

BEYOND OCCUPATION: PROTECTED PERSONS AND THE EXPIRATION OF OBLIGATIONS

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In spite of the increasing importance and expanding scope of international law, some subjects of international law still fall outside of the protection offered by existing legal instruments.

Under certain circumstances, stateless persons,¹ for example, may find themselves in a situation akin to refugees, but due to occupation, have no (in any case not anymore) country of their own, and not being able to cross borders they would not qualify as persons fleeing their country of origin in terms of the 1951 Refugee Convention² and its 1967 Protocol.³ On the

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1. See, e.g., “[A] person who is not considered as a national by any State under the operation of its law.” United Nations Convention Relating to the Status of Stateless Persons, art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force on June 6, 1960).

2. United Nations Convention Relating to the Status of Refugees, art. (1)(A), July 28, 1951, 189 U.N.T.S. 150 (entered into force on Apr. 22, 1954). The Refugee Convention defines as a person who:

[O]wing 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. art. (1)(A) [hereinafter Refugee Convention].

3. See generally United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force on Oct. 4 1967) [hereinafter Protocol for Status of Refugees].

other hand, being confined to an occupied territory and thus being prevented from moving, they would not fit the description of Internally Displaced Persons (IDPs) either.

“Climate refugees” are a special sort of migrant, akin to IDPs when displaced within their own country due to catastrophic conditions, such as earthquakes, tsunamis, draughts and other, more or less, natural disasters. However, climate change, weather induced dire straits, *mutatis mutandis*, knows no frontiers and hence, “climate refugees” often have to cross into another country in order to escape from life threatening conditions. Yet, once crossing an international border, they are no longer IDPs, but neither are they refugees under the Refugee Convention, as “climate” today is not a (Refugee) Convention ground of persecution. Even where the Convention’s refugee definition applies, or where, for example, a legitimate claim to designation as protected persons under the Fourth Geneva Convention⁴ (Geneva IV) may be made, the rules governing the granting of the respective status, its duration, and the expiration of such obligations are at best blurry.

While all of the above groups of people may be described as “persons to be protected,” this article will have a main focus on state responsibility for convention refugees in times of—and beyond—occupation; juxtaposing their designation and states’ post-conflict obligations with the ones accorded to protected persons under Geneva IV as the two groups of “persons to be protected” perhaps the most directly affected by, and depending on, actions by foreign states.

Furthermore, while highlighting some questionable approaches on the part of individual states towards the state responsibility issues involved, those examples are merely illustrative of some general flaws of the current international refugee regime. Here, it is argued that although individual state’s actions may exacerbate or alleviate the general problems involved to a certain extent, unless those shortcomings are addressed on an international level, the often insufficient protection offered to people in need will persist.

Thus, this article will start with placing the current refugee and burden sharing regime in context, followed by an assessment of state responsibilities *de lege lata*. After highlighting some consequences of a narrow reading of state obligations and critiquing the existing legal framework, thoughts as to how to turn state responsibilities *de lege ferenda*

4. *See generally* The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force on Oct. 21, 1950) [hereinafter Geneva IV Convention].

into binding legal obligations are put forward, before offering some tentative conclusions, summarizing the main points of contention.

I. PLACING STATE RESPONSIBILITY FOR REFUGEES IN CONTEXT

The refugee regime, initially designed to cope with the aftermath of the Second World War and hence, in the main, focusing on European refugees fleeing from the horrors and consequences of war, nowadays is under pressure. In the 21st century, the majority of migrants and refugees entering Western, and especially European states, hail from distant countries and continents, not, as was previously the norm, neighboring states. And the total number of people, for various reasons, fleeing their country of origin has been on the increase for a number of years.

To the extent that rational choice is an option, people seek to achieve their goals, taking a line of least resistance. So do refugees, focusing on entering a safe country through whatever port of entry possible, albeit “choice” is often not an option they have.

Hence, taking Europe as an example, for geopolitical reasons, countries in the South and Southeast of Europe, such as Greece and Italy, are more likely to receive large numbers of refugees, mainly from African and Asian countries, than their Northern European counterparts, as the former often represent the closest port of entry into Europe. In an attempt to reduce so-called “asylum-shopping”—the activity of applying multiple times in different countries for asylum—the European Union (EU) established the Dublin II regime. The Dublin II regime basically states that wherever a person enters the EU with a view to seeking asylum determines where his or her application has to be processed and decided. If it were to be detected that a person made a second application in another EU Member State, that person will be sent back to the country through which he initially entered the EU. That, however, has further contributed to an unbalanced burden-sharing status quo, with countries closest to the entry ports receiving the highest number of asylum seekers. With an ever deteriorating system for asylum status determination due to lack of economic resources and perhaps also economic incentives, countries at the periphery, such as those in the north of Europe, receive an unduly low share of the total number of applicants entering the EU.

Furthermore, in order to control the growing number of refugees and migrants attempting to enter Europe, Frontex, the EU’s joint border patrol force, has increased its activities in the past two years by: dispatching patrol boats to the Aegean Sea to block arrival of mostly African illegal immigrants by sea, and, more recently, heightening control around the Greek town of Nea Vissa. Nea Vissa borders Turkey and has become the main corridor for illegal entry into Europe by Middle Eastern and North

African people seeking protection or simply a better future.⁵ Hence, people trying to enter the EU to explore new avenues take even greater risks in order to literally find an opening, and sometimes their “port of entry” is merely a rock.⁶ In addition, upset by the uneven distribution of burden within the EU asylum system, countries on top of the port of entry statistics are increasingly aiming at entering into bilateral agreements with countries that serve as hubs on the way to Europe. As a case in point, Italy and Libya reportedly executed an agreement that pays Libya compensation in return for cracking down on illegal migration routes stemming from, or in any case leading through, Libya. That agreement includes an opening for Italian authorities to swiftly return intercepted boat migrants to Libya, a country which is not a state party to the Refugee Convention, before they even reach Italian shores or “rocks” that is. The agreement has been criticized for not sufficiently differentiating between illegal migrants, and genuine refugees, and in many instances not even having the necessary procedures in place in order to make a well-informed decision as to the determination of the proper refugee status of the people intercepted, before they are returned.⁷

In sum, contemplating state responsibility issues in the context of the existing burden-sharing status quo, as highlighted by the EU asylum system, the emerging picture is one of imbalance to the extent that refugees’ due process rights, including a fair hearing of individual asylum claims, are jeopardized. The fairness of the asylum system is jeopardized by refugee flows simply being paid-off and redirected to countries less concerned with, and feeling less bound by, the Refugee Convention—and the granting of rights pronounced therein. But what legal obligations towards protecting refugees or protected persons under Geneva IV are there today?

5. Cf. Edward Cody, *Greek Town Becomes Flash Point in War against Muslim Immigrants*, WASHINGTON POST, Nov. 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/11/AR2010111107562.html> (last visited Nov. 25, 2010).

6. Cf. The small Italian island of Lampedusa, 127 miles off Sicily (and 70 miles off Tunis), which, due to its remote location en route from North Africa to Europe, has often become the first (and only) destination of migrants and (boat) refugees taking the sea way on their flight, risking the journey in overcrowded and unsuitable craft, just to come to an equally overcrowded island, with few chances of proceeding any further.

7. See generally *Italy/Libya: Migrants Describe Forced Return, Abuse*, HUM. RTS. WATCH, Sept. 21, 2009, available at <http://www.hrw.org/en/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse> (last visited Nov. 11, 2010); see also *Italy to Pay Libya 5 Billion*, N.Y. TIMES, Aug. 31, 2008, available at <http://www.nytimes.com/2008/08/31/world/europe/31iht-italy.4.15774385.html> (last visited Nov. 11, 2010).

A. *Responsibilities de lege lata: Where Are We at Today?*

As far as refugees are concerned, as a point of departure a state only has responsibilities for people crossing into its territory and applying for refugee status after crossing the border. In fact, an asylum application generally may not be brought unless the applicant finds himself within the country where he wants to seek asylum, and in any case, by definition, according to Article 1, Section A of the Refugee Convention, a refugee needs to be “outside the country of his nationality”—otherwise he would not qualify as a refugee. Other than that, states may also accept so-called “quota refugees,” denoting persons who have been selected and whose refugee status has been determined by the United Nations High Commissioner for Refugees (UNHCR), prior to being transferred to his or her country of refuge. In such cases, the entire process of selection and transfer is organized by the UNHCR, and generally referred to as resettlement. While states pledging acceptance of a certain refugee quota per year are bound by that statement, the pledge itself is generally voluntary. In contrast, if found to have a well-founded fear of persecution based on a Refugee Convention ground, accepting the refugee claim of a person fleeing to the respective country is not optional, but a legal responsibility for any state party to the Refugee Convention.⁸

But, excluding acceptance of UNHCR refugee quotas, which represent to a large extent deliberate choices, as opposed to legal obligations, where does that leave us in terms of responsibilities *de lege lata*?

If the only legal responsibility of states towards refugees pertains to those knocking at their respective frontier’s doors, what does that lead to on a global level? As previously mentioned, the EU asylum system, as well as other regions’ refugee regimes, suffers from a number of shortcomings, due, *inter alia*, to the fact that some ports of entry stand out. This leaves those countries closest to the refugee roads most travelled with, by far, the largest share of new arrivals. Neighboring countries physically connected to those Southern and Southeastern outer EU borders are, on average, significantly less affected by the migrant and refugee flows. The more towards the geographic periphery relative to the refugee flows a country is

8. For states not party to the Refugee Convention, legal obligations based on customary law, such as the principle of “*non-refoulement*” enshrined in Article 33 of the Refugee Convention, but now arguably also having reached status as customary law, may be contemplated. Accepting a person as a refugee and conferring refugee status on that person, and merely not returning a person to the country he or she fled from, without conferring refugee status on that person, are two quite separate issues. The former endows the refugee with a set of rights, including eventual, and usually, permanent residency status. The latter, on the other hand, resembles much more a fickle state of limbo, which may literally change overnight. See generally Refugee Convention, *supra* note 2, art. 33.

situated, the fewer, in general,⁹ the number of refugee claims, simply because it is harder and more expensive for a refugee to travel all the way.

Now, imagine Iceland. In accordance with that general pattern, the number of refugee arrivals to Iceland each year is quite small;¹⁰ though, to be fair, so is the total population of Iceland.¹¹ But is that itself sufficient ground for barely being required to deal with refugee flows? Based on international legal requirements as of now, the answer would be yes. Considering that Iceland is a country situated in a rather remote area, and is neither physically connected to the European mainland nor of particular political significance on the world stage, one might concede that Iceland has not much of an influence on any refugee flows, and as such, should only be required to deal with those actually coming to its borders and applying for protection.

But what if Iceland were a military superpower (for the sake of argument), and had been heavily involved in conflict zones overseas negatively affecting parts of the civilian population and contributing to refugee flows abroad—irrespective of positive goals that may have been achieved? Would the balance of obligations then change, or would it still be correct to assume that Iceland had no further obligations towards refugees other than to those who manage to cross the oceans and apply for protection in Iceland? In line with the existing legal framework, causation does not matter and states need only confer refugee status upon qualifying persons who apply within their borders. Even where occupation or intervention is the main contributing factor to a refugee flow, obligations *de lege lata* remain the same. People in such conflict situations often are not able to cross borders at all, or at best manage to cross into the nearest neighboring countries. With respect to the Iraq war, for example, states like Jordan and Syria carry the main refugee burden, simply due to their proximity to the conflict zone.

9. Of course, to the degree that there is a real element of choice involved, considerations of wealth, human rights record, etc. of the refugee's country of destination play a part in deciding where to try to apply for refugee status, but the general, overall (geographically determined) pattern is not significantly changed by that.

10. Seventy-six individuals in 2008, see Zoë Roberts, *Asylum Seekers in Norway: Can We Learn from Our Ancestors' Descendants?*, REYKJAVIK GRAPEVINE, July 21, 2009, available at <http://www.grapevine.is/Features/ReadArticle/Article-Asylum-Seekers-In-Norway> (last visited Nov. 11, 2010).

11. As of July 2010, Iceland's population amounts to a mere 318,000 people. Compared to Norway, also a country at the periphery and outside the EU, Iceland is not quite as remote from the main refugee roads. Although both are signatories to the Dublin Regulations, Norway has a population of 4.9 million inhabitants with a total number of 14,431 arrivals in 2008, or 3.1 refugee claims per 1,000 inhabitants, while Iceland has a mere 0.03 claims. Roberts, *supra* note 10, at 1–2.

Furthermore, what is the state of the law with respect to state responsibility for protected persons? According to Geneva IV, “persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹² “They shall at all times be humanely treated,”¹³ not be treated as enemy aliens,¹⁴ and “shall not be transferred to a Power which is not a Party to the Convention.”¹⁵ Even so, the detaining power may only transfer protected persons after it has “satisfied itself of the willingness and ability of such transferee Power to apply the present Convention”¹⁶ and “[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention”¹⁷ as the result of any agreement concluded between the authorities of the occupied territories and the occupying power.¹⁸

While Geneva IV conveys a number of rights upon protected persons, it is less clear how far those rights extend, what specific preconditions need to be fulfilled before protected persons may be transferred and thus their status changed, or for what period of time a state’s responsibility towards protected persons under Geneva IV applies. For instance, while Geneva IV applies to the protection of civilian persons in times of war and defines certain obligations of the occupying power, the wording of the above mentioned articles does not unambiguously explain whether the rules governing protected persons only apply *during* occupation. Regardless, there seems to be room for debate as to when exactly an occupation ends, when a formerly occupied power gains sovereignty, and when, if at all, obligations of the former occupying power towards protected persons expire.

Finally, in regard to persons defined as refugees, in recent years a certain amount of debate has been revolving around questions as to when refugee status may be revoked based on a change of circumstances in the refugee’s country of origin. In accordance with Article 1, Section C(5) of the Refugee Convention, if circumstances in the country of origin which led to the granting of refugee status have ceased to exist, refugee status may be discontinued. However, while a strict interpretation may lead to a

12. Geneva IV Convention, *supra* note 4, art. 4.

13. *Id.* art. 27.

14. *Id.* art. 44.

15. *Id.* art. 45.

16. *Id.*

17. Geneva IV Convention, *supra* note 4, art. 47.

18. *Id.*

presumption that states' responsibility for persons to whom refugee status has been granted may be discontinued, whenever the initial circumstances leading to a positive refugee status determination have changed (a definition of the durability of the required change of circumstances is nowhere to be found). Hence, even the expiration of states' obligations seems to be in dispute.

In sum, while state responsibilities for refugees and other protected persons *de lege lata* may be narrowly construed, the less-than-clear wording of certain provisions, and the imbalance of the current asylum system on a global level, invite addressing the underlying more generic questions such as: Does an occupying power carry primary responsibility for refugees "created" by war or intervention? Is legitimacy of relevance in that evaluation? Does an occupying power's granting of protected person status under Geneva IV expire with the end of occupation? What responsibilities exist with respect to ensuring the continued well-being of people once designated as protected persons by an occupying power? And under what particular conditions may refugee status be revoked, based on a claim of ceased circumstances in the refugee's country of origin? Those questions will be dealt with in the following sections, starting in reverse order.

1. Legal Consequences: Critique of the Current Legal Framework

Taking the above depiction of the existing legal provisions pertaining to state responsibility for protected persons during and beyond occupation as a point of departure, the ensuing account details consequences of a narrow reading of states' obligations—indicating where the underlying legal framework is unclear, blurry, or incoherent.

2. Ceased Circumstances

While Sweden took up the EU Presidency, the EU found itself at a critical juncture in regard to the creation of a Common European Asylum System (CEAS). The Reform Treaty, expected to be ratified by all Member States and enter into force in the course of 2010,¹⁹ introduces a system of integrated management of the EU's external borders, incorporates the Charter of Fundamental Rights which guarantees the right to asylum,²⁰ and expands the competence of the Court of Justice of the European

19. See Dr. Francesco Maiani & Dr. Vigdis Vevstad, Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal, EUR. PARL. DOC. PE 410.690 (Mar. 2009).

20. See Charter of Fundamental Rights of the European Union (EC) 2000/C 364/01 of December 18, 2000, art. 18, 2000 O.J. (C 364/01).

Communities (ECJ) with a view to questions of asylum and immigration.²¹ In that context, a recent request by the German Federal Administrative Court for a preliminary ruling by the ECJ, with respect to the interpretation of an article of a European Council Directive,²² gains importance as the outcome would not only have significance for all EU Member States, but the subject matter highlights a problem of global reach and contention.

The provision in question, Article 11, Section (1)(e) of Council Directive 2004/83/EC of April 29, 2004, concerns the cessation of refugee status because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, a stipulation commonly referred to as the “ceased circumstances” clause. Article 11, Section (1)(e) of said Directive is based on Article 1, Section (C)(5) of the 1951 UN Convention Relating to the Status of Refugees,²³ which therefore would be of relevance in the present case. According to Article 1, Section (A)(2) of the Refugee Convention and its 1967 Protocol,²⁴ a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”²⁵ The special protection thus conferred to a person defined as a refugee shall cease to apply if:

[h]e 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; . . . this . . . shall not apply to a refugee . . . who is able to invoke compelling reasons arising out of

21. Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 OJ (C 306).

22. On April 28, 2008 the German Federal Administrative Court submitted five identical references for preliminary ruling to the Court of Justice of the European Communities concerning the interpretation of said Article 11(1)(e) in the following cases: Case C-175/08, Aydin Salahadin Abdullah v. Fed. Republic of Germany; Case C-176/08, Kamil Hasan v. Fed. Republic of Germany; Case C-177/08, Khoshnaw Abdullah v. Fed. Republic of Germany; Case C-178/08, Ahmed Adem and Hamrin Mosa Rashi v. Fed. Republic of Germany; Case C-179/08, Dier Jamal v. Fed. Republic of Germany, Court Proceedings (EC) OJ (C 197) of Aug. 2, 2008, 3–5, available at <http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=197&Submit=Search&ihtmlang=en> (last visited Feb. 4, 2011).

23. See generally Refugee Convention, *supra* note 2.

24. See generally Protocol for Status of Refugees, *supra* note 3.

25. Refugee Convention, *supra* note 2, art. 1(A)(2).

previous persecution for refusing to avail himself of the protection of the country of nationality.²⁶

Based on a narrow reading of this provision, in recent years a number of countries, including Germany, have started returning refugees, especially from Iraq, to their country of nationality, asserting that circumstances have sufficiently changed to justify their return. In reviewing refugee status and interpreting the criteria for cessation, the German authorities have focused on whether the individual concerned, at the time of the review, faced a risk of persecution in the country of origin, either in the form of continuation of the previous danger of persecution or a new risk.²⁷ In order to justify returning refugees, UNHCR Cessation Guidelines require a change in circumstances to be:

- 1) Fundamental;
- 2) Durable; and
- 3) To result in effective protection being available in the country of origin.²⁸

However, for change to be accepted as fundamental, in the case of persecution by a State, German courts regarded it as sufficient that the persecuting regime had lost power. In regard to durability of change, the only relevant question was whether the former regime was likely to regain power. Instability resulting from military intervention was considered irrelevant insofar as there was no likelihood of the return of the previous regime,²⁹ and the availability of effective protection and general issues of safety, other than the likelihood of renewed persecution, had not been taken into account at all.

Thus, neither widespread insecurity, precarious living conditions, nor the only transitional character of the occupation of Iraq by the multinational forces were considered as relevant arguments against cessation. In practice, this approach resulted in the systematic revocation of refugee status, especially of Iraqis who had fled the regime of Saddam Hussein. However,

26. *Id.* art. 1(C)(5).

27. Bundesverfassungsgericht [BVerwG] [Highest Administrative Court] Nov. 1, 2005, 124 Entscheidungen des Bundesverfassungsgerichts [BVerwGE] 276 (F.R.G.). *See also* UNHCR, Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive (Aug. 2008), at 9 n.49, <http://www.unhcr.org/protect/PROTECTION/48a2f2a42.pdf> (last visited Feb. 7, 2011) [hereinafter EC Qualification Directive].

28. UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1(C)(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the "Ceased Circumstances" Clause), Feb. 10, 2003, HCR/GIP/03/03.

29. *See, e.g.*, EC Qualification Directive, *supra* note 27, at 9 n.49.

in view of the highly volatile security situation in Iraq, invoking the “ceased circumstances” clause in regard to refugees originating from that country would seem premature as, in the opinion of the UNHCR, the current conditions on the ground have neither fundamentally or durably changed—nor may availability of effective protection be reduced to protection against a recurring risk of persecution.³⁰

Recognition of refugee status leading to international protection entails protection against return to a country where the threat of persecution persists, as enshrined in the principle of *non-refoulement*,³¹ but also includes protection allowing for a life of dignity in the host State.³² The overarching objective of international protection is “to provide the refugee with a durable solution in addition to and beyond safety from persecution.”³³ This aspect has to be taken into account when the “mirror image” of the decision to grant refugee status is considered. If the ECJ had subscribed to such a reading of the “ceased circumstances” clause in its ruling, revocation of refugee status throughout the EU and beyond, not least in regards to refugees from a still fragile, occupied country, would likely have been reversed in numerous cases,³⁴ based on the principle of *non-refoulement*. In fact, the ECJ seems to have followed a middle course in its Grand Chamber Judgment of March 2, 2010.³⁵ The Judgment did not go as far as the UNHCR in stressing refugees’ right to a durable solution beyond safety from persecution, but dismissed the idea of revoking refugee status solely on the basis of a finding that refugees’ initial fear of persecution no longer exists, without examining additional conditions relating to the political situation in their country of origin. More specifically, the Court held that the competent authorities of the respective Member State have to “verify that there are no other circumstances which could justify a fear of

30. EC Qualification Directive, *supra* note 27, at 11–12.

31. See Council Directive 2004/83, art. 21, 2004 O.J. (L 304) 12 (EC) [hereinafter Council Directive 2004/83]; Refugee Convention, *supra* note 2, arts. 3–34.

32. See Council Directive 2004/83, *supra* note 31, arts. 20, 22–34; Refugee Convention, *supra* note 2, arts. 3–34.

33. EC Qualification Directive, *supra* note 27, at 15.

34. In Germany alone, a review may apply to up to 14,495 Iraqi refugees whose status had been revoked between November 2003 and May 2007, based on the authorities’ considerations that the dangers prevailing in Iraq were general dangers threatening the entire population and, as a general rule, could not be equated with persecution (*i.e.*, with the singling out of a particular person based on that person’s specific characteristics or affiliations). As to the number of potentially affected persons, see EC Qualification Directive, *supra* note 27, at 5 n.28, 10 n.53.

35. See generally *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Court of Justice, Mar. 2, 2010, available at <http://www.unhcr.org/refworld/docid/4b8e6ea2.html> (last visited Apr. 26, 2011).

persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of the Directive.”³⁶ Furthermore, such:

verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country.³⁷

While the ECJ ultimately (and perhaps necessarily) still leaves a significant margin of appreciation in the hands of national authorities, it strengthens ramifications of the refugee protection regime by more rigorously defining the framework for cessation assessments, and the conditions to be met, if refugee status is to be revoked based on “ceased circumstances” in the country of origin. Thus, revocation of refugee status may be expected to be reversed in numerous cases, and even those that are not reversed may still qualify for subsidiary protection status, or in any case may not be returned, based on the principle of *non-refoulement*. That, however, would constitute a much weaker legal position for the persons affected, without the prospects of access to a broad set of rights and permanent residency as the embodiment of a durable solution.³⁸

3. Primary Responsibility

Another important and related aspect concerns the general question of who bears primary responsibility for refugees in any given situation. The Refugee Convention obliges all States Parties to cooperate with the UNHCR in fulfilling its function of supervising the application of the provisions of the Convention.³⁹ It also prohibits the expulsion or “*refoulement*” of a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”⁴⁰ The Refugee Convention itself is silent in regard to distributing the burden of accepting

36. *Id.* ¶ 91.

37. *Id.* ¶ 71.

38. *Cf. supra* note 8.

39. *See* Refugee Convention, *supra* note 2, art. 35.

40. *See* Refugee Convention, *supra* note 2, art. 33(1).

refugees, which is why, as a point of departure, neighboring states usually are still left with the main burden of dealing with refugee crises.⁴¹

Looking at the Iraqi situation, neither the United States, nor Iraq, are even States Parties to the Refugee Convention, though the United States is a State Party to the 1967 Protocol. Furthermore, applicability of the provisions of the Refugee Convention could be based on customary international law. But even so, no particular legal obligation to accept a certain number of refugees may be inferred from those international rules. Yet, it seems intuitively wrong that of all Iraqi citizens claiming asylum in 2007, half of those claims were made in a small country like Sweden, where “Sodertalje, a city of 83,000 people, took in more Iraqis than the United States and Canada combined.”⁴² In acknowledging heightened responsibility for refugees stemming from Iraq, especially in regard to Iraqis that cooperated with the United States and because of this cooperation have been exposed to reprisals by insurgents, in 2007, the United States sought to adopt new legislation, the so-called Kennedy Bill. The Kennedy Bill⁴³ would increase the total intake of Iraqi refugees to the United States and, among other things, grant preferential status to Iraqi interpreters and translators seeking resettlement in the United States.⁴⁴

But a more general claim may be made that an occupying country always carries primary responsibility for the protection of those who where: specifically affected by the occupying power’s actions; refugees created by war or intervention, irrespective of the legitimacy of those acts; and people who would not have been refugees were it not for preceding actions of intervening forces. Apart from a potentially increased refugee basis, that is the “surplus” compared to the number of individuals who regardless of outside intervention would have been refugees at a relevant juncture, such state responsibility would all the more apply in regard to those targeted because of their direct work for the occupying powers or indirect

41. Jordan and Syria, for example, currently combine to host approximately two million Iraqi refugees, while Western countries accepted only a fraction of that number.

42. See “Little Baghdad” Thrives in Sweden: Sodertalje Has Taken in More Iraqis Than the U.S., but Mood is Changing, MSNBC, June 19, 2008, available at <http://www.msnbc.msn.com/id/25004140/> (last visited Nov. 10, 2010).

43. Refugee Crisis in Iraq Act, S. 1651, 100th Cong. (2007) [hereinafter Refugee Crisis in Iraq Act].

44. See *id.* § 5. See also Interview with Ambassador James Foley, Senior Coordinator on Iraqi Refugee Issues, & Tony Edson, Deputy Assistant Secretary of State for Consular Affairs, & Lori Scialabba, The Department of Homeland Security’s Senior Advisor to the Secretary of Iraqi Refugee Issues, Briefing on Development in the Iraqi Refugee and Special Immigrant Visa (SIV) Admissions Programs, U.S. Dep’t. of State, in Washington, D.C. (Feb. 4, 2008), <http://2001-2009.state.gov/p/nea/rls/rm/100030.htm> (last visited Feb. 7, 2011).

cooperation. Despite the potential adoption of the Kennedy Bill, the duty currently constitutes merely of a moral obligation, not a legal responsibility akin to a guarantor's obligation—though it may be time to reconsider that stance.⁴⁵

A final matter of concern meriting further scrutiny relates to the question of honoring previous obligations in the process of transition from occupation to sovereignty. A point in case pertains to the People's Mojahedin Organization of Iran (PMOI), an Iranian opposition group based in Ashraf City, Iraq. Neutral during the 2003 Iraq War, the group's members had been designated as protected persons under the Fourth Geneva Convention by the U.S. forces and reportedly provided assistance to counter-terrorism efforts, and intelligence, exposing Iran's nuclear program. The Iraqi government, however, while still in negotiations with the United States with respect to the expiration of the UN mandate of the multinational forces in Iraq,⁴⁶ indicated it would claim control over Ashraf and threatened to expulse the inhabitants, even to their country of origin where serious reprisals, including torture and death penalties, would await them.⁴⁷

After concluding the U.S.-Iraqi Status of Forces Agreement,⁴⁸ basically handing over responsibility for security in "Iraqi cities, villages, and localities" to Iraq by June 30, 2009,⁴⁹ the Iraqi government did not waste much time carrying out that threat. On July 28, 2009 Iraqi security forces raided the PMOI camp in Ashraf, assaulting the unarmed Iranian dissidents inside, wounding several hundred and killing at least seven.⁵⁰ Despite retaining 50,000 troops in Iraq, the attack showed that the U.S.

45. See generally Refugee Crisis in Iraq Act, *supra* note 43.

46. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) (*expiring* Dec. 31, 2008).

47. A decision of the Council of Ministers dated June 17, 2008 stressed that control of the PMOI should be handed over to the Iraqi government and repeated declarations by Iraqi officials echoed that claim: Cf. International Federation for Human Rights, Call on the Iraqi Authorities and the USA (Sept. 9, 2008), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=48d8da4bc> (last visited Feb. 7, 2011).

48. Agreement between the United States of America and the Republic of Iraq on the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 (entered into force on Jan. 1, 2009), *available at* <http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm> (last visited Feb. 7, 2011).

49. *Id.* art. 24(2).

50. See, e.g., Iran, "Exiles Killed in Iraq Raid", BBC NEWS, July 29, 2009, *available at* http://news.bbc.co.uk/2/hi/middle_east/8175171.stm (last visited Feb. 7, 2011); "L'armée irakienne prend d'assaut le camp des Moudjahidine du peuple", LE MONDE, July 28, 2009, *available at* http://www.lemonde.fr/proche-orient/article/2009/07/28/l-armee-irakienne-prend-d-assaut-le-camp-des-moudjahidine-du-peuple_1223674_3218.html (last visited Oct. 12, 2010).

forces were either unable or unwilling (based on their new mandate as well as considerations of convenience) to interfere and prevent the assault—mainly monitoring the situation. Questions remain, however, as to the justifiability of the underlying transfer of responsibility.

The PMOI were granted status as protected persons under Geneva IV by the U.S. forces in 2004 after lengthy procedures concluded that no evidence had been found that any of the Ashraf residents had been involved in prosecutable offenses. Hence, from that time onward, these residents were under the protection of the United States, as the occupying power, and any transfer back to the country under occupation, Iraq, would be preconditioned on living up to the provisions of Article 45, Geneva IV. Among the most central requirements of that legal rule are that the power to which protected persons are transferred to is a party to the relevant Geneva Convention, and that the transferor state, the occupying power or detaining power, “satisfied itself of the willingness and ability” of the transferee power, the previously occupied power.⁵¹ Once transfer has taken place, responsibility for the application of the present Fourth Geneva Convention rests on the accepting power, the transferee or previously occupied power, while the protected persons are in its custody, and as such an occupying power might make a claim of exoneration for whatever may happen to protected persons after the transfer.

However, Article 45, Geneva IV, further requires that if the transferee power “fails to carry out the provisions of the present Convention in any important respect,” a condition the killings undoubtedly fulfill, the occupying power shall “take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.”⁵² To be sure, Article 45 preconditions that request upon the occupying power “being so notified by the Protecting Power,” the transferee power, which only adds to the confusion of that legal provision. However, a teleological reading of Article 45 seems to suggest that the notification aspect must be regarded as being of subordinate importance. Otherwise, if, as in the above example, the abuser would be required to notify another power of its abuse, before that power may “take effective measures to correct the situation or request the return of the protected persons,” the provision would appear devoid of meaning.

Irrespective of the underlying political skirmishes and interference on the part of Iran (the current Shiite dominated Iraqi government maintains strong ties with Shiite-led Iran) that might have triggered the attacks on Ashraf, there is a more general question. That question is whether, or to

51. Geneva IV Convention, *supra* note 4, art. 45.

52. *Id.*

what degree (based on the same reasoning applied in regard to refugees “created” by conflict), an occupying power is under a special obligation to ensure the continued protection of those people, once designated as protected persons, or whether such state responsibility to protect on the part of an occupier simply expires, if transferred to the occupied state once that state assumes sovereignty, without the initial designator being under a continued duty to ensure the well-being of the protected persons? Furthermore, could such designation as protected persons, under the Geneva Conventions, be regarded as akin to the granting of refugee status in the sense that allowing the status of protected persons to be reneged, and the individuals concerned sent back to the country they fled, amounting to “*refoulement*,” which would be contrary to international legal provisions (such as Article 33 of the Refugee Convention)?

B. De Lege Ferrenda: From Moral to Legal Obligation

As has been outlined above, a country is, as a point of departure, only responsible for those refugees actually crossing its borders and applying for refugee status from within that country’s territory, unless it also has made voluntary pledges to the UNHCR of accepting transfer refugees. There is no causation requirement included in the Refugee Convention, or other applicable international law. However, if we agree, bearing in mind the Iceland example for the sake of argument, that basing responsibility for refugees merely on geographical proximity, is insufficient, and if we accept further that disregarding the causal element entirely seems equally intuitively wrong, how could we work towards incorporating an increased sense of legally binding burden sharing into the existing legal framework? While intervention and occupation sometimes may be a necessity, at times even internationally called for, it is my contention that, irrespective of the legitimacy of those acts and the good it may do for others, there will always be people who would not have been refugees were it not for preceding actions of intervening forces. And, at the very least with respect to those refugees “created” by war or intervention, the “surplus” refugee basis compared to the number of individuals who, at the relevant juncture, anyways would have been refugees for various (internal) reasons and regardless of outside intervention, a general claim may be made to primary responsibility of the occupying power.

Assuming certain heightened, primary responsibility of the intervening power, in any case for the protection of people whose lives were particularly negatively affected by the intervention, for example, due to their cooperation with the occupying forces, how could we turn such responsibility into a legal obligation?

One plan of action towards solving the issue of responsibility for protected persons would be to require the occupying power to ensure full acceptance (*i.e.*, both willingness and ability) of the transferee in regard to offering continued protection of persons designated as such under Geneva IV by the occupying power, prior to the transfer of power and prior to the regaining of full sovereignty of the formerly occupied power. Such an acceptance could be written into the terms of the sovereignty transfer prior to withdrawal of the occupying power. To a certain extent, Germany's regaining of sovereignty after the Second World War was also conditional on the acceptance and fulfillment of a number of predefined goals, including writing and adopting a new constitution, the creation of democratic institutions, *mutatis mutandis*. To be sure, the German situation was one of *debellatio*,⁵³ which does not occur very often, and is probably even less frequently desirable. Some situations are, however, comparable to a certain extent, and may be regarded as akin to the German scenario at the end of the war to the degree that sovereignty transfer is concerned. In that sense, also Iraq would have to qualify for such a plan of action, even though in most other regards it would be distinguishable from Germany in 1945.

Even where *debellatio* and hence loss and (re)transfer of sovereignty on an absolute level is not at issue, such commitment on behalf of the transferee state could be written into Status of Forces Agreements or similar bilateral treaties between occupying forces and occupied powers. However, both of the above scenarios would place the main burden on the transferee state and hence, would not in any significant way contribute towards the occupying power's heightened, primary responsibility.

But what if UN assistance, if not outright backing, with respect to (humanitarian) intervention or consequences of occupation (whether the intervention or occupation in question was justified or not),⁵⁴ could be preconditioned on prior acceptance of primary responsibility for (extra)

53. In other words, the complete subjugation of a belligerent nation usually involving loss of sovereignty. See, e.g., Merriam-Webster, <http://www.merriam-webster.com/dictionary/debellatio> (last visited Apr. 11, 2011).

54. In that regard, also, the UN's eventually more pragmatic approach in Iraq, where the UN first felt sidelined, if not outright beguiled and thus kept a distance, trying to improve the dire situation and contribute, *inter alia*, to the rebuilding process, even though this was not "their" intervention to begin with. The UN, for example, only at a significantly later juncture eventually collaborated with the Iraqi Governing Council (IGC) and the Coalition Provisional Authority (CPA) to establish the Independent Electoral Commission of Iraq (IECI), which was to decide upon the guidelines for the then forthcoming elections to the National Assembly. See Tom Syring, *Fata Morgana and the Lure of Law—Rebuilding a War-torn State after Regime Breakdown: Prospects, Limits, and Illusions*, in REBUILDING SUSTAINABLE COMMUNITIES IN IRAQ: POLICIES, PROGRAMS AND INTERNATIONAL PERSPECTIVES 63 (Adenrele Awotona ed., Cambridge Scholars Publ'g 2008).

refugee flows that may be expected, *i.e.*, on the prior pledge and provision of extra means with respect to the aforementioned “surplus” refugees that almost certainly accompany any intervention. While not being able (and neither required) to predict the exact number of refugees, or especially targeted persons, originating from a given conflict, nowadays no one may claim that extra refugee flows come unexpected in situations of armed conflict. Such acceptance could take the form of an agreement under UN auspices, for example, concluded with the UNHCR, where acceptance of a certain number of extra resettlements could be established—prior to any military action. To be sure, such a requirement may lead to greater reluctance with respect to intervening individually (as opposed to not only UN supported, but UN backed, or Chapter VII action), but would that necessarily be a bad thing? Considering that military intervention planning and accounting includes invoices for everything from drones and tanks to troops and fuel, it is about time that refugees become part of the equation detailing the costs of armed conflict.

C. Conclusions

The existing legal framework pertaining to state responsibility for protected persons in times of occupation and beyond is neither conclusive, nor balanced, and hence, in need of further clarification, if not revision. Greater efforts at burden-sharing, within regions and on a global level, in regard to addressing and dealing with the flow of refugees are mandatory. Burden-sharing will help alleviate the pressure on countries with the most exposed ports of entry without jeopardizing refugees’ rights to a fair hearing of their claims to protection.

On the other hand, there seems to be a danger that the “mirror image” of granting refugee status, *i.e.*, revoking the special protection conferred on a person once defined as a refugee under the “ceased circumstances” clause, too swiftly, may be used as a means of returning refugees to their country of origin. Closely following the legal developments in the ECJ, other courts of law, and the practice of states will be decisive for a well-balanced approach to limiting and ultimately revoking claims to protection.

Furthermore, as highlighted by the discussion of the PMOI case, Article 45, Geneva IV, represents a prime example of an incoherent, if not inconclusive, legal provision. It also points to a potential inherent consequence of an occupying power (unwittingly or not) contributing to acts of *refoulement* on the part of the transferee state. If, by letting an occupied state regain sovereignty, which that state abuses by treating those who previously enjoyed protected persons status as enemies, with or without actually threatening to expulse them to a third country where they would have to fear persecution, the designator state, the former occupying

power, indirectly contributes to a well-founded fear of persecution. The designator state, therefore, could be required to grant refugee status to those persons, as their situation then would not be any different from those of refugees.

Finally, especially with respect to what has been denoted as “surplus” refugees, where legal obligations akin to the ones stemming from the Refugee Convention are largely lacking, a greater sense of legal responsibility assumption or “*Verantwortlichmachung*”⁵⁵ is needed. While reluctance in that regard on the part of states is to be expected, it has been argued here that moral obligations may be turned into legal obligations, if political will and legal creativity are present.

Obviously, there are no easy answers to either the question concerning the “ceased circumstances” clause before the ECJ, or in regard to the allocation of primary state responsibility for refugees and other protected persons. The problem with both is that the issues involved pit numerous legitimate concerns against each other. “Ceased circumstances” deals with the extent and duration of an individual refugee’s right to protection and a life of dignity versus a state’s limited resources in accommodating persons in dire straits. The question of state responsibility pertains not only to heightened moral, if not legal, obligations associated with occupation, but also touches more generally on the limits of such responsibilities. When does an occupation end and complete sovereignty of the occupied state begin? When and under which circumstances may an occupying power dispose of its responsibilities to protect those placed in a precarious predicament, due to the occupying power’s actions, or designated as protected persons under the Geneva Conventions? How do we balance legitimate assertions of sovereignty on the part of a previously occupied state with concerns for the durable safeguarding of refugees and protected persons under international law?

While days of occupation may be exceptional times, it is all the more important to ensure that those ultimately and permanently endangered by the actions of occupying powers receive protection under international law that outlasts the occupational regime.

55. “Responsibilization”