamental rights as principles will be briefly introduced and adopted. Thirdly, Alexy's correctness thesis that posits a necessary connection between

¹⁹ Here I shall focus on the core ideas of Alexy's principle theory. Principle theory is not, originally, Alexy's term but rather was developed by Ronald Dworkin in response to legal positivism. See *Taking Rights Seriously* in which Dworkin argued that every legal system contains both rules and principles as distinct categories. Dworkin argues that positivism misses the uses of principles in legal interpretation, claiming principles are background standards against law is to be interpreted and applied (*Taking Rights Seriously* (1977) 22). Alexy, however, demonstrated in *A Theory of Constitutional Rights* (n 12), that principles can be directly applied and explained the relationship between the application of principles and proportionality. The debate on principles theory has developed, however, into a field of its own, and much of this debate goes beyond the scope of this thesis.

²⁰ I shall use 'refugee status determination cases' to refer to applications (formally submitted or made by presence in another state alone), and any subsequent appeals, by those individuals seeking to claim refugee status under the Refugee Convention. I have avoided using the term 'asylum seekers' as it raises many issues, such as the distinction between refuge and asylum, which I do not have space to address here.

law and morality will be put forward and it will be argued that the connection places certain requirements on lawmakers and decision-takers to consider the claims of morality.

The third chapter will consider normative aspects of the debate to determine how principles theory might operate in the area of refugee law. It looks to the foundational principles of refugee law with the argument that whilst Alexy's theories provide a theoretical framework for refugee law human rights and human dignity provide a normative framework. The chapter will first consider the underlying concept of human dignity and the arguments for the particular demand for respect in respect of human rights. The importance of human rights relative to other competing rights then will be set out. It will be opined that this claim is of special significance in the context of the nature of the claim asserted by refugees *to protection of human rights*. Demonstrating the particular importance, or value, of human rights protection will establish proposition nine, stated above. It will consider the frequently counter principles to the primacy of individual human rights, namely the 'priority to compatriots thesis', which claims that the needs of compatriots should be placed in front of those of strangers. It will be posited that such debates can be resolved, *prima facie* in favour of the rights of refugees, with more modest deference toward state interests, by considering the law of balancing, which requires that preference is given to the principle which has greater abstract weight and is given greater relative concrete weight on the facts of the case.

Chapter four will consider further the background principles of refugee law, namely the presumption that the primary duty to protect human rights falls

on the home state. The content of this primary duty, based on notions of political and sovereign legitimacy and the concept of collective violence, it will be argued, is significant in determining the content of the persecution criterion and the protective scope of article 1(2). Closer examination of the underpinnings of primary duty theory, it will be argued, suggests a broader interpretative scope of article 1(2) than is often applied in refugee status determination cases. In particular, it will be posited that an examination of the concept of violence underpinning refugee law will support a broader reading of article 1(2). The aim here is to consider which human rights violations might be said to demonstrate a broken bond between citizen or state.

Chapter five concerns the secondary duty stemming from the importance of human rights, which falls on the international community in the event that the primary duty is not fulfilled. This frames refugee law as a facet of obligations owed by states to the international community as a whole and not merely an act of charity or individual action. The view will be put forward that this secondary duty is not merely a discretionary duty but also includes concrete duties in certain circumstances. In particular, the notion of 'Responsibility to Protect' will be explored and applied to refugee law to argue that all members of the international community have a general responsibility to protect refugees. The chapter will also examine circumstances in which contracting states might be said to have a concrete and individual duty to protect refugees, namely the situation of individuals already within the jurisdiction of a contracting state.

The sixth chapter applies the notion of collective violence to circumstances facing female refugees. In discussing female refugees the evolution of the term 'persecution' in line with shifting notions of political legitimacy can be traced. The limited impact of this shift will also be revealed. In particular, the continued restrictive interpretations of 'persecution' and 'political opinion' will be highlighted. In light of the assertions of the previous chapters as to the expansive potential of the refugee definition it will be argued that the plight of many female refugees, who see their claims to refugee status refused, demands a closer examination and greater consideration of the interpretations of refugee law.

3 Terms Used

In this thesis the terms 'refuge' and 'asylum' will be used interchangeably, although it could be argued that they can support different meanings. The term 'asylum' is used in a variety of situations, including humanitarian asylum, outside of the Geneva Convention and the granting of refugee status within the Geneva regime. The differences in meaning are overlooked here as the thesis is concerned only with the Geneva regime. The term 'refugee' refers to people who satisfy article 1(2) whether or not this has been formally recognised. The term asylum seeker is, therefore, not used. This usage, it is argued, is supported by the assertion that refugee status is declaratory rather than constitutive. It is, therefore, possible to speak about 'refugees', in the abstract, to refer to those who have not yet claimed refugee status, those who have claimed refugee status but whose claim is yet to be determined and those who have already formally satisfied article 1(2). The term is used in this

manner as the thesis concerns, in the main, abstract discussions of refugee law rather than critique of actual cases.

The thesis seeks to explore the limits of article 1(2) and the concept of refugeehood against the backdrop of the underpinning notions of human rights, political legitimacy, collective violence and subsidiary protection and is not, therefore, primarily concerned with those who make false or unsustainable claims for refugee status. Instead the thesis is concerned with the boundaries of the term 'refugee' and the types of claims that can be supported within the current definition supplied by article 1(2). It considers, therefore, abstract notions and how these might impact actual cases but does not seek to, or claim to be able to, provide a finite list of claims of 'genuine refugees.' The aim instead is to provide some idea of the conceptual boundaries of article 1(2) in order to supply an interpretive guide to article 1(2) to be applied in actual cases to determine concrete outcomes.

The term 'asylum' is then used to refer to the protection afforded to those granted refugee status, as UNHCR has pointed out, in critiquing the EU Qualification Directive²¹, there is a distinction between refugee status and asylum, 'the Qualification Directive appears to use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum".'²² The terms are used

²¹ Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (29 April 2004).

²² UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC (OJ L 304/12 of 30.9.2004) January 2005 10-11.

here in line with this critique and 'asylum' is used interchangeably with 'refuge' to refer to the granting of protection.

Chapter 1 INTERPRETATIONAL DIFFICULTIES IN INTERNATIONAL REFUGEE LAW

The first chapter examines the conceptual coherence of the claim that the persecution criterion is an intrinsic limitation on the term refugee as it represents the semantic boundary between the terms 'refugee' and 'migrant'. This claim is of considerable legal, practical and theoretical significance as it argues that persecution is an inescapable element of refugeehood and one that represents inherent limitation "on the parameters of the definition's protective mantle"¹, which *cannot* be exceeded without resistance from the theoretical underpinnings of the concept. Thus, the claim is not simply that it is preferable to interpret 'refugee' and 'persecution' narrowly, or even that one ought to select a restrictive interpretation from the range of possible interpretations, but rather that the only theoretically supportable interpretation is one that does not include many situations that are claimed to be experiences of refugeehood. The chapter asks if there are inherent limitations provided by the semantic and conceptual boundaries of the term 'refugee', which explain the exclusion of certain experiences of refugee-like situations. This issue will be approached by asking, firstly, is persecution an inescapable feature of refugeehood? And secondly, if persecution can be said to be an inescapable feature of refugeehood does it represent an inherent limitation of the term of 'refugee'? It is argued that the issue of the scope of the persecution criterion must first be explored before positing any claims about a broader scope of protection under article 1(2).

¹ Bhaba 'The Tension Between Asylum Advocacy and Human Rights' 15 Harvard Human Rights Journal 167, 167.

In order to explore these issues the chapter begins with a discussion on how refugeehood is conceptualised, before examining the key contradistinction between refugee and migrant. It then moves to the core issues, namely the place of persecution in the concept of refugeehood and the different interpretational models of the term 'persecution' before making some brief observations as to the impact of the conclusions on the boundaries of the term 'refugee'.² What is argued here is that it is not necessarily a concern that international protection is extended to one category, refugee, and not to another, migrant, but that the issue, raised by Foster and Hathaway, is where the boundaries of these terms are drawn. The challenges by Foster and Hathaway might be better seen as challenging the drawing of the boundary between these terms rather than challenging the distinction per se. This thesis seeks to be part of the project redrawing this boundary so as to include many previously excluded people within the term 'refugee' and explores the distinction between 'refugee' and 'migrant' with this aim in mind.

1.1 Why Interpretational Explanations are Necessary

There can be little doubt that the conceptual boundaries of the term 'refugee' are contested. This stems partially from the many and varied uses of the term

² This proceeds on the assumption that there is a distinction between refugee and migrant. This assumption is by no means universally accepted and has been challenged. Arguably works such as Foster *Refuge from Deprivation: International Refugee Law and Socio-Economic Rights* (Cambridge University Press 2007) challenge this distinction. Hathaway has also rejected the presumption that individuals fleeing conflict do not fall under the protection of the Refugee Convention (see 'Refugee status arising from generalised oppression' in Alfredsson and MacAlister-Smith (eds.) *The Living Law of Nations* (Engel 1996) 61-67). However, the challenges presented in these works are not to any distinction between refugee and migrant but to the existing, or at least oft-made, distinction between the terms. The words are not synonyms and as such must have some difference in meaning.

in every day parlance and partially, it is argued, from conceptual confusion. As Turton observes, for many concepts- 'table' is offered as an example- the relationship between intension and extension is unproblematic, but this is not so for more abstract concepts such as migration, or, refugeehood.³ It is for this reason that interpretation of the term 'refugee' remains contested; 'refugee' is not a term that has clear content. The claim is not that of some legal and literary theorists such as Cornell⁴, Burton⁵ and Fish⁶, that all terms require interpretation, but that of Wittgenstein⁷, namely that there are some situations where interpretation is unnecessary but others where interpretation is essential, namely where the meaning of a term is far from clear. It is in these contested situations that the use of a particular interpretation may also be said to require justification. As Tully⁸ notes, in his discussion on Wittgenstein and Habermas, although there are certain things it would unreasonable to raise doubt about- the example of a person stating their name in the course of an everyday conversation is given but equally one could use Turton's example of a table, in neither of these situations would it usually be considered reasonable to respond by raising doubt either as to the identity of the speaker or the use of the intension 'table' when, say, extension is clearly in front of the

³ Turton 'Conceptualising Forced Migration (Working Paper No. 12)' (Refugee Studies Centre, October 2003) 2.

⁴ Cornell *The Philosophy of the Limit* (Routledge & Kegan Paul 1992).

⁵ Burton *An Introduction to Law and Legal Reasoning* (Little Brown and Co. 1985)

⁶ Fish 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism' (1982) 9 *Critical Inquiry* 20.

⁷ This is an interpretation of Wittgenstein, which, naturally, has been contested [see Cornell n 4]. It is argued, however, it is persuasive given, for example, §201 of *Philosophical Investigations* in which Wittgenstein states, "there is a way of grasping a rule that is not interpretation" Wittgenstein *Philosophical Investigations* (Blackwell 1963).

⁸ Tully 'Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection' 17 *Political Theory* 172 186. Stone describes these as situations "in which a call for interpretation seems superfluous" Stone 'Focusing the Law: What Legal Interpretation is Not' in Patterson (ed) *Wittgenstein and Law* (Ashgate Publishing 1995 [2004]) 262.

speaker- in other circumstances, however, it is entirely reasonable to raise doubts as to the use of a particular term. This applies to contested concepts particularly and it is here, argues Tully, that justification of the use of one interpretation over another is essential because where there are several competing and contested uses of the term and there is no self-justifying, i.e. obvious, reason to use one sense of the word over another then the need to give grounds for the use of a term arises.

The aim is not to evaluate the political desirability of particular interpretations of 'refugee', or to assess the practicality of applying the various interpretations, there will only be evaluation of an interpretation on conceptual grounds. Thus, no claim is being made as to whether experiences of refugeehood ought to be included in practice- this is a separate enquiry- but if experiences of refugeehood are to be excluded from the definition of 'refugee' these exclusions must be justifiable *within* the theoretical framework being used otherwise the conceptual coherence of the model being applied is called into question. Thus, if it is claimed that the concept of refugeehood requires that article 1(2) excludes, for example, those fleeing starvation (and it is widely argued that this is the case), this exclusion must be supported by the same theory that explains the inclusion of, for example, political activists within the concept of refugeehood being employed by the Refugee Convention, in order to be persuasive as an interpretational explanation.

1.2 Conceptualising Refugeehood

How then is refugeehood to be conceptualised? Concepts are elements of a system of concepts. We do not form a concept without relating it to other

similar- and dissimilar- concepts. The more abstract the concept one seeks to provide content for, the greater the reliance on other concepts to contextualise the term. As noted above, refugeehood is an abstract concept. It seeks to reflect a universal condition of refugeehood not merely the particular experiences of a refugee. As Kunz argues, the definition of a refugee under international law was supposed to be “both sufficiently wide and refined to relate the Saints of the Mayflower to the Czech refugees of 1968.”⁹ In order to encapsulate what is common to experiences as disparate in time and place as those mentioned by Kunz, above, refugeehood is often conceptualised through a series of dichotomies; to give content to the term by distinguishing ‘refugee’ from ‘refugee-like’. The distinctions between forced and voluntary migration, between persecution and prosecution, between types of violence (targeted and generalised, public and private and political and economic) have been used to give content to the abstract notion of refugeehood. In addition, refugeehood is a ‘compound concept.’ It does not stand-alone but is based on a series of contested concepts, such as alienage, ‘fear’ or ‘persecution’.

Within article 1(2) no term provides as much insight into the complex concept of refugee employed by the Convention as the persecution criterion. In the introduction to the UN publication of the Convention Beyani characterises persecution as “clearly the most important factor concerning the determination of refugee status.”¹⁰ In a leading case before the House of Lords, Lord Lloyd described persecution as “the exclusive benchmark for

⁹ Kunz ‘The Refugee in Flight: Kinetic Models and Forms of Displacement’ 7 *International Migration Review* 125 129.

¹⁰ Benyani ‘Introduction’ in Weis (ed) *The Refugee Convention* vol 7 (Cambridge University Press 1995).

international refugee status.”¹¹ The importance of the persecution criterion cannot be overlooked, therefore, and this importance lies in the centrality of the concept of persecution to the notion of refugeehood. It is the persecution criterion that conveys a sense of the normative judgments made when creating the legal category ‘refugee’ by revealing the distinctions present in the concept of refugeehood employed by the Convention and the influence these distinctions have on the answer provided by international law to the question ‘who is a refugee?’ This thesis seeks to discover if the concept of persecution can explain why a person fleeing a civil war is *not* a refugee under international law¹² but a person fleeing a targeted attack¹³ is? It asks if the concept of persecution can offer an adequate account of why a person fleeing starvation¹⁴ is *not* a refugee but a person fleeing imprisonment for opposing the ruling government is. At present there is no adequate explanation as to

¹¹ *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379.

¹² Some regional refugee instruments do recognise a person fleeing civil unrest as a refugee, for example under article 1(2) of Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted Sept. 10 1969) UNTS 14691 but the construction of the article makes it clear that these individuals are *not* considered persecutees, stating “The term ‘refugee’ shall also apply[...]”. The definition represents, as Shacknove notes, “the only salient challenge to the proposition that persecution is an essential criterion of refugeehood” (Shacknove ‘Who Is a Refugee?’ 95 *Ethics* 274 275). Although the subsequently adopted Latin American Cartagena Declaration, Organization of American States (1985) contains a similar provision including individuals fleeing “generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other events which have seriously disturbed public order” these definition remain secondary in importance to the Geneva Convention to which has 147 signatories (to either or both the 1951 Convention and 1967 Protocol).

¹³ See *Bolanos-Hernandez v INS*, 767 F.2d. 1277 (9th Circ., 1985).

¹⁴ The examples are numerous, Shacknove (n 12) notes, for example, the refusal of the UNHCR to provide refugee camps for 90,000 people who fled from the famine in Mozambique to Zimbabwe- the rationale for this decision was that the individuals in questions were not victims of persecution and therefore were not under the mandate of the UNHCR. The UNHCR has subsequently expanded its mandate to cover all displaced persons, including those internally displaced persons who do not qualify for refugee status since they are not outside the country of origin. However, the list could go on; why is a person fleeing natural disaster or compulsory military service not a refugee but a government official fleeing a military coup is? For further discussion see Aleinkoff T, Martin DA, Motomura H and Fullerton M (eds) *Forced Migration: Law and Policy* (Thomson Gale 2007).

how claims from victims of civil war violence could be grounded in current refugee law if the requirement of targeted persecution is retained.¹⁵

This enquiry is a pressing one because, as Arboleda and Hoy observe, the causes of international migration are increasingly inter-related, generated by a complex nexus of “wars, including civil wars, human rights deprivations, natural calamities and poverty.”¹⁶ The multi-dimensional nature of modern international migration makes it increasingly difficult to identify refugeehood solely by distinguishing it from the conditions of general migration, as the former UNHCR Commissioner Mme. Ogata noted in 1991 “the refugee issue has become part of much larger movement of people across frontiers and within them.”¹⁷

1.3 What is Forced Migration?

Despite the complex causes of movement across borders, the dichotomy between forced and voluntary migration remains the key contradistinction upon which the notion of refugee is built. Almost all concepts of refugeehood

¹⁵ See Kaelin ‘Refugees and Civil Wars: Only a Matter of Interpretation’ 3 *International Journal of Refugee Law* 435. Some cases seem to allow asylum claims from those fleeing civil war (cf *Bolanos-Hernandez* (n 13)) but it should be noted there is a distinction between a person fleeing a civil war whose claim for asylum is grounded in factors independent of the civil war and those whose claim is solely based on danger due to the unrest. However, due to space constraints the issue of targeted persecution will not be discussed further here.

¹⁶ Arboleda and Hoy ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’ 5 *International Journal of Refugee Law* 66 71.

¹⁷ ‘Refugees in the 1990s: Changing Response’ cited in *ibid* 72. The UNHCR mandate dictates that they cannot deal with IDPs displaced due to natural or man made disasters.

understand it to describe forced migration.¹⁸ There is no explicit reference to *forced* movement¹⁹ contained in article 1(2) but that is not to say the Geneva Convention overlooks it. There is, however, much debate on what is meant when migration is referred to as ‘forced’, and how this notion of ‘forced migration’ links to the persecution criterion is heavily contested.

1.3.1 Forced Migration as Lack of Agency

Differing interpretations of ‘forced’ have considerable impact on the experiences considered to include in the scope of the concept of refugeehood. According to one view ‘forced migration’ denotes “lack of choice.”²⁰ A refugee is “the victim of events for which, at least as an individual, he cannot be held responsible.”²¹ Lack of choice is used here to signify absence of decisions taken (lack of agency). Following this model, in order for migration to be deemed ‘forced’, the individual must not have made any choices that resulted in the circumstances motivating migration. This suggests treatment is persecutory only if it can be said that the person would have suffered the same treatment regardless of any action or inaction on her part. This would

¹⁸ Although this is not say all forced migrants are refugees, for the purpose of this discussion it is assumed that refugee status can only be awarded to those outside their country of origin or nationality (as required by the Refugee Convention). Thus, Internally Displaced Persons cannot be refugees under the Refugee Convention although they might quite accurately be described as forced migrants and are, due to this, considered within the mandate of the UNHCR. The issue here is contested experiences; described variously as ‘involuntary’ and ‘voluntary’, and which, dependent on resolution of the first issue, might or might not be considered experiences of refugeehood.

¹⁹ Some regional refugee instruments do recognise a person fleeing civil unrest as a refugee, for example under article 1(2) of Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa Sept. 10 1969 (UNTS no. 14691). The construction of the article makes it clear, however, that these individuals are not considered persecutees, stating “The term ‘refugee’ shall also apply...”. The definition represents, as Shacknove notes, “the only salient challenge to the proposition that persecution is an essential criterion of refugeehood” (Shacknove (n 12) 275). See also n 14.

²⁰ Vernant presents this model most succinctly although he is not an advocate, see *The Refugee in the Post-War World* (George Allen & Unwin 1953).

²¹ *ibid* 50.

encompass, for example, victims of the Nazi deportation programmes who can be said to have been 'forced to migrate' in the most basic sense; they were simply moved, having no choice as to whether to remain or go and no control over the destination. Building on laws of extradition, it is claimed that forced migration, understood as a lack of agency, also explains why 'common criminals' are excluded from refugee status; the decision taken by the individual to transgress national law renders any subsequent movement voluntary. This is a problematic claim. As Turton notes, on one level it is nonsensical to talk of involuntary migration in terms of lack of agency, "to migrate is something we do, not something that is done to us. You can move people and displace people, but you can't 'migrate' them."²²

It could be argued it is misleading to classify forced migration as revolving around the concept of choice; it would be better expressed as focused on lack of options. Although 'innocent victim' is often the sense in which 'refugee' is used²³; this is not the model of refugeehood employed by the Refugee Convention. This can be seen through an examination of article 1(f). Article 1(f) is separate, and subsequent, to the definition of refugee and excludes from refugee status any person who has committed an international crime or a

²² Turton (n 3) 11.

²³ Coverage of displaced persons leaving war-torn areas is the most obvious example, most of the individuals involved will not seek or be granted refugee status but as a group will be referred to as 'refugees', such as Georgian citizens who fled during the conflict in South Ossetia, 'Georgian Conflict takes toll on Refugees' <http://www.msnbc.msn.com/id/26125821/> (accessed 19.05.10). Other who might be described as 'innocent victims'-those targeted due to unalterable personal characteristics- are included in the concept of refugeehood employed in the Geneva Convention.

serious non-political crime.²⁴ The reference to *serious non-political* crimes makes it clear that under article 1(f) 'common criminals' are not excluded *prima facie* from refugee status. Thus, it is not accurate to say that the 'common criminal' is excluded from the definition of refugee in article 1(2). As refugee status is declaratory not constitutive, even in reference to criminals suspected of serious offences, article 1(f) operates as a *subsequent* negation of refugee status, so as to exclude an individual who would otherwise be recognised as a refugee from being awarded refugee status rather than to exclude criminals from the concept of refugeehood.²⁵ This suggests that refugeehood, as a concept, does not exclude those who can be held 'responsible' (in sense that the individual made a choice resulting in the circumstances motivating flight).

This view has been reinforced in the recent case of *HJ (Iran)* [2010] in which Lord Hope stated, "the fact that he [the applicant] could take action to avoid persecution does not disentitle him from asylum."²⁶ The enquiry into whether or not the treatment suffered, or feared, amounts to persecution cannot rest on a causal account of actions of the applicant without endangering many whom would be thought of as paradigmatic Convention refugees, such as those who suffer persecution due to religious belief, political opinion, or as confirmed in *HT and HJ*, sexual orientation. In these cases a strict causal approach would prove problematic as the persecutory acts could be said to have been caused by (in the sense of being a result of) a choice to subscribe to a certain view

²⁴ 'Common criminals' might be further distinguished from refugees if they are subject to prosecution not persecution but here the argument is that criminals are distinct from refugees because they made a choice to transgress national laws.

²⁵ This is not to say, however, that in practice article 1(f) is not often used to exclude suspected criminals from any consideration of a grant of asylum.

²⁶ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 3 [15].

point²⁷ or, in the latter case, to be open about one's sexuality.

1.3.2 Forced Migration as a Lack of Meaningful Choice

If the notion of 'forced' migration does not denote lack of choice as lack of agency what concept of choice does it use? Beyond the case of criminals other examples can be found of those who can be deemed responsible (in the loosest sense) for the circumstances that led to migration being recognised as refugees. The history of asylum, as well as case law under the Geneva Convention, demonstrates that refugeehood includes, to use Zolberg's terms, 'activists'- the politically engaged- as well as 'victims'- those targeted due to unalterable personal characteristics.²⁸ The politically engaged cannot be described as 'victims of events'; indeed Martin argues that the political dissenters are often seen as paradigmatic examples of the refugee because they are *not* the victims of events but rather those who make a conscious decision to act.²⁹

Inclusion of those who made active choices contributing to the circumstances motivating migration is most easily explained by saying that forced migration requires only that the decision to leave be classed as involuntary. Thus, the focus is solely on the options available at the point of emigration and not on

²⁷ This approach has been further rejected in UK jurisprudence by the Supreme Court ruling in *RT and Others; KM (Zimbabwe)* [2012] UKSC 38 in which it was held that *HJ(Iran)* ruling applied also to political opinion (even where that opinion were neutral or apathetic). The judgment was clear that people could not be expected to lie to avoid persecution.

²⁸ Zolberg et al *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press 1989) 31.

²⁹ In addition Martin argues an asylum system focused only on 'mere victims' "tends to treat people as history's pawns" and could be viewed as patronising, Martin 'The Refugee Concept On Definitions, Politics, and the Careful Use of a Scarce Resource' in Adelman (ed) *Refugee Policy: Canada and the United States* (York Lanes Press 1991) 46.

how the conditions of exit were created. This is not to say that an individual must have been forcibly deported in order to be a refugee; a refugee may still have taken the decision to leave but the conditions of exit must be such that the individual cannot be said to have had any *meaningful choice* as to whether to remain or leave. A refugee is distinguished from a migrant on the basis of a lack of choice but choice here signifies lack of available options rather than active participation.

The only options available to a refugee are migration or what might be termed 'tragic choices'³⁰- choices that can be described as involuntary as they do not involve the opportunity to pursue personal preference over both the outcome(s) and the choice process and, therefore, do not represent a choice at all.³¹ This model argues that the choice act itself is of fundamental relevance. Applying this to migration, it could be described as forced where the alternative to migration is such that it cannot be characterised as a real alternative but rather a 'tragic choice.' For refugees, the act of leaving cannot be described as voluntary as they did not exercise a choice in leaving; they are unable to pursue personal preferences over either the outcome or the choice process and migration was the only viable course of action.³²

³⁰ This is a term borrowed from Martha Nussbaum who uses it in a similar context but to refer to choices made in the absence of an alternative free from serious ethical wrongdoing, see 'Tragedy and Human Capabilities: a response to Vivian Walsh' (2003) 15 *Review of Political Economy* 414. Here I am using it to denote choices made in the absence of an alternative free from serious- if not life threatening- implications to the individual making the choice.

³¹ Sen 'Maximization and the Act of Choice' (1997) 65 *Econometrica* 745. The explanation above is a simplification of Sen's model of choice, which is to be applied to volitional choices in particular in relation to economic, social and political behaviour, none of which are relevant or examined here but the basic distinction is instructive.

³² This is not to say, however, that every person finding herself in the situation will decide to leave, an individual is still able to make a 'tragic choice' but it is argued that this is not a free choice.

1.3.3 Migration as the Only Viable Option

But when can migration be said to be the only viable option? In certain cases determination of this question might be said to be reasonably uncontroversial. Thus, although the holder of a particular opinion might be said to have the option of hiding or even changing her opinion available, it is clear within the meaningful choice model that this would not represent a viable alternative to flight. If one's only alternative to migration is to conceal a personal opinion, or for example, to hide one's sexuality, this does not represent a meaningful choice, even assuming such concealment would be possible. Although not stated in these terms this was clearly the analysis applied in *HJ(Iran)*, referred to above, as although the UK Supreme Court confirmed that the possibility of concealment was relevant *per se*³³ concealment could not be expected or

³³ There was some suggestion that the possibility of [successful] concealment might be relevant if it could be demonstrated that the claimant would act to conceal his or her sexuality on return to the country of origin whether or not the threat of persecution was present. In paragraph 15, Lord Hope states clearly, "The question is, what will the applicant actually do." It is respectfully submitted that this question risks misapplication. It is not a relevant question at any stage of the enquiry as if an individual is seeking asylum on the grounds that he or she has, or will, suffer persecution due to sexual orientation, the decision to be open about sexual orientation has, presumably, already been taken (or either freely or forced due to circumstance) otherwise there would be no desire to seek asylum. Determination of whether persecution is objectively to be feared by homosexuals in the country in question ought to be the first step and if established then the 'actual behaviour' of the applicant in question is irrelevant. Decision can only be made in the case of reasonably provable questions or asylum decisions risk becoming exercises in mind reading; there is simply no test to determine whether a person is telling the truth as to their sexuality, it is a personal matter, the internal aspect of which cannot be proven one way or the other. Furthermore, it is submitted that applying an 'actual behaviour' test risks claims being denied on the grounds that there is no 'proof' that the individual in question will make, or has made, his or her sexuality (or political opinion or religion) known to others. Such an approach leaves no room for individual who may have chosen previously to be discreet- or indeed to not practise homosexuality- even for reasons other than fear of persecution (perhaps for religious or family reasons)- but who now wishes to be open in a country where it is reasonably likely that this decision will result in treatment amounting to persecution. It would be virtually impossible for such an applicant to offer objective proof that on return to the country of origin he or she would 'actually' practise homosexuality openly despite previously having refrained to do so. It is suggested that countries where homosexuals are routinely subject to persecution are likely also to be countries where homosexuality is culturally and/or religiously condemned. It would be most

demanded.³⁴ Lord Rodgers stated, “[u]nless he [the applicant] were minded to swell the ranks of gay martyrs[...] he would be compelled to act discreetly.”³⁵ In the view of Lord Rodgers, it is clear that the opportunity to act discretely does not represent a meaningful option and can be dismissed, therefore, as a viable alternative to migration.

If forced migration denotes lack of meaningful choice (due to conditions of exit) then it is difficult to explain why refugee law has traditionally rejected victims of natural disasters or widespread violence as refugees. Can it be said that a person leaving a place where there is a high risk of starvation, for example, is making a choice? There are no options available for the individual to rank (thereby pursuing their personal preferences and rendering the choice act meaningful); the only viable option is migration, the other option(s) representing ‘tragic choices’. The classic model of migration identifies refugees, in both legal and sociological terms, as being motivated by ‘push’ rather than ‘pull’ factors.³⁶ In order to be recognised as a refugee, the

unlikely, it is respectfully argued, that an individual from such a cultural and religious background would willingly identify as a homosexual unless he or she was, in fact, homosexual. The stigma attached to homosexuality in many societies is such that it would be unlikely that such a claim would be made by an applicant simply as a matter of expediency to secure refugee status in a contracting state.

³⁴ Again, this reasoning was confirmed in *RT and KM (Zimbabwe)* (n 27). These two cases express an emerging recognition that the Convention does not, and cannot, contain a requirement to lie to avoid persecution.

³⁵ *HJ (Iran)* (n 26) [26]. Similar interpretations have been applied in other jurisdictions, see for example, the Canadian case of *Atta Fosu v Canada (Minister of Citizenship and Immigration)* [2008] FC 1135 and the American case, *Karouni v Gonzales* 399 F 3d 1163 (2005).

³⁶ As expressed, for example, in Dorigo and Tobler ‘Push-Pull Migration Laws’ (2005) 73 *Annals of the Association of American Geographers* 1 and Hayden ‘What’s in a name? The Nature of the Individual in Refugee Studies’ 19 *Journal of Refugee Studies* 471 474. This emphasis on push factors is, argues Hayden, what explains the focus on repatriation as the only durable solution to refugeehood. The argument assumes that if one involuntarily left home then one must wish to return once the reasons for leaving are no longer present. There is no space in this paper to explore the idea further. It is worth noting, however, that this view overlooks a key factor- that

overriding motivation must be to leave 'home' rather than to arrive anywhere in particular.³⁷ Adopting Ravenstein's long established theory of migration³⁸, pull factors can be defined as "those life situations that give one reason to be dissatisfied with one's present locale" whilst push factors are "attributes of distant places that make them appear appealing."³⁹ As Dorigo and Tobler note, this provides "a very elementary equation system"⁴⁰ that might be symbolised by a set of scales with one set of factors being deemed decisive only when they can be said to outweigh the other. If push factors are defined as in-country factors it is hard to see how a person fleeing starvation could be said to be motivated by pull factors; lack of food would surely constitute a 'life situation giving one reason to be dissatisfied with one's present locale'; in contradistinction to an external factor, such as the opportunity of higher earnings elsewhere.

people are involved and it is simply impossible to make a general rule as to how all people who leave home will react, some may wish to return, others might settle in the host country, still more might have children who are born in the host country making it impractical if not impossible to return home, and, of course, some may have actually wished to leave but not actually have done so before the event that finally made it impossible to stay.

³⁷ This attitude can be clearly seen in policies such as the 'first kick of the can' rule adopted by the EU 'Qualification Directive' [to n 18 in Introduction] whereby a person wishing to apply for asylum in the EU must do so in the first Member State he or she arrives in; failure to do so can result in deportation from any subsequent Member State visited without the state having to fulfill the usual requirement to hear a claim for asylum before ordering deportation. This rule has caused considerable political and judicial tension, particularly between Germany and other Member States. Before a change to the law in 2006, German asylum law required an applicant to demonstrate that the agent of persecution was the state- or at the very least directly sanctioned by the state, which led to several challenges before the European Court of Human Rights, including the T.I case (App. No. 43844/98) [2000] I.N.L.R. 211 in which an asylum seeker due to be deported to Germany from Britain, where non-state agents of persecution were recognised as within the scope of the Convention definition, succeeded in arguing that deportation to Germany under these circumstances would be tantamount to refoulement and therefore prohibited under Article 33.

³⁸ *Laws of Migration* from 1876, 1885 and 1889. Ravenstein presented a statistical model of analysis for migration patterns, which has been built upon by generations of human geographers, cited in, and cited in Dorigo(n 30).

³⁹ *ibid* 1.

⁴⁰ *ibid*.

The traditional exclusion of those fleeing starvation- or natural disaster, civil war or wide spread violence- from the concept of refugeehood put forward by the Geneva Convention could be explained in a number of ways. To begin with, one might argue that forced migration denotes only lack of meaningful choice due to conditions of exit and correspondingly these examples (of an individual fleeing starvation, civil war etc.) *are* experiences of refugeehood. This might lead to the conclusion that the exclusion of these experiences from article 1(2) is invalid or unjustified. One might pursue the argument sketched out in brief above to argue that refugeehood encompasses *all* forms of forced migration and that anyone unable to exercise a meaningful choice (understood as the availability of options through which to pursue personal preferences) in regards to migration is a refugee.

This much broader concept of refugeehood is used to suggest article 1(2) is in need of reform as it requires lack of available options *due to specific circumstances*, namely a 'well-founded fear of persecution' on Convention grounds. Equally, it could be acknowledged that certain experiences are excluded from article 1(2) but one might argue that this is necessary, for example, in order to reduce the number of refugees in host countries. The legal term refugee is, then, purposively curtailed and these other experiences are merely those not selected within the legal term but otherwise equally valid uses of the vernacular term 'refugee.' As noted in the introduction, in order to be coherent as a conceptual model the selection of certain experiences of refugeehood, and the corresponding exclusion of others from the scope of

international protection, should be explainable within the interpretational theory being used to provide content to the term 'refugee'.⁴¹

1.4 The Place of Persecution in Refugeehood

A further, and more complex, explanation as to why article 1(2) does not encompass all experiences of forced migration is the contention that migrants and refugees are *not* to be distinguished solely on the basis of the voluntary/involuntary dichotomy. This interpretational model might be called the 'persecution model' since it claims that the persecution criterion is the fact(or) used to identify refugees from amongst the many people crossing borders. Herein lies the function of persecution within the discussion; the persecution model of refugeehood claims that the contradistinction voluntary/involuntary rests not only on lack of available alternatives to migration but also requires a certain type of harm, namely treatment amounting to persecution. Persecution, then, is used to further differentiate those motivated by a *need* to leave home (refugee or Internally Displaced Person) from those motivated by a more general desire to be elsewhere (migrant).

On one level the use of persecution to demonstrate forced migration could be seen as pragmatic, as Hayden notes "it is far more practical to find social conditions that we believe can be relied on to indicate that people could not have done otherwise but flee than to ascertain exactly what each individual

⁴¹ Models of explanation, which range from the claims of realism to communitarian 'priority to compatriots' theories, have been deliberately omitted from discussion at this juncture. The ethical justifications for exclusion of certain experiences of refugeehood are necessarily subsequent to the enquiry as to whether any exclusion of experiences has taken place and will be explored in greater depth.

felt at the moment of emigration."⁴² Determining whether or not a person has been persecuted- or has reason to fear persecution- is seen (rightly or wrongly) as verifiable, through examination of evidence, in a way in which determining whether or not a person *felt* compelled to migrate is not.⁴³ The existence of compulsion is presumed from the fact of persecution, based on the proposition that if remaining is life threatening then one cannot be said to have had any meaningful choice in leaving. This is then used to impute motives for migration in individual cases. In their extensive study on forced migration Moore and Shellman, starting from the premise that without any further information we can assume that staying is preferable to leaving⁴⁴, contend, "one will leave one's home when the probability of being a victim of persecution becomes sufficiently high that the expected utility of leaving exceeds the expected utility of staying."⁴⁵

⁴² Hayden (n 36) 475.

⁴³ This argument is also used to support the assertion that 'fear' is to be interpreted *objectively* under article 1(2); a claim further bolstered by the adjective 'well-founded.' See Hathaway and Hicks 'Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"?' (2004) 26 *Michigan Journal of International Law* 1 526 in which they argue 'fear' criterion denotes "forward-looking expectation of risk" rather than the alternative definition of 'standing in trepidation'. This is an interpretation supported by the Australian Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v. Kord* [2002] 125 F.C.R 68 [69] in which Heerey J stated, "the use of a passive voice [in the Convention] conveys a compound notion concerned both with the conduct of the persecutor and the effect that the conduct has on the person being persecuted." See also Cameron "Risk theory and "subjective fear": the role of risk perception, assessment, and management in refugee status determinations" (2008) 20 *International Journal of Refugee Law* 432.

⁴⁴ This is a general claim but one based on empirical evidence; although, of course, there will be people whose experiences defy this assertion. It can be observed that people choose to move all the time, however, it is a tiny minority of the world's population who chose to move without any time frame for return. Mass migration as seen in the nineteenth and early twentieth century has largely ceased. Migration now is comprised of "small numbers moving from many places to many places" Vertovec (ed) *Migration* (Critical Concepts in The Social Sciences Routledge 2010) x.

⁴⁵ Moore and Shellman 'Fear of Persecution: Forced Migration, 1952-1995' 48 *The Journal of Conflict Resolution* 723 726-7.

This explains, then, the function of persecution in the concept of refugeehood; to act as indication of forced migration by demonstrating conditions of exit that can be said to be coercive thereby allowing imputation of motives of migration. However, this merely *explains* why it could be seen to be convenient to include the persecution criterion in the determination of refugee status; it does not *justify* it. In order to justify the exclusion of other experiences of forced migration from article 1(2), the persecution model claims persecution is inherent in the concept of refugeehood. Thus, according to the persecution model it is the persecution criterion that “establishes a valid claim to refugee status”⁴⁶ under international law.

1.4.1 Asylum and Persecution: A Brief Historical Overview

The traditional interpretation of ‘refugee’ emphasized the historical basis of asylum and the context in which the Convention was drafted. This led to a focus on the concept of persecution and, in particular, paradigmatic examples of persecution as perceived in the immediate aftermath of the Second World War and in the context of the burgeoning Cold War.⁴⁷ Cole and Garvey, amongst others, argue that persecution is not a constitutive feature of refugeehood but rather a relic from the Cold War, best discarded and replaced with a new conceptual standard. This critique of article 1(2)

⁴⁶ Shacknoven (n 12) 277. Shacknove is using validity here solely in the legal sense, he is not claiming that persecution ought to establish a morally valid claim to refugee status but rather that under the Geneva Convention persecution is the evidence selected as establishing a valid claim to refugee status. It is perhaps surprising, therefore, that this key term has been left undefined by the Convention. Although Hathaway suggests there are persuasive reasons as to why this is so *The Law of Refugee Status* (n 8 in introduction) 7.

⁴⁷ The Travaux Préparatoires contain no discussion of whether or not to include persecution in the definition (there was, by means of contrast, considerable debate on the wording of the standard of proof before the drafters settled on ‘well-founded fear’). Persecution is left undefined by the Convention, Preamble and the Travaux Préparatoires. The individualistic definition also represents a contradistinction to nationality specific definitions of refugee such as those adopted by the League of Nations to respond to Russian and Armenian refugee flows. It is in this way that article 1(2) is considered to provide a universal definition of refugeehood (that is in the sense of general), see Weis (ed) *The Geneva Convention Relating to the Status of Refugees* (Cambridge University Press 1951) x.

cites examples such as those mentioned above, people fleeing starvation, civil war or natural disasters, to conclude that the persecution criterion is “simply not an adequate definitional standard to embrace all those who require protection because they have been coerced to migrate.”⁴⁸ Thus, the claim by Cole, Garvey et al. is that the parameters of the definition, and the scope of protection provided by the Convention, are far narrower than the parameters of the term ‘refugee.’

The inclusion of the persecution criterion can be explained, according to Hathaway, as representing a desire “to give priority in protection matters to persons whose flight was motivated by pro-Western political values.”⁴⁹ In Hathaway’s view the concept of persecution, far from being a necessary feature of refugeehood was selected, in the first place, as a condemnation of the Soviet system. This view is supported, argues Hathaway, by the inclusion of the five ‘Convention grounds’; the selection of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion was designed to enumerate violations most often associated with the Eastern bloc rather than the socio-economic human rights violations found in the West.

Price, on the other hand, places persecution at the centre of the concept of asylum to conclude “the persecution criterion has a long history, and is inextricably connected with the way asylum has historically been understood and practiced.”⁵⁰ Certainly, the notion of a refugee as a persecuted person can be traced much further back than 1951. Price identifies the residual impact of the Greek concept of *asylia*, where ‘applicants’ were required not only to reach

⁴⁸ Hathaway (n 11 introduction) 117 For the sake of clarity, this is not the view taken by Hathaway but rather his characterisation of the approach taken by Garvey and Cole. His article goes on to suggest that persecution could be reinterpreted in line with human rights norms to breathe “new life into refugee law” *ibid* 122.

⁴⁹ Hathaway *ibid* 6.

⁵⁰ Price ‘Politics or Humanitarianism: Recovering the Political Roots of Asylum’ (2004) 19 *Georgetown Immigration Law Journal* 277 277.

a sacred space but also to convince the priest that they deserved protection⁵¹ and the more formal adjudication process in the Roman Empire. Price argues persuasively that the current system has more in common with these ancient conceptions of asylum than with the medieval idea of sanctuary- asylum granted by and in the church- the purpose of which was mercy, and, therefore, did not involve any form of judgment but instead was to be extended to anyone who reached a sacred building. It may be the case that the concept of asylum has, in Western thought⁵², always contained the notion that it is to be *granted* rather than simply given on request but this does not determine the content of the concept of asylum or the place of persecution in the concept of refugeehood.⁵³

Price's argument, and it is one put forward by Martin, Grahl-Madsen and Weis as well, goes further. It claims that if asylum can be said to involve some element of judgment of the 'applicant' (as deserving or not), persecution- variously defined- was the criterion used to determine the judgment. That asylum, as an institution, has its origins as a mechanism for protecting the persecuted is a well-supported claim. The influence of the religious fragmentation of the reformation is still evident in refugee studies today; the targeting of and/or discrimination towards individuals due to personal

⁵¹ *ibid* 289.

⁵² For an account of the concept of asylum in the Muslim world see Suhrke 'Refugees and Asylum in the Muslim World' in S Cohen (ed.) *The Cambridge Survey of World Migration* (Cambridge University Press 1995) 457. Suhrke notes that in Islamic thought the concept of asylum grew out of the hijra, the flight of Muhammad and his followers and focuses, therefore, on the duty of a Muslim to leave a non-Muslim society rather than on the duties of host states.

⁵³ There is also something to be said for the observation of the French representative in the travaux préparatoires that although in practice they may amount to the same thing there is both a difference in meaning and origin of the word asile and refuge, Weis (n 47) 16.

beliefs- or matters of conscience- remain paradigmatic examples of persecution. If the Reformation solidified the notion of religious persecutees as refugees, the French Revolution can be said to have done the same for those persecuted on grounds of their political beliefs. The first French Constitution guaranteed asylum to any foreigner forced to flee his country of origin for 'advancing the cause of liberty.'⁵⁴ Although the victims' experiences varied, in the case of these early refugees, the common element that identified the treatment as persecutory was the public pressure brought to bear on individuals for the sole reason of personal belief.

It could be argued that this remains the vernacular meaning of 'refugee' today, as Zolberg notes, those escaping religious or political persecution are still seen as 'classic refugees.'⁵⁵ However, as a legal notion refugee has not always included a formal link between persecution and refugee status. The first legal definitions of refugee were nationality specific; such as those adopted in 1905 to deal with the refugee flows from Armenia and Russia. Nationality specific definitions encompassed any person of the specified nationality outside their country of origin without any further enquiry into the personal experiences of the individual. Thus, membership in the specified group was sufficient to establish refugee status.⁵⁶ Similarly, the first definition

⁵⁴ For further details see Price (n 55) 306-8; Zolberg (n 33) 8-11.

⁵⁵ Zolberg (n 33) 5. The classic French dictionary *Le petit Robert* states that the term 'refugee' was first used in 1573 in the conjunction with the concept of asylum for those fleeing religious persecution. Indeed, the case of the persecuted Huguenot fleeing France is often cited as the first refugee flow and the UNHCR felt the Huguenot experience so closely fitted the idea of refugees that on the tricentennial of the revocation of the Edict of Nantes- which had, officially at least, allowed France's Calvinists to live alongside the Catholic population – they published a remembrance article.

⁵⁶ This method of awarding refugee status '*prima facie* refugee status determination' is still used today, particularly in countries that border refugee producing states, access

in international law, introduced by the League of Nations in 1921, focused on remedying the problem of statelessness rather than individual experiences; the denial of diplomatic protection by the country of origin or nationality was the defining characteristic of inter-war refugees and not persecution.⁵⁷ The emphasis on individuals rather than groups did not return until the post-war period. In the post-Holocaust world, in which the United Nations was established, persecution was, understandably, the “recurrent theme in[...]instruments dealing with refugees.”⁵⁸ Persecution is not only a feature of article 1(2); it is also specifically mentioned in the Article 14 of the Universal Declaration of Human Rights, which classifies “the right to seek and enjoy asylum from persecution”⁵⁹ as a Human Right.

The history of the refugee offers a mixed legacy in terms of the place of persecution within the concept of refugeehood. Whilst Price and Martin’s argument might be persuasive in terms of historical accuracy; it is hard to see why, or how, it follows without further justification that asylum today must be conceived as such. The theoretical appeal of an argument based on the claim ‘it was always so’ is limited. The question is whether there is some

to the vast refugee camps, in for example Jordan and Chad, is allowed on the basis of nationality of the refugee producing country and presence in the neighbouring country without further enquiry, see Albert ‘Prima facie determination of refugee status: An overview and its legal foundations’ (Refugee Studies Centre (University of Oxford) 2010).

⁵⁷ That is not say that denial of citizenship and/or diplomatic protection cannot be forms of persecution but merely that the emphasis was on a factual enquiry as to whether the individual was stateless rather than into any further victimisation suffered. The definition was introduced by the newly formed Office of the High Commissioner for Refugees created to manage refugee flows, largely through the granting of so-called ‘Nansen passports’ to allow refugees to travel and seek protection.

⁵⁸ Grahl-Madsen A, *The Status of Refugees in International Law*, vol One: Refugee Character (A.W Sijthoff 1966)

⁵⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14 (emphasis added).

conceptual reason why persecution should be seen as inescapable feature of refugeehood? Martin, Price and Grahl-Madsen certainly believe so. Moreover this claim is based on a very specific, and restrictive, interpretation of persecution. A key tenet of the traditional notion of refugeehood is that it is conceptually limited by the concept of asylum as a political institution and persecution as a political wrong. According to this view persecution is used to identify refugees from amongst the mass of people on the move because it is an inherently political concept. It is argued, however, that a restrictive concept of 'refugee' does not necessarily follow from stating that persecution is an inescapable feature of refugeehood.

1.4.2 Asylum and Extradition: a Jurisdictional Approach

Following this view, the emphasis on persecution, as Hathaway claims, is not simply a hangover from the Cold War but rather a requirement inherent in the institution of asylum, which operates as "a grant of immunity against wrongfully exercised authority."⁶⁰ Price sees here a link back to the Roman concept of asylum which was reserved for slaves, who were required to demonstrate that their master's treatment justified them being placed beyond his jurisdiction. The legal model of asylum as a political asylum became crystallised as an institution with the rise of the nation-state. Early scholars of international law, such as Grotius, linked the emerging concept of asylum to extradition, which Price identifies as a practice that developed as a counter to the earlier practice of granting sanctuary to common criminals.⁶¹

⁶⁰ Price (n 3 in introduction) 281.

⁶¹ The link between refugee status and extradition is perhaps not surprising when one considers that the laws on refugee status and extradition might both be applicable to one individual. For example where refugee status granted will operate so as to prevent extradition *A-G (Minister of Immigration) v Tamil X and RSAA* [2010] NZ SC 107.

Asylum, in the view of Grotius, was for those who would face persecution rather than prosecution if returned home (and extradition applied if the case were reversed).⁶² Until the twentieth century asylum was used, as Grahl-Madsen notes, almost exclusively to “denote...nonextradition for political offences.”⁶³ Thus, argues Price, building on Grotius’ approach, asylum requires justification to deny the legitimate claim of a state to exercise jurisdiction over their citizen(s) and persecution provides this.⁶⁴ Persecution is used as proof that the state’s claim is illegitimate. As with the Roman master, the claim to jurisdiction over the individual has been forfeited due to wrongful treatment. The mistreated citizen is viewed, as Arendt expressed it, as “stateless in the deep meaning of the term.”⁶⁵ Accordingly, claims Price, in order to constitute persecution the treatment must have been inflicted either “by the state or by an agent acting under the color of state authority.”⁶⁶

This model of asylum, it is claimed, explains why states are not placed under an obligation to provide asylum, but instead are given the right to grant it. The emphasis is on the interaction between the country of origin and the host state, rather than on the individual. The experiences of the individual are

⁶² Grotius, however, also suggested that those states, which transgressed the boundaries of natural law be subject to invasion by other states to restore justice. A view rejected by Wolff and Vattel who, in a foreshadowing of modern international law, advocated non-intervention except in cases of self-defence and asylum as a corollary of the duty of hospitality. This distinction between persecution and prosecution remains key, however, to the determination of refugee status under article 1(2).

⁶³ n 58 11.

⁶⁴ ‘Claim’ is not used here in the active sense (of demanding an entitlement) but is used descriptively to signify jurisdiction over an individual in international law (regardless of whether the state in question actually seeks- or even wishes- the individual in question to be returned).

⁶⁵ Cited in Zolberg et al (n 33)33.

⁶⁶ Price (n 3 in introduction)219 (emphasis added). Price’s aim is to “recover a conception of asylum as a definitively political practice” 245.

relevant only in so far as they justify the denial by one state of the claims of another state to that individual. This analysis is consistent with the traditional view of international law as inter-state law with states as the only actors on the international stage, reflected, for example, in the fact that (except for certain limited exceptions) states are the primary entities with legal personality in the international sphere.⁶⁷ Within this understanding of international law, the states are the constitutive elements of the international political and legal system. Individuals are, by contrast, the constitutive elements of the domestic political and legal systems. Individuals are only present in the international sphere as citizens of one (or perhaps more) of the states.⁶⁸

Furthermore, within the statist analysis of international law the key principles, upon which the international legal order rests, are said to be the right to self-determination of peoples and the norm of non-intervention. Asylum is conceived as 'mitigation of the principle of sovereignty'⁶⁹ and "the reverse

⁶⁷ It is for this reason that the focus of the Convention is the obligations of the (potential) host state and refugees bring claims in the domestic context, from within the legal system of the host state, not in the international arena, see Weis (n 47) 480. It is interesting to note that initially many European countries included the newly formed UNHCR in its determination process- France, for example, had a three person panel for hearing appeals on refugee status determination, one member of whom was a UNHCR representative. Similarly refugee status determination in Italy was through a joint process involving the Italian Government and the UNHCR equally. However, an admissions clause was deliberately left out of the operative part of the Convention and instead the final committee made a recommendation that Governments 'continue to receive refugees on their territory' and acted in 'the true spirit of international co-operation so these refugees may find asylum' (U.N Doc A./CONF.2/108 cited *ibid* 9).

⁶⁸ That this is the traditional model of international law is not disputed by critics of the political concept of asylum, such as Hathaway and Goodwin-Gill. This explains, they argue, the fact that (re-)emergence of the term 'refugee' coincided with the rise of the nation-state and the drive to produce an international legal framework for refugee protection was contemporaneous with the collapse of many of these new states in the inter-war period.

⁶⁹ H Bull *The Anarchical Society: A Study of Order in World Politics* (Macmillan 1977) 13.

side of the coin to tolerance.”⁷⁰ If plurality (which self-determination necessarily produces) is to be preserved, non-intervention is necessary, it is claimed, to provide assurance that if the potential extremes of plurality are realised, those who suffer can find refuge elsewhere.

Yet even if one accepts this view of international law- and it is certainly the view cited by many of the opponents of a more inclusive refugee regime - does this necessarily entail a purely political model of persecution? What is the justification for excluding the victims of starvation, civil war or natural disasters (especially where the government response could be said to be inadequate) if asylum is an institution designed to protect ‘victims of sovereignty.’ Could it not be argued that all those who suffer because of where they are born- and manage to leave- are refugees? The key factor is not, according to Martin, the need of the particular individual but the need for foreign relocation.⁷¹ In essence, the argument returns to question of how we define *forced* migration and argues that whilst a “wide range” of alternative solutions⁷² is available to deal with the needs of the general population, even in a failed state, asylum is the “only form of effective relief”⁷³ for the politically engaged or socially marginalised.

⁷⁰ Goodwin-Gill *International law and the movement of persons between states* (Oxford, 1978) 138.

⁷¹ Martin, 'Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternative to Refugee Interdiction' (1993) 26 *Cornell International Law Journal* 753 793.

⁷² Price (n 4) 309. This is built on the idea of ‘distinctive need’ put forward by Michael Walzer in ‘Distribution of Membership’ in Brown, Shue (ed.) *Boundaries: National Autonomy and its Limits* (Rowman and Littlefield 1981).

⁷³ Price *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press 2009) 309.

This would seem to be a practical, rather than theoretical, justification and, without entering into a discussion on the availability or effectiveness of these alternative solutions here, it can be observed that *if* unique need for foreign relocation is the only justification for a political model of asylum; then its persuasiveness would be undermined if the group in need of foreign relocation could be shown to include others beyond those included in the scope of protection, namely the politically engaged or socially marginalised. If the 'wide range' of alternative solutions for others in need were to be unavailable; then presumably asylum would have to be stretched to include all of those in need who have fled their country of origin or nationality. Alienage would be the last remaining distinction between those in need *in situ* and refugees. Yet this is *not* what Price, Martin *et al.* argue; to repeat, the claim is that asylum is *inherently* political and refugeehood only includes the persecution, and persecution can only refer to the politically active or those socially marginalised by government (in)action. If this claim is to be sustained then it must be explained why only these groups of persons are entitled to be granted foreign relocation and why the scope of protection does not encompass all cross-border migrants who are in need.

It is a key assumption of the political concept of asylum that states have an obligation to protect their own citizens and that refugees are created when- in exceptional circumstances- this obligation is not fulfilled.⁷⁴ Thus, when

⁷⁴ Warner argues that the current premise upon which international refugee law rests is that if states fulfilled their obligation (to their own citizens) there would be no refugees, that refugees are an exception to the norm, thus "the norms dealing with refugees are extensions of the normal obligations of states in extraordinary situations: they are not extraordinary rules" Warner 'The Refugee and State Protection' in Nicholson and Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 137.

defining refugeehood the search is for indicators that can be relied on to demonstrate that the individual does not stand in the usual position of citizen in relation to their home state rather than simply signs of more general need. As noted already, the link between persecution and refugeehood rests on the assumption that persecution is proof that migration was the only viable option; persecution, it is argued by the political model, is selected not only due to the serious nature of the harm feared or inflicted⁷⁵ but also because of its significance as evidence of a political wrong. The construction of a state's duties to citizens will be undertaken more comprehensively in chapter four. At present, however, it will be considered in relation solely to the contours of the definition of persecution.

1.5 The Link between Persecution and Lack of National Protection

If one accepts this model of refugeehood, as the result of a broken bond between citizen and state, this has considerable impact on the link between persecution and lack of national protection. The fourth requirement under article 1(2) that the individual be 'unable or unwilling to avail himself of national protection'. First, it suggests that this ought not to be separate

⁷⁵ Although the qualitative dimension to persecution has largely been overlooked thus far, it should be noted that there is general consensus that in order to constitute persecution the act would need to amount to (the threat of) a serious violation of a core human right. In relation to the Geneva Convention it is argued that this requirement can be found within the Convention text. Article 33, which contains the principle of non-refoulement, stipulates that return of an individual to a country where his or her life or freedom would be threatened is prohibited, suggesting any conduct threatening life or liberty unequivocally would amount to persecution under the Convention. Further to that the fact that Article 1(2) does not specify that the treatment must present a threat to life or freedom suggests that persecution may have a broader qualitative meaning in the definitional article than in article 33. In EU Member States, this view is reinforced by Article 9 (1) of the Qualification Directive, which states that persecution entails acts "sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights." Some link to human rights violations is, however, uncontested and will be explored in greater detail later.

enquiry and second, the need arises for an explanation of cases where the courts found a lack of national protection but deemed the persecution criterion unfulfilled.⁷⁶

The political model of asylum asserts that persecution necessarily denotes a lack of national protection, for it is the state- the body assigned under the state system and international law to protect its citizens- subjecting (directly or indirectly) the victim to harm. Although the political model of asylum is often viewed as restrictive in the case of national protection, it actually serves to lessen the burden on the individual asylum seeker by viewing persecution as demonstrative of a lack of national protection. It renders satisfaction of the persecution criterion tantamount to a statement that the claimant is 'unable or unwilling to avail himself of national protection' without any further proof being required.

This is a significant difference to the approach adopted across many jurisdictions, Canada, the United States, Germany and the United Kingdom for example, where lack of national protection is treated as a separate, and subsequent, enquiry to the persecution criterion. This view can be supported semantically by article 1(2). A refugee is a person who demonstrates "a well-founded fear of persecution" *and* is "unable, or owing to such fear, unwilling, to avail himself of the protection" of his country of origin or nationality. As a matter of construction, the definition seems to require enquiry into whether or not the claimant has been-or has good reason to fear being-persecuted

⁷⁶ It could, of course, merely be argued by those advocating the political model of asylum that these cases were wrongly decided and based on a misunderstanding of article 1(2). They are far from isolated examples, however, for most jurisdictions conduct a separate enquiry into the availability of national protection.

separately from the enquiry as to whether national protection was available. However, if two separate enquiries are conducted. First into whether the harm suffered amounts to persecution *and* subsequently as to whether national protection is available it can result in the denial of refugee status to an individual whom the court recognises as satisfying the persecution criterion (a result insupportable under the political model of asylum).

At the national protection stage of the enquiry the refugee's own experiences seem to have little place. Instead the focus is on the current situation 'on the ground' in the country of origin. The question asked is 'is there some mechanism of the state that could protect the claimant?' This could be anything from a functioning police force to a relevant statute. In *Horvath*⁷⁷ the applicant's claim failed because Slovakia was considered by the House of Lords to have a functioning police force and court system to deal with those targeting the Roma minority. In reaching the decision Lord Lloyd rejected Lord Hoffmann's approach in *ex parte Shah*⁷⁸, which stated, in line with the political model of asylum, 'Persecution [for a Convention reason] = serious harm + the failure of state protection.' Under this reading of article 1(2) Mr Horvath would have been awarded refugee status. However, the court adopted the formula 'Persecution [for a Convention Reason] + Failure of State Protection = Refugee Status.' Thus, Mr Horvath's claim failed notwithstanding the 'successful' establishment of harm constituting persecution.

⁷⁷ *Horvath* (n 11).

⁷⁸ *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 WLR 1025.

Alternatively, an applicant might state that they are *unwilling* to avail themselves of national protection. To succeed here they must show that this unwillingness is “*by reason of that fear*” of persecution. Logically, a fear of persecution must have already been demonstrated and ‘*that fear*’ clearly requires the claimant to link unwillingness to avail herself of national protection due to fear of the *specific* harm already established as constituting persecution. Instinctively, it seems a claimant-friendly addition to the definition; it could be envisaged as operating in situations where national protection is available (now) but due to the persecution the refugee suffered a deep mistrust of the authorities or a natural fear of returning to ‘the scene of the crime’ is present. In practice, it is virtually impossible to succeed under this limb; it could even be argued that the inclusion of ‘unwillingness’ was a meaningless addition to the definition. ‘Unwillingness’ (when contrasted with ‘unavailable’) implies that national protection does exist and if the requirements are read disjunctively and interpreted objectively then it is impossible to claim a *well-founded* fear of persecution if national protection is deemed by the national adjudicator to be present.

The distinction here is between unwillingness *due* to fear of persecution and ‘mere’ unwillingness (i.e. unwillingness due to a desire to remain in the host country). The argument goes. If national protection exists then an individual can have not *objectively* have anything to fear by returning home.⁷⁹ In *Dularie*

⁷⁹ The application of an objective standard fits squarely within the interpretational model that views persecution as a political wrong for it suggests that the behaviour of the home state is being subjected to scrutiny against the backdrop of a model of a state ought to behave. This is not the forum to engage in discussion of whether objectivity is ever achievable. It suffices here to observe that, at least in the arena of judgment of political system, it is difficult to envisage a truly objective standard; one must be applying a concept of political legitimacy against which the actions of the

*Boodlal v Canada*⁸⁰ the claim for asylum in Canada of a Trinidadian woman fleeing a violent husband was rejected on the grounds that Trinidad had recently passed a statute on domestic abuse, which the court interpreted as evidence of national protection for battered women. Mrs Boodlal's argument that even if Trinidad now had sufficient legal protection for battered women she had a genuine fear of returning home lest she suffer the treatment (accepted by the court as persecution) was dismissed. Mrs Boodlal's concurrent claim that a statute on family violence did not constitute available national protection also failed despite her husband's staggering eleven convictions for assault or issuing death threats against his wife during their residence in Canada, a state with established domestic abuse laws. The disparity between *available* and *effective* national protection was not even addressed.

It would be of considerable significance, therefore, to individual claimants if persecution were to be viewed as demonstrative of a lack of national protection. As noted above, if one takes persecution to be demonstrative of a lack of national protection asylum claims, such as Mr Horvath's or Mrs Boodlal's, that are currently dismissed may well succeed.⁸¹ In addition, it would suggest the need to reassess cases in which applications were denied

state are being judged. This observation links, as well, to arguments put forward here in subsequent sections and will be discussed in greater detail then.

⁸⁰ (Unreported) cited in Macklin 'Refugee Women and the Imperative of Categories' 17 Human Rights Quarterly 213 215.

⁸¹ This is not to say that demonstrating past persecution on a Convention ground would necessarily be sufficient to establish refugee status, the persecution would have to be reasonably contemporaneous with the asylum claim as persecution is, of course, demonstrative of a lack of national protection at the time of persecution and a change of government, for example, could defeat a claim. Here, however, the claim would most likely fail on the grounds that the applicant no longer had a 'well-founded fear' of persecution.

on the grounds that, although the treatment suffered amounted to persecution, the option of 'internal flight' was deemed to be available.⁸² To repeat, if persecution is viewed as demonstrative of a lack of national protection then these cases would require new analysis, because, the findings of persecution but denial on grounds of available national protection would be unsustainable within the interpretational explanation given; one or other of the findings- either that treatment amounted to persecution or that national protection was available must have been incorrect if the former is demonstrative of the latter. The 'unwillingness' option would be equally meaningless under this reading as under the current interpretation. There cannot be any need to demonstrate an unwillingness to avail themselves of national protection if national protection cannot be said to be available. Further, as will be demonstrated below, persecution as demonstrative of a lack of national protection is not merely one interpretation of the political model of asylum but rather an inherent feature of this model.

If persecution is demonstrative of lack of national protection, is it the only manifestation or merely one amongst many, selected for priority in awarding refugee status? If it is only one manifestation of lack of national protection further justification for the exclusion of other manifestations would be necessary, and, it is argued, difficult to maintain as the basis of the award of refugee status in the political model of asylum is the assumption that persecution is demonstrative of lack of national protection. On this argument

⁸² See, for example, *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920. For indepth discussion of when internal relocation is considered suitable see *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5. This case set up what is referred to as the 'unduly harsh' test requiring an individual to show it would be unduly harsh for them to be forced to relocate elsewhere in their country of origin.

protection must be extended in all instances, where there can be said to be a lack of national protection for an individual. It is hard, therefore, to envisage a successful argument for excluding other manifestations of a lack of national protection. This suggests that the relevance of the state-/non-state agent distinction is minimal.⁸³ As will be posited in chapter four, the public/private dichotomy would be another distinction that would be difficult to maintain whilst advocating a political model of asylum and a concept of refugeehood based on the state-citizen bond. A lack of national protection resulting in harm must necessarily be persecutory if, as Shacknove suggests, persecution is seen as *the* manifestation of a broken bond between state and citizen and, therefore, as a political wrong.⁸⁴

An articulated concept of legitimacy ought to be the anchor point to the determination of refugee status. It is this step that has been largely overlooked in discussions on refugeehood and persecution. The problem is not, necessarily, with the use of persecution as proof that migration was forced but with a lack of discussion on the content of the concept of persecution. In order for persecution to operate as evidence of forced migration, “we need to make some assumptions about how people make decisions and...assign a value to *p* [persecution].” As argued above, the ‘meaningful choice’ model provides a plausible basis for voluntary/involuntary distinction but what remains

⁸³ A76491421 (unpublished) US BIA Apr. 25 2000 cited Anker 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard Human Rights Journal 134 149.

⁸⁴ A fusion of persecution and state protection is not an argument that only state persecution is covered by the Refugee Convention. Chapter four considers the notion of collective violence in some detail. This concept, it is argued, explains why a practical fusion of persecution and state protection criteria does not exclude non-state actors of persecution.

unarticulated, and therefore unresolved, in refugee law is what is to be used to ascribe value to persecution.

Moore and Shellman offer one model of forced migration which could be applicable to refugees in particular, when conceptualising persecution we “[a]ssume that people are (1) purposive; (2) value their liberty, physical person, and life and (3) develop beliefs about the actors in society with respect to those values.”⁸⁵ The first assumption is implicit in argument relating to forced migration and forms the basis of the rejection of the lack of agency model of choice and supports the ‘meaningful choice’ model by suggesting that as people are purposive they can, and do, make decisions; the first task of refugee law is, then, to identify when this decision is forced i.e. there is a lack of alternative options. The second point asks us to identify things we believe people (in general) value. The third assumption relates again to human agency, it assumes that people will decide to leave (or at least see leaving as a viable option) if something they value is threatened, and will monitor threats from other actors in society to these values (and might, therefore, flee preemptively). Moore and Shellman argue, “as *p* [persecution] rises from 0 to 1...(for most people) there is some threshold value that will lead them to prefer leaving to staying”⁸⁶ and it is at that point any subsequent movement can be described as involuntary. If the movement is cross-border, the person is then, a refugee.

To return to the second assumption, if persecution can be defined as a threat to anything we presume people value, such as, liberty, physical person and

⁸⁵ Moore and Shellman (n 45) 726

⁸⁶ *ibid.*

life, our definition of persecution is dependent on assumptions as to what people value (and based on what we value ourselves).⁸⁷ Moore and Shellman make their assumptions explicit, which is exactly what most models of refugeehood fail to do. It could be argued that all models of refugeehood follow this pattern. First they all assume people are capable of making decisions; if no one could decide to leave all migration would be forced. Forced migration must be, therefore, when the decision is forced due to lack of alternative options. Secondly, some assumptions must be made as to what people value in order to assess when people can be said to have a lack of alternative options. Thirdly, we must assume that people act on threats to these values, thereby becoming refugees (or Internally Displaced Persons). The determination of what people value is, therefore, key to identifying refugees precisely because, as Grahl-Madsen argues, refugeehood signifies “those who are threatened with sanctions for struggling to protect their human rights.”⁸⁸

Refugee law can, therefore, only be explained in reference to a doctrine of rights to provide a framework for determining whether an act can be deemed illegitimate violence.⁸⁹ Normatively the link between legitimacy and human rights is strong, as Bilder notes, “to assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high

⁸⁷ Discussion of value and value-judgments is taken up in chapter three, in particular, p18-9.

⁸⁸ Grahl-Madsen (n 58) 11.

⁸⁹ This refers to human rights rather than citizens’ rights. Otherwise, following Weber’s definition of a state, these rights would be meaningless just when the would-be citizen needs them the most i.e. the moment power was wielded illegitimately and they ceased to live in a state and could, therefore, no longer claim to be citizens of anywhere. ‘Citizen’ is used here in a non-legal sense to (admittedly incorrectly) signify all those living in the given territory where power is being wielded.

order of legitimacy.”⁹⁰ However, asserting that refugee law must begin with a reference to a doctrine of rights immediately raises a number of complex theoretical questions. When one begins to discuss human rights one is immediately confronted with a series of sub-questions. What do we mean by human rights? Which rights are human rights? What are they rights to?⁹¹ These are the questions addressed in chapters three, four and five.

By applying the involuntary/voluntary dichotomy coupled with a broader understanding of persecution, tied to evolving notions of political legitimacy, article 1(2) could encompass a broader understanding of refugeehood and persecution than the traditional paradigmatic examples of the refugee. To return to the example of the individual leaving a country where there is widespread starvation discussed in relation to forced migration; not only would the absence of viable alternative beyond migration or ‘tragic choices’ allow the individual to satisfy the requirement of involuntary migration but also it could be argued lack of food could represent a human rights violation, and a political wrong, thereby fulfilling the persecution criterion, arguments taken up in the remainder of the thesis.

The key to explaining and justifying restrictive or expansive concepts of refugeehood and persecution lies, therefore, in the model of human rights used to give content to these concepts. Whether one views rights as

⁹⁰ ‘Rethinking International Human Rights: Some Basic Questions’ 1969 *Wisconsin Law Review* 171, 174

⁹¹ See for example M Nussbaum, ‘Capabilities and Human Rights’ (1997) 66 *Fordham Law Review* 273, Gerwith *The Community of Rights* (Chicago University Press 1996), Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press 2003).

entitlements, interests that require protection or “artefacts of state action”⁹² will not only have a profound impact on the interpretation of ‘refugee’ favoured but will, or ought to, provide the starting point for all theorizing about the concept of refugeehood. It is due to confusion over these core theoretical issues that uncertainty in regards to the concept of the refugee remains unresolved. Without an agreed frame of reference, in many cases commentators, adjudicators and asylum advocates are simply talking past each other. The starting point for determining ‘who is a refugee’ must be, then, a discussion on applicable human rights doctrines and concepts of political legitimacy, which will be undertaken in subsequent chapters.

1.6 Conclusions

This chapter has addressed the underpinnings of the concept of refugee in international law. It has been accepted that there is a need to maintain *some* distinction between the terms ‘refugee’ and ‘migrant’ and that the persecution criterion may be seen as serving as the boundary between the terms. What has been disputed, however, is the impact of these claims. It has been argued that it possible to maintain a distinction between ‘refugee’ and ‘migrant’ as based on the persecution criterion without producing an inevitably restrictive concept of refugeehood. The borders of the term ‘refugee’ in international law depend not on a reiteration of traditional concepts of political legitimacy based on sovereignty but on an examination of the demands evolving

⁹² This phrase is borrowed from Nussbaum *ibid* 273. These are merely a few ways of theorizing about human rights: if, for example, one adopted Robert Nozick’s view (in *Anarchy, State and Utopia* (Basic Books 1974) that rights provide moral constraints on state action the framework for assessing illegitimate action is clear; any action transgressing the boundaries is illegitimate. Refugee Law could then be seen as transforming a moral right (to have these constraints on state action respected) into a legal right (to be afforded protection when these constraints are ignored).

concepts of human rights place on the notions of political legitimacy and sovereignty. The scope of international protection, it is argued, is dynamic rather than static and, as such, capable of shifting along with these notions without dissolving the boundary between 'refugee' and 'migrant' entirely.

Chapter 2 RECONSTRUCTING REFUGEE LAW: BASIC PROPOSITIONS

Chapter one sought to set out some of the historical and conceptual background of international refugee law. This chapter will set out an analytical and normative framework for interpreting international refugee law drawing on the theories of Robert Alexy. Alexy's theories are a useful lens through which to reconsider refugee law and provide a good basis for reconstructing our intuitions about refugee law. Alexy considers critical issues that also lie at the heart of refugee law, namely the connection between law and morality and conflicts between fundamental rights. The latter issue is raised explicitly in many refugee cases and the former is implicitly raised when considering the underpinnings of refugee law. Alexy's theories point towards a clearer understanding of many of the unexpressed assumptions of refugee law and the impact of these understandings on interpretations of existing refugee law. In particular, Alexy's theories offer us a guide for addressing, and assessing, hard cases in refugee law¹ such as those that appear to pose challenges to the conceptual foundations of refugee law. Alexy's theories are useful to refugee law, therefore, in helping to demonstrate how critiques of refugee law decisions may be based on practical and legal reasoning grounds and not only on moral or policy differences. It will be demonstrated that often criticisms, or support, of refugee law decisions that are couched in policy terms are capable, in fact, of being

¹ As Menéndez argues "Alexy's theory does not predetermine the answer to be given to those cases, but it brings analytical clarity and precision in the reasoning of hard cases, and thus, renders it possible to replicate the train of reasoning of judges; consequently, it increases the extent to which decisions can be criticised inter-subjectively" *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory - European and Theoretical Perspectives* (Arena 2004) 12.

assessed- and reinterpreted- in legal terms. This allows us to reconstruct refugee law such that we can begin to identify when decisions are false in that the legal reasoning behind the decision is flawed. A criticism of a decision on refugee status based on flawed legal reasoning, it is argued, is given a different status within legal systems than criticism based on differing interpretations of policy aims. Importantly, a legally defective decision can be challenged within the legal system.

This chapter will provide the foundation for the remainder of the thesis by using Alexy's reconstruction of basic rights as principles and law as having a necessary connection to morality (the connection thesis) as the basis for a more sophisticated understanding of refugee law. This chapter will begin by setting out Alexy's principles theory. In elucidating the key characteristics of principles, Alexy's model provides a clearer understanding not only of the nature of principles but also of the analytical role of principles in refugee law. In particular, the argument for viewing fundamental rights as principles put forward by Alexy will be discussed. The chapter will move on to discuss the normative role of principles in refugee law through discussing the connection thesis in conjunction with what Alexy terms 'law's claims to correctness.' Finally, it will begin to tease out the background principles to refugee law, which will reveal that human rights norms are already contained *within* refugee law and that this moves the site of criticism away from the Refugee Convention and places it instead on the governments and adjudicators of potential host states. Alexy provides a model for reconstructing the interpretation of international refugee law in domestic courts in a manner compatible with the background principles of international law. These

background principles and this claim will then be fleshed out in the remainder of the thesis.

2.1 Principles Theory: An Analytical Framework for Refugee Law

2.1.1 Robert Alexy's Principle Theory

Alexy's theory begins with the claim that every norm must be either a rule or a principle.² For the purpose of this thesis, the exclusionary thesis will not be explored further; what is salient here is Alexy's characterisation of principles. Principles are contrasted with rules, which are portrayed as definitive commands that must be obeyed exactly. The nature of rules as definitive commands must result in either complete adherence to the rule or non-compliance (i.e. breaking of the rule). It is not possible to 'partially obey' a rule. If one is faced with contradictory or incompatible rules (two legal 'oughts'). This 'conflict of rules' can be resolved only by creating (and applying) an exception, or declaring at least one of the rules invalid. Alexy gives the example of a school regulation prohibiting students leaving class before the bell.³ A school is most likely also to have a rule that upon hearing the fire alarm, students must leave the building immediately. This conflict of rules is resolved by introducing an exception to the rule that one may not leave class before the bell except in the event of a fire. As neither rule has been declared invalid both continue to operate.

² I will not address the theorem of exclusive identification, here it suffices that we consider human rights norms as principles in refugee status determination cases though they need not be seen exclusively as such. Why they ought to be seen as such is discussed in greater detail in later sections.

³ Alexy 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 160 161.

Alexy depicts circumstances in which one is faced with contradictory rules are described as 'conflicts' whereas situations in which an individual encounters incompatible principles are characterised as 'collisions.' In engaging with Klaus Guenther's critique of principle theory⁴, Alexy sets out an example of a collision of principles, asking us to imagine a scenario where an individual (*a*) has promised to attend the party of a friend but, at the last minute, hears that another friend has been taken ill and is in need of assistance. This results in a collision of two principles, namely, the principle that 'promises must be kept', and, the principle that 'friends in need must be helped.'⁵ Alexy posits that without a distinction between rules and principles, the collision of principles has three potential solutions. If one views principles as norms like any other norms, including rules, three solutions present themselves:

- 1) The 'tragic model'- here *a* is subject to both obligations although she cannot fulfil them with the result that no matter what course of action *a* decides to take she violates a norm and does wrong.

This would fail to provide any guide for behaviour as it focuses solely on the problem created but offers no solution.

- 2) Alternatively, one can decide that in the event of a collision of principles *neither* principle applies and *a* is, therefore, not under any obligation to either friend.

This, as Alexy observes, does not make any allowance for different circumstances in which the collision of principles occur and does not distinguish, therefore, between different types of obligations. In this example, no recognition is given that the promise is only a promise to attend a party and the other obligation is to help a friend in need.

⁴ See, K Günther *Der Sinn für Angemessenheit* (Suhrkamp 1988).

⁵ Alexy 'Justification and Application of Norms' (1993) 6 *Ratio Juris* 157.

- 3) The collision can be solved by determining conditional priority of one principle over another in the specific circumstances through the application of the principle of proportionality.⁶

In this example, then, the balancing of the colliding principles would result in conditional priority being given to the obligation to help the friend in need over the principle that one ought to keep promises as the promise in this case is relatively insignificant to the need of the other friend.

In the third solution, Alexy identifies the very nature of principles and the basis of principle theory. The third solution allows for recognition of circumstances and different types of obligations. The alternative solutions presented above allow both principles to remain valid whilst presenting a solution to the collision and is in contrast to the 'all or nothing' nature of rules. The principle of proportionality, mentioned above, as the structure of weighing and balancing the sub-principles of appropriateness, necessity and proportionality in the narrow sense, is used to determine which principle is to be given conditional priority. This reveals two of the features of principles; incompatible principles result in collisions rather than conflicts (which is the case with rules) and a collision of principles is resolved through balancing (rather than declaring one principle invalid or creating an exception as with rules).

If both principles remain valid it follows that neither principle is to be entirely dismissed, hence application of the principle of proportionality to determine

⁶ See Alexy (n 3) for discussion of some objections to principle theory, for example, the argument that 'rule' and 'principle' just refer to different uses of norms (see in particular 230 – 297).

conditional priority of one principle over the other. The application of the principle of proportionality requires that each principle be weighed up against the other. Balancing, of course, reminds one of scales. If each principle is placed on the scales; neither is entirely rejected but, to resolve the collision, balancing of reasons for one principle or the other will continue until one principle outweighs the other (to a greater or lesser degree). Although in the example above, the promise to attend a party could easily be classified as trivial in comparison to the need of a friend, one could think of an example where the promise, which would be broken to meet the need of the ill friend, is far from trivial. For example, it may have been a promise to collect a friend's child from school, which if broken would leave the child alone. One might still decide to give conditional priority to the ill friend in need, if the situation were an emergency, but this decision would not be taken as easily as the decision to skip the party. It would also require that *some* action be taken to ensure the safety of the child.

It seems difficult to accept that a principle can be dismissed entirely if it has been only marginally outweighed. This leaves a situation little better than option one or two above. Principle theory argues that the principle that has been outweighed ought to be realised to the extent possible whilst retaining conditional priority of the other principle. For example; one might render emergency assistance to the ill friend and then rush to pick up the child or one might phone another friend and ask for assistance. This follows the claim that principles are to be realised to the greatest degree possible within the context so colliding principles may *both* be realised (although, of course, one to a greater and the other to a lesser degree). This is quite a different scenario to a

clash of rules where, if no exception exists or can be created, one rule is declared invalid and ignored entirely. This is why Alexy characterises principles as optimisation commands or goals to strive towards; although the principle may not be entirely realised it ought to be achieved to the extent possible given the actual and legal possibilities.

Alexy depicts principles as ‘optimisation commands’ to which the meta-principle of proportionality, defined as the structure of weighing and balancing the sub-principles of appropriateness, necessity and proportionality in the narrow sense, applies. Principles are “norms commanding that something be realised to the highest degree that is factually and legally possible”⁷ or, goals to strive towards.⁸ There is a duty to optimise the normative impact of every relevant principle.

When one examines the nature of a principle viewed as an optimisation command, two inter-connected elements of a principle are revealed. The first contains the characteristics of a rule, the second retains the nature of the principle (thus distinguishing principles from rules, which contain only the first part). The first part of the principle is a *definitive obligation* to realise a principle to the highest degree and in this sense, principles have the structure

⁷ *ibid.*

⁸ Dworkin further distinguishes principles and policies, arguing that principles are not goals to be reached in the sense of striving to improvement in the community but are to be seen rather as “standard[s]...to be observed....because it is a requirement of justice or fairness” (Dworkin *Justice in Robes* (Harvard University Press 2006) 22-3). Dworkin accepts that this distinction is often blurred and, at least in the sphere of human rights, it seems impossible to maintain a distinction between policies and principle. It is, also, a particularly unhelpful distinction in terms of refugee rights as it would require a serious debate over whether things such as immigration control were ‘merely’ policies or were in fact principles. Here I argue, in line with Alexy, that human rights norms are principles although as Sen notes, they may motivate policy ‘Human Rights and the Limits of Law’ (2006) 27 *Cardozo Law Review* 2913.

of rules in that failure to realise the principle to the highest degree possible represents a broken rule. These are what Alexy refers to as ‘commands to be optimised.’ Although principles might not be fully realised they are still definitive commands to be fulfilled by optimisation- or achieved- to the greatest extent possible. The second part is the content of the principle, whatever is to be optimised, to return to the original example, this might be the principle that promises must be kept or friends in need must be helped. The principle is, then, the ideal ‘ought’ (to be optimised) and the rule is that this principle must be optimised (the optimisation command).⁹ Optimisation is, in essence, the overall purpose of balancing and this duty to optimise has the character of a rule (and not a principle).

2.1.2 Fundamental Rights as Principles

Principles theory is of use in international refugee law primarily as Alexy’s asserts that fundamental rights have first and foremost the character of principles rather than rules.¹⁰ It is posited here that this observation applies not only to constitutional rights but also to international human rights law, especially when used in national courts. Fundamental rights are necessarily asserted by a claim to refugee status as, as set out in chapter one, the persecution criterion requires the actual or feared violation of a human right. Principles theory tells us then that fundamental rights raised in refugee law are subject to balancing *and* that this balancing must be undertaken in reference to criteria to determine the weight given to each principle.

⁹ See Alexy (n 3) 300-302 for discussion.

¹⁰ *Theory of Constitutional Rights* (trans. Julian Rivers 2002 Oxford University Press) 55 [TCR]. Fundamental rights might be seen as “positive expression of the most basic principles of practical morality” Menéndez (n 1) 17.

It has been claimed that fundamental rights receive better protection when viewed in the form of a rule than in the form of a principle. This misunderstands Alexy's assertion. Alexy's claim is that fundamental rights are *by their nature* principles. This does not prevent formalisation of a principle into a legal rule but the right would retain the features of principles also.¹¹ For example, the first article of the German Basic Law might be said to have the characteristic of a rule. It states 'human dignity is inviolable', thus any act violating human dignity is unconstitutional. It is, however, also a violation of the principle of human dignity that underpins that rule. It is not only a violation of article 1 of the German Basic Law but also a violation of a basic right. The fundamental right retains the structure of a principle even when formalised.¹² Fundamental rights, such as human dignity, also provide background standards against which interpretations of other laws are made and measured. As such, "fundamental rights norms constitute the positive expression of the most basic principles of practical morality."¹³ Fundamental rights as principles provide, therefore, the building blocks of the legal system due to what Alexy terms their 'radiating force'¹⁴ as other legal norms in the legal system are (re)interpreted in line with basic fundamental principles expressed, for example, in a constitution. In Dworkian terms, principles here set limits on the discretion of judges such that the absence of a rule limiting discretion does not mean that the decision is not controlled by any

¹¹ TCR (n 11) 80. Fundamental rights transposed into national constitutional law contain both a constitutional rule and a principle that can be used as a guide for interpretation of other principles also. For the purposes of clarity, given the number of Alexy's works being referenced shortened titles will be used as well as pinpointed references.

¹² Thus the German Constitutional Court refers to "the principles [...] expressed by constitutional rights" (BVerfGE 81, 242 [254] *Handelsvertreter*, emphasis added).

¹³ (n 1) 17.

¹⁴ TCR (n 11) 60.

standards.¹⁵ Principles, including or indeed primarily fundamental rights, provide background standards for interpretation of laws.

It has been claimed that some fundamental rights cannot be accurately described as principles as they are exempt from balancing. For example, the prohibition on torture is described as 'absolute' which would preclude torture from balancing exercises. Indeed Alexy is not arguing that these rights known as 'absolute rights' are capable of being lawfully infringed but instead is claiming that they take precedence over other principles only according to "a large set of conditions of precedence...together with a strong degree of certainty that they are satisfied it takes precedence over other competing principles."¹⁶ It is better to see these rights as containing balancing in the characterisation of the right rather than as absolute in the sense of rules. The right to be free from torture, for example, contains inherently, in its characterisation, greater weight than any other principle that might be raised in opposition.¹⁷

In this sense core human rights (basic human rights and the core of other, more marginal rights) become absolute as the balancing has already taken place, rendering them of greater weight than other rights. These principles then take on the character of a rule as "precedence at the level of principle [can result in] a breach at the level of rule."¹⁸ The content of the rule, that is when which actions can be said to constitute a breach, is determined by

¹⁵ (n 16 in introduction) 32.

¹⁶ TCR (n 10) 63.

¹⁷ The discussion here involves abstract weight rather than concrete weight. Concrete concerns the disagreements about the correct solution of individual cases not general propositions about the weight of particular principles, *ibid* 81.

¹⁸ *ibid* 64.

“preference relation between [the core significance of the right] and other competing principles.”¹⁹ Thus, the rule is breached each time the ‘wrong’ principle (that is a principle that does not have the greater weight) is given precedence. In terms of fundamental rights the argument is that the principle at stake, for example, human dignity contains, in its characterisation, greater weight than competing principles in certain conditions determined by the content of the right to human dignity thus transforming the principle into a rule whenever the conditions are satisfied “conditional statements of preference give rise via the Law of Competing Principles to rules which require the consequences of the principle taking precedence.” Such a principle can only be outweighed then²⁰ when the conditions are such that the importance of satisfying the other competing principle is greater. With some fundamental rights, such as right to be free from torture, the conclusion has been reached that we can, at present at the very least, not conceive of conditions in which the importance of a competing principle would be greater than the importance of the right to be free from torture.

In addressing the concerns of those who argue fundamental rights cannot be principles, as expressed above, we have strayed from ‘pure’ principles theory. We are now considering evaluative terms such as ‘importance’. As Alexy notes, when we are discussing ‘importance’ of a principle “the question is not how important somebody thinks [the competing principles] are but how important they *actually* are.”²¹ This is because Alexy’s principles theory is not meant merely as a decision-taking model of balancing, although it certainly

¹⁹ *ibid.*

²⁰ According to the law of competing principles which “sets the conditions under which one principle takes precedence over another” *ibid* 69.

²¹ TCR (n 10) 103.

provides this, but is also a justification model.²² In assigning weight to each principle, as required by the balancing exercise, we move from the decision-taking model to the justification model for Alexy requires that this weight is assigned 'rationally', in other words is justified, and this is where value judgments come into the process.

2.2 A Choice of Normative Principles: Law's Claim to Correctness

Although principle theory, as Alexy notes in response to Sieckmann²³, says nothing about the content or validity of the principle *per se* but merely explains how principles are to be used it is not a facet of positivist law. The criticism of the principles theory, that it if everything is subject to balancing nothing can be persuasively criticised²⁴, then, not valid in relation to Alexy's formulation of principles theory. To claim otherwise misses a key element of Alexy's overall theory of law, namely the connection thesis: that all law is necessarily connected to morality. In addition, as balancing is subject to the meta-principle of proportionality, although silent on the weight of colliding principles *per se*, it does require that the 'Law of Balancing' is satisfied. The law of balancing states:

²² For the distinction see *ibid* 100-1.

²³ Alexy (n 3) 294.

²⁴ See, for example, Poscher *Grundrechte als Abwehrrechte. Reflexive Regelung rechtlich geordneter Freiheit* (Mohr Siebeck 2003). Habermas has also criticised principle theory for reducing 'reasons...to policy arguments' trans. W. Rehg. *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 258. This, however, seems to overlook the meta-principle of proportionality which requires that the criteria of suitability, necessity and proportionality are met. This immediately precludes all decisions that would not meet these criteria. This does not, of course, guarantee that principles theory is the best route to achieving the just result in every decision but that it is helpful in most decisions and particularly instructive in cases concerning basic rights.

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.²⁵

In stating that the relative importance of satisfying the principle determines the weight to be given, normative concerns inevitably enter the equation. The relative importance of a principle cannot be determined in a vacuum and, it is argued, it is determined, therefore, by reference to law's correctness thesis set out below. Thus, although principles theory alone provides no answer to the question of how to determine the weight to be given to each principle in the case of a collision, Alexy is not silent on this issue. Alexy's principles theory is to be taken in conjunction with his correctness thesis, which supplies the analytical foundations, and discourse theory, which might be said to provide the normative basis for Alexy's legal theory.

In this section, the second function of principles theory is considered, namely as an explanation for the necessary connection between law and morality. Here it will be shown that although principles theory when taken in isolation might be thought to remain silent as to which principle ought to succeed in balancing, when combined with law's claim to correctness principles theory contains also a requirement that the selection of the winning principle is made on justifiable grounds. Alexy links his principle theory to his interpretive approach to assert that every legal decision contains some balancing and, therefore, necessarily incorporates principles.

The question is, then, two-fold: which principles are relevant to international refugee law? And what weight is to be given to each of the principles? The

²⁵ TCR (n 10) 130.

former question, it will be argued, is answered by reference to the nature of law and, more specifically, to human rights theory and, as such, there are definitive limits within which principles can be selected. The former question occupies the subsequent three chapters. The latter question, however, will vary depending on circumstances but is also governed by the requirement of justification. It is this part of the process, the balancing, which is determined by factual circumstances and possibilities. Mead's example of a team game might be instructive here. Mead asks us to imagine a team game where individuals are required to take a specific role *within* the team (a business, for example, or, indeed a football team). This dual role requires individuals to consider what is best for their own position *and* that of the team, so they have a dual perspective of 'I' and 'We the team.' This requires that:

Each adopts not merely the perspective of the good of the team or of all of the other players on the team, but also a second-person plural perspective in which they all assess the state of play and the expectations and possibilities of members of both teams engaged in play[...] each moves back and forth between perspectives in order to see what it is that one ought to do at any particular time.²⁶

In other words, principle theory does not tell us which particular perspective succeeds at any given time; it merely requires that we consider the different perspectives (or normative concerns) relevant at any given point to determine what is best for everyone 'in the game.' In a Rawlsian sense, we are moving back and forth between theories, adjusting the weight given to principles in line with the shifts in emphasis. In this 'game' of balancing, Alexy's correctness thesis argues the underlying principles remaining intact *whatever* may be factually possible at any given point and whatever other principles these underlying principles may come into collision with. These underlying

²⁶ *ibid* 244.

principles govern the validity of the law and, most pertinent for our purposes, the interpretation of laws.

2.2.1 Law's Claim to Correctness

Alexy considers not merely the analytical structure of law but the normative structure. In short, a claim is made that moral rights are necessarily included in the law making and adjudication process due to a necessary connection between law and morality. To say that norms are moral is to say that they are "justificatory, universalisable and categorical."²⁷ To say that there is a necessary connection is to argue that it is conceptually necessary (to hold as a matter of definition).²⁸ The concept of law is to be defined such that moral factors are necessarily included.²⁹ For Alexy, this is demonstrated by law's 'claim to correctness.' This claim, made whenever it is asserted 'X is law', is one that can be challenged: the claim to correctness may be found to be false. If it is found to be false, it is on the grounds of morality, or, more specifically, on the grounds of having transgressed the minimum requirements of justice such that any judge applying the rule, principle or norm would be administering lawlessness rather than law.³⁰ This is because the claim to

²⁷ Beyleveld and Brownsword *Law as Moral Judgment* (Sweet & Maxwell 1986).

³¹ "Categorical" here refers to Kant's categorical imperative that one should act only according to principles that one can rationally will everyone to act on (that one would 'will that it become a universal law') Kant *Groundwork for the Metaphysics of Morals* (trans. & ed. A. Wood with essays by J. B. Schneewind et al. Yale University Press 2002 [1785]) 37.

²⁸ Though as Alexy notes it could also be seen as a factual connection as invalid systems of law have not lasted such that it might be said that no invalid system has been held to have long-term validity, Alexy *The Argument from Injustice: A Reply to Legal Positivism* (Oxford University Press 2002 reprint 2010) 93 [AFI].

²⁹ AFI (n 28) 34.

³⁰ This threshold of "extreme injustice" (emphasis added *ibid* 48) is arguably set too low; this, by Alexy's own admission, gives more weight to the factual dimension of law vis-à-vis its ideal dimension. This creates a problem when one considers rights, which are, for factual reasons, unrecognised or unenforceable. Here, flawed, but not yet extremely unjust, systems would continue to flourish if the factual can outweigh the ideal unless it passes such a high threshold of lawlessness. Yet, Alexy states that

correctness, raised by the act of enacting a law (*a*), necessarily contains the assertion “that *a* is correct and, second, *guarantees* that *a* can be justified and, third, *expects* that *a* that all addressees of the claim will accept *a*.”³¹ Unlike for Raz, law does not merely claim authoritative status as a social fact but also claims a basic moral correctness of law: an assertion which if proved to be invalid renders the ‘law’ illegal. In an argument similar to Dworkin’s notion of a threshold of ‘moral acceptability’³²; Alexy asserts that if the act a ‘law’ requires fails to satisfy the claim to correctness, this law is ‘defective’ or ‘invalid’.³³ The claim to correctness, in turn, is built on discourse theory. It presents legal reasoning as a (special) form of general practical reasoning.³⁴ This presupposes human beings are capable of making arguments and, indeed, it is premised on the assumption that human beings are characterised

the claim to correctness is made by individual norms and that a whole legal system becomes lawless (*Unrecht*) when too many individual norms within the legal system fall below the threshold. It seems, therefore, that there might be an argument for raising the threshold for individual norms from the bare minimum to more comprehensive protection for core basic rights as it would not endanger an entire legal system for more norms to be invalid rather than just legally defective. Legal certainty would not, therefore, be significantly impacted. Alexy seems to consider the possibility of setting the threshold at a different level, stating that his “thesis of forfeiting legal character by crossing a certain threshold of injustice” could apply “however that threshold is determined”, with the obvious proviso that the threshold could not be determined in a manner incompatible with concept of justice TCR (n 10) 28. Indeed, Radbruch argued that legal certainty must give way to justice stating “legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: utility (purposiveness) and justice” (*Statutory Lawlessness and Supra-Statutory Law* (1946) *Oxford Journal of Legal Studies* 1, 13). However, for the purposes of this thesis, this debate is perhaps unnecessary as it is sufficient that the norm, or interpretation of a valid norm, be labelled ‘legally deficient.’

³¹ ‘Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat’ in Gosepath and Lohmann (eds) *Philosophie der Menschenrechte* (Suhrkamp 1998) 244, 208 and AFI (n 28) 4.

³² *Law’s Empire* (Hart Press 1998 ed. [1986]).

³³ TCR (n 10) 35.

³⁴ *A Theory of Legal Argumentation* (Oxford University Press 2009) 211-220 [TLA]. It is a special form of practical reason as it is concerned not only with practical logic but also logic within the legal system in question, See, TLA 12, 220. As Alexy states: Unlike the case of general practical discourse, this claim does not relate to whether or not the normative statement in question is absolutely rational, but rather only to whether it can be rationally justified within the framework of the valid legal order (289).

by this ability to put forward arguments.³⁵ That human beings are discursive beings is what gives us our interest in the claim to correctness.³⁶ The claim to correctness cannot be avoided.

The claim to correctness, Alexy argues, means law necessarily contains some normative underpinning to set limits on what can be law. The principle of injustice, contained, in a simpler form, as part of the Radbruch formula³⁷, states: *legislature, administrator and adjudicator are obligated to realise justice*. This would render unjust law faulty, and if the law is faulty to the extent of violating the most basic, minimum requirements of justice then the law becomes invalid i.e. its legal character is destroyed. Although this might, at first glance, appear to risk invalidating many laws, Alexy (and indeed Radbruch) are not attempting to remove any legal pluralism or to deny that different conceptions of justice might exist but rather make a claim to a minimum standard required in order to be able to satisfy the claim to justice

³⁵ Alexy 'Discourse Theory and Human Rights' 9 (1996) *Ratio Juris* 209 "Whoever never in his life makes an assertion and puts forward an argument does not take part in the most general form of life of human beings" 217.

³⁶ This claim is made in relation to all human beings in general, for, as Alexy explains, even those who do not subscribe to the view of correctness must appear to do so in order to participate in the system, which may lay their claims open to charges of incoherence later if they seek to reject these claims to legitimacy later. Alexy notes: Tyrants, dictators, and despots have always known this and have usually attempted legitimations by employing arguments. That those arguments were regularly bad and mere propaganda is not important here. Decisive is the fact that they try to use these arguments at all. In this way, the maximization of individual utility leads into argumentation and consequently into the field of discourse rules, because a sufficient interest in correctness has to be taken into account (ibid 219.)

³⁷ The Radbruch formula requires that " 'flawed law' yield to justice" G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (1946) *Oxford Journal of Legal Studies* 1. Radbruch transformed his position from that expressed in 1932 that the primary role of judges was to "validate law's claim to validity...to ask only what is legal" (Radbruch, 'Legal Philosophy' in Patterson (ed.) *The Legal Philosophies of Lask, Radbruch and Dabin* (Kurt Wilk trans. Harvard University Press 1950) 15-249.) See, also Paulson 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' *Oxford Journal of Legal Studies* (1995) 15 489. Radbruch dismissed a value-blind view of the law stating that the law must be defined by some reference to the law's purpose (Radbruch 'Legal Philosophy' 50-1.)

raised by the label 'law.' Just as with the discussion of 'persecution' in chapter one, what is at stake here is the semantic limits of the term. When Alexy- and Radbruch- speak of unjust laws, these are laws that offend the basic principles of equality and justice such as to render these laws invalid, such as those enacted during Nazi dictatorship that stripped Jewish citizens of their rights and citizenship, not laws which are in some minor way deficient or not entirely ideal.

It is this connection between law and morality that is denied by positivists. Not only does the correctness thesis suggest that this separation cannot be maintained but, it is argued, the correctness thesis is further strengthened by the claim made, including by positivists, that the law carries with it a legal *and* moral obligation of obedience. This, argues Fuller amongst others, is nonsense, asking, "how can we have a *moral* obligation to obey without guarantee that our obedience will not result in immoral acts?"³⁸ The moral obligation to obey the law can only be seen as binding, it is argued, if the law can claim to be moral. This is exactly what the law is asserting in the claim to correctness: that it is morally valid and, thus, can be considered binding.

³⁸ Fuller (1957-8) 'Positivism and Fidelity to Law - A Reply to Professor Hart' 71 *Harvard Law Review* 630 p656 in response to Hart's (1957-8), 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* 593. The debate is beyond the scope of this thesis but in support of Fuller's position see, the papers collected in 83 *New York University Law Review*, Symposium: The Hart-Fuller Debate at Fifty (2008) [published also as Cane (ed.) *The Hart-Fuller debate in the Twenty First Century* (Hart Publishing, 2010)] in particular, David Dyzenhaus, 'The Grudge Informer Case Revisited' 1000-34; Leslie Green, 'Positivism and the Inseparability of Law and Morals' 1035-58; Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' 1135-69. On the impact of the debate, see Nicola Lacey, 'Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' 1059-87 of the collection.

Indeed Hart seems to acknowledge this when stating “it will often be pointless to acknowledge or point to a legal obligation if the speaker has conclusive reasons, moral or otherwise, to urge against fulfilling it.”³⁹ It seems also to follow from Hart’s assertion that for what he terms a ‘rule of obligation’ gains it obligatory force because:

- i) deviation from the rule is seen as serious, thus generating “an insistent demand for conformity and great social pressure on those who deviate or threaten to deviate
- ii) of a belief that conformity is necessary to the maintenance of society or “some highly prized feature of it.”⁴⁰

These requirements at the very least demand criteria external to the law and legal system against which to determine whether deviance from the rule would produce a serious consequence or a feature ought to be highly prized in society. Without entering into the debate in too much depth, it can be asserted that the criteria against which this is to be judged are to be found in moral norms. The law gains obligatory force, then, when deviation from the rule is morally serious and conformity is deemed necessary to maintain society or some highly prized moral feature thereof. If legal validity is not impacted if the content of the law requires conduct prohibited by a rule of moral obligation, as Hart claims, then what grounds the *ought* in ‘ought to be obeyed’? This is, essentially, a restatement of the claim that ‘ought’ cannot be derived from ‘is’ so the law cannot derive its ought claim from the fact of the law alone.⁴¹ If this is so, then law must necessarily be connected to morality

³⁹ *The Concept of Law* (Second edn, Clarendon Press 1961 [1994]) 199.

⁴⁰ *ibid* 84-5.

⁴¹ This claim, known often as Hume’s bridge, requires that “one cannot travel from ought to is without first paying ‘ought tolls’.” (Beyleveld and Brownsword (n 27) 19). Here we are referring to moral oughts rather than predictive oughts, which are

and “the concept of law is the concept of morally legitimate power”⁴² such that the authority claim of law is fulfilled by the content of the concept.

2.2.2 The Demands of the Correctness Thesis

If law is necessarily connected to morality, this brings with it the idea of *moral* justification, as posited by Alexy in the correctness thesis and, carried into principles theory, in requiring justified reasons for giving greater weight to one principle over another. Accordingly, incorporation of morality into law via positive law is not the only route that Alexy sees for the necessary recognition of moral principles within the legal system. Whilst Alexy accepts that it *might* be possible to enact rules without necessarily engaging normative justifications, this is not possible when one considers principles. Principles, as Alexy demonstrates in his reconstruction set out in more detail below, necessarily require *balancing* and balancing requires justified grounds for selecting one principle over another. As Menéndez notes, the connection between discourse and the claim to correctness is intended to address reasoning in hard cases for “[t]he aim is to establish criteria which allow replicating the judgment in order to test its correctness.”⁴³ Proportionality in the law of balancing, combined with the claim to correctness, provide criteria against which to reason in hard cases.

derived from ‘is’ in the sense of being factually based so whilst ‘John ought to beat Simon at chess’ can be derived from ‘John is a better chess player than Simon’ moral oughts are derived from moral premises not from factual circumstances.

⁴² Beylveled and Brownsword (n 27) 119-20. Thus Hart’s effectiveness condition for classifying something as law is a condition of stability not legal validity (ibid 210-11). The same could also be said of Kelsen’s requirement of coercive force in order to be labelled law (and to be distinguished from moral obligation).

⁴³ (n 1) 10.

Here the connection between law and morality cannot be denied: if justified grounds for selecting principles are required, then basic moral norms must dictate the selection. As weight cannot be 'enacted' it must be determined relative to something and this 'something', Alexy asserts, is provided by moral norms. Following this, the law of balancing requires a value-judgment as to the relative importance of the competing principles in order to determine which principle can be said to be more important to satisfy. As noted above, this requires determination of which principle is *actually* more important, not which principle is preferred by any of the parties involved, thus although the balancing is undertaken in relation to specific circumstances only the value-judgment as to the importance of a principle must already have been made. This *abstract* value-judgment creates also conditional preference for the principle expressing the more important value such that "what under a system of values is *prima facie* the best is under a system of principle what ought to be."⁴⁴ Similarly, if the principles are ranked equally in the abstract then a "smaller degree of satisfaction, or a greater degree of infringement [of principle 1]...is only permissible...when the relative degree of importance [of principle 2] is very high."⁴⁵

Moral principles, then, enter the law even where the moral principle in question has not been transformed into positive law.⁴⁶ They function as "a

⁴⁴ TCR (n 10) 92.

⁴⁵ *ibid* 104.

⁴⁶ That a reason might be chosen that is not based on valid positive law or morality is denied by Alexy as necessarily excluded by the claim to correctness as a judicial decision necessarily raises a claim to correctness, and this claim will not be satisfied if the judge does not justify her decision, see Alexy 'The Nature of Arguments about the Nature of Law' in Meyer, Paulson, Pogge (eds.), *Rights, Culture and the Law* (Wildy 2005) and *Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford 2003) 14.

greater law” that “may function as a corrective vis-à-vis written statute.”⁴⁷ Even where positive law contains no moral requirements- moral principles still enter into the adjudication process as the judge must consider these in order to fulfil the claim to correctness necessarily raised by her decision.⁴⁸ The requirement that the judgment of one principle as outweighing another be just demands, then, that the law is interpreted justly: that it is interpreted bearing in mind relevant moral principles or normative concerns.⁴⁹ If legal norms, decisions, and indeed the legal system as a whole, necessarily lay a claim to legal correctness (the correctness thesis) and if principles, as optimising commands, require a realisation to the greatest possible extent (principles theory), then at least some of the arguments with which the judge justifies the balance she strikes must, regarding their content, have the character of moral arguments.⁵⁰ There is, then, not only a conceptual connection between law and morality at the systemic level. There is also a substantive connection between law and morality at the level of individual norms. This substantive connection is present also in the application of a legal norm.

In other words, as the dimension of weight cannot be created, or “enacted” by the lawmakers weight cannot be simply relative to the other principle(s)

⁴⁷ TCR (n 10) 198.

⁴⁸ R. Alexy ‘An Answer to Joseph Raz’ in G. Pavlakos (ed.) *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy* (Oxford University Press 2007) 55.

⁴⁹ Although, it has been noted that law’s claim to correctness is not (necessarily) identical to morality’s claims, indeed, this is accepted by Alexy himself (TCR (n 10) 214). The complicating factors stem from the fact that laws are embedded in a specific legal system. Further elaboration of that issue is beyond the scope of this thesis and need not concern us overly, for the legal system refugees’ rights are embedded in is that of international law which contains, and assumes, universal acknowledgment of core human rights.

⁵⁰ Alexy AFI (n 28) 77. A non-justifiable norm is defective (qualifying connection) and, in the case of extreme injustice, even forfeits legal character (classifying connection).

involved. Here weight given would be merely arbitrary and would not constitute a justified decision. It, therefore, must be weight relative to something external to the legal system. This commitment to moral principles then is independent of the legal system as, Beyleveld and Brownsword state, “an agent, if he is to adopt Moral Reason, must commit himself to his Moral Principles on the understanding that, from the moment of commitment, those particular principles take on a life of their own independent of his future contingent desires.”⁵¹ The moment of commitment can be taken to be the point at which the claim to correctness is made.

This external source of reasons provides interpretative guidance for the principles at stake so as to supply, through reasoning, the relative weight to be given to each principle in particular circumstances. This external force is provided by moral norms, in the guise of the meta-principles of proportionality, justice and equality and, of particular relevance to refugee law, the assumption, set out in the subsequent chapter, that all human beings have human rights. These meta-principles are relevant to all legal decisions, but, it is argued here, there are also law-specific background principles relevant to particular laws or situations. These law-specific background principles are to be found in the moral principles that guided the enactment of the law in question and, it is argued, remain relevant in guiding interpretation

⁵¹ n 27 25. Alexy would very possibly object to the combination of his thesis with claims by Beyleveld and Brownsword, whose theories he has labelled as ‘overridealised’ (‘Effects of Defects—Action or Argument? Thoughts about Deryck Beyleveld and Roger Brownsword’s *Law as a Moral Judgment*’ *Ratio Juris* 19 (2) 2006 169. Yet as noted above for the purposes of this thesis, even if morally incompatibly that falls short of extreme injustice only renders a decision ‘legally defective’ and not ‘invalid’ this is sufficient. Alexy’s dispute with Beyleveld and Brownsword is primarily concerned with the effect of inconsistency with moral principles on legal validity rather than in challenging the claim that moral incompatibility has *some* effect.

of law as they form a central part of that specific law's claim to correctness by providing specific grounds on which the law is to be seen as correct, justified and ought to be accepted.⁵² In other words, it is asserted that these law-specific background principles are merely the explanation of how this law satisfies the principles of justice, which are then subject in individual cases also the principle of proportionality.

Kratochwil⁵³ makes a similar point when arguing there is both determinacy and indeterminacy within system of principles as principles (and rules) state the duties of actors providing a determinate 'class of permitted actions' within which discretion may be exercised, the outcome of which is inevitably indeterminate as it is based on individual choice from amongst the viable options. The limit set by the background principles (both informal principles accepted by all parties and general moral norms that ought to be adhered to by all parties), however, mean that one is not free to do nothing if required to act by the principle or rule; one is only free to choose from *within* the 'class of permitted actions.' If, Kratochwil states, one is required by law to give to charity to receive a tax deduction, one is not free to claim the tax deduction without a charitable donation, however within the range of charities each donation is equivalent: one may give to Unicef, or the National Trust or indeed any other recognised charity and legitimately claim the deduction. In the case of refugees, if one accepts that states are under some obligation to act to protect refugees (either a moral obligation or as signatory states of the

⁵² These specific grounds cannot, of course, violate law's original claim to correctness, the claims must be specific formulations of the meta-principles applicable to all laws.

⁵³ Kratochwil 'How do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 47.

Refugee Convention a legal obligation), states must *act* as the requirement of action falls within the determinate area of the rule (i.e. action is unequivocally required) but *how* a state acts to protect refugees is within the area of individual choice. Provided the action falls within the 'class of permitted actions' (i.e. it may be said to be an action which would protect some refugees) then the state cannot be chastised for its choice, however, the key point remains; to not act is to not make a choice and, therefore, takes the state outside of the 'class of permitted actions'⁵⁴ and in to conflict with the determinate rule requiring action.

For Kratochwil, in a similar claim to Dworkin⁵⁵, the boundaries to the class of permitted actions are determined by background principles, which are not necessarily explicitly stated but instead are provided by the use and justifiability of the rules (laws) in question.⁵⁶ The boundaries are set by the limits of plausible interpretations accessed by reference to the original justification for the law. The justification of the law, as Kratochwil notes, inevitably brings with it some reference to norms, principles and takes the interpreter of the law beyond mere invocation of rules. This asserts that it is impossible to merely invoke rules, rules (or laws) are *applied*, that is they are only invoked in real circumstances when the rule is raised to deal with actual events. The connection between rules and 'the real world' is provided, Kratochwil argues, by implicit understandings as to the use and justification of the rule and legal/moral principles more generally. This suggests, then, that the positivist conception of law as a system of rules in which the character

⁵⁴ It is key, therefore, to precisely determine the set of 'permitted actions.'

⁵⁵ n 16 in introduction 2.

⁵⁶ Kratochwil (n 53) 42.

of the rules is established only by reference to the system (i.e. in which morality plays no part) cannot be maintained. In reference to international law, Kratochwil claims, it particularly challenges this underlying notion of 'national interest' which is often invoked as a determinate concept; this, argues Kratochwil, following Shklar, it cannot be as its content is provided by background assumptions, for example, as to the role of government, the nature of 'the state' or existence and importance of borders.

In terms of refugee law, then, if norms such as 'national interest' are to be relied upon to restrict access to asylum for refugees then this invocation of national interest must be subject to balancing and interpreted with reference to the purpose of the convention, namely the protection of refugees. To entirely ignore the claims of refugees- to give no weight to these claims in the balancing process- would not only be outside the class of permitted actions but could also be seen as producing a decision, which fails to satisfy the claim to correctness raised by the judge or law maker. The basis of this statement is a claim that to exclude refugees from host countries would be to violate not only the background principles of refugee law but also such a ranking of principles will not withstand scrutiny. This claim is taken up in the remainder of the thesis.

Chapter three of the thesis is concerned, in part, with establishing the ranking of principles relevant to international refugee law in the abstract such that this value-judgment can be applied in concrete cases. Chapters four and five then consider the implication of a higher ranking of the principles of fundamental rights by assessing hard cases outside the paradigmatic examples of

refugeehood that refugee status determination bodies may be asked to consider, such as victims of domestic violence, in terms of legal reasoning against the backdrop of the principles considered in chapter three. It is suggested that as decision-makers are under an obligation to satisfy the most important principle to the greatest degree, the competing principles to those that argue in favour of a refugee's admittance must necessarily be stronger *in the abstract* or be of very high relative importance *on the facts* to be given greater weight. If a decision fails to do this, it might be said to be 'legally defective'.

2.3 Conclusions: Alexy's theories and International Refugee Law

2.3.1 Application of Alexy's Theories to International Law

The first objection to this project may well come from those who argue that Alexy's developed his theories to explain national (German) constitutional law and this renders it inapplicable to international law, perhaps even to other domestic legal systems that do not have a comparable constitution. This is rejected here.⁵⁷ Although Alexy's theory is focused on national judicial decision-making, in the context of constitutional rights, the correctness thesis, as a classifying and qualifying condition of law, cannot be limited only to constitutional law or domestic law but to anything claiming legal status. As the connection thesis is positing certain truths, and underpinnings, that go to the heart of law as a general concept it applies equally to national or

⁵⁷ The latter objection is dealt with by Julian Rivers in his introduction (TCR (n 10) xvii-lii) to TCR in which Rivers argues that Alexy's theory is as applicable to the British system, which arguably contains no constitution, as to the German. Rivers argues "there are ample grounds for the thesis that his theory is applicable more widely" due to "the formal abstraction and substantive openness of his theory" *ibid* xviii).

international. Thus, this obligation to realise justice stems from the nature of law, as Alexy posits:

Law consists of more than pure facticity of power...[i]ts nature compromises not only the factual or real side but also the critical or ideal dimension.⁵⁸

The critical or ideal dimension not only allows for criticism, and disapplication of 'laws' that have no sound moral footing (many of those enacted in Nazi Germany or Apartheid South Africa could be set aside as lacking legality on these grounds), but the ideal dimension could also be said to create the corresponding requirement that these ideals be given legal force in some manner.⁵⁹

It often has been argued that a lack of formal acknowledgment of responsibility for refugees in the Refugee Convention, and other international instruments, results in any duties to refugees remaining, at best, moral duties. It would follow, then, that without reform of international and national law to include concrete assertions of refugees' rights and the duties of potential host states, the situation will remain static with a moral right to asylum enforceable nowhere. The only countries under concrete obligations to refugees then are those, like Germany, that have chosen to place themselves under this obligation by including a right to asylum in their Constitution. Alexy's

⁵⁸ Coercion has been described by Alexy as another "Coercion is necessary if law is to be a social practice that fulfills its basic formal purposes as defined by the values of legal certainty and efficiency", Alexy 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281, 293.

⁵⁹ As Wang states: "if a judge does not ground his decision on correct balancing of moral principles, we might be inclined to say that he makes a moral rather than a legal mistake. But this moral mistake will lead to some false propositions of law and therefore has a significant impact on the correctness of his decision"; in this manner morality is part of law regardless of whether it is part of positive law as legal correctness *is* moral correctness (Wang *Rechtstheorie* 41 (Max Planck Institute 2010) 300, 315). In this manner, Alexy's claim to correctness is similar to Dworkin's notion of 'truth conditions' for- or doctrinal concept of law see Dworkin (n 8) 234-238.

reconstruction of balancing within principles theory could easily be applied in such cases, his theory being concerned primarily with the German Constitution and Constitutional Court. The refugee can appeal to her constitutional right to asylum that is, in turn, weighed against any counter claim. The German Constitution demands that the weighting is done by reference to the principle of human dignity by making the right to human dignity absolute *and* formally foundational to any other constitutional rights. Human dignity might, thus, be described as the background principle relevant to all decisions concerning application and interpretation of the German Constitution. The absolute nature of human dignity serves then as a limitation on all decisions, even those concerning those who are not citizens.

What is argued here is that although international refugee law is not constitutional, it is subject to the same basic reconstruction as any constitution when applied in domestic courts.⁶⁰ Alexy's theories might be concerned primarily with domestic laws and thus have an easier task in reconstructing the process and explaining the decisions in constitutional courts than in courts applying international law but the principles theory and the correctness thesis can be of use in examining any legal decision, in particular those involving the

⁶⁰ The debate on interaction between public international law and domestic constitutional law is beyond the scope of this thesis but it might be argued that the fundamental principles of international law, particularly those pertaining to human rights, express the basic limits on *all* constitutions. If these principles are contravened then the said constitution would not be able to assert a valid claim to correctness. In this sense, though perhaps only in this sense, national constitutional law might be said to be subject to international law. See, for further argument on this point, Kleinlein 'Constitutionalization in International Law' (2012) *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Band 231) 703. Kleinlein argues "public international law recognizes a common interest of humanity transcending state interests, hierarchically supreme 'constitutional principles' set boundaries to the hitherto unlimited will of states...[o]n the basis of these observations, constitutional doctrine in public international law scholarship tries to put public international law on a constitutional foundation" (ibid).

assertion of fundamental rights as refugee cases inevitably do. Whilst it might not be as clear cut when discussing the application of article 16 of the German Constitution, principles theory and the correctness thesis explain the demands on law makers and adjudicators (at the very least in signatory states to the Refugee Convention) that limit the range of plausible interpretations to those justiciable against the backdrop of law's general claim to correctness and the specific 'claim to correctness' asserted by refugee law and discoverable through examination of the underpinning norms of the Refugee Convention.

We are not, then, dealing with 'merely' moral rights and duties but also legal rights and duties established by reference to the background principles of international refugee law. Although these legal rights might be 'soft', as opposed to 'hard' definitive rights such as the right to asylum contained in the German Basic Law, they are nevertheless legal rights as failure to give precedence to these rights in cases where the principles behind these rights have greater weight would result in a legally defective decision. As set out above, these rights enter into the formal legal process in two ways: the correctness thesis demands that laws passed by legislators (such as national immigration and asylum laws) conform to the principles of justice so as not to be deemed 'defective' or, in extreme cases, 'invalid'. The correctness thesis also requires decisions by adjudicators (such as refugee status decisions) be justified and justifiable. In simple cases this does not present a problem but in hard cases when interpretive questions are raised and balancing is required then it becomes particularly important and instructive.

The background principles, both those relevant to all law of justice and equality and those specific to refugee law (relating to the special claim of human rights and the role of states) operate so as to constrain possible decisions by adjudicators to those that can be justified by reference to these principles. The background assumptions against which refugee law sits, then, are of primary importance and will form the basis for the subsequent chapters as these background assumptions form the norms against which balancing is undertaken and decisions are to be justified.

2.3.2 Rules and Principles in International Refugee Law

When one considers a refugee status case several different principles and, indeed, rules are at stake. It is important to note that whilst international law may be applied (directly or indirectly through incorporated measures) in these cases; decisions are taken by domestic governments and appeals are heard in domestic courts and tribunals and not in international courts. The rules to which the court determining refugee status is bound are likely, therefore, to be largely those enshrined in domestic law. For example, if the refugee is applying in a signatory state that article 1(2) of the Refugee Convention applies can be seen as a rule. As the majority of signatory states apply article 1(2) either directly or, more often, through incorporation into domestic law, we can proceed on the assumption that this rule applies to most refugee status determination hearings. This is a rule for were article 1(2) to be overlooked entirely, rejected or misused the decision making body would have failed to apply a rule correctly and the decision would need to be retaken (although the decision would not necessarily reversed).⁶¹

⁶¹ There are also numerous other rules which are more obviously rule-like in character that are applied in asylum cases (such as, controversially, timely

There could be said to be a rule also, following Alexy, that principles need to be applied. Here, Alexy's principles theory merges with his correctness thesis to state that the meta-principles relevant to interpretation are not only the formal principle of proportionality but also substantive principles of equality and justice. When discussing the rights of refugees, a realm where moral rights are almost readily acknowledged but the impact of these moral rights on positive law is as readily denied, the correctness thesis has particular traction. Interpretations of the Refugee Convention often might be said to fall into the category of 'interpretative injustice' or incorrect interpretations of valid law. This, as Alexy notes, would be more than simple incorrect interpretation, it would be a violation of legal rules as well as judges are obligated to interpret prevailing rules correctly. This changes the terms of the debate when critiquing decisions taken in refugee law. It shifts the debate from one in which 'human rights advocates' are calling for the imposition of additional standards into refugee law and instead argues that the norms against which refugee status decisions are assessed are *internal* principles international refugee law is already subject to. As Dworkin notes, "the rights thesis guides [...] criticism by exposing the deep structure of judicial arguments in hard cases, including the principle of rights it contains, and therefore the more general political and moral theories these [background] principles presuppose."⁶²

application and, perhaps less controversially, the exclusion of those convicted of serious crimes rules.)

⁶² Dworkin (n 3 in introduction) 313.

Principles enter the decision making process as guides to interpretation in the Dworkinian sense of principles as ‘background standards.’⁶³ Thus although human rights standards have led to an evolution of interpretations of the ‘persecution’, the boundaries of the term are ‘policed’ by fundamental principles, such as fairness, which cannot be contravened. Although “the content of rights may vary with background justification”⁶⁴, rights cannot be varied, restricted or expanded, *without* adhering to background principles. In refugee status determination cases, human rights norms act as principles understood in the Dworkinian sense and operate as moral background standards against which key terms, such as persecution, are (to be) interpreted. Secondly, when being used as background standards, principles ought to operate in the Alexy sense, as goals to be reached to the greatest degree possible. This demands that when balancing (refugee) rights against other rights, human rights are protected to the *greatest* degree factually and legally possible. Conversely, following the principle of proportionality, infringement of rights must be to the *least* degree legally and factually possible.

2.3.3 Basic Propositions

The framework put forward in this chapter provides the foundation for the thesis. It has been argued here that Robert Alexy’s theories are relevant to international refugee law. Alexy’s principles theory, it is claimed, sets out key propositions for this thesis, namely that fundamental rights are principles, that principles contain the dimension of weight and as such are subject to balancing and that balancing requires a determination of relative weight. This,

⁶³ This argument, ‘the rights thesis’, is set out in *ibid.*

⁶⁴ *ibid* 365.

for refugee law, is key. Refugee law concerns fundamental (or human) rights, as will be set out in the subsequent chapter. Characterising fundamental rights as principles brings into refugee law Alexy's principles theory and determines that decisions made involving these principles involve balancing and as such must satisfy the laws of balancing. In order to satisfy the laws of balancing determinations of relative weight must be made as in order to produce a justified decision the principle given the greater weight must be a) of greater abstract weight and b) of greater abstract importance (or value). The claims of a justified decision stem from Alexy's correctness thesis, which, it is argued, provides some basic normative requirements for law, including international refugee law. It proves a necessary connection between law and morality, which requires that balancing decisions are justifiable and justified relative to the requirements of morality. This normative framework guides the choice of normative principles. In international refugee law, it will be argued in the following chapter, the notion of human rights, and in particular the principle of human dignity, provide the underlying principles. Viewing these principles through the framework set out in this chapter, it is argued, clarifies the position of human rights in refugee law and challenges the hitherto virtually unchallenged presumptions of the current system of refugee law. This will demonstrate, it is argued, that the current refugee law system encapsulated in the Refugee Convention is in need of *interpretational* reform but it is not, necessarily, in need of a complete overhaul or abolition. Given that states seem unwilling to implement a new refugee law system, the framework set out here, it is argued, shows us how to better use the system we currently have. The thesis now turns to examine the concept of human rights with this project of reinterpretation in mind.

Chapter 3 THE CONCEPT OF HUMAN RIGHTS IN INTERNATIONAL REFUGEE LAW

This chapter builds on the assertions of the previous chapter to argue that when one is engaged in a balancing exercise; the conceptual foundations of the principles one is balancing necessarily become relevant. In other words, in order to engage in a balancing exercise one must also consider the relative value of the principles one is balancing. It is argued that in order to consider if the widespread state practice of viewing refugee status as something to be granted, rather than a right, can be justified; it is necessary to consider if the claim that human rights have priority over other rights- be these competing rights collective or individual- can be made out. The position of non-derogable rights will also need to be considered. When one considers the development of refugee law almost inevitably the recognition of a 'new' refugee goes hand in hand with the fleshing out of the concept of human rights.¹ Human rights have been identified as the standards against which refugee law is to be interpreted and applied. As Foster has noted, "the need for some objective guidance has underpinned the development of human rights approach to interpreting the Refugee Convention."² Human rights, and the interpretation and underpinning thereof, are becoming increasingly central to refugee law.

The chapter will examine the notion of human rights and the underpinning of international refugee law that stems from the principles of human rights, in

¹ Chapter six considers this development in regards to the recognition of rape, sexual violence, domestic violence and forced marriage as a forms of persecution.

² Foster (n 2 chapter one) 87.

particular the foundational principle of human dignity. The case for viewing human rights as special rights worthy of protection is put forward and the implications of this view for refugee law are discussed. The obligations, both practical and interpretational, human rights place on signatory states will be considered, in the abstract at this juncture. The claim advanced in this chapter is foundational to the thesis, namely that if core human rights (which refers to basic human rights such as right to life and the core of all rights considered human rights) can be shown to have a special claim to protection that outweighs other rights, in the abstract, when subject to balancing this gives refugee's rights conditional preference over competing rights and goods.³ Although definitive priority *might* be granted to other rights on the facts establishing conditional primacy would already be a great leap forward in securing refugees' rights, which at present are relegated to second place behind the rights of states. The priority given to human rights might be said to be recognised in International Law in the notions of *jus cogens* and *erga omnes* in which certain norms, including arguably human rights, are hierarchically superior to other international norms in that their violation renders a territory, or decision, invalid.⁴

Following the framework laid out in the previous chapter the widespread assumption that the weight given to refugees' rights is to be determined by potential host state(s) is denied. As the law of balancing⁵ applies and it follows

³ Alexy 'Law, Morality and the Existence of Human Rights' (2012) 25(1) Ratio Juris 2.

⁴ Although the notions of human rights and *jus cogens* are not coextensive, there might be said to be "an almost intrinsic relationship between *jus cogens* and human rights" Bianchi 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 (3) European Journal of International 491, 491. Human rights can be said to be *erga omnes* as they are, by definition, owed to everyone. This argument is out forward below.

⁵ Alexy TCR (n 10 in chapter 2) 104.

that the weight given to a principle must be justified. If we recall the assertions of the previous chapter, discussing a collision between national security and press freedom, Alexy asserts: *if* principles are ranked equally in the abstract then a smaller degree of satisfaction of one principle is only permissible if the relative importance of satisfying the competing principle is greater. The important word here is 'if': if the principles are not ranked equally in the abstract then we are not concerned with the relative importance of satisfying principles on the facts but on the abstract importance of satisfying a principle such that it is ranked higher in the abstract requiring, then, an even greater degree of relative importance in satisfying the competing principle than if the principles were ranked equally in the abstract. The implications of this for refugee law are as followed, if human rights are ranked higher in the abstract then they are given conditional priority in the abstract and must be given definitive priority on the facts if a) the competing right is not a human right b) the competing right is a human right, the relative importance of which is less. We can, then, begin to put forward some tentative conclusions as to the ranking preferences of principles at stake in refugee law cases.

The approach of using human rights standards to assess refugee claims 'makes sense', as Marouf notes, as it is in an international treaty and requires therefore that principles of international treaty interpretation apply.⁶ The starting point is Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969. Art 31.1 states:

⁶ 'The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm' (2011) *Scholarly Works Paper* 788.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

Article 32 reminds that the preamble is relevant in regards to the interpretation. The matter was addressed by the International Court of Justice (ICJ) in its 1951 Advisory Opinion on Reservations to the Genocide Convention in terms that could apply equally to the 1951 Convention as follows:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilising purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'être* of the convention.⁷

With these purposes in mind it is necessary to examine the interaction between morality and law through the prism of human rights protection with particular regard to the limits of state interests. This task will not be accomplished in one chapter but will form the basis of the subsequent chapters.

As was argued in the previous chapter, proportionality provides a method of legal reasoning when considering refugee claims. It was argued also that proportionality via the balancing exercise necessarily engages moral

⁷ Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 15, 23

considerations. As Linderfalk notes, “proportionality is tied to moral and political norms”⁸ as it is “inevitably relative to some certain criterion or criteria. Such criteria derive from the intended purpose of the particular law at issue.”⁹ The purpose of refugee law, it is asserted, is the protection of human rights.¹⁰

Further to the preceding chapter, in order for a connection between law and morality to be operational there must be some identifiable moral principles, violation of which leads to either legal defectiveness or legal invalidity (depending on the severity of the violation). It is necessary first to discuss the existence of moral elements. The discussion here will be limited to human dignity and human rights and, in the subsequent chapter, the principles of (political) justice. The discussion is so limited as if any moral elements are relevant to refugee law it is these. The discussion will also be brief, although some time will be spent discussing the so-called ‘existence problem’, it will only be undertaken to the extent necessary to refute relativism. The focus of this chapter is underpinnings of human rights, namely the principle of human dignity and the demand for special protection. The existence of human rights is supposed to be proven and justified; why will be briefly set out below.

3.1 Human Dignity

The relevance of human dignity to human rights law is irrefutable. Human dignity is often stated as the foundational principle of human rights. It is

⁸ Linderfalk ‘Towards A More Constructive Analysis of the Identity of Special Regimes in International Law: The Case of Proportionality’ (2013) 2 Cambridge Journal of International and Comparative Law 859.

⁹ Ibid 860.

¹⁰ This will be explored in more detail in Chapter 5.

frequently used in other international and domestic legislation. For example, doctors are endured to practice 'with respect for human dignity', the term is repeated in legislation from health care to education to governance to the extent that it has been labeled 'meaningless.'¹¹ Even if human dignity is not entirely rejected as a useful concept how human dignity is being used and what it means in these various contexts is disputed. Despite the lack of agreement concerning meaning human dignity is beginning to be used in refugee cases, particularly in discussions of so-called third generation rights.¹²

An in-depth exploration of the term is beyond the scope of this project but a few observations can be made. First, the vagueness of the concept of human dignity does not render it useless when applied in concrete circumstances, indeed a vague concept is more adaptable and remains useful as long as the parameters of the term are capable of delimitation. Secondly, here we are concerned with the meaning of human dignity in relation to human rights and the idea of human rights "depends on the vague but powerful notion of human dignity."¹³

Donnelly's comments above reflect a general impression that the concept of human dignity is central to human rights law. Indeed it is often spoken of as synonymous with human rights. It is given prominent place in many human rights treaties. The International Covenant on Civil and Political Rights, for

¹¹ See, for example, Macklin 'Dignity is a Useless Concept' (2003) *British Medical Journal* 327 1420. For the many uses of 'human dignity' see, Schultziner 'Human Dignity: Functions and Meanings' in Malpas and Lickiss *Perspectives on Human Dignity: A Conversation* (Springer 2007).

¹² For two of the few judicial considerations of human dignity in the refugee law context see, *Begzatowski* 278 F 3d (7th Circuit) (2002) and *Refugee Appeal 71427/99 RSAA* (16 Aug 2000).

¹³ Dworkin (n 21 introduction) 99.

example, states unequivocally that the rights enumerated "derive from the inherent dignity of the human person."¹⁴ The UN Charter of 1945 affirms a view of human dignity as a status stating the importance 'in fundamental human rights, in the dignity and worth of the human person'. The 1948 Universal Declaration of Human Rights then strengthened the idea of human dignity as basis for other rights in its Preamble, stating 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'¹⁵ Article 1 of the Declaration of 1948, as a central provision regarding human dignity in international documents, emphasizes: 'All human beings are born free and equal in dignity and rights.' Article 22 and Article 23 also contain references to human dignity. The Preamble of the UNESCO Charter of 1945 relates to human dignity, as does the ICECR (article 13), the International Convention on the Rights of the Child (article 28), to name a few.¹⁶ Article 1 of the European Charter on Fundamental Rights refers to human dignity as 'inviolable. It must be respected and protected.' The preamble discusses it in terms of the first of the 'indivisible, universal values' the charter seeks to protect. That human dignity is relevant to, or indeed takes centre stage, in human rights law seems difficult to dispute. As Waldron notes, aside from the

¹⁴ This not purely a Western ideal, Donnelly argues, quoting Abdul Aziz Said's assertion that "[i]n Islam as in other religious traditions, human rights are concerned with the dignity of the individual." Donnelly 'Peace as a Human Right' in Mertus et al *Human Rights and Conflict: Exploring the Links between Rights, Laws and Peacebuilding* (US Institute for Peace Press 2000) 152.

¹⁵ n 59 chapter one.

¹⁶ There are also references to human dignity in the UN General Assembly Declaration on the Elimination of All Forms of Intolerance and Discrimination on the Basis of Religion or Conviction of 1981 (see Preamble and especially Article 3: 'The discrimination between human beings on the basis of religion or conviction constitutes an insult to human dignity'), the International Convention on the Elimination of All Forms of Discrimination against Women of 1979 [CEDAW] (Preamble), the UN General Assembly Declaration on the Elimination of Violence against Women of 1993 (Preamble), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 [CAT] (Preamble).

numerous explicit mentions of human dignity there are many more implicit references to human dignity in human rights law.¹⁷

3.1.1 Defining Dignity

There are several different approaches one can take to the concept of human dignity. My brief account draws upon Christopher McCrudden's helpful examination of dignity as a legal concept.¹⁸ It can be viewed as a protected good in and of itself, a theoretical concept providing the basis of other rights or as a moral status belonging to humans.¹⁹ Rao identifies three concepts of human dignity used in constitutional cases; human dignity as intrinsic human worth, human dignity as a communitarian concept and human dignity as recognition.²⁰ The third version may well be reframed as human dignity as status and has been seen in US cases concerning right to marry for gay couples. The second concept will not be explored in greater detail below. This version of human dignity is not of particular use to refugee law as it focuses on violations of human dignity from the perspective of the community. This concept of human dignity was used to explain why a dwarf could not make a living participating in the sport of dwarf throwing in *Wackehnehim v France*.²¹

In human rights law, human dignity might be said to do work in all of these capacities. Indeed for refugee law human dignity may be a useful concept

¹⁷ "How Law Protects Dignity" (2012). New York University Public Law and Legal Theory Working Papers. Paper 317.

¹⁸ Human Dignity and Judicial Interpretation of Human Rights (2008) The European Journal of International Law 19 (4) 655 and McCrudden Understanding Human Dignity (Oxford University Press 2013).

¹⁹ See Waldron *Dignity, Rank, and Rights* (Oxford University Press 2012). These are just a few concepts of human dignity it has also been identified as a religious concept stemming from the status humans have from being made in God'

²⁰ Rao 'Three Concepts of Dignity in Constitutional Law' Notre Dame Law Review 86 (2011) 183.

²¹ CCPR/C/75/D/854/1999.

particularly because of this capacity to mean different things in different contexts whilst retaining a core meaning. This may allow it to act as a bridging concept in bringing less established rights into the persecution criterion and therefore within the scope of refugee law. This section will first seek to set out this core meaning of human dignity before exploring how human dignity is and can be used in refugee law.

For all of these mentions in international and national laws human dignity remains a contested notion. As Rao notes, “[w]ith the Universal Declaration’s emphasis on “dignity,” it became an internationally recognized legal term of value, even if the precise meaning of dignity remained unspecified.”²² This has led some to argue that human dignity is of little use as a concept in international law.²³ It may well be for this reason that human dignity remains little used in refugee law. Heuss however suggests this might what makes human dignity a useful concept. Heuss refers to human dignity as a ‘non-interpreted thesis’, a concept ‘that is not fixed in its meaning and can therefore marry otherwise opposing views.’²⁴ Waldron similarly sees this ambiguity an important and positive feature of human dignity.²⁵

²² n 17 195. Spielberg similarly notes, “[H]uman dignity seems to be one of the few common values in our world of philosophical pluralism. But while our philosophies seem to agree on this conclusion, they display no agreement about its reasons” Spiegelberg *Human Dignity: A Challenge to Contemporary Philosophy* in Gotesky & Laszlo eds. *Human Dignity* (Gordon and Breach 1970) 62.

²³ McCrudden, for example, argues “does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions” n20 655.

²⁴ Cited in Schroeder, ‘Human rights and human dignity: an appeal to separate the conjoined twins’ (2012) 15 *Ethical Theory and Moral Practice* 323, 326.

²⁵ Cited in McCrudden n 15 13.

The value of dignity is that it “functions as a concept around which we can meet and discuss.”²⁶ When considering the boundaries of refugee law, or rather the boundaries of what refugee law should be used to protect, human dignity is a useful tool. This is particularly the case for refugee law as it is to be applied across borders. It might be identified as a common feature of all of the rights against the violation of which refugee law offers protection. This thesis argues that human dignity remains at the core of human rights law and, therefore, refugee law. It is impractical, as well as unhelpful, to ignore the concept, particularly when seeking to map the limits of refugee law. An infringement of human dignity might not necessarily be sufficient to make out a claim to refugee status but it is difficult to envisage a violation of human dignity for which there was a lack of state protection that would not entitle the victim to refugee status. Human dignity, it is argued here, has the potential to be of great use to refugee law. This is in particular because one element of human dignity around which there is some consensus is that it- whatever it is- demands protection. It also provides a vehicle for interpreting refugee law.

For Schlink human dignity is pointless as it is sufficient to consider human rights on their own.²⁷ Human dignity adds nothing to right to life. This is a persuasive argument for established rights. It is less so for emerging rights. When one wishes to determine if a right is capable of being recognized a human right one needs a foundational notion against which to consider the right in order to make a determination. As McCrudden notes, despite his

²⁶ Ibid.

²⁷ ‘German Constitutional Culture in Transition’ [1993] 14 *Cardozza Law Review* 713, 724.

reservations about the concept, human dignity “plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of human rights interpretation and adjudication.”²⁸

Whilst the ambiguity of human dignity is a good feature, the common core must first be identified. Human dignity cannot be useful to refugee law without first identifying some common meaning. The search for meaning might be split into a few distinct yet overlapping enquiries. Firstly, what is meant by human dignity will be explored in terms of the development of the concept. The core minimum meaning of human dignity will be identified and this discussion will continue to a consideration of the meaning. Secondly, the concept will be fleshed out by considering human rights law. This section will consider the link between choice, autonomy and human dignity. Finally, the uses of human dignity and human rights in refugee law will be considered.

3.1.1.1 *Brief Background to the Concept of Human Dignity*

A starting point for an understanding of human dignity is often the judgments of the German Constitutional Court. There are several reasons for this. Firstly, Article 1 of the German Constitution is a statement of human dignity. This is an early *legal* expression of human dignity.²⁹ Secondly, it could be said that human dignity has been transposed from a philosophical notion to a legal notion in response to the horrors of the Holocaust. It was included in

²⁸ n20 656.

²⁹ Although mention of human dignity had also been contained in the 1919 Weimar constitution and the 1917 Mexican constitution. These constitutions did not endure long enough to have significant judicial consideration. Similarly although human dignity was mentioned in the 1933 Portuguese Constitution and the 1937 Irish Constitution this was very much a Catholic version of human dignity.

the German Constitution in response of the recent horrors and German jurisprudence necessarily engaged with the concept.³⁰ As Habermas notes this notion of human dignity became solidified after the horrors of the Holocaust, “[o]nly during the past few decades has it also played a central role in international jurisdiction. By contrast, the notion of human dignity featured as a legal concept neither in the classical human rights declarations of the eighteenth century nor in the codifications of the nineteenth century.”³¹ Thirdly, the philosophical foundation of human dignity may be traced to the German philosopher Immanuel Kant.

Kant was not the first philosopher to consider the notion of human dignity. The concept is mentioned as far back as ancient Rome. Similarly to the ancient notions of human dignity Kant sees human dignity as a status. Kant however articulates the concept as separate to a person’s worth. Kant’s aim is to consider how a person should be treated in abstract he is therefore unconcerned with the person’s character or actions. There is no sense of a person unworthy of human dignity. Kant often asks one to consider how others should treat one on the basis that one will necessarily see oneself as worthy of value and protection. An in-depth discussion of Kant is beyond the scope of this thesis and this thesis does not purport to examine Kant’s theory or theories itself. Only one element of Kant’s many philosophies is examined, the categorical imperative, and it is acknowledged that this is only a brief examination.

³⁰ It is also a useful expression of human dignity in that the framers of the Constitution specifically sought to avoid ‘a specific philosophical or ethical concept of human dignity’ in order to allow it to remain ‘open to different approaches’ Walter ‘Human Dignity in German Constitutional Law’ in European Commission for Democracy through Law 24.

³¹ *ibid* 465.

Kant's articulation of human dignity is that people must be treated as ends in themselves rather than merely means; stating: "[E]verything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity."³² Kant's reformulation of his categorical imperative requires that one "[a]ct[s] in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means." This places emphasis on the value of human life as in and being of itself deserving of moral respect. This demand for respect might be said to be core of the concept of human dignity. In 1992 the German Constitutional Court in one of its multiple considerations of the term stated that the term 'human dignity' means that the human being has a right to 'social value and respect'.³³ This demand for respect stems from the fact that human dignity is not linked to any specific characteristic, achievement or feature of a human being. It is therefore not capacity dependent.³⁴ Similarly Kant emphasizes that the categorical imperative is *not* context specific. It is in contrast to the hypothetical

³² Kant (n 27 chapter two). Bognetti describes Kant as the father of the concept of human dignity see 'The Concept of Human Dignity in European and U.S. Constitutionalism', in Nolte (ed.) *European and US Constitutionalism, Science and Technique of Democracy* (Cambridge University Press 2005) 75. Although concern has been expressed at the Catholic theological underpinning of Kant's theory Tasioulas and McCrudden both take the view that the religious underpinning is not problematic to the extent that, in Tasioulas' terms, that they can be 'cashed out'- or replaced- in terms of reason(s) see n 20 33.

³³ Decision of 20 October 1992, BVerfGE 87, 209 [Sammlung der Entscheidungen des Bundesverfassungsgerichts – Reports of the decisions of the Federal Constitutional Court.

³⁴ And has therefore been used to explain why the execution of those with mental retardation is an affront to their human dignity see *Atkins v. Virginia* (2002) 536 US 304.

imperative; a conditional obligation to perform an obligation for the sake of a specific purpose or end.

3.1.1.2 Judicial explanations of human dignity

Human dignity explains why we cannot will as universal law anything that does not respect persons as ends not means. The German Constitutional Court has expressed this as the 'object-formula.'³⁵ This enjoins other actors not to treat the individual as an object in such a way that challenges or questions the value of the individual. This returns to Kant's notion that dignity has no equivalent and, therefore, no price. Dignity cannot be bargained away, traded or replaced. This view of human dignity also explains how human dignity can protect those who may be unaware of their own dignity. It further links to the notion of individuals as right holders and not merely objects of rights.

Violations of human dignity, Heyde suggests, "brings into contempt the value which a human being has by his/her being a person. Measures of this kind would be humiliation, branding, outlawing or other behaviour which deprives the human person of the right to recognition as a human being."³⁶ Sedmak similarly speaks of human dignity as an enjoiner not to treat people as objects and offers what might be termed the vulnerability test. Sedmak suggests "Vulnerability provides a litmus test: how we deal with the most vulnerable members of society tests our commitment to dignity."³⁷

³⁵ Judgment of 3 March 2004, BVerfGE 109, 279 (n 29).

³⁶ Commentary on the EU Charter of the Fundamental Rights of the European Union, Article 1: Human Dignity.

³⁷ In n 15 32. Sedmark considers relationality, rather than autonomy, as the important aspect of human flourishing. This will be considered in more detail below.

ECJ has considered human dignity on many occasions and Judge Fitzmaurice in *Ireland v United Kingdom* noted human dignity is a broad one, in the context of Article 3 it can cover:

‘something seriously humiliating, lowering as to human dignity, or disparaging, like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one’s sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt ...’³⁸

The ‘humiliation’ conception of human rights is one rejected by McCrudden. The humiliation argues McCrudden is secondary to the harm. As McCrudden explains it ‘[d]ignity does not just protect people from the experience of a collapse of self-esteem or being ignored but from the actual harm itself.’³⁹ It might however be argued that both humiliation and harm are capable of being violations of human dignity, depending on the circumstances. This explanation allows for mental torture to be recognized alongside physical torture and, it could be argued, is preferable for that reason alone.⁴⁰

The value of human dignity is that it can be used in different contexts. Although the ECHR does not contain an explicit expression of human dignity the concept has been discussed in several cases before the ECtHR. In the East African case the affront to human dignity was used to explain the wrong of

³⁸ 2 EHRR 25, 27.

³⁹ Although this is sometimes seen as distinction between choice and relational theory there is a similar caveat in choice theory. It is not necessary to have the actual capacity to make choice, it is the general human capacity to take choices that is important.

⁴⁰ For an indepth discussion of human dignity as connected to humiliation see Luban ‘Human Dignity, Humiliation and Torture’ (2009) 19 *Kennedy Institute Ethics Journal* 211.

racial discrimination.⁴¹ Similarly human dignity was used to explain why corporal punishment was capable of being a breach of Article 3 prohibition on inhuman and degrading treatment.⁴² That human dignity is capable of responding to changing circumstances in which it may be violated can be seen in the variety of references to and cases before the ECtHR in which human dignity forms a key part of the legal argument.⁴³ The need for international human rights law to 'mature' by expanding its normative content is identified by Philip Alston⁴⁴ and human dignity might be said to be useful in providing direction for this maturing.

It could be argued that instead of adopting either a rights or duty based view of human dignity one could adopt a view of human dignity as multi faceted. Human dignity could be said to include both a rights based notion, serving as the foundation of rights, and a duty creating element, in that violations of dignity and the connected rights, create reason to act. Further human dignity might be seen as a principle which stands behind other individual rights. In this way it may also provide a guide to interpretation of human rights.⁴⁵ This

⁴¹ *East African Asians v. United Kingdom* 3 EHRR (1981) 76 203–207.

⁴² *Tyler v United Kingdom* 2 EHRR 1 [33].

⁴³ *Bock v. Germany* 12 EHRR (1990) 247 [48] *SW v. UK; CR v. UK*, 21 EHRR (1995) 363 [44] *Ribitsch v. Austria*, 21 EHRR (1995) 573 [38] *Goodwin v. United Kingdom*, 35 EHRR (2002) 447 [90–91] *Selmouni v. France* 23 EHRR (1999) 403 (Article 3), *Moldovan v. Romania* 44 EHRR (2007) 16 (Article 14), *Pretty v. United Kingdom*, 24 EHRR (1997) 423 (Article 3), in which it was stated that '[t]he very essence of the Convention is respect for human dignity and human freedom' [65]. These cases cover issues as diverse as the right to a fair trial, the right not to be punished under a retrospective law and the right to a private life.

⁴⁴ Introduction to Human Rights Law (International Library of Essays in Law and Legal Theory 1996) xi, xii.

⁴⁵ For articulation of this multi faceted concept of human dignity see *Dawood v. Minister of Home Affairs* [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC). 'Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.... it is [also] a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is

echoes the Vienna Convention enjoiner to recall the principles and purposes behind a Convention when seeking to interpret terms of international law. This obligation to consider the specific purpose of the treaty reminds one that human rights law protects a range of interests and goods. It also suggests that as human dignity has been identified as a concept laying behind these many varied rights it must necessarily be a flexible concept.

The flexibility of the concept of human dignity is reflected in the range of cases in which the European Court of Justice has considered human dignity to be engaged.⁴⁶ This returns to Rao's observation that human dignity has been used in number of ways in constitutional cases. That human dignity is capable of demanding the evolution of human rights law is shown in the judicial recognition of same sex marriages in several countries.⁴⁷ It has also been used to explain a right to adequate housing⁴⁸ and the right to safe public transport.⁴⁹ The English and Welsh House of Lords had begun to use this concept although infrequently⁵⁰ and the Supreme Court has yet to substantively

offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour' [35] (O'Regan J).

⁴⁶ This includes cases on more obvious issues such as sex discrimination (Case C-168/91, Christos Konstantinidis [1993] ECR I-1191) but also less obvious violations of human dignity such as laser games which require simulation of death (Case C-36/02, Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609). See also the cases of Case C-13/94, P v. S and Cornwall County Council [1996] ECR I-2143, at para. 22, the opinion of Maduro AG in Case C-303/06, Coleman v. Law, Judgment of 31 Jan. 2008, at paras 8-10, 12-13, 15, and 22 and Case C-377/98, Netherlands v. European Parliament and Council [2001] ECR I-7079.

⁴⁷ See, for example, *Halpern v. Attorney General* (2003) 65 OR (3d) 161, *CA for Ontario or South African case of Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (Constitutional Court).

⁴⁸ *Khosa v. Minister of Social Development* (2004) (6) SA 505 (CC).

⁴⁹ *Rail Commuters Action Group v. Transnet Ltd t/a Metrorail* (2005) (2) SA 359 (CC).

⁵⁰ *Ghaidan v. Godin Mendoza* [2004] 2 AC 557, at 604 [130] (Baroness Hale); *R v. Secretary of State for Work and Pensions ex parte Carson* [2005] UKHL 3 [49] (Lord Walker).

engage with the concept. Carozza sees this use of human dignity across jurisdictions as the search for the universal.⁵¹ This means the concept is capable of meaning many things whilst retaining its core meaning. Human dignity is a way of asking us what (rights) we consider most important and what we might need to protect and enjoy these things.

3.1.2 Human Dignity and interpreting human rights

Human dignity can be useful as a starting point for reasoning about whether or not a feature of being human should be protected and to what extent. As McCrudden notes, inclusion of human dignity in the UDHR was “a vital attempt to articulate their understanding of the basis on which human rights could be said to exist” on the part of the drafters.⁵² Eleanor Roosevelt is said to have explained the inclusion of human dignity with the claim that “every human being is worthy of respect ... it was meant to explain why human beings have rights to begin with.”⁵³ Thus “to attend to human dignity is to attend to the *value* or *significance* that belongs to human being (this alone is a reason why the concept of human dignity cannot be discarded.)”⁵⁴ It is the value or significance which also creates an obligation of respect Kant explained, “[M]an regarded as a person . . . possesses, in other words, a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.”⁵⁵ Similarly, Alan Gewirth explains that this universal dignity creates an obligation of “necessary respect” that

⁵¹ Carozza, ‘My Friend is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights’ 81 Texas Law Review (2003) 1031.

⁵² n20 677.

⁵³ Glendon A *World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 146.

⁵⁴ *ibid* 20.

⁵⁵ Cited in Rao n 22 195.

“consists in an affirmative, rationally grounded recognition of and regard for a status that all human beings have by virtue of their inherent dignity.”⁵⁶

Human dignity operates as a “the moral principle [that] ought to inform how society and other individuals interact with them.”⁵⁷ Human dignity grounds respect individual autonomy and justified claims to basic needs required to have a life of one’s own. Thus “to attend to human dignity is to attend to the *value* or *significance* that belongs to human being (this alone is a reason why the concept of human dignity cannot be discarded.)”⁵⁸ Feinberg views human dignity as essentially synonymous with human rights stating “[t]o respect a person then, or to think of him as possessed of human dignity simply is to think of him as a potential maker of claims.”⁵⁹ Dignity however can be seen as the basis of human rights and not merely a synonym for the same. Habermas articulates this link between human rights and human dignity as “[h]uman rights developed in response to specific violations of human dignity, and can therefore be conceived as specifications of human dignity, their moral source.”⁶⁰ As McCrudden notes if you see human dignity as the basis of human rights then “dignity becomes an interpretive principle to assist the further explication of the catalogue of rights generated by the principle.”⁶¹

Human dignity might then be defined as having two key elements, inviolability and universality which in turn generate a general demand for

⁵⁶ ‘Human Dignity as the Basis of Rights’ in Meyer & Parent (eds) *The Constitution of Rights* (1992) 17.

⁵⁷ Green ‘Human Dignity’ in *ibid* 151.

⁵⁸ *Ibid* 20.

⁵⁹ ‘The Nature and Value of Rights’ [1970] *Journal of Value Inquiry* 243, 252.

⁶⁰ *The Concept of Human Dignity and the Realistic Utopia of Human Rights* (2010) *Metaphilosophy* 464 [464].

⁶¹ *n* 20 681.

respect and a specific obligation to respect and protect it on the state. Andrew Clapham expands on the duties that this concept of human dignity generates:

- (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another;
- (2) the assurance of the possibility for individual choice and the conditions for 'each individual's self-fulfillment', autonomy, or self-realization;
- (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity;
- (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.⁶²

Human dignity might be summed up as the assertion that human beings have special value as such, is "closely related to the idea of human *worth*."⁶³

Human dignity contains:

- 1) an ontological claim that all human beings have this status of equal moral worth which is inherently held and not conferred upon individuals by anyone
- 2) a normative principle that all human beings are entitled to have this status respected by others
- 3) and, therefore, to have a duty to respect it in others.

This discussion on human dignity might show that there are many different concepts of human dignity. It however also shows that there is consensus

⁶² Clapham *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 545-6.

⁶³ Malpas (n 9 chapter three) 19.

about the core of human dignity. The core might be said to comprise of four elements. Firstly, in all of these articulations of human dignity it is expressed as inviolable, a right that cannot legitimately be infringed, forfeited or renounced. Secondly, it is a right held on the basis of being human and nothing more or less. Thirdly, human dignity demands respect. As McCrudden notes “human rights texts have gone further and supplemented the relational element of the minimum core by supplying a third element regarding the relationship between the state and the individual.”⁶⁴ Hathaway summarizes the relationship between human rights and human dignity by viewing human rights as a project by states in articulating and defining unacceptable infringements of human dignity.⁶⁵ This is the notion that the state is to operate for the benefit of the individual and not vice versa. These four elements are more than sufficient to allow human dignity to operate as a useful concept in refugee law.

Refugee law builds on this same concept. This can be seen in the protection afforded to persons whose right to religious beliefs or political views are being infringed. More recently this wider concept of human dignity has been recognised to encompass a right to express sexuality. This gives us a broader concept of human life beyond what is required merely to survive. It is argued here that this demand for a broader concept of living rather than merely existing stems from the concept of human dignity and the obligation to respect human dignity through refraining from infringing on another’s ability to form and carry out their own life plan. This, of course, is not a limitless

⁶⁴ Ibid. This element of human dignity will be considered in the following chapter.

⁶⁵ The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary (1998) *International Journal of Refugee Law* 80, 85.

concept. We can of course only carry out our own life plan to the extent that it does not unduly impact on another's life plan following Kant's categorical imperative requiring, in simple terms, that we treat others only as we could will others to treat us.

Despite the many and varied usages of the term found in their detailed exploration of human dignity across disciplines, Malpas and Lickiss identify one common theme "the relation between dignity and autonomy."⁶⁶ The debate itself cannot concern us here, it suffices to say that this author comes down on the side of establishing a foundational link between dignity and autonomy and asserts that "dignity is not *either* respect for autonomy *or* equality but the *ground* for both concepts."⁶⁷ It is the *answer* to the question 'why should I respect people's autonomy?' not a reformulation of the question.⁶⁸

This link between dignity and autonomy renders human dignity of such value. The value of human dignity lies in the fact that it must be respected in order to allow individuals to form and carry out their own life plan. As Rao notes "[d]ignity as agency can have universal, or at least widespread, appeal because it does not require a specific concept of dignity."⁶⁹ It is useful, therefore, that human dignity is capable of being articulated in a different manner depending on the circumstances as it mutates to ensure that threats to one's life plan are identified, prohibited or to provide a basis for punishment of the violators. As human dignity is the grounds for respecting individual

⁶⁶ Malpas and Lickiss (n16) 3.

⁶⁷ Sulmasy 'Human Dignity and Human Worth' in *ibid* 10.

⁶⁸ *ibid*.

⁶⁹ n22 200.

autonomy “how we think about the dignity that is ours (whoever ‘we’ may be) depends very much on our conception of ourselves.”⁷⁰

3.2 Justifying Human Rights and Explaining Human Dignity

There have been many different routes taken to explaining the existence of or justifying human rights; Alexy identifies eight different forms of foundational arguments, ranging from the religious to the instrumental, from biological to the existential.⁷¹ Alexy defends an explicative argument, specifically one based on discourse theory, which he combines with an existential argument to justify human rights. Human dignity is identified here as *the* underlying abstract value behind human rights providing the core of human rights. The principle of human dignity might be said to provide sufficient justification for the existence of human rights as it recognises the fundamental and inherent worth of a human being in all circumstances.

Although there are many and varied justifications for human rights if one is seeking to rely on the existence of human rights as a foundation for other claims one theory need not be demonstrated to be persuasive to the detriment of all other theories. Indeed, to identify only one persuasive foundation of human rights might suggest a thinner basis for human rights than is actually the case. The various justifications for human rights set out above, and the others not mentioned, might be said to *all* to some extent to provide foundations for human rights but to rely on the existence of human rights for

⁷⁰ ‘Human Dignity and Human Being’ in *ibid.*

⁷¹ ‘Menschenrechte ohne Metaphysik?’ (2004) 52 *Deutsche Zeitschrift für Philosophie* 15 translated terms included.

the remainder of the thesis one only needs to accept one of the theories presented above as providing good reasons to act.

A common feature of accounts of the special nature of human rights is recourse to the notion of agency used from Hobbes and, in parts, Kant through to Hart, Gewirth, Raz, Griffin and Tasioulas, to name a few.⁷² This builds on the observations as to the content of human dignity made above. Gewirth, for example, thinks of human rights as those rights necessary for purposive human action guided by free choice.⁷³ Hart, in *Are There Any Natural Rights?* argues that if there can be said to be any moral right at all then the equal right of all to be free is it and he bases this assertion on the human capability of choice. The human capability of choice, for Hart, is what gives one the right to be free from interferences in our liberty (meaning if one wishes to interfere in the liberty of another special justification must be given). If we are capable of choice, argues Hart, then we have the right to be free from coercion or restraint in these choices and are at liberty to do any action that would not coerce or restrain others. In other words, all things being equal, we

⁷² The relative merits of Interest/Benefit theories of rights and Will/Choice theories are beyond the scope of this thesis and are not, therefore, discussed here. For an overview of these debates, see Simmonds 'Rights at the Cutting Edge' in Kramer et al *A Debate Over Rights* (Clarendon Press 1998). The distinction between the theories might also be said to be far from clear cut, for example, Kramer, describes himself as an 'interest' theorist, but insists that every right must give rise to a correlative duty: 'Rights Without Trimmings' in *ibid*.

⁷³ Gewirth (n 90 in chapter one) Though this notion of human rights does not lead to recognition of all of the rights Gewirth seeks to justify, for example, as Raz demonstrates, a slave may be said to act purposively but they are not free, thus freedom would not appear to be a human right as is it not a precondition for acting purposively see Raz (n 13). However, the counter argument to Raz centres on the ability of an agent to act purposively or the *capacity* to choose one's one life plan. If an agent has this capacity, and based on the assumption that *all* human beings have this capacity whether or not this is factually true, then this capacity ought to be respected and recognised, so the slave ought to have freedom because she can act purposively. Freedom is not a precondition for acting purposively but a right due to all who are capable of acting purposively.

have both a negative and positive right to make use of our capability of choice.

This type of argument is often associated with Martha Nussbaum and Amartya Sen, although they do not refer to it as choice theory but rather the 'Capabilities Approach.'⁷⁴ Their theories are centred on the value of individual choice. At the most basic level, the capabilities approach evaluates individual well-being based on the interrelated assumptions as to a) the value of individual choice and b) that without respect for core human rights one's choices are limited or, even, non-existent. Well-being and development should be discussed in terms of people's capabilities to function, that is, on their effective opportunities to form and carry out their own life plan. For Sen and Nussbaum, the range of capabilities needed to carry out one's life plan effectively involves far more than just basic goods. Individuals need both the means and the freedom to achieve their ends. Human rights, then, are connected to the capacity to choose and the freedoms needed to make use of this capacity. This presupposes certain foundations for human rights, namely the individual as autonomous and, therefore, entitled to respect for this autonomy, in the guise of the right to be human dignity, which forms the basis of human rights.

Griffin, similarly, focuses on agency, seeing human rights as those required to allow "deliberating, assessing, choosing and action to make what we see as a

⁷⁴ *The Quality of Life* (Oxford University Press 1993). Expanding on Sen's arguments in *Commodities and Capabilities* (Oxford University Press 1985) and applied by Nussbaum further in *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

good life for ourselves.”⁷⁵ The interest human rights protects, then, is human agency and the very fact that the individual in question is human (and it is assumed values her purposes) is what justifies protecting their agency. In Gewirth’s terms, being a human allows one to say ‘I at least have a prima facie claim right to generic features of agency.’⁷⁶ Griffin links this directly to personhood, one’s status as a human being and the inherent dignity attached to this status. Personhood, a concept tied closely to human dignity, is a core element of the concept of human rights articulated throughout international human rights law; the UDHR, for example, declaring ‘[a]ll human beings are born free and equal in dignity and rights. They all endowed with reason and conscience...[.]’⁷⁷ Signatory states to the UDHR, and other UN Human Rights treaties including arguably the Refugee Convention, are to a certain extent committed to this concept of human rights. The foundations of this are, however, worth exploring.

Despite the many and varied usages of the term found in their detailed exploration of human dignity across disciplines, Malpas and Lickiss identify one common theme “the relation between dignity and autonomy.”⁷⁸ The debate itself cannot concern us here, it suffices to say that this author comes down on the side of establishing a foundational link between dignity and autonomy and asserts that “dignity is not *either* respect for autonomy *or*

⁷⁵ Griffin *On Human Rights* (Blackwell 2007). The phrase ‘the good life’ is discussed below.

⁷⁶ Gewirth (n 90 in chapter 1) 109-10.

⁷⁷ Article 1 (1948). The Preamble also states “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

⁷⁸ Malpas and Lickiss (n 9 chapter three) 3.

equality but the *ground* for both concepts.”⁷⁹ It is the *answer* to the question ‘why should I respect people’s autonomy?’ not a reformulation of the question.⁸⁰ This link between dignity and autonomy renders human dignity of such value. The value of human dignity lies in the fact that it must be respected in order to allow individuals to form and carry out their own life plan. It is useful, therefore, that human dignity is capable of being articulated in a different manner depending on the circumstances as it mutates to ensure that threats to one’s life plan are identified, prohibited or to provide a basis for punishment of the violators. As human dignity is the grounds for respecting individual autonomy “how we think about the dignity that is ours (whoever ‘we’ may be) depends very much on our conception of ourselves.”⁸¹ Human dignity operates as a “the moral principle [that] ought to inform how society and other individuals interact with them.”⁸² Human dignity grounds respect individual autonomy and justified claims to basic needs required to have a life of one’s own. As Raz states:

Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future.

This view of human dignity allows it to be of great use in refugee law as it begins with the assumption that individuals have a right to control their future and that this right is intimately connected with human dignity. As Raz notes any significant interference with right to control one’s future would constitute a violation of human dignity. This would seem to place significant restrictions on what states can do with those putting forward refugee claims.

⁷⁹ Sulmasy ‘Human Dignity and Human Worth’ in *ibid* 10.

⁸⁰ *ibid*.

⁸¹ Sulmasy n 78 10.

⁸² Green ‘Human Dignity’ in n78 151.

After all, those putting forward refugee claims are seeking to control their own future or rather seeking to regain control of their own future. This idea will be explored in greater detail in chapter five. It is necessary first to consider what versions of one's future- or present- are protected by human dignity. The following sections seeks to consider what sort of choices are or ought to be protected by human rights law by considering the notions of personhood and the good life. The argument is that it is necessary to consider these questions before human rights law and human dignity can guide refugee law. One needs to consider the foundations of these rights so that decision-makers can consider if the violation put forward by an applicant is a violation encompassed by the protective scope of refugee law. This project is particularly pertinent claims involving newly emerging rights or rights which have not yet been the subject of a refugee claim. This suggests a method for analysing these rights within refugee law, namely it enjoins the decision-maker to consider whether there has been a violation of human dignity.

3.2.1 Personhood

For Griffin, the notion of human dignity is connected to personhood. In turn personhood is underpinned by the twin concepts of autonomy and liberty, which are needed to enable an individual to choose one's own life plan and to realise this plan.⁸³ As noted above, and will be explored below, the value of this approach is that it does not dictate a certain concept of the good life. A human right is "an effective, socially manageable claim on others"⁸⁴ to have one's autonomy and liberty respected. Actions that significantly curtail one's autonomy and liberty, thereby preventing one from forming or realising one's

⁸³ Griffin 'First Steps in an Account of Human Rights' (2001) 9 *European Journal of Philosophy* 306 320-3.

⁸⁴ *ibid.*

own life plan, are failures to respect an individual's personhood and *prima facie* human rights violations. This view largely accords with Capps' foundations of international human rights law, which, following Gewirth, he argues is to be found in human dignity understood in terms of freedom and autonomy. Freedom being defined as "absence of unjustified coercion or constraint by the actions of others"⁸⁵ and autonomy meaning capacity to achieve one's purposes. For Gewirth, freedom and well-being are 'generic features of agency' which are necessary for an agent to achieve *any* purpose and as such have a special role, requiring protection.⁸⁶ They also justify restricting the actions of other agents and placing the burden of protection on these other agents.

Raz, writing about Griffin's concept of human rights, argues that the notion of personhood connected to one's ability to form one's own life plan is flawed.⁸⁷ Raz maintains that personhood cannot contain a requirement that, as Griffin puts it, 'one must choose one's own course through life- that is, not be dominated or controlled by someone or something else'⁸⁸ as this suggests "someone who is dominated by his powerful mother, or controlled by his commitment to his employer (having signed a 10-year contract, on condition that the employer first pays for his education) is less of a person than someone who is not dominated or controlled."⁸⁹ Griffin's concept of human rights is

⁸⁵ Capps *Human Dignity and the Foundations of International Law* (Hart Publishing 2009) 108.

⁸⁶ Gewirth (n 90 in chapter 1) 13-15. See also, Beyleveld and Brownsword (n 27 in chapter two) 129-133.

⁸⁷ Raz *The Morality of Freedom* (Clarendon Press 1986) 324-327.

⁸⁸ Griffin (n 69) 311.

⁸⁹ Raz (n 24) 325. This is not to say that Griffin necessarily intends his version of personhood to be read as such, indeed statements such as 'what is needed for human status' might suggest that Raz' critique is well-founded but if one amends Griffin's

open to another interpretation. Personhood stems from the human *capacity* for agency, it says that as a person is capable of forming one's own life plans⁹⁰ she *ought* to be allowed to do so; to say that personhood is based on human agency is not to say that an individual whose agency is being frustrated or denied is not a person.

It could be argued that Griffin's conditions for agency are *ought* not *is*; personhood ought to entail autonomy and liberty (freedoms to choose and realise), where it is does not, due to outside interference, then this is wrong. If a person ceased to be a person when unable to exercise a capacity to choose, personhood would not provide a foundation for human rights, it is precisely because an individual remains a person *despite* the denial of their personhood by another that personhood can underpin human rights. Capps notes this distinction in stating, that "(i)human beings have dignity when they can exercise freedom or, more specifically, autonomy and (ii) autonomy is protected by a series of rights which every human being has because they are human."⁹¹ A denial of human dignity is not, however much the perpetrator may wish it to be, a denial of the victim's humanity, rather it is a failure to respect the inherent dignity of the individual, which can be classified as a

statement to 'what is needed for *recognition* of human status' then the problem of personhood dependent on *actual* capacity for agency (as opposed to *theoretical* capacity for agency given that the individual is a human) disappears, see footnote below.

⁹⁰ This assertion is based on the general concept of personhood applying to all persons, it need not be true of every particular person so a person who is unable to actually exercise intentional agency due to a severe stroke, for example, remains a person never the less, they need not actually possess the capacity for agency only be part of the human race which as a whole possess this capacity. They may in the future be able to exercise this capacity or, at least, would have been able to do so if circumstances were different.

⁹¹ Capps (n 83 chapter three) 108.

wrong. As Donnelly notes, “[h]uman rights are but one way that has been devised to realize and to protect human dignity.”⁹²

The notion of personhood allows us to say it is wrong when a person is denied full personhood through frustration or denial of her human rights and is in this way linked to the notion of human dignity. Here personhood operates as a status, like refugeehood, which requires recognition to be effective but which is *not* constitutive but declaratory: a person is a person whether others recognise that or not and the lack of recognition of personhood, expressed by the frustration or denial of agency, is at the root of human rights violations. To return to Raz’ objections, then, a person whose life plans are thwarted by a domineering mother *might* be the victim of human rights abuses (if the mother is sufficiently domineering so as to actually remove real choices from her child’s life) but in any event they remain a person, they are not “less of a person than someone who is not so dominated or controlled” but exactly as much as a person as anyone else, that is why the domination and control is wrong. This is precisely the point in *human* rights, to say that this individual, as a person, ought to enjoy the same rights as another person to allow them to formulate and realise their own life plan.⁹³ Raz accepts this, in noting a distinction between capacity and its exercise, human rights being then, “rights of those with the capacity for intentional agency to preserve that capacity.”⁹⁴

⁹² Donnelly (n 9) 303.

⁹³ As for the employee who has promised her employer 10 years of service in return for her education, her personhood is apparently fully recognised, she was able to choose her life plan which included entering into a contract, she has bound herself and any person is free to do that.

⁹⁴ Raz (n 24) 326.

Tasioulas, on the other hand, seeks to provide a pluralist account of human rights, with autonomy and liberty just two of the interests grounding human rights.⁹⁵ Tasioulas instead proposes that rights are singled out as human rights “only if they are weighty enough to justify the imposition on others of duties to respect and further those interests in various ways.”⁹⁶ This suggests that the question refugee status decision makers must ask themselves in determining whether there has been a *human rights* violation is, ‘did the home state have a duty to respect the right violated?’ This, however, could be said to lead to a circular argument, how might one determine whether or not a state (in this case) had a duty to respect the right in question without looking to justify the existence of the right in the first place? Put otherwise, how do we decide if the rights are ‘weighty enough’ to justify the imposition of a correlative duty without looking to the justification for the right itself? The grounds of human rights must precede arguments as to the content of human rights.

Alexy similarly sees something beyond mere action or capacity for action, arguing that his correctness thesis is intrinsically connected with the concept of argument, which makes discourse theory preferable as the theoretical foundation of human rights. The distinction with action-orientated theories of justification resolves more around how we wish to conceive of human life than in identifying a justificatory theory that can be demonstrated to be persuasive to the detriment of all others. Alexy wishes us to see ourselves as “discursive and reasonable creatures”⁹⁷ rather than just beings of action. As well as acknowledging the realm of action Alexy’s version of taking rights

⁹⁵ Tasiloulas (n 15 in introduction) 96.

⁹⁶ *ibid* 96.

⁹⁷ Alexy (n 46 in chapter 2) 12.

seriously involves “taking seriously the implications of the discursive capabilities in real life.”⁹⁸ Discourse, as part of the political process and more generally, might also be seen as the bridge between moral rights and positive law as it gives real world legitimacy, via political debate, to the implementation of moral rights into positive law. Discursive theory might be viewed as an expansion of agency theory, the foundations of agency theory needs to be established first then regardless of whether this is considered ultimately sufficient.

3.2.2 The Good Life

Raz’ further concern is that having established human rights as those rights needed to preserve the human capacity for agency, Griffin’s conception of personhood and human rights goes further, looking to human rights to preserve not only the capacity for agency but also to ensure its successful exercise. This, Raz fears, is impossible as we lack criteria to say which rights are necessary to ensure the successful exercise of agency and in determining which choices people are likely to want to make (and ought to be protected therefore) we stray dangerously close to enforcing a particular view of the ‘good life’. For example, Raz takes Griffin’s requirement that everyone be allowed minimal education and information in order to be able to formulate their own life plan. As Raz notes, if this requirement is only minimal then it is easily met, “just by being alive (and non-comatose) we have some knowledge, resources and opportunities”⁹⁹ but Griffin wishes to go further and here, Raz, argues he strays into formulating his conception of a good life rather than grounding human rights. However, minimal education and resources might

⁹⁸ *ibid.*

⁹⁹ Raz (n 24) 326. The comatosed would still be protected from violations of their human dignity via the humiliation or harm conceptions of the notion.

be said to go beyond merely being alive without straying into one version of the good life. Indeed, this conception of human rights excludes very little from one's concept of the good life.

This differs from Tasioulas' pluralist account, which expressly includes "certain minimal conditions of a good life."¹⁰⁰ Griffin seems to intend to formulate some conception of the good life within his view of human rights, however this is not to say that such a view is a necessary component of a personhood-based explanation of human rights. If one bases human rights on personhood, within plausible limits, many different conceptions of the good life are available; indeed this is the purpose of having a choice based conception of human rights. People ought to be free to choose their own plan which will almost inevitably result in a myriad of different life choices but it is, however, the choice act which is protected rather than plurality in of itself. Thus, capacity rights, such as right to life and right to liberty are valued as necessary preconditions to being able to choose one's own life path.

This multifaceted view of the good life is expressed also in the variety of human rights protected through a range of international treaties. Article 13 of the International Covenant on Economic, Social and Cultural Rights ties education to dignity, stating: "education shall be directed to the full development of the human personality and the sense of its dignity." This ties the concept of choice to respect for human dignity implying that one way of ensuring respect for human dignity is to prevent interferences with a person's ability to form and carry out their own life plan. This is consistent with Sen

¹⁰⁰ Tasioulas (n 15 in introduction) 96.

and Nussbaum's capabilities approach to human rights, which places the choice act in the centre of concept of human rights. This view fleshes out what constitutes respect for human dignity by providing capabilities a person should be free to exercise.

The link between human dignity and man's ability to choose is not a new one. As Mc Crudden notes "in the Dignity of Man, published in 1486, Pico della Mirandola argued that at the root of Man's dignity is the ability to choose to be what he wants to be."¹⁰¹ This does not necessarily require a concept of human dignity centred on autonomy. In the most simple terms, this version broadly Libertarian concept of liberty can be countered by noting that a person might chose to be part of a community. Rousseau, to name just one, builds a more communitarian concept of rights and as noted by Rao above this more communitarian concept of human dignity has been used in constitutional cases in terms of the dignity of the community. What these varied forms of human dignity demonstrate is that human rights law can be used to protect a variety of choices, including the choice to be in a community.

Other human rights are protected choices, one might choose to place religion at the centre of one's conception of the good life such that religious belief requires protection as a human right or one might choose to place political participation in a similar position. Human rights are attached to all persons so as to allow everyone the chance to choose to value these things that other humans' value. This is more than justifying human rights purely on self-

¹⁰¹ n20 659. Although for Mirandola the significance of man's ability to reason is that it is a gift from god, this element of his theory is not a conceptually necessary one. The value of choice can be in the choice act itself.

interest. These values are of *intrinsic* and *instrumental* value. Human rights are not justified by interest theory alone but also a form of will theory, placing the capacity for freedom at the centre of any justification of human rights.¹⁰²

Tasioulas, argues Griffin, must demonstrate the special importance of liberty and autonomy such that these interests ground human rights (whilst other interests also connected to the good life do not). It could be argued that the special importance of liberty and autonomy is connected to this choice act, it allows other interests to also be protected if they are also connected to a person's capacity for or exercise of choice (agency). For Griffin, on the other hand, personhood (again understood in terms of autonomy and liberty) is not of 'special importance', indeed he concedes there might be values of greater importance, but 'of a particular sort of importance.'¹⁰³ Personhood forms the basis of human rights because it is a value in need of particular protection as "it is peculiarly vulnerable to threat from those in authority".¹⁰⁴ Human rights would be seen as "protections of human agency"¹⁰⁵ even if it were not accepted that rights could be *derived* from the idea of normative agency.

In this sense, liberty and autonomy are foundational. It is not that, as Tasioulas states, that right to freedom from torture needs to be explained in

¹⁰² Will based theories can take a variety of different forms, from Hart's weak assertion that if any moral right exists it is 'equal right of all men to be free.' ('The Ascription of Responsibility and Rights' 49 *Proceedings of the Aristotelian Society* (1955) 171-177) to Gewirth's more comprehensive claim that as freedom and well-being are necessary conditions for an agent's rationally purposive action, I must logically accept the same claim to protection when asserted by other agents (1983). This, Gewirth terms as the 'principle of generic consistency.'

¹⁰³ Griffin 'Human Rights and the Autonomy of International Law' in Tasioulas and Besson (eds) *The Philosophy of International Law* (Oxford University Press 2010) 347.

¹⁰⁴ *ibid* 347.

¹⁰⁵ *ibid* 346.

terms of autonomy and liberty. Tasioulas is correct in stating that the evil of pain itself is enough to justify this as a human right but it can be explained in terms of autonomy and liberty. The argument is that the common feature of human rights is that they can be explained by reference to protection of individual autonomy and liberty but they need not be explained solely on this account. This provides a more definite guide to interpretation than Tasioulas' pluralist account for it gives us a underlying explanation of human rights and defining characteristics to seek when determining whether or not a right is a human right or not. Tasioulas also views human dignity as a foundational principle; one which can help us decide how to act.¹⁰⁶ Tasioulas considers human dignity a basic moral status but as therefore insufficient alone to explain human rights. He combines human dignity with human interests to provide a rich theory of human rights.

Griffin further suggests that the effect of giving determinacy to the term 'human rights' might even be sufficient ground to accept personhood as grounding human rights, arguing "[t]his is not a *derivation* of human rights from normative agency; it is a proposal based on a hunch that this way of remedying the indeterminateness of the term will best suit its role."¹⁰⁷ This varied concepts of human dignity have variously been used to ground a variety of human rights. Indeed the flexibility of human dignity as a concept might be said to have allowed human rights law to expand and evolve. This poses a particular problem for refugee law and raises the question of whether

¹⁰⁶ He also sees Kant's version of human dignity as a act focused and his theory as one to be considered prior to acting. See Chapter 16 Understanding Dignity. This distinction is not however adopted here, in this author's view both Kant and Tasioulas provide a guide to considerations prior to acting. This is what makes both theories useful to refugee law.

¹⁰⁷ *ibid* 346.

refugee law is limited to a specific type or generation of human rights or whether the expanding concept of human rights may also expand refugee law. This thesis has argued that as human rights law expands so to can the concept of refugeehood. This is not to say however that all human rights violations will automatically give rise to refugee status.

3.2.3 Human dignity and Generations of Rights

Refugee law may be criticised perhaps for being overly focused on first generation rights.¹⁰⁸ This may be said to have been carried through from the concept of human rights and human dignity being established at the time of drafting the 1951 Convention. It may also be because of the link between these first generation rights and the notion of human dignity as demanding restraint on the part of the State. For paradigmatic refugees, of course, ‘interferences’ from the state will most likely be the reason for their flight. As Rao notes “[t]he earliest “first-generation” rights stemming from inherent

¹⁰⁸ The notion of generations of rights was presented by Karel Vasak in 1979. The first generation of human rights might be said to be roughly in line with those defined in the International Covenant on Civil and Political Rights (ICCPR). The second generation consists mainly of the human rights specified in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although no third covenant was under consideration until 1981, Vasak argued that several new human rights, such as the rights to development, to a healthy environment, and to peace, were already beginning to emerge in international law. This terminology is so widely used now that the UK parliament used this terminology when considering a bill of rights, it defined third generation rights as “rights which have attained international recognition as human rights but which are not easily classified as either civil and political rights or economic and social rights. They include rights such as the right to self-determination, the right to natural resources, the right to economic and social development and the right to intergenerational equity and sustainability” see, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtright/165/16509.htm>. Whether this is a good analysis of human rights is beyond the scope of this thesis and the author does not seek to explicitly adopt this scheme of human rights. The terminology is used, however, as this is the terminology often used by decision-makers and courts when discussing human rights in refugee law. It is also a convenient short hand for different types of human rights claims.

dignity relate to negative liberty.”¹⁰⁹ As refugee law has evolved beyond state persecution to recognise non-state agents of persecution, and human rights law has begun to consider positive conceptions of human dignity via the notion of choosing and maintain your own life plans, so refugee law has expanded to consider second and third generation rights. As Alston notes, second and third generation rights have often been described as goals rather than rights.¹¹⁰ Alexy’s principle theory explains how this objection is unnecessary. If human rights are principle (albeit concretised principles) then they are goals in any event. This not only dissolves the distinction between rights and goals but Alexy’s theory also places a demand to maximise. Alexy’s theory then offers a guide to action as well as conceptual explanation. It shows that it is not the generation of the right that determines the action required but a case by case balancing act subject to the optimisation command (to reiterate this requires that both principles be optimised to the greatest degree legally and actually possible).

In practical terms in refugee law the hierarchy of rights does not necessarily preclude a refugee claim on the basis of second or third generation rights but it is clear that where the violation is a first generation right the question of persecution is almost glossed over (or at least becomes merely one of fact.) In short, no one questions if torture is capable of constituting persecution. The same cannot be said of second or, to an even greater extent, third generation rights, as Foster has set out in regards to socio-economic rights.¹¹¹

¹⁰⁹ n 20 204.

¹¹⁰ *Non-State Actors and Human Rights* (Oxford University Press 2005) 341.

¹¹¹ Foster (n 2 chapter one) n.

Instances of second and third generation rights in refugee law remain largely parasitic on establishing discrimination on a Convention ground. For example, it remains difficult to establish a violation of the right to education would be sufficient for refugee status. However if one can show that an individual was excluded from any form of education for discriminatory reasons this may well come within the scope of refugee law.¹¹² Refugee law still largely adopts a hierarchical model of rights, considering more 'minor' violations of first generation rights as within the scope of refugee law whilst excluding, to a lesser or greater degree, second and third generation rights.¹¹³ The English and Welsh courts acknowledged that any human rights violation could engage the Refugee Convention if the violation is extreme enough and/or if discrimination sits behind the violation.¹¹⁴

This differs from the approach taken by the Inter American Court of Human Rights (hereafter Inter American Court) where so-called second and third generation are seen as stemming from first generation rights. The approach of the Inter American Court, it is argued, demonstrates how human dignity allows an analysis of rights away from rigid hierarchisation. It suggests third generation rights are not more or less important but perhaps impacted in a different way. The approach taken by the Inter American Court is arguably

¹¹² see for example *Krayem v Secretary of State for the Home Department* [2003] EWCA 649 concerning a Palestinian man who claimed refugee status on the basis of deprivation at a refugee camp in Lebanon.

¹¹³ See for example, *R v Secretary of State for the Home Department (ex p Ravichandram)* [1996] IM Ar 97 or *Demikaya* [1999] Ar 498 for approval of the hierarchical model. *The case of WRH (Re) Nos T97-05485* referred to third generation rights "as compared to the more serious harms of categories one and two."

¹¹⁴ See for example *Gashi* (n 5 in introduction) [1996] UKIAT 13695 in which it was stated "an entitlement to food, housing and medical care...can at an extreme level be tantamount to persecution if denied" 31. For a more in depth discussion see Foster (n2 chapter 1) and Hathaway (n 11 in introduction) 111.

leading to a bridge between negative and positive rights by demonstrating that non-interference is often not enough in regards to human rights. It asks one to consider not just an interference with a right but also instances where no action has been taken thereby resulting in an interference with the right to a dignified life. For example in *The Street Child Case* the court stated:

[T]he fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.¹¹⁵

Similarly, in *Ximenes-Lopes v. Brazil*¹¹⁶ the Court used the right to life to ground a positive obligation to secure health care. This right was framed as an offshoot of the right to life. The reasoning of the decision could equally have been seen as establishing a positive right to healthcare.

This bridging work has been via the concept of right to a dignified life. The Street Children case sought to establish that the right to a dignified life placed certain demands on states. This notion of a dignified life may be set to fit well with a view of human rights as valuing freedom and autonomy. This view is also particularly suited to refugee law. If we recall discussion of conceptualising persecution in chapter one, Moore and Shellman argued that in viewing persecution as a push factor, we “[a]ssume that people are (1)

¹¹⁵ *Villagrán-Morales et al. v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, 144 (Nov. 19, 1999); see also Human Rights Commission General Comment 6 Art. 6, The Right to Life, 5, U.N. Doc. HRI/GEN/1 (Apr. 30 1982) in which it is stated “[T]he right to life has been too often narrowly interpreted. . . . [T]he protection of this right requires that States adopt positive measures. . . . States parties [should] take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.” .

¹¹⁶ 06 Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006) suggested an obligation to monitor availability of health care.

purposive; (2) value their liberty, physical person, and life and (3) develop beliefs about the actors in society with respect to those values."¹¹⁷ This explanation of why persecution serves as a boundary concept between 'refugee' and 'migrant' builds on an agent focused view of human rights. It looks to interferences with one's capacity to act as an agent (or form and follow one's own life plan) that either stem directly from the state or indirectly from a lack of effective state action. It is important for refugee law then to consider the scope of the state's duty to protect its citizens in order to establish when this duty has not been fulfilled, giving rise to prima facie to a refugee claim. The Inter American Court considers the right to a dignified life as generating specific duties on governments to secure the "minimum living conditions that are compatible with the dignity of the human person."¹¹⁸

This suggests a right is a human right when closely tied to the core element of autonomy (which could be said to form the central element of recognition of personhood or, put otherwise, respect for human dignity) and the conditions needed to be able to use this autonomy. The Inter-American Court of Human Rights has set out how the right to a dignified life can bridge the gap between generations of rights stating:

[T]he right to life is restored to its original status as an opportunity to choose our destiny and develop our potential. It is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions. In such framework, a single right with a double dimension is set, like the two-faced god Janus: one side, with a first-generation legal concept of

¹¹⁷ Moore and Shellman (n 45 in chapter 1) 726.

¹¹⁸ *Indigenous Community Yakyé Axa Case (Paraguay)* Inter-Am. Ct. H.R. (ser.C) No. 125. Importantly it also places obligations on states to take positive states to act to protect individuals from violations by non-state agents.

the right to life; the other side, with the concept of a requirement to provide conditions for a feasible and full existence.¹¹⁹

This suggests that the concept of a dignified life asks us to consider more carefully not only what interferences must be avoided to allow a person to live their life but also what positive rights must be enforceable. This reasoning might be said to echo the work of Olivier de Schutter on the right to food.¹²⁰

This notion of a dignified life only infrequently raises its head in refugee law at present.¹²¹ It is not necessarily a new feature of refugee law but rather an occasional one. Whilst the phrase 'dignified life' does not appear to have been used in a refugee law decision this notion of persecution being a wrong that impacts on a person's ability to lead and form their own life might be said to be alluded to at the very least. The UNHCR asserts that racial discrimination can be a form of persecution where "a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights."¹²² Similarly, Hathaway's assertion that "refugee law ought to

¹¹⁹ *Sawhoyamaya Indigenous Community Case (Paraguay)* Inter-Am. Ct. H.R. (ser.C) No. 146, (Judge Garcia Ramirez, concurring at 18) (March 29, 2006).

¹²⁰ Although de Schutter is primarily concerned with the implementation of a right to food- logical in terms of his now former mandate as UN Special Rappator on the Right to Food- his discussion on the need to implement a right to food might be said to be similarly linked to other rights in that de Schutter sees this right as necessary precursor to the realisation of other rights, see for the most succinct explanation of de Schutter's arguments <http://www.theguardian.com/global-development/poverty-matters/2013/mar/04/fao-food-basic-human-right> (accessed 3 June 2014).

¹²¹ The word 'dignity' is mentioned frequently but it is rarely considered substantively. Cases engaging, albeit often briefly, with dignity include *Begzatowski* 278 F 3d, *Refugee Appeal No 71427/99*, R.A. No 711193/98 RSAA 9 Sep 1999, *Ali v Canada* (Minister of Citizenship and Immigration) (right to education considered), *Freiberg v Canada* (Secretary of State) 1994 18 FTR 283 (right to healthcare).

¹²² UNHCR Handbook (1996) 69.

concern itself with actions which deny human dignity in any key way” has been approved and applied in several cases.¹²³

Following the UNHCR handbook, this reasoning has been applied in refugee cases.¹²⁴ Recently perhaps the most prominent application of this concept has been in the field of sexuality based asylum claims but by no means exclusively. Most often human dignity has been mentioned more in passing than in any meaningful sense. In *Re GJ* the New Zealand Refugee Status Appeals Authority observed that “sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.”¹²⁵ Similarly in *Win* the Australian court remarked “the Convention aims at the protection of those whose human dignity is imperiled.”¹²⁶ This built on the sentiment expressed in *Chan*, where McHugh J stated: “[m]easures ‘in disregard’ of human dignity may, in appropriate cases, constitute persecution .”¹²⁷ Having regard to the concept of human dignity led the court to consider restrictions of access to employment and education as capable of constituting persecution. Although there was no explicit statement of the link between limited access to the job market and education and human dignity it might be reasonable to assume that it was considered an interference with the right to a dignified life to prevent a person from working or accessing education. This suggests again

¹²³ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 (HCA).

¹²⁴ *X (Re)* (2009) 90364 (IRB).

¹²⁵ [1998] (1995) INLR 387, 420.

¹²⁶ *Win v Minister for Immigration & Multicultural Affairs*, [2001] FCA 132, [20].

¹²⁷ *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, 430–31.

a view of human dignity as connected with one's right to form and carry out a life plan.

As noted in chapter one, however, *HJ (Iran)*¹²⁸ contained consideration of the type of life a person could be expected to leave as the UK House of Lords considered whether someone could be reasonably expected to avoid persecution by hiding their sexuality (or living discreetly). Whilst the decision contained reservations¹²⁹, it also held that this duty to avoid persecution could not be enforced. The reasoning behind this might be said to link to the concept of a dignified life, namely that it asserts that a person must be allowed to enforce positive rights not merely ask for non-interference. Lord Dyson observed, “[t]he right to dignity underpins the protections afforded by the Refugee Convention.”¹³⁰ The decision and judgment have been heralded as ground breaking, it might however be seen as long overdue. Indeed, the Court referred back to Lord Steyn's judgment in *Islam and Shah*, which drew attention to the first preamble to the Declaration, which proclaims the inherent dignity and the equal and inalienable rights of all.¹³¹ It follows from human rights law that there can be no requirement to hide in order to avoid human rights violations.¹³² It is inconsistent with the view of a dignified life but it is

¹²⁸ n 26 chapter one.

¹²⁹ The court, for example, stated that if the applicant would have acted discreetly due to familial or social pressure this was not sufficient for refugee status, the reason for acting discreetly must be to avoid persecution to bring the claim within the ambit of refugee law.

¹³⁰ n26 [113].

¹³¹ n78 chapter one.

¹³² The decision of the Supreme Court of the United States of America in *Lawrence v Texas* 123 S. Ct. 2472 (2003) and that of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 come to similar conclusions on the issues of “discretion”, “reasonableness” and “avoidance”. The decisions of the Human Rights Committee in *Toonen v Australia* (Comm No

certainly also contrary to the purpose of human rights, namely to be enjoyed and enforced not merely ignored.

This discussion of a dignified life continued from *HJ(Iran)* to *RT(Zimbabwe)* where the right not to hold any (political) opinion was considered. Here Lord Dyson again considered the issues at hand in terms of the individual's dignity, citing Sachs J opining that "the right to believe or not to believe is a key ingredient of a person's dignity."¹³³ These infrequent substantive considerations of human dignity in the field of refugee law nevertheless demonstrate that human dignity has much to offer refugee law. In particular human dignity suggests a prism through which to consider whether or not an act constitutes persecution. It confirms, indeed it might be said to provide, the inherent link between persecution and human rights standards.

3.2.4 Cumulative Persecution

The notion of a dignified life may also be of assistance in considering cases of cumulative persecution. At first glance the notion of cumulative persecution seems to sit ill with the assertion that persecution concerns the violation of core human rights. For this reason, perhaps, cumulative persecution has been rejected in some jurisdictions.¹³⁴ This rejection rests on the failure of cumulative acts to pass a seriousness threshold and, following Foster, rests on

488/1992, UN Doc CCPR/C/50/D/488/ 1992, 4 April 1994) (sodomy laws) and *Joslin v New Zealand* (Comm No 902/1999, UN Doc CCPR/C/75/D/902/ 1999, 30 July 2002) (same sex marriage) are of direct relevance as are a raft of decisions of the European Court of Human Rights, including *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR) (criminalising homosexual acts), *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHRR 601 (ECHR) and *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (ECHR) (ban on homosexuals in the military).

¹³³ n26 chapter one.

¹³⁴ For example Germany, as was discussed in the case of Gashi. *R v. Secretary of State for the Home Department, Ex parte Gashi* (1998), Gashi [2002] EWCA 227 and in the UNHCR intervention in Gashi and Nikshiqir (n 5 introduction).

an unnecessary distinction between generations of rights. This distinction in turn creates the notion of a hierarchy of rights. For refugee law it suggests that as we move 'down' the hierarchy the claim is more difficult to make out as it will require either a more serious violation or (or possibly and) violation of a number of rights. This clearly misunderstands the meaning of 'serious'. There is nothing in the word serious which necessarily excludes the cumulative impact of individually minor acts. If one considers these cases through the prism of human dignity this may provide an alternative and a move away from this notion of seriousness. The New Zealand Tribunal has usefully explained the wrong of cumulative persecution in terms of human dignity noting:

[i]t is recognized that various threats to human rights, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution.¹³⁵

This dictum arguably posits an understanding of human dignity based on the autonomy and choice. It looks at the cumulative effect of acts as becoming persecutory at the point at which the acts, as a whole, interfere with an individual's human dignity or right to a dignified life. This might, put otherwise, be said to be the point at which a person's ability to form and carry out their own life plan become significantly compromised.

In US, UK, Irish, Belgian and Canadian jurisprudence, to name a few, cumulative persecution has been recognised as capable of forming the basis for refugee status.¹³⁶ In *Re (Hoxha)* Baroness Hale explained how the

¹³⁵ Appeal No. 71404/99 RSAA.

¹³⁶ *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where applicant witnessed violent attacks, and suffered extortion 9/2003 A-2 harassment,

discriminatory treatment of rape victims could constitute persecution by invoking human dignity stating:

To suffer the insult and indignity of being regarded by one's own community . . . as "dirty like contaminated" because one has suffered the gross ill-treatment of a particularly brutal and dehumanizing rape . . . is the very sort of cumulative denial of human dignity which to my mind is capable of amounting to persecution.¹³⁷

The UNHCR handbook instructs contracting states to consider cumulative persecution, stating:

an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds".¹³⁸

Just as the expansion of persecution to cover socio-economic rights has been underpinned by the concept of discrimination so has the notion of cumulative persecution. Human dignity, and the notion of a dignified life, it is argued are pointing the way towards a fuller understanding of persecution; one that

and threats); see also *Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (cumulative effect of severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (holding that harassment, wiretapping, staged car crashes, detention, and interrogation constituted persecution); *Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001) (applicant was harassed, fired, interrogated, threatened, assaulted and arrested); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996). The reasoning was also approved in the seminal Canadian case of *Ward*. For discussion by the Irish tribunal see G.V & I.V. [2011] IEHC 262. The Belgian case of Nr. 8.259 reflects the same reasoning, the court stating: "the various grounds given in the applicant's asylum account are in themselves insufficiently serious; however, cumulatively and in connection with the situation in Iran they can justify the benefit of doubt. It is therefore, in the case at hand, appropriate to give the applicant the benefit of the doubt."

¹³⁷ R v. Special Adjudicator (ex parte Hoxha)[2005] UKHL 19 [87].

¹³⁸ UNHCR Handbook (.

includes different generations of rights and types of persecutions. The concept of discrimination remains key to this evolution, providing a form of bridging concept between the right and persecution.

The notion of cumulative persecution reminds us that harm can take various forms. Counsel for one claimant reminded the Canadian tribunal that “there are many more subtle ways of persecution people other than beating them up. Many refugees would probably rather suffer an occasional beating than face a life of repression, poverty and disadvantage because of their ethnic or religious background.”¹³⁹ This recalls that persecution can take different form. One form might be an individual act of such gravity to violate a human right. Torture is a clear example of this. One instance or threat of torture would be sufficient to constitute an act of persecution. However, human rights law and refugee law are beginning to evolve so as to recognise that individual acts falling short of persecution may accumulate so as to result in or cause serious harm. A danger in this approach, Foster has identified, is that it if misinterpreted it can be taken to require extreme harm to the individual’s health, educational or economic prospects. This hierarchical approach has been adopted in several cases.¹⁴⁰ Most notably the court in *Gashi* whilst recognising the notion of cumulative persecution also accepted the argument of the UNHCR intervener that “some human rights have greater pre-eminence than others and it may be necessary to identify them through a hierarchy of relative importance.”

¹³⁹ *SWE (RE) T99-04041* (2000) cited in Foster (n2 chapter one) 87.

¹⁴⁰ See for example, *R v SSHD ex parte Ravichandran* [1996] Imm aR 97, *Demirkaya* [1999] Imm Ar 498 and *R (on the application of Okere)* [2000] All ER (D) 1770.

This notion may be said to stem from the laws of harassment and discrimination that recognise the same.

It is conceivable then that sexual harassment at work could give rise to a refugee claim if, for example, the state failed to provide any mechanism of redress and this harassment stemmed from societal attitudes to women. Similarly, if additional requirements were set for one section of the population across a number of fields it might be sufficient to constitute persecution. For example, the imposition of religious requirements for entry into professions, education and health care could accumulate to constitute persecution.¹⁴¹ The concept of cumulative persecution might be said to be recognition not only of the multiple forms of persecution but also recognition of the importance of the emerging concept of a dignified life.

The Inter-American Court discussion of a dignified life shows also that consideration of the foundations of human rights, and human dignity, provide a guide for interpretation. In other words, the content of specific human rights are derived from these concepts, with personhood (or normative agency in Griffin's terms) providing a threshold term¹⁴² for interpretation. For example, it might be difficult to see how content for right to liberty can be found. However if one looks to the notion of human dignity

¹⁴¹ See for example the case of *Desir* 840 F2d 723 (9th Circuit 1988) 727 in which the claim of an Israeli Arab to refugee status was accepted on appeal. The court found that being excluded from working as an accountant and a life guard, the two professions for which he held qualifications, along with harassment whilst working as a fisherman could constitute persecution. This contrasts with the New Zealand case of an Iranian woman whose claim to refugee status on the basis of socio-economic rights was rejected as she was excluded from her profession as a hairdresser but not necessarily from other professions (70863/98).

¹⁴² This would operate, according to Griffin, in a similar way to other threshold concepts such as consent or *mens rea* *ibid* 349.

and autonomy, the right to liberty can be explained as necessary to protect human capacity for autonomy and its exercise so that an individual can live a dignified life.¹⁴³ This is very much how human dignity has been used in the Inter American Court. Secondly, human dignity can provide some guide to behaviour by establishing when interferences with a human right can be justified by reference to the rights of others. This again returns to Alexy's balancing exercise, which demands that we determine either concrete priority of one right over the other in the circumstances. This may be done either by reference to the importance of the value the specific right is protecting or by considering which right is being infringed to the greatest degree.

3.2.5 Pragmatic Justification of Human Rights

As the normative significance of human rights has grown, the use of human rights arguments is more often used to justify legal decisions, in particular, Carozza argues:

appealing to the principle of human dignity, courts establish the basic ground of commonality and comparability of their decisions with those of courts in other jurisdictions, despite whatever other differences may exist in their positive law or political and historical context...[r]eliance on the idea of human dignity as a source of justification[...] simply does not make sense unless it is regarded, at least implicitly, as something the meaning and value

¹⁴³ Similarly, Griffin gives the example of a right to minimum welfare and beginning with the concept of human dignity (defined as "valuable status of being a normative agent") he is able to flesh out the right to minimum welfare and state that it is the level required to live as a normative agent i.e. more than mere subsistence. Rawls' theory, Griffin persuasively argues, is unable to provide content in a similar manner- the question 'at what level of welfare would its neglect start to provide a *prima facie* justification for intervention?' is unanswerable (without recourse to some other theory or concept to provide content for the term welfare it is simply circular- at what level is answered with 'at the level states find unacceptable' followed by the question 'at what level would states find welfare provision unacceptable?') Griffin (n 39) 346.

of which transcend local context and constitute a commonality across the differences of time and place.¹⁴⁴

Human dignity might be seen as a 'bedrock truth' as a "fact[...] of recognition, of acknowledgment, constituting the very beings we are, and that we take for granted in what we do"¹⁴⁵ without reflection. Human dignity might then be said to have achieved a level of universality and acknowledgment beyond the theoretical justifications set out above. Thus, whether or not one accepts the moral justifications set out above, human rights exist as a social fact in our world as we believe and, more importantly, act as if they do. Human rights also have the status of positive (international) law as Nickel states, "[h]uman rights' is not just another label for historic ideas of natural rights."¹⁴⁶

That is not to say that there are not issues in "the 'working out of the practical implications of human dignity in varying concrete contexts'"¹⁴⁷, indeed this is considered further in relation to refugee law below. Yet it can be stated that human rights are morally justified (indeed morally obligatory), universally accepted as a social fact, demand special protection and results in primacy over other categories of rights.¹⁴⁸

3.3 A Special Claim to Priority

The claim constructed here is as follows: where an interest is worth protecting (as human dignity is) then this interest produces a right to have that interest

¹⁴⁴ 'Human Dignity and Judicial Interpretation of Human Rights: A reply' *European Journal of International Law* (2008) 19(5) 930 933.

¹⁴⁵ Iglesias 'Bedrock Truths and Human Dignity' *Logos: A Journal of Catholic Thought and Culture* (2001) 4.1 114, 114.

¹⁴⁶ 7

¹⁴⁷ *Ibid.*

¹⁴⁸ For this reason, those committing human rights violations rarely, if ever, admit to doing so but instead seek to explain why the act is *not* in fact a human rights violation.

protected either by non-interference or through positive action depending on the interest and circumstances. As Sen states, “[a] pronouncement of human rights is an assertion of the importance of the corresponding freedoms- the freedoms that are identified and privileged in the formulation of the right in question.”¹⁴⁹

This suggests that we consider human rights to have a special claim to protection, which we expect other agents to recognise, regardless of their position. As Nickel states, “as minimal standards they can hope to be supported by very strong reasons of universal appeal, to be of high priority, and to resist claims of national and cultural autonomy.”¹⁵⁰ If these claims take priority then even “extreme scarcity of resources will not extinguish one’s claim”¹⁵¹ If human rights failed to take priority over other principles they would be virtually useless as “one of the basic purposes of rights would seem to be to insulate right-holders from claims based on such principles, which otherwise would be not only appropriate but decisive reasons for political and even individual action.”¹⁵² The claim is built on the assertion that human dignity is worth protecting, for any of reasons set out above, and that human rights protect human dignity and, as such, deserve special respect not least because “in the absence of an alternative solution to the very real problems of protecting the individual and human dignity” human rights are the best method for ensuring the protection of what all human value for themselves

¹⁴⁹ Sen Human rights and the limits of law (2006) *Cardozo Law Review* 27 2921.

¹⁵⁰ *ibid* 3.

¹⁵¹ Nickel (n 4) 68.

¹⁵² Donnelly (n 9) 305.

and ought to value for others.¹⁵³ This returns to the assertion made in section one that human rights include a bundle of different right positions. Which position is used depends what would best protect the right-holder, “to confer dominion upon the right holder”¹⁵⁴ over the core of human dignity. Thus, at least to the extent that the core of human dignity is at risk, human rights must operate to protect it.

This *moral* claim to priority also explains why positive (institutionalized) human rights have a ‘suprapositivity’¹⁵⁵ as reflections of moral rights held to be external to any positive law. Unlike other laws they cannot be overridden merely by the enacted of subsequent implicitly or explicitly repealing law. It explains also why principles such as right to a fair trial were applied in common law jurisdictions before any formalisation of the right. Human rights might be said to require transformation into positive law not only on their own account but also for the sake of legal certainty. If human rights even as ‘only’ moral rights are capable of entering legal deliberation, as asserted by principles theory, and, of binding legal decision makers, as asserted by the correctness thesis, then transformation into positive law not only follows from these claims but also renders the legal decision making more transparent than appeal to unwritten principles might. For the purposes of thesis, human rights do not necessarily need to have undergone the transformation into legal rights; it is sufficient to state that human rights are included in the legal

¹⁵³ As Donnelly notes “[i]f we are to try to assess whether human rights is a better way to approach human dignity and organize a society, we need to ask, “Better for what?” This is a question of means, not ends. Human rights are not ends in themselves; or rather they are not entirely ends in themselves. Among other things, as we have seen, they are means to realize human dignity” (ibid 314).

¹⁵⁴ Wellman (n 6) 107.

¹⁵⁵ As expressed by Neuman ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) *Stanford Law Review* 55 1863.

decision making process *and* are capable of taking priority over even positive rights. This is a moral claim but one with impact on the legal process. In short, the claim is that human rights are to be given priority in the legal process due to their moral priority.¹⁵⁶

Why is it that these *human* rights can be said to have a higher priority than other rights or, put otherwise, special claim to protection? There are competing versions of the protection rights confer upon individuals and hence competing accounts of the relationship between conflicting rights and collective interest ('the public interest').¹⁵⁷ The strong account affords human rights lexical priority as expressed in Dworkin's notion of rights as 'trumps.' Even weaker accounts, such as Alexy's, gives rights *prima facie* priority over competing claims.¹⁵⁸ At its root, this claim is contained in the characterisation of human rights as holding a high priority *as a matter of definition*. Alexy sees a

¹⁵⁶ This claim will be expanded in the subsequent chapter where the limitations human rights can place on state sovereignty are set out. Chapter four will demonstrate how the moral priority of human rights is capable of producing legal effects, in the form of judicial reasoning based on the moral priority of human rights which results in human rights being given priority over other interests (e.g. state sovereignty).

¹⁵⁷ The terms collective interest and the public interest are used here to refer to the rights and interests of a potential host state's population as a whole: what might otherwise be termed 'goods'. It is not intended to convey collective rights in the sense of group rights e.g. minority rights but rather to signify the types of rights that might conflict with the human rights of refugees, for example, the notion of national security. It is also acknowledged that some collective goods contain bundles of individual rights. The good of "public health", for example, might be said to be realised to a great extent if and when individual rights to health are respected and fulfilled. The analysis here is not, however, concerned with the construction of collective goods but rather with how these collective goods come into conflict with individual rights as asserted by a claim to refugee status.

¹⁵⁸ Raz also might be said to put forward a weak account which affords no greater weight to fundamental rights than other rights *per se* claiming only that these fundamental rights signify particularly important interests. The rights themselves are given no greater weight than the underlying interests. This distinction is not, however, of great importance here as if the interests underlying fundamental (or human) rights can be shown to be of greater importance- which it has been argued they must be to be called fundamental rights- than the interests protected by other rights then the fundamental right take precedence. See, Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) pp186-192, 254-255.

special connection between justice and human rights, from which stem human rights special claim to protection. This Alexy terms the 'core thesis', which states:

Every violation of human rights is unjust, but not every injustice is a violation of human rights. If this is true, human rights represent the core of justice, whereas justice comprises more than human rights.¹⁵⁹

Human rights are linked to justice in their assertion of universality such that it might be asserted that "[t]he principal philosophical foundation of human rights is a belief in the existence of a form of justice valid for all peoples, everywhere."¹⁶⁰

This core thesis underpins Alexy's claim that "human rights are norms that essentially claim priority with respect to all other norms."¹⁶¹ If justice is a defining feature of any law or legal system, as asserted in the claim to correctness, then a right connected so intimately with justice¹⁶², and the realisation of justice, must be given priority. Alexy asserts, "[i]f human rights

¹⁵⁹ Alexy (n 1) 9. As the bracketed reference in the quote shows, this is not the first or only place Alexy has put forward this claim, it is made also in 'Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat' (1998) in *Philosophie der Menschenrechte* Gosepath and Lohmann (eds) (Suhrkamp, 1998) 244–64, and in the articles "Discourse Theory and Human Rights" (Alexy 1996 209–35) and, in 'Menschenrechte ohne Metaphysik?' (2004) 52 *Deutsche Zeitschrift für Philosophie* 15). The alternative, as Alexy notes, is found in the 'equivalence thesis' which claims that human rights and justice are coextensive. This distinction need not concern us here, however, as the principles of justice are taken up in more detail in the subsequent chapter and "in both cases, the violation of human rights would be, at the same time, a violation of justice. For this reason the existence of human rights implies the existence of principles of justice" (Ibid).

¹⁶⁰ Fagan (2005) 'Philosophical analysis of the concept of human rights' in *Human Rights: Essex Internet Encyclopaedia of Human Rights* (Fagan ed, University of Essex) available online <http://www.essex.ac.uk/hrc/research/publications/EIEHR/#h> (accessed on 12.10.2012).

¹⁶¹ Alexy (n 1) 18.

¹⁶² That human rights can be violated to an extreme degree means that the Radbruch formula is applicable, i.e. in the case of human rights violations the law must yield to justice (See Alexy (n 1) 13.)

are justifiable, their priority claim is, therefore, also justifiable.¹⁶³ This claim to *prima facie* priority is put forward more strongly by Dworkin's notion of 'rights as trumps'¹⁶⁴, which claims that rights ought to be given lexical priority over other interests. Dworkin claims also, in an echo of Alexy, that these rights are to be protected and promoted to the greatest extent possible.¹⁶⁵ Waldron similarly views rights as a strict restriction on action.¹⁶⁶ Yet rights that have not received formal legal recognition are often conceived of as, at best, high priority goals (similar to Dworkin's policies). Human rights might perhaps, then, be better characterised as "strong considerations that generally prevail in competition with other concerns such as national prosperity or administrative convenience."¹⁶⁷ Human rights are rights in more than just linguistic terms, they carry with them the normative significance of rights. The basis of these assertions is that human rights even when not legal rights are not merely moral rights as they put forward a special claim to protection *and* that this has some weight in the legal process. In Donnelly's terms, "if rights, in general, are trumps then human rights are the honor cards in the suit."¹⁶⁸

¹⁶³ *ibid.*

¹⁶⁴ Dworkin (n 16 introduction) 367. Rights act as 'trumps' on Dworkin's account over "background justification that appeal to the collective welfare" *ibid.* This is the case even where the background justification is such that it would usually be decisive (*ibid* 364). Thus although the "political force" of rights might depend on the political system in which the right is asserted, the moral- and arguably legal- force of the right is *not* dependent on which political system it which it is inserted.

¹⁶⁵ *ibid.* This rejects Raz' claim that rights, whilst particularly important interests, do not have greater weight than other interests and can, in principle, be outweighed by other important considerations, such as collective goods *The Morality of Freedom*, 1986. This is a stronger version of Alexy's *prima facie* claim to priority, claiming that human rights *do* have a greater weight than other interests. This does not rule out collective goods outweighing the human rights of an individual in a specific case but the circumstances would need to be such that the collective good was asserting the human rights of a collective. Human rights could *not*, therefore, be outweighed by non-human rights claim but could, however, be outweighed by a collective good if this good is constructed from a bundle of individual rights.

¹⁶⁶ *Theories of Rights* (Oxford University Press 1984).

¹⁶⁷ Nickel (n 4) 24.

¹⁶⁸ Donnelly (n 9) 303.

This claim for special protection stems from the *value* of what is to be protected. The assertion is that human rights protected human dignity and that human dignity is of value. The reasons for this have been set out above.

The primacy of human rights over other categories of rights has been established above. It may seem as if no counterargument may be found to the human dignity being, at the very least, a key concern in any discussion of obligations whether at a national or international level. The claim I wish to make is that the order of values used in forming a value-judgment is centred on human dignity. If this is the case then to prevail any other competing values would need to be explained as of greater value of human dignity.

The starting presumption has been set out above, namely that the principle of human dignity is the foundation and justification for human rights and duties to respect and protect these rights. The frequent mention of human dignity in international conventions and domestic constitutions might be said to reflect a consensus that human dignity is a fundamental value and one worth protecting. It might be justifiable to restrict the freedom of, and place the burden of protection on, other agents, on the basis of human dignity for at least one, if not all, of the follow reasons: because a violation interrupts ongoing projects, constitutes grievous harm, robs an individual of freedom and well-being and causes secondary harm to others.¹⁶⁹

¹⁶⁹ A form of this argument is put forward by Wellman (n 6).

3.4 The Collision of Human Dignity and National Interest

The chapter so far has set out the moral claims that stem from human dignity might be said to underpin the human rights claims of refugees. The concept of a dignified life evolving from the notions of autonomy and choice and expanded by the Inter American Court of Human Rights has been set out as showing the way for the obligation of states in regards to human rights. This is a low standard and is not requiring states to agree to even the standards of protection guaranteed in the UDHR.¹⁷⁰ It has also be set out as an interpretational guide in refugee law. Distilling what has been said above, for the purpose of this thesis Nickel's starting assumptions in 'Making Sense of Human Rights' are adopted, namely that people have secure, but abstract, moral claims to:

- 1) have a life
- 2) to lead one's life
- 3) against severely cruel or degrading treatment
- 4) against severely unfair treatment¹⁷¹

A more extensive concept of human rights could certainly be put forward but this is sufficient for refugee law. This concept of human rights, it is argued, is based on human dignity and The thesis will proceed on Nickel's assumption

¹⁷⁰ Although it could be argued that the second right- to lead one's life- may be demanding, the right to lead one's life does not necessarily denote the most robust notion of one's life. It might, instead, be interpreted along the lines of Nussbaum and Sen's capabilities approach where rights are intended to allow an individual to choose and attempt to carry out their life plan in some basic way. This requires that rights are in place to protect an individual's functionings ('beings and doings' Sen, *Inequalities Reexamined* (Harvard University Press 1992) 4) and opportunity freedom (freedom to choose between alternative functioning combinations- Sen *Development as Freedom* (Oxford University Press 1999) 12. The claim is that to secure these capabilities ought to be *goal* of domestic and international society.

¹⁷¹ Nickel (n 4) 61.

that “[t]he four secure claims have roughly equal weight or priority.”¹⁷² Competition between these principles would come down to the degree of infringement, following the proportionality test but these claims, or principles, would take precedence over other rights. Collective rights, or national interest, have not yet entered the picture thus individual rights take conditional precedence.

When determining whether human dignity is capable of providing a *supreme* principle of refugee law (and, therefore, the foundation of the imposition of obligations) we must consider whether there are any competing claims. In order to operate as the underlying principle human dignity must be of such importance so as to outweigh all other principles thereby taking on the characteristics of a rule in that it cannot be violated.¹⁷³ As noted in the introduction, despite rhetoric on the human rights of refugees, in the case of refugees, the primacy of human rights seems to be largely ignored. Indeed, the opposite starting proposition seems to hold, namely that it is the rights of states that take priority. This necessarily implies that even in the case of so called absolute rights national interest can take precedence. This section will first explore the claims of national interest. It will then consider the concept of absolute and non-derogable rights.

¹⁷² Sen (ibid 1999) 7.

¹⁷³ The identification of one underlying principle would not, however, prevent conflicts *per se*, it is possible to envisage situations where both parties put forward arguments connected to human dignity. The most common manifestation of this is played out by the criminal justice system daily: the individual accused of a crime puts forward their right to liberty and this must be weighed against, what are usually seen as the rights of society but may be alternatively framed as, the rights of all other individuals to security. The question, then, becomes a factual one, with *both* principles operating as underlying principles (i.e. principles no one questions are relevant to the determination of the case). It is clear neither principle may be set aside entirely, the issue is only the weight to be given to each principle.

The most oft used claim to counter those of refugees concerns the notion of 'public interest.' Public interest, a concept arguably even more nebulous and undetermined than human dignity, is often viewed as being an effective counter to the claims of refugees. Yet, as McHarg notes, "it is central to our understanding of rights....that in situations of conflict they protect individuals' interests or choices from being overridden by considerations of collective utility."¹⁷⁴ The question arises as to why this general presumption that rights protect individuals against the collective is rebutted in the case of refugees. How does the public or collective interest of the potential host state operate to outweigh the rights of refugees in the abstract such that conditional priority is given to the rights of states rather than vice versa? We noted above that in discussing human dignity collective rights have yet to enter the framework. In human rights terms the primacy of individual rights over collective rights is assumed but in refugee law, and policy, the opposite might be said. These starting assumptions cannot both be used simultaneously; either refugees' rights take conditional priority or the rights of states do. Following Alexy's framework to resolve this conflict, and to determine which starting assumption is correct, which right(s) is of greater value must be determined.

3.4.1 What is Public Interest?

The notion of public interest, or collective good, is based on a value-judgment. First, 'collective good' asserts that the proposition in question is a good- or at

¹⁷⁴ 'Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' *Modern Law Review* 62(5) 672.

least not an evil. Secondly, 'public interest' asserts that this is more than a classificatory value judgment, merely to assign the label 'good' or 'bad', but is also a comparative value-judgment¹⁷⁵ in that public interest is used to override other interests.¹⁷⁶ It has been claimed that public interest can never be weighed against rights effectively as the notion of public interest is elusive to define.¹⁷⁷ It is, however, necessary to engage with the notion when considering refugee law as it is oft cited in asylum cases and must, therefore, have some content.

Refugee law currently contains a conditional priority for national interest. Consider Article 32 on Expulsion of Refugees, which states:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Although the article contains procedural safe guards for protecting a refugee from being expelled for less than compelling national security reasons, it does allow still expulsion. Public interest is being considered primary, albeit only in extreme situations. Balancing can assist with this situation, where public

¹⁷⁵ See Alexy *TCR* (n 10 in chapter 2) 86-91 for more on the distinction between classificatory and comparative value-judgments.

¹⁷⁶ Only this questions is of concern now, the content of public interest will be discussed in greater detail in subsequent chapters.

¹⁷⁷ See Virginia Held for discussion of the competing views of public interest which he identifies as 'preponderance (or aggregative) theories, unitary theories or common interest theories' (*The Public Interest and Individual Interests* (Basic Books 1970)).

interest clashes with individual interest. The discussion here attempts to resolve the issue of whether the interests begin the balancing exercise with equal weight. It argues that they do not, namely individual interest has conditional priority. This argument will be set out below however first the opposing argument of the conditional priority of public interests will be set out below.

There are several different theories of public interest. Held identifies three main schools, the preponderance or aggregative theories, unitary theories and common interest theories.¹⁷⁸ Preponderance theories rely on a subjective definition of interests, claiming that individuals are the best judge of their own interests. Following this, the notion of public interest cannot have independent content but must simply be an aggregate of individuals' interests. There are many objections to theories of this school¹⁷⁹ but the most significant perhaps is related to Alexy's claim to correctness, namely that if it is a principle to be used in the law it must stand up to moral judgment and cannot, therefore, be value-neutral judgment. If we adopt whatever happens to be in the interest of a preponderance of people (even assuming we have a mechanism for determining this) without measuring the merits of these interests against moral standards then there is a risk of extreme injustice. The unitary theories are seen as a counter to the '(human) rights as trumps' school in that public interest is treated as an overriding interest. It is, however, an objective theory of interest arguing that collective interest is derived from

¹⁷⁸ *ibid.*

¹⁷⁹ Other objections include the practical claim that it is impossible to find a mechanism capable of determining what is in the interest of a preponderance of people and the rational objection that allowing individuals to pursue their own interests, with no limits, may lead to irrational outcomes.

what individuals ought to want. The question, then, is 'what is (objectively) good for people?' rather 'what do people (subjectively) believe is good for them?' This typology does contain an objective standard of judgment for the public interest and could succeed if some interests are removed from any determination of public interest by defining them as *a priori* illegitimate. However, this paradigm is ultimately rejected here as incompatible with the view of human rights, and in particular of human dignity, presented above. Although the notion of objective good is more appealing than subjective good it is still open to the same criticism that privileging collective good over individual good runs the risk of sacrificing the interests of the few to those of the many. This is fundamentally incompatible with an individual-centred theory of human rights where human rights also claim special protection.

Finally, common interest theories focus on the interests that all members of public can be said to have in common as distinct from those of particular individuals or groups. This is based on a form of categorical imperative, individuals are only able to will for themselves what they could reasonably will for all. A form of this theory is presented by Barry who argues that, in line with a view of human rights focused on autonomy, specification of goals may be individual (and, thus, subjective) but how best to achieve these goals must be determined objectively. The notion of 'net interests' is used which allows people to have different interests in respect to the same situation insofar as they simultaneously occupy different roles in relation to the situation so does not require an unrealistic convergence of individual interests on each issue. This also does not conflate individual interests with moral justifiability an individual's interests might be overridden by other interests if

they are not morally justifiable or cannot be achieved without unjustifiable infringement of the rights of others. This maps exactly onto the claims that individual autonomy, or the right to choose one's own life plan, is limited only by the extent to which this plan infringes on the life plans of others. In other words, one is free to set one's own goals but how you may seek to realise these goals is limited by other people's rights.

What is key here is that public interest is not set up as the sole criterion for legitimate public action but, in line with views positing the primacy of human rights, it is presented as merely one element in decision-making. Where public interest (the objective standard of what is good as defined by the categorical imperative) conflicts with individual rights, balancing operates to resolve this conflict and involves a comparative value-judgment. An individual interest may be deemed more valuable as an end in and of itself regardless of the instrumental benefits to the public of denying this interest. For the purposes of this thesis the notion of common interest adopted is as follows: a distinct set of collective interests, which must be balanced against one another and against other relevant decisions in concrete situations.¹⁸⁰

How does public interest relate to individual interest then? Alexy posits four conceivable conceptual conjunctions between individual rights and collective goods:

- 1) individual rights are means to collective goods
- 2) collective goods are means to individual rights
- 3) collective good consists of the existence and satisfaction of individual rights

¹⁸⁰ McHarg (n 86) 678.

4) individual rights and collective goods exist independently of any means-end relationship or relationship of identity.¹⁸¹

Which conjunction one accepts impacts on the starting assumption for balancing. If we recall the discussion of 'rights as trumps' above, we can see that whether or not public interest is seen as a mere interest or as rights in some form has an immediate impact on whether or not our starting assumption that individual rights outweigh collective goods, or public, interest, must be defended. If collective goods are interests then following the (albeit differently phrased and weighted) assertions of Alexy, Dworkin, Waldon and Donnelly, rights outweigh interests, at least *prima facie*, and have conditional priority. The issue is where one sets the limits of the priority given to rights. On the other hand, if collective goods are a form of rights (either aggregated rights of individuals or as a means to securing individual rights) then neither automatically takes conditional priority and to assert conditional priority would require a construction of why the particular rights in question (rights of refugees) take conditional priority over collective goods.

The simplest form of this argument merely states that collective goods are not a form of rights. This argument cannot be sustained; a collective good is often a composite of individual rights such as the notion of 'public health'. The notion of human rights being given priority also demands a more robust protection of refugees' rights. At the very least, it sets a much higher threshold for the outweighing of these rights by collective goods. This represents a reversal of the traditional position which grants collective goods of the potential host state *de facto* priority by presenting state sovereignty as

¹⁸¹ Alexy 'Individual Rights and Collective Goods' in Nino (ed) *Rights* (New York University Press 1992) 169-174.

absolute. The traditional view did not require *any* examination of the relative weight of the collective goods raised by the potential host state against the rights of the refugees. It left (leaves) the potential host state free to decide whether or not to take into account the human rights of refugees. In this view, as Gilbert notes, the Refugee Convention would represent a voluntary concession¹⁸² rather than an expression of the inherent limitation on sovereignty human rights represent. It is argued here that the claim that human rights have moral priority has legal impact. It demands that where these rights are raised they are considered and considered as having priority over other forms of rights. The human rights of a refugee can only be outweighed, therefore, by the human rights of (an)other individual(s) and only if, and when, these human rights would be either more severely infringed than the rights of the refugee. This constructs a conditional priority for the rights of refugees based on the higher value of human rights. In essence, the claim is to a hierarchy of norms in which human rights represents the pinnacle.

As asserted in chapter one, asylum is a mechanism for protecting human rights, thus the value of refugees' rights might be said to be coextensive with the value of human rights. Refugee claims can be split into two categories. The first category comprises of claims based on danger the so-called absolute rights (which we recall refers to rights that include balancing in the characterisation so that they have been determined to have such great value that they are to be given priority in all circumstances we have yet encountered), for example right to freedom from torture. These rights it is

¹⁸² 'Human Rights, Refugees and Other Displaced Persons' in De Wet and Vidmar (eds) *Hierarchies in International Law: The Place of Human Rights* (2010) 177.

asserted are not capable of being outweighed unless public interest can be said to be of equal value coupled with a more severe violation than denial of refugee status would represent. If public interest cannot be said to have equal comparative value, these rights might be said to have definitive priority. The second category encompasses claims concerning rights, which are capable of being outweighed, such as the right to liberty and freedom of expression. Here only conditional priority could be established for refugees asserting these claims. This assertion that establishing priority for human rights establishes at least conditional priority for refugees' rights is based on the assumption that no claim to public interest is capable of outweighing a claim to human rights protection. This assertion is not one that will go unchallenged; a claim that public interest is capable of being of greater value will be addressed below.

3.4.2 The Public Interest Defence

This discussion begins with the claim that for *all* balancing, the principle of proportionality and impartiality (or equality) operate as underlying (or background) criteria. Not only Alexy but also Rawls make the claim that principles of equality specify how conflicts of principles (or conflict of interests in Rawls' terms) are to be resolved. Impartiality, as Miller notes, "has to do with even-handed application of the rules¹⁸³- rules which may themselves require us to treat different categories of people differently. It is, therefore, possible to act impartially without giving equal weight to the claims of everyone affected by your actions."¹⁸⁴ The argument put forward by the priority to compatriots thesis is that nationality creates *relevantly* different

¹⁸³ Although Miller talks of rules, this applies also to principle, here. Miller *Principles of Social Justice* (Harvard University Press 1999).

¹⁸⁴ Miller *ibid* 165.

categories of people (compatriots and 'others'); as Tan notes, patriotic partiality, as he terms it, is "a form of permission or...the right of people to favour compatriots in spite of demands of others."¹⁸⁵ Thus, if 'patriotic partiality' is followed, we are *required* to treat compatriots differently to outsiders and may, therefore, be said to act impartially whilst giving greater weight to the claims of compatriots. The implication of this is that 'lesser claims' by compatriots will outweigh greater claims of non-citizens. In other words, the public interest or collective good is defined in purely national terms.

In the case of refugees this means that even if the refugee's claim is to the most basic human right (the right to life) it can be outweighed by the claims of the host state's citizen to, for example, the right to education. Nationality, then, is allowed to weigh the scales in a manner obviously immaterial in national disputes- where the right to life would always outweigh the right to education. You cannot, for example, remove a human obstacle in your way to securing a place for your child in a school even if there is no other school for your child to go to. However, if we change the circumstances and child A is a non-national and child B is a national, the rights of child B are given extra weighting thus whilst murder might still be seen as too far, the removal of child A to another country would not. Admittedly this is not the scenario in refugee law, child A here is asking for entry into child B's country, entry, which according to patriotic partialitists, can be rightly- and ought to be- denied by the claims of child B with no further justification than that child B is a national and child A is not. This might sound a flippant example, and to an

¹⁸⁵ 'Cosmopolitan Impartiality and Patriotic Partiality' in Weinstock, (ed.) *Global Justice, Global Institutions* (2005) *Canadian Journal of Philosophy* 165 187.

extent it is, however it reveals the underlying issue when discussing if priority can be granted to compatriots: it is based on a normative assumption as to the value of compatriot ties. It comes down to the question 'can compatriot ties be said to give public interest priority (conditional or definitive) over outsiders' rights?' If this is so, then conditional priority for refugees' rights is impossible.

3.4.3 Priority to Compatriots

The first question to be resolved is the primacy of states' powers. This question, states Gilbert, needs to be resolved before one can consider the secondary issue of the source and extent of protection provided by international (refugee) law.¹⁸⁶ In the context of the rights of refugees the sticking point in establishing priority even where absolute rights are threatened is the so-called 'priority to compatriots' thesis, which claims a primary duty to compatriots that must be at least substantially discharged before any duties to outsiders can be considered. It is not that claims of refugees are denied but these claims are not recognised as being capable of outweighing the claims of the host society and of the individuals in the host society.

The underlying premise of patriotic partiality is an assumption that there is something morally significant about borders. This presumption can be effectively countered¹⁸⁷ but it is not necessary to engage directly in this debate

¹⁸⁶ Gilbert 'Human Rights, Refugees, and Other Displaced Persons in International Law' in De Witt and Vidmar *Hierarchy in International Law: The Place of Human Rights* 176.

¹⁸⁷ See, for example, Carens 'Aliens and Citizens: The Case for Open Borders' *Review of Politics* (1987) 49(2) 251. One of the most consistent and contentious battles over the extent of moral obligations to outsiders can be found in the conflict between cosmopolitan theories of global justice (such as Beitz, 1979 Pogge, 1989, Nussbaum, 1996) and communitarian theories of national justice. Two of the most persuasive and

in order to establish conditional priority for the rights of refugees. Even if one were to accept that there is something morally significant about borders, that is to say there is something morally significant about individual political communities, which are delineated (even protected) by borders, the issue here is the *extent* of the moral significance of borders- how much weight is this to be given? Can priority *justifiably* be given to compatriots in every case? There is no need to consider here whether the existence of patriotic ties is morally significant or if it can provide a basis for action, the only issue is whether these ties outweigh the claims of refugees to human rights protection.

If we return to principles theory, for every refugee case a balancing act is to be engaged in, as noted also in chapter two, principles theory itself tells us nothing about the weighting to be given to each principle. This is determined at the normative level. The question is, then, what justifies this heavy weighting given to the rights of the host society? On a basic level, it is clear that the danger posed by the individual accused of a crime (quite apart from arguments that, in a functioning criminal justice system, the individual accused is assumed to have been aware that their behaviour constituted a crime) might justify deprivation of liberty. Here public interest outweighs individual claims with the proviso that the deprivation of liberty must be proportionate to the crime, in that it must be necessary to deprive the

persistent supporters of the national community and opponents to cosmopolitan demands of global justice are Michael Walzer (1977, 1983,1994) and David Miller (1995, 2000, 2007). Within this debate, however, there is little focus on refugees. In Miller's latest book, for example, the question of specific obligations to refugees is granted only 3 pages (2007 225-227). Walzer's *Spheres of Justice* also dedicated only 4 pages to the question (1983 48-51). Pogge (2002) does not mention refugees at all, neither does Beitz (1979). This is, of course, because they were not attempting to address the issue of refugee admittance but seeking posit more generally applicable theories of justice. It does, however, illustrate the lack of focus on the specific obligations to outsiders who are involuntarily in our midst.

individual of her liberty to punish the crime, the deprivation must be suitable punishment and the punishment must proportionate in the strictest sense. The question before us is 'can the needs of the host society operate similarly in refugee law?' Or to return to our original question: is nationality relevant? According to patriotic partiality, as noted above, patriotic ties not only could operate as a principle but *must*.

The question of refugee rights crystallise the problem of how to define obligations to outsiders in a world of states, particularly when these obligations appear to be in conflict with duties to the state itself. If one believes that states are under a primary duty to their own citizens (or even if one only views this as a practical and political reality that cannot be avoided), if one wishes to posit *any* duties to refugees (by definition outsiders to the political community), a conflict of duties is bound to arise. Patriotic partiality argues this can only be resolved in favour of the host state. This would leave states with only 'residual duties' to refugees¹⁸⁸ and the argument for conditional priority of refugees' rights over public interest claims can proceed no further.

Where priority is given to compatriots, the protection of refugees can only be secondary. In particular, when admission and exclusion are viewed as necessary to preserve communal independence¹⁸⁹ or where obligations are viewed as growing weaker with distance then claims to priority of human

¹⁸⁸ Such, for example, is Robert Goodin's argument even as he seeks to urge states to offer more protection to refugees. See, 'Globalising Justice' in *Reshaping Globalization: A Progressive Agenda*, ed. David Held and Mathias Koenig-Archibugi (Oxford: Polity Press 2003). Further discussion below.

¹⁸⁹ Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983) 62.

rights are perceived as weaker when asserted from outside the political community. Following these arguments, the obligation to refugees is weaker than the positive obligations of the government to provide for its citizens and of each citizen to their compatriots and the negative obligation not to inflict harm oneself.¹⁹⁰ In a priority to compatriots thesis, human rights might still be given conditional priority but this priority operates only where the individual asserting her human rights is a compatriot. In other circumstances the priority is reversed and the claims of the host society are given priority. In his distinction between thin and thick morality Walzer accepts the need for a universal “moral minimum”¹⁹¹, including the principle of asylum which is capable of giving refugees’ claims some traction and renders the claims of *some* value. Similarly, Miller speaks of an obligation to provide refuge, which is shared by all those capable of providing it¹⁹² but it is relegated, firstly, behind national obligations, thus becoming an obligation to be discharged once more pressing local obligations have been fulfilled, and secondly, to the realm of ideal theory, deemed not applicable to the current situation.¹⁹³

In no circumstances, according to the patriotic partiality thesis, can refugees’ rights be given priority over the rights of the host state to control entry. The perceived conflict of principles between rights of refugees and public interest claims is, according to the priority to compatriots thesis, not a conflict at all as it is always to be resolved in favour of citizens over outsiders. This is also one of the principal objections to a more robust system of duties to refugees. Each

¹⁹⁰ Miller ‘Nationalism’ (2007) in Drysek, Honig and Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford University Press 2007) 227.

¹⁹¹ Miller *On Nationality* (Oxford University Press 1994) 9-10.

¹⁹² Miller (n 102) 226.

¹⁹³ *ibid* 225.

state is free- and ought to be free- to decide the extent of their obligation to refugees independently.¹⁹⁴ The right to asylum, whilst existing in theory, is “not a right that can be enforced against particular host states.”¹⁹⁵ The implications of this view are not refuted by Miller, who concedes that without a guarantee of asylum, many refugees will not find a state willing to take them,¹⁹⁶ despite the human cost a more robust duty to refugees is incompatible with a state’s duties to its own citizens. It follows that if priority to compatriots is not able to establish a greater moral value for political communities than for individual human rights then Miller’s conclusion is turned on its head and states willing to take refugees must be found as refugees’ rights take conditional priority over the right of states to regulate entry. The right to determine membership in the political community or the right to determine entry need not be challenged directly in order to secure conditional priority for rights of refugees; they only need to be shown to be of lesser comparative value than individual human rights. Conditional priority for the rights of refugees would also form the basis of an assertion of a duty to admit refugees when this priority becomes definitive on the facts.

Connected to the priority to compatriots thesis is the issue of limited resources. It is argued that in a world of limited resources duties to the near-by needy, defined not only geographically but also politically, are to be discharged first. Any other duties are merely discretionary. This, as Shue notes, provides a ‘conceptual straightjacket’ when it comes to possible ‘distant strangers’ that appears to allow duty holder free discretion on who to help,

¹⁹⁴ Walzer (n 101) 51, Miller (n 102) 227.

¹⁹⁵ Walzer (n 101) 150.

¹⁹⁶ (n 102) 227.

where resources are outstripped by demand. As eluded to in the opening quotation, the idea that no one country could house all the world's refugees leads many to suggest no country is under a concrete obligation to house any refugees at all. There are two interrelated claims here, the first is that where a duty cannot be entirely fulfilled by an agent, the agent is relieved from the obligatory force of the duty. Secondly, there is the claim to priority of the near-by needy over the so-called 'distant strangers', as mapped out above.

The first claim may be set aside immediately. It is a claim concerning the structural nature of duties- that the obligatory force of a duty is tied to whether or not an agent is able to entirely fulfil the content of the duty (or not). This claim is defeated by the explanation of duties as principles as reconstructed by Alexy in his principles theory: what is required of the agent is that this duty is fulfilled to the greatest extent legally and factually possible. The circumstances might, therefore, render a state only able to make a minimal contribution but the obligation to make this minimal contribution is definitive. The only counter, then, to definitive obligations to refugees is the assumption explored briefly above that priority ought to be given to the needs of compatriots, first, and, secondly, near-by needy (anyone with whom a state has existing ties) and, finally, to 'distant needy' (anyone with whom a state has no special tie). In other words, in order to strengthen the otherwise weak obligation of potential host states, a refugee must demonstrate some specific tie to the host state. This alone is capable of 'moving' the obligation up the scale towards a more definitive obligation, otherwise all things being equal there is no definitive obligation to refugees and the duty to admit is merely one of charity. This assertion is denied and will be shown to be as flawed as

the construction of duties as definitive only where entirely achievable posited directly above.

What will be argued here is that there is no case for priority to compatriots and, as such, it cannot be said to outweigh *prima facie* the needs of refugees. This grounds the claim that priority to compatriots cannot be an underlying principle in refugee law. The needs of the host society are more properly viewed as secondary principles to be considered at the 'factual' stage (what might be described as 'yes, we ought to take the refugee, is there any reason why we cannot *on these circumstances?*' If the right to be granted asylum is characterised as a principle, as an optimisation command, refugees ought to be guaranteed a place of refuge in all but the most dire of circumstances yet states would not have to cede all discretion to international bodies as it would be for domestic courts to engage in the balancing of the principles of the right to asylum and the duties of states to their own citizens.¹⁹⁷

This creates quite a different picture than that put forward by most states, namely that they are entitled to weigh up their own needs with *equal weighting* to those of refugees. Such claims rests on two misapprehensions, firstly that priority to compatriots can be justified and secondly, that, even if it can be justified, that this presents a conflict of duties which must always be resolved in favour of compatriots and citizens. The first misapprehension requires broader discussion and can only be briefly addressed below. The second is

¹⁹⁷ That is not to say that no international scrutiny would be required but rather that the rule of an international body such as the UNHCR would be clear; to determine whether the principle of refuge had been optimised. If there had been a demonstrative failure by a government or domestic court to optimise this principle sanctions could be imposed on this basis.

fundamentally flawed and must be set aside if there is to be any meaningful notion of refugee protection.

The notion that one set of obligations is owed to nationals and another to non-nationals is built also on the assumption of two separate moral spheres: each with contained spheres of justice; one universal field of international relations, and another particularist world of the domestic community. Walzer strives to maintain this separation, even as refugees, crossing between the two involuntarily and suddenly, reveal it to be untenable. If people cross between the two, why do our obligations remain static? Walzer gives no reason why the moral distinction between the national and international must be maintained if the *actual* distinction does not exist. It could be argued that with this movement refugees reveal the limits of communitarian accounts on rights, which can be morally and empirically challenged.¹⁹⁸

There are a number of different routes one might take to countering any claim that nationality is relevant in access to protection from human rights violations. One of the leading paradigms is so-called, "luck egalitarianism."¹⁹⁹

¹⁹⁸ The assumptions about the nature of refugee flows are, it could be argued, largely the result of suppositions about the character of the modern nation-state. Miller's latest book (n 102) refers to a world made up of self-determining national communities. Walzer presumes political communities to be akin to "neighbourhoods, clubs and families" (n101 35). These assertions rest on the Hobbesian assumption of an intimate connection between the interests of the government and the people. Communitarian theory defines rights along the lines of Walzer's sphere's of justice; internationally-against foreigners- individuals have a right to their own state; only domestically- against the state – may political and civil rights be claimed. In doing so it assumes an empirically unsubstantiated reality in which the emotional attachment and civic loyalty inherent in communities protect the members from mistreatment. If one does not consider states to be culturally homogenous entities nor democratic political communities-and states that fulfil both criteria are rare- then the moral and ethical legitimacy of an exclusionary 'right to self-determination' must be called into question.

¹⁹⁹ Ronald Dworkin 'Equality of Resources' (1981) *Philosophy and Public Affairs* 10.

Luck egalitarianism states, simply put, that people's success in life should reflect their choices, but not their unchosen circumstances. This is a key theory in suggesting that global redistribution is required as the better-off owe 'compensation' to the less well off. Robust counter-arguments are to be found also in Cosmopolitanism. Following the Kantian enjoinder that individuals be treated "*Zweck an sich*"- as ends not means- it is maintained that individuals have equal status as objects of moral concerns²⁰⁰ and arbitrary factors, including nationality and ethnicity, should not be determinants of moral worth.²⁰¹ This is a key claim of the notion of human dignity that individuals have equal moral worth and, therefore, the right to have human dignity respected. This is a universal claim not one concerned with borders or political community. The universal nature of human rights presents one immediate challenge to the notion of priority to compatriots: if human rights are universal, why is nationality a relevant factor in determining the availability of protection against human rights violations?²⁰² If this cannot be

²⁰⁰ Pogge *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press 2002) 169; Caney (2005) 'Cosmopolitan Justice, Responsibility and Global Climate Change' in *The Global Justice Reader* Brooks (ed) (Blackwell 2007) 3

²⁰¹ Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

²⁰² This debate is perhaps most vociferous in the area of economic inequality. Discussions of duties to eliminate, or at least alleviate, global poverty are also concerned with the issue of whether distributive duties, if they can be said to exist, are limited by borders (and/or special ties). Just as in discussions of duties to refugees, it has long been assumed- without challenge- that no definitive duties could be owed to those outside our borders as Weistock notes:

Until fairly recently, it could be thought that our gut-level moral reaction to the extent of human suffering in many parts of the world could best be cashed out under the rubric of "duties of charity." According to this view of things, it speaks well of us that we take it upon ourselves to contribute to the alleviation of suffering in distant parts of the world, but it is not something that is strictly speaking *required* of us. Because we are not causally responsible for the creation and maintenance of conditions of abject poverty, any help that we do proffer is supererogatory – that is, admirable, but not obligatory...globalization makes it the case that our obligations toward the global poor are obligations of *justice* rather than of *charity* (ppviii-ix).

This has now been challenged by many legal and political theorists. This debate is beyond the scope of this thesis but can be followed, to name a few, in the works of

justified then the priority given to compatriots is, at least, legally defective if not in fact legally invalid. The claim to universality of human rights *in all circumstances* is asserted robustly by Cosmopolitanism. Cosmopolitanism contends that fundamental allegiance lies with the moral realm of humanity²⁰³ and that this allegiance is above, but not necessarily to the exclusion of, national allegiances.²⁰⁴ Pogge labels this “moral cosmopolitanism.”²⁰⁵ Legal cosmopolitanism, on the other hand, calls for the institutionalisation of this to give each person equal legal status.²⁰⁶ Pogge, Caney and Nussbaum, for example, suggest cosmopolitanism requires a global system of justice. Pogge envisages a global agreement on a list of human rights- including the right to emigrate, which would foster more robust obligations to others, encompassing economic obligations to redistribute wealth.²⁰⁷ This more extensive version of cosmopolitanism aside, the basic proposition is that *all* human beings have equal moral worth coextensive with the scope of human dignity.

Thomas Pogge in *World Poverty and Human Rights* (Polity Press 2002), David Held *Democracy and the Global Order* (Polity Press 1995); and Peter Singer *One World* (Yale University Press 2002) (on the side of universal obligations) and David Miller *On Nationality* (Oxford University Press 1995) and Michael Walzer (n 101) on the side of limited obligations.

²⁰³ Held ‘Principles of Cosmopolitan Order’ in Held et al *Cosmopolitanism* (Polity press 2010) 229.

²⁰⁴ See Nussbaum (1996) for detailed discussion of the compatibility of national and global allegiances based on Stoic cosmopolitanism, which sees allegiances as concentric with the fundamental allegiance resting with the outer circle- of humanity- but not diminishing the personal or inner value of the inner circles of regional, local and family allegiances. See also Tan (2005) 174-175. Cosmopolitanism is not, as a theory, opposed to any form of national sentiment or diversity, as charged by some (Putnam, 1996, Himmelfarb, 1996), it allows for both allowed for local and familial ties. Will Kymlicka’s assertion in *Multicultural Citizenship* that some minorities have special rights to protect their cultures (Clarendon Press, 1995), for example, would not clash with Cosmopolitanism assuming that these special rights do not apply to distribution of social goods but only to cultural rights, such as the right to speak your own language at home or wear traditional dress.

²⁰⁵ ‘Cosmopolitanism and Sovereignty’ (1992) 102 *Ethics* 48, 48.

²⁰⁶ (1992) 49

²⁰⁷ *Realizing Rawls* (Cornell University Press 1989) 72.

This is a debate concerning the extent to which compatriots can be given priority with the conclusion that compatriots cannot be given definitive or conditional priority where individual rights are threatened. If nationality is irrelevant to balancing then the claim to human rights protection is of (at least *prima facie*) greater value than public interest. The principle of human dignity, it is asserted, does not recognise borders. This is accepted implicitly by the international community by the notion of *jus cogens*, war crimes and crimes against humanity. It is also explicitly asserted in the Universal Declaration of Human Rights. There are no grounds then to reject this assertion where refugees are concerned, indeed the justifying grounds of human rights demand that equal application. It is asserted that claims made as to the primacy of individual rights in the national setting can be extended to international sphere. Thus as Alexy asserts that the proportionality principle demands that the core of human rights remain untouched, this assertion applies also to cases where protection of the core of the human right is being claimed by outsiders. Thus, even weighty public interests cannot outweigh category one claims (where the threat is to a right containing balancing in the characterisation such as right to life) and public interest does not have *conditional* priority in any case. The abstract conditional priority given to individual rights in domestic cases, which, as Alexy argues, “expresses a basic preference in favour of those principles which are directed towards individual...liberties”²⁰⁸, operates also in the case of a refugee seeking admission.

²⁰⁸ Alexy (n 10 chapter 2) 81.

If nationality were rejected as an operative principle in determining access to human rights protection then greater weight may only be given to the claims of nationals if the rights of the nationals in question can be said to be more valuable in the circumstances than those of the refugee. It is not impossible for this to be the case but in most potential host states it is difficult to think of circumstances in which either the right being claimed by the host society is of greater significance than the rights asserted by most refugee claims or where the rights of individuals in the host society will be infringed to a greater degree than the equally valued right of a refugee. In most cases, although of course not all, the non-national is the person in immediate danger; the national is not. To return to the demands of impartiality, and Miller's observation above, if nationality does not create a rule that requires us to treat people differently yet individuals are treated differently due to their respective nationalities then the balancing may not be said to be impartial. In terms of principles theory, if nationality cannot justify any greater weight (or lesser weight) being given to host states' claims then the abstract weight of refugees' rights and host state claims must be at the best equal. Indeed in cases where the public interest asserted has no human rights element then refugees rights would take priority and in cases where the human rights claims asserted by the states involve lesser degrees of infringement than those asserted by refugees, priority again can be established for refugees' rights.

It was asserted above that public interest is not the sole criterion for determining legitimate public action but forms only one element in any decision-making calculus which may or may not prevail depending on the circumstances. Indeed, public interest may have to be sacrificed in pursuit of

other ideals which are valued as ends in themselves. Public interest, then, is not only *capable* of balancing against rights but indeed, following Alexy, as it has the characteristic of a principle it must be subject to balancing against the right at stake and whichever is stronger should prevail. In this sense, determining which of the competing interests prevails will reflect a value judgment. Without the notion of priority to compatriots, then, public interest can only be given the weight it objectively deserves in relation to the specific circumstances before the court. Importantly in interpreting the Convention national courts are already bound by international human rights norms. That is to say the range of plausible interpretations is limited by international human rights norms. It could be argued that the important yet *secondary* place of national interpretations is recognised in international law. For example, Article 38 1(c) of the statute of the ICJ was intended to provide a route by which domestic legal traditions could influence international law but the influence is limited to the extent that it relates to 'general principles of law recognised by civilized nations.'²⁰⁹

This must be so, again following Alexy, for the principle of proportionality applies to all balancing exercises not only to prevent the judge substituting their own view for 'the public interest' but also to demand that any infringement of one principle by another be necessary, appropriate to achieve the aim and proportional in the strictest sense. Thus, courts are not merely asking whether acts serve legitimate collective goals (the interests of host states' citizens could certainly be defined as *prima facie* legitimate collective

²⁰⁹ For the argument that the principles recognised by civilized nations refers to the principles of international law see Karlshoven et al *Essays on the Development of the International Legal Order: In Memory of Van Panhuys* (Martin Nijhoff 1980) 66-70.

goals) but also whether it is proportionate (as defined above) to encroach on the right(s) at stake to such a degree to achieve the goal. If it cannot be deemed to be proportionate then the argument of public interest fails. Although the outcome of individual cases cannot be established in the abstract, we can state *prima facie* conclusions. This is justified in particular, it is argued, as the priority to compatriots thesis resolves this balancing *prima facie* in favour of the host state. The argument here is that the principle of human dignity resolves this balancing *prima facie* in favour of the refugee.

3.5 Rights and Refugees

It has been argued here that the starting point for refugee law is the conditional priority of refugees' rights over the claims of states. This creates, it is posited, a *prima facie* right of admittance for refugees. This claim will be fleshed out further in subsequent chapters to consider the content of states' duties to their own citizens which further explains how the refugees' claim is a claim to human rights protection and strengthens the claim to the primacy of refugees' rights.

3.5.1 *Prima Facie* rights

It might be thought that *prima facie* rights would do nothing to further the position of refugees but *prima facie* rights can be useful. Although they cannot be absolute rights, as by definition these rights are required to shift in priority depending on circumstances, they are genuine rights and are they do dictate action where there are no competing principles or, in Nickel's terms,

“substantial competing considerations.”²¹⁰ In such cases the lack of other operative considerations renders the *prima facie* definitive and the weight of the right become fully specified. Secondly, even *prima facie* rights can be defined in details and principles for ranking can be determined. A *prima facie* right, as Nickel argues, “implies not that this sort of work cannot be done but that we recognise that the work will always remain partially unfinished.”²¹¹ Thus, to assert that the rights of refugees are *prima facie* rights is not meaningless rhetoric. Conditional priority can still be claimed for refugee rights and the circumstances in which these rights are capable of taking definitive priority can still be discussed and elaborated. As Alexy notes, “[c]onditional statements of preference give rise via the Law of Competing Principles to rules which require the consequences of the principle taking precedence whenever the conditions are satisfied.”²¹²

3.5.2 Absolute Rights?

In a simplistic version of balancing there cannot be any concept of absolute rights having priority over other considerations. It would seem then that Alexy’s balancing theory cannot accommodate absolute rights. This would suggest also that refugee law cannot accommodate absolute rights. In chapter two²¹³, however, it was argued that certain rights have the exercise of balancing inherent in their characterisation so as to have the effect of being absolute rights. In the context of refugee law this is a controversial concept as states assert that refugee status may be granted but cannot be demanded. It is then an act of charity rather than fulfilment of an international obligation. The

²¹⁰ Nickel (n 4) 43.

²¹¹ *ibid* 44.

²¹² (n 10 chapter 2) 101.

²¹³ p65-66.

existence of absolute human rights is not the focus here.²¹⁴ Here the question is if it is possible to envisage an absolute right how could refugee law cope with this? How the duty to protect refugees can be constructed a demand of refugee law will be constructed below. This section will examine if the case for certain rights to be considered absolute rights can be made out. If this argument can be made out, this goes to the absolute (as opposed to conditional) priority of certain individual rights over state rights.

It is clear that when we speak of absolute rights we are speaking of a particular species of human rights from which no derogation is permitted. Although the notion of absolute human rights has proved difficult to maintain in practice there is remarkable consensus over which rights one might consider absolute. The right to life and the right to be free from torture are the first two rights that might be identified. This is not to say these rights are universally respected. The death penalty is an obvious affront to the right to life. It explicitly attempts to balance the right to life of an individual over, variously, the rights of the victim (and the victim's family) or the good of the community. The American attempts to redefine torture as 'enhanced interrogation techniques' demonstrate that torture is more widely seen as right from which no derogation is permitted. Judicial mentions of absolute rights are bolstered further by mentions of derogable rights, suggesting a

²¹⁴ For discussion of this see, for example, the discussion between Gewirth and Levinson: Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1; Levinson, 'Gewirth on Absolute Rights' (1982) 32 *The Philosophical Quarterly* 73; and Gewirth, 'There are Absolute Rights' (1982) 32 *The Philosophical Quarterly* 348.

contrast between these rights and others.²¹⁵ There is often, however, a lack of discussion as to why a particular right is absolute or otherwise.

Human dignity is identified in the German Basic Law as being an absolute right. As noted above, human dignity has many uses. One of these is as a right in and of itself. When it is used in the sense it might be considered absolute. It is clear however that when it is used in other senses, as a foundation for human rights for example, it is able to give rise to both absolute and derogable rights. In other words some rights will be part of Kant's categorical imperative, actions which we cannot will as universal law and must therefore oppose. Other rights could be seen to fall with Kant's alternative version of the hypothetical imperative, which might be said to give rise to context-specific rights. In simple terms Kant is contrasting actions that we could never will to be universal (to be identified as actions treating others as means not ends) and those for which context is relevant. Rainbolt argues Kant's notion of perfect and imperfect obligations arising from the categorical and hypothetical imperatives can be seen as creating obligations with latitude and obligations without latitude.²¹⁶ In other words, absolute and derogable rights.

This, it is argued, is the most robust argument against the death penalty and torture. It is simply impossible to will either the death penalty or torture as universal law. If we were to do so we would have to accept that we may be a victim of torture or be put to death. This would be a self-defeating argument

²¹⁵ The Grand Chamber of the European Court of Human Rights refers to 'absolute rights such as those guaranteed by Articles 2 and 3 of the Convention' in *Ilascu v Moldova and Russia* 2004-VII; 40 EHRR 46. The UK Supreme Court has found '[t]he privilege against self-incrimination is not an absolute right': see *Ambrose v Harris* [2011] UKSC 43 at [34] and [56] (per Lord Hope).

²¹⁶ Rainbolt, 'Perfect and Imperfect Obligations' (2000) 98 *Philosophical Studies* 233.

with most persons. This suggests then that these rights should be seen as absolute. In Alexy's terms the balancing has already taken place and the principles have been determined to be of such priority that nothing we can envisage will outweigh them. Gerwirth puts forward a similar view, stating; '[a] right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.'²¹⁷ As such these 'absolute principles' take on the character of a rule. On the other hand, whilst one might not will as universal a blanket ban on practicing religion, one can easily will as universal some limits on the practice of religion. Limits on the practice of religion that would endanger lives, for example, would usually be seen as a reasonable limit. As Mavronicola notes, if we label a right absolute, its 'absoluteness' is usually at least a starting point even if it is later challenged.²¹⁸

A key challenge to absolute rights is that if absolute rights exist how would one resolve a clash of these rights. What is one person's right to life is set against another's right to be free from torture? Mavronicola notes, this question is a distraction. It is raised most often in hypotheticals but should it be raised in reality Mavronicola suggests a rule that 'there is no positive duty to act in a way that constitutes a violation of the negative duty encompassed by an absolute right.'²¹⁹ Thus, one does not need to consider whether it can be justified to torture someone in order to save another's life as one cannot have a positive duty to act in a way that constitutes a violation of a negative duty of non-interference with an absolute right. Mavronicola reminds us that in these

²¹⁷ n 178 2.

²¹⁸ 'Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) *Human Rights Law Review* 12 723, 758.

²¹⁹ n 178 732.

hypothetical examples one is not looking at one action which violates two absolute rights but one action which will violate an absolute right and another action which constitutes a violation of an absolute right whilst seeking to prevent violation of another.²²⁰

Rainbolt notes that whilst negative obligations in relation to absolute rights can only be fulfilled in one manner (through one 'act-token' as Rainbolt frames it), namely non-interferences, positive obligations in relation to absolute rights can be fulfilled through a number of acts. There is then an element of choice and an element of limitation (in the sense of the limited effectiveness) in fulfilling the positive obligations that necessarily renders it an imperfect obligation. Mavronicola reminds us that this does not allow actors (be that individuals or states) to ignore positive obligations, noting '[t]he fact that the positive obligations encompassed by an absolute right may involve a degree of variability and uncertainty in the action required to fulfill them does not entail that they are displaceable.'²²¹ Another important qualification Mavronicola points us to is the confusion between legal inviolability and physical inviolability.²²² In other words lack of enforcement, or the fact of

²²⁰ This appears to be the approach taken by the ECtHR in *Gaefgen v Germany* 52 EHRR 1 in which it was stated that even in a 'ticking time bomb' situation, where the kidnapper of a child is caught but the child's whereabouts remain unknown- so as to create a real danger to the child's life- torture cannot be used. The court further found that not even threats of torture could be used. In relation to extradition the same reasoning been used in *Chahal v United Kingdom* [1996] -V; 23 EHRR 413. See also, *Z v United Kingdom* 2001-V; 34 EHRR 3. The approach was also followed in German Federal Constitutional Court in the Aviation Security Act case, where the Court held that shooting down an airplane which was likely to be used as a terrorist weapon was a violation of the right to life in conjunction with the human dignity of the innocent passengers aboard. For discussion see, Möller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court' (2006) 51 Public Law 457.

²²¹ n178 734.

²²² Ibid.

violations, does not render a right any less absolute. This recalls the 'is'-
'ought' fallacy.

For refugee law, the duty of non-interference with absolute rights remains primary. If a refugee is asserting a claim to refugee status on the basis of (feared) violation of an absolute right the negative duty of non-interference is a perfect one. Namely a state may not take any action that constitutes interference with the refugees right to, for example, not to be tortured. It can be argued recognition of this underpins the additional non-refoulement obligation on contracting states. This approach is taken also in relation to Article 3 extradition or deportation cases in ECHR contracting states. This will be discussed below. In terms of refugee law it further suggests a split between cases where it will be necessary to consider the reason for the violation (as seen for example in the distinction between prosecution and persecution in relation to right to freedom) and those in which the reason is irrelevant. This is not to say that absolute rights will never need to be considered in depth in refugee cases. Firstly, there will always be the question of fact or, better phrased, the establishment of reasonable likelihood of risk. This task however is not under discussion here. Secondly, the framing of a right as an absolute right does not end the task. Absolute rights still require considerations of scope. The question of whether the behaviour in question does or does not fall within the scope of the absolute right will also turn on the facts of the specific case.

The UNHCR recognises the different types of rights and the interplay between these rights and refugee law. The UNHCR guidance was also

discussed in the UK case of *Gashi*.²²³ The UNHCR states that there are three categories of rights:

- 1) absolute
- 2) rights which allow limited derogation (for example only in times of public emergency)
- 3) binding rights which 'reflect goals for social, economic and cultural development'.

The third category of right, it is noted, is contingent on state resources. It is not then that it is permitted to violate these rights but that violations of these rights may not necessarily give rise to a protection claim. This would be the case, for example, in a situation of mass hunger caused by a natural disaster which the government sought to address, however ineffectively. These rights however are subject, the UNHCR and court in *Gashi* note, to the principle of non-discrimination. This leads back to the discussion of human dignity and the generations of rights at section 3.1.4 and we recall that where discrimination can be shown individually 'minor' human rights infringements can be elevated to persecution.

3.5.3 The Undeserving Refugee

Following on from the observations concerning absolute rights above the notion of limiting refugee status to those potential victims of human rights abuses who *deserve* refugee status is perhaps surprising. This however remains the legal position in refugee law. The exclusion clause – Article 1(f) –

²²³ n 5 introduction.

has been seen as creating the notion of a worthy refugee.²²⁴ Article 1(f) suggests “under the legal definition a refugee must not just face potential persecution, but must *be worthy of being* a refugee.”²²⁵ This assertion is confirmed by UNHCR guidance.²²⁶

The notion of excluding a person from refugee status runs contrary to the notion that refugee status is declaratory and not constitutive. As Zargor notes, the impact of Article 1(f) is compounded by the requirement of recognition for refugee status. Although one might be a refugee without recognition, without being declared a holder of refugee status protection is not afforded to the individual. A refugee must demonstrate that refugee status ought to be granted not only pursuant to Article 1(2) but also that status is not precluded under Article 1(f).

This is a problematic notion given the assertion that refugee status is not constitutive but more fundamentally in light of the more extensive assertions concerning the inviolability of human rights. This raises the question of how if human rights apply to all simply by virtue of being human, an individual can

²²⁴ Although as Zagor notes “article 1(F) does not technically exclude refugees; it *defines* them in ethical terms on the basis of their past conduct and affiliations” ‘Uncertainty and Exclusion: Detention of Aliens and the High Court’ (2006) 34 FLR 127-160. This has not prevented Article 1(F) being referred to as ‘the exclusion clause’ for undeserving refugees in UNHCR documents and by the judiciary, see for example UNHCR, 2003 Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003) HCR/GIP/03/05, paragraph 2 (‘The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees.’) This view has been endorsed in judicial decisions, for instance *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 1222.

²²⁵ *Recognition and Narrative Identities: the Legal Creation, Alienation and Liberation of the Refugee* (2011) ANU Research Paper.

²²⁶ UNHCR’s Handbook (n 27 chapter three)147.

be passed over for protection of those human rights. Can we forfeit our human rights? Refugeehood is based on human rights from which one cannot be ousted.

There is an evident overlap between the exceptions in Article 33(2) and the exclusion clause which forms part of the definition of a refugee in Article 1F of the 1951 Convention. Article 1(f) provides:

[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 33(2) states:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country

Article 1(F) might be seen as backward looking with Article 33(2) looking forward requiring that the person to be a current or continued threat to the potential host state. Similarly Article 1(F) is outward looking, referring to crimes committed outside the host state and Article 33(2) referring to potential crimes conducted within the host state (although this is not explicitly stated

and arguably Article 33(2) can be engaged with a threat of commission of a crime outside the host state territory).²²⁷

Article 1(f) creates a greater conceptual issue than Article 33(2). It is not a matter of the right of the refugee having been weighed against the rights of the potential host community and found lesser. Instead Article 1(f) seems to purport that certain individuals can justifiably be excluded from international protection due to their actions. The individual might be sent to have forfeited their rights. The UNHCR approach, however, suggests that balancing is appropriate here also.²²⁸ The approach adopted has been to balance the crime committed against the risk on return.²²⁹ Goodwin-Gill however suggests that because the crimes referred to in Article 1(f), namely crimes against peace, war crimes, and crimes against humanity, are necessarily extremely serious, states have assumed that for the very nature and circumstances of the crime can make the principle of balancing crime against consequences redundant.²³⁰ The United States, Australia United Kingdom, New Zealand, and Canada do not recognise any requirement under Article 1(f) to balance the nature of the crime with the degree of persecution feared. In *Canada v. Malouf* the Canadian Federal Court of Appeal stated that the decision-maker was not required to balance the seriousness of the claimant's conduct against the alleged fear of

²²⁷ Grahl-Madsen notes that the Swedish Delegate asked for the removal of that country from the provision 'to cover such cases as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country'. Grahl-Madsen, *Commentary on the Refugee Convention 1951* 237. See also Weis, *The Refugee Convention (1951)* 343.

²²⁸ UNHCR Handbook (n 27 chapter three) 149 and 156.

²²⁹ See

http://www.immi.gov.au/media/publications/refugee/convention2002/05_exclusion.pdf.

²³⁰ (n 83 chapter one) 97. However at 105-7 Goodwin-Gill seems to suggest he would support balancing.

persecution.²³¹

Conceptually this is deeply problematic. Refugee law can accommodate an exclusion from refugee law where balancing has taken place. It cannot however accommodate blanket exclusion. As set out in chapters two and three balancing allows for other rights to supersede those of the refugee if the rights of the refugee can be said to have been outweighed. This is instinctively correct. Human rights law always contains a recognition that rights must be balanced as rights will necessarily clash. However it could be argued that this merely demonstrates that the interpretation of Article 1(f) as not requiring balancing is incorrect. It should also be noted that generally defences to Article 1(f) crimes are accepted.²³² This does not detract however from the incompatibility of the notion of exclusion from human rights protection with the development of human rights law, which has focused on the inviolability of human rights. In the post-9/11 world Article 1(f) may be more widely used. *JS (Sri Lanka)* [2010] for example saw build on the UNHCR declaration that being involved in a terrorist organisation might be sufficient to allow exclusion.²³³

After the initial keenness to broaden Article 1(f) a more cautious approach might be said to be emerging. In the UK an initial attempt to link Article 1(f) to the much broader terrorism provisions of s54 of the Immigration, Asylum

²³¹ [1995] 190 N.R. 230 (F.C.A.). An Australian court made a similar finding in *Dhayakpa v MIEA* (1995) 62 FCR 556.

²³² *R v Keogh* [1964] VR 400 accepted automatism as a defence and *Zecevic v DPP* (Victoria) (1987) 12 CLR 645 allowed necessary use of force as a defence. *Ramirez v Canada* [1992] 2 F.C. 306 (C.A.) accepted duress also a defence. Acting on the orders is not an accepted defence, this is only to be expected as this is similarly no defence to trial for the crimes listed in Article 1(f).

²³³ UKSC 15. See also UNHCR Guidelines (2010) (n 223) 26.

and Nationality Act 2005 was eventually halted in the Supreme Court. In *Al-Sirri* the Supreme Court found:

16. The article should be interpreted restrictively and applied with caution. There should be a high threshold “defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security”. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.²³⁴

The court in built on UNHCR guidance to limit the applicability of Article 1(f) to acts which were directly contrary to the purposes of international law and the international community.²³⁵ The English and Welsh courts have recognised that Article 1(f) should be narrowly interpreted when considering if an Algerian male could be returned to France under the safe third country policy. It was held in *Kerrouche v Home Secretary* that Mr Kerrouche could not be removed to France as the French interpretation was too broad.²³⁶ Although this insistence on excluding such persons from refugee status does not sit with the universality of human rights and human dignity it is perhaps, as Hathaway stated, a practical concession. It might be seen as a concession made in order to secure protection for those who had no part in the human rights violations.

²³⁴ *Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54.

²³⁵ The Court stated, at paragraph 17:

Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.

²³⁶ [1997] Imm AR 610. It was not required for Mr Kerrouche to demonstrate that the French interpretation was unsupportable but only that a more generous approach was applied in the UK.

In practical terms, however, this question is often less pressing, as noted in the introduction refugee status is not the only form of protection. As Hathaway notes Article 1(f) was most likely introduced for practical reasons, as it represents ‘a pragmatic recognition that states are unlikely to agree to be bound by a regime that requires them to protect undesirable refugees...’ even if they are genuinely at risk of persecution in their state of origin.²³⁷ We might argue that we can exclude a person from refugee status for the reasons in Article 1(f) but this does not mean that the excluded ‘refugee’ can be refouled. It could be argued the Refugee Convention recognizes this by making refoulement a separate prohibition in the Convention. The development of the interpretation of Article 33 has operated so as to prevent refoulement of individuals who arguably fall within Article 1(f).²³⁸

Although previously relatively unchallenged Lauterpacht notes:

The interpretation of Article 33(2) must also take account of other factors. Particularly important is the trend, evident in other textual formulations of the principle of non-refoulement and in practice more generally since 1951, against exceptions to the principle of non-refoulement.²³⁹

The Declaration on Territorial Asylum contains a similar exclusion clause but states:

should a State decide in any case that exception to the principle [of non-refoulement] stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such

²³⁷ (n 91) 214.

²³⁸ The concern here is not, however, what conduct constitutes conduct under Article 1(F) and/or Article 33(2) but rather if, with the assertions previously as to the human rights nature of the 1951 Convention, the exclusion of a refugee from the protection afforded by the Convention can be justified explained.

²³⁹ (n 91) 44.

conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.²⁴⁰

Similarly although the OAU indicates grounds on which the Convention will not apply it does not allow exceptions from the principle of non-refoulement.²⁴¹ Lauterpacht argues this is a general trend in accepting that non-refoulement is an absolute principle, stating:

Non-refoulement in a human rights context allows of no limitation or derogation. The principle simply requires that States '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'.²⁴²

The more pressing issue therefore is how exclusions from refugee status may be justified where it is accepted that human rights attach to every person by virtue of being human. This formulation of human rights does not allow for the justified violation of absolute human rights due to the person's conduct.

For absolute human rights the notion of being exempt due to conduct- no matter how heinous the conduct- is anachronistic. Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture'. If the impact of refusal of

²⁴⁰ 14 December 1967, A/RES/2312(XXII).

²⁴¹ See Art. I(4)–(5) of the Organisation of African Union Refugee Convention 10 September 1969, 1001 U.N.T.S. 45. See also UN High Commissioner for Refugees (UNHCR), *The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination*, January 2013, available at:

<http://www.refworld.org/docid/50fd3edb2.html> [accessed 15 August 2014]

²⁴² As per General Comment No. 20 (1992) of the Human Rights Committee (HRI/HEN/1/Rev.1, 28 July 1994).

refugee status due the engagement of Article 1(F) is that there is no place of safety for the person this would result in de facto derogation from absolute rights.

This suggests that similar to the obligation not to extradite where there is a real risk of torture Article 1(F) can only be *acted upon* where implementation of the removal following a refusal of refugee status would not result in the violation of an absolute human right. Thus refugee status might be refused on the basis of Article 1(F) but that does not mean that the person can be *refouled*. Although the protection of the refugee Convention might be denied to someone the protection of international law may not be. This reasoning might be said to be confirmed in General Comment No. 20 (1992) on the interpretation of Article 7 of the ICCPR prohibiting torture or cruel or inhuman or degrading treatment or punishment, the Human Rights Committee which states:

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity . . .

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation

of article 7 for any reasons, including those based on an order from a superior officer or public authority.

Thus Lauterpacht argues that the Article 33(2) exception does not apply where to treatment feared would amount to violation of an absolute right. He states:

Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

The same could be said to the application of Article 1(F).

Weis clarifies:

The words 'where their life or freedom was threatened' [in Article 31(1)] may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees 'escaping from persecution' and to the obligation not to turn back refugees 'to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinion'. In the course of drafting these words, 'country of origin', 'territories where their life or freedom was threatened' and 'country in which he is persecuted' were used interchangeably.

...

The words 'to the frontiers where his life or freedom would be threatened' [in Article 33(1)] have the same meaning as in Article 31 paragraph 1, that is, the

same meaning as 'well-founded fear of persecution' in Article 1A(2) of the Convention. It applies to the refugee's country of origin and any other country where he also has a well-founded fear of persecution or risks being sent to his country of origin.²⁴³

The same conclusion is reached by Grahl-Madsen:

[T]he reference to 'territories where his life or freedom would be threatened' does not lend itself to a more restrictive interpretation than the concept of 'well-founded fear of being persecuted'; that is to say that any kind of persecution which entitles a person to the status of a Convention refugee must be considered a threat to life or freedom as envisaged in Article 33.²⁴⁴

As Grahl-Madsen seeks to demonstrate it is, above all else, illogical to apply a more restrictive interpretation to the refoulement clause than to the qualification clause. It cannot be that person must show a great risk to prevent refoulement than is required to qualify as a refugee in the first instance. Indeed the refoulement clause far from being narrower may be considered broader than Article 1(2). It can be said to cover situation where the refugee convention does not apply but a threat to the individual's life and liberty still exists. Most likely this is situations where a Convention ground for persecution cannot be established. As Lauterpacht argues:

The Article must therefore be construed to include circumstances of generalized violence which pose a threat to life or freedom whether or not this arises from persecution[...]. Adopting the language of the Human Rights Committee and the European Court of Human Rights in respect of non-refoulement in a human rights context, the appropriate test will be whether it

²⁴³ Weis (n2) 303 and 341.

²⁴⁴ A. Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2–11, 13–37* (UNHCR Division of International Protection, Geneva, 1997) 231–2.

can be shown that the person concerned would be exposed to a 'real risk' of persecution or other pertinent threat.²⁴⁵

Case law has broadly supported the assertions above that although Article 1(f) and Article 33(2) may seem to condone the concept of an undeserving refugee this concept does not allow the person to be removed to a country of danger however undeserving of refugee status they may be found to be.

In ECHR member states Article 1(f) has been used to exclude individuals from refugee status but has rarely been effective at allowing actual expulsion of the 'undeserving refugee.' The ECHR, in particular Article 3, has been successful at operating as a fail safe to prevent abuse of Article 1(f). The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) includes a similar provision, also at Article 3, on the expulsion, return ("refoulement") or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.²⁴⁶ Although use of other human rights instruments to prevent Article 1(f) operating so as to place individuals in danger is reassuring it is also conceptually unsatisfactory. Refugee law might be said to include its own safety mechanism in the shape of article 33 but with 33(2) this is not a sufficiently robust protection mechanism. Refugee law needs to acknowledge that the concept of the undeserving refugee has no place alongside the universality of human rights.

²⁴⁵ (n 53) 39-40.

²⁴⁶ [1984] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

3.6 Conclusions

This chapter has sought to build on the foundations laid down in chapter two. If we recall Alexy's key claim that values inevitably enter into the legal system as one cannot satisfy the claim to correctness if decisions made are not justifiable and justified. Moral rights provide good justifications and it is this interest in correctness that justifies human rights. This chapter has demonstrated that human rights, as special moral rights, are justified and of high priority. Thus, human rights provide strong reasons to make a decision, have heavy weighting in balancing and have conditional priority over other rights. If we consider what Raz terms 'exclusionary reasons', a second-order reason not to act on a first order reason, we might state as our starting point that human rights are capable of outweighing other rights in that they provide good exclusionary reasons not to act on other reasons. In other words, human rights are capable of 'trumping' other rights because they provide either better reasons to act than other principles, such as priority to compatriots. In order to determine the strength of a human right claim in refugee law, in terms of conclusive reasons, we must ask ourselves what reasons might be conclusive in which circumstances. This is the task of the subsequent chapters, to consider firstly the circumstances of a human rights claim unfulfilled by the primary addressee and, secondly, the specific circumstances of addressing a human rights claim to the international community but the guiding principle set out here is that refugees' rights have conditional priority over public interest. This chapter begins with the claim that the principle of human dignity and principles of human rights are *always* at stake in refugee law cases and sets out why this is the case. This chapter recalls that, following Alexy, competing principles must be shown to be a greater abstract importance or

value to be ranked higher in conditional preference. It has been argued here, in relation to human rights, that conditional preference can be given to the principle of human rights protection. This excludes greater weight being given to the claims of host states than to the claims of refugees unless, on the facts, greater weight can be given to the competing principle in arguing either the infringement of human rights is minimal *or* the importance of satisfying the competing principle is so great so as to outweigh the infringement. Further more, it has been demonstrated that some fundamental rights are capable of containing balancing in the characterisation of the right such that they take on the characteristics of a rule and become absolute. In these cases, it is argued, definitive preference can be given to absolute fundamental rights which definitively excludes greater weight being given to the claims of host states when the refugee's claim concerns these absolute rights. These claims provide the background standards for interpretation of the Refugee Convention and places limits on plausible interpretations of the Convention.

Chapter 4 POLITICAL LEGITIMACY AND HUMAN RIGHTS IN INTERNATIONAL REFUGEE LAW

This chapter considers a background principle of refugee law, namely the presumption that the primary duty to protect human rights falls on the home state. The content of this primary duty, based on notions of political and sovereign legitimacy and the concept of collective violence, is significant in determining the content of the persecution criterion and the protective scope of article 1(2). Closer examination of the notion of 'the political', in particular, suggests a broader interpretative scope of article 1(2) than is often applied in refugee status determination cases. The claim here is that the notion of refugeehood is tied to the idea of political legitimacy in that the refugee is the victim, either directly or by omission, of *illegitimate* state violence. Chapter one noted lack of national protection under the Refugee Convention could be seen as a secondary element of the persecution criterion, namely that persecution inherently denotes a lack of national protection.¹

This chapter argues that the state, under the current conception of international law, is presumed to be the primary guarantor of the rights of its citizens. This requires not only that the state respects the negative duty of non-interference but also that it satisfies the positive duty of protecting human rights. The argument put forward in chapter one was that international protection under the Refugee Convention is extended to refugees, in contradistinction to migrants, without inevitably demanding

¹ For discussion on the shifting meaning of persecution within in refugee law see Fortin 'The Meaning of Protection in the Refugee Definition' (2000) 12 International Journal Refugee Law 548.

restrictive interpretations of article 1(2). Goodwin-Gill has argued that in interpreting persecution requires an examination of reasons, interests and means.² Reasons refer to illegitimate ends, interests to the human right threatened or violated and measures denotes the means by the agent seeks to achieve the illegitimate ends. Interpreting persecution, then, involves analysing these three elements, which, in turn, depends on an understanding of what constitutes illegitimate ends, which threatened interests are relevant and which measures constitute illegitimate violence. This chapter explores the three elements of the definition by examining the notions of *illegitimate* violence, the content of the concept of human rights and types of action that constitute illegitimate *violence*.³ The 7th circuit court observed that the concept of legitimacy necessarily enters into considerations of treatment constituting persecution, stating:

Although there is no statutory definition of persecution, we have described it as punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as *legitimate*.⁴

The previous chapter sought to demonstrate the primacy of claims to human rights protection. It has been argued that this gives the rights of refugees' conditional priority over competing claims. This claim is further strengthened when one considers the nature of the claim to human rights protection made

² Goodwin Gill *The Refugee in International Law* (Clarendon Press 1996) 78. See also Goodwin-Gill and McAdam, *The Refugee in International Law* (Oxford University Press 3rd ed 2010).

³ The concept of illegitimate violence used here would include legitimate end that is pursued too far so as to fall foul of the principle of proportionality.

⁴ *Ambati v. Reno* 233 F3d. 1054 (2000) (emphasis added).

by refugees. The claim to human rights protection is not being made in a vacuum but within the current system of international law. As set out in chapter one, this system operates as protection against illegitimate or wrongfully exercised authority. This assertion forms the basis of the claim that asylum is a political institution with refugee status to be awarded only to those who have suffered political wrongs. This view is not rejected here. What is rejected, as alluded to in chapter one, is that a restrictive interpretation of refugeehood follows from this claim that asylum is a political institution. Whether or not certain people, situations or types of human rights violations are included, or excluded, from refugee status depends on the notion of 'political' employed. If a refugee is a victim of a political wrong then the question 'what constitutes a political wrong?' must be examined. It is now widely accepted that persecution is not concerned only with officially sanctioned political acts but the limits of the term 'political' are still hotly contested. Refugee status is now routinely recognised for victims of human rights violations inflicted by non-state actors refugee status yet claims made by victims of economic mismanagement by state officials are routinely rejected.⁵ Without further examination of the concept of 'political' this cannot be explained or, indeed, critiqued.

The chapter will first consider the claim to human rights protection made in refugee law. It will then proceed to consider the content of the notion of human rights, addressing briefly which type of rights might be said to be

⁵ Although there has been considerable controversy over non-state agents of persecution the jurisprudence on the matter has become so settled that Germany was heavily criticised for maintaining the requirement of government linked persecution and in 2006 was forced to amend the domestic interpretation in line with EU Qualification Directive (n 18 introduction) which stipulates that the agent of persecution is not a determinative factor in refugee status.

human rights. The remainder of the chapter will examine facets of political legitimacy, firstly, the concept of political legitimacy itself will be considered, then the related notions of 'the political' and political acts will be explored and, finally, the argument that collective violence is a type of violence relevant to refugee law will be put forward. It will be argued that viewing the persecution criterion through the lens of collective violence will throw new light on the protective scope of article 1(2).

4.1 Human Rights and State Sovereignty

Having explored the foundations of human rights the question remains as to how human rights operate in refugee law. Human rights operate at two levels in international refugee law. Human rights violations underpin the persecution criterion. Human rights also operate as the justification for the denial of state sovereignty of the home state inherent in granting protection to its citizen. The latter function requires further enquiry into human rights; state practice cannot be criticised on the grounds that it does not meet current human rights standards without first explaining why human rights standards ought to be adhered to and what these human rights standards are.

4.1.1 The Claim in Refugee Law

Before proceeding to examine the notion of a 'political wrong' this chapter will say something further about why any notion of 'politics' plays a role in refugee law. Some reasons for this have been given in chapter one, from the point of view of the receiving state. It was argued that it is the treatment by the country of origin, or home state, that allows the host state to deny the

usual rights of sovereignty of a state over its citizens. This view of refugee law is predicated on the assumption that states have rights over, or a claim to, their citizens. This is a foundational assumption of Westphalian sovereignty and, as such, a foundational claim of international law. It is, however, now a double-edged sword for states. The notion that states have a claim over their citizens is the flip side to the far more important claim that states have responsibilities *towards* their citizens.⁶ The importance of this claim to international law is reflected in refugee law, namely in the extension of protection to those whose country has either directly violated the negative duty of non-interference or failed to fulfil the protective duty. In other words, the notion of political legitimacy, as setting the boundaries of sovereignty, is key to refugee law as refugee status can only be extended to those in need of secondary (or surrogate) protection. The content of the duty of the home state is, then, key to determining whether there is persecution (and lack of national protection) that transforms the traveller from a migrant, asking for entry, to a refugee, asserting their claim to protection.⁷ The concept of political legitimacy, it is argued, patrols the border between 'refugee' and 'migrant' and the content of this concept is determined by the content human rights. Human rights, it is argued, are now the benchmark for legitimacy, as Risse notes "[w]hen organized power is criticized for harming those whom it ought to benefit, appeals to human rights tend to be used."⁸

⁶ Indeed, as Gilbert argues, in an increasingly globalised world, territorial borders are the "strongest reminders of the Westphalian paradigm" n 184 (chapter 3) 176.

⁷ This claim to protection is set out further in chapter five, here we are concerned only with the issue of domestic legitimacy- how the home state's duty to its citizens can be framed in order to identify violations of this primary duty. The secondary duty on the international community, what might be termed as 'international legitimacy' occupies the following chapter.

⁸ 'What are Human Rights? Human Rights as Membership Rights in the Global Order' (2008) Kennedy School of Government Working Paper RWP07-033, 1.

As Vernant notes, there is always “a certain element of relativity” in the classification of acts as ‘persecution’ as “a mere finding that certain circumstances exists in the country of origin is not in itself sufficient; the facts must be appraised in the light of certain standards.”⁹ Persecution, it could be argued, is not verifiable as an objective (absolute) truth in the manner claimed by those advocating the use of persecution as demonstrative of forced migration; it is capable only of relative truth. Thus, labelling an action as persecution and a ‘political wrong’ is dependant on a notion of (political) legitimacy against which to judge the actions of the state.¹⁰ For Weber the definition of ‘state’ itself has a close connection to legitimacy; a state is a community that “(successfully) claims the *monopoly of legitimate use of physical force* within a given territory”¹¹ and there is no state unless power is wielded legitimately.

Weber does not give the concept of legitimacy specific content but it is enough for the present purpose to apply the definition of a state posited by Weber to the situation of refugeehood. If a state can only be said to be a state if power is wielded legitimately then all those subject to *illegitimate* ‘use of physical force’

⁹ Vernant (n 7 introduction) 7.

¹⁰ There is a similar view advanced by Sternberg in relation to interpretation of refugee law in North America. Sternberg argues, “the grounds of refugee protection are not fixed but parallel discriminatory social and political attitudes towards defined groups” *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law Canadian and United States Case Law Compared* (2002 Martin Nijhoff) 1.

¹¹ Weber ‘I Politics as a Vocation: II Economy and Society’ in David Held (ed), *States and Society* (Blackwells 1919). See also Lewis ‘Power, Legitimacy and the State’ in D. Held et al (eds) *States and Societies* (Blackwell Publishers 1983). As Lewis notes Machiavelli puts forward a similar definition of the state, arguing, “there are two ways to rule by law [i.e. legitimately] or by force. The first way is natural to men, and the second to beasts” (cited 414).

are living in, to borrow Rawls' terminology, 'out-law states'¹² and, under the classic view of international law, must be considered refugees. These are people whose 'assigned protector'¹³ has failed them and who can legitimately be seen as beyond the jurisdiction of their home state because it no longer constitutes a state.¹⁴ A 'political wrong' could be seen as any action within a given territory that could be deemed as illegitimate. The claim of a refugee, then, is to protection from this political wrong, which, by definition, cannot be sought from the home state.

It has been argued by Anker, amongst others, that more expansive interpretations of persecution reflect a new human rights paradigm emerging in refugee law¹⁵, with an emphasis on a broader understanding of conduct constituting persecution, so as to include the acts, in particular, of rape and

¹² I have not used the terminology of 'failed states', although this is how illegitimate states could be described in Weberian terms, to avoid confusion. I have used Rawls' term 'out-law states' as it conveys a similar sense of judgment of the legitimacy of the state through the actions of the government. Rawls also makes a useful distinction between 'out-law states' and 'burdened societies', where circumstances beyond the control of the Government render it difficult or impossible for a Government to meet the basic needs of citizens, even if they aspire to do so *Law of Peoples* (Harvard University Press 1999). Price also employs this distinction, see n 3 introduction 72-75.

¹³ A notion borrowed from Goodin 'What's so Special about our Fellow Countrymen' (1998) 98 *Ethics* 663.

¹⁴ And international law is based on states *not* territories. As Benyani argues "the theory of State responsibility rests on a simplistic but complex practical proposition. It is that every state must be held responsible for the performance of its international obligations under the rules of international law" prevention of refugee flows could be seen as one such international obligation see Benyani 'State Responsibility for the Prevention and Resolution of Forced Population Displacements' (1995) 7 *International Journal of Refugee Law* 130, 130.

¹⁵ Price speaks of the trend in Commonwealth countries towards recognition of gender-targeted violence as persecution but this shift can also be identified in US jurisprudence on persecution see 'Persecution Complex: Justifying Asylum Law's Preference for Persecuted People' (2011) 47 *Harvard International Law Journal* 413. The trend towards recognition of gender persecution as is acknowledged by the UNHCR in 'Guideline on Gender-Related Persecution within the Context of Article 1A(2)' HCR/GIP/02/01 in which the UNHCR state the evolution of interpretation of persecution have "run parallel to, and have been assisted by, developments in international human rights law and standards" 3.

genital mutilation.¹⁶ Price, on the other hand, argues that this shift away from the paradigmatic examples of persecution to a broader interpretation is evidence that the humanitarian concept of asylum (asylum as catering for those in need) a model of refuge incompatible with the foundations of international refugee law. For Price, and others such as Martin, the idea of ‘the political’ restrains refugee law, limiting the granting of refugee status to those who have suffered ‘political wrongs.’ The scope of the persecution criterion, then, becomes coextensive with the scope of political legitimacy and human rights. Restrictive notions of human rights, tied almost inevitably with restrictive notions of the political, have the impact of limiting the scope of article 1(2). Even those thought of as champions of progressive notions of global justice, such as Pogge, have continued to cling to restrictive notions of human rights. Pogge states:

[h]uman rights violations, to count as such, must be in some sense official (...)
[H]uman rights thus protect persons only against violations from certain sources. Human rights can be violated by governments, certainly, and by government agencies and officials, by the general staff of an army at war, and probably also by the leaders of a guerilla movement or of a large corporation – but not by a petty criminal or by a violent husband.¹⁷

Thus although human rights have been used to set limits to political legitimacy, the notion of ‘the political’ seems also to be used to limit the

¹⁶ See Anker who argues “states are interpreting key criteria of the refugee definition in light of human rights principles”, Anker (n 83 chapter 1) 134 135. Anker refers to these acts as gender-specific which, definitionally, they are not- and men can be victims of both- but it is clear that in the context of a discussion on persecution, rape as a weapon is more prevalent as a male perpetrated crime against women. Genital-mutilation as a custom is centred on female genital mutilation. This discussion is expanded in chapter six.

¹⁷ *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press 2002) 57. See also Roth *Governmental Illegitimacy in International Law* (Oxford University Press 1999).

concept, or at least the use of, human rights. This might be seen as a formulation of a practical conception of human rights, which “ define a boundary of legitimate political action.”¹⁸

However an expansive notion of human rights in refugee law (and with it a broader understanding of conduct constituting persecution) can be explained whilst retaining the notion of ‘political wrongs’ and whilst maintaining an expansive concept of human rights. This claim is not based on a broader humanitarian concept of asylum but rather on something quite similar to Price’s preferred political concept of asylum. The notion of human rights, similarly, can retain a political character without the implications Pogge insists upon. Although the broader concept of asylum can be seen as responding to need, as Price charges, the *justification* for responding is not the need of the refugee¹⁹ but in the cause of the need, namely that the home state has failed in its duty. It is this failure that explains a break from the norm in international law of each state being responsible for its’ own citizens and, as noted above, justifies one state denying the claims of another state to its’ citizens. It follows logically from the premise that each state is viewed as responsible for their own citizens that the citizens of failed states are singled out for refugee status. The question of the scope of the persecution criterion

¹⁸ Wenar ‘The Nature of Human Rights’ in *Real World Justice* A. Føllesdal and T. Pogge (eds) (Kluwer 2005) 285. Although it is a conception still justified by and based on what Wenar calls ‘the orthodox conception’ of human rights, namely one that defines human rights as rights held by virtue of humanity. The distinction between the two conceptions of human rights, then, is perhaps best summed up as one of context, with the orthodox conception applying in all contexts but the practical conception being used for a practical end in a specific context, that of state sovereignty.

¹⁹ Although the need of the refugee could form the basis of a separate argument with need as a reason for acting. This argument is not considered here but in moral terms, at least, it could be deemed persuasive. The justification for international action to assist refugees is explored in greater detail in the subsequent chapter.

comes down to the scope of the concepts of human rights, sovereignty, legitimacy and 'the political.'

The claim that human rights is a political concept is entirely compatible with the traditional view of refugee law as providing 'substitute protection', refugee status could still be seen, as was envisaged by the drafters, as "a response to disfranchisement from the usual benefits of nationality."²⁰ In chapter one it was claimed that in order for persecution to operate as evidence of forced migration, "we need to...assign a value to *p* [persecution]." It could be argued, the value we ascribe to 'p' has changed but the task we are undertaking is the same- determining the content of persecution based on notions of legitimacy-the traditional statist view of international law and its corresponding political model of asylum need not require, therefore, a restrictive notion of refugeehood.

The broader concept of refugeehood is, of course, already widely supported by those who view refugee law as a branch of Human Rights law and advocate a more rights-based approach to asylum adjudication. As Bhabha notes "the field of human rights has undergone significant transformation since the mid twentieth century, when the principle normative framework for refugee law was established"²¹ and it would be quite surprising if refugee law did not reflect this transformation. Refugee law, then, is, or ought to be, response to shifting notions of human rights and 'the political.' The Rome Statute of the International Criminal Court, for example, contains an

²⁰ Memo from the S-G, U.N. Doc.E/AC.32/2, 13 Jan 3 1950 cited Weis (n 47 chapter 1) 12.

²¹ Bhabha 'The Tension Between Asylum Advocacy and Human Rights' 15 Harvard Human Rights Journal 167 169.

expansive definition of persecution, which it could be argued reflects the shifting notion of illegitimate violence from the 1951 Convention to the 1998 Statute of the ICC.²² In the first attempt to define persecution under international law, Article 7(2)(g) of the Rome Statute defines persecution as: “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” This allows for shifting notions of fundamental rights and violations of these rights as international law evolves.²³

4.1.2 The Country of Origin in Refugee Law

The country of origin is central to international refugee law, without an illegitimate act of that state against its own citizen no need for refuge would arise. As Tomuschat notes, if “[the country of origin] behaved in consonance with current human rights standards, the whole problem would simply disappear.”²⁴ Here the evaluative function of international human rights norms and laws are key; it is against these standards that the country of origin is judged and how it is determined if the act is persecutory. This also suggests that the view of international refugee law as neutral in regards to the country of origin is misplaced; granting refuge is inevitably a judgment against the

²² 2187 U.N.T.S. 90 (entered into force July 1 2002). Further, crimes against humanity under Article 7(1)(h) includes: “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or *other grounds that are universally recognized as impermissible under international law*, in connection with any act referred to in this paragraph (Article 7) or any crime within the jurisdiction of the Court” (emphasis added).

²³ See also Robinson ‘Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience’ in Lattanzi and Schabas (eds) *Essays on the Rome Statute of the International Criminal Court: Volume 1* (II Serente 1999).

²⁴ Tomuschat ‘State Responsibility and the Country of Origin’ in Gowlland- Debbas V (ed) *The Problem of Refugees in the Light of Contemporary International Law Issues* (Kluwer International 1996).

country of origin.²⁵ There is simply no way to determine refugee status without making a judgment on whether the home state has violated the human rights of one its own citizens (or failed to act to prevent a violation by a non-state agent). This determination cannot be made without some element of judgment, the awarding of refugee status is a statement that the country of origin has acted illegitimately *vis a vis* that individual. Refugee law is, as Price argues, expressive in character, “asylum is intertwined with the evaluation and condemnation of other states’ internal practices.”²⁶ In the case of those whose human rights cannot be respected or protected at home, international refugee law is designed to provide “prospect of *legitimate disengagement* from the community in favour of surrogate protection elsewhere.”²⁷

The evaluative function of human rights norms and law results in both international documents such as UDHR, ICCPR and ECHR, and domestic documents such as constitutions²⁸, playing an important role in guiding judicial interpretations of key criteria in article 1(2). There can be little understanding of concepts such as persecution, refugeehood and forced migration without reference to human rights standards. In the Australian case of *Wang*, Merkel J stated the term ‘refugee’ is “in turn, to be understood as written against the background of international human rights law ...”²⁹. There is, then, a link between refugee law and human rights law in the

²⁵ See for further elaboration of this argument see discussion of Price (n 73 chapter 1). Granting asylum, Price argues, “entails the expression of condemnation” of the home state behaviour 71. This argument is expanded in chapter six, p1.

²⁶ *ibid.*

²⁷ ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 *Journal of Refugee Studies* 113 (emphasis added).

²⁸ Particularly in the case of Germany where the Basic Law guarantees a right to asylum for the political persecuted (article 17).

²⁹ *Wang v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 1599 para 73.

determination of the persecution criterion of article 1(2). Goodwin-Gill argues persuasively that the persecution criterion “lock[s] the refugee firmly into the human rights spectrum”³⁰ by placing human rights violations at the centre of refugee status. Human rights are being claimed (respected and/or violated) in the first place in domestic political sphere. In this way, human rights violations in refugee law are ‘political wrongs.’

4.1.3 Identifying Human Rights

As elucidated above, outlaw states are those states that “flout the requirements for international legitimacy by violating basic human rights.”³¹

The key to explaining and justifying restrictive, or expansive, concepts of refugeehood and persecution lies in the model of human rights used to give content to these concepts. The boundaries of political legitimacy are set, it is argued, by the notion of human rights. If we claim that sovereignty does not entitle a state to illegitimately interfere with the human rights of its citizens we must also be clear on what rights constitute *human* rights. In the previous chapter the justification for human rights was established and a view of human rights as rights designed to protect an individual’s capacity to form and carry out their own life plan was put forward. The notion of a dignified life was also considered. Refugee status decisions, then, centre on whether there has been act which has prevented, or will prevent, the applicant from choosing and/or realising their own life plan (with the proviso that the life

³⁰ Goodwin-Gill *Refugees and Human Rights* (Oxford University Press 2003) 34. See also Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, 2010).

³¹ Cited in Price (n 73 chapter 1) 73.

plan must be 'socially manageable'³², if it is not, interference might be justified on this basis.)

In order to constitute a human rights violation, the act must prevent the individual from forming or realising their own life plan, it cannot merely minimally interfere with this plan. Take, for example, the right to education: if one accepts that everyone has a right to education, as to be deprived of any education would seriously limit one's ability to formulate a life plan³³, it follows that this requires some educational opportunities to be made available to everyone. It does not follow that everyone be entitled to be educated wherever and in whatever subject they wish. A policy by a government to exclude a certain section of the population from formal education would be, therefore, a human rights violation but university entry requirements would not. And, as Raz notes, whether the right was enforceable against a specific government at a specific moment might well depend on political, social and economic conditions at that time and as such the response of the international community to a denial of the right to education might vary.³⁴ Similarly, Griffin maintains that the right to work is not a human right but that the right to be provided with opportunities to work may well be a human right for all adults depending on socio-economic conditions.³⁵

³² i.e. the life plan cannot contain significant infringement of other's human rights.

³³ Griffin expresses this as "one must have at least a certain minimum education and information and the chance to learn what other's think" to render the choice of one's own course through life real. Griffin (n 20 chapter 3) 311.

³⁴ Raz 'Human Rights without Foundations' in Tasioulas and Besson (ed) *The Philosophical Foundations of Human Rights* (Oxford University Press 2010) 336.

³⁵ Cited in Tasioulas (n 15 in introduction)(n 13 introduction) 79. The argument is that as work is not the only method of securing resources, the right to work is not a human right. Tasioulas persuasively disputes this, arguing that even if this were the case (which it presently is not), the opportunity to work could be seen as a vital part

This view of human rights creates a basic list of requirements for justifying a right as a *human* right. Nickel suggests that in determining whether a right is a human right we must ask, and satisfy, six questions. An adapted version of this list is proposed here, to determine whether a right is a human right we must ask ourselves:

- 1) does the norm respond to a severe threat?³⁶
- 2) Does it protect something of great importance?
- 3) Can it be formulated as a right of all people today?³⁷
- 4) Is it a specific political right rather than some weaker norm?³⁸

How does this view of human rights fit with the notion of political legitimacy? Nickel's list suggests a strong link between human rights and 'the political' by requiring that the right claimed as a human right be political in nature. Conceptions of human rights as political are not, therefore, linked only to

of one's life plan, see *ibid* 90. The connection between human rights and current conditions is explored in more detail below.

³⁶ Nickel requires the threat to be both severe and *widespread* in 'How Human Rights Produce Duties to Protect and Provide' 15 (1993) *Human Rights Quarterly* 77.

However, it is argued this appears to conflate the definition of human rights with issues of violation and enforcement. The definition of a human right is logically prior to the question of violation or enforcement, a right may therefore never be actually threatened with violation (or be the threat may be widespread and violations frequent) and still be a human right. It is sufficient, then, that the any threat to this right would be severe even if we cannot at this point conceive of how this right might actually be threatened. Sadly, most of the rights we claim as human rights have already been threatened but in the case of so-called emerging human rights this requirement of 'widespread' threat might prove problematic.

³⁷ This might seem to suggest an historically limited concept of human rights but it requires only that it the right is reliable "in the sense that rational, reflective, and morally sensitive people continue over time to find them appealing and do not discover good reasons for rejecting them" (Griffin n 17 in chapter 3 61).

³⁸ Nickel (n 35) 91. This list is truncated, the original list included also requirement that "the normative burdens imposed by the right are tolerable and capable of being equitably distributed" and that the right is feasible in "an ample majority of countries." This requirements, it is argued, are requirements of enforcement and feasibility, which are, as stated above, logically subsequent to the definition of human rights. This issue has been addressed also in the introduction.

refugee law but also seen widely in the characterisation of human rights in general.³⁹ The question is then raised as to the impact of characterising human rights as political. Is Pogge's assertion that this limits human rights to rights against the state well founded? The answer to this can be found in examining the scope of political legitimacy.

4.2 Political Legitimacy

A *political* conception of human rights might be defined as one where human rights are tied to the conditions of legitimate government. It can be seen, for example, in Rawls' theory of human rights. For Rawls the impact of asserting that human rights are political is the claim that human rights violations are capable of generating a justification for intervention.⁴⁰ There seems to be few solid reasons for limiting human rights to those justifying intervention alone. If one views human rights as merely triggers for intervention, argues Griffin, this overlooks a more foundational (and individual) purpose, namely the protection of human dignity.⁴¹ There is, as Griffin remarks, some implausibility in attempts to entirely disconnect human rights from how they have been and continue to be used, namely to protect human dignity against

³⁹ Indeed, as Nickel's inclusion, along with Pogge above, in this debate shows, the idea of human rights as inherently political in nature is put forward not only by those who might be thought of sceptical of human rights or the claims of human rights to special protection but also by those who champion more expansive notions of justice.

⁴⁰ Raz (n 33) assumes the moral importance of state sovereignty as requiring special justification for any intervention, this is not a view the author follows, however, it is accepted that even without assigning special moral importance to sovereignty, as sovereignty is politically (and indeed legally) recognised, it requires justification to go against the norm of non-intervention which, it is argued, can be provided by human rights violations just as Raz states.

⁴¹ Griffin 'Human Rights and Autonomy of International Law' in Tasioulas and Besson *The Philosophy of International law* (Oxford University Press 2010) 346.

abuse by those with power.⁴² Human rights are simply not used, nor have they ever been, only to justify intervention, if so the International Criminal Court would not exist, nor would the United Nations High Commissioner for Human Rights or the UN High Commissioner for Refugees (whose role is to seek protection of the human rights of refugees and internally displaced persons). Alternatively, Griffin suggests:

the function of human rights in international law is (1) to make international relations go further than they otherwise would, and (2) to promote human rights....their purpose is to regulate the behaviour of those in power.⁴³

This suggests refugee law has a soft law function as well as real world application.

Human rights, according to Beitz, should be treated as *sui generis* norms designed to protect individual's most basic interests from standard threats. This is an overtly political conception where the standard threat is posed by the government, either through direct actions or inaction that allows non-state agents to violate human rights. Rawls' human rights stem from, and form a part of, his theory of political justice between *peoples*, focusing on justifications for external interference in domestic politics, and as such the list produced is more limited than many conceptions of human rights, excluding, for example, freedoms of expression and associations.⁴⁴ Yet, as Griffin notes, Rawls' theory contains no internal justification for truncating the list of human rights so severely. The explanation, often given, that these are rights which states might

⁴² This is a point made also by Griffin in response to Raz' political conception of human rights, see *ibid* 347.

⁴³ *ibid* 353.

⁴⁴ Rawls (n 11).

feel justify intervention cannot explain why these rights are 'urgent rights'⁴⁵ by relying solely on the likelihood of political agreement, this not only removes a traditional function of human rights in holding governments to account (internationally if not domestically), but also fails to provide content for the concept of human rights against which a right can be analysed to determine if it is indeed a human right.

For Raz, as well, the link between sovereignty and human rights is strong, although he does not see such an exact overlap between legitimate authority and respect for human rights as Rawls, he does develop a link between state sovereignty and human rights⁴⁶, relevant in particular for explaining the international function of human rights.⁴⁷ Raz defines human rights as "rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena."⁴⁸ In order to be human right, a right must contain three features, it must be a) an individually held moral right, b) capable of imposing a duty on states to respect and promote this right⁴⁹ and c) failure to respect and promote this right must remove the usual immunity from intervention enjoyed by sovereign states.

⁴⁵ *ibid.*

⁴⁶ Raz quite rightly argues that the limits to legitimate authority can be set by factors other than human rights. If we take the example of a constitutional democracy, we can see that limits to legitimate authority are set by the constitution (such as the structure of government, which is not connected necessarily to human rights but to a concept of politics) and the voters (in principle at the very least).

⁴⁷ Raz (n 23 in chapter 3) 23-109.

⁴⁸ Raz (n 33) 328.

⁴⁹ Although Raz does concede that b) may leap frogged in cases where multinationals or supra-state organisations can be said to have primary responsibility to fulfilling this duty *ibid* 327.

4.2.1 Relativity

Before proceeding to examine the impact of the link between political legitimacy and human rights, we pause to address a key concern in emphasising such a link, namely that this produces an historically relative concept of human rights. A political conception of human rights might be seen as (too) intimately connected with prevailing international conditions and as such the types of rights we consider human rights, rights capable of imposing duties on states and as justifying *pro tanto* intervention might be seen as too dependent on global conditions. This might run the risk of removing the ahistoricity of human rights and transforming these rights from the universal foundations set out in chapter three into historically and politically relative rights. Yet as Tasioulas remarks, whilst an increase in instability might lower the standard of human rights norms, “the emergence of more stable geo-political environment...might justify significant reduced levels of state immunity and a corresponding increase in the number and demandingness of human rights norms.”⁵⁰

Whilst it is important, particularly for refugee law, that human rights norms shift in line with social conditions, it is also important that the conception of human rights norms contain some core elements to measure newly emerging rights against. As such, a two level definition of human rights might be offered, with core elements contained in the notion of personhood but an ‘in-practice’ notion of human rights more closely tied to geo-political conditions as an additional layer. Just as Tasioulas suggests, in discussion of Raz’s

⁵⁰ Tasioulas ‘Are Human Rights Essentially Triggers for International Intervention?’ 4 (2009) *Philosophy Compass* 938 944.

human rights theory, that 'in-principle' judgments regarding intervention justified on human rights grounds must "be keyed to certain geo-political conditions"⁵¹, in-principle decision as to the awarding of refugee status for victims of certain types of human rights violations must respond to changing conditions but whilst bearing in the mind the core notion of personhood.

But how does one judge whether a state has violated an individual's human rights when there are such varied circumstances across the globe? It is often argued that if one adopts the same standard for human rights around the world, the result is a rush to the lowest common denominator.⁵² One can concede some link between historical circumstances and the content of human rights whilst maintaining that the *idea* of human rights as individual moral rights connected to human capacity for autonomy is an immutable part of our understanding of human rights.

In Griffin's view this suggests human rights as having two features: personhood and, what he terms, practicalities (whether right in question is or ought to be relevant in current geo-political conditions with reference to historical role of human rights.)⁵³ The shifting geo-political conditions might, optimistically, result in a reduced recourse to the notion of human rights, if rights were generally secured but it might also throw up new rights (in response to new violations or wrongs) which need to be assessed as human rights or not and provided with some content. Gewirth's generic features of

⁵¹ *ibid* 946.

⁵² In particular this is a criticism levelled at Rawls' truncated list of human rights, which in an effort to be applicable in all societies fails to mention some rights which might be considered foundational, such as the right to freedom of expression and freedom of association.

⁵³ Griffin (n 40) 346.

agency do not produce a static list of goods one requires to achieve one's purpose, instead the generic features are used as a standard to measure goods against to see if a particular good is necessary in a particular society, at a particular time for an agent to achieve her purpose. Personhood can serve the same role as the generic features of agency here and provide a test against which, for refugee law, state behaviour can be measured. As Capps explains, this means an agent can rightfully claim "Z is a non-subtractive good relative at the time (Y) to the place (X) in which I live."⁵⁴ In practical terms, this might mean, when assessing a human right, that different levels of protection for, or fulfilment of the right are required, an agent in one society might be able to claim successfully that her human right to education has been violated through a denial of access to university education (although it most likely will also be a violation of right to be free from discrimination), whereas in another society the same right would be violated only if the individual had been denied access to basic education. The key is that a right to *some* education is established as human right and the variation in standards does not mean that it is not a necessary good for forming and realising one's own life plan nor that denial of the right is not a failure to fully recognise and respect an individual's personhood.

Human rights are both intimately connected with prevailing historical conditions and contain non-contingent factors. These are required to separate out human rights from other rights to provide adequate philosophical coherence and a usable concept that could be transferred into the legal sphere. This, it is argued, can be adequately provided by the notion of personhood.

⁵⁴ Capps (n 83 chapter three) 112.

The notion of personhood might be summed up as: a) stemming from the value of individual autonomy and liberty as necessary conditions for human agency and b) a status held by all humans by virtue of being human, which demands recognition by others. This can provide determinate content to act as guide to interpretation for those working with human rights laws. For refugee law it provides content against which to measure claims to 'new' human rights, the violation of which *prima facie* would satisfy the persecution criterion. International refugee law is concerned with violations of individual autonomy and liberty that amount to a denial of, or failure recognise, personhood. The exact content of human rights might vary in response to shifting geo-political norms, or prevailing conditions of international legitimacy but the core notion of human rights remains and it is against this backdrop that the persecution criterion is to be interpreted.

4.2.2 Political Wrongs and Refugee Law

The political concept of human rights maps on to the claim in refugee law that international protection is extended to those victims of illegitimate violence. In this conception of international human rights law, refugee law must take its place in the general schema, the function of refugee status is to offer protection to those victims of power and by doing so to recognise and respect personhood where it is most threatened. Shifting interpretation of persecution can be seen as a reflection of changing concepts of state legitimacy (even if not always expressed as such) rather than a new paradigm for refugeehood. In order to be persuasive, Price, Martin and those advocating a political model of asylum must be able to link the concept of persecution as a political wrong to a doctrine of rights that explains why the relevant state obligations (in determining state legitimacy) are confined to civil and political rights and

cannot be extended to social and economic rights. To be a coherent explanation for limiting refugeehood the claim must be, when excluding certain experiences from refugeehood, that these experiences are *not* experiences of a political wrong and therefore do not constitute persecution.

Carlier, citing gender persecution as an example, observes, “just as standards concerning the content and level of protection of human rights have evolved, equally the causes of exile included in the concept of persecution within the meaning of the Convention can change and still be included within this definition.”⁵⁵ It is not the theoretical foundations of the concept of asylum or refugeehood that have changed but the view of what constitutes a legitimate state- of what amounts to persecution and when national protection can be said to be lacking- that has evolved. Hathaway argues that the plurality of systems “restricts any attempt to define in absolute terms the nature of the duty of protection which a state owes to its people”⁵⁶ but the notion of persecution could be seen to represent the minimum threshold- the point after which the duty could no longer be said to be fulfilled without becoming a completely empty duty. This would be the point where, in Dworkian terms, we start ‘taking rights seriously.’⁵⁷

Sen, who also argues that the link between human rights violation and politics is strong, sees this link as expanding rather than retracting the notion of human rights. Sen notes that it could equally be said of those who starve that

⁵⁵ Carlier ‘The Geneva Refugee Definition and the Theory of Three Scales’ in Nicholson and Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 48-9.

⁵⁶ Hathaway (n 48 in chapter 1) 113.

⁵⁷ *Taking Rights Seriously* (Harvard University Press 1977).

they have “insufficient entitlement to food” (a political issue) rather than simply that there is insufficient food available.⁵⁸ Those facing starvation could, on this reading, be encompassed by refugeehood and article 1(2). Conceptually the key feature of refugeehood could be as easily identified as vulnerability due to lack of state protection⁵⁹, only one expression of which is violation of civil and political rights. As Suhrke notes, it does not matter then if the threat is economic or physical violence the existence of circumstances demonstrating that “immediate protective measures are necessary” is sufficient.⁶⁰ The claim being made, then, is that a political notion of human rights does not inevitably or necessarily lead to a restrictive notion of persecution. This can be seen when examining the notion of political violence in refugee law through the lens of collective violence.

4.3 Collective Violence: The Shrinking Concept of the Domestic and the Evolving Concept of Political Violence

An overlooked fact is that international refugee law involves the application of the concept of violence, both in relation to human rights violations needed to ground the application and in the sense of mapped out in chapter one, of illegitimate violence by the state, which is needed to deny the home state’s jurisdiction over the applicant. Refugee law needs to be clear on what concept of violence undergirds the persecution criterion, recalling that persecution can

⁵⁸ Sen, *Poverty and Famines: an Essay on Entitlement and Deprivation* (Oxford University Press 1981. See also Turnton (n 3 in chapter 1) 3.

⁵⁹ Vulnerability in terms of human security has been explored in some detail by Suhrke ‘Human Security’ (1999) 30 *Security Dialogue* 3.

⁶⁰ *ibid* 271.

be seen also as demonstrative of a lack of national protection.⁶¹ The concept of violence, like that of refugee, can be interpreted narrowly or broadly to refer to a range of acts but to select the relevant definition for the context, it is argued, the definition must be relative to particular interests. It is not simply a matter of determining whether a violent act took place but to ask if it is *relevant* violence. In the case of international refugee law, the interests are (in principle) to provide surrogate protection for the refugee, who is a victim of persecution and cannot rely on the home state for protection.⁶² The concept of violence employed in international refugee law must reflect this interest in protecting those who have suffered or fear human rights violations in line with the function of refugee law.

The concept of violence in international refugee law is in the first instance connected to human rights violations. The breadth of the concept of violence employed will determine the breadth, or otherwise, of the notion of persecution and, correspondingly, that of article 1(2) by reducing or expanding the types of human rights violations included under the term 'persecution' and article 1(2). At present the concept violence employed in refugee law lags behind evolving human rights norms, which suggest that the concept of violence ought to be able to encompass newly recognised forms of harm alongside the traditional forms of violent harm, such as murder or torture. It will be argued here that the concept of violence underpinning international refugee law is that of collective violence and that this operates at

⁶¹ As argued in chapter one and proposed by Hathaway (n 48 in chapter 1).

⁶² This is a wildly held judicial view- see the UK case of *Horvath* (n 11 in chapter 1) the Canadian case of *Ward* [1993] 2 S.C.R. 689, 733 or the Australian case of *Wang v. Minister for Immigration and Multicultural Affairs* [2000] FCA 1599. As discussed above in section one, to provide surrogate protection could be described as the overriding function of refugee law.

once to underline the expansive character of refugeehood and as a limiting factor on the scope of article 1(2). First we must consider what is meant by the concept of violence.

4.3.1 What of violence?

Violence is a word with a broad spectrum of meanings, many context specific, others highly generalised. The different shades of meaning, and differing possible applications, allow 'violence' to be used in contradictory ways, often simultaneously. Despite the potential vagueness of the concept, refugee law cannot avoid using 'violence' as it is behind the notion of persecution, and the condition of refugeehood in general. As refugee law unavoidably involves the application of the concept of violence it needs to be clear about which meaning of violence is being applied, yet this issue has rarely been explored in relation to refugee law.

In its most basic sense 'violence' is often used to connote anything forceful. This incredibly broad concept of violence includes metaphorical uses, such as a 'violent storm'. It is possible, therefore, to define violence amorally but "to call something 'violent' is often to give at least a *prima facie* reason why it is morally wrong".⁶³ In particular, the pejorative connotations of the term are connected with the notion of 'harm', that violence can often cause harm and almost always results in, at the least, fear, is what gives it this negative shade. This is related to violence as a form of intentional (in the broadest sense to include recklessness) human action which, as Bäck states, include a "moral component associated with choosing to engage in actions that harm another

⁶³ Bäck 'Thinking Clearly about Violence' 117 *Philosophical Studies* 219 224.

person and attempting to force that person to act as you want.”⁶⁴ Bäck offers a definition of a violent act, when violence is used in the pejorative sense, requiring 1) the attempted action is aggressive, 2) the agent is morally responsible for that attempt to cause harm (defined as pain or injury), 3) the agent ought not to will to inflict that harm, 4) the patient should not want to suffer that harm (i.e. the action unjustly violates the rights of the victim).⁶⁵

This definition of violence is relevant to ‘refugeehood.’ In general international refugee law concerns itself with moral agents; the refugee (here the ‘patient’ who did not want to suffer that harm and whose rights have been unjustly violated by the violent act), and the perpetrator of the human rights violation grounding the application (who committed the aggressive act, causing harm she ought not to willed to cause and is, thus morally responsible). In refugee law, the moral judgment element of violence is, in a sense, left aside, that is to say whilst negative moral judgment clearly attaches to the perpetrator of the violence against the refugee she is not the concern of refugee law.⁶⁶ It is perhaps for this reason that the importance of the concept of violence in refugee law is often overlooked; it is considered merely a factual enquiry ‘did the applicant suffer a human rights violation?’ This is not a closed question to which the answer is merely ‘yes’ or ‘no.’ The ‘yes’ must be accompanied by a statement of what treatment (or part of the treatment)

⁶⁴ *ibid.*

⁶⁵ *ibid* 225.

⁶⁶ There is a widespread mistaken belief that the Convention requires further discussion of the perpetrator in regards to motive for the treatment, see below. The perpetrator may, however, be marginally relevant to the extent that if a justification for the violence exists it may operate to determine whether the violence is legitimate or illegitimate certain cases. The distinction between persecution and prosecution rests on this difference. It will not be relevant in cases where the right is absolute e.g. torture, see chapter six p10-11.

suffered by applicant is recognised as a human rights violation amounting to persecution and the ‘no’ is a statement that the applicant did not suffer a human rights violation or did not suffer a violation of the type covered by article 1(2). For example, in the UK case of *Sepet*⁶⁷, the applications failed as ‘conscientious objection’ was not considered to be a core human right by the majority of the court and there was, then, no violation to form the basis of a successful refugee status claim under article 1(2).

The concept of violence employed in refugee status determination cases goes beyond attaching a moral judgment to the perpetrator’s act and is still relevant even though the perpetrator is not the concern of the case. The concept of violence is part of what is required to form a clear picture of whether the treatment the applicant suffered is, or is not, persecution, as well as being related to the determination of lack or presence of national protection. The persecution criterion is another way of asking ‘did the applicant suffer relevant violence?’ The notion of violence, if left unexamined or unquestioned, can cause severe problems for certain types of applicants whose harm may be linked to newly emerging human rights norms, not yet recognised as violence relevant to article 1(2). As Garver argues, “what is fundamental about violence is that a person is violated...violence in human affairs amounts to violating persons.”⁶⁸ It is important that this central function of violence in refugee law, in drawing attention to the person whose has suffered or fears violence, is not overlooked. Refugee law, however abstractly worded, is about individual cases and specific contexts, violence is

⁶⁷ *Yasin Sepet, Erdem Bulbul v Secretary of State for the Home Department* [2003] UKHL 15. This case is discussed in more detail chapter 6 p20.

⁶⁸ ‘What Violence is’ in Rose (ed) *Violence in America*, (New York 1969) 6-7.

there as a 'mediator concept', that is one against which other concepts can be understood and the facts of the individual case can be measured.⁶⁹

As yet nothing has been said about the content of the concept of violence in international refugee law, only that it contains some moral element, in that it is related to moral agents, and, more importantly for refugee status determination cases, it is closely linked to the concept of 'harm' as expressing a human rights violation. What of the concept of violence more specifically? A narrow concept of violence might include only direct personal violence i.e. an act of aggression by one individual directed against another individual in the immediate vicinity. This concept cannot be employed in refugee law as it says nothing about the response to the act or the identity of the victim, which are both requirements of the persecution criterion (for example, for conditional rights such as imprisonment the response must be disproportionate to transform prosecution to persecution) and the identity of the victim must not be arbitrary in the sense that it was *entirely* irrelevant who the victim was. This kind of micro violence is not the subject of refugee law but more properly concerns domestic actors.⁷⁰

It would be more accurate to say that refugee law employs a notion of collective political violence. This is not to say that every act of collective

⁶⁹ This phrase has been borrowed from Patrick Capps (n 83 chapter three). The mediator concept contains all of the features necessary, other related concepts can then be mediated through this central concept. For violence in refugee law, it is argued, collective violence is the mediator concept. The case for this is set out below.

⁷⁰ That is not to say that a refugee claim could not be grounded on one level could be described as an instance of direct personal violence but additional elements would be required for a successful application under article 1A(2) such as a failure to respond appropriately to individual violence by a public authority but this, it is argued later, might be said to transform the act of direct personal violence into a quite different sort of violence discussed below- what is referred to as collective violence.

violence would give rise to a good case for refugee status but rather that it would not be possible to have a good case for refugee status without an act of collective violence, as it is collective violence, it is argued below, that grounds the notion of human rights violations as persecution under article 1(2).

4.3.2 Collective Violence

Collective violence is often conflated with wartime or conflict violence⁷¹ but although collective violence is frequently an indicator of a conflict it is conceptually distinct and does not necessarily require mass or widespread violence.⁷² It is not about scale but concerns “infringement of norms and the evaluation of these.”⁷³ Collective violence, defined by Imbusch, refers to violence, which “cannot be seen as an isolated act”⁷⁴ but rather is based on political, religious or social discord.⁷⁵ This does not mean that a violent act carried out by an individual acting alone cannot constitute persecution, as noted above collective violence is *not* mass violence, but the question to ask

⁷¹ For example, Reiss and Roth include only war, state violence, riots and activities connected to organised crime in collective violence (n 16). This, it is argued, would be better described as mass violence or ‘violence by a collective’ rather than collective violence.

⁷² Although the debate about the distinction and importance of individual and collective rights is important; in terms of refugee rights it is not being considered in this thesis. The debate is of course relevant in terms of the rights of the people of the host country, these may be an assertion of collective rights, but refugees are not asserting collective rights. Refugee status is always based on individual evaluation even in cases where the claim is that one is a member of a group, ethnic, religious or otherwise, that is being targeted. There may, therefore, be overlap between an individual claim for refugee status, on the grounds of being a member of a persecuted minority, and the collective assertion of the rights of that same persecuted minority. Refugee law is however only concerned with the former claim, the latter merely providing context. Further refugee status would be unlikely to be an appropriate mechanism of human rights protection for those asserting collective rights. If one is using collective rights to refer to the rights of peoples a key element of the claim will be to assert the rights *in* a specific territory or country to which the people have ties.

⁷³ Imbusch ‘The Concept of Violence’ in Heitmayer and Hagan (eds) *International Handbook on Violence Research* (vol 2 Springer 2003) 22.

⁷⁴ *ibid* 27.

⁷⁵ These areas of discord map exactly on to the Convention grounds for persecution under article 1A(2).

when evaluating if the act represents collective violence (and persecution) is whether the violent act represents conformist behaviour. Direct individual violence differs conceptually from collective violence as “unlike deviant individual perpetrators who have a lower attachment to norms”⁷⁶, collective perpetrators act *in conformance* with (perceived) political, social or religious norms (in the country of origin or residence) rather than in rejection or misunderstanding of these norms.

Imbusch constructs the perpetrator of individual violence as such; she does not welcome public attention (as revulsion, outrage and official sanction are likely to follow) and any justification of the violent act is *subsequent* only.⁷⁷ Collective violence, on the other hand, is identifiable by a “predominance of superindividual motives for causing injury and harm to designated groups: people are ascribed particular characteristics or are identified as belonging to a group and then made victims.”⁷⁸ Here public attention is not necessarily avoided, although it may not be sought. It may be semi-public e.g. state condoned but ‘hidden’ from the general public but collective violence is “public or semi-public because...the injury and killing is itself dependent on particular conditions and circumstances” in society.⁷⁹ The public/private

⁷⁶ n 71 27.

⁷⁷ With the limited exception of self-defence but this need not concern us here see *ibid*. The subsequent justification is an attempt to explain how the act was, in fact, in accordance with societal norms- for example, the thief who argues that he was forced to steal due to bankruptcy still accepts that stealing is wrong so if asked before the theft he would not have admitted it was his intention to carry out a theft at all. He is merely now offering a justification for his action now he has been apprehended. Whether or not the justification is accepted, rejected or relabelled as an excuse, is then based on societal norms.

⁷⁸ n 71 30. Here motive is not used to refer to the actual motive of the perpetrator, as will be discussed below, instead it is referring to the general or root cause, motive is used in the general rather than in the specific sense of intent.

⁷⁹ *ibid* 27. For example, ‘disappearances’, torture of political prisoners or, indeed, domestic violence, where it cannot be said that the violence is hidden because of fear

distinction here melts away. The motive is also superindividual such that justification of the violence is inherent in the act. This is expressed in the notion that where the violence is collective violence, societal norms and standards have impacted on the perpetrators sense of justice such that the perpetrator believes themselves to be acting legitimately where objectively she may be said to be acting illegitimately. Collective violence is exercised more functionally than individual violence and “in most cases has a strong political component.”⁸⁰ Refugees are victims of this type of violence; victims made from the assignment of political, ethnic, religious or social characteristics, which are, in and of themselves, used by the perpetrator, and the society in which the perpetrator acts, to justify the violent act. Acts of persecution can be seen as individual manifestations of collective violence.

The notion of collective violence maps exactly onto the concept of violence underpinning the persecution criterion in article 1(2) where violence is relevant as an indicator of broken bond between state and citizen and not just as a human rights violation in and of itself. Collective violence is, by definition, not being dealt with sufficiently by the (home) state as it either directly sanction, condoned or appeased by the state (or at least a sufficient enough section of society to render any state opposition ineffective). The reason the refugee requires surrogate protection via the Refugee Convention is because the human rights violation is a product of collective violence and, as such, cannot be dealt with in country. The classification as collective

of sanction and/or public revulsion might all be described as collective violence. This type of violence is not ‘behind the scenes’ even if it takes place behind closed doors.
⁸⁰ n 71 27.

violence, then, can transform an act from a human rights violation, which after all may take place in host countries as well, to article 1(2) persecution.

4.3.3 Beyond Political Violence

The need to maintain a distinction between migrant and refugee, as noted in chapter one, has been used to exclude those whose claims do not seem at first glance to be political from refugee status by asserting that these violations do not constitute political wrongs. As such, those claiming socio-economic rights have traditionally been excluded from refugee status. An attempt to define 'political' as excluding any socio-economic notions is not only conceptually unnecessary but also is contradicted by closer examination of the notion of political legitimacy. A similar statement can be made about the notion of collective violence, which it is argued, engages with the concept of 'the political.' Thus fears that acknowledging the notion of 'collective violence' in refugee law would result in a collapse of the distinction between 'refugee' and 'migrant' are based on a misunderstanding of the distinction between collective and structural violence.

Part of the reason for this fear of acknowledging the centrality of concept of violence to refugee law is a fear of creating an 'over-inclusive' definition.⁸¹

Refugee law does require some distinction between 'refugee' and 'victim of human rights abuses' or 'victim of social inequality.' Structural violence, as defined by Galtung⁸², refers to social inequality and might well include those who are hungry or living in severe poverty alongside those who are subjected to direct violence. Social inequality might rightly be described as secondary

⁸¹ It is this fear, for example, that motivates Price (n 14) to press for 'political asylum' with a narrowly defined concept of the political.

⁸² Galtung 'Violence, Peace, and Peace Research' 6 Journal of Peace Research 168.

violence, and it is not outside of every definition of violence by any means, but it is not the applicable concept of violence in refugee law.⁸³ That is not to say that all of these victims are not of international concern but merely that international refugee law is concerned with those whose lack national protection (or put otherwise for whom surrogate protection is necessary.)

However, those in need of surrogate protection are *not* limited to political activists or arbitrary victims of intolerance and it may well be that collective violence is built upon the foundations of long-standing structural violence. It is argued here that surrogate protection is need for victims of collective violence as by definition the violence is in conformity with societal norms, thus the victim cannot be expected to return to the country of origin whilst such conditions persist. This is not to say, either, that all victims of poverty, hunger or even natural disasters would be excluded from refugee status. Poverty or hunger deliberately inflicted or exacerbated, or relief after a natural disaster withheld or delayed, due to political, social, religious or racial discrimination would be within article 1(2). Poverty, hunger or devastation after a natural disaster would not be included, however, where the government seeks to remedy the situation (however unsuccessfully), this requires humanitarian aid undoubtedly but it is not the remit of international refugee law.

⁸³ In a similar manner, phenomenon as diverse as mislabelling refugees as migrants and the pay divide between men and women can be seen as acts of violence. This is, however, another use of the term violent and is as useful to refugee law as the notion of a 'violent storm.' It is simply not the topic under discussion but attempts to make it so do not increase the scope of article 1A(2) but instead tend to have the opposite effect of causing a narrowing of the scope in order to 'protect' potential host states. The argument here is that article 1A(2) is already much broader than acknowledged, it is merely a matter of interpreting it in line with international human rights norms and applying the concept of collective violence.

As elucidated above, outlaw states are those states that “flout the requirements for international legitimacy by violating basic human rights.”⁸⁴ Political violence, however, provides a broader and less government focused concept than that of outlaw states. Collective violence could include practices that are not officially sanctioned (indeed they might be legally prohibited) but are widely practiced in a state. It could also include acts taking place in ‘burdened societies’, those societies according to Rawls that ‘aspire to meet their citizens’ basic needs but historical, social, and economic circumstances’ prevent realisation of this goal.⁸⁵ If the historical, social and/or economic circumstances expressly permit or foster acts, which contravene international human rights norms, such acts might rightly be considered collective violence.

The impact of the proposition is considerable. It suggests that the concept of ‘political wrong’ (in the sense of being a violation of human rights in breach of the state’s duty to protect) can evolve so as to include violence such as human trafficking, rape and female genital mutilation, for example, alongside more paradigmatic forms of persecution. The claim is that if interpreted in this light article 1(2) provides a dynamic definition, capable of evolving to reflect evolving notions of political legitimacy to include new experiences of refugeehood. It suggests that even if persecution is considered to be an inescapable feature of refugeehood it need not necessarily narrow the parameters of the term ‘refugee’. Further discussion would then be necessary before accepting a restrictive interpretation of article 1(2) and a narrow concept of refugeehood as the interpretational explanations offered do not

⁸⁴ Cited in Price (n 14) 73.

⁸⁵ Rawls (n 11) 103.

demonstrate an inherent limitation on the concept. Although it is not possible to address all of the relevant issues here, illumination of the areas in need of discussion is necessary not only explain the conceptual confusion in refugee law but also if any attempt is to be made to resolve it. As noted above, the political model of asylum used by many to advocate, and indeed justify, a limited notion of refugeehood and a restrictive concept of persecution does not *inherently* demand such restrictions; refugeehood is not 'conceptually limited' and the political model of asylum could equally be used to justify an expansive concept of refugeehood and a multi-faceted definition of persecution. The key to explaining and justifying restrictive, or expansive, concepts of refugeehood and persecution lies in the model of human rights used to give content to these concepts.

Political violence provides a broader and less government focused concept than that of outlaw states. As the New Zealand court noted political opinion is context based thus when considering female refugees it:

must be oriented to reflect the reality of women's experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin. In the particular context, a woman's actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality. Such a situation is properly characterised as "political"... [as it] was seen by the respective families as a direct challenge to her role and duties and to their

authority to control her behaviour for the benefit of their collective communal identity and status.⁸⁶

This case served to demonstrate that collective identities, particularly social roles such as 'wife' or 'husband', in this context are capable of underpinning collective violence such that it may amount to persecution on the Convention ground of political opinion. The reasoning by the New Zealand case expresses this notion persuasively as will be expanded in chapter six.

Collective violence contains political elements, in that it implies either direct infliction of violence by the state or imputed involvement by the state in supporting, or at least not actively discouraging, the social, political, religious or cultural norms which allow the violence to take place in that particular society at that particular point in time. The role of international human rights law is to define international norms of behaviour to allow evaluation of the way states treat their citizens (or allow their citizens to treat each other). It was argued that the norms devolved and emerging in international human rights law are directly linked to the determination of whether harm amounts to persecution in international refugee law. It follows then that shifting human rights norms impact on, or ought to be reflected in, international refugee law. It could be argued, then, that what is required to satisfy article 1(2) is a identification of a) a human rights violation and b) collective violence. Collective violence could include practices that are not officially sanctioned (indeed they might be legally prohibited) but are widely practiced in a state. It could also include acts taking place in 'burdened societies.'⁸⁷ If the historical,

⁸⁶ *Refugee Appeal No. 76044* (11 September 2008).

⁸⁷ Rawls (n 11) 106.

social and/or economic circumstances expressly permit or foster acts, which contravene international human rights norms, such acts might rightly be considered collective violence.

A functional fusion between persecution and the requirement that the claimant be unable or unwilling to access state protection has been suggested in chapter one and is expanded here. The fusion is functional in the sense that in many cases, particularly where the Convention ground is political opinion or membership of a particular social group, in fulfilling the persecution criterion (and the Convention ground) via the concept of collective violence the state protection element has necessarily been fulfilled. The concept of collective violence is of use in cases where the claim is not what might called a traditional or paradigmatic refugee claim. The reason for considering non-paradigmatic claims is that these claims are the claims that most often result in judicial scrutiny. Where paradigmatic claims go to appeal it is often on the grounds of factual dispute not legal scope. For example, it might be disputed that the person is not a prominent political activist as claimed or is not in actuality an adherent of a particular religion. Any appeal would not be concerned with the scope of refugee law or what type of claim is included within Article 1(2).

On the other hand when seeking to establish that domestic violence could constitute persecution the concern was over the scope of refugee law. In particular the issue often raised was whether domestic violence as so-called private violence could come within the scope of persecution and refugee law. Here collective violence offers a concept for determining when domestic

violence could constitute persecution and when it might rightly be described as another form of human rights violation, as will be explored in detail in chapter six. Collective violence does not require a state actor but rather societal acquiescence.

This is distinction from a requirement of state persecution. The suggestion here is that collective violence is used as a transformative concept capable of moving a human rights violation to persecution. The concept of collective violence does not require state action. It encompasses persecution by non-state actors as collective violence requires only that the violence be in conformance with societal norms. This need not be the norms adhered to or favoured by the government. This would conceptually explain how claims by those targeted by gang member in Jamaica⁸⁸ or subject to domestic violence in Trinidad were successful refugee status claims. In both cases the initial rejection of the claimants' refugee status application was based on the fact that in both cases the government could not be said to support or allow the violence in question and laws existed to punish the perpetrators of such violence. It was reasoned by the Secretary of State that the existence of laws, which were enforced, was sufficient to render the violence general violence rather than persecution.

Collective violence explains how this is incorrect. The government may fully intend to enforce the law in question or to prevent the violence in question but

⁸⁸ *Althea Sonia Britton v. Secretary of State for the Home Department* [2003] EWCA Civ 227. The Court said: "The fact that the law enforcement and security forces in Jamaica are overzealous does not mean that they exert effective control. Nor does the fact that they use armed response when apprehending criminal suspects. The CIPU report which we have seen does refer to gang violence in Jamaica, particularly in Kingston and the police's ability to control it."

if this protection is ineffectual it may still be persecution. The persecutory, and political element, of the violence in both the above examples lies in the general societal attitude to the violence not the governmental attitude. In both cases the societal attitude was shown to be generally dismissive of or unwilling to engage with such violence. In the case of gang violence in Jamaica, it is argued, the violence was so prevalent in certain sections of society that it was either condoned or accepted as regrettably commonplace and as such not something that could be combated or opposed. This, I would argue, is collective violence.

UNHCR, Guidelines on International Protection states that the “causal link” or “nexus” is satisfied in the case of non-state actors (1) whether or not the failure of the State to protect the claimant is Convention related or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.⁸⁹ This reminds us that a Convention ground is required, of course, but it need not motivate the lack of state protection. The state may fully intend to protect the victim against persecution on a Convention ground but if it is unable to do so this is sufficient.

What makes collective violence relevant for refugee law is where the norms the perpetrator of the collective violence is adhering to contravene international human rights standards, that is they are not conforming to an

⁸⁹ No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees 1 May 2002 [23].

international norm but to a local or regional standard which cannot be supported internationally. Thus, the one off denial of access to health care for a woman in a society, which provides health care to women on a regular basis represents a clear human rights violation but not an instance of collective violence. The same denial in a society, which explicitly or implicitly attempts to deny women access to health care is both a human rights violation *and* an instance of collective violence. The latter scenario would give rise to a good case for refugee status, whilst the former would not.

Collective violence might also be of use in cases of cumulative persecution, in explaining why these cumulative acts may become persecution (as opposed to harassment). Clearly states would be resistant to a view of persecution which encompasses forms of harassment. The functional fusion of persecution and state protection is also of use here as it reminds that cumulative acts become persecution and not harassment if the state is involved either directly or indirectly. Collective violence similarly stipulates that where the cumulative acts are as a result of societal attitudes, which the government cannot or will not combat this too can give rise to refugee status. When considering cumulative persecution the question of motive for the actions will most likely be raised, namely is there a nefarious motive for these individual acts which tie them together so as to constitute harassment or discrimination. When considering this in the context of refugee law the notion of collective violence again becomes relevant. Collective violence sets out how to consider motive in the context of refugee law.⁹⁰

⁹⁰ For further discussion of this see pages 240-1 and 314.

The argument here is four-fold, it is claimed 1) labelling as collective violence renders the act a relevant human rights violation under article 1(2), 2) collective violence *always* denotes persecution for a Convention reason and 3), persecution is demonstrative of a lack of national protection, therefore, no further enquiry into national protection is required, and 4) it is posited that article 1(2) can support such a reading.

4.4 Political Opinion

The case law on 'political opinion' remains fragmented, whilst it is clear it does include acts beyond partisan politics, it is unclear when and where the 'political opinion' ground can apply. There has been a steady broadening of the category of 'political opinion' (and therefore in the type of acts which constitute expression of a political opinion) since the late 1980s. This can be said to reflect the development of, and the increased level of attention paid to, international human rights norms. As a few examples, in *Sagaydak v. Gonzales*⁹¹, exposing corruption was accepted as a political act and retaliation for this was, therefore, persecution on a Convention ground. In *Chang v. INS*⁹², the refusal to report persons who violate China's security rules was deemed a political act. In *Osorio v. INS*⁹³, labour activities, such as membership in a trade union, were accepted as expressing a political opinion and the *Fatin* case⁹⁴ saw feminism accepted as a political opinion *per se*.

⁹¹ 405 F.3d 1035, 1041-45 (9th Cir. 2005)

⁹² 119 F.3d 1055, 1062 n.4 (3d Cir. 1997)

⁹³ 18 F.3d 1017, 1031 (2d Cir. 1994)

⁹⁴ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)

Yet the *Fatin* case also reveals the limits of the political opinion ground, although feminism was accepted as a political opinion (that is political opinion was broadened beyond partisan politics), it was not discussed in detail what might constitute a manifestation of feminist views, in particular the issue of whether refusal to wear religious dress was sufficient, was left undetermined. Similarly, in the *Sepet* case, the majority in both the Court of Appeal and House of Lords rejected the view that refusal to complete compulsory military service could constitute a political opinion (explicit or implicit).⁹⁵ It could be argued that, evolving human rights norms have created a greater range of topics on which a citizen can legitimately disagree with the state, as acknowledged by courts in cases such as *Sagaydak*, mentioned above. With this broader base for legitimate disagreement with the state, there ought to be corresponding acknowledgment that this disagreement can be voiced or exhibited in many ways. However political disagreement is manifested, underlying it is the assertion by the citizen of the limit of state power and, often, the assertion of a human right. In the case of refugees, the denial by the state of these human rights is what gives rise to a good case for refugee status. Although the concept of human rights has evolved to encompass more than 'basic human rights' amongst 'core entitlements', this is not always reflected in refugee law and there continues to be resistance to recognising assertion of these rights as *expression* of political opinion.

⁹⁵ n 66. Although Laws LJ was eager that partial conscientious objectors were to be considered on the same footing as absolute objectors, so argued that the Convention must be read sufficiently broadly to equate secular and religious pacifism, in order to avoid an arbitrary distinction between the two and in order to achieve this 'a political quality' was to be attributed to secular pacifism. However, to Laws LJ, this did not render refusal to complete military service a political act sufficient to conclude that the perpetrator imputed a political opinion on to the draft evader n 66 [160].

The traditional interpretation of the 'political opinion' ground for persecution under article 1(2) is to restrict it to explicitly expressed political opinions, e.g. membership in a political party, political activism which has gained the attention of the state, and to falsely ascribed political opinions, or imputed political opinion, that is where the individual did not hold a particular political opinion but was believed by the perpetrator to hold a political view. This was often confused with implied political opinion. Imputed political opinion says nothing as to the victim, other than that they were unfortunate enough to be mistaken for someone with beliefs they do not actually hold. This suggests that had the perpetrator of the persecutory treatment realised her mistake she would have ceased.

Implied political opinion is quite different, it covers situations where the victim's act, behaviour or lifestyle are (perceived to be) demonstrative of a political opinion. Here political opinion does not refer to conservatism, liberalism or communism, for example, it is not about pro-Government or anti-Government activism but concerns acts which have a political nature *regardless* of the intentions of the actor.⁹⁶ Examples range from the deliberate acts of a conscientious objector to the woman who refuses to wear religious dress or an individual who happens to be homosexual. The victim in such cases has denied the authority of the government, and/or society, to control, influence or prevent that area of their life, whether they do so publicly or in private. In *Sepet*, regrettably in the dissenting opinion, Waller LJ concluded that implied political opinion should be recognised as a Convention ground for persecution. Using the example before him, Waller LJ opined that

⁹⁶ Which further emphasises the irrelevance of the motive of the perpetrator in such cases.

objection to military service ought to be seen as demonstrative of a political opinion. For example, the partial objector refuses to serve in that particular military at that particular point in time, whatever the reason for refusing to serve the individual is also denying the right of the state to force her to do so—this is a political opinion whether the individual means it as such or not. Likewise, for the absolute objector “the political opinion expressed is that there ought to be an exception [to military service] for conscientious objectors.”⁹⁷ This is a political opinion even if it is based on religious conviction (although here the individual may also have the additional violation of freedom of belief alongside freedom of conscience/right to conscientious objection).

The Refugee Convention offers an internal justification for including a greater range of manifestations within article 1(2) under the ‘political opinion’ ground of persecution with reference to the purpose of the Convention to offer surrogate protection, the notion of what constitutes a political act must shift in line evolution of the trigger factors sufficient to allow a denial of state jurisdiction over an individual by both the individual in question and the international community. To return to chapter one, the persecution criterion functions in refugee law as justification for the denial of jurisdiction of a state over its citizen. The act resulting in persecution, or fear of persecution, is also in many cases intimately connected with the notion of a denial of authority, the act is often a statement by the individual that the state cannot legitimately prevent them acting in this way. Thus, the homosexual who is imprisoned for her sexuality is making a political as well as personal statement through her

⁹⁷ n 66 [160].

sexuality, she is denying that the state has a right to dictate 'appropriate' and 'inappropriate' types of sexuality to its citizens, and a woman refusing to wear religious dress is making a similarly political statement in denying the right of the state to prevent her from doing so. This does not require conscious political thought from the individual, the political nature of the act is inherent. To return to *Sepet*, Professor Goodwin-Gill's expert opinion accorded with Waller LJ's view, stating,

The refusal to do military service, however motivated, can be a political act, reflecting an essentially political opinion regarding the permissible limits of State authority.⁹⁸

This can be seen also in relation to other areas of political disagreement. Even whilst the official policy of European countries, the US, Australia and Canada was to deny refugee applications made on the basis of the one child policy, lower courts did attempt (unsuccessfully) to present a broader interpretation of 'political opinion', for example, two district courts in the US awarded refugee status to victims of the one child policy. Although these decisions were reversed on appeal, the judgment in *Xin-Chang Zhang* makes a key point, "there can be little doubt that the phrase 'political opinion' encompasses an individual's views regarding procreation."⁹⁹ This is particularly the case where the individual lives in a country with a strict set of laws on procreation, against which individual opinion may well be aligned. This US case shows an almost complete reversal of logic from previous one-child policy cases. In *The Matter of Chang* the claim of a man facing forcible sterilisation if returned to China was rejected on the basis that there was no evidence that the policy was

⁹⁸ cited *ibid* [151].

⁹⁹ *Xin-Chang Zhang v Slattery*, 859 F. Supp. 708, 1994 US District.

“a subterfuge for some other persecutive purpose.”¹⁰⁰ In 1989, then, forcible sterilisation was not considered persecutory by US officials, whereas by *Zhang* in 1994, the same law was capable of being persecutory, and on Convention grounds. Similarly, in a never-repeated statement before the US court, the Ninth Circuit court characterised the gender persecution suffered by Olympia Lazo-Majano as such:

His [the perpetrator] statement reflects a much more generalized animosity to the opposite sex....Olympia was not permitted...to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.

Here it seems a political opinion may be as broad as view that women are entitled to their own opinions and/or to disagree with men and it need not be expressed in words, indeed any action to evade male domination might be seen as manifesting a political opinion.

This suggests a more expansive notion of human rights and political legitimacy and, by extension, a more expansive notion of persecution. For example, in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* an Australian court recognized that denial of access to food, shelter, medical treatment as well as education for children “involve such a significant departure from the standards of the civilized world as to constitute persecution”.¹⁰¹ This could be seen as reflecting a shrinking concept of domestic jurisdiction reflecting that the standards of treatment expected of states in relation to their own citizens are ever higher. Whereas previously,

¹⁰⁰ 20 I. & N. Dec 38 (1989).

¹⁰¹ [2000] HCA 19 [29] (Austl.) available at: http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html

even when the UDHR was drafted, areas such as food, shelter, medical treatment and education were almost universally accepted as being for the state to decide *without external interference or judgment* i.e. these were not areas in which international law was relevant or applicable.

This was also mirrored in international refugee law, for example, victims of China's 'one child policy' were routinely denied refugee status on the grounds that as the policy was enforced through a law of general application (that is a law applied to everyone), punishment for contravening the law was merely prosecution and not persecution.¹⁰² Central to this was the opinion that China could legitimately restrict the private lives of its citizens in this manner under the banner of protecting provision of public services (i.e. to control the population was to ensure proper provision of public services to all citizens in a country where the population was so vast). This view would be unlikely to be repeated today.¹⁰³ The entrenchment of the ECHR, with Article 8 right to private and family life, into domestic law across Europe would make it difficult to maintain that a core human right had not been violated by such a policy as China's one child policy.

¹⁰² see Spikerboer *Gender and Refugee Status* (Ashgate Publishing 2000) for example *The Matter of Chang*, discussed by Price (n 3 in introduction) 120-1 and *Sepet* (n 67).

¹⁰³ Although the issue of laws of general application remain (see below), the entrenchment of the ECHR, with the article 8 right to private and family life, into domestic law across Europe would make it difficult to maintain that a core human right had not been violated by such a policy as China's one child policy. Indeed, even whilst the official policy of European countries, the US, Australia and Canada was to deny refugee applications made on the basis of the one child policy, lower courts did attempt (unsuccessfully) to push against this interpretation, for example, two district courts in the US awarded refugee status to victims of the one child policy, although they were reversed on appeal, the judgment in *Xin-Chang Zhang* makes a key point, "there can be little doubt that the phrase 'political opinion' encompasses an individual's views regarding procreation."

Although the scope of human rights violations within article 1(2) could be said to have widened, many rights continue to have only marginal or ambiguous status within article 1(2), for example the right to conscientious objection. In the United Kingdom, the case of *Sepet*, mentioned above in relation to law of general application, brought this issue to forefront. Mr Sepet, and Mr Bulbul, both Kurdish Turks, had applied for asylum in the United Kingdom on the ground that, if required to return to Turkey, they would suffer persecution for refusal to undertake compulsory military service and as such should be considered refugees. The appellants' arguments centred on the existence of a fundamental right to refuse to perform military service on grounds of conscience. Mr Sepet and Mr Bulbul contented that this right of conscientious objection ought to be considered internationally recognised as all of the European states, with the exceptions of Albania, Turkey, and the Former Yugoslav Republic of Macedonia, recognised it as such and that this right was included under article 9 of the ECHR. This argument was supported in principle by the UNHCR as an intervening party and by expert opinions presented by Professors Goodwin-Gill and Hathaway. It was not an argument that found favour with either the Court of Appeal¹⁰⁴ or the House of Lords.¹⁰⁵

The majority of the Court of Appeal held that a right to conscientious objection was not considered a legally recognised and guaranteed right under international law and could not be established by recourse to the general right of freedom of thought, conscience, and religion, expressed, for example, in Article 9 of the ECHR. Waller LJ dissented but the majority opinion was

¹⁰⁴ n 66.

¹⁰⁵ *ibid.*

affirmed in the House of Lords, where Lord Hoffmann opined that whilst the right to freedom of conscience was absolute, manifesting personal belief was a conditional right.¹⁰⁶ Key to the Court of Appeal and House of Lords reasoning was that whilst conscientious objection might be said to be an emerging right, it was not an established right. Great weight was given to the lack of formal recognition of the right to conscientious objection and in particular, to Article 4(3)(b) of the ECHR, which states that 'forced labour' does not include compulsory military service. The expert opinions, provided by Professor Goodwin-Gill and Professor Hathaway, expressly contradicted this view, arguing that this approach failed to consider other rights potentially impacted by compulsory military service. In both his expert opinion and in a talk given subsequently, Professor Goodwin-Gill was adamant that the court was making a fundamental error in interpreting article 1(2) as requiring formal legal recognition of the specific right in question before violation of this right can ground refugee status. This approach overlooked the manner in which human rights gain legal recognition- by analogy to already existing rights. There would not be any legal human rights if rights were not given recognition in the legal sphere for a first time. Professor Goodwin-Gill explained:

The confusion of the Court arises from the perceived need to establish that the right of conscientious objection to military service exists and is recognized as a fundamental human right or 'core entitlement', *before* it can form the basis for a refugee claim and a well- founded fear of persecution within the meaning of the 1951 Convention. This is incorrect and is not required by the terms of the 1951 Convention or impliedly by reference to its object and purpose. The right to freedom of conscience is the central right at issue, and it is freedom of

¹⁰⁶ *ibid* [46].

conscience which is violated in the public political sphere when a person is compelled to do military service contrary to their sincerely held belief.¹⁰⁷

The key, opined Goodwin-Gill, is the *purpose* of the Convention. Just as the concept of violence sketched above is only persuasive in relation to the interests the Convention is designed to protect, so to the concept of human rights employed by the Convention can only be sculpted in relation to the interest of the Convention. The purpose of the Convention, as mentioned above, is widely considered to be to provide surrogate protection to those who have suffered human rights violations. Relevant human rights violations for the purpose of the Convention must, then, be any human rights violations, with collective violence providing the limiting factor.

4.4.1 A flexible approach to defining persecution

What then would be a relevant human rights violation for international refugee law? It is argued here that *any* human rights violation ought *prima facie* to give rise to a good case for refugee status. That is to say if a right has been recognised elsewhere, or is emerging as a human rights norm, this should be sufficient footing for the court to at least consider the right as one being capable of grounding a case of persecution. Whether or not the case succeeds depends on then on the facts before the court rather than on disputation of the type of violations included. The collective violence element would then focus the discussion as to whether, on the facts before the court, the application for refugee status would be successful.

¹⁰⁷ Goodwin-Gill *Refugees and their Human Rights* RSC Working Paper 17 (August 2004) available at www.rsc.ox.ac.uk.

This would prevent blanket statements such as those seen in *Sepet*, in regards to conscientious objection, and as were previously seen in *Campos-Guardando*, where rape was excluded from the definition of persecution and before *HJ*, in relation to discrimination against homosexuals. Instead it would allow a more flexible approach to defining persecution in line with shifting human rights norms. It is simply too late for the applicants in question when attitudes finally change. Rape was considered human rights violations before *Campos-Guardando* but was excluded from scope of international law by being labelled 'private violence' in most jurisdictions before *Kunarac*. The change in attitude could not lead to re-examination of previous cases and it must be acknowledged that many cases were denied solely on the basis that rape could *never* constitute persecution.

Although this lag between law and 'the real world' cannot be entirely avoided, using collective violence as the filter rather than type of human rights violation avoids blanket 'bans' being issued by governments or courts on cases involving certain types of human rights violations. This will demand individual examination of all cases, rather than a cursory glance at the case to see if it fits exactly within existing case law. It is often said by courts that refugee law requires individual examination, and that the case before the decision maker has been turned down on individual merits but the case cannot receive sufficient individual attention where the type of violation is held to not constitute persecution *regardless of the particular circumstances*.

As Goodwin-Gill argued in *Sepet*, there is absolutely no requirement under article 1(2), or the Convention as a whole, that the human rights violation

under discussion has been previously recognised as giving rise to refugee status. This would result in a stagnation of international refugee law, if the purpose of the Convention is to provide surrogate protection it must respond to new forms of human rights violations and it would be preferable if this did not require years of activism first with the law lagging lamentably behind reality. The path to recognition for rape victims, for example, was lengthened considerably by fears of creating a huge number of new refugees. This kind of concern cannot shape interpretations of international refugee law (it belongs to the realm of politics and policy, if anywhere all).

The Refugee Convention requires self-referential interpretation, that is to say guides to interpretation can be found in the Convention purposes, which are linked to international human rights law, and thus demand a fluid approach to interpretation rather than rigid categorisation. As Higgins states “[r]eference to “the correct legal view” or “rules” can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purpose of the law.”¹⁰⁸ It is not enough, then, for refugee status decisions to be guided by reference to the Convention alone, they must also consider the purpose of the Convention and that this is a general purpose (protection of refugees), which by its nature shifts and evolves in line with human rights norms.

¹⁰⁸ Higgins *Problems and Process: International Law and How We Use It* (Oxford Clarendon Press 1994) 5.

4.4.2 Conclusions on Collective Violence and Political Legitimacy

It has been claimed that, “the Convention is legally and linguistically limited” reducing its applicability¹⁰⁹ and that, therefore, the Refugee Convention needs to be scrapped rather than merely reinterpreted. This kind of concern has led to calls for a new system of international refugee law, Hathaway, for example, proposing a system where by refugee status “become[s] the entitlement of all persons whose basic human rights are at risk.”¹¹⁰ Of particular concern to Hathaway is the additional requirement of “some differential impact based on civil or political status [i.e. a Convention reason].”¹¹¹

Whilst it is accepted that the Convention is in one sense limiting, such as “[o]ne may have fear for all sorts of reasons but the fear must fall within the convention because of one of the reasons in the categories”¹¹², it has been argued in the thesis so far that it is not the case that article 1(2) cannot accommodate new fears or experiences of persecution. Although interpretations of the Convention are limited with reference to its purpose (for example, it is accepted that it applies only to forced migrants not voluntary migrants), this is a broad purpose and thus allows the Convention to respond to shifting human rights norms and for Convention grounds to be interpreted broadly as well.

In order to take into account the concerns of those who fear an unworkably broad category, if for example refugee status applied to all those whose basic

¹⁰⁹ Edwards, ‘Case Commentary: Female Genital Mutilation- Violence against Girls and Women as a Particular Social Group’ 19 Denning Law Journal 215

¹¹⁰ Hathaway (n 48 in chapter 1) 121.

¹¹¹ *ibid.*

¹¹² Edwards ‘Case Commentary: Female Genital Mutilation- Violence against Girls and Women as a Particular Social Group’ 19 Denning Law Journal 271, 271.

human rights were unmet or threatened, whilst not creating an artificially limited refugee status, it has been proposed that *all* human rights violations ought to be within the scope of article 1(2) with the notion of collective violence to limit the category of 'refugee.' This is firmly a human rights approach, it demands that international human rights norms are recognised and applied, it does, for the reason Price decries, namely to "expand the scope of the anti-brutality principle for the core of basic human rights....to the full roster of rights listed under international instruments."¹¹³ It does not, however, move away from the notion of legitimacy as the core to determining the persecution criterion, nor does it, necessarily, produce "a large class of harms that cannot be inflicted for any reason."¹¹⁴ These fears, voiced here by Price but often repeated by governments and refugee status determination bodies, are not well founded. It is possible to retain refugeehood as distinct from other instances of human rights abuse whilst expanding it sufficiently to reflect shifting human rights norms. In fact, it must be possible for international refugee law to be meaningful and it cannot be done without a focus on human rights. Without reference to international human rights norms, however expansive these may well become, international refugee law loses its purpose and conceptual foundations, as it will no longer offer protection to those whose state has targeted or failed to protect.

Collective violence is proposed as the limiting factor to maintain 'refugee' as a distinct category of victims of human rights violations. It is of paramount importance though, that collective violence is *not* interpreted as mass violence or as having any requirement of frequency or being widespread, to repeat

¹¹³ Price (n 3 introduction) 54.

¹¹⁴ *ibid.*

collective violence *only* requires that the violence be said to be in some way accepted or condoned by societal norms in the country of origin. This also allows determination of the lack of national protection element, it would not rely on superficial factors such as the existence of a national law to deal with the human rights violation in question but on whether it could actually be said that someone committing such a human rights violation acted contrary to societal norms. This demands *effective* national protection of human rights rather than just legal lip-service. Such determinations are already made in Country of Origin reports, briefing documents produced by embassies, the UN, the World Bank and indeed many NGOs.

Collective violence retains the notion of national protection but demands enquiry more broadly than merely in to government or state measures and is heavily influenced by international human rights law as it reflects a judgment that the collective behaviour or attitude in the country of origin is rightly described as violent. To label something 'violence' conveys a judgment as to the legitimacy of the act, as violence is *prima facie* wrongdoing it requires special justification if it is to be deemed legitimate; as Imbusch state, "it is the criteria of legality/illegality and legitimacy/illegitimacy which make institutional violence appeal either as relatively unproblematic or as injustice."¹¹⁵ This judgment as to the legitimacy of the act purported to be persecution is made in reference to international human rights law. If one has established a human rights violation has taken place or is feared, the collective violence element asks a) if there is any special justification which can make the violation legitimate (i.e. is the human right violate absolute or conditional)

¹¹⁵ Imbusch (n 71) 21.

and b) if the right violated is conditional then is the justification offered sufficient (i.e. does it map onto the justifications for violating conditional human rights accepted under international human rights law). If there is no special justification for the violence and if controlling social norms are present so render the violence 'collective', then the victim of this violence is a refugee. The concept of collective violence, it is argued, demonstrates how a human rights violation may be a political wrong with little or no state involvement if the practice or conduct constituting a human rights violation may be considered a cultural or societal norm. Here there is not even a requirement to show state inaction or acquiesce, it is sufficient to show that the state is unable to prevent the violation whatever its intentions.

To repeat, this does not require a new refugee law but rather than article 1(2) is interpreted with these ideas in mind and using the Convention grounds as a guide to the *type* of grounds on which a person might be exposed to persecution as a refugee. It is not meant, it is argued here, as a narrow or exhaustive list but to emphasise the types of grounds collective violence is inflicted on i.e. civil and political disagreement. It has been argued here that, in particular, the 'political opinion' ground is capable of encompassing many acts that may not appear overtly political at first glance. Although Convention grounds such as race, nationality and religion are linguistically narrower, political opinion or social group can be interpreted broadly without straining against linguistic barriers. As such, political opinion quickly moved beyond its narrowest meaning of 'partisan politics' but still resists, in many jurisdictions, a broad enough interpretation so as to include objection to military service or refusal to obey discriminatory laws and/or restrictive

social practices. This is a category that is ever evolving and ought to reflect shifting human rights norms and notions of political legitimacy. Social group has also been narrowly interpreted in the past so as to exclude, for example, gender. The *Fornah* case points towards a new interpretation where it is acknowledged that gender, as a social constructed concept, must be included in the category of 'membership in a particular social group.'

In particular, it has been stressed that it is vital that refugee status determination cases do not rest on the motive, actual, purported or implied, of the perpetrator. Is it virtually impossible to imagine how one might prove the *actual* motive of a perpetrator who by the very circumstances of refugeehood is not present and may not be called before the body determining refugee status. A focus on motive, it has been noted, causes considerable problems, such as excluding subjected to cultural rituals, 'private violence' and those who can be said to have been punished for evading a law of general application *even where the law itself is persecutory*. Lord Justice Waller in *Sepet* aptly demonstrated the danger of this distinction on the basis of general application, it would not allow an individual to refuse to serve in a military committing human rights violations.¹¹⁶ The soldier who refused to be serve at a concentration camp during the Holocaust or attempted to escape Yugoslavia, Rwanda or Sierra Leone during the genocides would not be a refugee according to the 'motive' interpretation of article 1(2), punished for evading a law of general application these individuals would merely be prosecuted not persecuted and would, according to this interpretation, not have been expressing a political opinion of any kind. It simply cannot be the

¹¹⁶ *Sepet* (n 67) [184].

case for a Convention designed to protect those whose human rights have been violated that it does not extend its protection to those who refuse to participate in human rights violations.¹¹⁷ To demand an individual to inflict human rights violations, or suffer *any type* of punishment must constitute persecution. This is just one instance where a focus on motive renders the Refugee Convention inapplicable to those whose human rights have been violated or are at risk. Such logic has also been used to exclude almost all instances of sexual violence, where an overriding 'purely sexual motive' can always be claimed and never disproved.

It has also been demonstrated that underlying all discussions of gendered violence within refugee law is a fatal tendency to overlook the importance of, and potential for, a new concept of political within article 1(2). At present, progress made in improving the rate of recognition for female refugees, in line with male counterparts, is inevitably halted when it comes up against the concept of 'political.' This chapter has demonstrated that reform is not only necessary but possible within existing conceptual framework of article 1(2) and the Refugee Convention. A new notion of political, which dispenses with the private/public dichotomy to acknowledge the pervasive and fluid nature of politics, would allow article 1(2) to continue operating and more accurately reflect the varied experiences of female refugees. In such refugee-producing situations women may suffer from diminished agency but they do not entirely

¹¹⁷ In addition as international law attaches individual criminal responsibility for human rights violations (and not merely state responsibility), to demand a soldier served under such conditions would be asking individuals to open themselves up to prosecution by a future war crimes tribunal as well as to commit human rights violations. This, as Price notes, is distinct from asking a soldier to participate in an illegitimate war, to which no individual responsibility can be attached under international law, *jus ad bellum* governs only state behaviour in resorting to war. See Price (n 3 introduction).

lack agency- a concept of agency that does not recognise defiance of a spouse or community as significant demonstrations of political agency is an impoverished concept and causes considerable injury to female refugees.

In addition, this chapter has demonstrated the danger in governments, courts and tribunals seeking to provide blanket statements in relation to human rights violations. The 'this one is on our list, that one is not' approach to defining the scope of the persecution criterion is illogical and the antithesis of the purpose of the Convention, which again is to provide protection to those who have suffered or fear human rights violations. This deliberately broad purpose is to allow the Convention to respond to 'new' types of human rights violations, in line with evolving human rights standards. The idea that there exists somewhere a list of relevant human rights violations to refugee law, and that one must first try to show that your particular type of harm either is already recognised or can be 'added' is unnecessarily restricting the application of article 1(2). This led to the exclusion of rape, now immediately recognised as a paradigmatic example of a human rights violation, from article 1(2) in the past and was applied to exclude freedom of conscience (conscientious objection) in *Sepet*. These blanket bans risk stagnating international refugee law and making it, as its critics often charge, unable to respond to new refugee experiences.

For these reasons an alternative guide to interpretation has been proposed, which concerns, in particular, the notion of collective violence. Identification as an instance of collective violence, it is argued, is the transformative factor

turning a human rights violation into persecution. This would allow *any* human right violation to *prima facie* form the basis of a refugee status application but to still retain refugeehood as a distinct category human rights abuse victims. Collective violence already underpins the concept of refugeehood; the refugee is someone who cannot turn to their own country for protection from or redress after human rights violations, it follows that the refugee is resident in a country where acting in accordance with societal norms could allow a human rights violation (a society where collective violence takes place). Examination of the human rights violation to see if it could be described as in accordance with societal norms, and therefore collective violence, will allow the persecution criterion to continue to operate as the defining factor separating refugeehood from other forms of human rights abuse. It is the element of collective violence that makes the rape victim in a society where rape is justified by the inferior position of women a refugee but the rape victim in a country where rape is condemned ineligible for refugee status. Human rights violations are present in both cases but what renders the former case one of relevance to refugee law is not the type of human rights violation but the underlying societal conditions, summed up in the notion of collective violence. This provides an expansive definition of 'refugee', flexible enough to respond to shifting human rights norms but limited enough to retain a distinctive character.

4.5 Conclusions for Refugee Law

It has been argued, firstly, that the notions of human rights and political legitimacy set the boundaries of the persecution criterion. Secondly, these boundaries have been shown to be far less restrictive than is often claimed.

Human rights and political legitimacy, it has been demonstrated, are not only capable of sustaining broader interpretations but refugee law demands more expansive definitions. This claim is made in order to satisfy the underlying purpose of refugee law, namely to protect victims of illegitimate violence. This purpose, it is claimed in an argument to be taken up in the next chapter, requires that refugee status is extended to all victims of political collective violence who seek international protection. It was argued in chapter three that human rights have a special claim to protection and in this chapter has considered the content of the notion of human rights. The claims made in these chapters are, then, interlinked and special protection, and priority, is claimed by all rights than can be classed as human rights as understood above. This is not a notion of human rights as limited by the concept of 'the political' but one expanded by this concept.

Chapter 5 SECONDARY DUTIES- THE ROLE OF THE INTERNATIONAL COMMUNITY IN INTERNATIONAL REFUGEE LAW

The previous chapter argued that in seeking refugee status, refugees are asserting a claim to human rights protection. The contours of this claim have been considered, in order to establish what types of treatment and actions can be said to constitute a human rights violation. Chapter four also considered in which circumstances human rights violations can be said to reflect a failure of state protection, which, it was argued, can be assessed through the concept of collective violence. This chapter proceeds from the assertions in chapter four to examine the impact of this failure by the home state to fulfil their duty to their citizens to argue that the international community has an obligation to promote, protect and enforce human rights to a minimum standard where the primary duty holder fails to do so.

This chapter seeks to extend the conception of human rights put forward in chapters three and four. As Risse notes, “[a] conception of human rights consists of four elements: First, an actual list of rights classified as human rights; second, an account of the basis on which individuals have them (an account of what features turn individuals into rights holders); third, an account of why that list has that particular composition, that is, a principle or a process that generates that list; and fourth, an account of who has to do what to realize these rights, that is, an account of corresponding obligations.”¹ Chapter four considered the rights classified as human rights and briefly put

¹ Risse (n 7 chapter 4) 5.

forward a process to assess whether a right is a *human* right. Chapter three put forward justifications for human rights and why all humans are rights holders. This chapter will examine Risse's fourth element and put forward an account of 'who has to do what to realize these rights' in relation to refugees in circumstances where the primary duty holder- the state- has failed to secure an individual's human rights.

This chapter will reconstruct the claim that a secondary duty to protect human rights falls on the international community if, and when, the primary duty holder (the state) fails to fulfil their duty. This builds on the concept of responsibility to protect, applying this to refugee law. As by definition, refugees are unable to enforce primary duties (either the negative duty of non-interference or positive duty to protect and promote human rights) the secondary duty must be engaged, and enforceable, in order to provide any possibility of protection from persecution. It will be argued that this secondary duty is not merely discretionary but also includes concrete duties in certain circumstances. In particular, the circumstances of emergency are considered in relation to a duty to rescue by admittance. This chapter returns, therefore, to consider the claim to conditional priority for human rights claims set out as a framework in chapter two and fleshed out in theoretical terms in chapter three. Here, the impact of this claim of human rights to conditional priority is considered in relation to the specific circumstances of refugeehood. In particular, the notion of a secondary duty to protect refugees, engaged in the event of the failure of the primary duty-holder, is considered and put forward as providing the conceptual foundations for concrete obligations to refugees that fall on the international community and are, in certain

circumstances, capable of being addressed to specific members of the international community.

The aim is to provide a clearer account of why, and with what impact, specific obligations are owed to refugees by the international community. Without this, it is argued, it is very difficult to provide a justified criticism of the treatment of refugees by potential host states. In order to be able to assess whether a potential host state has violated its obligations to refugees under the Refugee Convention, we need to be clear not only on who is a refugee but on the obligations generated by the circumstances of refugeehood. At present, even in relation to signatories of the Refugee Convention, there is often considered to be no concrete obligations to refugees. This chapter argues that this assertion cannot be maintained if the importance of human rights, set out in chapter three, and the framework for assessing refugee claims, set out in chapter two, hold. As argued in these chapters, both the importance of human rights and the framework for assessing the claims of refugees are not put forward as a *new* understanding of refugee law but as an elucidation of the current system. This chapter does not propose a reform of refugee law, then, but a reform of the interpretation of refugee law, in line with the reform of interpretation of the persecution criterion set out in chapter four. Here, a reform of the interpretation of international obligations to refugees is set out and it will be argued, these obligations are *already* placed on members of the international community.

In order to examine the content, concept and nature of the secondary duty to refugees, which it will be argued falls on the international community, this

chapter will begin by considering the interaction of human rights law and refugee law and the claims of humanitarian law with the aim of clarifying the position of refugee law within the schema of international law. It will then go on to set out the justification for, and content of, a secondary duty to protect human rights falling on members of the international community. This duty, it will be argued, stems initially from the assertions of the previous chapter as to the contours of political legitimacy when considered in the context of the current international system. How human rights trigger not only domestic duties but also international concern will be set out.

5.1 The Relationship between Human Rights Law and Refugee Law

Before commencing a discussion of the nature of obligations to refugees within international law, it is necessary to explore a few contentious issues. Although it is now customary for protection issues surrounding refugees to be viewed as part and parcel of international human rights law, it is far from uncontested that refugee law is accurately, or even best, classified as part of human rights law. Garvey maintains, to the contrary, “international refugee law rests on an humanitarian premise.”² Yet Goodwin-Gill argues, “[t]he protection of refugees has its origins in a human rights context.”³ There is, however, a third alternative, one advocated by Hathaway and Anker amongst others, which is to maintain the unique and separate function of international refugee law, whilst drawing upon international human rights law. It will be argued here that international refugee law might be seen as straddling the

² Garvey 'Towards a Reformulation of International Refugee Law' (1985) 26 Harvard International Legal Journal 483 484.

³ Goodwin Gill 'The Language of Protection' (1989) 1 (1) International Journal of Refugee Law 6.

international human rights law and international humanitarian law and drawing inspiration from the former but with conceptual footing in the latter. It does, however, also have unique features, which distance it from both. Most obviously, the purpose of the Convention is comparatively narrow, dealing as it does only with refugees. This section will explore the interactions between international human rights law, international humanitarian law and international refugee law and will begin by defining each briefly.⁴

5.1.1 International Humanitarian Law

International Humanitarian law is often thought of as the modern version of *jus in bello*, the traditional international laws of war, which governed interaction between civilians and enemy forces during formal states of war. These laws of war were designed to protect non-citizens who came into contact with state authority being exercised extra-territorially. The most obvious instance of an exercise of state authority extra-territorially is that of an invading army, hence the notion that humanitarian law is exclusively a law of war governing such things as the rights of prisoners and civilians against the invading army. Humanitarian law is a relatively recent term; it does not appear in the Geneva Conventions of 1949, although these conventions form the legal foundations of modern humanitarian law. Humanitarian law goes beyond a mere reaffirmation of *jus in bello* as it is now considered to cover *all* armed conflicts, whether exercises of state authority or non-governmental forces. Thus, international humanitarian law continues to apply to formal, declared, inter-state wars but also includes the relatively new concepts of collective humanitarian intervention and peacekeeping operations, which

⁴ For discussion of how international humanitarian and international human rights law have influenced the development of refugee law see, for example, Sternberg (n 9 chapter 4).

although military conflicts (to varying degrees⁵) would not usually be described as 'war'. Yet, humanitarian law is not law of universal application; its operation is limited to specific circumstances, which must be present before it becomes applicable. The debate over whether Refugee Law is best classified as humanitarian or human rights law is, therefore, far from academic. The labelling of refugee law as humanitarian law clearly limits its application and denies the element of universality afforded, in principle, to human rights law.

5.1.2 The Relationship between Humanitarian Law and Human Rights Law

The relationship between human rights law and humanitarian law was often simplified to the statement that humanitarian law applies in times of war and human rights law applies at all other times. This simplification is clearly inaccurate; in principle human rights law applies always, therefore is as applicable in wartime as in peacetime.⁶ Yet humanitarian law is still limited to armed conflicts, although, as noted above, the emergence of peacekeeping and humanitarian intervention has blurred this line. The notion of obligations owed to an individual by a state is key to both humanitarian and human rights law. As Garvey notes, humanitarian law rests on the recognition of immunity obligations of the state exercising authority extra-territorially towards non-citizens.⁷ Yet as Dieter Fleck observes, it has been "denied so far that international humanitarian law also offers rights to individuals

⁵ Humanitarian intervention can closely resemble a war, differing from traditional inter-state war by the collective nature of the action and UN authorisation, for example as enforcement action under Article 42 of the UN Charter but still represent an 'invading army'. Peacekeepers, on the other hand, are not intended to engage in any military conflict and peacekeeping operations are often by consent.

⁶ As confirmed by the ICJ in its advisory opinions on Nuclear Weapons ICJ Reports 1996 226 [25].

⁷ Garvey (n 2) 485.

corresponding to the duties of states.”⁸ International humanitarian law, then, does not create directly enforceable rights for individuals, who remain dependent on other states and international organisations to enforce international humanitarian law. To this end, Edwards argues, “keeping international refugee law distinct from international human rights law has played into the hands of governments choosing to flout minimum standards.”⁹ The issue of the interaction between human dignity and state responsibility is one, which remains unclear. Although there is some consensus that human dignity ought to be protected from and by the state. There is also consensus that human dignity is universal. The logical conclusion from these two positions is that states have an obligation to protect human dignity universally not just in its own jurisdiction. This is not however a position recognised in international law. The ICJ has notably failed to mention human dignity- preferring instead the dignity of states. Human dignity has however been mentioned in dissenting judgments showing perhaps movement towards a more human rights centred approach to international law.¹⁰ Carozza argues “The idea of “universal” or “fundamental” rights, in sum, does not contradict in principle or practice the reasonableness

⁸ Fleck *The Handbook of International Humanitarian Law* (Oxford University Press 2008).

⁹ Edwards 'Refugees, Human Rights and the Right to 'enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293.

¹⁰ Dissenting Opinion of Judge Tanaka in the South West Africa Case, Dissenting Opinion of Judge de Castro in Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal [1973] ICJ Rep 166, at 29, Dissenting Opinion of Judge Shahabuddeen in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226, at 383, Separate Opinion of Judge Weeramantry in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections [1996] ICJ Rep 595, at 641: '[o]ne of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual.'

and recognition of pluralism in the specification of a conception of the human good to which human rights refer.”¹¹

5.2 The Operation of International Refugee Law

This, argues Garvey, prevents international refugee law from being rightly labelled as ‘human rights law.’ Garvey’s argument is that the operation of international refugee law as an international treaty to which states only are signatories places it firmly in the humanitarian law box. This is a claim supported by Hathaway, whilst campaigning for a reconceived notion of refugee law within the human rights paradigm; Hathaway argues that current refugee law “is fundamentally a means of reconciling the national self-interest of powerful states to the inevitability of involuntary migration.”¹² As such, refugee law operates as an international agreement on how to manage forced migration rather than a rights enhancing convention.

In line with Hathaway’s argument, according to Garvey, the 1951 treaty was an inter-state agreement to manage a specific problem. The initial time constraint placed on those wishing to apply for refugee status (‘events prior to 1951’) confirms Garvey’s analysis, however, the removal of this time bar suggests that the Convention now has some element of universality. However, unlike human rights law, in principle, applicable all of the time; humanitarian Law and refugee law are context specific; there are certain triggering circumstances, which determine whether or not the law can be

¹¹ Subsidiarity as a structural principle in International human rights law *The American Journal of International Law* (2003) 73.

¹² Hathaway (n 8 introduction) 113.

applied. International refugee law refers to law concerning both the definition and admittance of refugees and treatment of refugees after recognition of refugee status. International Refugee law does not, however, cover treatment of those denied refugee status and only on certain interpretations does it apply to those seeking refugee status beyond the definitional article 1(2) of the 1951 Convention.

Those who subscribe to the notion of *prima facie* refugee status (that is where refugee status is presumed until proved inapplicable) might argue that refugee law applies to all those seeking recognition of refugee status. Conceptually, this may be a sound argument; if refugee status is declaratory not constitutive, then a person is a refugee whether or not they have yet to have this status officially recognised. Refugee law ought, therefore, to have been applied from the moment of entry into the host country. However, practically (and indeed logically) this is impossible, refugee law can only apply after a determination of refugee status, otherwise it would apply to everyone. Therefore, asylum law applies to those seeking asylum (via recognition of refugee status) and migration law applies to those who are seeking to enter another country until or unless the individual declares an intention to seek asylum. Refugee law, then, is in reality, applied only narrowly to those who are seeking refugee status, that is the definitional article 1(2) of the 1951 Convention is applied to determine if refugee status is appropriate. Except in this narrow exception, refugee law is then applied only to those already recognised as refugees.¹³

¹³ This does not mean, however, that human rights law more generally does not apply to anyone entering another country. Asylum seekers, awaiting for refugee status decision, ought still to have their human rights respected, be that the right to

Garvey's argument, however, goes beyond the circumstances of drafting to the heart of refugee law. The link between refugee law and humanitarian law is foundational, namely that both types of law are based on the protection of individuals who *cannot* enforce rights directly but instead rely on the international system for protection. Both humanitarian law and refugee law operate, according to Garvey, on what J.D Singer calls 'the non-human level', that is the international sphere where the only entities¹⁴ with legal personality are states. International refugee law is for the use of states in deciding refugee status applications (to determine who is in need of substitute protection) and is *not* a rights giving document for those seeking asylum.¹⁵ Thus, refugee law does not afford the *right* to asylum but instead provides the criteria for states that are willing to allow individuals to exercise their right to *seek* asylum. Just as Fleck observed in relation to humanitarian law, international refugee law does not afford asylum seekers (i.e. those seeking recognition under the convention) rights corresponding to state duties and affords a refugee (i.e. a person with refugee status under the convention) only limited rights. A refugee is as Goodwin-Gill states, "a beneficiary, beholden to the State with a status to which certain standards of treatment and certain guarantees

be free from arbitrary detention or the right to access to food, shelter, education or work.

¹⁴ With limited exceptions, for example, the laws governing war crimes and crimes against humanity allow for individuals to be agents under international law.

¹⁵ International Refugee Law may, of course, be of use to asylum seekers if the applicant can argue that it has been misapplied and it may also be called upon by refugees with Convention status. For example, if the standards of treatment to be afforded to those with refugee status are breached the Convention could be used to compel the host state to meet its obligations. Thus, article 33, which prohibits the return of those with refugee status to the country of origin or residence whilst a danger of persecution remains, is often used directly by those with refugee status.

attach.”¹⁶ Refugees awaiting status decisions are not, then, rights-holders, in the strictest sense, in the potential host state. This suggests that human rights law is not useful in understanding the operation of international refugee law, where the refugees are merely the right-less beneficiaries of another’s obligation.¹⁷

5.2.1 Returning to international human rights law

The points presented above certainly seem to show a mismatch between refugee law and human rights law, however, is this the only meaning of ‘human rights law’? Does human rights law always give rise to a claim-right? The duty-model approach to human rights, which requires a corresponding duty for each right, is often seen as the best, or indeed only, explanation which will afford human rights any enforceability. The objection to a conception of rights, which stands free from the notion of duty, it is argued, would be meaningless. Beitz and Goodin, echoing Shue, argue, “If public officials proclaim that everybody has a right to X but do nothing to ensure that people can in fact have or do X if they so wish, then the so-called ‘right’ can hardly have much value; indeed people then can hardly be said to ‘have’ the right at all.”¹⁸ But is this in fact the case? Must rights have a corresponding duty to be called rights at all? There are two issues at stake, firstly, does the duty-model of human rights accord with the actual operation of international human rights law? Secondly, is it an *existence condition* of a (human) right that a corresponding duty be identified? The latter question has been addressed in chapter three, the former issue will be considered now.

¹⁶ n 29 (chapter 4)

¹⁷ See Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 9.

¹⁸ Beitz *Global Basic Rights* (Oxford University Press 2009) ix.

If we return to discussion of *international* human rights we can see that these rights become justiciable *only* through national implementing measures of international standards and/or through domestic legislation, be that a constitution or an act of parliament. Thus, they are not generally enforceable, but are directly enforceable *against the home state*, and then only if some human rights legislation or constitution to protect these rights exists. Human rights law could include domestic laws, such as the US Bill of Rights, regional laws, such as the ECHR, which do produce directly enforceable rights. International human rights law refers instead to international treaties such as the UDHR or the ICCPR. Whilst human rights law, in general, has a long tradition, international human rights law is largely a twentieth century project, focused on the recognition of universal human rights rather than with the purpose of creating automatically justiciable rights. Here rights have not been transferred into the legal sphere within the meaning of rights set out above, an international human rights does not follow the pattern *X has a right where Y has a duty*. This is simply not the case for the UDHR, which describes rights which “ought to be cherished” by states.¹⁹ As Donnelly reminds us, “we should be careful not to confuse possessing a right with the respect it receives or the ease or frequency with which it is enforced.”²⁰ What Donnelly refers to as the ‘possession paradox’, whereby ‘having the right’ is most important when one does not ‘have the right’ is key in international refugee law, when one does not ‘have the right’ (i.e. human rights have been violated and/or are

¹⁹ For further discussion of this distinction see Chinkin ‘International law and human rights’, in Evans (ed) *Human Rights Fifty Years On: A reappraisal* (Manchester: Manchester University Press 1998) 115.

²⁰ Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 8.

unenforceable) is exactly when surrogate protection is necessary and the awarding of refugee status is recognition as the individual always posed the right denied or infringed and, as such, 'had the right' to expect it to be respected.

International human rights law does not have the remedial function of domestic human rights law, it does not automatically produce rights that individuals can enforce in domestic courts. Without national implementing measures the UDHR or the ICCPR are just statements of an ideal. Only rarely are individual entitlements produced under international law. It is for this reason that Hart, Austin and others have argued that international law does not constitute a form of law at all. This debate does not concern us here, although it is an important one, but it is noteworthy that there is a clear conceptual distinction between international and domestic human rights law, present even if one does consider international law as law right called. This is not to say, however, that international human rights law is mere rhetoric or lip-service to the idea of universal rights. Hart does acknowledge that international treaties could gain legal status as binding even non-signatory states through the rule of recognition.²¹ Patrick Capps sees international law as "an attempt to subject the complex social relations which compromise international relations, and which are often damaging to human dignity, to regulation."²² The result of this attempt, when finally complete, would be "that international legal institutions are the ultimate authority for how states

²¹ see Hart (n 39 chapter 2).

²² Capps (n 83 chapter three) 6.

should act".²³ This is the concept of international law meant here, one that is part of an ideal project that has been only partially achieved at present but still has enormous normative value.

Instead, international human rights may be said to follow a broader notion of rights, for example, Gewirth defines as rights following the structure A has a right to X by virtue of Y.²⁴ In the case of human rights in the simplest form: A has a right to have right X respected by virtue of being human. This makes no comment as to the existence or otherwise of a correlative duty- the right exists by virtue of being human irrespective of the acknowledgment of a duty. However, international human rights law does go beyond abstract values which suggests that there ought to be mechanisms to protect and realise these values and as such is intimately connected with the idea of political legitimacy, as was discussed in chapter one and will be explored in more detail below. This is not to say that international human rights law is merely 'a manifesto for political change', as Donnelly notes, "claiming a human right, in addition to suggesting that one ought to have or enjoy a parallel legal right, involves exercising a (human) right one already has...[H]uman rights rest on a prior moral (and international legal) entitlement."²⁵ International refugee law is part of this process of claiming a human right, a citizen stating that as their human rights are not protected at home they will seek protection elsewhere is implicitly asserting that they are a right holder, that they possess

²³ *ibid.* See also, Pogge 'Cosmopolitanism and Sovereignty' (1992) 102 *Ethic* 48. Here Pogge refers to 'legal cosmopolitanism', which represents this view of international law based upon the concept of human dignity and a commitment to international legal institutions that seek to ensure a respect for human dignity from states.

²⁴ Gewirth *Human Rights: Essays on justification and application* (University of Chicago Press 1982) 65.

²⁵ Donnelly (n 18) 10.

the human right in question and that, therefore, the fact that this right has not been respected is of international concern.

Refugee law also has the dual nature of being both domestic and international, with domestic legislation incorporating, supplementing or in some case detracting from international refugee law (the Refugee Convention). Domestic refugee law, then, may interact with any number of domestic and regional human rights statutes and conventions, in its application as domestic law international refugee law might be aided by local human rights law. But international refugee law is not directly concerned with these national measures (other than to provide a standard for national measures of signatory states). International refugee law is, instead, concerned with defining factors in the country of origin, which can give rise to a good case for refuge and, as such, might be said to trigger a duty on the international community to provide a place of refuge. Just as with international human rights law, international refugee law can be seen as an ideal, an attempt to subject state decision-making in relation to refugees to some kind of international regulation and scrutiny. As yet, this not directly enforceable, thus the UNHCR cannot take a signatory state to court for failure to live up to international obligations, but in principle the UN could take measures of sanction and in practice, the state can be subject to rebuke from the international community which in an era of international legitimacy is a form of sanction, albeit a weak one.²⁶

²⁶ For further discussion on the ways in which international human rights norms can shape state behaviour see, Pogge 'The International Significance of Human Rights' (2000) 4 *The Journal of Ethics* 45.

A focus on only on international human rights law and international refugee law narrows, then, the types of rights under discussion. Rights here signify “the morally ideal set of entitlements”²⁷ that an individual *ought* to be able to enjoy by virtue of being human. These are the rights, which might be described as ‘moral trump cards’, as Dworkin does, which ought to allow them to outrank other interests. Broadly speaking, this is the type of aspirational human rights law intertwined with international refugee law. It is a violation of these rights that provides the trigger factor for a good case to refugee status, or more broadly refugee flows are created by human rights violations. In addition, human rights operate also a legal trump card, for example, the principle of *non-refoulement*, contained in article 33 of the Refugee Convention, states that a person cannot be returned to a country where her human rights would be violated or endangered.

In addition, if the aim of the Refugee Convention is to provide protection when and where human rights cannot be protected at home, it implies the recognition and application of international human rights standards.²⁸ International human rights law has a very specific relationship with international refugee law, in particular the UDHR, which was framed only shortly before the Refugee Convention. As such, these are very much part of the same post-War legacy, in which the world attempted to protect in the future rights that had been so grievously violated just a short time before. Refugee law was an acknowledgment that in many countries the rights contained in the UDHR would remain only ideal and that the international

²⁷ Bäck (n 62 chapter 4) 369.

²⁸ This argument is taken up again in chapter six Female Genital Mutilation and the challenge posed by cultural relativism.

community required a method to deal with this. Although the refugee may not be able to enforce her human rights in her country of origin, she may leave this country and seek refuge elsewhere. This might be described as the conceptual origins of international refugee law, the notion that human rights violations give rise to a right to seek refuge.²⁹

This points towards the central function of international human rights law, which does not produce directly enforceable rights necessarily, but instead provides a valuable standard against which to evaluate state treatment of its own citizens. This represents the normative value of international human rights law, even where it is not respected or enforceable it can be used to identify illegitimate violence and to justify condemnation of such violence. As Deborah Anker explains, “[t]he function of the international human rights regime is to judge whether states are fulfilling their duties under internationally agreed upon human rights norms and, through monitoring and publicizing, to deter future abuse: in short, to change the behavior of states.”³⁰ The focus then in human rights law is dual, on the individual to whom rights attach, and on the state, on whom the duty to respect and protect these rights is placed. In this way international refugee law is firmly underpinned by international human rights norms and laws as it uses international human rights law to identify state behaviour below the

²⁹ This may sound a weak right and in many ways it is, the right to seek refuge does not guarantee refuge (it is no right to a place of refuge, or right to asylum) but it is a considerable shift from the traditional view that a state was entitled to treat its citizens how it wished, a view which denied the international community any right to judge or interfere with domestic decisions, even to the extent of granting refuge to refugees.

³⁰ Anker (n 83 chapter 1) 134.

internationally required standards which amount to human rights violations giving rise to a good case for refugee status.

5.2.2 The place of International Refugee Law

The connections, then, between international human rights law and international refugee law are not to be overlooked but Hathaway, drawing on the work of Gervase Cole is quick to point out that “refugee law, intended to serve a strictly remedial or palliative function, has its own claim to legitimacy, distinct from the interventionist or facilitative mandate of international human rights law.”³¹ Refugee law provides ‘substitute protection’³² in the sense that it is “a response to disfranchisement from the usual benefits of nationality.”³³ The notion of ‘substitute protection’ was confirmed a leading asylum case from the British House of Lords, *Horvath*, in which Lord Hope stated that the purpose of the refugee 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*.”³⁴ The host state, then, is fulfilling a duty on behalf of the international community to offer substitute protection to ‘victims of sovereignty’ whose

³¹ ‘Approaching the Refugee problem today’ in Loescher, G and Monahan, L (eds) *Refugees and International Relations* (Oxford University Press 1990). Though Price disagrees with the characterisation of asylum as ‘palliative’, arguing it is not addressed at the refugees’ immediate needs but at an interim solution to alienation. The work of the UNHCR in providing aid directly to refugees is, for Price, the palliative element to the international communities ‘tool-kit’ (Price n 14 chapter 1). However, it could be argued that refuge is still palliative, it is merely less immediate than direct aid. In addition, direct aid is rarely given to those who succeed in having Convention refugee status awarded (as they are the ones who have managed to leave), aid is given to internally displaced persons or to those living in a zone of severe deprivation.

³² Hathaway (n 46 chapter 1) 117.

³³ *ibid* 124. Citing a memo from the Secretary-General of the U.N., U.N Doc.E/AC.32/2 [13] (Jan 3 1950).

³⁴ *Horvath v Secretary of State for the Home Department* [2003] 3 All ER 577 HL (emphasis added).

assigned protector has failed to fulfil the primary duty to the citizen. Thus, although refugee law is conceptually linked to international human rights law, as it determines (or ought to determine) key concepts such as persecution relative to human rights norms, it does serve a separate function to international human rights law; international refugee law is designed to offer some remedy to the persecuted. This is the practical function of international refugee law, one that is executed alongside the expressive function of condemnation of the country of origin.³⁵

5.3 Secondary Duties and the Refugee Convention

The primary duty has been set out in chapter four. This chapter concerns the secondary duties generated by the notion of human rights, in particular the notion of surrogate protection. In British asylum law, the seminal case of *Horvath*, considered the relationship between the notion of protection and persecution in the Refugee Convention in depth. Lord Hope of Craighead stated the 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.”³⁶ Lord Lloyd built the holistic approach on the principle of surrogacy – that the ‘host’ state is acting in lieu of the ‘home’ state where state protection is unavailable which he argued underpins the whole convention.³⁷ Lord Clyde further emphasised the ‘purposive approach’ to interpretation with reference to the Preamble, which he emphasised;

³⁵ The idea of refugee status as condemnation is considered also in chapter six, p1.

³⁶ *ibid* [385].

³⁷ *ibid*.

seeks to achieve...the preservation of those rights and freedoms for individuals where they are denied by their own state. ... The Convention assumes that every state has the obligation to protect its own nationals. But it recognises that circumstances may occur where that protection may be inadequate. The purpose of the Convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination in his own state³⁸

The notion that refugee status is a mechanism of surrogate protection is, then, well established and is echoed in other jurisdictions. The Supreme Court of Canada in *Ward* expressed similar sentiments, stating that, "the international community was meant to be a forum of second resort for the persecuted, a "surrogate", approachable upon failure of local protection", and that "[t]he international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged."³⁹ Although the discussion in *Ward* concerned denial of protection on grounds of existing national protection, the implication is that *if* national protection is not available there is a duty on other states to provide surrogate protection. The justification for this eluded to in such judgments as those expressed above, namely the importance of 'those rights and freedoms.'

The scope of this surrogate protection and what causes it to be extended, or denied, is not discussed. Indeed such discussion would, in a signatory state, be unnecessary in order to establish the authority to extend such protection, in law this authority stems from the Convention. The concern here is whether there is not only authority to extend protection (at the discretion of the state) but also an obligation to do so. The argument put forward here is that international law has evolved, or at least is currently in the process of

³⁸ *ibid* [396].

³⁹ *Canada (Attorney General) v Ward* [1993] 2 S.C.R. [689].

evolving, such that the traditional notion of the state as the only unit of interest in international law is no longer sustainable.

The traditional statist view of international law is summed up by Jessup:

The concepts of alienage and citizenship are based on the notion that the individual has no legal significance from the standpoint of international law save as he is related to one state through the bond of citizenship or nationality and thus stands in relation to other states in the role of alien.⁴⁰

Surrogate protection, then, merely substitutes the host state for home state and, thereby, allows the statist version of international law to sustain. As noted in the previous chapter, the notion of the state in international, and indeed domestic, law has undergone significant changes from the Westphalian model of absolute sovereignty and now might be said to contain conditions of (international) legitimacy. This shift, it was claimed, stems from the increasing recognition of the importance of, and claims stemming from, human rights. The notion of conditional sovereignty, it is argued, acknowledges that *human* rights do not have borders in that these rights are to be respected by *every* state in order to be recognised as a legitimate member of the international community. This development of newly emerging rights and new interpretations of existing rights might be said to be a reaction, or a natural consequence of, the inclusion of more states and traditions within the international sphere.⁴¹ These developments in human rights law are relevant to international refugee law not only in terms of interpreting the persecution criterion but also in terms of redefining the notion of state sovereignty and

⁴⁰ A Modern Law of Nations (Macmillan 1968) 9.

⁴¹ The differing legal traditions and the influence of these on human rights and human rights law are beyond the scope of this project. Chapter four and Chapter considers what might be said to be the flip side of this, namely cultural relativism or relativity.

third state responsibility. The UN speaks more substantively in terms of shared responsibility and is beginning the task of concretising a substantive obligation to protect and in particular a *shared* responsibility to protect.⁴²

Linklater notes “[m]odern international law can be regarded as representing an advance in promoting “humaneness” by expressing commitments to a global version of the harm principle.”⁴³ The aim of Linklater’s harm principle is to protect what he dubs ‘welfare interests’⁴⁴ humans have in common. As Barry notes different concepts of the good life do not preclude agreement that basic forms of harm need to be eliminated⁴⁵ or, reformulated, that people are entitled to protection from basic forms of harm as even basic forms of harm have not successfully been eliminated. Linklater also notes that injustice constitutes a form of harm as, in Smith’s terms, “real and positive hurt to some particular persons.”⁴⁶ Linklater posits a more expansive concept of positive responsibilities to protect those in danger of being harmed:

⁴² See, for example, HRC Res 8/5 (June 2008) ‘Promotion of a democratic and equitable international order’, which speaks of a shared responsibility for managing economic and social issues. Consider also the Right to Development which speaks of an obligation placed on all human beings. See also Obina Okere ‘The Protection of Human Rights and the African Charter on Human and People’s Rights: A comparative Analysis of the African and European Systems’ (1984) 6 Human Rights Quarterly 141. This sets out how the African system focuses more on responsibilities than rights. In depth discussion of this development is beyond the scope of this thesis. The right to development might be seen as a facet of a dignified life and in this way it may enter into consideration in a refugee claim, as set out in chapter three 3.2.1.

⁴³ ‘The problem of harm in world politics: implications for the sociology of states’ (2002) *International Affairs* 319, 330.

⁴⁴ For Linklater the origins of these welfare interest may be traced back ‘at least to Stoic philosophers’ including Cicero who wrote of ‘nature, which might be defined as international law [...] the particular laws by which individual peoples are governed...ordain that no one is justified in harming another for his own advantage.’ This principle argues Linklater forms the bedrock of later philosophies such as Mill, Kant and Smith *ibid* 331 .

⁴⁵ Barry *Justice as Impartiality* (Oxford University Press 1998) 87–88.

⁴⁶ Smith *Moral Sentiments* (Penguin 2010) 79.

Complex responsibility is more demanding of moral agents since it requires them to be reflective about the ways in which conduct may unintentionally harm other human beings, whether now or in the future. In consequence, moral agents take their complex responsibilities seriously when they try to understand how their actions affect other persons, and when they change their behaviour to avoid harm, even though there is no legal obligation or social directive to do so.

The Refugee Convention need not then specifically state that signatory states to act to protect refugees, although in any case it arguably does, to place an obligation on states to act. Further states need not necessarily be signatories to the Convention to be obligated to undertake some actions to protect refugees. Albeit considering more direct bystanders Elie Wiesel's discussion of bystanders⁴⁷ reminds us that not acting in the face of violence can be seen as contributing to the harm in refusing to recognise entitlement to advance human rights claims.⁴⁸ Nelson Mandela argued that "[o]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human rights, the right to dignity and a decent life."⁴⁹ The same could be said of offering refuge, although often seen as a gesture of charity to provide protection against human rights violations might better be framed as an act of justice. The Preambles to the Geneva Conventions all assert that '[r]espect for the personality and dignity of human beings constitutes a

⁴⁷ See Brown "The Holocaust as a Problem in Moral Choice" in Wiesel et al. (eds.), *Dimensions of the Holocaust* (Northwestern University Press 1990) 54–55. Hannah Arendt makes a similar argument in her study of Eichmann, *Eichmann in Jerusalem: The Banality of Evil* (Penguin, 2006 ed) when considering the actions of one person in the context of genocide.

⁴⁸ What Gay referred to as "mortal indifference to ... human dignity" see Gay *My German Question: Growing Up in Nazi Germany* (Yale University Press 1998) 185.

⁴⁹ 3 Feb 2005 cited in McCrudden (n 20 in chapter three) 663.

universal principle which is binding even in the absence of any contractual undertaking.'

5.3.1 State Sovereignty and the Duty to Protect

As noted in chapter three, the first question to be resolved is the primacy of states' powers. This question, suggests Gilbert, needs to be resolved before one can consider the secondary issue of the source and extent of protection provided by international (refugee) law.⁵⁰ Gilbert argues international law now represents limitations on state's power to control entry to or expulsion from its territory. This rejects the notion that state sovereignty is an established rule all international law is subject to and instead affirms Benedict Anderson's concept of the state as an 'imagined community'.⁵¹ As an 'imagined community' it is (presumably) capable of being re-imagined in line with shifting standards of legitimacy. In terms of international refugee law, it might be said to be by necessity a limitation on state sovereignty. It is, in the first place, a limitation on the home state's sovereignty by denying their jurisdiction over a citizen. More importantly here refugee law might be said to also represent a limitation on the sovereignty of the receiving state. Although a state is defined by reference to its population, from which state's powers to control entry and expulsion might be said to flow, this control it is argued is not unlimited. Both in reference to its own population *and those on their territory* states are bound by the principles of human rights expressed formally in reference to refugees in the Refugee Convention. Although the definition of

⁵⁰ n 184 chapter 3 176.

⁵¹ Anderson *Imagined Communities* (3rd ed Verso Books 1991) 5-7.

refugee status is not in and of itself a limitation on a receiving state's power to expel the individual as refugee status is declaratory and not constitutive in theoretical and practical terms it represents a significant limitation. This limitation is expressed in the principle of non-*refoulement*. A refugee cannot be returned. In practical terms then a refugee may not be expelled. The Refugee Convention might be said to represent a voluntary concession, in the sense that it formally binds a signatory state. However, it might also be seen as an unavoidable concession in the sense that the Refugee Convention is merely a formal expression of the theoretical and practical implications of the universality of human rights and the notion of secondary duty-holders. In this sense, Gilbert argues, "[i]nternational refugee law and international human rights law act in parallel to limit the state's power."⁵²

The notion of conditional sovereignty necessarily impacts on our understanding not only of domestic sovereignty but also of the international community. If members of the international community must adhere to notions of legitimacy at the domestic level, it seems untenable to continue to argue that responsibility of the international community is not engaged when these conditions of legitimacy are violated. This notion of international responsibility can be seen, for example, in the emerging notions of responsibility to protect and human security. It can be seen also, it is argued, as underpinning the refugee convention. This is not to argue that this was the intention of the drafters, indeed states were eager to establish the contrary, but that it is an inescapable responsibility stemming from the importance of

⁵² n 42 177.

human rights and the shifting notion of domestic legitimacy coupled with the emerging notion of international responsibility.

Refugee law is necessarily part of this shift as it is concerned not only with home state legitimacy, as encompassed in the persecution criterion, but also with the protection element, expressed in the requirement of a lack of national protection. These elements are intertwined, as argued in chapter one, the persecution criterion might be characterised as an expression of, and a symptom of, lack of national protection. The notion of protection is, therefore, inherent in the concept of refugeehood and as the concept of protection shifts so too must the concept of protective obligations to refugees. It is argued, then, that refugee law is intended to provide surrogate protection to those whose state, the primary duty holder, has failed to provide protection. This is a fairly uncontroversial position. However, what is argued here is that this notion of surrogate protection is not one, which the potential host state may *choose* to extend, at its own discretion, but one which is to be extended when required. The international community, it is argued, has a duty to extend surrogate protection as the secondary addressee of the duty to protect human rights. Further, it is argued, this duty may attach to specific states and become concrete rather than merely abstract duties addressed to all, and therefore no one. This argument will be reconstructed below.

5.4 Third State Responsibility for Human Rights Violations

Following Ramcharan, the international protection of human rights may be either direct or indirect. Direct international protection refers “the intercession of an international entity either at the behest of a victim or victims concerned, or by persons on their behalf, or on the volition of the international protecting

agency itself to halt a violation of human rights.”⁵³ Included in this direct protection, it is argued, is the granting of refugee status. On the other hand, indirect international protection denotes:

the totality of the activities undertaken at the international level to advance the realization of human rights, including standard-setting, research, studies, educational activities, the dissemination of information, advisory services and activities to deal with complaints of violations of human rights or with cases or situations of such violations.⁵⁴

This indirect protection may form part of the way in which the international community fulfils the general duty to promote and protect human rights but it is far vaguer and less effective than the granting of refugee status. Refugee status ought, therefore, to form part of the mechanisms of the international community for protecting human rights.

Nickel calls for us to view human rights as creating different categories or levels of duties that ought to combine to ensure adequate protection from violation. The claim-to-freedom from torture, for example, would create, according to Nickel, four duties, which are addressed simultaneously to everyone *and* specific agents/institutions where appropriate. The duties created would be:

- 1) duty to refrain from torture, addressed to everyone,

⁵³ *The Concept and Present Status of the International Protection of Human Rights Forty years After the Universal Declaration* (Martinus Nijhoff Publishers 1989) 17.

⁵⁴ *ibid* 20.

- 2) duty to prevent torture, addressed to each government in reference to all persons within the territory and jurisdiction of that country,
- 3) duty to create and maintain a political system which does not engage in and seeks to prevent torture, addressed to the people of a country,
- 4) a duty, addressed to international institutions, to assist and encourage governments to prevent torture, and, where necessary, to sanction, punish and prevent those governments that fail to do so.⁵⁵

If we consider refugee law we can see the problems that arise if a split between specific duties addressed to perpetrators and general duties addressed to all others is maintained. Persecution, by definition an unjustified human rights violation, is a failure to fulfil a negative duty of non-interference (category 1 in Nickel's model) and the positive duty to protect human rights placed on the home state (category 2). The reason, however, for refugee law is the lack of any effective mechanism for enforcing these duties either against individual perpetrators or the home state. These primary duties to respect and protect human rights, whilst grounding the notion of persecution, cannot be the only duties under international refugee law or it would not constitute an effective method of protecting human rights at all. The secondary duties must then become engaged (categories 3 and 4) and are, to borrow Shue's

⁵⁵ Nickel (n 4 in chapter 3) 80. Although Nickel does not identify it, arguably there is a fifth duty placed on members of the international community to create and maintain an international system which does not engage in and seeks to prevent torture.

terminology, 'positive indirect duties.'⁵⁶ As Nickel argues "a morally justified right does not just disappear, or cease to direct behavior, when it is systematically violated. In such a case, the right's capacity to generate obligations may shift so as to increase responsibilities of the secondary addressees."⁵⁷ This is particularly applicable to refugee law, where it is the failure of the first two, and most probably three, levels of duties that has pushed the refugee into flight. The refugee, then, is dependent on secondary addressees recognising this concept of shifting or split duties to acknowledge when they might become the relevant addressee of a duty to protect human rights. The Refugee Convention positively encourages burden sharing, with the proviso that the refugee's human rights are protected and respected.

Ferreira, building on Griffin's work, similarly argues that rights need not equate directly to one specific duty but may create a plethora of duties attached to different actors depending on the context. Ferreira takes as his example a right to peace and security. Assuming this is a right, we can formulate this right starting with the assumption that there is an interest in international peace and security (or international peace and security is an interest worth protecting). If we say this is an interest worth protecting, there is a right to international peace and security (or we might say, everyone across the globe has a right to individual security). If there is a right to international peace and security, then following a simple right-duty model there must be a duty to secure international peace and security. This type of argument is then used by 'pragmatists' to suggest that there cannot be such a right as it is

⁵⁶ Shue *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn Princeton University Press 1996) 697.

⁵⁷ Nickel (n 17 in introduction) 85.

obviously unenforceable, utopian and so broad as to be virtually contentless. A similar argument is made to counter a right to asylum; if no one could take all of world's refugees then, as the opening quotation stated, no one can be forced to take any. Following Nickel, if the interest is worth protecting we cannot simply say that the duty is too onerous but must look for different ways of imposing the duty.

If *only* a broad duty were created, the duty to protect victims of human rights, even if limited only to those who have fled their home country might seem to onerous to justifiable be addressed to any specific actor. However, if we take what we might label 'the multi-duty model' there need not be only one duty or one addressee arising from human rights violations. Instead we might suggest a range of duties, created from the general right to security (to continue Ferreira's example), which vary in their obligatory force and content. This might make a *general* requirement to all actors who have some control over this interest to act with the interest(s) in mind but make *specific* demands of political leaders that peace and security is actively sought and protected where possible.

Ferreira uses this argument to defeat claims that all rights that seem to create unfeasible duties cannot be rights at all and at best may only be progressive goals. If a right to asylum, based on the general interest in protecting human rights, gave rise to many different duties some of those duties could be enforceable even if the general duty is infeasible. ⁵⁸ In certain cases, it is argued, refuge might be the only available or viable protection from human

⁵⁸ Ferreira 'The Expanding Realm of Human Rights' (2008) 14 Res Publica 57 62-3.

rights violations. Nickel's model suggests that a duty to provide refuge, to be fulfilled through intersecting levels of duties, would then arise. As noted above, following Nickel's levels of duty, if levels 1-3 have failed, international obligations are engaged as the only method of protecting human rights under these circumstances. These international obligations are, in these circumstances, binding and addressed to all members of the international community. Although these duties might require different things of different actors within this community.

If we recall Nickel's model of claim-to rights generating duties then it could be argued that, built on his claim that the people of individual countries have a duty to create and maintain political institutions that secure and protect human rights, a corresponding duty is placed on members of the individual community to create a similar system at the international level. This would create a fifth category of duty. This would demand that individuals, through their governments most likely, would have a duty to maintain effective international institutions for protecting human rights. If these institutions were unable to effectively protect human rights, the duty would return to the individuals, and their home states, who are able to provide protection from human rights violations.

This returns to Nickel's argument that as the right always exists, a duty to protect this right must also exist and will become attached to the most appropriate addressee in the circumstances, moving from category 1 to 5. For international wrongs, Nickel argues, "the responsibility will fall on those

countries with the capacity to make a difference.”⁵⁹ This capacity to make a difference might be determined by location, “[f]or example, Mexico has often been in a good position to provide refuge and assistance to those fleeing Guatemala.”⁶⁰ It might, alternatively, be determined by available resources and power or special ties with the country or people in need of assistance. For refugees, there is an additional element; the addressee of the duty, it could be argued, is partly determined by the country in which refuge is applied for. That is to say that the country receiving the application for acknowledgment of refugee status (and therefore a right to international protection and to remain in the host country) would need to demonstrate an inability to house or protect the refugee in question before refugee status could be determined elsewhere.⁶¹ This argument is reflected in a position paper from the European Parliament concerning the Common Asylum Policy which states:

[i]n all these different contexts, Member States may need to accept that asylum within the EU is the only viable option if international obligations are to be upheld.⁶²

To recall the argument put forward in chapter three; where an interest is worth protecting (as human rights as undoubtedly are) then this interest produces a right to have that interest protected either by non-interference or through positive action depending on the interest and circumstances. This right, in turn, is capable of generating duties, the purpose of which is to

⁵⁹ Nickel (n 17 in introduction) 85.

⁶⁰ *ibid.*

⁶¹ This incidentally explains the illegality in the proposed plan by the Australian government for ‘outsourcing’ the processing of those seeking recognition as refugees to Malaysia.

⁶² Available at

[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT\(2013\)433711_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf) (accessed 2 March 2014).

protect the right and it is this purpose that determines the content of the duty. Our first question as to what duties are created by various rights is to ask 'what is the most effective method of protecting the right in question?' For this reason, states Nickel, claim-to rights cannot create *only* discretionary duties. Where an adequate response cannot be secured through discretionary duties, argues Nickel, a better alternative is called for, which may require non-discretionary duties be imposed.⁶³ The right may require different duties and/or different addressees of a duty depending on the circumstances.

The first objection made be said to concern the enforceability of onerous, discretionary duties. As noted above, the starting assumption, for many, is that where a duty is onerous it cannot be assigned to any specific agent as they would be unable to fulfil this duty, placing them in a catch-22 situation where however they act they have failed.⁶⁴ To address this objection, Shue suggests a 'division of labour.'⁶⁵ Shue's duty sharing, however, differs significantly from other proposals of burden sharing as it frames discretionary duties as discretionary only in their mode of fulfilment. These duties are to be fulfilled by each agent even if only indirectly. Shue's argument is that "it is not necessary for everyone else to have all the duties to fulfil a right, it is necessary only for some other to have each of the duties required. On the side of duties there can be a division of labor."⁶⁶ This division of labour is to

⁶³ Or alternatively, as will be argued below, that discretionary duties are understood as duties which allow discretion on how they are fulfilled rather than allowing the addressee to opt in or out of the duty at will, see p4.

⁶⁴ This is similar to the tragic choice model, where an agent has two competing duties and is unable to fulfil both simultaneously. It has been argued that in such cases, the agent is released from both duties and is free to make a choice as to which duty, if either, he is to fulfil. This argument is dealt with below.

⁶⁵ Shue (n 48) 688.

⁶⁶ *ibid* 689.

address, in particular, 'burdensome duties', those which Shue defines as "require the expenditure of some resource I control, like time, money, energy or emotional involvement."⁶⁷ It is vital, however, that addressees of these 'burdensome' duties are aware that they are under concrete obligations to fulfil these duties *however burdensome* they may be. As Shue notes, "[W]hat I give up in, say, time or money in fulfilling a positive right is not genuinely mine to retain if I truly have a duty to use that resource on behalf of someone else's right...[n]o more than in the case of a negative duty, then, do I...give up anything I am entitled to keep."⁶⁸ Similarly, Nickel argues "the claim-to-freedom from torture may be universal without all of the corresponding duties being universal in the sense of being against everyone...[a]ll that is required is that for every rightholder, there is *at least one* agent or agency with duties to protect that person from torture."⁶⁹ This model does not require all levels of duties to be engaged simultaneously, if category 1 is fulfilled then none of the addressees of later duties need act at all.

Discretionary duties cannot be entirely ignored even if there are limited resources: if I am under a duty to someone (by virtue of a right he or she holds) I must fulfil it. However, I may choose an indirect method of fulfilling the duty i.e. I may assign the duty to an international organisation or my national government. This assignment, however, creates a new positive indirect duty "to create, maintain and enhance institutions that directly fulfil rights"⁷⁰ akin to Nickel's third category of duties outlined above. This operates in a similar manner to in domestic settings, where I might assign my

⁶⁷ Ibid 690.

⁶⁸ *ibid.*

⁶⁹ Nickel (n 17 in introduction) 80 (emphasis added).

⁷⁰ Shue (n 48) 697.

duty to secure the physical security of others to the state (who in turn commission the police to fulfil this duty). I cannot, however, simply assign my duty to the state and walk away, I must pay taxes to maintain the police force. The content of the duty is then determined by the arrangement I make to fulfil it, before the decision to assign my duty to the state and the police to fulfil it still existed, and was robust, even if it were highly indeterminate. Even if individuals have discretionary duties to refugees, these must be fulfilled and if individuals commission the state to do this for them and states commission the UNHCR this merely creates a second duty to maintain and enhance the institution commissioned to fulfil the duty. It can be argued, therefore, that if we have chosen to task the UNHCR, or another host country, with protecting refugees, we have a duty to maintain the UNHCR and to support the other host country.

The model proposed here builds on Nickel's categories of duties to suggest that duties towards refugees become engaged upon the failure of home states, and fellow citizens, to fulfil their duties. These duties, it has been argued, are addressed to many different actors in the international sphere, which following Shue may be fulfilled directly or indirectly depending on the circumstances and resources of the potential host country. Human rights, in turn, are capable of generating duties, the purpose of which is to protect the right under threat and it is this purpose that determines the content of the duty. This might be reduced to a claim as to what *having* human rights means.

Firstly, the general duty arising out of human rights violations requires anyone in a position to help "to consider what he or she can reasonably do in

the matter involved.”⁷¹ It is not an obligation of all to ‘drop everything’ to aid the victim of the human rights violation but rather “an acknowledgment that if one is in a plausible position to do something effective to prevent the violation...then one does have an obligation to consider doing that.”⁷² This is the obligation which any potential host states might be said to be under and, following Shue, it is a duty which must be fulfilled even if only indirectly or minimally. If this general duty to consider assisting the victim of a human rights violation is recognised as a principle, as such, there is a requirement that potential host state seek to protect the human rights of the victim to the greatest degree possible given the actual and legal conditions. It may be that the actual possibilities leave no room for the host state to assist the refugee but such a claim would need to be subjected to the balancing process and could not simply be made by a potential host state with little or no scrutiny. As a principle, of course, it may also collide with another principle (or obligation), which might result in the other being given conditional priority but the duty could not simply be dismissed. Having established that duties to refugees could be fulfilled alongside duties to citizens, states cannot now avoid the question of duties to refugees merely by claiming ‘priority to compatriots.’ The routine denial of applicants from certain countries, the introduction of laws creating bureaucratic hurdles to asylum applications and the detention of asylum seekers would have to be subjected to a balancing process whereby decision-makers determined whether or not conditional priority ought to be given to diplomatic and security concerns over duties to refugees.

⁷¹ Sen ‘Human Rights and the Limits of Law’ (2006) 27 *Cardozo Law Review* 2913
2922

⁷² *ibid.*

5.5 International Law and the International Community

5.5.1 The Purpose of Asylum

The claim that the international community has an obligation to protect refugees, it is argued, is reflected in the purpose of asylum. This purpose is to provide temporary protection to those whose human rights are in danger and are unable to seek protection from their home states. This purpose is recognised in the international community and has been expressed in numerous cases. The UK Court of Appeal, for example, stating “the very purpose of the Refugee Convention...is to impose on states parties a duty to protect persons within their borders who cannot return to their country of nationality for fear of being persecuted there.”⁷³ In short, the purpose is to provide substitute protection, which follows logically from the fact that, as Goodwin-Gill states, “the lack or denial of protection is a principle feature of the refugee character.”⁷⁴ In the simplest terms, refugees require legal and political protection because this is what they lack. This is coupled with the assumption that there are secondary duty holders, namely the international community as set out above. This reminds us, Hathaway argues, that “refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy.”⁷⁵

It is argued that to extend protection to those in danger and without state protection is the logical extension of the bedrock assumptions of international

⁷³ *AA v Sec. State for Home Department* [2006] EWCA Civ 401; [2007] LK v Sec. of State 1 W.L.R 3134 [79].

⁷⁴ Goodwin-Gill ‘The Language of Protection’ (1989) *International Journal of Refugee Law* 6(1) 6.

⁷⁵ Hathaway ‘Refugee status arising from generalised oppression’, in Alfredsson & MacAlister-Smith (eds) *The Living Law of Nations* (Engel 1996) 61-67.

law, expressed by Nathwani as “[t]he implicit line of thought can be characterised as follows: refugees are human rights victims; we should assist human rights victims because we believe in human rights and profess to protect them.”⁷⁶ We might recall now, as established in chapter one, asylum is a mechanism for protecting human rights and this mechanism is triggered when the home state fails to protect, or endangers, the human rights of the refugee. As noted above, put otherwise, the home state fails to fulfil its primary duty, this triggers the secondary duty held by international community.

The duty to protect human rights is, then, engaged and, as established above, it rests on all those capable of helping to provide protection with a definitive obligation that they fulfil this duty to the greatest extent legally and factually possible. All of these claims are based on the assertion that a) human rights are universal, b) the universality signifies not only that human rights are *held* universally but that duties to protect them are universal also and c) following the reconstruction of duties offered above, human rights are capable of generating definitive duties, which it is the obligation of all to fulfil to the greatest extent legally and factually possible. This rests on a normative claim not only as to the value of human rights but also as to the duties they are capable of generating. This might be reduced to a claim as to what *having* human rights means. Following Bohman it is claimed:

⁷⁶ Nathwani ‘The Purpose of Asylum’ (2000) 12 International Journal Refugee Law 354 634 -5. See also Hathaway, ‘New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection’ (1995) 8 Journal of Refugee Studies 281.

Having *human* rights... comes with the normative power to have rights: the power to make claims upon all those who also have human rights (and to be responsive to their claims).⁷⁷

In terms of refugee law, Goodwin-Gill asserts that refugee status is merely one form of protection for “the right of every human being to life, liberty and security, which may be jeopardized by breach of the principle of refuge.”⁷⁸

5.5.2 Guaranteeing Human Rights

It is argued here that this is a logical corollary of the recognition and guarantee of human rights by the international community in the post-war period. It is the logical extension of the assertion that human rights are the entitlement of every human being by virtue of their humanity alone. The post-war context of the Refugee Convention, and indeed international human rights law, makes it clear that the intention of internationally guaranteed rights was, and remains, to move rights away from the national context. The tethering of *the entitlement* to human rights in the national sphere, thereby leaving a vacuum in which the stateless and *de facto* stateless refugees exist, is defeated by the assertion that human rights belong to everyone, in every context, by virtue of humanity alone. If human rights exist prior to, and independent from, a political community, as is asserted, then these rights cannot cease to exist when one is alienated from the political community.⁷⁹

⁷⁷ Bohman ‘Constituting Humanity: Democracy, Human Rights, and Political Community’ in Weinstock, (ed.) ‘Global Justice, Global Institutions’ Canadian Journal of Philosophy 233, 233.

⁷⁸ Goodwin-Gill (n 65) 15.

⁷⁹ If I am wrong about this assertion, then those individuals living under regimes, where human rights are not recognised, have no human rights and no redress, therefore, for what might be deemed human rights violations elsewhere. It would follow from this that, for example, the Jews of Nazi Germany, stripped of nationality and citizenship, had no human rights to be violated and the post-war human rights movement has achieved no change in position on the nature of human rights. Plainly, given the impetus for the UN foundation, treaties, laws and institutional structure,

This is not to say states no longer play a role in *securing* human rights, this is certainly the case and indeed the rationale for admonishment and sanction of states that fail to do so, but that the Refugee Convention, and as above international human rights law, is intended as a method of protection for those whose state's have failed in the primary duty. Otherwise, as Arendt noted, human rights would again prove powerless when needed the most.⁸⁰

Arendt, in her consideration of how totalitarian regimes were able to reduce human beings to 'superfluous beings'⁸¹, sought to prevent the repetition of the situation in Nazi Germany where the status of 'a human being in general'⁸² carried with it no rights or, Arendt's terms, resulted in a loss of the right to have rights. Great progress has certainly been made in the recognition and concretisation of human rights in both the international and national sphere; we can now assert that 'human rights' is more than an empty term. Yet in the context of refugees, if the post-war human rights movement is to mean anything, we must be able to say we have moved beyond the position Arendt spoke of where 'the only 'country' the world had to offer the stateless was the internment camp.'⁸³ The rightless are, as Arendt sought to have recognised, most often refugees. As Bohman notes:

this cannot be the case. Human rights must exist outside of the political community and independent from legal recognition and enforceability.

⁸⁰ Arendt *The Origins of Totalitarianism* (Harcourt, Brace, New York 1973) 302.

⁸¹ *ibid* 297.

⁸² *ibid*. For Arendt, the best way to guarantee that the position of Jews in Nazi Germany would not be repeated was to establish a right to membership of political community, and a right not to be excluded from the rights guaranteed by membership in this political community. If these rights could be effectively established, refugees would not exist but until this is the case then the right to have rights must be tethered instead to an individual's humanity, otherwise, as Benhabib states, Arendt's concept "is philosophically and normatively ungrounded". Benhabib *The Reluctant Modernism of Hannah Arendt* (Rowman and Littlefield, 2000) 82.

⁸³ Kesby *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press 2012) 2.

To arrive at such a “bare” human status, such a person is usually a victim of political violence, such as genocide and other crimes that deprive her of all rights, statuses, and powers that together enable her to have a place in the world as a participant in speech and action. Such persons are the victims of tyranny, where the absence of civil authority and laws leave them without normative powers; they can then in Locke’s memorable phrase only “appeal to heaven.”⁸⁴

To repeat the assertions of chapter three, human rights are the entitlement of all human beings by virtue of individual and collective humanity. International law, it is argued, is based on this assertion, to make it, as Lauterpacht claimed, “universal law of mankind” such that “international law is under an obligation to the notion of inherent human rights.”⁸⁵ As Kesby notes, “the principles of human rights would maintain that being human is the right to have rights...that has displaced citizenship as legal status for entitlement to rights within states.”⁸⁶ This was expressed by Judge Cancado Trindade of the ICJ who held in *Case Concerning Ahmadou Sadio Diallo*, relating the duty to protect those deprived of consular protection, that international human rights law represented “the historical rescue of the human person as [a] subject of contemporary international law.”⁸⁷ This, it is argued, holds as well for rights outside of states, as was echoed by the IACtHR on the *Juridical*

⁸⁴ Bohman (n 68) 233.

⁸⁵ Lauterpacht and Lauterpacht *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1970) 166.

⁸⁶ Kesby (n 74) 92. This is a foundational claim to recognised human rights law, but could also ground a claim in seeking to establish new human rights, it disputes, therefore, the claim by some that human rights are limited to rights expressed and positivised in international human rights law.

⁸⁷ *Republic of Guinea v Democratic Republic of Congo* (Case Concerning Ahmadou Sadio Diallo) [judgment of 30th Nov. 2010] found at http://untreaty.un.org/cod/ICJsummaries/documents/english/182_e.pdf (accessed on 28/06/2012).

*Condition and Rights of Undocumented Migrants*⁸⁸, leading Cancado Trindade to conclude “This jurisprudential construction pointed in a clear direction: consular assistance and protection became much closer to human rights protection.”⁸⁹ The same could easily be said of international refugee law.

This is in part due to the drive for human rights law to become more effective. For international human rights law to be effective, and not merely abstract or illusory, the guarantees must attach to the individual irrespective of their nationality, citizenship or immigration status. For refugees, they could be said to be travelling *with* their human rights. If these rights are not left at the border upon flight but instead go with the refugee, then the right to have these human rights acknowledged effectively protected is what is at stake and must be guaranteed in order to untether the right to have rights from the state. The refugee, moving across borders, challenges the notion of universal rights by virtue of humanity alone. The question is whether this challenge is to defeat the universal nature of human rights or not? If we wish to continue to maintain that human beings hold human rights by virtue of humanity alone, we cannot strip people of these rights at the border nor keep people in a ‘legal vacuum’ whereby these rights cannot be regained until they are allowed to cross another border. The basic proposition asserted here ought to be relatively uncontroversial, it is asserted that refugees have human rights. As discussed in the previous chapter, it is the humanity of refugees that gives rise to their claims for human rights, their humanity which makes moral demands of others that human dignity is respected. For refugees, their human rights

⁸⁸ Advisory Opinion No. 18 of 17.09.2003.

⁸⁹ n 78 [20].

have been denied at home, the obligation falls, therefore, on the international community. As Bohman states:

The right to nationality is thus not a mere right to protection; it is a normative power that...creates political obligations for the international community to all persons without status or place in an ongoing or functioning political community: it is not just a right not to have one's membership arbitrarily taken away, but the right to have a status that makes effective social freedom possible [...].⁹⁰

The role of international law, argues Bohman, is "the recognition and enforcement of claims to membership in humanity."⁹¹

5.5.3 Human Rights as *erga omnes* Obligations

A key element of establishing human rights as a trigger for international action is in establishing human rights as rights violations of which are relevant to all of us, as *erga omnes* - obligations to the international community as a whole.⁹² This can be contrasted with ordinary two-party norms. The basis for *erga omnes* norms can be seen in the various treaties of the UN but also in the draft articles of the International Commission.⁹³ The notion of *erga omnes* is closely linked to that of *jus cogens* – preemptory norms which states must comply with and do not have a basis in consent. Certainly *jus cogens* norms are also *erga omnes* norms.

⁹⁰ Bohmann (n 68) 236.

⁹¹ *ibid.*

⁹² See, e.g., Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford 1997); Karl Zemanek *New Trends in the Enforcement of Erga Omnes Obligations* (2000) 4 *Max Planck UNYB* 1.

⁹³ See in particular articles 24, 48 and 54 for references to obligations owed to the international community as a whole which can justify third party state action http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

There is some debate as to whether human rights are erga omnes obligations. As Posner notes, at the very least, “[h]uman rights norms provide a strong case for erga omnes status.”⁹⁴ The accepted erga omnes norms of aggression, genocide, slavery and racial discrimination might be said to necessarily recognise human rights as erga omnes obligations. All of these erga omnes norms are based on the universality of the rights of those injured by aggression, threatened by genocide, imprisoned or treated differently because of their race. In the case of the norms of genocide and racial discrimination a clear commonality between the violations is an element of serious harm and discrimination on the basis of protected characteristics. Similarly, the wrong of slavery is in denying to some freedom belonging to all.

The overlap with human rights law is self-evident in that the justification for identifying certain norms as erga omnes norms seems to rest on the same basis as human rights: that there are certain rights held by everyone simply by virtue of being human and, therefore, certain acts which cannot be allowed as they violate these important rights. It is the acknowledgment that certain acts cannot be allowed that gives rise to the notion of erga omnes, namely that violation of these norms give third party states (or perhaps in the age of NGOs also individuals) legal claims against any state violating them. Judge Cançado Trindade has noted in his judicial expansion of erga omnes that human rights treaties might be seen as method of monitoring erga omnes obligations stating:

there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (...) than the methods of supervision

⁹⁴ Posner ‘Erga Omnes Norms, Institutionalization and Constitutionalism in International Law’ (2008) Public Law and Legal Theory Working Paper No. 224.

foreseen in the human rights treaties themselves (...) for the exercise of the collective guarantee of the protected rights. (...) the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations.⁹⁵

Refugee law, it is argued, can provide one forum in which *erga omnes* obligations can be fulfilled and *erga omnes* rights, namely human rights, can be protected.

The Barcelona Traction case confirmed that all states have a legal interest in the protection of basic human rights. Although the ICJ in the Barcelona Traction case stated that this did not allow states to intervene regardless of nationality, the concepts of Responsibility to Protect and *erga omnes* are being used to enforce the idea of universal jurisdiction. This shift has arguably been recognised by the ICJ in the *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) case in which it was held that a party could establish standing via the concept of *erga omnes*. For example, the South African government has recently launched an investigation into sexual violence perpetrated by the government in Zimbabwe.⁹⁶ A Dutch Court also tried a Rwandan woman, by then a Dutch citizen, for inciting genocide.⁹⁷ An American circuit court similarly upheld jurisdiction over the perpetrator of torture even where both the perpetrator and victim were Paraguayan.⁹⁸ This

⁹⁵ Concurring Opinion in the *Case of Las Palmeras* para 14.

⁹⁶ See, <http://www.cbc.ca/thecurrent/episode/2013/02/26/investigating-reports-of-zimbabwe-rapes-under-universal-jurisdiction/>.

⁹⁷ See, <http://www.reuters.com/article/2013/03/01/rwanda-genocide-dutch-idUSL6N0BT8JM20130301>.

⁹⁸ *Filartiga v Pena-Irala* 6,30F.2d876 (2dCir.1980).

case further showed the historical roots of the concept of *erga omnes* as it relied on a 1789 law, the Alien Tort Claims Act, which gave foreign nationals the right to sue in an American court for wrongful actions that violate international law.

The above cases suggest that basic human rights are considered *erga omnes*. This might be said to follow logically from the assertion that human rights are universal and held simply by the virtue of being human. It has been argued, however, that even if one accepts that human rights are universally held, it does not necessarily demand recognition of universal jurisdiction (or, in the case refugees, responsibility) over human rights violations. This, however, is exactly what is asserted here. It is asserted that the universality and importance of human rights automatically demand universal respect. As universal respect has not yet been achieved, a universal obligation of protection might be said to be required.

Although the link between *erga omnes* and refugee law is more obtuse it might be said to be found in the individuals affected by *erga omnes* violations. *Erga omnes* obligations arguably focus less on the individual and more on the collective. *Erga omnes* obligations are concerned with preventing and, if the former is unsuccessful, punishing violations of universal norms. Refugee law is arguably there as a stopgap. Refugee law is intended to offer protection to individuals who are subject to human rights violations. Whilst the scope of refugee law is much wider than *erga omnes* and *jus cogens* norms, violations of these norms are clearly covered by refugee law.

Individuals who flee genocide, slavery or racial discrimination are paradigmatic refugees.

This however concerns the adjudication of specific refugee claims. Erga omnes might also be said to underlay refugee law more generally in that refugee law is a facet of the acknowledgment begun with the concept of erga omnes and built on in the concepts of Responsibility to Protect and Human Security, namely the international obligation to protect those at risk of serious human rights violations. This frames refugee law as a facet of obligations owed by states to the international community as a whole and not merely an act of charity or individual action. This argument is taken up below.

5.5.4 Human Rights as Triggers for International Concern

The demand for respect set out in terms of human dignity and human rights in chapter three might be said to also underlay the notion that human rights violations are of international concern. The concept of erga omnes focuses on when violations of certain rights can give rise to either a direct legal claim- in the case of prosecuting war criminals and crimes against humanity- or a justification for intervention. Human rights however might be said to also give rise to more opaque obligations to protect individuals. That international law now dictates action rather than just reaction has been acknowledged judicially in the Inter-American Court, Judge Cançado Trindade remarking:

[w]ith the transition from civil procedural law into the International Law of Human Rights, they moved out of the strictly *precautionary* realm and into the sphere of *protection*.⁹⁹

Henkin identifies two features of human rights as they evolved post-World War Two; firstly 'universalisation', the acceptance, in principle at least, of individual human rights. Secondly, 'internationalisation', the agreement, again in principle, that individual human rights are of international concern (that is to say that human rights are proper subjects for diplomacy, international law and international institutions).¹⁰⁰ Universalisation was the process by which it became widely claimed that human rights ought to be respected by national governments and, ideally, reflected in national laws such as constitutions or basic laws. International human rights, argues Henkin, are designed as additional protection where national law fails or is not in place and to encourage national governments to recognise and respect individual human rights.¹⁰¹

This has the effect that although the primary obligation is between state and citizen¹⁰², this does not mean that another state cannot enforce the right of 'true beneficiary' (i.e. the individual). Indeed, not only *can* another state enforce the human rights of another country's citizen(s) but the other state might indeed be obliged to do so. This statement is premised, at root, on the *a*

⁹⁹ Kankuamo Indigenous People Case 4.

¹⁰⁰ Henkin 'International Human Rights as Rights' (1979) 1 Cardozo Law Review 425-430.

¹⁰¹ *ibid* 428.

¹⁰² A term used loosely throughout such discussions, only rarely does it refer to legal citizenship but usually is used instead to refer to anyone subject to the jurisdiction of the country. This would probably be better as expressed as in refugee law as 'country of origin or habitual residence' but citizen is a commonly used shorthand here.

priori nature of human rights. If human rights are rights that attach to individual simply by virtue of being human these rights must pre-exist the state and the international community. Similarly, these rights continue to be rights held by all even where and when they are ignored. Thus, although in domestic, regional and even international law, human rights claims are often framed as appeals to positive law (as an 'article X violation'), the ultimate justification, as Vincent notes, "is not an appeal to positive law but [is an appeal] to what ought to prevail a moral/rational justification."¹⁰³ Although this is often overlooked, this notion of universal personhood is, ultimately, the justification for any action based on a human rights violation. It also grounds the claim that these are rights that ought to be legally recognised.

If one believes that states are under a primary duty to their own citizens (or even if one only views this as a practical and political reality one cannot avoid), if one wishes to posit *any* duties to refugees (by definition outsiders to the political community), so the argument goes, a conflict of duties is bound to arise, which can only be resolved in favour of the host states' duties to themselves. This would leave states with only 'residual duties' to refugees.¹⁰⁴ This argument seems at first glance to be a strong one for providing protection to refugees, Goodin argues:

Whatever may be the ordinary priority of your duty to render positive assistance first and foremost to your own...if there are people who for whatever reason stand outside this ordinary system of protection — people

¹⁰³ Vincent *Human Rights and International Relations* (Cambridge University Press 1986) 11.

¹⁰⁴ Such, for example, is Robert Goodin's argument even as he seeks to urge states to offer more protection to refugees. See, 'Globalising Justice' in *Reshaping Globalization: A Progressive Agenda*, ed. David Held and Mathias Koenig-Archibugi (Polity Press 2003). Further discussion below.

without a country; or people whose fellow country folk cannot or will not help them, or actively threaten to harm them — then a residual duty falls to the moral community at large to assist such persons as if they were one of our own.¹⁰⁵

However, Goodin immediately concedes that if this residual duty attaches only in the moral sphere and to no particular agent: “the situation naturally invites attempts at buck-passing and free-riding. (Contemporary history is full of examples of that.)”¹⁰⁶ This creates the situation Shue referred to above, whereby positive duties are only general and imperfect and so appear to be left to the complete discretion of the addressees.

Although the argument of assigning duties is not one that rejects all obligations to refugees, it does render any obligations effectively meaningless if it does not fully explain the nature of residual duty. In the international arena, some argue that human rights also control justifiable interventions. For Rawls, human rights regimes (as part of the liberal conception of justice) govern ‘forceful interventions.’¹⁰⁷ Indeed, the distinguishing feature of human rights, as compared to other types of rights, is that severe violation can provide grounds for intervention. Rawls does not specify if forceful intervention can only be military (as Tasioulas reads his argument¹⁰⁸) or could take other forms (as Hinsch and Stepanians¹⁰⁹ or Beitz¹¹⁰ follow Rawls). This

¹⁰⁵ Goodin, 'Globalizing Justice' in Held, Koenig-Archibugi (ed) *Reshaping Globalization: A Progressive Agenda* (Polity Press, Oxford 2003) 11.

¹⁰⁶ *ibid.*

¹⁰⁷ Rawls *Law of Peoples* (Harvard University Press 1999) 14.

¹⁰⁸ Tasioulas 'Are Human Rights Essentially Triggers for International Intervention?' (2009) 4 *Philosophy Compass* 938 940,

¹⁰⁹ Hinsch 'Human Rights as Moral Claim Rights' in R. Martin, D.A. Reidy (ed) *Rawls' Law of Peoples: A Realistic Utopia* (Blackwell Publishing, Oxford 2006) 127.

¹¹⁰ Beitz and Goodin 'Introduction: Basic Rights and Beyond' in Charles R. Beitz, Robert E. Goodin (ed) *Global Basic Rights* (Oxford University Press 2009).

political conception of human rights sees them 'set the bench mark for internal legitimacy of societies.'¹¹¹ As discussed in chapter two¹¹², Raz, similarly, argues that the conceptual link between state sovereignty and human rights must mean "that their actual and anticipated violation is a (defeasible) reason for taking action against the violator in the international arena."¹¹³ Primary duties to fulfil human rights are addressed, then, to states. These duties might also be addressed to others (Raz certainly believes so¹¹⁴) so as to certainly bind individuals and other institutions within a state. Cançado Trindade see this as the "gradual establishment of a genuine *right to humanitarian assistance*."¹¹⁵ It might also be said to be pointing towards the gradual establishment of a right to refuge, in the case where humanitarian assistance is not being offered or is not appropriate.

The failure of these primary duty-holders is, then, the trigger for international action, which may be framed as not only a response to the primary failure (to enforce either international law or more generally international norms) but also as fulfilment of a secondary duty (to protect human rights addressed to all members of humanity).

5.5.5 Human Security

There is, however, an additional account of the way in which human rights violations can trigger international concern and responsibility connected to the emerging concept of 'human security.' The notion of human security is

¹¹¹ Tasioulas (n 91) 942.

¹¹² See chapter 2 p9.

¹¹³ Raz 'Human Rights without Foundations' in Tasioulas and Samantha Besson (ed) *The Philosophical Foundations of Human Rights* (Oxford University Press 2010) 336.

¹¹⁴ *ibid*.

¹¹⁵ *Matter of The Communities of Jiguamiandó and Curbaradó* (paras. 6-8). This term is specifically preferred to that of humanitarian intervention.

now taking centre stage in much of the UN's work. In 1994, the UN Development Programme Report¹¹⁶ suggested that the concept of security could be, and ought to be, applied not only to countries and borders but to people as well. The notion was intended to provide a concept against which to measure the individual impact of disruptive events both man-made and natural. As such, the UNDP identified two main branches of human security:

First, safety from such chronic threats as hunger, disease and repression. And, second...protection from sudden and hurtful disruptions in the patterns of daily life.¹¹⁷

Human security was further identified as having four main features: universality, interdependence (with other security concerns), more easily guaranteed through early prevention and people-centred.¹¹⁸ Human security applied, then, far more broadly than refugee situations but clearly the experiences of refugeehood are intended to be included within circumstances that would constitute a abuse of, or in rights-terms a violation of, human security.

Refugees lack human security. Asylum could be seen as a good in and of itself as it provides, or reinstates, human security to individuals deprived of this basic good. The severe violation of an individual's human rights, inherent in refugeehood, seen within the context of human security, could be said to automatically trigger international responsibility to address the lack of human security. The application of the refugee for asylum is what separates the

¹¹⁶ UNDP, Human Development Report: New Dimensions of Human Security, 1994, particularly Chapter 2.

¹¹⁷ *ibid* 25.

¹¹⁸ UNDP (n 97) 22-3.

refugee from others lacking human security, the refugee may not be any more or less in need of a greater degree of human security than others in analogous positions but they are separated by their articulated request for their human security to be protected by the provision of security by a host state. The lack of human security can, then, be assessed within the traditional framework, to argue that the home state has failed in its primary duty to provide security to its citizen(s). Human security can, however, also provide a non-state focus, in which international responsibility is triggered *directly* by the lack of human security. This would allow refugeehood to reflect also so-called 'non-citizens' whose state membership is under question or disputed as well as those who claim for asylum is clearly linked to fault on the part of a specific state. Such a concern is increasingly relevant as shifting borders and changing governments often make it unclear which state, if any, could be said in traditional parlance to have had original responsibility for the person seeking refuge.¹¹⁹ As Edwards and Ferstman note, " [u]nder the national security paradigm...in which notions of sovereignty, border controls and citizenship are of primary importance, the non-citizen is usually the first to be excluded."¹²⁰

¹¹⁹ In addition, it would prevent the almost complete breakdown of the system when faced with a person who cannot prove (or chooses not to do so) his or her country of origin. Such individuals are often left in limbo whilst the potential host-state seeks to ascertain the country of origin, most often within a state to which repatriation would be possible. This occurs, for example, with Zimbabweans who enter on South African visas (as there are severe difficulties obtaining visas from Zimbabwe and South Africa is often the first point of entry) and only after point of entry to a potential host state, the UK for example, claim Zimbabwean nationality. Individuals in such a position faced deportation either to South African (HS [2008] EWCA Civ 915) or to Zimbabwe, on the grounds of having misled border officials (RN (Returnees) Zimbabwe CG [2008] UKAIT 00083). See also, Parliamentary Briefing 'Asylum Seekers from Zimbabwe' (13 March 2009) www.parliament.uk/briefing-papers/SN03391.pdf.

¹²⁰ Edwards and Festerman *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) xxiv.

This is not to say that the bond between state and citizen is not relevant, it may be that a refugee's case can be clearly analysed in such terms, the political activist or excluded minority are called to mind. However, this does suggest that international responsibility could be triggered automatically by a lack of human security with refugeehood seen as one example of circumstances in which human security is severely threatened. This is reiterated in the doctrine of responsibility to protect, which could be seen as the flip side to the concept of human security. Refugee protection, therefore, becomes intertwined with issues of humanitarian intervention, or more specifically with the issue of when intervention can be justified, or ought to be undertaken, on humanitarian grounds. Whilst debates rage on whether or not to intervene in a humanitarian crisis, refugee flows have usually already begun. These issues are very much context specific, with it being difficult to predict in advance whether a crisis might be best alleviated by humanitarian intervention (assuming the political will is there to make this a realistic possibility) or one that cannot be tackled with intervention. But for refugee law, issue of humanitarian intervention ought not to intrude too much. Refugee law is set up to respond to specific requests from specific individuals who ask for refuge. It is, therefore, formally immaterial whether humanitarian intervention is already underway, being contemplated or has been entirely ruled out in the applicants' country of origin.¹²¹

¹²¹ Although, of course, this might have a bearing on return of refugees and would be relevant to general country of origin reports, it should not impact on the initial individual assessment of refugee status. However, determination of refugee status ought to be kept quite separate from issues of humanitarian intervention. Humanitarian intervention and refugee status overlap only in the cause of refugee flows and the assessment of security in the country of origin; where a country is so instable so as to attract calls for, or debates over, humanitarian intervention, human security has clearly been threatened and refugee flows ought to be considered likely. Although individual, many people from the same area or background can be

Refugee status ought to be seen as *another* method of protecting individuals whose human security has been threatened, one which can be viewed alongside humanitarian intervention and other tools to combat violations of human security, such as diplomatic pressure or sanctions. This purpose is reflected in the cessation of refugee status once the situation resulting in the need for a refugee claim ceases to exist.¹²² This cessation clause can only be applied, however, once it has been properly confirmed the human rights situation has altered considerably.¹²³ UNHCR guidance reminds decision makers that refugee status further may *only* cease if the situation has changed

experienced refugee status simultaneously. Mass violations of human rights are the subject of refugee status if refuge is applied for by these victims. These distinctions have been overlooked in the past with disastrous results, one need only think of Srebrenica to see that ruling out refugee status for individuals in areas where humanitarian intervention is being considered or even taking place may result in tragedy and a contradiction to the purpose of the Refugee Convention. See also Helton *The Price of Indifference* (Oxford University Press 2002).

¹²² Article 1C(5) and (6) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

(5) He can no longer, because the circumstances in connection 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; Provided 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 avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because 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; Provided 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.

¹²³ The UNHCR provides guidance to states as to when it is appropriate to seek voluntary return following cessation of refugee status, See, for example, UNHCR's formal declarations of general cessation: "Applicability of the Cessation Clauses to Refugees from Poland, Czechoslovakia and Hungary", 15 Nov. 1991, "Applicability of Cessation Clauses to Refugees from Chile", 28 March 1994, "Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique", 31 Dec. 1996, "Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania", 1 Oct. 1997, "Applicability of the Ceased Circumstances; Cessation Clauses to pre-1991 refugees from Ethiopia", 23 Sept. 1999, and "Declaration of Cessation – Timor Leste", 20 December 2002.

in relation to the specific Convention ground upon which the refugee's claim succeeded.¹²⁴

In particular, the granting of refugee status might be pertinent where direct intervention would be unlikely to significantly prevent violence and would, therefore, be likely fail any proportionality test. If the threshold for humanitarian intervention remains high, with, for example, factors such as the chance of short-term prevention of violence, long-term stability and probable casualties for the interveners having all to be taken into account, some alternative must be presented. There are cases where the threshold for intervention is arguably not met and other measures such as sanctions have little or only very slow impact in which people will be forced to leave their homes. In addition, there may be cases where intervention would be entirely disproportionate, for example, where the target of violence is a small minority in the country with no forces for interveners to support or where this violence takes place in private homes. In these cases, international responsibility is not limited to making appeals to the home state. Refugee status, and the ensuing protection from the host state, are then, a "situation specific human rights remedy."¹²⁵

The argument for refugee status being seen as a human rights remedy is backed up by article 35, which governs the cessation of refugee status. Refugee status can be revoked when, and only when, the threat of persecution (the violation of human rights) ceases. It must, then, be an option for those

¹²⁴ See, amongst others, UNHCR Handbook, para. 116.

¹²⁵ Hathaway *The Rights of Refugees under International Law* (Cambridge University Press 2005) 143. Again this view is confirmed by cessation of refugee status once the situation has also ceased.

who seek it whilst the threat of persecution remains. Refugee status, to repeat, is a reflexive process, it is triggered by the application for refuge and responds to the violation of an individual's human rights. At the very least, responsibility is engaged when an application for refugee is made.

The concepts of human security and responsibility to protect, however, suggest that members of the international community who can provide security may in fact have a broader responsibility to refugees so triggered by the violation of human rights (and human security) inherent in refugeehood, which will be explored in more detail in the next chapter. Refugee status, as briefly explored in chapter one, was intended to provide surrogate protection where national protection had failed. As Fortin underlines, "the whole reason the refugee convention was introduced was to combat the inferior position of individuals who are stateless or *de facto* stateless find themselves in, in a world where nationality provides access to enforceable rights."¹²⁶ If the Refugee Convention, and not only refugee status, was designed to provide enforceable rights without recourse to the home state then the international community, and the individual states that make up this community, arguably have a specific obligation to provide a place of refuge either directly or indirectly in order to fulfil their duty to protect human rights. Without such a system, human rights remain effective only within a political community and would not, then, in any real sense be universal. The claim to be constructed here is as follows: where an interest is worth protecting (as human dignity is for the reasons set out above) then this interest produces a right to have that interest

¹²⁶ Fortin (n 1 chapter 4) 562. This is also the thrust of Hannah Arendt's claim that with a loss of effective nationality, refugees have lost 'the right to have rights' (n 71).

protected either by non-interference or through positive action depending on the interest and circumstances.

5.6 Duty to rescue by admittance

There can be said to be a *de facto* duty to rescue by admittance for all refugees seeking recognition whether in country, at the border or, in international waters, seeking to reach a border. This duty to rescue by admittance, it is argued, is based on the assertion made in the previous chapter that international human rights are intended, and ought to, protect human dignity as an entitlement of every human being. The practical need for a duty to rescue was taken up also in the Council of Europe Report into the 'Lives Lost in the Mediterranean Sea: Who is Responsible?' The title alone makes it clear that it is possible for a state, or several states, to be *responsible* for the deaths of individuals who they fail to rescue at sea and that, indeed, someone must be responsible. In the report, the authors accused many of the ECHR signatory states of 'double standards in valuing human life'¹²⁷, which created an unacceptable 'vacuum of responsibility.'¹²⁸ Nowhere is the failure of a duty to rescue in relation to refugees clearer than at sea, although brought again into the limelight by the *Hirsi* case, the practice of ignoring refugees at sea is nothing new.¹²⁹ It is, however, becoming ever more frequent and deadly; the

¹²⁷ [12] 3 available at http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf (accessed on 20/4/2012).

¹²⁸ *ibid* [13.1] 3.

¹²⁹ Similar fates were suffered by Vietnamese refugees, so-called 'boat refugees', Haitian refugees attempting to reach Florida dubbed 'boat people' by the US Media from the late 1970s throughout the 1980s and 1990s, see, Goodwin-Gill 'The Haitian Refoulment Case: A Comment' (1994) 6 *International Journal of Refugee Law* 103 and Hathaway 'Labelling the 'Boat People': The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indo-Chinese Refugees"(1993) 15 *Human Rights Quarterly* 686 or Tsamenyi *The Vietnamese boat people and international law* (Griffith University Press 1981).

Council report estimated that 1,500 people had lost their lives attempting to seek asylum in Europe by crossing the Mediterranean sea in 2011 alone and that the majority of these victims were not lost at sea but instead were left to die by passing ships and aircraft including many military carriers.¹³⁰ These raised the question, explored in some depth by the Council report but still largely unaddressed by governments, as to who is responsible in such cases and how this responsibility intersects with international refugee law. Given that the established purpose of the Refugee Convention is to provide surrogate protection, it seems surprising, as well as horrifying, that those seeking refuge are not afforded *any* protection.

If the Refugee Convention is expressly to provide surrogate protection, coupled with the responsibility of the entire international community for protecting and respecting human rights, some remedy for a lack of available protection must be supplied. Of particular note is the ruling in *M.S.S v Belgium and Greece*¹³¹ in which the court found that not only could particular articles of the ECHR be violated in relation to the treatment feared or suffered in the applicant's home country but also that the article 13 right to an effective remedy in respect of these rights could be violated by states returning individuals without first ascertaining refugee status. This again characterises refugee status as a remedy available to those in need of international protection from human rights abuses and that the failure to provide this remedy, in certain circumstances, could be a breach of international law. A duty to rescue by admittance could be seen as logically connected to this right to an effective remedy; for refugees, without states being obliged to allow

¹³⁰ n 106 [5].

¹³¹ *Appeal no. 30696/09* (2012).

entry, any right to an effective remedy would be toothless. This points towards the need for an acknowledged duty to rescue by admittance for refugees to be expressed in international law as a duty under the Refugee Convention and international human rights treaties.

In addition, it is argued that the refugee, fleeing in order to find somewhere that recognises his or her inherent human rights, has particular call on international protection. As Hathaway notes, “the special ethical responsibility towards refugees follows not just from the gravity of their predicament, but also from the fact that it is always possible to address their plight in ways that, sadly, we still cannot for those who remain inside their own country.”¹³² Not only is the refugee fleeing persecution, which triggers international protection, but there is an additional element when considering a duty to rescue refugees, the refugee is in danger whilst in flight. Judge Cancado Trindade at the ICJ reminded the court that “[h]umaneness comes to the fore even more forcefully in the treatment of persons in situation of vulnerability.”¹³³ A particular element of the duty to rescue is the strength of this obligation in cases of emergency. The duty to rescue is said to stem from the duty of beneficence, which is derived from the concept of personhood, and is not, therefore a form of charity because performance of this duty is “no reason for self- congratulation.”¹³⁴ It has been argued that this is not an

¹³² 'Is Refugee Status Really Elitist? An Answer to the Ethical Challenge' in Carlier and Vanheul (eds) *Europe and Refugees: A Challenge?* (Kluwer 1997) 79, see also 87-8.

¹³³ Separate Opinion (No. 88) [12]. Judge Cancado Trindade went on to remark that, “under human rights treaties and instruments, which conform a Law of protection (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim” (para 13.) See also Cancado-Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

¹³⁴ Cited in L Weinreb *Natural Law and Justice* (Harvard University Press 1987) 1 43. See also EJ Weinreb, 'The Case for a Duty to Rescue' (1980) 90 *Yale Law Journal* 247

absolute duty in the Kantian sense as there is room for the actions taken to fulfil the duty to be more or less 'helpful'.

Locke's insistence that we have certain rights to do as we like which exclude certain demands being placed upon us is often cited in support of these views. Locke argued that there is only a duty of charity (an imperfect obligation) to others. However, some support for a duty to rescue, based on consequential arguments, can be seen in the so-called Lockean proviso 'one can acquire previously unowned things only if the acquisition does not worsen anyone's overall condition.' Weinrib, however, argues that the emergency situation negates the 'play room' otherwise inherent in the duty of beneficence, but this is only because "an emergency marks a particular person as physically endangered in a way that is no general or routine throughout society."¹³⁵ The emergency situation is what justifies the infringement of the rescuer's right to liberty, usually used to defeat imposition of a general duty to rescue. This is the basis of good Samaritan laws in France and Germany and can be used to impose a duty to rescue by admission in the circumstances of refugeehood.

Further, to counter Lockean decriers of duties to rescue, Michael Menlowe transfers the Lockean proviso from property rights to rights more generally to contend that the rescuer can be seen as a monopoly provider of a service- the service of a rescue. If the Lockean proviso applies, argues Mennlowe, a potential rescuer can only refuse to perform the rescue if it would not worsen anyone's overall condition (which in a rescue scenario would be highly improbable). Further opposition to the denying a duty to rescue based on the

¹³⁵ L Weinreb *ibid* 143.

value of liberty can be found in J.S Mill's argument that the liberty of another is as fundamental a value as one's own liberty. If this is so then the extent to which the other's liberty is threatened, relative to the rescuers is relevant. If liberty- in the general sense- is a fundamental value then there is a moral requirement to rescue because it greatly increases the liberty of the person rescued (whilst only momentarily infringing the rescuers liberty). Following this line of argument, the duty to rescue refugees could be seen to be a strong one- the fact that the appeal for rescue is made in life and death circumstances means not only that the rescuer cannot claim that no one's overall condition is worsened by a failure to rescue but also that the infringement of liberty for the rescuer is negligible in contrast with the great(est) infringement of liberty suffered by the refugee. If the relative threat to liberty is relevant, as Consequentialists argue, then the case for a duty to rescue refugees must surely be one of the strongest.

Menlowe also points to Grotius' view that a shortage of necessities resurrects primitive property right(s) of all persons to own all things- which he transfers to talk of rights more generally to argue against the view that there is no duty to rescue. Both these views suggest that when the situation is desperate- life and death for one party- then considerations of the rescuer's liberty ought to be set aside or, at the very least, have less value attached to them. In terms of refugees it is clear that the situation is a life and death one- or at least the claim is being made that it is so. It would be difficult to maintain, therefore, that the right of the rescuer to not have his liberty infringed- in the case of asylum, the right of potential host states avoid the burden if they so wish- detracts from any duty to rescue. A duty of charity would not suffice to

protect the majority of refugees. Menlowe gives the example of a person in a boat and states that on this logic the person in the boat would have no right to refuse a drowning person a space in the boat but they could, however, refuse to throw them a rope to climb aboard. Similarly, for refugees, the duty to protect is equally elusive if there is no duty to admit.

Although the peril is perhaps more immediately obvious for those at sea, it could be argued all refugees presenting themselves at a border are in an analogous situation in that they are in danger. This assertion has rarely been tested in court but can be gleaned from cases, for example, concerning enforcement visa, in which it has been held that denial of a visa in circumstances where an individual is seeking to asylum could amount to *refoulement*.¹³⁶ The denial of visas to those seeking entry (for the purpose of seeking asylum) could be seen as part of what Kesby terms 'the exportation of borders' such that "the experience of seeking entry into a third state may arise for some people while they are still at home. Although they are physically absent from the state into which they are seeking entry, they are legally present to the extent that immigration law is applied extra-territorially to deny their admission."¹³⁷ If we follow the logic from the *Hirsi* case then if effective control is exercised then the state can be said to exercise control over the individual and is bound, therefore, by the refugee convention including article 33. As *W.M. v Denmark*¹³⁸ recognised article 33 is violated if the denial

¹³⁶ The case establishing this principle *W.M v Denmark* (1992) Ap. No. 17392/90 (14/10/1992) concerned 17 citizens of East Germany who had entered the Danish embassy to request visas to travel to West Germany. The visa applications were denied and the individuals were forced to return to East Germany, here held the ECtHR, visa denial amounted to *refoulement*.

¹³⁷ Kesby (n 74) 110.

¹³⁸ n 114.

of a visa results in the individual either being forcibly removed to the home state or having no option but to return where there is a risk of serious human rights violations upon return. There is no significant conceptual or legal distinction between refugees at sea, those denied visas to enter, those denied a means to travel to safety¹³⁹, and those denied entry upon presentation at the border. These measures not only make illegal entry more appealing, leaving genuine refugees at the mercy of those willing to provide false documents and passage to a secure country, contributing to the problem of human trafficking but also, in the case of genuine refugees, amount to violations of article 33.

This must be the case if refugee status is declaratory. As Goodwin-Gill argues, “the duty to protect refugees arises as soon as the individuals or group concerned satisfy the criteria for refugee status set out in the definition.”¹⁴⁰ Thus, irrespective of whether the status is formally acknowledged, once the circumstances of refugeehood are present the duty to protect is triggered. The duty falls most certainly on the international community as a whole, and states may be required to act as part of the international community, but it may also become attached to a specific state if the refugee(s) can be said to be within the jurisdiction of the potential host state. Aside from the specific duty attaching where states already exercise control over an individual, this general duty may be also be strong where the state is able to assist the refugee, as Gibney states, the duty falls on states “as they control what refugees seek, namely access to secure territory.”¹⁴¹ Benyani argues “the theory of State responsibility rests on a simplistic but complex practical proposition. It is that

¹³⁹ Such as those who are unable to travel due to legal restrictions placed on airlines.

¹⁴⁰ Goodwin-Gill (n 108) 103.

¹⁴¹ Gibney *Open Borders Closed Societies? The Ethical and Political Issues* (Greenwood Press, 1988) 155.

every state must be held responsible for the performance of its international obligations under the rules of international law, whether such rules derive from custom, treaty or other sources of international law.”¹⁴²

5.7 Conclusions

This chapter has argued that each member state of the international community has a duty not only to observe their international obligations in respect of their own citizens but also in relation to the citizens of other states. This requires states to act positively to protect the human rights of those in danger. Refugees pose a particular challenge to the notion of generalised obligations in that refugees assert their claim to human rights protection in asking to be granted refugee status by a specific member state. It has been argued that at this point, the generalised obligation to protect human rights becomes a specific obligation addressed to the state in which the claim to refugee status is made. It has also been argued that the general obligation to protect human rights demands also that states act to ensure refugees have a place in which they can claim refugee status and receive protection. This requires collective action to ensure that states adhere to their international obligations to provide protection through the notion of ‘Responsibility to Protect’. This chapter has sought also to bring the duty to rescue via the concept of the Responsibility to Protect into the sphere of refugee law and to recognise that refugee status operates as a method of fulfilling both the general duty to rescue and responsibility to protect those in danger that may

¹⁴² Benyani ‘State Responsibility for the Prevention and Resolution of Forced Population Displacements’ *International Journal of Refugee Law* 130, 130.

become addressed to specific individuals- or countries- where refugee status is sought.

Chapter 6 Case Study: Collective Violence, Political Violence and

Gender

The chapter addresses the issue of gender-related persecution and the interplay between concepts of gender, violence and, above all, 'the political' within international refugee law. It considers the extent to which the challenges facing female refugees may be overcome by a creative interpretation of the Refugee Convention, consistent with correct principles of international treaty interpretation. It seeks to link many of the arguments and observations made in the previous chapters to some of the issues raised by applications for status from female refugees, focusing specifically on those putting forward so-called 'new' claims to refugee status such as the victims of domestic violence and sexual violence. Chapter three looked at the right to a dignified life and the notion of human dignity as capable of breaking down some of the barriers to human rights claims. In particular the notion of a dignified life was said to create a bridge between negative and positive rights and explaining why cumulative persecution is rightly covered by the Refugee Convention. The notion of human dignity was also set out as breaking down the distinctions between generations of rights, especially when analysed through the notion of discrimination.

These observations are of particular relevance to female refugees who, as a victim of gender discrimination, for example, may seek to rely on cumulative persecution or the infringement of second and third generation rights. Female refugees however may well also be relying on first generation rights. However this chapter will demonstrate that whilst the observation made in

chapter three that violation of first generation rights are rarely questioned as forms of persecution this is not always the case when it comes to female refugees. In particular the notion of private violence will set out as excluding many otherwise clearly persecutory acts. Chapter four argued broader concept of 'the political' lies behind article 1(2) than traditional interpretations of refugee law might suggest. This assertion, it is argued here, will help break down many of the assumptions clung to in refugee law that are especially damaging to female refugees, who continue to fall the wrong side of an untenable public/private divide. By examining the claims put forward by female refugees, in particular, one can see not only the impact of the restrictive definition of 'the political' but also the usefulness of the concept of collective violence in demonstrating how previously excluded experiences may be included within the definition of refugee without sacrificing conceptual clarity.

It is further argued that the plight of female refugees shows that this widened interpretative scope is not only conceptually possible but practically necessary not only to protect individuals in danger but also to send clear signals about the types of violence that give rise to international protection. This places refugee status firmly in the 'condemnatory' camp, rejecting the view that the granting of refugee status does not pass any judgment on the home state.¹ In

¹ In some cases, condemnation of the home state may not be fore-grounded. For example, the state concerned may be found to be unable to provide effective protection despite best efforts to do so. This does not necessarily imply any condemnation but may be a mere finding of fact. However, for other cases, particularly those involving a finding of lack of effective protection against societal attitudes, condemnation may seem to form part of the reasoning. The judgments in the case of *Shah and Islam (n 78 chapter one)v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 20 demonstrate how difficult it is to avoid condemnation in cases involving findings as to general

doing so this engages refugee law also in the struggle between cultural relativism and cultural imperialism. Refugee status, in addressing violence against women inflicted as a form of collective violence, becomes also a statement about types of behaviour that international society deems unacceptable. It has the potential to move gender violence into the category of internationally condemned prejudice along with violence underpinned by racial, religious and politically prejudice.² In exploring the treatment of female refugees this chapter seeks to examine these issues in the context of refugee law. This follows Buss in advocating recognition of “the ‘messaging’ work of law, in which trials, verdict and punishment communicate legal and social meaning about the rule of law, for example, and help build normative consensus.”³

societal attitudes in the home country. If refugee status is to be granted, there must be some judgment as to the unacceptability of the attitudes of many in the home society. The decision here turned on whether the applicants, both Pakistani women who were victims of domestic violence, were subject to persecution on a Convention ground. This involved evidence as to the prevalence of domestic violence in Pakistan as well consideration of the attitudes of Pakistani society, religious leaders and government to this violence. As Lord Hoffman’s judgment noted, findings of fact “cannot be ignored merely on the ground that this would imply criticism of the legal or social arrangements in another country.” It is trite to say it implies criticism to find that the attitudes of society such so as to allow and even encourage violence against one section of society yet it is often stated that “[t]he role of the international community... is not to condemn the country of origin” (Carlier (n 54 chapter 4) 705.)

² The same can also be said of cases where discrimination and violence are suffered on grounds of sexuality.

³ Buss ‘Performing Legal Order: Some Feminist thoughts on International Criminal Law’ (2011) *International Criminal Law Review* 11 409 413. Buss argues, “Criminal law... can be read discursively for the ideas and legal subjects called into service in its operation, and it can be examined in terms of its material effects, for example, on particular communities” *ibid* 411. Although refugee law does not have the extensive reach and direct societal impact of domestic criminal law, decisions on refugee status can still send clear signals as to the types of violence that are recognised as attracting international protection. Here deterrence of such violence may be far more indirect than criminal law but bringing such violence within the protective scope of international law is a considerable step forward in and of itself.

The chapter will explore the concept of gendered-persecution, focusing particularly on rape and domestic violence as acts constituting persecution, and trace the development of gender-persecution as a recognised legal category. It will also highlight the problems still facing victims of gender-persecution seeking recognition as refugees today. It will consider first the main hurdles facing female refugees seeking to establish refugee status, in particular the so-called 'public/private divide', before going on to consider how the concept of collective violence might move refugee law away from such dichotomies and towards a more inclusive definition of refugeehood. The chapter will begin by considering the marginalisation of female experiences within the refugee definition caused by restrictive interpretations of key concepts, in particular 'persecution' and 'political opinion'.

6.1 'Private Violence'

Women, in particular, can face considerable hurdles in establishing refugee status. This, it could be argued, is because refugeehood is traditionally associated with young men and the conceptualisation of refugee within international refugee law has often sidelined, if not entirely overlooked, women's experiences of refugeehood in anything but the most exceptional circumstances. There is an overriding practical reason for this; women are less mobile than men in many refugee-producing countries. This section seeks to address the issues female refugees face in being recognised as refugees but it should be noted that for most persecuted women the biggest issue is one of mobility, they are simply unable to cross borders or travel far enough to reach a potential host country, which means that the Refugee Convention and article 1(2) is simply never engaged. Thus, the majority of inhabitants of so-

called 'refugee camps', in places like Sudan, are women and children yet the majority of asylum applications in host countries come from (young) men.⁴

For those women who do manage to cross a border to submit a claim there are two main barriers preventing successful refugee status applications.⁵ Firstly, forms of persecution suffered disproportionately or solely by women, such as rape, FGM and domestic violence, were traditionally excluded from the legal concept of persecution on the basis that they represented *private* violence. The significance of labelling violence as private was the exclusion of the acts from the concept of 'political persecution', a core notion in defining refugeehood. The traditional approach to persecution argued that in order to constitute persecution, as opposed to 'mere violence', the act must be *public* in nature.

Secondly, *if* the woman succeeded in establishing that the treatment she had suffered amounted to persecution, applications were rejected on the basis that she could not demonstrate a 'Convention ground' for this persecution. That is to say, the asylum adjudicators and appeal courts, argued that violence, even

⁴ See Ceneda (February 2003) *Women asylum seekers in the UK: A gender perspective - some facts and figures*, London: Refugee Women's Resource Project at Asylum Aid http://www.asylumaid.org.uk/New%20WRP/RWRP_RRP_Publicationsdownload.Htm and Refugee Women's Resource Project (November 2005) *Gender issues in assessing asylum claims: spreading good practice across the European Union*, briefing by the Refugee Women's Resource Project, tabled by the UK Government at the Intergovernmental Committee Asylum Working Group meeting in Geneva on 15/16 November 2005 <http://www.asylumaid.org.uk/New%20WRP/RWRP%20Publications/GenderissuesintheasylumclaimintheEUNovember2005.pdf>

⁵ A gender-specific approach might be said to have been slow in emerging in Britain, for example, a Home Office published in 2004 found only six academic publications on refugee women and integration in the UK produced between 1996–2001 <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr2803.doc>. This is perhaps less surprising when one considers in the preceding year (2003) only 31% of asylum seekers were women. Available at http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/gender_issues_in_the.html? [accessed 10 January 2012].

where it amounted to persecution, did not establish refugee status unless it could be shown to have been primarily motivated by a Convention ground (such as race, religion, membership in a particular group). It has been observed “[g]ender is absent as an overt ground for protection under the Refugee Convention and readings of the Convention have commonly excluded it.”⁶ It might be thought that gender as an overt ground for protection is unnecessary. Following the recognition of women’s rights as human rights in CEDAW⁷ in the 1970s it seems shocking, although perhaps unsurprising, that female refugees still struggle(d) to get their claims recognised.

A central conceptual obstacle in establishing a claim to refugee status based on gender violence is a confusion, or conflation, of violence against women and gender violence. Gender violence is often used simply as a synonym for ‘violence against women’ i.e. violence where the victim is a woman. This not only overlooks the possibility of men being subjected to gender persecution but also muddies the conceptual category of gender violence to an extent that can render it meaningless. There are distinct forms of harm involving different elements of gender persecution:

‘gender-specific harm’ refer to harm that is unique to, or more commonly befalls, members of one sex ... [and] ‘gender-related persecution’ refers to a

⁶ McPherson *et al* ‘Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-seeking Women in Australia’ *Journal of Refugee Studies* (2011) 24 (2) 323, 323.

⁷ n 16 chapter three.

causal relationship between the persecution and the reason for the persecution [ie the victim's gender].⁸

A woman may be subjected to violence as a woman or *because* of her gender. Equally, a man might be subjected to violence as a man or *because* he is a man. Only the latter is gender-related persecution or 'gender-specific violence'.⁹ This important conceptual distinction is also reflected in arts 7(1)(h) and 7(2)(g) of the *Rome Statute* where it is acknowledged that persecution may be suffered solely due to socially constructed roles of male/female or that persecution may take a specific form because of the socially constructed roles of male/female.¹⁰ Despite the danger of oversimplification, a general observation can be made at this juncture that there is an important distinction between 'gender violence' and 'violence inflicted due to the victim's sex'. To accurately reflect real experiences, to clearly see the existing problems and to combat such problems in the future, it is necessary to be clear about the type of violence being dealt with. Whether a crime is labelled as gender violence or not is of empirical and conceptual importance in order to have a clear conceptual and legal category to be applied in the future. The conflation of these two distinct forms of violence, violence against women and gender

⁸ Roberts 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 159 164. In an observation as pertinent to international criminal law as to international refugee law, Roberts observed the distinction between gender violence and violence against women. Although it may be useful analytically we should keep in mind that persecution may be multilayered, *ibid* 189.

If a woman who was vaginally raped would have been persecuted in another way had she been a man, then the crime may be gender-specific, but it would not amount to gender-related persecution. However, if that woman would not have been subjected to persecution had she been a man, then the persecution may be gender-related.

⁹ For discussion of gender violence perpetrated against men, in particular the use of sexual violence with the intention of 'emasculating' victims, see, e.g., Sivakumaran 'Sexual Violence against Men in Armed Conflict' (2008) 18 *The European Journal of International Law* 253.

¹⁰ The *Rome Statute* could be said to provide solid legal footing for addressing gender violence as a separate crime.

violence, has been particularly damaging to female refugees. Gender violence, it is argued here, is rightly included within the scope of article 1(2). The conceptual explanation for the inclusions of gender violence within article 1(2) is offered through the concept of collective violence. It is argued that gender violence is a form of collective violence.

In order to assess gender violence, we must consider whether the victim's gender was a key factor in explaining the violence. If another causal factor was primary such as race, religion or ethnic origin, then although the form of violence may have been selected due to the victim's sex, this would not be primarily categorised as gender violence. Throughout the 1980s and 1990s applications for refugee status by rape victims were routinely denied on the basis that the motive for the attack had been *personal* ('because *she* is a woman') rather than political, racially or religiously motivated. In the United States, the case of *Campos-Guardando*¹¹ is considered by Anker to have resulted in a "sea change"¹² in judicial attitudes towards rape victims seeking asylum. Ms Campos-Guardando, a native of El Salvador, sought refuge in the US after she was raped by political opponents of her Uncle, whilst he, and other male relatives, were murdered. A federal court found that Ms Campos-Guardando was not a refugee as rape constituted private violence and could not, therefore, be classed as persecution. The outcry post-*Campos-Guardando* saw a judicial change of heart by the time Ms *Lazo-Majano* filed a very similar claim later that same year, asylum was granted on the basis of rape constituting persecution inflicted due to 'imputed political opinion.' Similarly, in Germany asylum was granted under the German constitutional provision granting

¹¹ *Campos-Guardado v INS* 809 F. 2d. 285 (5th Circuit 1987).

¹² Anker (n 83 chapter 1) 140.

asylum to political persecutees to a Romanian woman sexually abused by the mayor of her town.¹³ Although, as Anker states, the outcry surrounding the decision in *Campos-Guardando* resulted in a shift in views of rape in the context of asylum decisions- at least where the victim could demonstrate a clear political motive behind the attack- this did not result in an immediate change in attitudes to other gender-targeted violence or a lessening of the emphasis on public violence. As Peace notes, “Where rape has been interpreted as persecution the decision-making body of the relevant jurisdiction will have been convinced of the political dimension of the relationship between the violator and victim, the significance in asylum claims is upon this causal link and proving it is crucial to the case.”¹⁴

The problems for other areas of international law, specifically international refugee law, in ignoring the gender element to acts of violence can be when one examines refugee cases concerning sexual violence as a form of persecution following the ICTY case of *Kunarac*.¹⁵ In *Kunarac*, three male defendants were convicted of the mass rape and enslavement of Muslim women during the conflict in Bosnia and Herzegovina.¹⁶ This built upon the

¹³ CAS/DEU/95. For other cases where applicants were successful in having sexual abuse recognised as persecution, see, Appeals Nos. HX/73695/95 (17 May 1996) (unreported) and HX/70880/96 (10 Feb. 1997) (unreported) in Crawley *Women as Asylum Seekers; A Legal Handbook*, (ILPA 1997) 59. These cases, the first the case of a Kurdish woman from Turkey whose gang rape by Turkish police meant she had suffered persecution and similarly, in the second case, the granting of asylum to a Kenyan woman who was raped by police officers because of her alleged political opposition. In both these cases refugee status was awarded because 'state responsibility and grounds for persecution were clear' (Crawley, *ibid*) yet as Peace notes “Where these factors are not as unambiguous -the granting of asylum is less certain” (‘An Examination of the International Understanding of Rape and the Significance of Labeling it Torture’ 2003 *International Journal Refugee Law* 534 556).

¹⁴ *ibid* 557.

¹⁵ *Kunarac* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

¹⁶ *ibid*.

precedent that rape could be an act of genocide set by the ICTR in *Prosecutor v Akayesu*¹⁷ and represented the first prosecutions and convictions of rape as a crime against humanity. In recognising rape as a weapon of war, *Kunarac* marked a radical transformation of the position of sexual violence in international law.

The classification of rape as a crime against humanity had a considerable influence on the jurisprudence of refugee law and, in particular, the central term 'persecution' in the definition in article 1A(2). Initial reactions to *Kunarac* hailed it as a victory for feminist jurisprudence,¹⁸ in particular, as a challenge to the private/public dichotomy that had previously seemed so entrenched in international law.¹⁹ The definition of 'refugee' contained in the *Refugee Convention* requires, amongst other elements, that the refugee fears or has been a victim of persecution on *Refugee Convention* grounds — specifically due to the refugee's political opinion, religion, race, ethnicity or membership of a particular social group; these grounds often seem to require a clear public element. The public/private divide often, if not invariably, served to place activities of women and violence against women in the *apolitical* private sphere. This has the effect that '[i]n an international society peopled by States, women are analytically invisible because they belong to the State's sphere of personal autonomy'.²⁰

¹⁷ *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

¹⁸ Bergoffen 'Towards a Politics of the Vulnerable Body' (2003) 18 *Hypatia* 116 117.

¹⁹ Oosterveld 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution' 17 *Duke Journal of Comparative and International Law* 49 70.

²⁰ Knopp, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293 295.

Since the ICTY characterised rape as a crime against humanity in *Kunarac* it has been accepted that rape in and of itself is conduct amounting to persecution.²¹ To this extent, *Kunarac* has resulted in great progress for international refugee law by challenging this public/private divide. Yet, *Kunarac* has not dismantled this divide entirely and indeed it could be said to have reinforced this dichotomy by relying heavily on the circumstances of war and genocide to 'bring the private into the public'.²² The mixed legacy of the approach taken by the ICTY in *Kunarac* has rendered it the subject of much debate, particularly amongst feminist scholars.²³ Some feminists, in particular MacKinnon, argues persuasively that the approach taken was valid as the most significant factor of rapes in Bosnia was their part in the genocide against non-Serbs; thus, the extreme nature of these rapes as genocide committed by the Serbian military forces should be emphasised.²⁴ Yet, other feminists cautioned against overplaying the exceptionalism of 'mass rape' as genocide, arguing that rape as genocide would set too high a threshold that

²¹ *Kunarac* (n 14).

²² *ibid.*

²³ See Copelon 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243, 264; Edwards, 'The "Feminizing" of Torture, 356-7; Oosterveld, 'Gender, Persecution, and the International Criminal Court' 70.

²⁴ MacKinnon 'Rape, Genocide, and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5. MacKinnon did, however, express concern that this emphasis led to the rape not perpetrated by Serb forces. Similar concerns have been expressed in connection with the ICTR prosecutions of rape as genocide, in *Prosecutor v Kajelijeli*, the dissenting judgment noted that 'rape and sexual violence were exclusively perpetrated against Tutsi women (of which only some cases were reported to us) and were committed on grounds of their ethnicity': *Prosecutor v Kajelijeli (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-98-44A-T, 1 December 2003) [97] (Judge Ramaroson). Although Buss notes that there is considerable evidence of rape of Hutu women as well, this could not be charged as genocide "[t]he rape of Hutu women could only be prosecuted as a crime against humanity if it could be shown the rape of the Hutu woman constituted or was part of the attack against the Tutsi population ... Under art 4 of the ICTR statute, rape of Hutu women could be prosecuted as a war crime, though this is generally seen as a less significant category of crime than genocide or crimes against humanity" Buss (n 3) 159.

might erase less exceptional forms of violence against women.²⁵ Of particular note here is the argument that ‘rape and genocide are separate atrocities’ and that eliding them means that international condemnation would be confined to particular facts and circumstances.²⁶

Following *Kunarac* and building on the ICTR, the approach has been to label sexual or domestic violence as ‘cruel, inhuman or degrading treatment’ amounting to torture as recognised in international law under the *Geneva Conventions* and the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘UN Convention against Torture’).²⁷ It is noteworthy that international law has chosen to link rape predominately with torture rather than classifying it as its own form of cruel, inhuman or degrading treatment.²⁸ Whilst linking rape to torture rightly recognises the

²⁵ See especially Copelon (n 22) 245–8.

²⁶ *ibid* 246. Although rape was charged separately as a crime against humanity and a method of genocide, the context of armed conflict is a key element to both crimes. Although armed conflict is not a necessary element to label a conduct a crime against humanity, the requirement that such a crime is part of a widespread or systematic attack is easily satisfied by the armed conflict context and is thus a short cut to moving individual instances of violence into the realm of international law. This presents a problem for victims of similar conduct outside of an armed conflict if the wider conflict is seen as of primary importance in rendering the conduct of international relevance, *ibid* 257.

²⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

²⁸ This is not to argue that it cannot be both but rather that international refugee law through the *UNHCR Gender Guidelines* (n 14 chapter 4) and *Kunarac* has chosen to focus on rape as torture. A similar definition of rape as torture was put forward by the ICTR in *Akayesu* (n 16) the trial chamber stated [687]:

[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

However, the *Semanza Trial* rejected a requirement of state participation or acquiescence stating that ‘outside the framework of the Convention against Torture, the “public official” requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity’: *Prosecutor v Semanza (Judgment and Sentence)* (International Criminal

seriousness of the act, it might also be said to perpetuate the view that only sexual violence with a clear public element is of international concern and that other violence remains in the realm of domestic law. This is not an inevitable result of labelling rape as torture, rather this result is due to the prevailing interpretations of torture under international law such as in the *UN Convention Against Torture* which still contains a requirement that the act is committed by public officials.²⁹ Although other definitions and interpretations that do not require state involvement are available “[v]ery few cases have raised rape or other forms of sexual violence, and only an exceptional case has sought redress for harm outside state custody or by non-state actors, in spite

Tribunal for Rwanda, Trial Chamber, Case No ICTR-97-20-T, 15 May 2003) [342]. It is disappointing that the *Kunarac* approach to linking rape to torture has been the more influential, particularly in refugee law: *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001). The *Akayesu Trial* (n 16) approach not only removes the requirement of state or military involvement but also contained a clear statement that coercive circumstances need not include force but that threats and intimidation might be sufficient. This moves us a step away from a general requirement of an armed conflict or wider violent context such as genocide (although, of course, this was a requirement for the prosecutions before the ICTR).

²⁹ See, for example, Byrnes ‘The Convention against Torture’ in Askin and Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers 2000) 183–4, 187, 189; Romany ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 85, 85–6; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’) provides in art 7 that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] consent to medical or scientific experimentation’. Although usually used to address torture within state custody, art 7 does not positively require a state agent and the Office of the High Commission for Human Rights has urged that it be interpreted in a non-discriminatory way: see Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (vol I) (10 March 1992) para 2, 13; Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8]. However, the ICCPR is not the primary instrument used in international criminal law but is instead used when litigating torture as a human rights violation.

of favourable commentary and jurisprudence on these forms of torture in recent years.”³⁰

The impact of rape framed as a method of torture focuses on two key areas which are not of great value to refugee law and arguably fail to represent the totality of the crime of rape — namely, rape is portrayed as a weapon of war and as a form of torture connected to sexuality, rather than gender. This characterisation of rape makes it relevant to international law specifically only *during* armed conflicts. The fact that the sexual violence had taken place during an armed conflict was of considerable importance to the ICTY in their convictions in *Kunarac* as it provided the authority to the Tribunal to charge the defendants.³¹ As noted above, the approach was not to focus on the individual cases but on the coercive circumstances created by ethnic strife and armed conflict with the effect that where the Tribunal determined that sexual intercourse had taken place, consent was presumed not to have been given.³² Thus, although the *mens rea* of rape continued to include knowledge that the act occurred without the consent of the victim, after the Appeals Chamber had labelled the circumstances as ‘inherently coercive’, the issue of consent was not addressed. The unfortunate effect of the *Kunarac* approach to sexual violence was to suggest that the motive for the attack must be demonstrably linked to, or as in the case of refugee law, it must be in circumstances analogous to an international crime such as genocide to bring this within the scope of international concern. Although motive is not an element of the crime of rape, in international refugee law, the victim herself is putting forward the

³⁰ Edwards (n 22) 355.

³¹ ICTY Statute art 1; *Kunarac* (n 14) 430–431, 567–569.

³² *Kunarac* (n 14) [461–464] [567–569].

argument for rape as ‘persecution’ in order to satisfy art 1A(2) of the *Refugee Convention*. In international refugee law the focus is not on prosecuting the perpetrator or the elements of rape as a crime but on rape as an international crime in contradistinction to rape as a domestic crime. The refugee is seeking to demonstrate — and, indeed, must do so in order to receive refugee status — that the conduct amounts to persecution and is not just a crime that can be addressed by domestic law.

This requirement has the practical effect that, in order to bring conduct within the scope of art 1A(2) of the *Refugee Convention*, it is necessary by implication to demonstrate that the motive for the conduct is one that renders it *international* and not national such as those enumerated in art 1A(2) of ‘race, nationality, ethnicity, religion or membership of a particular social group’. Constructing rape as a crime against humanity required a link to systematic and widespread violence even if the rape itself was an isolated instance. Similarly, constructing rape as genocide required that the instances of rape be linked to genocide.³³ Thus, facets of the crime that are not elements of criminal conduct but form instead part of the wider context that renders the crime to be of international concern, often become conflated with the elements of the crime when the former is transposed to other areas of international law. This presents not only a confusing picture but also one where gender — as it has not been recognised as a defining element — appears not to play a central role in rendering the conduct to be of international concern.

³³*Akayesu* (n 16) [731–734].

The implication of this for other areas of international law does not necessarily concern international criminal law but, as noted above, international criminal law sets precedent for other areas of international and domestic law as it is perceived to single out the conduct which amongst the plethora of criminal conduct is capable of constituting an international crime.³⁴ Thus, the acknowledgment of rape as an international crime was conducive to the ‘moving’ of rape into the category of conduct capable of constituting an international crime *depending on the circumstances*.³⁵ *Kunarac* appeared to unintentionally establish a requirement for the motive of the crime to be such that it ‘moved’ the crime from the domestic arena to the international. Prosecutors in *Kunarac* were not concerned with motive as it is not an element of the crime of rape and the circumstances of genocide were proven separately; however, the implication of the compound ‘rape as genocide’ seems to have been taken by many when interpreting refugee law in relation to a claim for refugee status where rape is the conduct amounting to persecution to require the victim to show a similarly non-personal motive which would ‘allow’ the violence to be treated as public rather than private.³⁶ The focus on the genocidal circumstances, and by implication the motive of the perpetrator, seemed to suggest to many post-*Kunarac* interpreters of international refugee law that gender alone — which could be separated from

³⁴ For further discussion on the interaction between international criminal law and domestic criminal law see, Marston Danner and Martinez ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal law’ (2005) 93 California Law Review 75; Kadish, SH ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’ (1985) 73 California Law Review 323.

³⁵ See Pearce ‘An Examination of the International Understanding of Rape and the Significance of Labeling it Torture’ (2003) 14 International Journal of Refugee Law 534 556.

³⁶ Pearce *ibid* 557.

individual sexual desire — did not constitute a non-personal motive.³⁷ For the *Kunarac* prosecutors, the need to demonstrate motive was set aside as in the context of genocide motive can be assumed similarly to the coercive circumstances that allow the presumption of non-consent.³⁸ However, this did nothing to prevent the public/private dichotomy from being applied to claim that rapes committed outside of the context of genocide remain private violence and outside the protective scope of international law.

This approach is clearly practical and justifiable in ensuring successful prosecutions where sexual violence is rife but precise evidence is scarce; however, this approach can be problematic for setting a precedent in addressing sexual violence more generally.³⁹ The presumption of motive and non-consent are not carried outside of this context. Thus, the burden of proof remains on the women seeking international protection, particularly in refugee law where a link to a *Refugee Convention* ground is required. Female refugees have faced considerable problems in establishing gender as a non-personal motive that would ‘move’ the private violence into the public sphere and they have been unable to rely on *Kunarac* to dismantle the public/private divide entirely as had initially been predicted. This is not to say that the ICTY needed to label the sexual violence experienced by women during the Yugoslavian conflict as gender violence; quite the reverse, it can be said that

³⁷ The notion that rape is ever connected purely with sexual desire can be challenged. Although this is beyond the scope of this article, it is worth noting that even in non-political situations where the attack is directed towards a randomly selected individual, the primary motivation is likely to be either power or anger: ‘rape, then, is a pseudo-sexual act ... concerned much more with status ... [and] control ... than with sensual pleasure or sexual satisfaction’ *ibid.*

³⁸ *Kunarac* (n 14).

³⁹ Aside from the arguments present above, this approach has also been criticised for failing to recognise the agency of women even during armed conflicts. See, for example, Bergoffen (n 17).

the context of genocide clearly predominates there. However, a clear statement as to why this was *not* primarily gender violence but violence against women may have provided a clearer understanding on how gender violence as a separate category may be used in subsequent cases and in other areas of international law.⁴⁰ Whilst this might be seen as a justifiable by-product of the focus of international criminal law, it is important to recognise that the position of a wrongdoing in international criminal law's 'hierarchy of harm' also dictates the legal force or recognition of harms in other areas of international law and domestic law.

Rape ought to be established as a serious violation of human rights and a crime capable of attracting international legal concern without linking it to torture. Rape is a recognised crime and a grave breach of an individual's human rights. The notion of human dignity set out in chapter three ought also to be sufficient explanation of why and how rape is a human rights violation. It is a clear example of the treatment of another human as an object, namely an object for male use, in way that must surely be acknowledged as denying her dignity. It is for this reason that the continuing failure by many jurisdictions to criminalise spousal rape ought to at least raise the question if women in those countries face sufficient discrimination to be considered within the scope of refugee law.⁴¹ The extra layer of legal analogy, linking it to torture

⁴⁰ This is not to say that there was not a significant *gendered* element to violence in Yugoslavia; there was clear evidence that the *type* of violence suffered by both women and men was heavily influenced by gender including the rape of women and man and the castration of men but this must be seen in the context of genocide which was of primary importance in the victim's exposure to violence.

⁴¹ Whether or not it is sufficient in and of itself will depend on the context. It may for example have no practical impact that there is no law if women are able to report the rape and have it addressed under another law, as for example, is the case in Norway. This is in particular is relevant for explaining why women in those countries should

seems unnecessary. This suggests that the primary right violated by the act is the victim's right to be free from torture, which obscures the gender element of the crime. Seeking to 'feminise' gender-neutral crimes by adding gender violence against women to gender-neutral crimes runs the risk of

playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness of the harm with male conceptions of torture, rather than as grave human rights violations in their own right.⁴²

This, combined with the notion of inherently coercive circumstances created by conflict, creates a characterisation of rape as a crime which does not allow much room for gender elements and did not allow for progress to be made in international criminal law to be transposed into refugee law.

Despite early promise, *Kunarac* did not provide a basis for international protection to be awarded to refugees against sexual violence as *Kunarac* appeared to be limited to cases where racial or political motive could be demonstrated by linking to the situation in former Yugoslavia.⁴³ The lack of real judicial exploration of the significance, if any, of gender roles in the violence against women being prosecuted in *Kunarac* meant that it could only be used to establish rape as a serious enough violence to constitute

be considered members of a particular social group. Now that rape is prima facie accepted as persecutory, this remains a key way in which women are excluded from refugee status. Domestic violence victims, and indeed victims of human trafficking, remain excluded from refugee status under this reasoning, for example, the author represented a Mongolian lady excluded from refugee status on this basis. Mongolia does not have a law prohibiting spousal rape.

⁴²Edwards (n 22) 379.

⁴³ Buss (n 3). For an account of the progress of international refugee law in addressing gender violence see generally Anker (n 83 chapter 1)

persecution.⁴⁴ However, it could not be used by analogy to establish other forms of violence against women such as domestic violence as a crime in international criminal law. A violation of the right to be free from torture does not suggest anything particular as to the impact of gender roles in shaping the behaviour and views of the perpetrators, victims and indeed society more generally. Therefore, it might be preferable to characterise rape and sexual violence as a very specific sort of outrage against personal dignity. The concept of personal dignity would allow for the acknowledgment of gender elements to the extent that they are significant. This would be similar to the gender approach that should be taken with regard to forced marriage as it could allow for twofold harms — the rape itself and gender persecution.

The conception of rape as torture adopted in *Kunarac* failed to recognise the possibility of a significant gendered element of the crime; that is, it failed to acknowledge the distinction between the times when a woman is targeted as a woman — or a man is targeted as a man — and when she is targeted because she is a woman — or he is targeted because he is a man. If rape is viewed as a method of torture, it is often assumed that the victim has been targeted for reasons other than gender and that the only gender element is the form of torture, which might arguably be said to be dictated by the victim's sex. For decades, this assumption was transferred to international refugee law with little or no challenge arguably until the British case of *Fornah v Secretary of State for the Home Department*.⁴⁵ The view of violence against women as

⁴⁴ Gender was only viewed in terms of an aggravating circumstance in relation to the crimes committed in *Kunarac* (n 14) [867].

⁴⁵ [2007] 1 AC 412 [459]. *Fornah v SSHD* [2006] UKHL 46 (a) overturned the Court of Appeal denial of refugee status which had relied on the fact that, within Sierra Leone, female genital mutilation is 'clearly accepted and/or regarded ... as traditional and

persecution stagnated with the picture presented in *Kunarac* where it required victims to show a clear political, racial, religious or ethnic motive for the violence.⁴⁶ A victim was not able to refer to her identity as a woman to constitute membership in a particular social group as gender roles had not been acknowledged as a relevant factor in determining if violence against women was to be brought within the scope of international law.⁴⁷

A main reason for this, it could be argued, is that that in the eyes of main jurisdictions⁴⁸, the question of the *motive* of the rape still remains relevant. Although motive is not an element of the crime of rape, in international refugee law the victim herself is putting forward the argument for rape as ‘persecution’ in order to satisfy art 1A(2). The view of violence against women as persecution stagnated with the picture presented in *Kunarac*; where it required victims to show a clear political, racial, religious or ethnic motive for the violence. This focus on motive has led to, aside from limited circumstances of recognised racial or political conflicts (such as in Rwanda or Yugoslavia), to

part of the cultural life of its society’ *Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680 [44] (b).

⁴⁶ This is implied from the focus on the ethnically informed nature of the crimes committed in *Kunarac* in particular [16–18], [577], [592], [654], [669].

⁴⁷ This is implied from the fact that gender was only viewed as one of the aggravating circumstances in relation to the crimes committed in *Kunarac* [867].

⁴⁸ This is not limited to certain jurisdiction, see also, Ankerbrand ‘Women under German Asylum Law’ 14 *International Journal of Refugee Law* 45 2002 46 “The focus on state persecution causes particular difficulties for refugee women. Women are victims of especially severe and systematic violence within the private sphere where state protection is not available because domestic criminal law is not enforced or is non-existent.” Although the formal requirement of state persecution has been removed from German asylum law, the focus on state persecution arguably remains. See also, Kneebone ‘Women Within the Refugee Construct: ‘Exclusionary Inclusion’ in Policy and Practice the Australian Experience’ (2005) 17 *International Journal of Refugee Law* 7. See also, Harris who states that despite South Africa’s refugee law including gender under the grounds of persecution “[t]he findings in this Article show that women and survivors of gender-related persecution remain disadvantaged in the South African refugee status determination process” ‘Unheard Stories: Gender-Related Persecution and Asylum in South Africa’ (2008-9) 15 *Michigan Journal of Gender & Law* 291 295.

rape continuing to be labelled 'personal' violence.⁴⁹ This requirement has the practical effect that, in order to bring conduct within the scope of art 1A(2) of the *Refugee Convention*, it is necessary *by implication* to demonstrate that the motive for the conduct is one that renders it *international* and not national such as those enumerated in art 1A(2) of race, nationality, ethnicity, religion or membership of a particular social group. Following the characterisation of rape as torture and as part of a larger genocidal campaign, rape was recognised as 'persecution' under international refugee law. Yet, when men act 'in their own home', this is considered 'private violence' — these acts persist and remain unchanged by the recognition of rape and other forms of sexual violence as *capable* of being within the definition of 'persecution'.

The implications of the continued adherence to the public/private binary are two-fold. It denies women effective agency in the political sphere. In international law, women are recognised as agents in the public sphere only exceptionally and are thus, presumed to be *active* only in the private sphere and present in the public sphere only as *passive* victims. This is not only empirically questionable but produces a highly gendered concept of agency whereby male agency is recognised and female agency limited. In addition, the public/private binary also renders male action against women in the private sphere *prima facie* unpolitical. This characterisation of 'private violence' when men act 'in their own home' results in refugee applications

⁴⁹ See, for example, Legal Aid Commission of New South Wales, Australia, which stated "even where it is accepted ... that a woman has been raped by the military or other government official, she then has to demonstrate that the person who raped her was not acting in his private capacity rather than his official capacity before it is considered relevant to her claim for refugee status" (Violence and Women's Refugee Status at: www.austlii.edu.au/au/other/alrc/publications/reports/69/volII/ALRC69Ch11.html, 3.)

involving battered women, where there is no overtly political motive, being routinely rejected for failing to fulfil their persecution criterion. Indeed, it has even been claimed, such by Pogge as discussed in chapter four, that domestic violence does not constitute a human rights violation due to the non-government agent of persecution.

The public/private distinction presents problems not only for victims of domestic violence but also for the many, and predominantly female, victims of human trafficking. Where refugee status is applied for by a victim of trafficking, the granting of this status is often said to require the victim to demonstrate not only that she has been a victim of trafficking but that there is a risk of *re*-trafficking. This might be thought to reflect the general rule that past persecution does not automatically signify current danger required for refugee status. In Britain, the newness of trafficking-specific mechanisms has not allowed time for many cases to reach judicial consideration, however, the reasons for refusal letters served on those recognised as trafficking victims continue to echo this public/private distinction. It has been argued, for example, that a victim of trafficking is not in danger of re-trafficking because her family, complicit in the initial trafficking, are unlikely to attempt to re-traffick the victim given the initial 'failure'. This demonstrates no examination of the harm a trafficking victim might come to at the hands of her family even if she no longer likely to be re-trafficked. If the victim cannot demonstrate that her trafficking involved a wider network than her family, she is not entitled to refugee status as she cannot satisfy the 'public' element of refugee status.⁵⁰

⁵⁰ These observations are based on actual cases worked on by the candidate that have not resulted, yet, in court hearings or published material. The observations are, therefore, at this stage, purely anecdotal but might be said to at least appear to fit

Following *Campos-Guardando* Mrs Kuna, a battered wife, filed an asylum claim in Canada but was denied refugee status on the grounds that the treatment she suffered, which included repeated violent- often life-threatening- attacks, did not amount to persecution. The court accepted that Mr Kuna's ties to the ruling government *might* have resulted in Mrs Kuna's being unable and unwilling to avail herself of national protection but did not consider even severe beatings to constitute persecution when the perpetrator was a spouse rather than government agent.⁵¹ This has been reiterated in other cases, such as, *MIMA v. Ndege*⁵² in which a victim of domestic abuse from Tanzania was denied refugee status on the grounds that although there was sufficient evidence that her husband following customary marriage laws, viewed her as property to be treated as he wished. This, it was held, could not constitute a Convention ground as the woman's well-founded fear was of her husband not the state.⁵³ The continued impact of the public/private divide, Millbank argues, can be seen also in the differentiated treatment of gay and lesbian refugees. Millbank's research found "a stark contrast between lesbians trapped in their homes, persecuted by their families, and gay men entrapped

within the general pattern of problematic decisions reached through adherence to the public/private dichotomy that assumes violence from within the family to be a family problem rather than an example of collective violence.

⁵¹ A76491421 (unpublished) US BIA Apr. 25 2000 cited Anker (n 83 chapter 1) 149 Mrs Kuna was, however, granted humanitarian relief under the Geneva Convention against Torture. This presents a fascinating dichotomy between persecution and torture, suggesting that not all torture amounts to persecution, at least in the eyes of the US courts.

⁵² [2000] 59 ALD 758 (Australia).

⁵³ See also, Cauchi, Ilerodionou and Perry in coalition with Feminist Lawyers and Women Rights Action Network Australia, *The Invisible Women: A Report on Gender Based Persecution Claims by Women Asylum Seekers in Australia* (Melbourne, Nov. 2003). Musalo and Knight 'Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States', 13 *International Journal of Refugee Law* 51-70 (2001).

in parks and toilets, persecuted by the police. Lesbians had great difficulty grounding their claims, as their experiences were 'too private.'⁵⁴

The problem of violence inflicted both in the private sphere and by a non-governmental agent (usually a spouse) remained unresolved by the *Campos-Guardando* case, or following the progress made in *Kunarac*, and persists in posing problems for female refugees. The considerable resistance to establishing 'battered wives' as a social group demonstrates the continuing weight given to the private/public dichotomy in assessing the persecution criterion. Mullally found this divide was reflected across jurisdictions, stating "recent cases such as *Jessica Gonzalez v the United States* and *Opuz v Turkey* reveal, significant gaps remain between the rhetoric of human rights law and the reality of everyday enforcement and implementation on the ground. These gaps are most keenly felt by refugee women. While State practice suggests greater gender inclusivity and sensitivity in the practice of refugee law, women fleeing domestic violence continue to face obstacles in making their claims heard."⁵⁵ Even if an individual can persuade decision-makers to accept the violence as persecution, the issue of state protection, or lack thereof, constitutes a second stumbling block for female refugees. In *R v. IAR ex p. Subramaniam*⁵⁶ the opinion given was that 'atrocities such as rape would not come within the Convention ... unless it was systematic or condoned by state

⁵⁴ Millbank (2012) "Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation," *Seattle Journal for Social Justice* 1(3) 61-725. Millbank found that if the claims of male refugees on the grounds of persecution due to sexuality were rejected the public/private divide was not invoked. Indeed, Millbank found that claims were rejected on the grounds that the men's actions were 'too public', an argument which was entirely rejected in UK jurisprudence by *HJ(Iran)* (n chapter).

⁵⁵ Mullally (2011) 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative' *International and Comparative Law Quarterly* 60 459, 459.

⁵⁶ [2007] 1 IAR 359.

inaction against the perpetrators, neither of which [the claimant] had shown.' This, in itself, might seem merely a reiteration of the lack of national protection requirement of article 1(2) and as such an unsurprising statement by the court. However, to demonstrate state inaction has proven difficult as the mere existence of a police force⁵⁷ or the existence of a statute on the matter in question⁵⁸ have been held sufficient for the potential host state to establish state protection is and was available.

In South African case law, for example, Harris found a confusing picture, “[w]hile very extreme cases of rape are often recognized, some seemingly obvious cases of rape-as-persecution are not granted. For example, a Rwandan woman, having been repeatedly gang-raped by the Interahamwe, and subsequently rejected by her community, was awarded refugee status. Conversely, a Zimbabwean woman, the daughter of a national politician, was repeatedly tortured and raped to secure her involvement in the military, but was declined refugee status.”⁵⁹ In one decision the court held, “there can be no well founded fear of persecution that can be established from the fact that the rebels were raping girls. Rape is a crime that appears to be rampant [*sic*] all over the world.”⁶⁰

Similarly, although *Islam and Shah*⁶¹ is seen as a victory for feminist jurisprudence in that women subjected to domestic violence in Pakistan were found to fall within the definition of “membership of social group”, the

⁵⁷ *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379.

⁵⁸ *Boodal* Cited in Macklin (n 80 chapter 1) 215.

⁵⁹ Harris (n 46) 16.

⁶⁰ *DRC Female*, File No. DBR/004022/04, Refugee Reception Office, in Durban, S. Afr. [3] (Aug. 3, 2006).

⁶¹ n 1.

dissenting judgment contained many troubling echoes of previous denials of refugee status for female refugees. The court had been presented with considerable evidence, accepted by the bench, that domestic violence was rife in Pakistan⁶², that this violence was condoned by the state⁶³ and supported by many religious leaders⁶⁴ and was exacerbated by societal norms concerning women.⁶⁵ Yet Lord Millett still concluded:

these norms are not a pretext for persecution nor have they been recently imposed. They are deeply embedded in the society in which the appellants have been brought up and in which they live. Women who are perceived to have transgressed them are treated badly[...] But this not because they are women. They are persecuted as individuals for what each of them have done or are thought to have done.

Lord Millett accepts that the appellants had been treated badly and that this violence was inflicted on women who had transgressed social norms. To state that the women have been treated badly “for what they have done” falls once again into the trap of focusing on the actual motive of the perpetrator (to punish his wife for not acting as he wished her to) rather than the constructive motive (to enforce societal norms that deem women inferior). The actual motive, it is argued, is irrelevant here. The constructive motive, however, reveals the link between the violence the appellants had suffered and societal attitudes to women. These women were subjected to violence by their husband not “because of what they had done” but because their husbands could beat their wives with impunity and believed it to be their right to do so. Mrs Islam’s claim that she was a victim of political persecution was also

⁶² n 1 [629].

⁶³ n 1 [664-5]

⁶⁴ n 1 [635]

⁶⁵ n 1[664]

rejected despite the fact that her husband's violence began after she intervened in a political argument between boys at her son's school. Mrs Islam husband was angry she had become involved in politics and began to beat here. Yet to the court there was no political link. It is argued here that that Mrs Islam's involvement in a political argument is many ways conceptually distracting. Even if Mrs Islam had never expressed a political opinion, as her co-appellant Mrs Shah was found to have done, there remains a political element to the transgression of social norms. There is an implicit rejection of these norms in acting in a way that transgresses them. This a political act, whether labeled as such or not. In a society that insists women can be treated by men in any manner they see fit to seek refugee status as a victim of domestic violence can be seen as another political act. These societal norms are, after all, enforced and adhered to by women also. This is particularly the case in societies where the concept of honour killings is prevalent. To have offended the honour of one's family is, in effect, an intensely political act. It not only rejects one's family's view but a norm system adhered to by society. It is, in the sense of chapter four, collective violence as the violence is justified on the basis of patriarchal norms. To go against this system is to reject a norm widely adhered to. In this sense it might be seen as political.

The cases discussed above highlight that the impoverished concept of political agency not only denies women who act in the private sphere agency but also labels the acts of men in the private sphere 'unpolitical' when they may be anything but. There is a crucial difference between the act of a man committed in private because to act so in public would risk public sanction and/or shame and a man who acts violently in private knowing no sanction would be

attached to his action and believing it to be 'his right' to act so. This distinction not only reveals the untenable nature of the public/private divide in refugee law but is also the basis of the 'lack of national protection' element of refugee law- the latter example is clearly one where no national protection is available to the female victim whereas in the former it is. The lack of national protection is what renders the act political *irrespective* of the actual motives of the perpetrator. Collective violence explains also how even in a state where there are good faith political acts to protect women this may not be sufficient to constitute protection if the cultural norms to which much (or a significant section) of society adheres are sufficiently discriminatory or display a significant enough disregard for the rights of women.

The public/private dichotomy poses a particular problem for female refugees (who of course are not the only victims of domestic violence or rape) because women are still seen in many jurisdictions as 'belonging to the private (or domestic) sphere.' This is not a perception that male applicants have to overcome. Women struggle then to establish materiality in the public sphere where men are presumed present. This interpretation of women's (and men's) roles has the effect of limiting the scope of article 1(2) when applied to women. The issue of materiality in the public sphere is something feminist scholars in many disciplines have sought to address, Judith Butler, in particular, is keen to establish that "materiality is the cause of the discourse"⁶⁶ and not merely the effect. A perceived lack of presence in the public sphere both leads to and is in part a consequence of a diminished concept of agency in relation to women. Recognition of agency is vital because, as Long notes,

⁶⁶ *Bodies that Matter: On the Discursive Limits of "Sex"* (Routledge 1993) 9.

“the notion of agency attributes to the individual actor the capacity to process social experience and to devise ways of coping with life, even under the most extreme forms of coercion.”⁶⁷ Diminished agency restricts women’s options in reality and an impoverished concept of agency limits recognition of demonstrations of continued agency in refugee-producing circumstances, which are by definition coercive. It has been argued in chapter one that the concept of agency is one focused on the choice act, with migration described as forced where the alternative to migration is such that it cannot be characterised as a real alternative but rather a ‘tragic choice.’⁶⁸ This recognises that agency can be exercised even in the most coercive circumstances but that the acts it is possible to undertake under such circumstances may be materially different to those undertaken where no such limits to action exist. If avenues of action are entirely closed to the individual due, for example, to her gender, then failure to act within those avenues cannot be justification for denial of agency or blanket denial of refugee status.

This is especially pertinent to refugee law, where it is the perceived lack of presence of women in the public sphere that creates the discourse that women belong to the private sphere in refugee producing countries, which is so damaging to women seeking recognition as refugees. This is not only damaging to female refugees but also creates an unrealistic distinction between public and private spheres. As Greatbatch notes, “the bifurcated version of society itself ignores the realm of women’s lives outside domesticity, and creates a rhetorical and theoretical wall between domestic

⁶⁷ Long (1992). From paradigm lost to paradigm regained? The case for an actor-oriented sociology of development in Long and Long (eds). *Battlefields of knowledge, The interlocking of theory and practice in social research and development* (Routledge) 23.

⁶⁸ See p6-8 in chapter one.

and social culture. It roots women's oppression in sexuality and private life, disregarding oppression experience in non-domestic circumstances."⁶⁹

6.1.1 The Problem of Motive

The predominant factor in motivating violence might be rightly said to form part of the relevant enquiry for decision-makers deciding on refugee status. As Amartya Sen notes in *Identity and Violence*, the reduction of a person to one dominant feature of their identity is part of the process of violence, for a perpetrator of violence seeing the target as 'a Muslim', 'a Christian' or 'a woman' whilst disregarding other characteristics of identity is part of what allows them to act in such a violent manner.⁷⁰ In this sense, whilst it is always somewhat simplistic to speak as if there is only one contributing factor to violence, identification of the predominant factor motivating violence might be seen in this context as justifiable. Indeed, the concept of gender violence would not exist without there being instances where the predominant factor motivating violence might be said to be gender inequality or gender roles.

Thus, the persecutor's motivation is often said to be the proper focus of the persecution enquiry, as the Supreme Court in Canada stated, 'the examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution.'⁷¹ However, this approach might be said to conflate actual and imputed motivation for violence. Here it will be argued that whilst *imputed* motive is entirely relevant for refugee law, actual motive is not. The danger of

⁶⁹ Greatbatch 'The Gender Difference: Feminist Critiques of Refugee Discourse' 1 *International Journal of Refugee Law* 518 520.

⁷⁰ Sen (n 57 chapter 4).

⁷¹ *Ward v Canada* [1993] 2 SCR 689 [747].

such a 'actual motive' approach is illustrated by the British case of *Omoruyi*⁷² where Simon Brown LJ recorded the submission for the Secretary of State thus (paragraph 10):

discrimination is an essential feature of persecution for a Convention reason and that this requires the persecutor to be motivated by the reason in question, here religion ... [H]e must establish that the Ogboni are intent on harming him because he is a Christian and not merely because he crossed them. And this ... the appellant cannot do ... There is no reason to suppose that the Ogboni would not be equally intent upon harming anyone else who crossed them ...

Mr Ogboni's application was denied, the court accepting that:

this case fails not for want of enmity or malignity on the part of the Ogboni (these feelings, we must assume, were present in abundance), but rather because that motivation (that hostility and intent to harm) was in no realistic sense discriminatory against the appellant on account of his Christianity but rather stemmed from his refusal to comply with their demands⁷³

So an applicant targeted for refusal to comply with a cultural norm was not a refugee under article 1(2) because he failed to establish a Convention ground for persecution.

These decisions rest on the assumption that the court can discover the actual motive of the persecutor through examination of facts. In practice, it is, of course, *imputed* motivation that is the focus. Unless the persecutor recorded somewhere his motivation for the attack the assessors and appeal courts cannot possibly know the *actual* motivation behind the attack. Nor indeed should the actual motive be relevant. There is precedence for this approach. It

⁷² [2001] IAR 17:

⁷³ *ibid* [26].

could be argued international law already ignores actual motive when considering international crimes such as genocide or war crimes. Here, the fact that the actual motivating factor behind acts of violence during genocide might be personal enmity is deemed irrelevant if it can be said to be part of a general scheme of violence.⁷⁴ If the focus is on *imputed* motivation then it should be acknowledged that the courts already look beyond personal motivation to the circumstances of the country of origin.

This is the case in all refugee status determination cases, if one seeks refugee status on the basis of religious persecution, one would have a far stronger case in arguing not that the individual attack (or feared attack) was motivated by religious intolerance but that the general conditions in the country of origin are that of persecution of a particular religious group such that an attack on the basis of holding that religious belief is likely. Similarly, with political cases, one must demonstrate that one holds a certain political view and then establish that holders of that particular political view are subject to violence and/or severe discrimination. What is relevant, the Czech Asylum Court reminded decision makers, is the motive for failure to provide of protection.⁷⁵ If this motive is linked a Convention ground it is irrelevant what the motive for the persecution is. For example, if failure to provide protection to a domestic violence victim is due to discrimination against women within the legal system this would be sufficient to establish a Convention ground

⁷⁴ For example, The Special Court for Sierra Leone, when considering if forced marriage could constitute a new and distinct crime against humanity, required prosecutors to show a nexus between the enumerated act and broader widespread and systematic violence. *Prosecutor v Sesay (Trial Judgment)*, Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04- 15-T, 8 April 2009 ('RUF Trial Judgment')[159]. These criteria stemmed from the *Kunarac* case at the ICTY, discussed above.

⁷⁵ 5 AZS 7/2009-98

(namely membership of a particular social group discussed below) even though the persecution is the violence suffered at the hands of an abusive husband. *RT (Zimbabwe)* further reminded decision makers that there can be no requirement of 'double persecution'. Baroness Hale firmly rejected such a requirement. Given the serious nature of domestic violence this is likely to be sufficient to establish treatment constituting persecution. The functional fusion of the persecution and state protection elements will then operate to allow refugee status where the victim of domestic violence shows that this domestic violence is a part of a large societal attitude to women. Alternatively, refugee status may also be appropriate where society is opposed to a norm but the government support it. Collective violence is put forward as an alternative to state persecution *not* an additional requirement.

The previously predominant approach of labelling sexual and domestic violence as 'private' due the *personal* motivation of the perpetrator is, then, illogical within international refugee law. To dismiss a claim due to personal motivation of the perpetrator not only rests on a claim that is virtually impossible to prove⁷⁶ but a misunderstanding of the operation of article 1(2). The reconceptualisation of rape cases, such as *Campos-Guardando*, ought to be seen as recognition that personal motivation is irrelevant where an underlying Convention motive can be imputed. This view is supported by Lord Justice Waller in his partly dissenting opinion in *Sepet* when he states:

If what is being relied on is an implied political opinion by reference to conduct of a government which is being challenged, i.e. if what is being alleged as being persecution is the very fact that the government is operating

⁷⁶ In addition, the claim of personal sexual motivation failed as a defence in *Kunarac*.

a law which it is not entitled to operate so far as the challenger of the law is concerned, the causal nexus will in my view be supplied without any examination of “motive”.⁷⁷

Regrettably, this was not a view taken by the court as a whole in *Sepet* and is a point, which has largely been overlooked in many refugee status determination cases, particularly in relation to gender violence, where the notion of a ‘purely sexual motive’ continues to be raised.

The issue then of when Convention grounds can be imputed remains. The imputed motivation approach has, as demonstrated above, led to a change in attitude to rape cases in particular and to some success for rape victims in receiving refugee status. However, where there is no element of overt political, racial or religious persecution, women still face difficulties in establishing that violence against women could have even imputed political aspects. The political argument is effectively a catch-22 for women, in order to establish persecution she must show she has been severely discriminated against or subject to serious violence; this usually takes the shape of demonstrating that women are marginalised in the country of origin’s society, to be granted refugee status she must now show a Convention ground for this persecution, if women are marginalised, argues the host country, they are apolitical and the tormentor could not have assigned any political opinion to his victim. Host countries argue then that where women have been targeted as a woman this cannot be political persecution.

⁷⁷ *Fornah* (n 43a) [160].

However, it could be argued that there is a *constructive* political aspect to victimisation of many women, which coupled with the lack of national protection and/or opportunity for redress, does amount to persecution under article 1(2). This depends, however, on the concept 'political act' the adjudicator applies as will be demonstrated below. 'Political act' is still confined to acts with an overt political dimension and there remains a general reluctance to recognise the political dimensions of social or cultural norms. There remains in international refugee law, Spijkerboer notes, "a hierarchy of harm where overtly political violence is privileged."⁷⁸

6.1.2 The Political Act

In Refugee Law, it could be argued that the ultimate expression of agency is through a political act as it presumed that any response to a political act must represent political persecution (which as Chapter One demonstrated is the cornerstone of refugeehood). Refugee law assumes, in many ways, that 'political' is easy to define and identify. Article 1(2) rests on this assumption that it is clear what is and is not political (or indeed racially or religiously motivated). To an extent, this is the by-product of the need to assess claims against workable criteria. In order to place the applicant into a neat category within article 1(2) certain features of identity (such as race, religion or political opinion) are emphasised and a multifaceted individual becomes 'a political persecutee' or 'a victim of racial violence.'

Although it cannot be overlooked that in many refugee-producing countries, active participation in a narrowly defined public sphere is severely restricted

⁷⁸ Spijkerboer *Gender and Refugee Status* (Dartmouth Publishing 2000) 45.

for women, women *do* still participate in even the most restrictive public sphere; although it may not be through ‘traditional’ methods of political engagement, such as standing for office, but instead through alternative methods. A woman challenging gender norms, such as dress or behavioural codes, in public *or* private is an active political agent. As the UNHCR Gender Guidelines notes, “While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion.”⁷⁹ An expanded notion of political agency in relation to women reveals the many ways in which the public/private binary is untenable and is necessary to reflect a reality where many women’s options for action are restricted in ways not expected of men and are, thus, simply unable to demonstrate agency in the same way as their male counterparts. It contended here that the impoverished concept of political agency employed in relation to women in international refugee law significantly restrains application of article 1(2) to female refugees.

This compounded by the traditional (and in many ways legally necessary) focus on the identity ascribed by the persecutor to the victim, which, as noted above, is most often one-dimensional.⁸⁰ However, it is important to note that the individuals seeking refugee status do not actually have the one-dimensional identities their persecutors assign to them; the persecutor reduced what in reality is a complex identity to ‘key features’ when inflicting persecution. Focusing solely on the persecutor’s view of the refugee can create

⁷⁹ UNHCR guidelines (n 14 chapter 4) [23].

⁸⁰ Sen (n 57 chapter 4) 171. As noted above, Sen argues that the reduction of a person to one dominant feature of their identity is part of the process of violence, for a perpetrator of violence seeing the target as ‘a Muslim’, ‘a Christian’ or ‘a woman’ whilst disregarding other characteristics of identity is part of what allows them to act in such a violent manner.

considerable problems when addressing gendered persecution. It could be, for example, that a persecutor *believed* himself to be motivated solely by the presence of a woman within his reach when committing rape or sexual violence but this does not mean that the act itself is necessarily apolitical, as was confirmed in the *Kunarac* ruling. Whether or not the act is political depends on far more than just the persecutor's motivation and when examining gendered violence it is necessary to look beyond the act itself to surrounding circumstances before determining the political nature or otherwise of the act.

There are two ways in which the concept of a 'political act' enters into refugee status determination cases both of which create particular problems for victims of gendered-persecution. Although the issues often overlap and are certainly interrelated it is important to draw a distinction as to the point at which the applicant brings in the concept of a 'political act.' Firstly, in relation to establishing persecution the notion of a 'political act' is key. As noted in Chapter One, persecution is seen as political in nature, therefore, denial of the political nature of the persecutory acts makes any chance of fulfilling the persecution criterion slim. This, then, is an issue in all refugee status determination cases; if the applicant cannot demonstrate a political element (no longer confined to state involvement but vicarious state culpability at the least) then not only will she find it difficult to satisfy the persecution criterion but she may also encounter difficulties in establishing a lack of national protection.

Secondly, if the applicant wishes to rely on the Convention ground of 'political opinion' it must be shown that the persecution was inflicted due to their political opinion thus the act(s) which resulted in (fear of) persecution must be deemed political in order to have sufficiently demonstrated (imputed or actual) political opinion to the persecutor. This is a particular concern for female refugees as the rejection of 'women' as a 'social group' means a woman cannot argue that the persecution was inflicted merely because she was a woman but must show a separate Convention ground. Where there is no clear racial or religious motive that leaves 'political opinion' as the only possible avenue.⁸¹

Refugee status decisions, as Thomas Spijkerboer demonstrates in his comprehensive empirical study, do not usually define 'political acts' so instead we must rely on acts, which have been labelled 'apolitical' or 'non-political' to gain a clearer understanding of the interpretation of 'political' being applied.⁸² Spijkerboer makes five key observations when considering

⁸¹ Nationality is of limited use in countries where there is not a civil war or at least serious attempts to divide the current country into different 'nations.' It might, for example, be a Convention ground for a Chechnyan refugee but even then they would be more likely to ascribe racial and/or religious motives to the persecutor than 'nationality.' It was, however, of use in the immediate aftermath of the Second World War when, for example, an individual might be targeted for being German but outside of Germany's new borders.

⁸² Spijkerboer (n 75). The empirical study is unusual as access is rarely given to initial or tribunal level decisions, this represents one of the few studies in this area. However, it could also be argued that the types of appeals being heard across Europe and Common Law jurisdictions broadly bear out Spijkerboer's findings and demonstrate that the issues identified are still being encountered. For example, in the UK, Human Rights Watch has warned that the issues facing female refugees have been compounded by the introduction of the detained fast-track asylum process; designed to speed up decisions the process has led to a crystallisation of previously held assumptions, particularly views on the role of women within refugee-producing countries which inevitably leads to higher level of rejection amongst female applicants (a refusal rate of between 94-96% yearly stands testament to this). See, 'Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (February 23, 2010) <http://www.hrw.org/node/88671>. HRW argue that it is

the concept of the 'political act.' Firstly, he notes that acts which are 'viewed as based on emotions' are deemed non-political and cites the Chinese one child policy as an example, but, it could be argued, that non-compliance with dress code cases might come under this heading. The acts are characterised as 'matters of personal preference' i.e. personal preference to have another child or to not conform to a dress code. In these cases the issue of what is deemed a political act was key to the attempt to establish refugee status, the harm suffered or feared was usually serious and inflicted by the state or state-sanctioned but refugee status was not awarded due to lack of a Convention ground for the persecution.

Secondly, Spijkboer argues that acts which can be deemed 'self-interested' are also labelled non-political as they are considered to be economically motivated. This relates to the concept of persecution as well as to notion of a 'political opinion.' As demonstrated in Chapter One, persecution operates a proof that the migration was forced, thus the applicant must demonstrate that she had no option but to leave by showing she has been persecuted or feared persecution. Traditionally this was limited to political or racial persecution on the grounds that state involvement was necessary yet even once non-state agents of persecution had been accepted the notion of political persecution has been retained and narrowly applied. However, there seems to be little reason conceptually to limit 'persecution' to instances of political persecution and not to expand it to other instances where it is clear that the individual had no viable alternative to migration. Building on Shellman's models of migration, Chapter One argues it is conceptually incoherent to ascribe

simply inappropriate to put most female asylum seekers on the fast track process as the claims are too complex to be handled quickly.

economic motivations to those who leave due to a lack of viable alternatives to migration, whatever has caused the lack of viable alternatives. Where the migration can be said to have been motivated by push factors rather than pull factors it cannot be characterised as either voluntary or 'self-interested.' All refugees are self-interested to the extent that, like all people, they have an interest in survival. The distinction then between economic, self-interested motives for migration and political, selfless motives is as untenable as it is unhelpful.

In Chapter One, it was noted following Zollberg, that there has been a tendency to view refugees in two categories, helpless victims (here racial or religious motivation is usually relevant) or political martyrs. This view of refugeehood requires the refugee either to be a passive victim, targeted due to unalterable characteristics, or political activists, who selflessly puts themselves in the line of fire. This conceptualisation of 'political' as active results in involuntary acts being depicted as non-political. Thus, persecution due to *forced* membership in a group, even a political party, is often considered apolitical as the victim's act "lacked the motivation which makes an act political."⁸³ Here the issue is with whether the applicant can find a Convention ground for the persecution, that is although they have engaged in an act, which brought about serious consequences which could be characterised as persecutory, the act itself is deemed 'non-political' and the response to this act, therefore, is characterised as apolitical whomever the respondent is. If the act is not deemed to be 'political' the conclusion is that it cannot have either revealed an actual political opinion or caused the

⁸³ Spijkboer (n 75) 101.

persecutor to impute a political opinion, where one was not actually held and the persecution could not have been 'for reason of...political opinion'. Thus, where there is no clear racial or religious motive, it is then impossible for the applicant to establish that the act is persecution inflicted on a Convention ground rather than 'random violence', which is not thought to be included under article 1(2).

Fourthly, acts that could be deemed 'minor' or 'subordinate' were not considered political. Here Spijkboer routinely found that asylum adjudicators argued the applicant could not have been 'known to the regime' (or opponent non-state actors) if the acts she was engaging in were too minor to draw attention to herself. This has been given as another objection to including dress code violations as evidence of a 'political opinion.' This was not a contention backed up by any particular in country evidence but rather a general opinion held to unless specifically contradicted by in country reports.

Finally, Spijkboer identified a general trend of attributing motives for flight to female refugees, which disqualified them from refugee status even where another interpretation was available which could have founded a successful claim. There can be little doubt from Spijkboer's study or dearth of successful appeals by female asylum seekers that this trend is bolstered by the general assumption underlying many refugee status decisions for female refugees, namely that women are simply not present in the public sphere. If it is not considered the norm for women to be political a woman must prove herself to be exceptional before her case can have even a hope of succeeding.

6.1.3 Political Violence: The Concept of 'Normal' Violence

A core issue in applications from female refugees is the characterisation of the *nature* of the act the applicant seeks to have recognised as persecution. It is clear throughout the case law, both in refugee status decisions at first instance and appeals, that persecution, as a legal concept, refers to serious harm. As noted in Chapter One, the notion that the harm is 'targeted' is also central to the conceptualisation of persecution under article 1(2). Thus, women fleeing 'general violence' are not granted refugee status even if they have suffered serious harm. This affects, in particular, those fleeing civil wars. In addition, as noted above, victims of 'random violence', that is violence with no clear cause or without an easily ascribable political or racial motive, are also excluded. Rape is often portrayed in this manner, as an act 'out of the blue', which bore no relation to the political situation in the country. As Spijkboer notes in his empirical study, in Dutch refugee applications this was commonly labelled 'irrational violence' and having no identifiable motivation it could not hope to be labelled 'political'.

The notion of 'rational violence' also entered into status determination cases, particularly in cases where the applicant seeks to establish that a law of general application is persecutory in and of itself. Recently, it could be argued, there has been a radical shift in attitudes to these cases, at least in relation to practicing homosexuals from countries where homosexuality is illegal.⁸⁴ The UNHCR Gender Guidelines declare that a law may be considered persecutory

⁸⁴ It could, of course, also be argued that banning homosexuality is *not* a law of general application but a law specifically targeted at individuals due to their sexual orientation; it does not after all apply to heterosexuals who are not affected by the law as they are not homosexual. Thus, it is no different to a law targeted people due to their racial origin or religious beliefs.

in and of itself and argued that this has “proven material to determining some gender-related claims.”⁸⁵ This is particularly the case where the law does not comply with international human rights standards. As the Guidelines note, the applicant must demonstrate either that they fear persecution under that law (i.e. that the punishment for breaking that law is disproportionate enough to be classified as persecution and not prosecution) or that being forced to conform to this the law is persecutory in and of itself. In most cases the applicant argues *both* points, the latter has been a successful argument in cases involving homosexual couples where homosexuality is banned. One element of the decision was clearly the violent punishment (in many cases death) that the applicant would suffer if caught but since *HJ (Iran)*, in Britain at least, it has been made clear that forcing an individual to comply with the law (even if the punishment were less extreme) is persecution in and of itself because it involves a violation of a core human right, the right to a private life.

There is no doubt that this is a considerable move towards a human rights based approach to refugee law. However, Spijkoboer identified other areas where violent punishments are considered ‘rational violence’ and, therefore, not persecutory. Such reasoning was often employed in rejecting applications from Chinese women who suffered under the one child policy, even where the women had suffered forced abortion or sterilisation. These acts, states Spijkboer, were characterised as methods of “intended to restore the situation to what it was before the illegal act [getting pregnant]” or as enforcement measures. Spijkboer also found that female Iranian applicants who objected to the strict dress codes and restrictive social norms were also rejected on this

⁸⁵ UNHCR Guidelines (n 14 chapter 4) [10] 4.

basis. It was argued that law applied to all Iranian women and that, as such, objection to the law, even where the punishment contravened human rights treaties, was not sufficient to establish persecution. These were instances of *prosecution* and could not then represent harm or violence so as to bring the act under the persecution criterion in article 1(2).

The concepts of 'harm' and 'violence' are then key to establishing persecution. This is particularly the case when assessing applications where the act identified as constituting persecution is sexual violence. As noted above, here female applicants have had to overcome several hurdles in establishing rape as a method of persecution. Firstly, the private/public dichotomy was used to argue that as 'private violence' sexual violence could not found refugee status. This is linked, of course, to the notion of a 'political act', rape not being considered politically motivated but attributed to the personal lust of a man. Rape was then characterised as 'random violence', initially, therefore, even where rape was endemic and perpetrated by government agents it was not recognised as persecution. Although this perception of rape has been slowly eroded and there is now a general acceptance that rape *can* be a method of torture and persecution (particularly since the *Kunarac* ruling established rape as a crime against humanity) there remain several problems with conceptualisation of rape as persecution in refugee status determination cases.

Collective violence provides a limiting factor connected to the notion of illegitimate violence, provided in Chapter One and as such the type of violence considered a human rights violations within the scope of article 1(2) depends on the view of the content of the relationship between state and

citizen, and as this evolves so too must the type of violence considered as a human rights violation. It is dependent, therefore, on what is considered to be a relevant human rights violation to international law i.e. which violations represent the state falling below international standards. To an extent, this can be seen in refugee law, the UNHCR Guidelines are frequently ahead of domestic governmental or judicial recognition of the change in attitude to a specific right, moving it from something less persuasive to a 'human right'. This was very much the case with gender persecution, where domestic recognition of gender persecution lagged behind its inclusion under article 1(2) according to the UNHCR. There was a time where rape was not considered a human rights violation but an act of 'private violence.' Yet, the issue of 'private violence' continues to be overlooked. This is based on a fundamental disagreement over the meaning of international law. The assertion that domestic violence is not a *relevant* human rights violation for international law depends entirely on your view of international law, namely what you consider to be covered by international law. As Andrew Clapham asserts in his attempt to expand human rights obligations to non-state actors, the claim that non-state actors are not the concern of international human rights law, indeed that attempts to include them would trivialise the notion of human rights, amounts to a statement "that political prisoners are a legitimate subject of concern and violence against women in the home is not."⁸⁶

Human rights in international law need not be interpreted this way, for example, in The Truth and Reconciliation Commission for Sierra Leone, the

⁸⁶ Clapham 'Human Rights Obligations of Non-State Actors' in de Búrca, de Witte and Francion (eds) *The Collected Courses of the Academy of European Law* (vol XV/1 Oxford University Press 2006) 37.

commission uses the term 'human rights violations' to refer to the acts of all parties in the conflict, whether these acts were committed within a 'bush marriage' (forced marriage) or in armed conflict against a combatant. Indeed as Clapham notes, if the acts of private individuals cannot constitute human rights violations under international law then the acts of terrorists are not relevant human rights violations to international law, he goes on to cite the paper 'Human Rights, the United Nations and the Struggle Against Terrorism' which express relief that "[f]ortunately, human rights thinking and even jurisprudence has evolved and now certain non-state actors like rebel groups and multi-national corporations can be held responsible for rights violations."⁸⁷ If international law in general has evolved, in some areas international refugee law has resisted such evolution.

The exclusion of acts of private individuals implies a view of international law resting on the (traditional) premise that human rights laws are essentially negative laws, that is to say human rights laws restrict state action but do not require positive action at all. This is not the way international law works but rather the way it is interpreted as functioning. The now widespread acknowledgment that private actors may violate human rights in a way that is relevant to international law shows the evolution of international human rights law from entirely negative to, at least partially, positive. The expanding scope of international human rights law now requires states to *act* in certain situations rather just to refrain from acting. One area that states are expected to act is in protecting the human rights of their citizens, failure to do so makes the human rights violation by the private individual a public matter and a

⁸⁷ *ibid* 38.

relevant human rights violation to international law. Here the notion of collective violence again clarifies why this human rights violation attracts international legal obligations. The human rights violation where the perpetrator has acted in conformance with societal norms and without fear of punishment as she is aware the state is unwilling or unable to act to prevent her from violating another's human rights is both an instance of collective violence and a situation in which violation of human rights by a private actors is very much relevant to international law, be that international human rights law (which condemns the violation and the lack of state action to prevent or redress it) or international refugee law (which offers surrogate protection to the individual whose rights have been violated).

6.2 A Conflict of Rights: Cultural Rights under International Refugee Law

One area where the concepts of human rights violations and collective violence could be seen as most controversial is in relation to cultural practices and norms. Restrictive social or cultural norms might be based on long-held cultural beliefs or expressions of religious belief, which could be included under the rubric of 'cultural rights'. The tension between protecting universal rights and cultural rights is present throughout human rights law and this is not the place to engage in a discussion on universalism and cultural relativism but the issue will be explored in relation to refugee law, it suffices to say that it is contended here that if human rights are universal and as such they must apply everywhere and in every situation.⁸⁸ It has been argued that it is not the

⁸⁸ As Thomas Franck argues human rights are labelled 'universal' not 'western', even if one believes they originated in the West (a disputable claim) this does not render them culturally specific. They are instead intended to add a layer of transcultural

place of international law to declare traditional practices as human rights violations or even that to do so would be racist or imperialist and that, therefore, asylum ought not to be granted on the basis of exposure to traditional, cultural practices. The Canadian Minister for Immigration, at the time of adopting the UNHCR Gender Guidelines into Canadian law, expressed his apprehension in applying these guidelines in difficult cases stating, “[b]ut will Canada act as an imperialist country and impose its values on other countries around the world? . . . I don't think that Canada should unilaterally try to impose its values on other countries regarding laws of general application.”⁸⁹

Yet, as posited above, the granting of refugee status goes beyond the individual application and is also a statement about what constitutes illegitimate violence. Refugee status says that the international community extended surrogate protection here because of a grave human rights violation demonstrative of failure of state protection. Refugee law, then, cannot avoid issues of cultural relativism, by its very nature it judges whether the violation was legitimate or not (this is what, for example, the prosecution or persecution question turns on) and it must, therefore, engage with traditional, cultural practices and make similar determination. In order to make this determination of whether there has been a human rights violations within the scope of article 1(2), as noted above, international refugee law draws on

universal rights built on social, economic and historical development and do *not* to reject cultural rights *per se*. Franck “Are Human Rights Universal?” (2001) 80 Foreign Affairs 196. For an overview of the debate see, Franck or Brown “Universal Human Rights? An Analysis of the Human Rights Culture and its Critics” in Patman (ed) *Universal Human Rights* (Bantam 2000) 31.

⁸⁹ Cited in Macklin (n 80 chapter 1) 252.

international human rights law.⁹⁰ As Macklin noted, in response to the fears of the Canadian minister:

If a Kurd comes to Canada claiming that he was whipped by Iraqi police interrogators for his political activities, Canada does not consider whether whipping is a time honored tradition in the man's country of origin, or whether the assertion of Kurdish nationalism is against the law in Iraq. Canada does not worry about offending the sensibilities of states that flog people because of their ethnicity or political opinions when Canada declares that the claimant was persecuted.⁹¹

Yet concerns about cultural traditions have presented considerable barriers to female refugees fleeing from practices such as FGM and, in particular, arranged marriages and honour killings. These victims have not often found protection abroad.⁹²

In short, in the push and pull between universal rights and cultural relativism, international refugee law is already in the universal rights camp. Universal human rights norms are the standards against which the act grounding the refugee status application is judged to determine whether or not this act amounts to persecution. Refugee law has to assume human rights to be universal in order to provide protection on the basis of human rights violations that can take place any time in any location. This is not necessarily inconsistent with the view rights are defined and realised only within a given social context, and does not disclaim that there are cultural differences in the

⁹⁰ Christian Tomuschat's observation bears repeating here, "[the country of origin] behaved in consonance with current human rights standards, the whole problem would simply disappear." (n 23 in chapter 4) 76.

⁹¹ Macklin (n 80 chapter 1) 253.

⁹² For example see, Shapiro, 'She Can Do No Wrong: Recent Failures in America's Immigration courts to Provide Women Asylum from Honor Crimes Abroad' ' 18 American University Journal of Gender, Social Policy and the Law 293.

interpretation and recognition of human rights, but the claim that “there are no general moral standards that apply” is rejected.⁹³ It is posited here that there are general moral standards and that in relation to refugee law these can be found in international human rights norms, such as those expressed in the UDHR.⁹⁴ It has been argued, by Price and Martin amongst others, that many human rights are simply too subjective to be used in refugee status determination cases, yet the UN, the WHO, the World Bank and the IMF⁹⁵ all make daily determinations of human rights abuses around the world, as indeed do most national governments in determining foreign policy and producing country of origin reports for immigration tribunal use.

One instance where the tensions between universal and cultural rights came to the fore in refugee law has been in relation to refugee status applications where the conduct submitted as amounting to persecution is Female Genital Mutilation (FGM), either fear of this practice or having been forced to submit to it. FGM is practiced predominately in western and eastern Africa but also occurs in parts of Asia and the Middle East.⁹⁶ Although often associated with

⁹³ Brown (n 87) 119

⁹⁴ It also agrees with Beitz, then, that our objection to human rights violations is based on the consequential harm of a human rights violation, Beitz states “our belief that genocide is a great wrong has nothing to do with the fact that other people agree it is so, but with the nature and consequence of the genocide itself” “Human Rights as a Common Concern.” *The American Political Science Review* 95 (2001) 269 274.

⁹⁵ The World Bank and IMF, for example, have a three point scale to determine if human rights protection is sufficient for a country to qualify for a structural adjustment loan, which involves classifying rights as 1. Not protected by the government 2. Somewhat protected by the government or 3. Protected by the government. If the IMF can do this, there seems no reason why international refugee law can not require decision makers to do the same (or indeed simply to refer to determinations by international bodies such as the UN or IMF).

⁹⁶ World Health Organization on Female genital mutilation, <http://www.who.int/mediacentre/factsheets/fs241/en/index.html>

Islam, it is not required, or indeed even referred to, by the Quran⁹⁷ and the WHO confirms it has no identifiable health benefits.⁹⁸ It is not often practiced by state officials but by private individuals considered to be of authority in the community.⁹⁹ Long considered a cultural tradition, protected even by international legal provisions on cultural practices, FGM is now almost universally perceived as a human rights violation, as a violation, for example, of article 5 of the UDHR.¹⁰⁰

Recent case law on FGM reveals a trend towards recognising FGM as a relevant human rights violation for international refugee law¹⁰¹, which runs alongside condemnation of this practice in international human rights law

⁹⁷ Although it is interpreted by some Muslims as being required, such as in Muslim minority in Togo where FGM is seen as a religious requirement.

⁹⁸ n 95.

⁹⁹ See Cisse 'International Law Sources Applicable to Female Genital Mutilation: A guide to Adjudicators of Refugee Claims Based on Fear of FGM' 35 Columbia Journal of Transnational Law 429.

¹⁰⁰ It also violates the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and, in the case of children (and FGM is often practiced on girls approaching maturity), it is a violation of the Convention on the Rights of the Child, which calls for the abolition of "traditional practices prejudicial to the health of children." As well as contravening article 18 of the African Charter on Human and Peoples' Rights 1981 adopted by the 18th Assembly of the Organisation of African Unity (but neither signed nor ratified by Ethiopia). Yet women are still being deported from UK to countries where they are at risk of FGM: *Female genital mutilation: asylum seeker fights deportation to the Gambia* (6 November 2012) <http://www.guardian.co.uk/society/2012/nov/06/female-genital-mutilation-asylum-gambia> (accessed 6 November 2012).

¹⁰¹ See for example, the US case of *Adelaide Abankwah v. Immigration and Naturalization Service*, 2nd Circuit, 185 F.3d 18, 1999, *Farah* (CAN). This contrasts with cases in Germany, for example, where before a change in law applications were rejected due to the non-state agent of persecution and applications continue to be rejected on the basis that an internal flight option exists, see Ankenbrand, 'Refugee Women under German Law' 14 International Journal of Refugee Law 45. Ankenbrand also disputes the claims to internal flight options such as moving from a rural to an urban area and seeking protection in NGO run camps. Not only are these option dependent on mobility (but the same could be said of seeking refugee status abroad) but they do not reflect in country circumstances such as tribal areas, whereby it is simply not possible to move to an area inhabited predominately by another tribal or ethnic group and to enter a NGO run camp may be to condemn the refugee to eternal dependence on an NGO rather than offering any sustainable form of surrogate protection.

and demonstrates the evolving nature of the term ‘persecution.’ This might be said to have been further confirmed by *RT and KM (Zimbabwe)*¹⁰² where the UK Supreme Court clearly rejected the notion of a hierarchy in the forms of persecution. It not only demonstrates the evolving nature of human rights law but also why it is of central importance to international refugee law that the category of relevant human rights violations is kept broad and fluid. In addition, it reveals why the notion of collective violence could prove useful in refugee law. In Home Office guidance on Sierra Leone, for example, it is noted that FGM “is accepted as the norm in society.”¹⁰³ It ought, therefore, to give rise to a good case for refugee status as a human rights violation and an instance of collective violence perpetrated because of a Convention ground (namely due to the victims membership in a particular social group).

6.2.1 Fornah

A seminal case in recognition of FGM as giving rise to a good case for refugee status which provides a good illustration of the possibility of progressive interpretations of article 1(2) is the British case of *Fornah*¹⁰⁴. Although Canada was the first jurisdiction to grant refugee status on the basis of FGM, in the *Farah* case of 1994¹⁰⁵ and refugee status had been awarded in the UK previously in cases concerning fear of FGM¹⁰⁶, the reasoning employed by the House of Lords is ground breaking and serves as an example of how article 1(2) ought to be interpreted. It also points towards a new conceptual framework for international refugee law, in which article 1(2) could be

¹⁰² [2012] UKSC 38.

¹⁰³ Cited in *Fornah (n 43b)* [680].

¹⁰⁴ *ibid.*

¹⁰⁵ [1994] IRB Refugee Div. (Toronto) T93-12198, T93-12199, T93-12197.

¹⁰⁶ See, for example, *P and M v Secretary of State for the Home Department* [2004] EWCA Civ 1640; [2005] Imm AR 84.

interpreted in line with the presented formula of 'human rights violation amounting to collective violence = refugee status.' In *Fornah*, the House of Lords overturned the Court of Appeal decision to reject Ms Fornah's application for refugee status. Ms Fornah had applied for refugee status as an unaccompanied minor, who had fled Sierra Leone after her family had been killed. Ms Fornah's application centred on fear of being subjected to FGM if returned to Sierra Leone as her father was no longer alive to protect her from undergoing the procedure. FGM, here, was the harm alleged as constituting persecution under article 1(2).

The Court of Appeal held that FGM did not come within the definition of persecution. In addition, the Court of Appeal opined that women at risk of FGM did not amount to a social group under the 'membership in a particular social group' ground for persecution because all women in Sierra Leone were all likely to be subject to FGM as the practice is "clearly accepted and/or regarded...as traditional and part of cultural life."¹⁰⁷ Lord Justice Auld said, "[t]o confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution."¹⁰⁸ Auld LJ, with Lord Justice Chadwick concurring,

¹⁰⁷ *Fornah* (n 43b).

¹⁰⁸ *ibid* [1]. The notion of a group being unable to constitute a particular social group under the Convention due to being defined by fear of persecution had also been used to defeat claims to membership in a particular social group for victims of domestic violence, for example in the early stages of *Shah and Islam* (n 78 chapter one)(of *Shah and Islam* [1999]) the special adjudicator and Court of Appeal found that Mrs Islam had been persecuted in Pakistan and that authorities in Pakistan are both unable and unwilling to protect her. But held that as a matter of law the appellant was not a member of a "particular social group" because the group did not exist independently of the feared persecution (IAT (unreported) 2 November 1996 and *Regina v. Immigration Appeal Tribunal and Another, Ex parte Islam* [1998] 1.W.L.R. 74). This was

concluded that fear of FGM could not be defining feature of a group as it was not an immutable characteristic (i.e. it was something which could change, namely by submitting to FGM women would no longer have to fear FGM).

This was disputed by Lady Justice Arden, who persuasively argued:

To take account of that factor and conclude that this characteristic is not immutable... would be to conclude, in the case of persecuted left-handed people, that they could not constitute a particular social group for the purposes of the Refugee Convention because, when the persecution succeeds, they no longer have their left hands.¹⁰⁹

The reasoning of the Court of Appeal demonstrates again the dangers of overlooking the purpose of the Convention; the test for whether a reading of the Convention is an acceptable interpretation ought to be with reference to

overturned at the House of Lords, Lord Steyn stating 'particular social group' "covers Pakistani women because they are discriminated against and as a group they are unprotected by the state. Indeed the state tolerates and sanctions the discrimination" [34]. Lord Hoffman further stated: "the legal and social conditions[...]left her unprotected against violence by men were discriminatory against women. For the purposes of the Convention, this discrimination was the critical element in the persecution. In my opinion, this means that she feared persecution because she was a woman. There was no need to construct a more restricted social group simply for the purpose of satisfying the causal connection which the Convention requires." [96]. On the other hand, in his dissenting opinion Lord Hope argued that the appellants had failed to satisfy the requirements for refugee status, conceding "[t]he evidence in the present case is that the widespread discrimination against women in Pakistan is based on religious law, and the persecution of those who refuse to conform to social and religious norms, while in no sense required by religious law, is sanctioned or at least tolerated by the authorities...[w]omen who are perceived to have transgressed them are treated badly, particularly by their husbands, and the authorities do little to protect them. But this is not because they are women. They are persecuted as individuals for what each of them has done or is thought to have done." [110-2]. For Lord Hope, Lord Steyn's careful distinction between domestic violence in Britain, present but condemned and prosecuted and that in Pakistan, accepted on the evidence as systemic yet largely ignored was not addressed. This view is unsustainable when one considers the cases of Mrs Islam and Mrs Shah through the lens of collective violence, the facts of their cases fall within the notion of collective violence as the individual instances of domestic violence are a symptom of societal norms condoning violence against women, in particular within a family. .

¹⁰⁹ *Fornah* (n 43b) Lady Justice Arden [67].

the purpose of providing surrogate protection to those who have suffered or fear human rights violations. It also repeated the error of reading Convention ground as seeking the motivation for persecution, in discussing whether or not the group could be defined other than by reference to the alleged persecution, the Court of Appeal, in suggesting that it was relevant whether or not victims were selected due to an immutable characteristic or not were again focusing on the motive of the potential perpetrator. If one begins by considering the motive of a man carrying out FGM, it can easily be argued that his motive was to complete a traditional ritual rather than to harm the girl in question, it follows then that once FGM has been completed then the girl is no longer at risk and has nothing to fear from him. In addition, she was selected then only because she had not yet been circumcised and now she has been, again, it follows she is no longer at risk.

This is flawed logic. The actual reason, or motivation, for the human rights violation may well have been cultural practice or local tradition, it could be accepted that the perpetrator does not necessarily choose to circumcise the girl simply *in order to* cause pain or harm but this is not relevant to the Convention. What is relevant to the Refugee Convention is that FGM is a practice, which violates human rights (and it *must* qualify as a severe human rights violation, FGM passes the threshold for gravity of harm and is a violation of the right to freedom from torture and the right to bodily integrity) and that girls undergo this procedure because they are female (an immutable characteristic). The fact that it is an accepted practice does not render it less of a human rights violation. That it is an accepted practice makes it conversely

more relevant to international refugee law, as it allows it satisfy the collective violence element as well as being a human rights violation.

The House of Lords (Lord Bingham, Lord Hope, Lord Rodger, Baroness Hale and Lord Brown) took an entirely different approach to the Court of Appeal. Lord Bingham and Baroness Hale focused on the fact that this human rights violation was committed only against women and as justified due to the perceived position of women in society (in this case in Sierra Leone). The court also rejected the Court of Appeal assertion that this did not amount to a Convention ground for persecution, as ‘women’ could not constitute a social group, membership in which could be the reason behind the persecution.¹¹⁰

Lord Bingham stated:

Women in Sierra Leone are a group of persons sharing a common characteristic which...is unchangeable, namely a position of social inferiority as compared to men. They are perceived by society as inferior, *that is true of all women, those who accept or willingly embrace their inferior position and those who do not.*

FGM, Lord Bingham further noted, did not define the group but was “an extreme and cruel expression of male dominance.”¹¹¹ Women do not, then, have to publicly object or even try to avoid the practice in any way, simply being a woman in a society where women are perceived as inferior and

¹¹⁰ This was key to the rejection of Ms Fornah’s refugee status application, instead she was awarded humanitarian protection until she turned 18. The court did not explain how she could qualify for humanitarian protection yet not be a refugee- this disconnect is rarely explained despite repeated statements that the purpose of the Refugee Convention is to provide surrogate protection.

¹¹¹ *Fornah* (n 43a) [31] (emphasis added).

therefore subject to human rights violations gives rise to a good case for refugee status.¹¹²

This also tackled the issue of women who had already been subjected to FGM, in the past applications made on this basis were rejected as she had nothing to fear as she had already submitted to the practice, this was clearly rejected.

Baroness Hale stating:

The stumbling block seems to have been the fact that FGM is a once and for all event. Once done, it can neither be undone nor repeated. Thus, it was argued, if many members of the group are no longer at risk, because they have already suffered, it can no longer constitute a group for this purpose. But if the group has to be defined only to include those at risk, it then looks as if the group is defined solely by the risk of persecution and nothing more. This is a peculiarly cruel version of Catch 22: if not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone.... It is those characteristics which lead to the persecution, not the persecution itself which leads to those characteristics.¹¹³

Baroness Hale and Lord Bingham presented FGM as an expression of severe discrimination against women, a conceptualisation, which could be, and ought to be, applied to other forms of gender persecution such as rape and domestic violence as well as punishment for deviance of other gender specific

¹¹² One formulation of a social group successfully used in an FGM asylum claim is “women opposed to FGM who belong to an ethnic group that practices FGM” *Re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

¹¹³ *ibid* [112-113].

laws. Baroness Hale's speech points towards this, she considered it 'blindingly obvious' that Ms Fornah belonged to a particular social group and argued:

[T]he world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the international Covenant on Civil and political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women, are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments.¹¹⁴

This view was echoed by Lord Rodger who emphasised, "The harm is 'gender-specific.' So, being a woman is a *causa sine qua non* of being a victim: in other words, 'but for' being a woman, the persons concerned could not be selected as victims of the practice although accepted that that may well be an oversimplification."¹¹⁵ This again underlines the importance of moving away from examining motivation for the persecution in defining persecution or finding a causal link between persecution and the Convention grounds. What is relevant is not the individual motivation of the perpetrator but what exposed the victim to the human rights violation, be that her gender (social group)¹¹⁶, her religion, her race, nationality or political opinion (implied, imputed or actual).

¹¹⁴ *Fornah* (n 43a) [86].

¹¹⁵ *ibid* [74].

¹¹⁶ And as argued in chapter two, gender must be a social group as it is a role assigned to the individual by society due the individual's sex, whilst man/woman is not assigned by society, male/female are roles defined by society.

6.3 Conclusions: Gender Violence as Collective Violence

Only recently, in cases such as *Fornah*, has it begun to be recognized that the question must at least be asked 'is this gender violence?' The answer to be determined by the extent to which the victim was selected for violence due not only to her gender but to gender relations in the home country. It is important that cases continue to develop in this jurisprudential direction to counter the charge, still valid after *Kunarac*, that "international...law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched."¹¹⁷ If refugee law is to move beyond the damaging public/private divide collective violence offers a path to a expansive yet conceptually robust definition of refugeehood. It offers an alternative distinction between those victims of violence qualifying for refugee status and those victims of violence who will not qualify for refugee status.

Collective violence retains the notion of national protection inherent in article 1(2) but demands enquiry more broadly than merely in to government or state measures and is heavily influenced by international human rights law as it reflects a judgment that the collective behaviour or attitude in the country of origin is rightly described as violent. It is of paramount importance though, that collective violence is *not* interpreted as mass violence or as having any requirement of frequency or being widespread, to repeat collective violence *only* requires that the violence be said to be in some way accepted or condoned by societal norms in the country of origin. This also allows

¹¹⁷ Charlesworth 'Feminist Methods in International Law' 93 *American Journal of International Law* (1999) 387.

determination of the lack of national protection element, it would not rely on superficial factors such as the existence of a national law to deal with the human rights violation in question but on whether it could actually be said that someone committing such a human rights violation acted contrary to societal norms. This demands *effective* national protection of human rights rather than just legal lip-service. Such determinations are already made in Country of Origin reports, briefing documents produced by embassies, the UN, the World Bank and indeed many NGOs. It would also require that more weight and respect is given to expert testimony intended to provide background information for the court.¹¹⁸

As this chapter has demonstrated, there continues to be applications from female refugees that are rejected on the grounds that they do not come within article 1(2). The reasoning behind many of these exclusions might be traced to a lack of understanding as to how gender violence can be experienced by women as a form of persecution. Collective violence, it has been argued, offers a lens through which to see these experiences of gender violence more clearly as a form of refugeehood. It has been argued also that collective violence does not obscure the political element of much of this violence but rather highlights this. Charlesworth and Chinkin, quoting Charlotte Bunch, state

[Violence against women] is caused by “the structural relationships of power, domination and privilege between men and women in society. Violence against women plays a central role in maintaining those political relations at

¹¹⁸ This is a particular problem in refugee law, for example in the UK the case of *Sepet* (mentioned above) was decided in direct contradiction with expert opinion, similarly in the US Shapiro details a number of cases involving the threat of honour killings where expert testimony which emphasised the prevalence and likelihood of honour killings in the cases before the court were seemingly ignored. See Shapiro

home, at work and in all public spheres" The maintenance of a legal and social system in which violence or discrimination against women are endemic and where such actions are trivialized or discounted should engage state responsibility to exercise due diligence to ensure the protection of women.¹¹⁹

It is not the structural inequalities between men and women that could give rise to a good case for refugee status but the violence caused by these structural inequalities, collective violence reinforced by state failure to act.

Thus, violence is not simply 'wrongs done to women' but is a product of 'the socially produced capacity for women to be wronged'.¹²⁰ Sharon Marcus, for example, argues for the adoption of the approach to gender violence that sees it as a language through which gender inequality is defined, expressed and, possibly eventually, contested. Marcus uses the term 'rape script' to refer to rape as a process made possible by gender inequality and in turn scripting anew the terms of gender inequality. The content of the rape script is clearly variable and is determined by the '*gendered grammar of violence*, where grammar means the rules and structures which assign people to positions within a script'.¹²¹ In adopting a gendered approach to analysing violence, the force and consequences of the gender stereotypes expressed in social norms that are expected of women and wives point towards a primary form of violence that may escalate in times of conflict but constitutes a form of violence in and of itself as well. This broadens the notion of violence to include severe pressure imposed on individuals due to restrictive social

¹¹⁹ Charlesworth and Chinkin *The Boundaries of International law* (2000) citing Bunch 'Passionate Politics Essays 1968–1986' (1987) *Feminist Theory in Action* 491.

¹²⁰ Brown 'Women's Studies Unbound: Revolution, Mourning and Politics' (2003) 9 *Parallax* 3 11.

¹²¹ *ibid* 392.

norms; in the case of forced marriage, this includes practices expected of and inflicted on individuals that are justified due to the social construction of gender.

The actual acts of domestic violence, sexual violence *and* severe discrimination (such as denial of access to education, health care or work) are all acts of collective violence and fall squarely within article 1(2). This does not, however, require that an individual suffer violence of that kind before coming within article 1(2), as acknowledged in *HJ(Iran)*, refugee law must not require an individual to place themselves in harms way by publically flaunting societal norms until they suffer physical violence. Violence means both injury and harm and harm need not be physical harm. If an individual has only 'tragic choices', to return to chapter one, where she may only conform to social norms, which do not adhere to international human rights standards (representing the harm) or face further persecution (which may be characterised as a subsequent instance of harm), or leave, if she is able to leave and chooses to do so, she is a refugee.

There remain then several key issues in the area of gendered-persecution within existing international refugee law. It is paramount that cases are addressed on a case-by-case basis, thus what fits for one case may not be appropriate conceptual analysis of a subsequent case and it must be remembered that not all female refugees are victims of gendered persecution, just as male refugees are not excluded from the concept. However, some general observations can be made. Firstly, it is important to recognise that sexual violence can be conceptualised within the personal dignity paradigm

and need not be expressed solely in terms of violence akin to torture. The ICTY eluded to this conceptual distinction in labelling rape as both a crime against humanity *and* torture. The over reliance on the torture paradigm when addressing the issue of sexual violence within international law has stilted the progress made by the ICTR and the ICTY in addressing the issue of rape and sexual violence in the international context by making it conceptually problematic to transpose progress made in these tribunals to other areas of international law, particularly refugee law. Here a link between personal dignity and sexual violence is vital in establishing rape and sexual violence as above all human rights violations and, therefore, forms of persecution irrespective of the motivation of the perpetrator or the use of severe physical violence or substantial force. This is vital if victims of sexual violence committed outside of a recognised war or conflict are to be recognised as refugees. These women may not be able to rely on general conditions in country or evidence of wide spread coercive circumstances; rape is still possible as persecution even if it is an unusual act within the home country if other circumstances, such as lack of national protection, are present.

Secondly, it is still vital to maintain the distinction between sexual violence and gender crimes such as forced marriage, repressive social norms addressed solely to women, where the crime either does not include or goes beyond sexual violence and is rooted primarily in roles assigned to the victim due to their gender. There is a place in international refugee law for sexual persecution, gendered persecution and persecution that may accurately be characterised as including elements of both alongside, and indeed within, the traditional notions of persecution. The progress made in international law in

recognising sexual violence, and indeed gender crimes, is not insignificant and is much to be praised but within refugee law there remains considerable work to be done before international refugee law can accurately lay claim to gender neutrality. At present, there remain significant barriers to female refugees being recognised as such, not least because of a lack of understanding of the similarities and differences between sexual violence and non-sexual gender violence, where the progress made in the *HJ* case ought to point the way for determining cases concerning female victims of gender persecution. Whilst violence may be linked to the victim's sex, or sexual in character, it is important also to acknowledge that in many cases sexual violence is more accurately described as part of or a consequence of gendered societal norms and roles, which ascribe certain roles to women and allow certain behaviour of men that often form and provide the context for the acts of sexual violence female refugees have fled in fear of or suffered.

And finally, underlying all discussions of gendered violence within refugee law is a fatal tendency to overlook the importance of, and potential for, a new concept of political within article 1(2). At present, progress made in improving the rate of recognition for female refugees, in line with male counterparts, is inevitably halted when it comes up against the concept of 'political.' This chapter has demonstrated that reform is not only necessary but possible within existing conceptual framework of article 1(2) and the Refugee Convention. A new notion of political, which dispenses with the private/public dichotomy to acknowledge the pervasive and fluid nature of politics, would allow article 1(2) to continue operating and more accurately reflect the varied experiences of female refugees.

CONCLUSION

Glynn recently argued “discussions over the need to adapt a more ‘political’ or ‘humanitarian’ refugee definition do not represent a new phenomenon; they merely resemble a modern continuation of the contrasting views put forward by a variety of personalities involved in the formation of the 1951 Refugee Convention.”¹ This thesis has sought to suggest a direction in which this continuing debate might head. The task of interpreting article 1(2) retains its relevance until or unless other forms of protection offered to those fleeing danger in their homeland offer the same legal protection and subsequent right as those offered by the 1951 Convention. There has been a tendency to argue that instead of reinterpreting article 1(2) other categories of protection, such as the so-called ‘humanitarian protection’, can be offered to those whose experiences of persecution may not mirror those envisaged by the drafters of the 1951 Convention. Suggestions of this kind are rejected here not only for failing to secure comparable legal protection for such individuals but also as failing to recognise the dynamic potential of article 1(2).

The thesis has considered the concept of persecution through the prism of human rights law and the concept of human dignity. The approach taken by this thesis may be summed up as follows:

- 1) The key structural and normative assumptions of Robert Alexy theory serve as the underpinning of this thesis’ reconstruction of refugee law.

¹ Glynn ‘The Genesis and Development of Article 1 of the 1951 Refugee Convention’ (2012) *Journal of Refugee Studies* 25 (1) 134 136.

- 2) Alexy's principles theory demonstrates a) that fundamental rights are principles b) that principles are characterised by the dimension of weight and as such are subject to balancing c) that balancing requires a determination of relative weight
- 3) Alexy's correctness thesis demonstrates a necessary connection between law and morality which requires that balancing decisions are justifiable and justified relative to the requirements of morality
- 4) In order to produce a justified decision the principle given the greater weight must be a) of greater abstract weight or b) of greater abstract importance (or value)
- 5) The principle of human dignity or principles of human rights are *always* at stake in refugee law cases
- 6) Competing principles must, therefore, be shown to be of a greater abstract importance or value to be ranked higher in conditional preference
- 7) Definitive preference can be given to absolute fundamental rights which definitively excludes greater weight being given to the claims of host states when the refugee's claim concerns these absolute rights
- 8) Conditional preference can be given to the principle of human rights protection, which excludes greater weight being given to the claims of host states than to the claims of refugees unless, on the facts, greater weight can be given to the competing principle in arguing either the infringement of human rights is minimal *or* the importance of satisfying the competing principle is so great so as to outweigh the infringement.

- 9) This provides the background standards for interpretation of the Refugee Convention and places limits on plausible interpretations of the Convention.

These basic propositions, constructed in chapters one to three of this thesis form the basis of the key claim put forward, namely that article 1(2) and the 1951 Convention as a whole are capable of supporting shifting interpretations of key concepts such as persecution in order to reflect the evolving notion of refugeehood. The task of this thesis has been to identify where one may draw the line between refugee and refugee-like so as to render article 1(2) a more expansive but still workable definition of 'refugee.' Central to this task is the persecution criterion which has been identified as representing this line between migrant and refugee. This, in and of itself, is perhaps an uncontroversial claim. Those advocating a restrictive or traditional interpretation of article 1(2), such as Price and Martin, focus similarly on the persecution criterion. Where the approach advocated here departs from Price and Martin is in arguing that the persecution criterion does not operate to limit article 1(2) to paradigmatic experiences of refugeehood only. The political opponent and the religious persecutee might be paradigmatic examples of a refugee but these are far from the only individuals entitled to assert a claim for refugee status and the protection of the 1951 Convention. This thesis has sought to explain how the above claim to an expansive definition of 'refugee' can be conceptually constructed *within* the current refugee law regime.

Following Gilbert it has been argued that international law, including refugee law, now represents a limitation on state's power to control entry to or expulsion from its territory. This rejects the notion that state sovereignty is an established rule all international law is subject to and instead affirms Benedict Anderson's concept of the state as an 'imagined community'² capable of being re-imagined in line with shifting standards of legitimacy. International refugee law might be said to place several limitations on state sovereignty. It is, in the first place, a limitation on the home state's sovereignty by denying their jurisdiction over a citizen.

More importantly here refugee law might be said to also represent a formal expression of the claim that both in reference to its own population *and those in their territory* states are bound by the principles of human rights. The priority to be accorded to human rights protection could be said to have been recognised in international refugee law in the prohibition on *refoulement* contained in article 33. Although the definition of refugee status is not in and of itself a limitation on a receiving state's power to expel the individual as refugee status is declaratory and not constitutive in theoretical and practical terms it represents a significant limitation. The Refugee Convention might be said to represent a voluntary concession, in the sense that a state cannot be compelled to sign the Convention. However, it might also be seen as an unavoidable concession in the sense that the Refugee Convention is merely a formal expression of the theoretical and practical implications of the universality of human rights and the notion of secondary duty-holders. This

² n 43 (chapter 5) 5-7.

supports Gilbert's claim that "[i]nternational refugee law and international human rights law act in parallel to limit the state's power."³

The foundational principles of refugee law provide also a reference point for evaluation of interpretations of the Refugee Convention. Interpretations of refugee law that contradict these foundational principles might be rejected as invalid, rather than merely not preferable. As 'refugee' is to be interpreted in line with foundational notions such as human rights and political legitimacy the scope of international protection can be seen as dynamic rather than static. As such the definition is capable of shifting without dissolving the boundary between 'refugee' and 'migrant'. The continuing exclusion of certain experiences of refugeehood from article 1(2) shows this widened interpretative scope to be not only conceptually possible but conceptually and practically necessary in order for the Refugee Convention to fulfil its protective function within international law.

³ n 94 (chapter 3) 177.

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