

REFUGEES: THE UNFREE AND OPPRESSED

NORMATIVE FOUNDATIONS OF REFUGEEHOOD AND RIGHTS IN DISPLACEMENT

By

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Submitted to



Doctoral School of Political Science, Public Policy and International Relations

In partial fulfillment of the requirements for the degree of Doctor of Philosophy

Supervisor: Professor Nenad Dimitrijevic

Word Count: 67355

Budapest, Hungary

2020

Declaration

I hereby declare that this dissertation contains no materials accepted for any other degrees, in any other institutions. The dissertation contains no materials previously written and/or published by any other person, except where appropriate acknowledgement is made in the form of bibliographical reference.

Budapest, 26 April 2020

Felix E.H. Bender

To Magda

Abstract

Who should be recognized as refugees? What are the normative foundations for their claims, and which are the rights refugees should receive in displacement? This thesis addresses these questions. It argues that neither persecution for specific or for any discriminatory reasons, nor a fear of harm should ground a right to refugee status. Refugees are not those persecuted or those fearing harm, but those politically oppressed and unfree. They are those who lack the legal and political means to seek recourse to their specific situations, to control the conditions that govern their lives. It is this condition of political unfreedom of refugees that extends into their displacement. Refugees are oppressed in refugee camps, unfree in liberal democracies. I argue that this should change. Refugees should govern refugee camps and receive political rights on a national level in liberal democracies.

Acknowledgements

The etymological origins of the English word “to acknowledge” points to a meaning that combines the word “acknow”, meaning “to confess” with the word “knowledge”. In this section, I have to confess to drawing on the knowledge of a lot of people.

Perhaps the person from whom I have learned most is my supervisor, Nenad Dimitrijevic. The word supervisor does not, however, adequately represent what he has been to me during the last five years. More fitting is the German “Doktorvater”. Nenad has been a source of tremendous knowledge, allowing me not only to explore different philosophical traditions and arguments that would suit my project the best, but gently pointing out to me when I strayed too far from the path that my thesis was set out to take. Yet, his intellectual guidance is only one reason why the term Doktorvater is so fitting. Nenad was more than just an intellectual mentor. He encouraged me when I was close to giving up and always lent an open ear to any matters that occupied my life outside of the academe. For all the encouragement, support, and philosophical discussions, I owe Nenad much more than a confession of drawing on his guidance that ultimately led to finishing this thesis.

My confessions should not end here, however. My thesis has benefitted greatly from the input of the members of my dissertation panel, János Kis and Zoltan Miklosi. János’ uncanny ability to analytically dissect each and every argument was invaluable for finding the crucial aspects and developing the best versions of the thesis I put forward. Zoltan’s comments, suggestions and critique have done nothing less than this. His input was of great importance for developing the thesis as it is now.

While writing my thesis, I was given the opportunity to visit many places and study with many people. Perhaps of most importance was my visit at the Refugee Studies Centre at the University of Oxford and the opportunity to work with Matthew Gibney. To say that his advice has impacted my thesis would be an understatement. Our discussions have resulted in many changes, none less important than this thesis' focus on the non-ideal aspects of refugees' lives in displacement. I would also like to thank the other members of the Centre, and especially Gil Loescher without whom I would never have built up the courage to submitting my work in different public outlets, Dawn Chatty for our interesting discussions, Jeff Crisp, Cathryn Costello, Tom Scott-Smith, Ali Ali, and Lilian Tsourdi for their questions, comments, and critique. I would also like to thank Lili Song, and Jacqueline Mosselson for making my time at the Centre so much more enjoyable.

I would also like to express my gratitude to the Institute of Advanced Studies Kőszeg and its scholars for supporting my research visit there and the members of the Philosophy department of the University of Amsterdam which invited me to presentations, reading groups and discussions and supported my thesis through various stimulating critical comments.

While developing the ideas that appear in this thesis, I travelled to and participated in many conferences and workshops. It would be impossible to enumerate all the persons and comments that have offered their knowledge, experience and critiques that have led to making this thesis better. I would nevertheless like to mention some who have left a lasting mark: Serena Parekh, Ulrike Krause, Alexander Betts, Kieran Oberman, Sarah Fine, and Matthew Lindauer.

Finally, what would a confession be without mentioning one's friends? I have not only learned from them but enjoyed my time during this PhD because of them. Felipe G. Santos is the most positive person I have ever met. Our discussions, his critique but first and foremost his attitude to life have been an encouragement and pleasure. When times got tough, Miles Maftean was always

there for me – not only academically but as a friend on whom one can rely. Alexander Wickert was the reason I stayed sane during this time, organizing many dangerous but fun trips and adventures by bike, boat and foot. Difficult times were never as difficult when Andrea Peinhopf was around. Her sense of humor and her support were crucial not only during but also before I started my PhD at CEU. I would also like to thank Weronika Grzebalska for all the critical discussions over wine and beer. My interest in the topic of refugees, however, originates with the events surrounding the so-called “refugee crisis” in Hungary in 2015 and my participation with Migszol – the Migrant Solidarity Group of Hungary. The friends I met through this group have not only contributed to my intellectual development, but were a large reason for enjoying my PhD as much as I did. Olsi Dudumi, Babak Arzani and Behrooz Torki were always available for a drink, a joke and a serious conversation. I owe a lot to them. Annastiina Kallius, Aiski Ryökäs, Mussa Kilam, Aliz Pocsuvalszki, and Zoltán Somogyvári are great friends, and I owe nothing less to them, too. I would also like to mention all the others who have accompanied me during my journey, and especially: Johannes Gunesch, Johannes Mahr, Andres Moles, Miklos Zala, Viktor Ivankovic, Man Kong Li, Leung Kin Wai, Olga Löblová, Daniel Izsak, Seraphine Maerz, Salome Schaerer, Jenna Althoff, Alberto Fierro, Alfredo Sanchez, Thomas Peak, Lars Zeigermann, and Achim Ahrens.

Any confession would be incomplete, however, if it did not mention those who played the most important roles during my journey. Without my parents and my brother, I would not have been able to complete this thesis. They provided me with support when times were rough, encouragement when I was writing and with love throughout.

The single person most important not only to me, but to this thesis, however, is Magda Ulceluse. Without saying too much, there is little more that I can say about what she and her support has

meant to me and my work. Her positivity and humor, her thought and critique, her understanding and encouragement have been the greatest source of knowledge and intellectual rigor for this thesis and is the reason for who I am as a person and an academic. She is a partner in the true sense of the word. It is for this reason that I dedicate this thesis to her.

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Introduction

Let me begin this thesis with the story of a refugee's journey. This refugee, who shall remain unnamed not because she is nobody but because she could be anybody, left her country of origin feeling powerless and lacking any hope for being able to change the conditions that governed her life. The regime she left behind did not allow for political change from below. It suppressed all the voices expressing grievances and limited the unfolding of ideas and initiation for change. Those who opposed it publicly were not seen again, locked away in prisons or punished otherwise. She was not one of these people, even though she would have wanted to publicly voice what bothered her, why she could not live the life she wanted and how it would be possible if the right people were in charge. But she stayed quiet. She was afraid, knowing that the risk of exposing herself would be too great for her to bear. Confronted with the choice between a life in oppression and the chance of a life in freedom elsewhere, she decided to set off on what she imagined would be a long journey. The Global North had cordoned off, imposing travelling restrictions that made it impossible for her to travel as she would have previously. She was relegated to a human being whose money was suddenly tainted and would no longer buy her the transport nor the comfort other human beings enjoyed.

Setting off by bus and then by foot, her journey, however, lasted only a few days at first. She arrived, exhausted, in a refugee camp, close to the borders of her home country. Registering with the UNHCR, receiving her share of humanitarian aid and a roof to sleep under, she wanted to move on soon. The journey onwards, however, was dangerous. News of those who had already left

confirmed the images of people crossing deserts, crammed into dinghies, and abused by traffickers and border guards that flashed over the TV screens and internet pages nearly every day. Life in the confines of the camp allowed her to busy her mind and suppress what laid ahead of her, but it also enabled her to keep alive a far distant hope of returning home if circumstances surprisingly changed. The camp authorities promised an enticing alternative to the horror stories she heard: travel by airplane, comfort and security implied in the resettlement programs that lead to the Global North. As many of us would, she decided to wait, hoping to travel on in safety but ultimately making the squalid shelter in the middle of nowhere that was the refugee camp her home. The temporariness with which the camp was run meant little to her at first. After all, they all endured with the thought of travelling further or back very soon. Soon, however, she met those who fled conflicts she already forgotten about and realized that the temporariness of the camp was an indefinite one. They told stories that were eerily similar to hers, but the end she had hoped for was never mentioned. They were all stuck between the promise of moving on and the hope of moving back. The camp suddenly appeared to her in a much different light. The mode of emergency in which it was run turned into authoritarian rule, the UNHCR from a helper in need to a sovereign in control, and the confines of the camp from offering security to fences securing others from them. Little was gained here, she thought. Leaving one life in oppression for another seemed to her to make little sense, and she decided to take on the dangers of onwards travel once again.

Arriving in the Global North, she was not quite sure what to expect. From the stories she had heard others tell, it was supposed to be a place in which one could begin anew, make one's own choices and live in freedom. Whether this picture was accurate or not, she was not certain. After all, she too tried to picture the destination of her arduous journey in the best possible light both to be able to endure its difficulties and to justify her departure to the friends and family she had left behind.

At first, the picture of a new beginning seemed to line up neatly with what she encountered. The bureaucratic mills of her new home quickly spat out documents officially recognizing her as a refugee: she would be able to stay. She was ready to begin making her own choices and a life that her textbooks called a life in freedom. Yet, very soon after her arrival, the state separated her from the few friends and acquaintances she had made during her journey. She was forced to move one time after another, first placed into an overcrowded reception center with facilities so poor it reminded her of the refugee camp she had just left, and then relocated again to live in a remote part of the country in which she knew no one and nothing about. The documents she received, though allowing her to stay, allowed her little else. In fact, they seemed to be the source of a fundamental difference between her and the people she lived amongst. This difference did not only appear in her chances to secure a job, education or housing, but seemed to be more fundamental in character. She realized that living amongst equals, she was not afforded the same freedoms. These seemed to belong only to locals. She realized that though generous at times, the policies that were made specifically for her kind were not made by her kind. They catered to the interests of others. It was refugees like her who had to feel the consequences. The laws and regulations specifically concerning her made life much harder than it needed to be, introducing many bureaucratic hurdles and a great deal of insecurity about her future. Such a life, she was surprised to find, was not a life in which she was in charge. Though different from what she knew before, she was still trapped in a life of unfreedom.

Why, though, do I begin with a fictional story? The reason is that it exists only as a (non-)ideal type of the journey of refugees. No one story told by a refugee can encapsulate the entirety of the plight of refugees, stretching from the conditions they leave to the conditions pertaining in refugee camps and in liberal democracies.

It is fictional not the least because many of them will never have left their homeland. Most will continue to endure oppression and unfreedom in the countries in which they live without ever leaving. Their decision to stay is often multifaceted. They do not want to leave their family and friends behind or cannot imagine life elsewhere. Yet, we should not discount another factor in their decision to stay. The international refugee regime would not recognize them as refugees. Political oppression does not count as a ground for claiming refugee status. Even if they would leave, they would be rejected at the borders of states that claim to value both liberalism and democracy. Of those who ultimately decide to leave, most will never make it to one of the liberal democracies of the Global North. Many will arrive in refugee camps to stay there indefinitely or return back home as a result of the poor conditions pertaining in the camps. The reality of the stories of refugees is thus much more fragmented, broken up into bits and pieces that sometimes fit our general narrative and sometimes not. Yet, all of the individual elements of our story are true. The right to refugee status should not be tied to persecution or harm only, but to unfreedom and political oppression. Along their journey, wherever they may end up eventually, refugees face a continuous condition of unfreedom. Refugee camps are governed in near autocratic fashion, often perpetuating and causing dangers and threats to the lives of their inhabitants. Liberal democracies, though promising personal and political freedoms to their own citizens, do not extend such rights to refugees. There, too, refugees live in a condition of unfreedom. This thesis will try to explain each element of the story. It will argue that refugees are the politically oppressed and unfree, show that such condition often reaches deep into their displacement, and that they should receive political rights both in refugee camps and in liberal democracies.

The thesis thus asks who should be recognized as a refugee and which rights refugees should receive in displacement. It is divided into two main parts. The first part discusses whether the normative

foundations of our legal and philosophical conceptualization of refugeehood are sound. It argues that neither persecution, nor a fear of harm make for a solid foundation on which to construct a theory of refugeehood. Rather, I argue, it is political oppression and unfreedom understood as a lack of public autonomy and formally expressed through a lack of legal-political status that makes for a solid normative foundation for understanding refugeehood. This understanding of who is a refugee undoubtedly has consequences for which rights I believe refugees should hold in displacement. Consequently, the second part of this thesis deals with the question whether refugees should receive political rights in different locations in displacements. I ask not only whether they should receive political rights in liberal democracies, but whether the conditions in refugee camps allow refugees to govern them. Finally, I offer a brief conclusion to this thesis. In the following, I would like to break down the different chapters of my thesis in greater detail, provide a general overview of the questions, their relevance and the arguments I put forward.

In the first chapter (*Normative Foundations: Legal and Philosophical Understandings of Refugeehood*), I ask about the normative foundations of legal and philosophical concepts of refugeehood. What are the normative foundations for recognizing individuals as refugees? I distinguish between two legal interpretations of international refugee law and their differing core normative arguments and a third approach that is rooted in the philosophical literature on refugeehood. These approaches are the Classical Approach, the Human Rights Approach, and the Humanitarian Approach.

The chapter begins with the Classical Approach and asks whether persecution for specific reasons and thus a traditional interpretation of international refugee law can function as a solid normative foundation for understanding refugeehood. I separately analyze both the condition of “persecution” and the so-called Nexus Clause. These form the normative bedrock for determining

who should be recognized as a refugee. The Classical Approach faces several normative shortcomings. Not only does it exclude all forms of persecution that do not occur on the ground of its rigid “closed list” approach and that thus do not occur for reasons of race, religion, nationality, political opinion or membership in a particular social group. It is also incapable of accounting for indiscriminate violence as a possible source of refugeehood. The Classical Approach thus treats ethically similar cases differently. From an ethical perspective, no difference exists between being persecuted for one of the specific reasons stipulated in the Geneva Convention Relating to the Status of Refugees and experiencing harm for another non-listed reason or as a consequence of general violence not targeting anyone specifically. The chapter then moves to the second approach of interpreting international refugee law. It asks whether the “Human Rights Approach” can accommodate the criticism issued against the Classical Approach. It argues that instead of basing our understanding of refugeehood only on persecution for specific reasons, we should understand persecution more widely as a denial of human rights. It also seeks to re-interpret the Nexus Clause. Rather than arguing that refugees are those persons fleeing from persecution for specific reasons, it holds that we should understand the Nexus Clause as a non-discrimination clause. In other words, a refugee is someone who is persecuted for any discriminatory reasons. While this approach is undoubtedly more open to different scenarios, it is not significantly improved compared to the Classical Approach. The call for modest change may originate in its attempt to legally re-interpret international refugee law, rather than seeking out different normative roots. A project that seeks to do just that is not confronted with the same analytic conditions and constrictions. It does not require searching for the most morally acceptable account that can still be situated within the framework of existing international refugee law, but rather searching for normative foundations that are themselves satisfactory. I show that the Human Rights Approach struggles with indiscriminatory

violence as a possible scenario that warrants refugee status. The chapter then turns to an approach that has gained traction in the philosophy of migration and refugeehood. I call this approach the “Humanitarian Approach”. It argues that the basis for understanding who a refugee is should be a fear of serious harm. I show that this way of understanding refugeehood accommodates the biggest criticisms of the previous two approaches. It allows for considering indiscriminate harm as reasons for leading to refugee status. While this is, indeed, an advantage, I show that a fear of harm cannot itself function as the normative foundation on which a solid understanding of refugeehood can be built. Such an approach does not allow for qualifying harm. It does not allow for distinguishing cases that are normatively different. The Humanitarian Approach cannot distinguish between cases in which individuals fear harm but possess ways to avoid threats, tackle them, or demand compensation and cases in which individuals fear harm and possess no way to avoid or combat the threats they face. In other words, there must be another, deeper clause for understanding which harm should lead to refugee status and which does not. Indeed, some of the Humanitarian Approaches hint at the existence of such a qualifier – the existence or lack of recourse to the specific situations refugees face.

While the first chapter offers a critique of the normative arguments of legal and philosophical approaches to refugeehood, the second chapter (*A Novel Normative Foundation for Refugeehood: Political Oppression and Unfreedom*) offers a positive account for a novel normative foundation for refugeehood. It argues that instead of basing our understanding of refugeehood on persecution or on a fear of harm, it should be based on political oppression and unfreedom. Political oppression and unfreedom can be understood as a lack of public autonomy which is formally expressed through a lack of legal-political status - a status that legally expresses the recognition of individuals as moral equals in law and politics. I will show that political oppression and unfreedom should

matter for a claim to refugee status because those oppressed and unfree ultimately lack the political and legal recourse necessary to 1. safeguard their personal autonomy, 2. define the boundaries of what constitutes personal autonomy and, 3. inform decision makers about threats to and violations of their personal autonomy. What matters for a claim to refugee status is ultimately the lack of recourse and thus the inability to control the situation one faces, avoiding threats, adapting to combat them or demand compensation for harm suffered. Such an approach avoids the problems of under- and overinclusion that the other three approaches face. It is capable of accounting for indiscriminate harm while also offering a qualifying clause that allows for not including any form of harm as relevant to refugee status. This approach is better suited in dealing with scenarios that do involve harm and such scenarios that do not. I demonstrate this by turning to the example of threats of famine and ecological disruptions and disasters. Political oppression and unfreedom functions as a better normative foundation for assessing such scenarios. It does not only help us in distinguishing when situations involving harm should lead to refugee status and when they should not. I also show that it helps us identifying when persons should receive refugee status even if harm is absent.

This understanding of refugeehood would undoubtedly lead to many more people being able to successfully claim refugee status than currently do. It may lead to rejecting far less people at our borders. Yet, questions of scale do not in themselves turn rights into wrongs. They do not matter in determining a normatively correct foundation for claims to refugeehood. This does not mean that they may not matter for a very different question: the question regarding the duties of liberal democratic states to refugees. I treat these two questions – the question about who should be recognized as a refugee and the question regarding the scope of the duties of states towards refugees – as analytically different. Much has been written on the latter, and this thesis will not

unfold and examine the many different questions that are involved in such an inquiry. Yet, each such theory depends and departs from an understanding of who should be recognized as a refugee. They do so sometimes implicitly, assuming the legal understanding of refugeehood as normatively valid, and sometimes consciously, bracketing the question of normative validity and assuming the legal framework as a non-ideal starting point for another normative inquiry.

The first part of my thesis offers a novel foundation for such theories. To that end, an inquiry into the normative foundations of refugeehood may not only lead us to reassess our assumptions on who should be recognized as a refugee, but may also have consequences for thinking about what liberal democracies owe to whom.

Chapter 3 (*Should Refugees Govern Refugee Camps?*) begins the second part of this thesis. It turns to the question which rights refugees should receive in displacement. Specifically, it asks whether refugees should receive political rights in various situations of displacement. One specific case of displacement is analyzed here: the situation of protracted refugee situations in refugee camps. I ask whether refugees should govern refugee camps. I argue that they should. The chapter employs what political theorists call the “all-subjected principle”. In a nutshell, the principle states that all those subjected to rule in a political unit should have a say in such rule. The chapter asks whether the conditions for this principle to apply hold in the case of refugee camps, too. What is required for the principle to apply is the existence of a political unit understood as a distinct governance structure and subjection to political rule of individuals within it. These conditions hold in the case of refugee camps. Host states have retreated nearly completely from the camps. In their absence, the camps have developed distinct economic systems, functioning according to their own rules and regulations; they have developed their own legal systems in which refugees adjudicate their own crimes, even operate prisons and security forces; they have developed their own political systems

in which the UNHCR and contracting NGO's have replaced the host states as sovereigns, ruling without checks and balances. Within such distinct governance structures, refugees are subjected to political rule by international organizations. The chapter then shows in what ways the democratization of refugee camps could be beneficial for its inhabitants. With regards to different aspects of the camp life, it shows that possessing public autonomy will allow refugees to 1. Safeguard their personal autonomy through being in control of the conditions that govern their everyday lives, 2. define what violates their personal autonomy and what could tentatively amount to legitimate restrictions and 3. inform decision-makers of threats and violations of their autonomy. While most of the literature on the ethics of migration and refugeehood has focused on the ethics of admission and the duties of liberal democracies towards refugees, this chapter seeks to ask which ethical guidelines we should follow in the case that refugees never make it to liberal democracies. It departs from a standpoint of non-ideal theory in assuming that protracted refugee situations are just that: protracted, and that they will hence not change in the foreseeable future. It hopes to show that this must not mean that we disregard the situation of those living in refugee camps, but that political philosophy has something to say with regards to their situation, too. I hope to show that it is the democratization of refugee camps that makes life in them more bearable.

The second part of this thesis is completed with chapter 4 (*Should Refugees Receive Political Rights in Liberal Democracies?*). It turns to the question whether refugees should receive political rights if, and once, they enter liberal democracies. It, too, employs the all-subjected principle, but focuses on different aspects of the principle. The question of whether refugees should govern refugee camps demands a deeper look into the basics of the principle, in evaluating whether the camps qualify as political units and whether refugees are indeed subjected to rule within them. In the case of liberal democracies these aspects are of less interest. States make for the paradigm

cases of political units and the subjection to rule of their inhabitants seem equally undisputed. In order to answer the question that guides this chapter, I thus turn to two conditions for the all-subjected principle to apply to refugees in liberal democracies. Conventionally, transients are excluded from the purview of the principle. I ask why transients should be excluded and whether a robust justification of this condition can justify excluding refugees, too. I show that the condition of excluding transients is based on the all-subjected principle being forward, not backward looking. Time spent in a state is taken as a proxy for future residence in the country and not in itself relevant for a right to political participation. I show that refugee status can function as such a proxy, and that refugees are thus not transients as are tourists or visiting students. The second aspect that we need to deal with is the question of membership. Does the all-subjected principle even apply to those who are not citizens of a country? I show that citizenship and political rights do not necessitate each other. They can be had independently of each other. All that matters, I show, is the political relation between the political unit and those subjected to rule. I thus take citizenship to denominate a specific legal, rather than a specific political status, that provides its holders with many rights other than and beyond political rights. Citizens do possess the right to vote only because they are also subjected to political rule. The all-subjected principle thus applies to refugees in liberal democracies, too. In the last section of the chapter, I show how exactly refugees are subjected to rule in liberal democracies, other and beyond the ways its citizens are. The aim is to show that enfranchisement is a matter of urgency for refugees, that it should occur on a national level, and that it would have immediate positive and significant impacts on their lives. Liberal democracies determine the reception conditions of refugees, govern their everyday lives during their stay and even decide the conditions for their repatriation. All these occur without the participation of refugees. The chapter argues that in all three stages, the participation of refugees

may lead to beneficial outcomes. The chapter thus not only seeks to build on the rich literature on non-citizen voting but poses a previously unaddressed question: whether refugees should receive political rights as soon as they receive refugee status. Doing so, I hope to have also contributed to the understanding why time matters for a right to political participation and to the distinction between citizenship as a legal category and subjection to rule as a political factor.

The dissertation ends with a concluding section that seeks to briefly summarize what I have done throughout. What I hope to show is that the normative core of the contemporary international refugee regime and dominant philosophical interpretations of who a refugee should be are normatively flawed. The understanding of refugeehood leaves unseen a large part of what distinguishes it normatively: the political oppression and unfreedom of individuals. I wish to show that it is political oppression and unfreedom rather than persecution or a threat of harm that makes for a solid basis for understanding refugeehood. This will shed some light also on the conditions that refugees face in displacement. The lack of political freedom follows them throughout. They are not only politically unfree in refugee camps, but also in liberal democracies. This thesis hopes to demonstrate the importance of their conditions and advocates for change: for political freedom for those disenfranchised; political freedom for refugees.

Part 1

I. The Normative Foundations of Refugeehood

“Who should be recognized as a refugee?”. This is the question with which this first part of my thesis is concerned. It may seem as if this question has already received ample attention. Much excellent scholarship has appeared on the political philosophy on migration and refugees. Yet, most of it focuses on the question regarding the duties of liberal democracies towards refugees. What has been sidelined is the question regarding the normative validity of the concept of refugeehood employed in philosophy and political theory. Most of the contributions have either tacitly assumed a specific legal understanding of refugeehood as normatively valid or have bracketed the question of normative validity in order to pursue other questions. Part one of this thesis inquires into the normative foundations of legal and philosophical understandings of refugeehood, asks whether they are sound, and proposes a better normative foundation for determining who is a refugee. Part one is divided into two chapters.

The first chapter asks what the normative foundations of our legal and philosophical understandings of refugeehood are. I will argue that the normative foundations of the classical interpretation of international refugee law (the “Classical Approach”), as well as a more liberal interpretation of international refugee law (the “Human Rights Approach”) cannot ground our understanding of refugeehood. Neither individual persecution for specific reasons, nor persecution

for any discriminatory reason can function as a normative basis for determining who is and who is not a refugee. Philosophers have weighed into this debate, too – sometimes purposefully and sometimes as a byproduct of other research questions they have pursued. What has emerged is what I call the “Humanitarian Approach” – an approach that argues that a refugee is a person who fears harm. I will show that this approach is equally unsuited for understanding who is and who is not a refugee. Rather, as I will hint at in the first chapter and build on in the second, what matters for an understanding of refugeehood is political oppression. In the second chapter, I will argue that it is political oppression, understood as a lack of public autonomy and formally expressed as a lack of legal-political status, that makes for a normative foundation of refugeehood. I will show that such an approach is both better suited for all sorts of cases that do involve harm or persecution, as well as for cases that do not. This first part of the dissertation will thus, read as a whole, argue that refugees are not those fleeing only from individual persecution or a fear of harm, but from political oppression. They are the politically unfree.

1. Normative Foundations: Legal and Philosophical Understandings of Refugeehood

1.1 Introduction

Who should receive refugee status? International lawyers and political philosophers alike have grappled with this question. This chapter discusses the most prominent approaches to determining refugee status and asks whether these approaches provide sound normative arguments for who is to be included and who is to be excluded from receiving refugee status. It forms the negative argument of my dissertation. It begins with reviewing contemporary international refugee law and the definition of who is considered a refugee. I call this the Classical Approach to refugee status determination. According to the Geneva Convention Relating to the Status of Refugees of 1951 and the Protocol that amended it in 1967, which serves as the authoritative foundation for nearly all national legislation on the matter, two central factors determine who should be accorded refugee status: Persecution and the so called Nexus Clause. The Convention argues, in a nutshell, that a person should be recognized as a refugee if he or she has a “well-founded fear of persecution”, defined as a risk of serious harm, and is outside of her country of origin. Additionally, he or she is

considered persecuted only if such persecution has occurred on the grounds of particular reasons such as race, religion, nationality, political opinion or membership of a particular social group. I will show that such a definition is inadequate from a normative perspective as it a) does not include generalized violence, b) leaves aside many other possible reasons for persecution, and c) could lead to cases being included in the refugee definition that should not, being therefore both under- and over-inclusive of the cases deserving refugee status. It cannot serve as a good *normative* foundation for thinking about refugees.

I will thus turn to the second approach, the “Human Rights Approach”. Pioneered by James C. Hathaway¹ and since followed by many others and applied by a number of courts, this approach addresses the criticisms of the Classical Approach. It argues that persecution and the Nexus Clause should be understood in a wide fashion. It attempts to align international human rights law with refugee law by arguing that we should, instead of gripping tight to a closed list of specific reasons for persecution, interpret the Nexus Clause as a “non-discrimination” clause. On this view, a person should be considered a refugee provided that his or her human rights have been violated and that such violation is discriminatory. Rather than arguing for refugee status determination on the basis of persecution for particular reasons, it argues for persecution to be understood as human rights violations for any discriminatory reasons as the key factors for determining a claim to refugee status. I contend that this approach, too, is normatively deficient. Even though it recognizes human rights violations as forms of persecution, such violations give rise to a claim to refugee status only if an element of discrimination is also present. Note that the Human Rights Approach represents a shift in the interpretation of international refugee law. While some courts have turned

¹ James C. Hathaway, *The Law of Refugee Status*, 1st ed. (Toronto and Vancouver: Butterworths, 1991); and James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 2014).

to such an interpretation, I treat the Human Rights Approach and the Classical Approach as analytically different. Even though the former promises a much wider scope of those recognized as refugees, it falls prey to many similar criticisms as does the latter. While it can account for some of the shortcomings of the Classical Approach, it remains under-inclusive. The Human Rights Approach excludes from a claim to refugee status all those people fleeing indiscriminate violence, such as (civil) wars, famine, and ecological disruptions, among others.

The third approach reacts to such criticism. The “Humanitarian Approach”, as I call it, argues that the determining factor for a claim to refugee status should be serious harm. It is able to accommodate persons fleeing both from persecution as well as from indiscriminate generalized violence. It argues that refugee status determination should not be based on persecution, or the violation of human rights for particular or discriminatory reasons, but holds that it should be based on harm, no matter the reason. I will show that this approach, too, is normatively inadequate. Making harm the determining factor for a claim to refugee status is both over- and under-inclusive. It is over-inclusive, since not every instance of serious harm should result in a claim to refugee status. The reason is, as I shall argue, that while harm occurs in virtually all human societies, not all persons lack the necessary recourse to legal and political institutions to tackle threats of harm. Those that do, retain the possibility of demanding compensation and instigating political and legal change where social ills and other harmful actions or situations have led to morally deplorable state of affairs. For this reason, the approach also results in under-inclusion, as it excludes all those persons who, though not harmed, lack recourse to their state institutions, having lost their legal-political standing in their home community. The foundation for this claim, my positive argument, will be laid in the next chapter.

Throughout the chapter, I employ a methodology of using both legal cases and hypothetical thought experiments in undermining the claims of the different approaches and fostering my argument. In doing so, I especially draw on court decisions in the United States and the United Kingdom, but also refer to decisions by courts in Australia, Canada and the European Court of Justice. The cases used should be understood less as a comprehensive overview of all case law with regards to the different issues, though I have set to include the most prominent and recent cases, but as examples that trigger intuitions, make normative points and provide the ground for systematic analysis.

1.2 The Classical Approach

The “Classical Approach” is based on the legal definition of who should be recognized as a refugee. It presents a long-dominant interpretation of refugee law. I will first explore the main themes in international refugee law - persecution and the so-called Nexus Clause - and show respectively why they do not make for sound normative foundations for understanding who should be recognized as a refugee. I will argue that the approach is both over- and under-inclusive.

The right to refugeehood is classically defended as a right for those individually persecuted. It is firmly entrenched in international and national law. The Geneva Convention Relating to the Status of Refugees provides the basis on which the definition of refugeehood in most countries is modelled on. It states that the term refugee should apply to a person who:

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”²

The Protocol Relating to the Status of Refugees that amended the definition in 1967 abandoned the territorial and temporal restrictions of who is to count as a refugee. Consequently, the definition no longer applies only to people fleeing from Europe and from events occurring before 1951. The Convention stresses that the ground for refugeehood is a well-founded fear of individual persecution for specific reasons. It thus consists out of two parts. The first part states that the ground for refugeehood must be a well-founded fear of persecution. The second part, known as the Nexus Clause³, specifies the reasons that are deemed unjustified grounds for punishment - persecution. We will first explore the foundation of the right to refugeehood - a well-founded fear of persecution – and then turn to the Nexus Clause.

1.2.1 What is persecution?

While individual persecution marks the centerpiece of the Geneva Convention in identifying who is a refugee, it has proved difficult to define what the concept exactly entails. The UNHCR

² UN General Assembly, “Convention and Protocol Relating to the Status of Refugees,” 189 United Nations, Treaty Series § (1967) Art. 1 (2).

³ Michelle Foster, “The Nexus Clause in the Refugee Convention,” *Mich. J. Int’l L* 23 (2002): 265–340; Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge et. al.: Cambridge University Press, 2009), 104.

handbook notes that “there is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success.”⁴ Indeed, neither the Geneva Convention nor the Protocol amending it offer an official definition of the term.⁵ Grahl-Madsen ⁶ notes that while court decisions in the 1950s and 60s were defined by largesse in interpreting the term, this has later changed to more restrictive rulings. All in all, the judicial practice is somewhat inconsistent in explicating how persecution should be understood until today.⁷ Some courts interpret persecution to mean that the state is *unwilling* to protect its citizens. This can involve either direct actions by the state or a restraint from acting against non-state agents that threaten or harm citizens. Yet, courts have increasingly adopted an understanding of persecution as also entailing the *inability* of a state in protecting its citizens.⁸ Furthermore, the question remains whether all forms of harm count as persecution. Does any form of human rights violation count as persecution? I will return to this question in greater detail when discussing the “Human Rights Approach” in section 2. Yet, it seems possible, at least normatively, to discern what is understood as persecution.

⁴ United Nations High Commissioner for Refugees, “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,” no. December (2011): 13 Art. 51.

⁵ Hathaway and Foster, *The Law of Refugee Status*, 182.

⁶ “Identifying the World’s Refugees,” *The Annals of the American Academy of Political and Social Science* 467, no. 1 (1983): 15.

⁷ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), 91.

⁸ See Price, *Rethinking Asylum: History, Purpose, and Limits*, 146. Walter Kälin distinguishes four types of non-state persecution: 1. Persecution carried out by private parties but condoned or instigated by the state, 2. Situations in which agents of persecution have gained control over the whole or part of the country, so that they can be understood as being de-facto authorities, 3. The state does not condone persecution, but is unable to provide protection, 4. Persecution is carried out by non-state agents where the state has collapsed. Walter Kälin, “Non-State Agents of Persecution and the Inability of the State to Protect,” *Georgetown Immigration Law Journal* 15 (2000): 416; See also for the German case: Reinhard Marx, “The Notion of Persecution by Non-State Agents in German Jurisprudence,” *Georgetown Immigration Law Journal* 15 (2000): 447–61.

The Cambridge Dictionary of English language defines persecution as an “unfair or cruel treatment over a long period of time because of race, religion, or political beliefs”.⁹ Steinbock adds, that the term is related to a notion of pursuing or “hunting” someone.¹⁰ Price outlines what I believe to be a precise definition: persecution is “serious harm inflicted or condoned by official agents for illegitimate reasons.”¹¹ This seems squarely in line with what the Convention foresees. It is the “well-founded fear” of individual persecution understood as harm that must be “serious” enough to warrant justified flight for illegitimate reasons that makes for the Convention definition and the normative argument underlying it. But is that both conceptually and normatively satisfactory for describing and defending a right to refugeehood? The criticism can take two forms. The first challenges the ambiguity of the notion of persecution when it comes to determining refugee status. The second criticizes what is usually understood as “illegitimate reasons”. I will begin with the first. In the next section I will describe the Nexus Clause and the criticism revolving around it.

Placing persecution at the heart of the refugee definition creates several problems. First, let us imagine that someone lives in the midst of a war zone, exposed to daily mortal threat. The notion of persecution would not qualify her as a refugee once she decides to pack her belongings and cross an international border. The reason would be that she was not individually pursued by the state.¹² Persecution is limited to those that are individually targeted by the state, or as Price adds, to those whose persecution is condoned by the state. The underlying argument of persecution is based on offering security to those that are “activists’ and ‘targets’ rather than ... ‘victims,’”¹³

⁹ See: <http://dictionary.cambridge.org/dictionary/english/persecution> last accessed Oct. 23rd, 2017.

¹⁰ Daniel J. Steinbock, “Interpreting the Refugee Definition,” *Immigration and Nationality Law Review* 19 (1998): 757.

¹¹ Price, *Rethinking Asylum: History, Purpose, and Limits*, 135.

¹² Although, as we shall see later, the context of a war does not exclude the possibility of being persecuted. Persecution can happen both during peace times and times of war.

¹³ Veit Bader, “The Ethics of Immigration,” *Constellations* 12, no. 3 (2005): 339.

Furthermore, the definition entails that there must be serious harm, or a threat thereof, involved. Yet, it is far from clear what serious harm means. States are capable of harassing their peoples in different ways: it may subject them to arbitrary confiscation of property; it may intrude into the personal autonomy of people (as, for example, in the case of the Chinese One Child Policy) and so forth. In jurisprudence, these cases have been extremely controversial, because it seems virtually impossible to draw a line between which state actions cross the line to serious harm.¹⁴

Additionally, harassment and harm may not always be individual. States can issue laws and decrees that are general in form, harming and infringing on the personal autonomy not only of particular individuals but of the whole population. This is also the main criticism that the “Humanitarian Approach” raises, which we will discuss in the last section of this chapter. It claims that the definition should include those fleeing generalized violence, such as war, wide-spread gang violence, famine and ecological disasters.¹⁵

Arguments from persecution could intervene with an intermittent clause. They could argue that such cases are accounted for by understanding persecution as a *well-founded* fear of violence by state agents.¹⁶ The argument that all that is needed is a “well-founded fear” of persecution, however, does not help here either. Its meaning remains unclear, both in jurisprudence and normatively. Should a well-founded fear imply more than, say, a 50% chance of serious harm? As Justice Stevens argues in his dissenting opinion in *Cardoza-Fonseca*, it seems wrong to assume

¹⁴ See T. Alexander Aleinikoff, “The Meaning of ‘persecution’ in United States Asylum Law,” *International Journal of Refugee Law* 3, no. 1 (1991): 21–23; and chapter 3 in Hathaway and Foster, *The Law of Refugee Status*. See also Annex 1 for an explication and example of the difficulties in defining which forms of harm should count towards a claim to refugee status.

¹⁵ Bader, “The Ethics of Immigration,” 339.

¹⁶ cf. Mark Gibney, “A ‘Well-Founded Fear’ of Persecution,” *Human Rights Quarterly* 10, no. 1 (1987): 109–21 for the US Supreme Court’s reasoning in the case *INS v. Cardoza-Fonseca*.

that “because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no ‘well-founded fear’ of the event's happening.”¹⁷

Or should we perhaps adopt the argument of a “sliding scale” threshold of risk, which holds that any minor chance of serious harm should be recognized as sufficient for a claim to a well-founded fear of persecution, while less serious forms of harm should require a much higher likelihood of that harm occurring?¹⁸ But, as Hathaway shows, this argument also suffers from the wrong belief that anything more than just a vague range of risk can be determined when looking forward in assessing whether such a fear upholds.¹⁹

Alternatively, some courts, such as the German Federal Administrative Court, have adopted the view that a real chance of serious harm should be assessed through inquiring whether “a reasonable-minded, prudent human being in the applicant’s position could have a fear of persecution.”²⁰ Yet, this formulation remains questionable, too. On such grounds, it would be relatively easy to tell those persons fearing persecution based on political opinion, such as activists, to merely cease in their activities. Or, as Hathaway and Foster argue: “Yet the fact that a given claimant is impetuous, outspoken, or simply determined openly to confront perceived injustice is no basis for refusing her application, even if a ‘prudent’ person in her circumstances might have been more cautious, reserved, or less openly activist.”²¹

¹⁷ INS v. Cardoza Fonseca 480 U.S. 421, at 480 (1987)

¹⁸ See: Hathaway and Foster, *The Law of Refugee Status*, 115–16.

¹⁹ This is, as the risk of persecution is not only backward but forward looking. Hathaway is right to argue that when determining whether there is a risk of persecution when looking forward, it is virtually impossible to discern more than just a vague range of risk the applicant would face if he returned to his or her home country.

²⁰ cited in Hathaway and Foster, *The Law of Refugee Status*, 117.

²¹ Hathaway and Foster, 117.

In short, fear is extremely hard to measure. What is the threshold at which we can reasonably state that another person's fear is well-founded? Does a black person in the United States today have a well-founded fear of persecution? We can certainly say that being black in the USA comes with a much higher likelihood of being harassed by the police, being arrested and killed. Yet, should black people be considered refugees once they leave the US? While I believe that similar forms of race-based harm can and should lead to recognition of refugee status – think, for instance of Jews facing serious harm during the pogroms in the late 19th and early 20th century in Russia or the harm Jews faced during the rule of the National Socialists in Germany – this might not be so in the former case. Below, I will argue that the normative denominator is the lack of legal standing of people: the fact that they are no longer legal (-political) persons in their community.

Understanding the right to refugeehood as being based on fleeing any sort of violence is gaining prominence both in academia and in jurisprudence. The definition of the Organization of African Unity (OAU) holds that

“[t]he term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”²²

²² Organization of Africa Unity, “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,” 1969, 1–5 Art. 1 (2). Similarly, the Cartagena Declaration: “[I]n addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Cartagena Declaration, Part III, 3, 22nd of November “Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama” (1984), <http://www.refworld.org/docid/3ae6b36ec.html>.

Similarly, the reference to “B-refugees”, “de-facto refugees”²³ as well as the introduction of the instrument of subsidiary protection in the EU, which provides those with temporary protection (non-refoulement) who are not “individually persecuted” and thus do not qualify as Convention refugees, shows that the understanding of persecution as the normative center piece of refugeehood is increasingly understood as sufficient, but not necessary.

The Humanitarian Approach issues just this criticism against the Classical Approach. It states that individual persecution is but one form of violence inflicted or condoned by a state on its citizens. The argument from persecution disregards forms of diffuse violence such as general harassment and violence not targeting specific individuals but the population at large either by general repression of the population, (civil) wars, famines, economic deprivation or ecological disasters. The Humanitarian Approach states that it makes no difference for a person whether she is actively pursued by the government or whether that person must flee because she lives in war torn regions, in which her life is under threat, in regions ravished by famine or environmental disasters.

Authors defending the argument from persecution have answered that experiencing harm itself does not qualify someone to be a refugee. Matthew Price has held that such an approach could not distinguish between when a person requires protection by another state and when not. He argues that the basis for a right to refugeehood must lie in persecution, because we should be concerned with harm done for *illegitimate reasons*.²⁴ He defends what has become known as the Nexus

²³ Note that both “b-refugees” as well as “de-facto refugees” refer to formulations of humanitarian forms of protection before the introduction of subsidiary protection status in the EU. These formulations have attempted to make space for cases in which persons were subject to the non-refoulement clause but could not be identified as refugees according to the Geneva Convention. For the introduction of a “B” category in Swedish immigration law, see: Grahl-Madsen, “Identifying the World’s Refugees,” 17; Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?,” *International Journal of Refugee Law* 3, no. 3 (1991): 435–51.. For “de-facto refugees”, see: Austin T. Jr Fragomen, “The Refugee: A Problem of Definition,” *Case Western Reserve Journal of International Law* 3, no. 1 (1970): 58.

²⁴ Price, *Rethinking Asylum: History, Purpose, and Limits*, 108–9.

Clause. In the next section, I will discuss whether the Nexus Clause can save the argument from persecution. I will argue that this is not the case.

1.2.2 The Nexus Clause

The argument from persecution stresses that it is not any harm that qualifies one to be a refugee. Otherwise, so the argument, one could not distinguish between legitimate and illegitimate harm done to individuals. In other words, if harm played the major role in identifying who a refugee is, then one might need to recognize those people as refugees who are prosecuted rather than persecuted by their governments. Yet, according to the Classical Approach, the two differ exactly in the sense that the harm involved in the prosecution of general crimes is legitimate, while that involving persecution is not.²⁵ Imagine a case in which a person robs a bank and consequently flees to another country claiming asylum there because he was pursued by the government of his home state. We would, of course, reject such a ground for the right of refugeehood. Why? The argument from persecution states that this is because persecution is tied to clauses of causation. Some harm done to individuals is improper because the reasons for such harm are illegitimate, while other reasons are not. The Geneva Convention states that harm is illegitimate if based on reasons of religion, race, nationality, membership of a particular social group or political opinion.²⁶

²⁵ Note that this is controversial. The legitimacy of prosecution must, after all, be tied to the character of the regime in question. While it seems easier to identify some forms of prosecution as persecution, as for instance in the case of regimes prosecuting for “political crimes”, the differentiation between prosecution and persecution quickly becomes difficult in more ambiguous cases. We will discuss one such example (decency laws in Iran) when returning to the question regarding the recognition of refugee status in the absence of harm in the following chapter.

²⁶ An ongoing debate in jurisprudence and legal literature discusses whether there is a difference between causation understood as “for reasons of” and “on account of”. Some scholars debate whether the latter phrasing (which is not the Convention phrasing) results in a narrower set of conditions implying conscious, individual pursuance of a person,

The Nexus Clause can thus be defined as the clause establishing that there must be a linkage between a Convention ground and the risk of being persecuted.²⁷ I will argue that there are considerable interpretive difficulties with the clause, both in normative theory and in jurisprudence.

One strand of the argument states that a Convention ground (religion, race, nationality, political opinion, membership of a particular social group) must be the sole reason for flight. In *Alfaro-Rodriguez v. INS*, a case in the US, a woman fleeing from El Salvador applied for asylum on account of her political opinion. She declined joining the FMLN guerilla, of which her husband was a member. She was consequently beaten, harassed and threatened by the guerilla. The Board of Immigration Appeals (BIA) rejected her claim. The court reasoned that her claim was not based solely on Convention grounds and that the abuse by her husband would have taken place also if she would have refused him on any other grounds.²⁸ As other courts have recognized, it is very rare that a person flees based on one ground only.²⁹ There are usually a number of different reasons that contribute to a Convention ground and that make for the decision to flee, in addition to the reasons for having a well-founded fear of persecution. In this case, direct persecution by non-state actors, domestic violence as well as the unwillingness or inability by the government to protect Alfaro-Rodriguez could be seen as *intersecting* reasons for her claim.

for claiming the status of Steinbock, "Interpreting the Refugee Definition," 759–60; Goodwin-Gill and McAdam, *The Refugee in International Law*, 101.. The UNHCR handbook, however, uses the phrases interchangeably. I will do the same here. The difference between the two is negligible, not least because the difference in interpretation reappears in the way causation is interpreted, as I show below.

²⁷ James C. Hathaway, "International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground," *Mich. J. Int'l L.* 23, no. 2 (2002): 211.

²⁸ See: Foster, "The Nexus Clause in the Refugee Convention," 270 and: *Alfaro-Rodriguez v. INS*, No. 98-70289, 1999 U.S. App. LEXIS 31945, at *6 (9th Cir. Dec. 2, 1999).

²⁹ See: *Jahazi v Minister for Immigration and Ethnic Affairs*, (1995) 61 F.C.R. 293, 299 (per French J.). See also Foster, 269–70..

Such cases gave rise to the “but-for” test which originates in tort law. The test proposes to interpret the Nexus Clause by asking whether such treatment would have occurred were it not for the claimant’s (and thus “but for her”) political opinion, race, religion, nationality or social group.³⁰ The argument is that a Convention ground must be the major reason for the claim. Yet, such an approach places a big burden of justification on the claimant. If this were the grounds for giving rise to the status of refugeehood, then people fleeing would need to argue based on the intention of their persecutors, showing that it was in fact a Convention ground that was decisive for their persecution. Additionally, similarly to the “sole cause” interpretation, it remains difficult to discern one determinative cause for flight. Many different causes can contribute in equal weight. Hathaway and Foster thus note that the problem of the “but for” test would require to show that a person has been persecuted for one particular reason and that, if that particular cause were not existent, such persecution would not occur. They note that the but-for test thus suffers the same shortcomings as identified for its purpose in tort law. It “challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs,’ thus opening ‘the door wide for conjecture.’ These considerations apply a fortiori in refugee law given the hypothetical nature of an assessment concerning prospective assessment of risk.”³¹ The but-for test for assessing a nexus between persecution and a Convention ground seems, largely, unsatisfactory.

Finally, an interpretation favored by some courts views the Convention grounds as contributing causes.³² According to this interpretation, Convention grounds must factor in the reasons for flight, but need not be the sole cause nor be the determinant cause for persecution. This would mean that persecution for mixed reasons could result in a person successfully claiming refugee status. The

³⁰ Hathaway and Foster, *The Law of Refugee Status*, 386–87.

³¹ Hathaway and Foster, 387.

³² Foster, “The Nexus Clause in the Refugee Convention,” 283–87.

interpretation thus relaxes the stringency of the causation that must, according to the argument from persecution, exist between persecution and certain reasons. However, this is also the main deficiency of the argument. It remains unclear what the minimum threshold of a contributing cause must be in order for a person to qualify as a refugee.³³ How heavy must the political opinion, the race, religion, nationality of group belonging weigh as a reason for it to amount to persecution?

To see why this question triggers problems, take for instance the case of *Immigration and Naturalization Service vs. Elias-Zacarias*. Elias-Zacarias claimed refugee status in the United States based on persecution on account of political opinion. Two guerilla members entered his home in Guatemala at the end of January 1987, asking him to join the guerilla. Upon his refusal, they advised him to rethink his decision and told him that they would return to his house. He claimed that the guerilla would have forced him to join or kill him and thus argued that he had a well-founded fear of persecution based on political opinion. The majority decision by the judges resulted in denying his claim. The court ruled that “Elias-Zacarias still has to establish that the record also compels the conclusion that he has a “well-founded fear” that the guerrillas will persecute him *because* of that political opinion, rather than because of his refusal to fight with them.”³⁴ The court held that persecution must have occurred on account of the victim’s political opinion, and decided that “even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one’s family and friends, a desire to earn a better living in civilian life, to mention only a few.”³⁵ The majority opinion of the court held that Elias-Zacarias’ claim of persecution based on political opinion should be denied because he did not provide direct or circumstantial proof for that his persecutors

³³ Foster, 285.

³⁴ *Immigration and Naturalization Service v. Elias-Zacarias*, 502 U.S. 478, at 483 (9th Cir. Jan. 22, 1992)

³⁵ *INS v. Elias-Zacarias* see n.7 at 482.

acted on behalf of his political opinion. Even though his political opinion may have played a role in his refusal to join the guerilla and hence in him being persecuted, the majority decision held that it was not enough to warrant a claim to refugee status. On the other hand, the dissenting Justices Stevens, Blackmun and O'Connor, argued that the claimant's reasons were sufficient, stating that refusal to join the guerilla was based on the political stance of 'neutrality' between their side and the side of the government. How heavy must the political opinion of Elias-Zacarias thus weigh to count for persecution on that ground? It seems virtually impossible to draw a line here. Besides pointing to difficulties in legal adjudication, the difficulty of providing such a threshold also raises the question of whether tying persecution to specific reasons (such as political opinion, race, religion etc.) is the correct normative basis for determining refugee status. Making such reasons the determining factor for deciding refugee status can be both over- and under-inclusive. This applies to all three interpretations of the Nexus Clause.

The Nexus Clause could be understood as over-inclusive because its reading of reasons could entail that a vast amount of people suddenly appear to have claims to refugee status, even though we would normatively have the intuition that this should not be so. That means: the reasons could be understood as weighing too heavily, overshadowing other relevant aspects to determining why someone should be a refugee. If the Nexus Clause is indeed the determining factor for deciding who is a refugee, one could argue that a black person who left the United States because she faced regular racially motivated harassment by the police should count as a refugee. After all, that person faces persecution, interpreted as a degree of likelihood of harm,³⁶ on account of her race, which is

³⁶ In *INS v. Stevic*, the U.S. Supreme Court held that persecution was to be understood as some degree of likelihood of threat to the life or freedom of a person (*INS v. Stevic*, 467 U.S. at 422 (1984)), which Steinbock interprets as that there must be some degree of probability of harm. As he, however, notes, this decision remains controversial as the Convention definition does not seem to require such likelihood, but merely a "well-founded fear" ("Interpreting the Refugee Definition," 744-45.) As Price notes, "[a] 'well-founded fear' may exist even if there is a 10 percent

the determinant for qualifying harm as Convention-relevant and thus as decisive for the claim to refugee status. The form of harm she is experiencing is, undoubtedly, morally wrong. Yet, that does not yet tell us why she should qualify for refugee status. Some argue that this would be over-inclusive, especially seeing that despite the clear racial harassment that often occurs in the US, black people possess recourse to state institutions. They are in the position of taking to the courts, contacting their representatives on a local, regional and national level, organize protests (as they have rightly done) and engaging in civil disobedience. In other words, the place to initiate change and thus the locus and target of their actions, remains on the national level. Even if the institutions that govern their lives are not morally perfect, it is within these that change remains possible and it is these to which they turn rather than turning to the institutions of other countries. What matters is that they retain a form of legal-political status that allows for the possibility of change, for the possibility of seeking joint control over the conditions that govern their lives, other than flight.

The critique of over-inclusion appears especially often with regards to the “but for” and “contributing cause” interpretations. Placing the political opinion, religion, race, social group and nationality of the claimant at the heart of the determination of refugee status can lead to over-inclusion when these reasons are only marginally important for the harm that people face. An English court of appeals has argued that in the case of the “but-for” test, this could result in

“... the example of an individual who, on the way to church, witnesses a crime and is then threatened with serious retribution by the criminals if he or she exposes them. But for that person’s religion ... they would not have been put in fear of persecution ... [A]nd yet, without reducing the argument to an absurdity, it would come within the Convention if the applicant’s argument in this case were right.”³⁷

probability of harm.” (Price, *Rethinking Asylum: History, Purpose, and Limits*, 112.). See also *INS v. Cardoza-Fonseca*, 480 U.S. at 440 (1987), which relaxes the likelihood condition previously upheld in *INS v. Stevic*.

³⁷ *Velasco v. SSHD*, 2000 Lexis, EIN Database App. No. SLJ-1999, 7981-C (U.K.C.A., Apr. 2000).

According to the English Court of Appeals, this “opens up the possibility for an infinity of causes”.³⁸ As Hathaway and Foster³⁹ argue, the same objection of over-inclusion applies to the “contributing cause” interpretation of the Nexus Clause. For, if the nexus between harm and a Convention reason can be marginal, one could find a plethora of cases in which the applicant can argue that the harm done to her is somehow connected to one of the Convention reasons.

These examples show that placing specific reasons at the heart of determining refugee status can be imprecise in outlining who should count as a refugee. Even if they function as a proxy for another set of reasons (for example as a proxy for state illegitimacy), placing those reasons at the heart of refugee status determination can result in over-inclusion. Overinclusion can occur because a country may still be burdened by manifest social ills (such as the United States and the still prevailing racism there), that also expresses itself in the risk of serious persecutory harm against some individuals, even though the individuals in such countries can instigate social and political change through the existing open institutions of that country. In other words, it is over-inclusive, because even if a person experiences serious harm on the basis of one of the Nexus reasons, such as race, or religion, and even if such illegitimate and morally condemnable actions are performed at the hands of state officials, say the police, it seems strange to refer to such a person as a refugee if his political and legal paths to compensation of legal or political change remain open. Someone can thus be targeted by state officials on those grounds without losing their political-legal status – without retaining recourse to one’s own state.⁴⁰

³⁸ *Idem*.

³⁹ “The Causal Connection (‘Nexus’) to a Convention Ground: Discussion Paper No. 3 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002,” *International Journal of Refugee Law* 15, no. 3 (2003): 461–76.

⁴⁰ The chance that such a person would be considered a refugee by most of today’s courts is slim, but not a thing of impossibility. One need just refer to cases of conscientious objectors fleeing the United States and asking for asylum in Canada or other states, or military deserters See: Patrick J. Glen, “Judicial Judgment of the Iraq War: United States

Normatively of much more interest, however, is the implication of the under-inclusion of the Nexus Clause. If the specific reasons provided by the Convention are the decisive factors for determining refugee status, many cases in which a person has been harmed and cannot show some clear connection to Convention grounds, will not qualify that person for refugee status. Take for instance the case of a Nigerian man (*Omoruyi v. SSHD*) seeking asylum in the UK on grounds of religion. The English Court of Appeals decided against the applicant's claim. The claimant fled Nigeria, fearing death at the hands of a satanic sect that he had refused to join, claiming refugee status on account of his Christian belief not allowing him to do so. Upon investigating the case, the court denied his claim, because it turned out that Omoruyi was not chosen by the sect on the basis of his Christian belief, and thus not persecuted *because* he was Christian, but because of his father's connection to the cult.⁴¹ Yet, it is hard to see why this should be of normative significance. For Omoruyi, the threat remains the same. He fears death at the hands of the sect upon return to Nigeria. Whether he is persecuted because of his Christian faith or for another reason does not alter his position. There is no moral reason why he should not be able to claim refugee status. The Nexus Clause, thus, places too much emphasis on the reasons for which harm is experienced.

It is not only that the Nexus Clause places too much emphasis on the reasons for which harm is experienced. Sometimes, the problem is the lack of clarity between the threat of harm and a Convention reason. Consider the following case:

Armed Forces Deserters and the Issue of Refugee Status," *Wisconsin International Law Journal* 26 (2009): 965–1032 and; Cecilia M. Bailliet, "Assessing Jus Ad Bellum and Jus In Bello within the Refugee Status Determination Process: Contemplations and Conscientious Objectors Seeking Asylum," *Georgetown Immigration Law Journal* 20 (2005): 337–84.

⁴¹ *R (on the application of Omoruyi) v. Secretary of State for the Home Department (SSHD)*, No. C/2000/0025/IATRF (U.K.C.A., Oct. 12, 2000).

In 1992, Baljinder Singh Sangha, a 15-year-old Indian boy entered the United States, claiming asylum on grounds of political opinion. In 1991, his father joined and assumed a leadership role in the Akali Dal Langowal party, which condemned militant and terrorist solutions to political problems in the Punjab. His father criticized the Bhindrawala Tiger Force (BTF), an organization promoting a separate Sikh homeland known as Khalistan, for promoting violence in the region. The court then noted that:

“In September, 1991, four armed men forced their way into the Sangha home. They beat up Sangha's father until Sangha and his brother came to protect him. The men identified themselves as members of the BTF. They demanded that Sangha's father cease his political activities, pay them 100,000 rupees, and give over Sangha and his brother. They said they wanted the two brothers to fight for Khalistan and they wanted to make the brothers unavailable to support the father. They gave Sangha's father three weeks to comply.”⁴²

The father subsequently arranged for his sons to leave India. The court denied refugee status to Sangha on the basis that he did not show causal connection between the persecution he faced and his political opinion. It ruled that the BTF did not persecute Sangha because of his political opinions, but rather because it wanted to punish his father for his political engagement.

Cases like these show that there are two related problems with the determination of refugee status connected to specific reasons that can result in under-inclusion. First, as elaborated above, it excludes some of the cases because there are a plentitude of different reasons of which a Convention reason plays only a role “remote to the point of irrelevance”.⁴³ If the determination of refugee status is not supposed to be over-inclusive by counting even the slightest connection to a Convention ground, then the Nexus Clause must exclude cases in which a Convention reason was

⁴² Sangha v. INS, 10 F.3d 1482, 1482 (9th Cir. 1997).

⁴³ Hathaway, “International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground,” 217.

only a minor reason for flight amongst many other non-protected reasons.⁴⁴ This has been identified as a problem mainly in the legal literature on international refugee law.⁴⁵

The second problem has received greater attention in normative political literature on refugees and asylum. It concerns cases that include arguably no Convention grounds. The Nexus Clause simply does not recognize certain reasons as worthy of protection. One such reason is gender-based persecution. The fact that courts have repeatedly tried to fit certain cases of gender-based persecution as persecution on political grounds⁴⁶ or persecution based on membership of a social group⁴⁷, reflects the glaring gap the Nexus Clause shows with regards to this issue.⁴⁸ Courts have visibly struggled with recognizing domestic violence, trafficking, forced marriage and other gender based discriminations and forms of violence as forms of illegitimate persecution and have often ruled them to be based on personal quarrels and private reasons for flight.⁴⁹ Yet, this interpretation does not set gender-based persecution visibly apart from other forms of recognized persecution. Just as with the interpretation of persecution based on political opinion, race, religion, nationality or membership of a particular social group, it remains difficult to discern whether gender specific reasons are the grounds for flight or whether other personal or socially specific

⁴⁴ This goes back to the Elias-Zacarias case: The infliction of harm must happen on the basis of the convention ground. See: Anjum Gupta, "The New Nexus," *Colo. L.Rev.* 85 (2014): 400.

⁴⁵ see: Foster, "The Nexus Clause in the Refugee Convention," 269–83.

⁴⁶ The case of forced sterilization in *Matters of Chang* (In re Chang, 20 I. & N. Dec. 38, 39–40 [B.I.A. 1989]), Congress decided to amend the refugee definition to include forced sterilization and abortion as to be interpreted as a form of persecution based on political opinion. See: Gupta, "The New Nexus," 390–92.

⁴⁷ In a case of female genital mutilation, the Board of Appeals in the United States decided that female genital mutilation (FGM) constitutes persecution on the ground of the applicant's membership of a social group. The social group, however, was not "women", but "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice (In re Kasinga, 21 I. & N. Dec. 357, at: 365 (B.I.A. 1996)).

⁴⁸ See: Jacqueline Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse," *International Journal of Refugee Law* 1, no. 4 (1989): 518–27; Elena Fiddian-Qasmiyeh, "Gender and Forced Migration," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh, Gil Loescher, and Katy Long (Oxford: Oxford University Press, 2014), 395–408.

⁴⁹ Gupta, "The New Nexus," 395.

circumstances were the reasons. This may make us question whether providing a set of specific reasons is indeed the right normative standard for assessing refugee status. But even if it were (which I will reject below), there are no good grounds for treating gender-based persecution any different from other reasons.⁵⁰ A simple thought experiment can show this. Imagine the founders of the Convention had included gender as a protected reason under the Nexus Clause when drafting the Convention. Would it be acceptable today to remove gender as a legitimate reason? Rather than thinking why it should enter, we should find arguments for why gender does not constitute a legitimate reason according to the logic of the argument from persecution. This is, of course, also the case for many other reasons. Think of reasons such as age-based discrimination, handicap discrimination, or indiscriminate harm such as famine, extreme poverty, environmental disasters, drug- and gang-wars, and (civil) wars. Should these scenarios be immediately excluded from the realm of possible reasons for claiming refugee status? The Classical Approach not only leads to excluding forms of indiscriminate harm, but fails to present a distinction between discriminate and indiscriminate harm that would matter morally. Even if one accepts the distinction as a morally valid one, the Nexus clause presents a catalogue of accepted reasons that is too rigid according to its own logic. The list of protected grounds is simply not exhaustive of legitimate reasons for flight. This means that both its understanding of persecution and the Nexus Clause lead to under-inclusion.

⁵⁰ As Indra “Gender: A Key Dimension of the Refugee Experience,” *Refuge: Canada’s Journal on Refugees* 6, no. 3 (1987): 3–4. argues.

1.3 The Human Rights Approach

One possible reaction to the critique of the Nexus Clause would be to simply extend the list of protected grounds. This could be done, of course, by merely adding single elements such as gender-based violence, famine or existential poverty to the Geneva Convention definition. But such an approach runs into considerable difficulties. The clause would need to specify all possible grounds on which a person could be illegitimately persecuted, which would require constantly expanding it, adding single elements to the clause. There may be, however, various grounds that amount to illegitimate persecution but occur less often. Equally, as the emergence of gender-based persecution as a widely recognized form of illegitimate form of harm proves, such a “closed list” approach remains undynamic and incapable of responding to newly emerging forms of illegitimate persecution.⁵¹ Take, for instance, persecution based on age, and as an example the case of *MIMA v. Applicant Z*.⁵² In this case, a young Afghani man was denied refugee status based on “membership of a particular social group”. The man fled Afghanistan following his forced recruitment by the Taliban, who searched for “young, able bodied men”. He argued that he faced persecution based on discrimination against his age, for it was only such people that faced recruitment by the Taliban. Now, despite his claim being rejected by the Australian Federal Court, there are no good reasons why persecution based on age should be treated differently than persecution based on gender. A closed list approach would have to foresee all the possible grounds on which a person can be persecuted. This would likely result either in over-legislating the clause

⁵¹ Hugo Storey, “What Constitutes Persecution? Towards a Working Definition,” *International Journal of Refugee Law* 26, no. 2 (2014): 273.

⁵² *Minister for Immigration & Multicultural Affairs v Applicant Z* [2001] FCA 1823

by introducing a large number of general as well as minor possible reasons for persecution or would remain not exhaustive of all the possible forms of illegitimate persecution.

An alternative is provided by the “Human Rights Approach”. According to James Hathaway, it extends the Convention list by aligning refugee law with international human rights law. This would make the interpretation of what constitutes persecution more open. In doing so, Hathaway tackles both the restrictive reading of the term persecution and the Nexus Clause. He holds that persecution should be interpreted as the “sustained or systemic denial of basic human rights demonstrative of a failure of state protection”.⁵³ Rather than mere pursuance, such an approach interprets persecution to extend to all threats of basic human rights. It does not, however, state that refugee status determination is based on experienced hardship or suffering,⁵⁴ but argues that respecting certain human rights make for the minimal conditions of any claim to state legitimacy,⁵⁵ and that the violation of such human rights can be interpreted as persecution. It does so by tying refugee status determination and the interpretation of persecution to the International Bill of Rights, consisting of the Universal Declaration of Human Rights⁵⁶ and the two UN Covenants, the International Covenant on Civil and Political Rights (ICCPR)⁵⁷ and the International Covenant of Economic, Social and Cultural Rights (ICESCR).⁵⁸ The Human Rights Approach uses these to argue for a four-category list of human rights⁵⁹ and state obligations that constitute an extended

⁵³ Hathaway and Foster, *The Law of Refugee Status*, 185.

⁵⁴ Hathaway, *The Law of Refugee Status*, 105–6.

⁵⁵ Hathaway, 106.

⁵⁶ “Universal Declaration of Human Rights,” *United Nations*, no. December (1948): 1–6.

⁵⁷ “International Covenant on Civil and Political Rights,” *United Nations, Treaty Series* 999, no. 14668 (1966): 171.

⁵⁸ Hathaway and Foster, *The Law of Refugee Status*, 200–201; UN General Assembly, “International Covenant on Economic, Social and Cultural Rights” 993, no. 14531 (1966): 3.

⁵⁹ It should be noted that Hathaway interprets these four categories as constituting a normative hierarchy in the first edition of his book. Hathaway and Foster reject the idea of a hierarchy that exists between those rights in the second edition. They now argue that these rights cannot be interpreted as *normatively* hierarchical, because withstanding the fact that rights such as economic and social rights can only be implemented progressively, that does not mean that

list of different harms. Some of these may not be inflicted for any reason (without being considered persecution), others only in a non-discriminatory fashion, in emergency situations, or when resulting from an absolute lack of resources.⁶⁰

- (i) “non-derogable human rights as a set out in the ICCPR;
- (ii) derogable human rights as set out in the ICCPR;
- (iii) (progressively implemented) economic, social and cultural rights set out in the ICESCR;
- (iv) miscellaneous human rights found in the UDHR not codified in either of the covenants.”⁶¹

First, the category of non-derogable rights is introduced by Art. 4 of the ICCPR and includes include rights to life (Art. 6), protection against genocide (Art. 6), torture (Art 7), slavery (Art. 8), imprisonment merely on the basis of inability to fulfill contractual obligations (Art. 11), ex-post facto punishment (Art. 15), recognition as a person before the law (Art. 16) and rights of freedom of consciousness, thought and religion (Art. 18). They include, thus, what Price calls the “anti-brutality norm” – the violation of these rights is so serious that it challenges the presumed legitimacy of states.⁶² It is important to point out that the derogability of rights does not depend solely on their normative importance. It rather rests on the relevance of specific rights in times of public emergency. Thus, as Hathaway shows, the reason why some rights were made non-derogable rests strictly on their irrelevance for state control in times of public emergency.⁶³ This

they are normatively less important. See: Hugo Storey, “The Law of Refugee Status, 2nd Edition: Paradigm Lost?,” *International Journal of Refugee Law* 27, no. 2 (2015): 348–60. Hathaway and Foster cite the Vienna Declaration and Programme of Action in arguing that this is the case because: “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” see: Hathaway and Foster, *The Law of Refugee Status*, 203; UN General Assembly, “Vienna Declaration and Programme of Action” A/CONF.157 (1993). For this reason, it is assumed below that these rights do not stand in a hierarchy towards each other. The analysis of the Human Rights Approach will thus continue on the basis of the second edition of the book.

⁶⁰ Hathaway, *The Law of Refugee Status*, 112.

⁶¹ Storey, “What Constitutes Persecution? Towards a Working Definition,” 278–79.

⁶² *Rethinking Asylum: History, Purpose, and Limits*, 110.

⁶³ Hathaway and Foster, *The Law of Refugee Status*, 202.

is why rights such as Art. 11., the impermissibility of imprisonment on the basis of non-payment of debt, is considered part of the list of non-derogable rights. Such rights were thus made non-derogable not because they are normatively more important than those who are, but because they are irrelevant for state control in states of emergencies. It would hence be wrong to determine refugee status simply based on the violation of only non-derogable rights.⁶⁴ This means, it would be wrong to assume that non-derogable rights as outlined in the ICCPR constitute the normative core of the human rights declaration, and that the protection of such rights suffices to guarantee a minimal protection to people.⁶⁵

The second class of human rights is not normatively less important and thus constitutes a relevant class of harms in the interpretation of persecution. These are rights that may be restricted only in situations of public emergency. They include rights of freedom from arbitrary detention, the right to a fair trial, privacy rights, the rights to political participation, to join trade unions, freedom of movement, opinion, expression, assembly, and association.⁶⁶ The third category consists of economic, social and cultural rights such as to food, clothing, housing, health care and social security. As Hathaway and Foster argue, the violation of socio-economic rights may be understood as serious harm and thus interpreted as persecution. Yet, as they also point out, poverty itself does not constitute a sufficient ground for such a claim. What matters is either the denial of the security to an adequate standard of living or a discriminatory form of deprivation of socio-economic rights.⁶⁷ Finally, the last category consists of rights listed in the UDHR that are not codified in

⁶⁴ Hathaway and Foster, 202–3.

⁶⁵ As does the European Union's Qualification see: Hathaway and Foster, 202..

⁶⁶ Price, *Rethinking Asylum: History, Purpose, and Limits*, 115.

⁶⁷ Hathaway and Foster, *The Law of Refugee Status*, 230–32.

either the ICCPR or the ICESCR. According to Hathaway, rights falling in this category, such as the right to be free from arbitrary deprivation of property, do not constitute persecution.⁶⁸

The Human Rights Approach thus significantly extends the meaning of persecution. It has, at its core, an extended list of what Price calls the “anti-brutality principle”⁶⁹, which states that certain rights are so fundamental that their violation is always constitutive of a lack of state legitimacy. Breaching such rights is always sufficient for a claim to persecution (except in certain instances of public emergencies). The violation of other rights, while being equally normatively important, constitute persecution only if their abrogation has been conducted in a discriminatory fashion or in non-emergency situations.⁷⁰ Extending the meaning of persecution may hence tackle some of the problems raised above with a narrow reading of persecution, but it also has consequences for the interpretation of the Nexus Clause. Here, however, an approach based on human rights takes two distinct directions.

The first direction results in a relaxation of the Nexus Clause. This is the path taken by Hathaway (and Foster) in both the first and second edition of *The Law of Refugee Status*.⁷¹ The second direction results in the elimination of the Nexus Clause altogether. This argument is found in one earlier article by Hathaway⁷² and describes the direction in which political philosophers have consequently argued (see section 3 of this chapter). I will first discuss the first direction. In the subsequent section, I will then take up the second direction and will consider it as part of the

⁶⁸ Hathaway, *The Law of Refugee Status*, 111; See also: Price, *Rethinking Asylum: History, Purpose, and Limits*, 115.

⁶⁹ Price, *Rethinking Asylum: History, Purpose, and Limits*, 115.

⁷⁰ Hathaway, *The Law of Refugee Status*, 112.

⁷¹ *The Law of Refugee Status*; *The Law of Refugee Status*.

⁷² James C. Hathaway, “Reconceiving Refugee Law as Human Rights Protection,” *Journal of Refugee Studies* 4, no. 2 (1991): 113–31.

“Humanitarian Approach”. This seems to me more adequate, especially given comments by Hathaway himself:

“It is suggested by some that refugee law is essentially coterminous with international human rights law, or even with humanitarianism, such that any person whose basic dignity is jeopardized should be entitled to seek protection abroad. This generous perspective collides with the implicit assumption of conventional refugee law that unless excluded from the national community, one should vindicate claims to liberties and entitlements from within the state.”⁷³

The Human Rights Approach does not claim that any violation of human rights creates the basis for refugee status. Rather, it first attempts to widen the meaning of persecution by informing refugee law with the continuously developing standards of human rights law and then, secondly, seeks to find ways in which human rights violations can be subsumed under a more dynamic interpretation of the Nexus Clause. The Human Rights Approach, thus, does not discard but re-interpret the Nexus Clause. Hathaway and Foster argue that the Nexus Clause can be interpreted as a limiting clause to the protection from human rights violations. This means that it limits protection to people who not only suffer from human rights violations, but who suffer such violations *and* are also fundamentally politically or socially marginalized. As such, the Nexus Clause can be understood as protecting people who both face human rights violations and are discriminated against.⁷⁴ It argues for a Nexus between who the claimant is and what she believes in, on the one hand, and persecution understood as the violation of human rights, on the other hand. If this is correct, then we can reassess whether the list provided under the Nexus Clause is sufficient for accounting for claims to refugee status today. They note that, the Nexus Clause is, however, “unduly anchored in a particular era”. While the drafters of the Convention thought it would cover most of the claims by European refugees after the second world war, it does not include many of

⁷³ Hathaway, *The Law of Refugee Status*, 137.

⁷⁴ Hathaway and Foster, *The Law of Refugee Status*, 363.

the reasons for flight that have emerged since.⁷⁵ Yet, the principle of non-discrimination underlying the Nexus Clause provides the basis for extending the clause to other people similarly discriminated. The justification for this principle follows a similar logic as exposed in the previous section regarding the inclusion of other reasons into the Convention. It argued that if a given reason, such as gender-based discrimination, were already part of the Convention clause, there would be no good reason for eliminating it from the clause. On this account, the logic of the Nexus Clause allows for many more reasons to be included than presently are. Hathaway and Foster argue that the non-discrimination principle represents the underlying logic of the Nexus Clause and that it can serve as a way to include grounds of flight that possess the same non-discriminatory logic as those that are already part of the clause.

Hathaway and Foster identify one particular Convention ground as the vehicle for their non-discrimination clause: the ground relating to the “membership of a particular social group”. They argue that this ground can be interpreted following the general logic of non-discrimination that also underlies the other Convention grounds. This is known as the *ejusdem generis* approach, according to which “...a general term following in a list of particular terms should be interpreted in a manner consistent with the general nature of the enumerated items.”⁷⁶ The “membership of a particular social group” category can then function as a ground that is capable of including all other discriminatory reasons for human rights violations, such as “...disfranchisement on such bases as gender, sexual orientation, family, age, and disability...”⁷⁷ The Nexus Clause is then

⁷⁵ Hathaway and Foster, 363.

⁷⁶ Alexander T. Aleinikoff, “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group,’” in *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection*, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge et. al.: Cambridge University Press, 2003), 289.

⁷⁷ Hathaway and Foster, *The Law of Refugee Status*, 363.

extended to include all other potential grounds on which a person is persecuted due to what she is or believes (non-discrimination principle). The justification for what to include is based on the idea that these characteristics are either immutable (what a person is) and thus cannot be changed by the person in question, or that these characteristics are so fundamental to the identity or conscience of a person that she should not be required to change these (what a person believes in).⁷⁸

Even though the Human Rights Approach significantly extends the scope of cases falling under both the definition of persecution and the Nexus Clause, it still ties refugee status determination to discriminatory persecution. Hathaway and Foster write:

“While it is true that those whose predicament is simply the result of natural disasters or widespread turmoil do not ordinarily qualify as Convention refugees, this is not because the adverse impact falls on large numbers of persons, but rather because of the non-discriminatory nature of such risks. Because refugee law is concerned only with protection from persecution tied to a claimant’s race, religion, nationality, membership of a particular social group, or political opinion, those impacted by natural calamities, weak economies, civil unrest, and even generalized failure to adhere to basic standards of human rights are not by that fact alone entitled to refugee status.”⁷⁹

According to the Human Rights Approach, generalized and indiscriminate forms of violence, such as civil wars or foreign aggressions do not constitute a legitimate basis for claiming refugee status. This does not mean that persecution based on a Convention ground cannot also occur during civil wars and other conflicts.⁸⁰ Such instances would be protected according to the Human Rights Approach. What it does not protect against is the specific form of violence characteristic of such

⁷⁸ Hathaway and Foster, 426; See also: Aleinikoff, “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group.’”

⁷⁹ Hathaway and Foster, *The Law of Refugee Status*, 175–76.

⁸⁰ This is what Storey calls the “exceptionality approach”. See: Hugo Storey, “Armed Conflict in Asylum Law: The ‘War-Flaw,’” *Refugee Survey Quarterly* 31, no. 2 (2012): 4.

conflicts: violence that occurs without the state specifically targeting individuals. The Human Rights Approach excludes all cases of indiscriminate violence.⁸¹ This leads to decisions such as made in the case *Federal Court of Canada in Saliban v. Minister of Employment and Immigration*, which concerned a claim to refugee status by a Lebanese citizen

“... a civil war situation does not pose an obstacle to a claim provided the fear is not a fear felt by all citizens indiscriminately because of the civil war but a fear felt by the applicant himself, by a group with which he is associated or, at the very least, by all citizens because of a risk of persecution based on one of the reasons in the definition.”⁸²

Similar judgments were made in *Isa v. Secretary of State (Canada)*, or by the House of Lords in *SSHD v. Adan*, which concerned a Somali man who fled to Britain with his family in October 1990 and was denied refugee status on the basis of that “there is no ground for differentiating between Mr. Adan and the members of his own or any other clan.” The court thus upheld the ruling of the Immigration Appeal Tribunal which stated that

“...there is no evidence that the respondent would suffer persecution on account of his membership of the Habrawal sub-clan of the Isaaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan than for the general population and the members of any other clan or sub-clan.”⁸³

The Human Rights Approach thus has the peculiar effect that it only recognizes certain human rights violations as worthy of refugee status, protecting against human rights violations only if they have also occurred for very specific reasons.⁸⁴ It excludes from protection many people who suffer

⁸¹ See: Storey, “Armed Conflict in Asylum Law: The ‘War-Flaw.’”

⁸² (*Salibian v. Canada (Minister of Employment and Immigration)* (1990) 3 F.C. 250)

⁸³ *Secretary of State for the Home Department, Ex parte Adan, R v. [1998] UKHL 15*; (2nd April, 1998).

⁸⁴ After all, the approach is called the “Human Rights Approach”. Yet, it does not protect from all forms of human rights violations but only very specific forms of such violations.

the most atrocious violations of human rights: all those caught up between the front lines of wars, the victims of aerial bombardments of cities and villages, and those who are the victims of ravaging militias and armies which do not differentiate between any of their victims.⁸⁵ This has been widely recognized as a pervasive problem of the Human Rights Approach. Hugo Storey has called it the “war-flaw”, pointing to the incapability of the Human Rights Approach of dealing with the specific forms of human rights violations and harm occurring during conflicts.⁸⁶ Mark Gibney has shown with regards to the case of the Persian Gulf War of 1990 that the consequences of excluding victims of indiscriminatory violence from refugee protection contradicts the underlying rationale of an approach that attempts the protection of human rights.⁸⁷ Even Hathaway and Foster seem to recognize the ethical issues with upholding the Nexus Clause. Yet, they argue that

“The ethical basis for the nexus criterion may be questioned given that the human consequences for a person at risk of detention due to her ethnicity are identical to those confronting a person at risk of detention due to indiscriminate oppression. But given the perception of states that global asylum capacity is insufficient to accommodate all those who would be likely to advance refugee claims based simply on the risk of serious harm, the need for a principled limiting criterion becomes clear. The non-discrimination principle ... represents a principled and sound means of drawing a regrettably necessary distinction since it identifies those potential human rights victims who are fundamentally marginalized in their state of origin.”⁸⁸

Hathaway and Foster thus resort to an empirical argument of scarce resources. They claim that a limiting principle such as the Nexus Clause is necessary because states perceive their capacity to be limited. Yet, it is insufficient for any theory that aims at discerning what should be the underlying reason for determining refugee status to point to the perception of states in their capacity to take in refugees. This may, perhaps, be an excusing reason for limiting the intake of

⁸⁵ See also Mark Gibney, “USA Refugee Policy : A Human Rights Analysis Update” 5, no. 1 (1992): 36–37..

⁸⁶ “Armed Conflict in Asylum Law: The ‘War-Flaw.’”

⁸⁷ Gibney, “USA Refugee Policy : A Human Rights Analysis Update,” 37.

⁸⁸ Hathaway and Foster, *The Law of Refugee Status*, 362–63.

refugees, but it cannot function as a *prima facie* ground for determining refugee status. Furthermore, it is far from clear whether the empirical argument holds, even if we set aside that Hathaway and Foster resort to state perception. Even if refugee protection costs resources, it remains far from clear that states cannot expend the necessary resources to accommodate people seeking refuge if there were the political will to do so. This especially stands as it remains unclear how many of those facing indiscriminate violence would even flee and seek refuge. An alleged lack of resources does not in itself provide us with an argument for who should be considered a refugee. It does not constitute a *prima facie* argument for determining refugee status, but merely potential excusing circumstances for not hosting refugees. There is a big difference between the two, as the determination of refugee status must come prior to any excuse not to host refugees.

Such objections led a number of researchers to argue that the Nexus Clause should be eliminated in determining refugee status. Mark Gibney, in relation to his example of the Gulf War, notes:

“What we suggest instead is that individuals fleeing Persian Gulf-like situations ought to be recognized as refugees. The reason for this is quite simple: there is a very high probability of harm occurring, and offering refuge will sometimes be the best means of avoiding that harm.”⁸⁹

Other researchers have similarly advocated for abolishing the “for the reasons of” part in determining refugee status.⁹⁰ The next section will deal with those approaches. Rather than arguing that refugee status should be based on a narrow reading of persecution for specific reasons (the five Convention grounds), or on the basis of human rights violations for all discriminatory reasons (the Human Rights Approach), the next section will deal with an approach that argues that all those

⁸⁹ Gibney, “USA Refugee Policy : A Human Rights Analysis Update,” 38.

⁹⁰ see: Hathaway, “Reconceiving Refugee Law as Human Rights Protection.”

who fear a serious threat of harm, no matter the reasons, should receive refugee status. This is what I call the “Humanitarian Approach”.

1.4 The Humanitarian Approach

This section discusses what I call the “Humanitarian Approach”. It will first outline the arguments of the approach, drawing on various philosophical accounts. It will then evaluate to what extent it is embedded in international law. In European law, the instrument of “subsidiary protection” stands out as a form of protection that could arguably interpreted as being based on humanitarian principles. I will discuss to what extent the form of subsidiary protection is limited with regards to the wider philosophical Humanitarian Approach and finally discuss the shortcomings of a wider interpretation of the Humanitarian Approach.

The Humanitarian Approach comprises of all those approaches that argue for harm being the sole determining factor for claiming refugee status.⁹¹ It acknowledges the problem that persists with the Nexus Clause and with a narrow understanding of persecution. As Hathaway himself remarks in one of his earlier articles:

“...it is suggested here that it is rather the Convention's insistence that fear of persecution be linked to the refugee's civil or political status which is most limiting. This privileging of the norm of non-discrimination in relation to other essential attributes of human dignity

⁹¹ As such, it represents an ideal type approach. This means, that a specific idea is shared by a number of different theories. The authors must not present theories that align perfectly, any many differences may appear in their works. They may even personally disagree with such classifications. Yet, an ideal type approach – the “Humanitarian Approach” – may nevertheless be identified as underlying their different theoretical approaches and forming the normative foundations of their theories.

accounts for the inapplicability of the Convention to most refugees today, where risk to basic human rights alone is not sufficient to establish a claim to Convention refugee status.”⁹²

Hathaway goes on to argue that all people whose human rights are at risk should be entitled to claim refugee status.⁹³ As elaborated above, Hathaway argues for a more encompassing interpretation of persecution understood as human rights violations according to the International Bill of Rights and specifically the Universal Declaration of Human Rights. He argues that the Nexus Clause excludes those people who arguably suffer from the most atrocious human rights abuses. If refugee status is concerned with protecting those that suffer from human rights violations, there are no good grounds for excluding those that face indiscriminate harm. Similar positions are taken by several different philosophers. Matthew Gibney writes:

“I will use the term ‘refugee’ ... to denote those people in need of a new state of residence, either temporarily or permanently, because if forced to return home or remain where they are they would – as a result of either the brutality or inadequacy of their state – be persecuted or seriously jeopardise their physical security or vital subsistence needs.”⁹⁴

Gibney and Hathaway’s earlier article argue against a narrow understanding of persecution for determining refugee status. They both recognize that such a definition in combination with the Nexus Clause does not only exclude people fleeing indiscriminate harm, but that such exclusion seems to be inconsistent with the basic tenets of an approach that argues for refugee status determination to be based on the violation of human rights. If refugee status determination is based on the protection of human rights, it makes little sense to exclude from it all those people that

⁹² Hathaway, “Reconceiving Refugee Law as Human Rights Protection,” 121.

⁹³ Hathaway writes: “Taken together with the essential meaning of persecution, refugee status should be the entitlement of any person or community for whom there is no reasonable likelihood of meaningful protection of basic human rights—whether civil, political, economic, social, or cultural—in their own state. Hathaway, 124.

⁹⁴ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge et. al.: Cambridge University Press, 2004), 7.

suffer from severe human rights violations only because such violations have not occurred for discriminatory reasons. The Humanitarian Approach argues that there is no ethical difference between a situation in which a person flees aerial bombardments that are specifically targeting her (group) and a situation in which a person flees aerial bombardment even though the bombers have no intention of specifically targeting her (group). It does not matter for the person in question whether she is going to be killed for a specific reason or not. The threat to her remains the same. After all, what matters is the protection of human rights, not the protection of human rights only for those that can name specific discriminatory reasons as to why *they* suffered from such human rights abuses. Joseph Carens writes that

“To insist that a refugee must be deliberately targeted is a mistake. From a moral perspective, what is most important is the severity of the threat to basic human rights and the degree of risk rather than the source or character of the threat.”⁹⁵

Such approaches thus find no reasons for excluding from refugee status determination all those people who are threatened with or suffer serious harm in instances such as (civil) wars, famines, severe poverty, natural catastrophes and so forth. To categorize such people as refugees, refugee status determination must be solely based on harm, experienced or the threat thereof. A number of different scholars argue along similar lines.

Aristide Zolberg, Astri Suhrke and Sergio Aguayo contend that refugee status determination should not be based on persecution for specific reasons, but that we should “... define refugees as persons whose presence abroad is attributable to a well-founded fear of violence ...”⁹⁶ Violence

⁹⁵ Joseph H. Carens, *The Ethics of Immigration* (Oxford et. al.: Oxford University Press, 2013), 201.

⁹⁶ Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York and Oxford: Oxford University Press, 1989), 33.

can be inflicted both directly and indirectly, through imposing conditions that make a normal life impossible.⁹⁷

Similarly, Emma Larking argues that we should understand the claim to refugee status as the claim of people who flee from states that are unable or unwilling to provide conditions necessary for living a decent human life, basic dignity, devoid of a threat to an unnatural death and free from terror.⁹⁸ Michael Dummett defines refugees as persons “who are forced by fear for their lives or of torture, rape or unjust imprisonment to flee their own countries have a valid claim on other human beings to afford them refuge.”⁹⁹

The Humanitarian Approach can arguably also be found in other forms of refugee protection. Although there are different forms of complementary protection in international refugee law, I will focus here on the form of subsidiary protection found in European Union law.

The European Commission 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” combines classical refugee protection according to the Geneva Convention with subsidiary protection. The latter is designed to protect persons that do not qualify as refugees according to the Geneva Convention definition,

⁹⁷ Even though they add a qualifying clause to their definition that remarks that additionally to suffering forms of violence, a person is only considered a refugee if she can be aided solely by moving abroad, the underlying argument for the importance of violence for determining refugee status remains. It need not bother us here. The argument for the centrality of harm can be distinguished from any added limiting clauses. Furthermore, it is questionable whether their argument for the qualifying clause holds. After all, the possibility of helping people in situ exists for all other forms of harm that makes for refugeehood as well. Joseph Carens offers a compelling rejection of such an argument. He states that “In my view, this approach [the named qualifying clause] implicitly confuses two distinct sorts of questions. The first is ‘What is the best solution to a particular problem?’ The second is ‘Should a person who has fled because of this problem be granted asylum as a refugee?’” See: Carens, *The Ethics of Immigration*, 202.

⁹⁸ Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of Law* (Surrey and Burlington: Ashgate Publishing Limited, 2014), 2.

⁹⁹ Michael Dummett, *On Immigration and Refugees* (London and New York: Routledge, 2001), 34.

but who face serious harm in their state of origin and can, as a consequence thereof, not be sent back to such countries (principle of non-refoulement). The exact formulation reads as follows:

“‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;” Article 2 (e) Qualification Directive 2004/83

Article 15 of the Qualification Directive defines serious harm as:

“(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” Article 15 Qualification Directive 2004/83

Even though the status of subsidiary protection accounts for indiscriminate violence in situations of international and internal armed conflict and hence reacts to one of the criticism of conventional refugee protection, it is far more limited than the comprehensive Humanitarian Approach outlined at the beginning of the section. While “there is nothing in Article 15(c) limiting the source of violence as long as it arises in the context of an armed conflict.”,¹⁰⁰ its focus on international or internal conflict also proves to be its most apparent limitation. Contrary to Article 15 (c), the Humanitarian Approach does not only consider harm that occurs in the context of (civil) war as a source of eligibility for a status of protection, but harm per se. As such, subsidiary protection does

¹⁰⁰ Helene Lambert and Theo Farrell, “The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence,” *International Journal of Refugee Law* 22, no. 2 (2010): 249.

not grant protection to people fleeing indiscriminate harm other than armed conflicts, such as the harm implied in famines or environmental disasters.¹⁰¹ This seems normatively inconsistent. If we ought to understand refugees as those fearing indiscriminate forms of violence, we cannot simply select specific instances in which such violence occurs while excluding others. If the basis for our understanding of refugeehood is indeed a fear of indiscriminate harm then we cannot only include persons fleeing armed conflict but must consider all other forms of such harm, too. When I speak of the Humanitarian Approach, I will thus refer to it as an argument that includes all forms of indiscriminate harm. I proceed with evaluating whether the fear of (all forms of) serious harm makes for a correct normative foundation of refugeehood.

The Humanitarian Approach addresses the problems identified with determining refugee status through persecution and a nexus to the five Convention grounds. Yet, the approach faces

¹⁰¹ There exist a few other, more internal, points of criticism regarding the interpretation of Article 15 of the Qualification Directive, which follows the leading case of *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* CJEU - C-465/07. Article 15 (c) limits protection to civilians only. From an ethical perspective this seems, at best, questionable if the protection from serious harm is of central concern. One could imagine a case in which a soldier of an authoritarian government flees its attacking ravaging army, and in which such an attack can be considered “unjust”. Such a soldier is without doubt in harms way and it seems questionable why such a soldier should not be considered a refugee once he or she flees its army to another country. The UNHCR in its submission to the English Court of Appeal as Intervenor in *QD & AH (Iraq) v Secretary of State for the Home Department* argues that: “From the perspective of refugee / human rights law, the distinction between violence employed against military targets and civilians is a false one. The correct distinction is between violence giving rise to a well-founded fear of persecution and violence that does not but which nonetheless gives rise to the need for international protection outside the regime of the 1951 Convention. It is in the latter sense that violence is ‘indiscriminate’ within the meaning of Article 15(c).” *QD & AH (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620, at 45.2. Furthermore, the limitation to civilians in armed conflicts causes yet another unsatisfactory consequence in this regard. The UNHCR submission also notes that such an interpretation could mean “... that where armed conflict leads to a break down in law and order leading to endemic criminal violence, those fleeing would be unable to claim SP [subsidiary Protection] because the violence would not be committed against civilians in breach of the Geneva Conventions.” (ibid at 45.3). While article 15 (c) thus protects from indiscriminate violence caused by armed conflict, it does not do so for other causes of indiscriminate violence, such as criminal or gang violence (and, according to the intervening submission by the UNHCR not even if such violence appears as a consequence of armed conflict). A nexus between the situation of indiscriminate violence and an armed conflict must thus exist in order for a person to qualify for subsidiary protection. A similar interpretation was held up by French judicial authorities. See: Roger Errera, “The CJEU and Subsidiary Protection: Reflections on *Elgafaji* - and After,” *International Journal of Refugee Law* 23, no. 1 (2011): 93–112.

considerable difficulties itself. It is, similarly to the other approaches so far discussed, both over- and underinclusive of the cases that should receive refugee status. If harm were indeed the determining factor for claiming refugee status, this would lead to strange results.

Take again the case of *Alfaro-Rodriguez v. INS*, concerning a woman from El Salvador who applied to be recognized as a refugee in the United States, based on persecution for reasons of her political opinion. She was severely beaten and harassed at the hands of FMLN guerillas that included her husband upon refusing to join the guerilla. The United States Court of Appeals for the Ninth Circuit ultimately rejected her claim. The court ruled that the beating she has suffered did not occur because of her political opinion but would have happened following any instance in which she disagreed with her husband.¹⁰² While the Classical Approach, as shown by the ruling of the court, and the Human Rights Approach, have difficulties with classifying such cases as qualifying for refugee status, the Humanitarian Approach offers a solution to this problem. The Human Rights Approach may argue, through a wide interpretation of the Nexus Clause, that women from El Salvador might constitute a particular social group according to the Geneva Convention definition. But it would still need to show that a nexus between her being beaten and the fact that she is part of a particular social group exists.

The Humanitarian Approach, on the other hand, need not search for the reasons of the beating. The sole fact that she is subjected to serious harm may be considered enough for receiving refugee status. Presuming that a risk of serious harm remains if Alfaro-Rodriguez were to be repatriated to El Salvador, the Humanitarian Approach would allow to brush aside the Nexus Clause. It would

¹⁰² cited in: Foster, "The Nexus Clause in the Refugee Convention," 270.

argue that the Nexus Clause is irrelevant when it comes to the moral aspect involved, which is the harm she is about to face.

Yet, the argument is deficient. Imagine that the woman was not from El Salvador, but from Germany and that the Guerilla were a mafia gang, her husband being its member. Now, imagine that the husband of such imaginary woman would subject her to serious beatings and constant harassment. She knows that there is a fair chance that the mafia gang and her husband would find her if she remained in Germany. If she subsequently left Germany, it seems as if an approach that bases refugee status determination on harm would need to classify the German woman moving abroad as a refugee. After all, she fears serious harm upon arrival in Germany and that should be the determining factor for a claim to refugee status. Yet, this sounds strange. After all, the woman in Germany retains her political legal status in her country. Even if a threat of serious harm, or of constant harassment would remain, she has the ability to take to the courts, retains the possibility to seek changes to the laws, contact her political representatives, or raise validity claims for her case in the public sphere through a variety of means such as organizing or taking part in protests, petitioning and so forth. There seems, thus, to be a manifest difference between the case of the woman from El Salvador and the woman from Germany. While the above argument would work for the former, it seems not to work for the latter. The question is then, whether the normative work in these cases is actually done by the likelihood of harm, or whether it is not the lack of a person's political legal standing in her home community that does it instead: namely, the possibility of recourse to state institutions and the legal and political ability to make amends.

If the Humanitarian Approach understands refugees as people fleeing a fear of serious harm, it should not differentiate between domestic violence occurring in Germany, Switzerland, Iran or

Saudi-Arabia. It should see no difference between scenarios in which persons experience harm but possess recourse to their own state institutions and scenarios in which any recourse is lacking.

The Humanitarian Approach would need to argue that any person facing domestic violence should receive refugee status once she leaves her country. The same applies for any other morally problematic situation. It is hard to argue that, in those cases, recourse to state institutions plays no role in determining eligibility for refugee status. And indeed, some accounts that can be broadly fitted in the Humanitarian Approach have argued so. Alexander Betts has developed the concept of “survival migration”, referring to ‘persons who are outside their country of origin because of an existential threat *for which they have no access to a domestic remedy or resolution.*’”¹⁰³ The concept includes, in a broadly Humanitarian Approach, the clause of domestic remedy or recourse to state institutions as a disqualifying clause for determining refugee status. Yet, if this is the case, we may ask whether what does the normative work here is harm, or whether the key factor for determining refugee status is actually the lack of recourse to state institutions. The problem equally persists with regards to the cases for which the Humanitarian Approach was designed for: indiscriminate violence in various forms.

Take, for instance, the case of environmental refugees. These are people who have left their habitual place of residence as a reaction to either long-term environmental changes or natural disasters, which are often the consequence of the former.¹⁰⁴ El-Hinnawi defines environmental refugees as:

¹⁰³ Alexander Betts, “Survival Migration: A New Protection Framework,” *Global Governance* 16, no. 3 (2010): 365 emphasis added.

¹⁰⁴ See: Norman Myers, “Environmental Refugees in Globally Warmed World: Estimating the Scope of What Could Well Become a Prominent International Phenomenon,” *BioScience* 43, no. 11 (2012): 752–61; and: Nick Gill, “‘Environmental Refugees’: Key Debates and the Contributions of Geographers: Environmental Refugees,” *Geography Compass* 4, no. 7 (2010): 864.

“... those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By ‘environmental disruption’ in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life”¹⁰⁵

These include people that move as a result of environmental change causing desertification, soil erosion and drought and people that leave as a consequence of natural disasters such as cyclones, storm surges, earthquakes and floods.¹⁰⁶ Environmental refugees are not recognized as such under international law. Neither the Classical Approach to determine refugee status nor the Human Rights Approach classify people fleeing from natural disasters and the like as refugees.¹⁰⁷ The Humanitarian Approach, on the other hand, would be able to recognize such people as refugees. It could argue that while the harm these people have experienced was indiscriminate, since cyclones, earthquakes and the like usually do not distinguish between ethnic groups and religions,¹⁰⁸ the harm they experienced can be so serious and lasting in their home region that once they leave their country of residence, they should be recognized as refugees.

¹⁰⁵ Essam E. El-Hinnawi, *Environmental Refugees* (Nairobi: United Nations Environment Programme, 1985), 4.

¹⁰⁶ See: El-Hinnawi, *Environmental Refugees*; Jodi L. Jacobson, *Environmental Refugees: A Yardstick of Habitability* (Washington D.C.: Worldwatch Institute, 1988).

¹⁰⁷ The Human Rights Approach might be able to recognize those people as refugees that have, as a consequence of environmental causes experienced severe harm and have received differential treatment to other people or groups similarly affected. Then, it could argue, an element of discrimination in combination with the prolonged and state sanctioned serious harm amounts to persecution based on a discriminatory reason. Yet, the Human Rights Approach is not able to accommodate into those people that are simple indiscriminately affected by natural catastrophes and the like.

¹⁰⁸ Assume here, that relief actions and the sort do also not discriminate between ethnicities, religions and so forth.

As an example, consider the so-called Haitian boat people that began arriving at the shores of Florida in 1972. As Myers¹⁰⁹ explains, their flight was caused by environmental reasons.¹¹⁰ People left their regions as a consequence of a rundown of environmental resources, such as soil, water and trees which functioned as the backbone of the local economy.¹¹¹ Myers writes

“Almost three-quarters of the populace depends directly on agriculture. Only one-third of all land is considered suitable for farming, but population pressures cause three-fifths to be cultivated. Two-thirds of the farmland is on slopes of more than 20°, yet it has to support farmers at densities of more than 270 km², as great as in the most heavily populated agricultural areas of India. The soils are thus exceptionally prone to erosion, half of all farmlands being so eroded that they might be un-reclaimable. In some places, much of the landscape has lost virtually all its soil, exposing large stretches of bare rock.”¹¹²

People from Haiti, he argues, are thus to be considered environmental refugees, fleeing from the uninhabitable land. The Humanitarian Approach could argue that what matters is not actually the reason behind the Haitian boat people’s flight. Whether or not they flee a military dictatorship or the likelihood of harm as caused by environmental circumstances, what matters is simply the likelihood of such harm.

Yet, again, it remains questionable whether harm should bear the normative work in such an argument. Consider the following hypothetical case. Imagine there was a flood in X, an Austrian city close to the border to Germany and the roads and other ways to escape the water masses are blocked by the water. The only way to flee their uninhabitable lands is a route to Germany and hence the people of that city cross the border. Should these people be considered refugees? It seems

¹⁰⁹ Norman Myers, “Environmental Refugees: A Growing Phenomenon of the 21st Century,” *Philosophical Transactions of the Royal Society B: Biological Sciences* 357, no. 1420 (2002): 609–13.

¹¹⁰ See also: Rajendra Ramlogan, “Environmental Refugees: A Review,” *Environmental Conservation* 23, no. 1 (1996): 81–88.

¹¹¹ Myers, “Environmental Refugees: A Growing Phenomenon of the 21st Century,” 609–10.

¹¹² Myers, 610.

hard to argue that they should. Even if their lands were uninhabitable for the considerable future due to the physical, chemical, and/or biological changes in the ecosystem (or resource base) or temporarily unsuitable to support human life there, and people would thus be subject to serious harm, it seems hard to argue that these Austrians should be considered refugees upon entering Germany. After all, the Austrians in this example, even if their livelihoods were at stake and even if they had suffered serious harm and could not return to their places of residence, still do have recourse to state institutions. They retain the possibility of seeking amends, either through courts, or if the government were unable or even unwilling to do anything about their situation, they still possess the legal political standing in the country that enables them to seek political change to their, without doubt, harmful and detrimental situation. If this is the case, however, it seems questionable whether in the case of the Haitian boat people, the normative work for a claim to refugee status is indeed done by the likelihood of harm such people faced, or by their lack of political-legal standing that disabled them from seeking either redress either in the form of reparations, resettlement inside the country, financial aid or the ability to politically raise the issue and seek changes for managing or accommodating the environmental disruption. After all, while the harm stemming from environmental disruptions is not human made, it can only be humanly undone to some extent and it is, as Myers explains, more of a task to manage or accommodate these factors properly. There seems to be, however, a big difference between those people that do not have the political or legal possibility to do so and those who do. And thus, even though a good case could be made for considering the Haitian boat people refugees, fleeing from the ecological disasters that disrupted their life, this might have more to do with their political and legal inability to seek redress, a change of ecological management and compensation under the military dictatorship the country suffered during large stretches of the century, than with the harm the

ecological disruption has caused. If the Humanitarian Approach does not want to argue that our imagined Austrians have a claim to refugee status (which seems normatively untenable), then it seems as if the approach needs to reconsider whether it is indeed the likelihood of harm that does the normative work in determining refugee status.

It is not harm per se that does the normative work in determining refugee status even in situations of indiscriminate harm such as is the case with ecological disruptions and disasters. The same can be shown with regards to other forms of indiscriminate violence, such as gang and drug violence and even with regards to war. Not every person experiencing harm does, by that fact, become a refugee upon leaving their country of origin. Even in a case of war or terrorism, not all people in harm's way do become refugees, as long as they have political and legal possibilities to address the specific situation they face. In the case of terrorism this seems clear, since even harm being done does not disqualify the person to seek amends, reparations and so forth on the basis of their legal-political standing in their home community – as in the case of American people possibly subject to a terrorist threat.¹¹³ In the case of war, the same applies. A person is not immediately a refugee merely by the fact that a conflict occurs in her region, as long as “internal flight alternatives” continue to exist in which she retains recourse to state institutions. We will return to this possibility in the following chapter.

¹¹³ A terrorist threat or even a terrorist attack in the United States undoubtedly means a likelihood of harm to people especially living in big cities with symbolic character, such as Washington DC or New York. Yet, it seems hard to argue that in the face of today's forms of asymmetric warfare (of which terrorism can be interpreted to be part of), every person of such asymmetric war should be recognized as a refugee. Imagine a person leaving a city in the United States that is one of the more likely targets of terrorist attacks and crosses the border to another country. Should that person be recognized as a refugee? It seems odd to argue this. The American citizen, after all, retains his or her political legal status in the United States and can seek not only amends to the likelihood of harm originating from terrorist threats, but also retains recourse to state institutions for asking for compensation even if the terrorist attack has harmed him or her directly. Such a situation seems to be very different from situations in which terrorism occurs in countries in which citizens do not have the political legal standing to change or seek amends to their situation – in which they are completely powerless with regards to the likelihood of harm they face.

Even in some versions of the Humanitarian Approach such as Betts’ “survival migration”, it is not ultimately the threat of harm but the lack of the possibility of redress through recourse to state institutions, and thus the possibility to do so on the basis of a person’s legal political standing in their home community that triggers a right to refugee status. After all, serious harm or the risk thereof is present in virtually all societies – and total elimination of serious harm was and will probably never be achieved by any society. What matters is the ability to address such harm, to create institutions and rules to avoid it, to manage it and if it does appear, due to some circumstance of misfortune or developing social or political ills in a society, to offer compensation. This does not mean, of course, that harm is not morally condemnable or that social ills should not be addressed. Yet, it means that harm itself cannot be the determining factor for a claim to refugee status.

While harm can hence not be seen as the determining factor for claiming refugeehood, this does not mean that harm is not important for such a claim. In other words, harm can lead to a total lack of political-legal standing in a country – a state where neither reparation, redress nor political change remains possible when such prevalent harm makes political-legal action impossible. We will return to this possibility in the next chapter. Even in these cases, as we shall see, it is not harm but political oppression and unfreedom understood as a lack of public autonomy and formally (legally) expressed as a lack of legal political status that triggers a right to refugeehood.

To conclude, neither persecution for specific reasons (the Classical Approach), nor persecution understood more broadly as human rights violations for any discriminatory reasons (the Human Rights Approach), nor a fear of serious harm (the Humanitarian Approach) make for a sound normative foundation for understanding who should be recognized as a refugee. Each either leads to under- or over-inclusion. We will turn to another alternative for grounding the right to

refugeehood: political oppression and unfreedom. We will argue that understanding refugees as those politically oppressed and unfree allows for better understanding the plight of refugees, avoids the charges of under- and over-inclusion to which previous accounts are subjected to and provides a sound normative basis for the right to refugeehood.

2. A Novel Normative Foundation for Refugeehood: Political Oppression and Unfreedom

2.1 Introduction

The previous chapter aimed at uncovering the normative foundations of our legal and philosophical understandings of refugeehood. I have attempted to show that neither persecution for specific or for any discriminatory reasons, nor a fear of harm make for a sound normative foundation for discerning who should be recognized as a refugee. Rather, it is political oppression that can and should fulfill this function. In this chapter, I wish to move from indications to explanations and show why it is political oppression, understood as a lack of public autonomy and formally expressed as a lack of legal-political status, that should be considered the normative vantage point for thinking about a right to refugee status.

I will begin this chapter with an explanation of what political oppression and unfreedom is, how to understand it as a lack of public autonomy and how to conceptualize it as a lack of legal political status. The second part of this chapter then turns to the first way in which political oppression promises to be a better normative foundation for determining who should be a refugee. I will show

that it is better equipped to deal with scenarios in which persons experience harm than either the classical, human rights and Humanitarian Approaches. This will necessitate, to some extent, to revisit these approaches at times. I will show that the lack of public autonomy (or legal political status) can explain both that a person should receive refugee status when harm follows from such a lack or if harm effectively deprives a person of public autonomy. The last section of this chapter turns to the question whether refugeehood always requires harm. I argue that it does not. One should be able to claim refugee status also in the absence of harm. What constitutes its normative foundation is the political oppression of individuals. Political oppression and unfreedom can, but must not always, lead to harming those oppressed. Finally, the chapter offers a brief conclusion of the account based on political oppression and unfreedom.

2.2 What is Political Oppression? Public Autonomy and Legal Political Status

If we intend to understand refugees as the politically unfree, we must explain what we mean by the term. We must, in other words, provide a robust explanation of what a lack of public autonomy means and how we can conceive of such a lack in the language of law.

Why, though, should we care about the absence of political freedom and why should it figure as the core of an understanding of refugeehood? To understand this, we must turn to public autonomy – or, to be precise, its absence. The evil in political oppression does not solely lie in the harm it often brings with it. Rather it lies in denying a people its public autonomy and thus the opportunity

to determine their lives. It is in the pursuit of such denial that harm often comes to those most opposing oppression. Yet, its evil concerns many more people and lies in the fact that those touched by it have lost the ability to change the conditions that govern their lives.

Even though our approach will thus lead to many more persons being recognized as refugees, if they chose to flee and cross an international border, it does not lead to over-inclusion. As we shall see throughout the chapter, other approaches have attempted to include cases that do not feature harm, but struggle to do so practically. They may contend that refugeehood as fleeing from political oppression will lead to many people possessing a right to refugee status even if they are not overtly harmed. To these people, I wish to say two related things which will both be reiterated and expanded on in the last section of the chapter. First, political oppression can take many different forms other than straightforward, physical harm. Of course, one may argue that this constitutes harm if we extend the definition of what counts as harm, but it would be hard to see how to reach a cut-off point and conceptual limits that do not themselves fall to the over-inclusiveness critique. Political oppression thus expresses itself in many different forms, from violations of personal autonomy that are often not counted as straight forward harm, but significantly impact a persons' life, to the suppression of actions thus leading to forced non-action. The latter, especially, is a trait of politically oppressive regimes. They do not aim at exerting force and harming everyone, but bank on the threat of negative sanctions – on that political oppression leads to the self-policing of people who would rather not act than risk experiencing negative consequences. The silence and non-action of a population politically oppressed does not mean that they suffer less, albeit they might suffer differently.

Second, the charge of over-inclusiveness may refer to matters of urgency. One may argue that this approach is over-inclusive because we should first and foremost care about those cases which are

more urgent, and cases involving harm are more urgent than those which do not involve harm. It thus refers to an argument connecting the right to refugeehood to capacity (and resource) constraints in non-ideal circumstances, thus necessarily connecting the right to refugeehood to political / economic questions of states being able to admit refugees. This is a category mistake. Not only are questions of admission, involving all sorts of excusing factors that states and political philosophers usually advance such as resource constraints, independent from questions on the right to refugeehood. After all, the question whether a state is willing to expend resources is rather different from the question of who is a refugee. This way of bringing forward the charge of over-inclusiveness (based on resource constraints) is very different from a normative form of over-inclusiveness, and thus an over-inclusiveness that relates to the normative scope of the concept itself, and not to its effects. There may, of course, be an ethical difference in degree between cases involving harm and those that do not. Yet, we need to ask the question whether that ethical difference is a difference that matters in determining who is a refugee. The answer to this question must be no. Refugeehood is not an instrument that reacts to urgency. If it were, it would be a poorly constructed instrument. Think of situations in which persons are in need of immediate aid – flight to another country will be far less effective than providing instantaneous humanitarian aid or intervening militarily. Refugeehood is of another quality not only politically (states have used the instrument to condemn other states' actions as illegitimate), but normatively. It aims not only at providing short-term relief, but at change: offering a long-term solution to the issues persons face. I will argue that it aims at offering a life in freedom, and thus a life in which persons are politically free and in which they are treated as persons that are able to participate in deciding on the conditions that govern their every-day lives.

Political oppression can be conceptualized as the absence of public autonomy. The loss of public autonomy equals the loss of the ability to participate in the “exercise of political self-rule”.¹¹⁴ And although some argue that this would matter in itself,¹¹⁵ it is worth showing that it matters for another reason, too. It matters because public autonomy is the collective correlative of personal autonomy, and thus refers to the control of another sphere – the public versus the private sphere – of one’s life. It matters because they are not only co-existent, but interdependent.¹¹⁶

We can understand personal autonomy as the capacity to decide over one’s own life according to one’s own choices. Etymologically and conceptually, one is autonomous only when one makes laws for oneself. While acknowledging the depth of the discussions about personal autonomy,¹¹⁷ I

¹¹⁴ Rainer Forst, “Political Liberty: Integrating Five Conceptions of Autonomy,” in *Autonomy and the Challenges to Liberalism: New Essays*, ed. John Christman and Joel Anderson (Cambridge et. al.: Cambridge University Press, 2005), 226; See also: Gerald F. Gaus, “The Place of Autonomy within Liberalism,” in *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge et. al.: Cambridge University Press, 2005), 273.

¹¹⁵ cf. Elizabeth Anderson, “Democracy: Instrumental vs. Non-Instrumental Value,” in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Christman (Oxford et. al.: Wiley-Blackwell, 2009), 213–27.

¹¹⁶ Some prefer the term of “co-originality” between personal and public autonomy. This formulation emphasizes the irreducibility of each of these to the other concept. They must appear simultaneously and inform each other. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: The MIT Press, 1996), 107, 118–32; cf. Jürgen Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?,” *Political Theory* 29, no. 6 (2001): 766–81; Jürgen Habermas, “Human Rights and Popular Sovereignty: The Liberal and Republican Versions,” *Ratio Juris* 7, no. 1 (1994): 1–13; Jürgen Habermas, “Remarks on Legitimation through Human Rights,” *Philosophy & Social Criticism* 24, no. 2 (1998): 157–71; Seyla Benhabib, “Reason-Giving and Rights-Bearing: Constructing the Subject of Rights,” *Constellations* 20, no. 1 (2013): 46.

¹¹⁷ Philosophers have often discussed the internal characteristics that allow for making one’s own decisions. They have been concerned with asking whether personal autonomy requires rational decision making and have inquired into the mental presuppositions for making decisions by oneself. Although these projects are of worth in their own right, I am not concerned with this idea of personal autonomy in this chapter. Much more than dealing with the “internal” characteristics that make personal autonomy possible, I am concerned with the external conditions that allow for persons to live autonomously. For variants on understanding personal autonomy, see: Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 369; Jeremy Waldron, “Moral Autonomy and Personal Autonomy,” in *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge et. al.: Cambridge University Press, 2005), 307; Gaus, “The Place of Autonomy within Liberalism,” 273. For an approach regarding external personal autonomy, see especially Marina A L Oshana, “Personal Autonomy and Society,” *Journal of Social Philosophy* 29, no. 1 (1998): 81–102. For the internal aspects of personal autonomy, which are also sometimes called “coherentist” approaches, see: Sarah Buss and Andrea Westlund, “Personal Autonomy,” *Stanford Encyclopedia of Philosophy*, 2018, <https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/>.

limit my attention to the ability to make decisions over one's own life in the context of external conditions that make this possible.

Public autonomy and personal autonomy are interrelated in three ways. First, public autonomy is necessary for defending the personal autonomy of individuals. This is a classically liberal understanding of the relation between public and personal autonomy. Sharing in the participation of mutual control over one's environment allows for defending against threats. It is a matter of the distribution of (the ability to exercise) power.¹¹⁸ The negative consequences to a disenfranchised group have been apparent not only historically, and with regards to contemporary examples (more on this in the last chapter of this thesis regarding the disenfranchised group of refugees), but also is apparent in theoretical terms.¹¹⁹ The interests of those not represented are much less likely to be

¹¹⁸ This therefore does not mean that political autonomy must be absolute, nor that it only truly appears in the absence of limiting legal structures. Rather to the contrary, the existence of legal structures are not only limiting, but enabling arrangements for political autonomy to appear in the first place. Their existence allows for far greater complexity in the exercise of political autonomy not only because it allows for creation of various avenues, institutions and authorities at whom claims can be directed, but because it allows for the expression of political will by a society that is differentiated rather than homogenous. It allows for introducing the differentiation of power across regional political structures and for introducing limiting clauses to the decisions federal or national governments can make, ultimately preventing not only a tyranny of the majority, but a significant loss in the complexity a political system can process. Constitutional provisions and legal structures should thus not be understood as limiting political autonomy but as an enabling condition for a form of political autonomy that both is and needs to be capable of processing higher forms of complexity appearing in politically differentiated and diverse societies. None of this takes away from the centrality of political autonomy for safeguarding rights and defending the interests of those ruled. We can thus speak of constitutional structures and political autonomy not only in a way that demands us to strike a compromise between the two as allegedly opposite "values", but as mutually enabling structural guarantors for political systems to generate and process complexity. For the compromise thesis, see: János Kis, *Constitutional Democracy* (Budapest and New York: CEU Press, 2003), 53. For checks and balances and the need of a federal system with differentiated regional political structures see: Alexander Hamilton, James Madison, and Jay John, *The Federalist Papers*, ed. Lawrence Goldman (Oxford et. al.: Oxford University Press, 1787), 1, 9, 10, 51.

¹¹⁹ Think about minority voting rights in the US, for instance. See: Laughlin McDonald, "The Quiet Revolution in Minority Voting Rights," *Vand. L. Rev.* 42, no. 4 (1989): 1249–97. The function of safeguarding the rights of individuals can be interpreted as a defense of the interests of those subjected to rule. As such, liberal democratic theory has not only emphasized the need to contain majority decision-making within a tight net of fundamental laws, but has also emphasized the role democracy plays in defending the interests of individuals. See, for instance: John Stuart Mill, *Considerations on Representative Government* (The Floating Press, 1861), 193. The procedural democratic and constitutional theory of Jürgen Habermas places the two - fundamental rights (or personal autonomy) and popular sovereignty (public autonomy) – on one level. He understands them as operating in a circular fashion, each necessitating the other. The safeguarding function of public autonomy then assumes another quality. It operates within the context of legal structures, but provides them not only with justification, but with a continuous re-actualization.

taken into consideration. The inability to participate, defending against looming threats, thus means that one cannot share in the making of the conditions that govern one's life. One lacks the ability to defend oneself in the political arena against threats to one's personal autonomy.

Yet, the classical liberal understanding of the relation between public and personal autonomy must be supplemented. There are other immediately important ways in which the two relate to each other. The second way in which public and personal autonomy are interrelated concerns the way the boundaries of the latter are defined. Constitutional history teaches us that we have not always understood the boundaries of personal autonomy similarly as we do today.¹²⁰ We have added and amended laws and regulations that protect what we see as the core of personal autonomy. Changes, either of categorical nature or degree, have often appeared with public debate marking practices and laws as detrimental to the personal autonomy of different segments of the population or the population as a whole. Public autonomy has shaped and is necessary in shaping the contours of what we consider the protected core of our personal autonomy. It possesses a defining role. Public autonomy is necessary for groups and individuals to put forward validity claims in determining which practices and laws violate their personal autonomy. Vice versa, we can easily see where a lack of public autonomy may lead. Without it, we lack the ability and the space for deliberation. We would lack the space in which we are able to define what constitutes the personal autonomy

Rights are interpreted as a fundamental and integral part of the procedural nature of exercising public autonomy itself. The procedural nature of the democratic decision-making process and a post-metaphysical standpoint translated into a positivistic understanding of law means that within a deliberative democratic framework, it is public autonomy that determines the more specific content of law, generates a form of communicative power (power in the Arendtian sense), and thus serves as a safeguard of the rights of individuals. See: Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Chapter 3; Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?"

¹²⁰ Some argue that constitutional history develops in cycles, driven by upheavals of momentary explosions of popular sovereignty that not only defend existing, but add new rights or shape novel understandings of the constitutional provisions. For such a dualist account of democracy, see: Bruce Ackerman, *We The People: Foundations* (Cambridge, Mass. and London: Belknap Press of Harvard University Press, 1991); Bruce Ackerman, *We the People: The Civil Rights Revolution* (Cambridge, Mass. and London: Belknap Press of Harvard University Press, 2014).

the state should defend. We would lack the ability to criticize aspects of practices, laws and regulations that we view as problematic. We would even lack the ability to re-affirm certain practices, defending them publicly.

Finally, a third way in which public and personal autonomy are linked refers to the informing power of public autonomy. Niklas Luhmann once wrote that protest and social movements function as the immune system of societies.¹²¹ This not only refers to public autonomy (a phrase he would have never used) as a necessary tool for defining the boundaries of what we understand as acceptable limits to regulations governing personal autonomy. It also refers to its informing capacity. The ability to sound the alarm bells is a vital aspect of a population being publicly autonomous. It allows individuals to point out where violations (even those defined and forbidden) occur, why they occur, how to challenge and how to avoid them. It allows for the transportation of relevant information to the steering parts of the political system in an effective manner.¹²² A loss of public autonomy would result in the inability of the political system to communicate relevant threats regarding the personal autonomy of individuals to the respective authorities and political decision makers. It would lead to a minimization of political communication from below

¹²¹ Niklas Luhmann, *Social Systems* (Stanford: Stanford University Press, 1995), 370–72; See also: Niklas Luhmann, “Systemtheorie Und Protestbewegungen,” in *Protest: Systemtheorie Und Soziale Bewegungen*, ed. Kai-Uwe Hellmann (Frankfurt a. M.: Suhrkamp, 1996), 175–200.

¹²² This follows from a procedural understanding of political systems, in which the circular relationship between the public and the political system allows for the generation of a communicative form of power that does not only pressure the structures of the political system, but provides it with information – information what is amiss, and what needs to be changed with regards to the contextualized understanding of rights, the rights themselves or any other identified social problems. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 170, 327. Some have maintained that this circular relationship includes a third sub-system: not only the political system and the public, but an administrative system that stands in relation to the political system and to the public. The circular relationship between all three is not one-directional. The informative capacity, and thus the capacity of the public to disturb operations both in the political and the administrative systems, need not rely only on the pressure the public can generate on politicians. The information channels both of politicians to public networks, and the channels from the public to the administration lead to a two-directional capacity for informing about mishaps and problems arising for and in the perception of the public. Niklas Luhmann, *Die Politik Der Gesellschaft* (Frankfurt a. M.: Suhrkamp, 2002), 253–65.

and hence, as we often see in autocracies, a relative lack of knowledge of threats and violations to the personal autonomy of its subjects (often until it is too late – see this chapter’s consideration of famines).

The evil in political oppression thus lies in denying persons their public autonomy understood as the ability to master the conditions that govern their lives. I will argue that the lack of public autonomy caused by political oppression qualifies harm, providing a normative foundation for recognizing refugee status. But while we can understand political oppression as a lack of public autonomy, how is it formally expressed? I propose to understand it as a lack of legal-political status. I will first briefly show what this means and which rights this entails before providing a more detailed explanation of why political oppression serves as a better normative foundation for determining who is a refugee.

How can we tell if someone is politically oppressed or unfree? There are, of course, power issues. One may face many constraints, being subject to various forms of power by various actors or structures. Here, we are interested only in political power. How is a lack of political power expressed so that we can tell if a person is politically oppressed? I propose to turn to a person’s lack of “legal political status”, by which I mean a status that formally recognizes a person as morally equal by guaranteeing her legal equality and political rights. This means that she must possess more than just any legally enforceable status, but a status of equal political standing in a community of moral equals in which she is capable of taking control over her own life. Despite possessing some form of legal status, serfs in the middle ages did not possess equal legal standing in their community. Despite being embedded in a political system, the citizens of North Korea do not possess equal political status that enables them to take control over their own lives. Possessing legal and political status requires that a person is able to access and exercise a number of different

rights. We may turn to the International Covenant on Civil and Political Rights (ICCPR) for an enumeration of these rights. They can be broken down into rights that secure the legal status of persons and rights that secure the political status of persons in their political community.

The first set of rights require that a person is recognized as an equal before the law and is able to claim these rights in courts of law. The International Covenant on Civil and Political Rights lists three rights that a person must effectively be able to claim. Article 16 states that “Everyone shall have the right to recognition everywhere as a person before the law.”¹²³ It guarantees to every person her legal recognition as a human being. This article is a reflection of the experience of denationalization and civil deaths of persons that had resulted in their loss of legal status, as happened to the ‘stateless people’ between two world wars, or the Jews under the rule of the National Socialists in Germany. As a consequence of losing their recognition as persons before the law, such people were suddenly no longer attributed any other human rights as they had simply legally ceased to exist as human beings.¹²⁴ The right to be recognized as a person before the law is thus a prerequisite for holding any other rights in a community of equals. Hannah Arendt writes that without legal recognition, such people have lost “the right to have rights”.¹²⁵ It amounts, Arendt writes, to “[t]he fundamental deprivation of human rights [which] is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.”¹²⁶ The loss of recognition as a person before the law denies her the ability to act legally

¹²³ UN General Assembly, “International Covenant on Civil and Political Rights,” Art. 16.

¹²⁴ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2013), 336; Hannah Arendt, *The Origins of Totalitarianism* (San Diego et. al.: Harvest Book Harcourt Brace & Company, 1973), 267–69, 278.

¹²⁵ Arendt, *The Origins of Totalitarianism*, 296–97.

¹²⁶ Arendt, 296.

and politically – she has lost the opportunity to “initiate and to form opinions on a shared, common world.”¹²⁷

The recognition as a person before the law, however, is not enough to guarantee a person legal recourse or legal status. She must also be able to have access to her rights through courts of law. This requires, first, that all persons are treated as equals before the law, entitled to equal protection without discrimination (Article 26 of the ICCPR). This article applies to all organs involved in the administration of justice, such as prosecutors and the police.¹²⁸ Article 14 guarantees that a person can claim and defend her rights before the courts.¹²⁹ Equality before the courts of law also implies a set of other fundamental rights: the presumption of innocence (Art. 14 (2)); the right to be adequately informed of charges; the right to have adequate time and facilities to prepare a defense, and be tried without undue delay (Art. 14 (3)); the right to summon and examine witnesses and the right to have the sentence examined by a higher court (Art. 14 (3) and (5)); finally, the right not to be punished twice for the same offense (or tried again for charges from which she has been finally acquitted) (Art. 14. (7)).

A person only possesses legal status if this set of minimal rights are guaranteed. These rights define the legal status of a person in her political community and serve as one of the two pillars of rights required for possessing legal political status and thus exercising public autonomy. The second pillar of rights are political rights.

Political rights are enshrined in the ICCPR, which opens with the statement that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political

¹²⁷ Richard J. Bernstein, “Hannah Arendt on the Stateless,” *Parallax* 11, no. 1 (2005): 55.

¹²⁸ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 439–40.

¹²⁹ UN General Assembly, “International Covenant on Civil and Political Rights,” Art. 14 (1).

status and freely pursue their economic, social and cultural development.”¹³⁰ The interpretation of this article reveals two (related) kinds of self-determination. First is external self-determination, which points to a people’s freedom from external domination by others. This part of the clause is traditionally seen as important for a people to enjoy any political rights. If people live under foreign domination, as happened during periods of colonialism, they are unable to access and enjoy their right to self-determination and remain deprived of political rights.¹³¹

The second aspect of self-determination is of greater importance here. While external self-determination states that the free choice of a form of government of a people must be free from external interference, the second form of self-determination holds that such free choice should not be manipulated or tampered with by domestic authorities. It guarantees “the right of every member of the community to choose, in full freedom, the authorities that will implement the genuine will of the people”.¹³² The right to internal self-determination refers to a right of individuals to meaningful political participation.¹³³ This in turn requires a set of specific political rights: the right to take part in public affairs either directly or through freely chosen representatives (Art. 25 (a) of the ICCPR); the right to vote in free, equal, and fair elections, and to stand for election (Art. 25 (b) of the ICCPR)¹³⁴; the right of equal access to public services (Art. 25 (c)). Meaningful political participation further requires rights that guarantee that a person has access to and is able to participate in the dissemination of information: the right to freedom of opinion and expression

¹³⁰ UN General Assembly, Art. 1.

¹³¹ Antonio Cassese, “The Self-Determination of Peoples,” in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University Press, 1981), 101.

¹³² Cassese, 97.

¹³³ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 160; Cassese, “The Self-Determination of Peoples,” 97.

¹³⁴ General Comment No. 25 of the U.N. Human Rights Committee, “General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service” (1996), ¶ 5.

(Art. 19 of the ICCPR); and the right to participate or organize peaceful assemblies and associations (Art. 21 and 22 of the ICCPR). In its comment 34, the HRC notes that these freedoms are integral to the right to vote. Political participation is not effectively possible without an independent press and without persons being able to access and disseminate information freely and meet and organize in associations or organize protests or assemble otherwise.

A loss of these rights leads to a lack of legal-political status. And although it may not always be possible to discern to what extent a person really possesses access to such rights, we certainly can tell when they are amiss. Political oppression often necessitates corrupting not one, but all of these rights, simply because they string together, influence and strengthen each other.

Having shown that the evil of political oppression lies in and can be understood as a lack of public autonomy, we may now turn to the question of how and why it makes for a sound normative basis for understanding refugeehood.

2.3 Why Political Oppression?

Why should political oppression matter to refugeehood? In this section, I will provide an answer to this question. It forms the normative core of my argument. I will show that the approach from political oppression is better suited in dealing with scenarios that involve harm as well as scenarios that do not. My approach takes a different route than the approaches discussed in chapter one.¹³⁵

¹³⁵ Readers may be reminded of approaches to refugeehood as taken by scholars such as Arendt (see, mainly: *The Origins of Totalitarianism*.) or Shacknove (“Who Is a Refugee?,” *Ethics* 95, no. 2 (1985): 274–84.) While both tend

It does not seek to identify who should be a refugee based on harm. Does that mean that this approach excludes individuals fleeing harmful situations? No. To the contrary, it provides us with a sensible standard to discern when harm should count towards refugeehood. It provides us with a qualifier. It differs, however, from other approaches in another way, too. Focusing on harm, they have struggled with situations of political oppression in which harm is absent. Two options remain for such approaches. The first is a prospective speculative account: individuals must show that the state will inevitably find out about their latent beliefs and (covert) actions in the future and that they hence cannot avoid being harmed. The second widens the scope of what counts as harm indefinitely. Both approaches suffer from difficulties. Focusing on political oppression as a determining factor for refugeehood allows us to circumvent these problems.

This section outlines the normative core of my argument in two steps. First, it turns to the question of when harmful situations should imply refugee status. Second, it asks when refugee status is warranted in the absence of harm. I show that my approach provides a better standard for discerning when harmful situations should matter for a claim to refugee status.

I argue that harm counts towards refugeehood in two instances. In the first instance, political oppression can lead to individuals suffering from harm. This is not only the case when considering the classical example of politically repressive regimes persecuting individuals. I will show that the same also holds with regards to other situations. There are clear examples in which the lack of political freedom leads to widespread and indiscriminate harm. I will illustrate this by turning to the example of famines. Such situations should trigger a claim to refugee status not because

in a similar direction as what I am defending here, they have not provided a full-fledged normative account of refugeehood, or made clear the relation between harm, the absence of harm and oppression. I see these as informative starting points. As accounts pointing generally in the right direction, without providing exact guidelines.

individuals suffer from harm, but because they lack the necessary recourse to battle the threats they face. They lack the political freedom to control their normative environment in the three ways we have outlined in the section above: that would allow them to ring the alarm bells, outlining where threats to their personal autonomy lie; the ability to identify which measures they see as violating their autonomy; the ability to control the situations they face, safeguarding their autonomy. This can both *lead to* indiscriminate harm *and* mean that individuals lack the possibility to establish control of the measures to combat such threats or seek compensation for past events. In the second instance, certain endemic forms of harm can sometimes lead to an effective loss of political freedom – a situation in which individuals cannot exercise their political and legal rights. Although a theoretical possibility when considering specific scenarios such as all-encompassing civil wars, or other (ecological) catastrophes, these situations occur only rarely in practice in countries that can be considered liberal democracies, leading to a sustained absence of accessible legal-political rights. Nevertheless, they may occur. We will show that such situations warrant a claim to refugee status, too.

In a second step we turn to the absence of harm. Why should political oppression lead to a right to refugeehood even if individuals are not harmed? I argue that there are two reasons. First, political oppression manifests itself in many different ways that are not normatively less significant than the specific consequence of suffering overt forms of harm at the hands of the regime. The politically oppressed will not be able to protect themselves against regime actions. They will not be able to voice what they see as violating their autonomy, and they will not be able to inform decision-makers of violations. Individuals may thus suffer in a myriad of ways, stretching from

smaller issues such as “laws of public decency”¹³⁶ to expropriation of property at the hands of unaccountable authorities. Political oppression may have consequences that fall short of physical, bodily harm.¹³⁷ Yet, in the vast majority of cases, political oppression changes the behavior of the population without the need of subjecting everyone to violent actions. This, precisely, is how coercion and political oppression works. It does not rely on the exercise of violence, but on the continuous and indiscriminate threat thereof. It need not be exercised on each and every individual for them to change their behaviors, adapt action according to the will of the sovereign – to unaccounted, illegitimate power. Second, another more practical reason may count towards using political oppression as a determinant for refugee status in the absence of harm. Other approaches have struggled with determining when “unexpressed political opinions” should lead to a claim to refugee status. I argue that we should abandon the speculative search for harm for a more practically oriented approach: recognizing political oppression as sufficient for a claim to refugee status without asking people to seek harm’s way.

2.4.1 Qualifying Harm: When political oppression causes harm

Political oppression can lead to harmful situations. This is not only the case when considering the classical example of direct individual persecution by oppressive regimes. The lack of political freedom also often causes indiscriminate harm. One example to which we shall turn here is poverty

¹³⁶ As we shall see below, these are laws regulating behaviors that are seen as violating the moral code of a society. They appear in western civilizations (regulations against public nudity) as well as in other societies.

¹³⁷ See Annex 1 for an exploration of how the other three approaches have attempted to set a threshold in defining what counts as harm and what does not. I show with regards to the example of poverty that it is not only extremely difficult to depart from standards of “harm”, but that it ultimately fails.

and famine. Yet, as we shall see, what triggers a claim to refugee status in these cases is not the harm involved, but the lack of political freedom – the inability to identify, warn and react to threats, and thus the lack of (political) recourse.

A person that experiences harm possesses a claim to refugee status, if such harm is the direct consequence of a lack of public autonomy. This may occur in a number of different scenarios. Take the case of economic deprivation.

Poverty itself does not provide a person with a claim to refugee status.¹³⁸ Yet there are cases in which the poverty that persons suffer is the direct consequence of their inability to control their own lives. Consider the case *Haitian Refugee Center vs. Civiletti*, in which 8 Haitians filed a class action on behalf of over 4000 Haitians who had sought asylum in Florida. They were effectively denied applying for asylum, which means that their claims were not processed as a consequence of what became known as the “Haitian program”. The Immigration and Naturalization Service (INS) launched a program that generally classified Haitians as persons fleeing for economic reasons, leading to their deportation before their asylum claims could be heard. The District Court before which this case was argued held that the Haitians were barred from due process, and that the economic conditions from which Haitians were fleeing were induced politically: “[m]uch of

¹³⁸ See Annex 1 for an explication of how the other approaches have dealt with the harm involved in extreme poverty. The two ways these have approached the topic of poverty is either by arguing that socio-economic harm can be inflicted on persons in a persecutory and discriminatory manner, basically using socio-economic deprivation as a tool of persecution. In such cases, however, the indiscriminate harm of poverty does not lead to refugee status. This interpretation also leads to a conclusion that seems strange: specific discriminatory but less harmful forms of economic deprivation lead to refugee status while living in absolute poverty does not. The other possible interpretation results from the Humanitarian Approach. It would result in an argument to include poverty as such as a factor triggering refugee status. Here, the question of determining the threshold of harm appears. How poor must a person be to have a claim to refugee status? Several different ways of trying to resolve this question have failed.

Haiti's poverty is a result of Duvalier's efforts to maintain power. Indeed, it could be said that Duvalier has made his country weak so that he could be strong. To broadly classify all of the class of plaintiffs as 'economic refugees,' as has been repeatedly done, is therefore somewhat callous. Their economic situation is a political condition."¹³⁹ The court argued that especially five factors contributed to the prevailing poverty in Haiti: the absence of skilled professionals, inadequate structure and public administration, an inadequate educational system, problems with aid from external sources and a corrupt fiscal system.¹⁴⁰ The court held that these problems were the "manifestations of oppression, their consequences the economics of Duvalier."¹⁴¹ In an effort to maintain power, Duvalier systematically oppressed the opposition. Until 1979, other parties were banned, trade unions forbidden (in 1979, other parties were allowed to exist, but repression continued, resulting in a de facto inexistent opposition). In order to contain possible sources of future opposition, Duvalier also began with the oppression of intellectuals and professionals. This resulted in a mass exodus of professionals and intellectuals from Haiti. The court observed that "[w]hile many of these persons may have left because they had supported other candidates, and therefore appropriately feared Duvalier, it is also true that Duvalier saw Haiti's elite as his enemy. In part this animosity was racial: Duvalier was the black candidate in a country where the elite of society were largely mulatto. But it was also because the elite were perceived as the logical source of future opposition. To oppress the elite was to take yet another step toward assuring his power."¹⁴² The actions of the government were not only restricted to sympathizers of the opposition or dissidents, but were also directed at doctors, lawyers, engineers, teachers and public administrators. By 1970, there were more Haitian physicians living in either Montreal or New

¹³⁹ *Haitian Refugee Ctr. v. Civiletti*, 503, F. Supp. 442 (S.D. Fla. 1980) at 509

¹⁴⁰ *Haitian Refugee Ctr. v. Civiletti*, 503, F. Supp. 442 (S.D. Fla. 1980) at 508

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

York than in Haiti. By 1976, about 250 000 Haitians had moved to New York.¹⁴³ In total, about 1.3 million Haitians are estimated to have left the country, with 300 000 moving to the United States.¹⁴⁴ The consequences for the Haitian economy were fatal. The absence of administrators coupled with hiring only party loyal applicants for administrative jobs caused a largely ineffective public administration. The educational system lacked qualified teachers and the absence of professionals had significant negative effects on the economy.¹⁴⁵

While the court held that the poverty experienced by Haitians was directly caused by their lack of legal political status,¹⁴⁶ the court also upheld an interpretation akin to the Human Rights Approach. It argued that poverty itself does not qualify those Haitians for claiming refugee status. Yet, the case of the Haitians differs from other cases in which persons possess public autonomy. What sets the Haitian case apart is the fact that the poverty they had suffered was directly caused by their inability to take control over their situation and the fact that they had no options for addressing and tackling the economic problems they encountered. Professionals, doctors and intellectuals were unable to take to the courts to challenge biased hiring strategies. They were barred from exercising

¹⁴³ Ibid.

¹⁴⁴ Myers, "Environmental Refugees: A Growing Phenomenon of the 21st Century," 610.

¹⁴⁵ Haitian Refugee Ctr. v. Civiletti, 503, F. Supp. 442 (S.D. Fla. 1980) at 509

¹⁴⁶ The court's conclusion is shared by a number of scholars. Gil Loescher writes "In Haiti, for example, the state serves as a vehicle for the enrichment of a small elite at the expense of the majority of the population. The Haitians who have fled in the tens of thousands for the past several decades have escaped extreme poverty caused by political exploitation." Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford and New York: Oxford University Press, 1993), 16; See also Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 13 affirming this conclusion.. The Haitian case is, of course, merely one of numerous possible examples in which poverty is the consequence of political oppression. Take, for instance, "A different but equally clear example is El Salvador, and countries like it, where wealth and power are so concentrated that the same economic rigidity prevails, and where the political system serves only to perpetuate economic disparity and wide-spread impoverishment." "Political Legitimacy in the Law of Political Asylum" "Political Legitimacy in the Law of Political Asylum," *Harvard Law Review* 99, no. 2 (1985): 463. See also Justice Einfeld "Is There a Role for Compassion in Refugee Policy?," *University of New South Wales Law Journal* 23 (2000): 312. for a similar argument.

their right of the freedom of expression and to organize in public protest the conditions they were subjected to. This holds not only for those who were persecuted by the regime.

The poor of Haiti lacked any recourse to state institutions. They were barred from opposing detrimental social and economic policies pursued by the government that turned their farmlands into large scale waste lands and subjected them to a life in poverty. Being stripped from the right to the freedom of expression, the freedom of opinion, assembly and to vote in free and fair elections, these people had no alternative to amend the situation they were subjected to other than flight to a different country.

Focusing on the lack of public autonomy instead of persecution or levels of harm allows the approach to avoid being both under- and over-inclusive. It recognizes the plight of those who have been persecuted by the state without confining the scope of who deserves refugee status to this group. It does not bar persons suffering from indiscriminate harm from a claim to refugee status, provided that the harm they had suffered was a direct consequence of their inability to control their own lives and remain without any alternative to amend their situation other than by flight. This allows for a wide array of cases involving harm to qualify for refugee status. It may include people who suffer continued violations of their human dignity as well as people suffering long-term economic deprivation or life-threatening harm. Despite these harms being qualitatively different, such persons qualify for refugee status because they were equally subjected to conditions that they could not avoid through any (and were caused by the lack of any) means of legal or political pathways. The Human Rights Approach would argue in the Haitian case that only those persecuted possess a claim to refugee status – after all, the only path providing redress to their situation was

flight. Yet, this does not distinguish the persecuted from those that had to suffer the detrimental policies of the Haitian state in other capacities. For these people, too, their lack of legal political status meant that the only way of redress to their situation was flight. The crucial aspect of their claims to refugee status did not lie in the question how much harm or what sort of harm they had suffered, but in their lack of any means for redress. This also avoids the pitfalls of the Humanitarian Approach. The latter would face significant difficulties in distinguishing which persons in the Haitian case deserve refugee status. If one takes the threshold of life-threatening harm, then should only those qualify for refugee status that face imminent death by starvation, while those in destitute economic conditions without relief in sight should not? If one takes the threshold of “extreme poverty” should only those qualify that fall beneath a global poverty line while those existing barely above should not? If one takes the threshold of violations of human dignity, then what suffices for a claim to refugee status? Those who would qualify for service in the public administration but were barred because of their lack of political loyalty and whose lack of employment opportunities had subjected them to a worse life?¹⁴⁷ Those who were able to eke out a meager living from their farming lands, but lived in insecurity of future state policies that could deprive them of their livelihoods? It is simply unclear who would qualify as a refugee according to the Humanitarian Approach in the Haitian case. The approach defended here holds that we must not set a precise threshold of harm that would differentiate between the different harms that individuals suffer at the hands of the state. What determines their claim to refugee status is not a pre-defined set of harms, but their lack of recourse through legal and political means.

¹⁴⁷ For such a conclusion, see Annex 1 for a reflection on how the Human Rights Approach responds to poverty as a possible cause for receiving refugee status.

The approach thereby also avoids being over-inclusive. It does not argue that anyone facing harm as a consequence of discrimination qualifies for refugee status. Take again the case of domestic violence from the previous chapter. Such forms of harm occur in many states. Not all cases of domestic violence automatically qualify for refugee status. There is a difference between a woman that suffers from domestic violence but has recourse to institutions providing relief, that has access to courts that regard her as in equal moral standing to all other members of the community and that is able to gather public support and push for changes in laws regulating the relation between men and women, and a person that suffers from domestic violence and has no alternative for alleviating her condition. Similarly, the approach avoids being over-inclusive as it does not argue that poverty in itself should lead to a claim to refugee status. There is a difference between people that suffer from poverty as a consequence of their lack of legal and political status¹⁴⁸ and have no possibility for redress to their conditions, and those people that possess access to legal and political remedies.¹⁴⁹

The approach from political oppression thus functions as a standard that qualifies harm. Not all harmful situations should lead to a claim to refugee status. Yet, it does so without having to

¹⁴⁸ As Justice Einfeld demonstrates, this is the case for many situations of poverty: “the economic turmoil which the people suffer is, more often than not, a direct consequence of the effect of foreign military intervention or internal political oppression [...]” Einfeld, “Is There a Role for Compassion in Refugee Policy?,” 312.

¹⁴⁹ A critic may respond with arguing that many individuals in modern democracies remain powerless. Just take, for instance, the poor in the United States. I do not object to this statement. The point here is not that poverty is bad and should be battled, but whether it should lead to refugee status. I claim that refugee status is not the correct instruments to tackle all sorts of ills and morally problematic situations that arise in societies, but that it is an instrument for tackling certain problems. In the case of the poor in the United States, the institutions at whom the call for change of their circumstances should be directed at are national ones. Even if they are powerless now, they must not be tomorrow. Power is not something that can ultimately either be had or not be had, but arises and is continuously generated in communication with each other – it is a medium of communication that can be actualized temporarily. Today, we see many forms of empowerment by the previously powerless. For just one example see the housing movement of those affected by mortgages in Spain. Felipe G. Santos, “Movements That Care: Empathy, Solidarity and Empowerment in the Platform of Those Affected by Mortgages” (Central European University, 2020).

determine a cut off point in terms of how much harm suffered is enough harm suffered for claiming refugeehood. It qualifies harm, but it does not ask for a threshold regarding its magnitude. This does not mean that we discount the most serious forms of harm suffered by individuals. The approach defended here is not only capable of including, but offers a better standard of inclusion regarding cases in which harm is severe and indiscriminate, and that thus differ from scenarios in which the main question of contention is the determination of refugee status given different degrees of harm, such as in the case of poverty. We will thus turn to the example of famines to illustrate this point.

Famines are a clear case in which the identification of serious harm is much easier than in the case of poverty. Millions of people perish when famines strike. Yet, as in many other cases of serious harm, famines too are primarily the consequence of a lack of political freedom. Despite the role environmental factors such as droughts may play in famines, they are not primarily natural, but “social phenomena”.¹⁵⁰ The reason, Amartya Sen argues, is that famines are not primarily caused by declines in food availability, but rather by the inability of people to command entitlements to food. This is the case, because “The mere presence of food in the economy, or in the market, does not entitle a person to consume it.”¹⁵¹ People lack the legal and political ability to access food that exists. Such entitlement failures may present themselves in various ways. Generally, either as failures in “ownership” entitlements or as failures in “exchange entitlements”. When ownership entitlements break down, persons are simply unable to establish ownership over the goods they produce. Similarly, when exchange entitlement failures occur, persons are unable to exchange their

¹⁵⁰ Amartya Sen and Jean Drèze, *Hunger and Public Action* (Oxford: Oxford University Press, 1989), 46.

¹⁵¹ Sen and Drèze, 9.

labor or goods for other goods. When a population lacks the legal or political ability to protect their entitlements that give them access to food, famines can occur even if food is available.

Famines occur as a consequence of foreign domination, as in the case of the Irish famine in the 1840's, or as a consequence of domestic oppression.¹⁵² Under British rule, the Irish lacked the political ability to command ownership over food. As a result, large quantities of food were exported to Britain while famine continued to ravage in Ireland, causing thousands of deaths. Similarly, despite having developed a sophisticated mechanism for detecting and preventing famines in India, the Indians lacked the political ability to pressure the British colonial rulers to use those mechanisms. These so called 'famine codes' were developed under British rule and were accessible to decision makers in reacting to threats of famine. The lack of the public's ability to pressure the government meant, however, that the existence of such mechanisms did not ensure their application. As a result, nearly 3 million people died in the Bengal famine of 1943.

In other cases, famines were the result of domestic political oppression as in Sudan, Ethiopia and Somalia. The so-called "Unknown Famine" in Ethiopia in 1973 was caused partly due to expropriation of pasture from herders, exploitation and feudal ownership structures of farmers in the Wollo Region of Ethiopia and partly due to the dictatorial regime's efforts to conceal the famine.¹⁵³ In Sudan, the attempt to turn the country into the "breadbasket of the Arab world" resulted in the hoarding of grain even during the famine – an enterprise promising high profit

¹⁵² Sometimes even being caused intentionally, as was the case with the famine known as the "Holodomor", which took the lives of approximately 5 million Ukrainians between 1932 and 1933. See: Andrea Graziosi, "The Soviet 1931-1933 Famines and the Ukrainian Holodomor: Is a New Interpretation Possible, and What Would Its Consequences Be?," *Harvard Ukrainian Studies* 27, no. 1 (2004): 97–115.

¹⁵³ Human Rights Watch, "Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty," 1992, 15.

margins. Here too, the lack of political legal status of the citizenry barred the affected people to issue command over food which was, in principle available.

In all these cases, the harm caused by famines is directly related to the lack of political freedom. In countries that lack the freedom of expression and opinion, the absence of a free press often results in early warning signs of famines going unreported. Combined with the denial of rights to the freedom of assembly and political participation, this means that such warning signs are not followed by increased public pressure on decision makers to address the needs of those affected. The absence of free and fair elections then leads to a lack of incentives for decision makers to take seriously the concerns of their citizens.

Conversely, if citizens possessed the right to freedom of expression, opinion and an independent press, impending conditions of famine would be picked up early and made into national public concerns. Persons that possess the freedom of assembly and political participation in democracies featuring multi-party parliaments and free and fair elections can then pressure decision makers into reacting swiftly to their situation. Authorities would have no other choice than to take seriously the plight of their citizens. In cases where people possess public autonomy, famines generally do not occur. In the words of Sen: “No substantial famine has ever occurred in any independent and democratic country with a relatively free press.”¹⁵⁴

This was the case in India after independence. In a number of occasions, conditions for impending famines were noticed early by the affected population. The press quickly picked up on them and

¹⁵⁴ Amartya Sen, “Democracy as a Universal Value,” *Journal of Democracy* 10, no. 3 (1999): 6–7.

turned them into a matter of national importance. Under the scrutiny of the voters and the political opposition, decision makers could not but take every measure available (such as the formerly mentioned mechanism of the “famine codes”) to prevent the famines.¹⁵⁵ This happened several times following droughts and floods: in Bihar in 1967-8, in Maharashtra in 1971-3 and in West Bengal in 1978.¹⁵⁶ The same holds true for a number of countries elsewhere. In Africa, one example is Botswana. Despite food production collapsing in the 1980’s (food production levels were so low that they only covered 13% of the amount of food needed nationally in 1984), the country escaped famine. Its citizenry generated public pressure for measures countering the impending famine. As a result, the government initiated large scale employment schemes, direct food distributions and imported food, effectively averting famine.¹⁵⁷ Famines, thus, are not only a matter of a lack of resources. Contrary to the Botswana case, countries ruled by autocrats and dictators such as Ethiopia and Sudan experienced severe famines during the same time, even though food shortages never reached the same low as in Botswana.¹⁵⁸ In many of the scenarios in which harm appears, it is thus the consequence not only of mismanagement, but of a systematic

¹⁵⁵ A report by Human Rights watch holds that “in order for a government to act in time to prevent a famine, it is necessary for it to be aware in advance of the impending famine. It is for this reason that the ‘early warning systems’ of today have been set up. However, the affected populace itself is invariably more aware of an impending famine than any technically-based system can be. The most effective early warning system is therefore allowing the people to make their fears known, by supplying credible information to the authorities. This may be done by direct representation to elected representatives or through a free press, or both.” Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 8..

¹⁵⁶ In these situations, Sen writes, “Reports on deaths from hunger reach the government and the public quickly and dramatically through active newspapers, and are taken up vigorously by parties not in power. Faced with a threatening famine, any government wishing to stay in office in India is forced to abandon or modify its on-going economic policy, and meet the situation with swift public action, e.g. redistribution of food within the country, imports from abroad, and widespread relief arrangements (including food for work programmes).” Amartya Sen, “Development : Which Way Now?,” *The Economic Journal* 93, no. 372 (1983): 757–59. In these cases, the public autonomy of those affected by the dangers of famine resulted in large scale public action that enabled citizens to restore their ownership and exchange entitlements (especially through public work schemes), providing them with access to food.

¹⁵⁷ Sen and Drèze, *Hunger and Public Action*, 154; Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 10.

¹⁵⁸ Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 9–10..

misallocation of power. It is the lack of political freedom that causes situations in which persons are harmed and in which they lack any defenses against such harm.

In these cases, it is clear that the harm that people suffer is the direct consequence of a lack of public autonomy. It is, however, not harm itself but rather its cause – the lack of political freedom – that should trigger a claim to refugee status. To illustrate this, we need to turn to the issue not of famines themselves, but of the *threat of famine*. Political oppression is the correct determining factor for claims to refugeehood because a threat of famine does not mean that a population cannot deal with such threat. Political freedom allows, along the three ways identified in the previous section, to maintain open channels of information from the population to political centers, to identify threats and warnings concerning measures that do not work or are inappropriate, and to hold accountable decision makers, safeguarding the rights of those whom famine and the measures against famine are supposed to protect.

Focusing on political oppression and unfreedom helps to avoid difficulties in deciding at what point a threat of harm is substantial enough to warrant a claim to refugee status. Determining refugee status based on a threshold of harm may, in the worst case, result in persons being unable to claim refugee status because threats to harm have not yet sufficiently materialized into experiences of harm. This may mean that the early warning signs of an impending famine do not satisfy the requirement of a threshold of harm. A person would then need to wait until she is affected by the famine. She would need to wait until it is clear that she is in harm's way and thus until the famine has already broken out, claiming lives. At this point, it may, however, be too late

for her to leave her country. Famines do not appear overnight.¹⁵⁹ Rather, they develop over time. The early signs of a famine involve people selling their assets in exchange for food. Only when persons have exhausted all their assets, does starvation set in. At that point, it may be clear that a person faces serious harm. Yet, it might also be too late for her to access refugee status. In many cases, such persons have, at this point, already exhausted their monetary assets to leave their home countries – especially if they aim at seeking refuge in liberal democracies which are often far away and which requires a substantial amount of money to pay for the travel.¹⁶⁰ It seems unacceptable that a threshold of harm would require a person to knowingly wait until she endures such harm in order to qualify for refugee status.

Alternatively, an approach that bases the determination of refugee status on a threshold of harm may argue that all that suffices is a credible threat to serious harm. Yet, identifying a threat of famine may prove difficult. Especially in cases in which governments attempt to conceal worsening conditions of their populace and restrict information from leaking to outside spectators, clear threats of famine may not be noticed by externals. This was the case during the so-called “Unknown Famines” in Ethiopia in 1973 and from 1979 to 1983. The restriction of information by the government resulted in the threats of famine largely going unnoticed internationally. Only once the threat had developed into a full-blown famine, concealment was no longer possible.¹⁶¹

¹⁵⁹ Peter Walker, “Refugees, Famine Warning and Sustainable Livelihoods,” *International Journal of Refugee Law* 2, no. Special Issue 1 (1990): 59–64.

¹⁶⁰ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 13. Those affected are often the poorest in a society. Yet, as Zolberg, Suhrke and Aguayo state: “The simple notion that poverty produces refugees is inconsistent with the fact that situations of extreme economic deprivation usually have not generated population outflows claiming international refugee status.” Zolberg, Suhrke, and Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, 260. Those that are most susceptible for the harms caused by famines typically are in the worst position to acquire the funds for leaving.

¹⁶¹ Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 17.

This is only possible in countries where the citizenry lacks public autonomy. Concealing threats of famines is only possible in a setting in which the citizenry is incapable of drawing attention to the dangers they face. Without an independent press and representatives that gather information from their constituency, information is distorted and barred from spreading. Governments are then sometimes capable of withholding information completely, even leading to a large-scale concealment of a raging famine. This was the case in China between 1958 and 1961. Dangers of an impending famine were not reported to political representatives following droughts, floods and the disastrous impacts of the “Great Leap Forward”.¹⁶² The lack of an independent media simultaneously meant that information about a threat of famine were not disseminated. In fact, even while famine was raging in China, large parts of the country were unaware of the situation. To externals, the full scale of the famine had not been revealed for decades after.¹⁶³ Data on the mortality rate during this period were released only in 1980. These showed that from 1958 to 1961, China experienced an increase in the mortality rate between 14 and 16 million.¹⁶⁴ The lack of

¹⁶² See: Sen and Drèze, *Hunger and Public Action*, 210. The policies of the Great Leap Forward entailed that agricultural collectives were grouped into huge People’s Communes in just a few months. This interrupted processes of the cultivation of land, resulting in sharp declines in food production. Simultaneously, 90 million people were forced from farming into steel production, leading to a substantial loss of the rural labor force Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 14. Ironically, even Mao Zedong seems to have been aware of the problems an undemocratic political system means for a centralized government. In 1962, shortly after the famine had ended, Mao stated: “If there is no democracy, if ideas are not coming from the masses, it is impossible to establish a good line, good general and specific policies and methods [...]. Without democracy, you have no understanding of what is happening down below; the situation will be unclear; you will be unable to collect sufficient opinions from all sides; there can be no communication between top and bottom; top-level organs of leadership will depend on one-sided and incorrect material to decide issues, thus you will find it difficult to avoid being subjectivist [...].” (Mao Zedong cited in Sen, “Development: Which Way Now?,” 759.).

¹⁶³ See: Sen, “Development: Which Way Now?,” 757–58. In their report on famines, human rights watch even states that the entire existence of the famine was publicly unknown until the 1980’s Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 14.

¹⁶⁴ See: Sen, “Development: Which Way Now?,” 758. Some sources suggest an even higher number of between 15 and 30 million Human Rights Watch, “Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty,” 14.

public information in countries where the citizenry lacks public autonomy may then make it extraordinarily difficult for external reviewers to correctly evaluate the credibility and the extent of a threat of serious harm. Yet, even if that were possible, problems would still remain.

Threats of serious harm still exist in democratic countries. Take, again, the case of independent India. Droughts and floods created serious risks of famines breaking out in 1967-8, 1971-3 and 1978.¹⁶⁵ Should a threat of serious harm in such cases lead to a claim to refugee status? An approach that determines refugee status based on the existence of a *threat* of serious harm would need to conclude that it does. It would need to treat the Indian and the Chinese cases (where droughts and floods also appeared) alike. It would not take into account the ability and possibility of a democratic population to 1. Safeguard their autonomy, controlling measures in reaction to looming threats and holding decision makers accountable, 2. identify which measures work, which do not, and which are both appropriate and proportional and 3. inform decision-makers about looming threats. Yet, what matters is not the threat of harm itself, but the ability of a people to react to them – the availability of recourse. Threats of serious harm may equally exist in democratic and non-democratic countries. Yet, a significant difference exists between the two that is not reflected in the existence of a threat of serious harm. In the former case, the citizens possessing public autonomy, have the ability to address situations that pose dangers of serious harm. They are

¹⁶⁵ This is not to say that degrees in the democratic quality of different regimes do not exist. It remains, for example, disputable exactly how democratic the Indian regime is. See: Sudipta Kaviraj, “Indira Gandhi and Indian Politics,” *Economic and Political Weekly* 21, no. 38 (1986): 1697–1708. Yet, what matters is that a regime is democratic enough for the public to keep open information channels to the political centers, to hold decision-makers accountable and thus to exert enough control over their own normative environment to impact and avert especially dangerous situations. Democracy in India may thus leave much to be desired. Yet, it’s political structures still allowed enough democratic control to identify the risk of famines and avert them.

capable of averting serious harm. In the latter case, they are not. What distinguishes the two cases in which a threat of serious harm exists is their (lack of) public autonomy.

In this section we have attempted to show that the approach from political oppression does not exclude people fleeing harmful situations. Rather to the contrary, it provides a better standard for judging when harm should lead to refugee status. This, as we have tried to show, has not only normative but practical benefits. To conclude we may briefly summarize what these are.

My approach suggests that harm should not be the basis for determining who is a refugee. Rather, it should be the political oppression and unfreedom of a people. This allows to qualify harm without falling prey to the limitations of the two legal approaches identified in chapter one. It allows for a standard that is not confined only to persecution, nor is it arguing that all harm should lead to refugee status, as does the Humanitarian Approach. These approaches ultimately not only result in either under- or overinclusion, but also present a standard that asks us to determine thresholds of harm that must be satisfied for a person to qualify as a refugee. I argue that this is both impractical as well as normatively unsatisfactory. I thus hold that the normatively correct standard is political oppression and unfreedom. What matters, ultimately, is not the threat of harm that a people face, but whether they are able to react to it, possess ways to avoid threats or remedy their situation. The question is whether they possess a form of recourse to the situation they face, and thus whether they are politically free (legally understood as possessing legal-political status). It is the fact of political oppression that turns a people from being faced with a threat of harm to a people with no way out other than flight. The approach also has practical benefits over the other approaches discussed. It does not require making a decision regarding the magnitude of harm that

must be suffered by a person in order to qualify for refugee status. Neither does it require a form of risk-assessment that it itself often impaired by the limited amount of information existing from politically oppressive regimes. Rather than asking for the likelihood of threats of harm materializing, the approach based on political oppression argues that what matters is not that the threat of harm exists, but that the politically oppressed have no means to combat it. They must not wait until it becomes abundantly clear to externals that a threat of harm exists. At this point it may already be too late to flee. All that is required is that they lack the political freedom to battle the dangers they face. It is thus the politically oppressed and unfree that should be recognized as refugees. This perspective does not bar us from including those who are harmed. As shown, political oppression does not only cause harm - and at that not only persecutory, but indiscriminate harm – but provides a better normative basis for determining refugeehood.

2.4.2 Qualifying Harm: When harm causes unfreedom

The preceding section has discussed cases in which political oppression and unfreedom cause harm. Here, we will turn to the opposite possibility: cases in which endemic forms of harm cause a people to lose their ability to exercise their political freedom. Take, for instance, scenarios of environmental disruptions or disasters caused by environmental change or (civil) wars. Which persons in such scenarios should possess a claim to refugee status?

The human rights and Humanitarian Approach argue that the correct determining factor for claims to refugee status in these cases is the experience of harm. This section will argue that a threshold

of harm is a normatively inadequate standard for determining refugee status in these cases, too. The two approaches fail to recognize the difference between scenarios in which persons experience harm but possess remedies other than flight and scenarios in which no such remedies exist. In the former, persons remain in control of their lives. They may face threats of serious harm, but they possess the ability to remedy such threats. These may come in various ways: in setting up warning systems to detect environmental disruptions and disasters early, in building infrastructure that allows for adaptation to risks of environmental hazards or protection from these, or in the availability of an “internal flight alternative” where they remain full standing members of their community with access to remedies and compensation claims. There may, however, also be cases in which a threat of harm leads to a lack of public autonomy. Certain forms of environmental disruptions and disasters as well as (civil) wars could result in the loss of control of persons over their own lives. For a person to be able to exercise her legal political status, her rights must be actionable and this requires a minimum guarantee of protection of her human rights. In some scenarios, the threat of harm bars people from exercising control over the situation they face. The threat is so pervasive that no remedies other than flight exist for these people. We will concede that such a scenario is theoretically conceivable, albeit rare in practice.

One scenario in which individuals could effectively lose their political freedom immediately springs to mind: the case of very specific instances of civil war. It should be apparent that being a member of a warring side does not immediately turn such a person into a refugee should she decide to leave her country of origin. The legal (and philosophical) literature rightly refers to the possibility of “internal flight alternatives”,¹⁶⁶ and thus the (sometimes) available avenues of fleeing

¹⁶⁶ For the debate in the legal literature on the “Internal Flight Alternative”, see the following. Note that these articles naturally discuss the question what protection must mean in the context of possibilities of internal flight alternatives.

to parts of the country that remain untouched by conflict. According to our approach, such alternatives are valuable only if persons remain politically free in such possibly existing areas – and that must mean that they remain in control over their own life, possessing recourse to state institutions, avenues of legally claiming compensation, or a political say in the conditions that await them. The existence of such “internal flight alternatives” in the absence of political freedom is of little value, however. Individuals may flee immediate war zones but lack any control over their own life in their new places of residence. Moving to other areas of the country as legally-politically disenfranchised may result not only in the inability to claim services or compensations but may also be the source of various other harms. It would mean lacking any recourse to the position that such people are placed in.

Merely being a member of a warring party does equally not suffice for being recognized as a refugee. One may think, for the sake of argument, about a just war being fought. If we assume that the soldiers belonging to the “just” side of such a war also are in full possession of their legal-political rights that make them full equal standing members of their political communities, it seems hard to argue that the mere confrontation with possible harm qualifies them for refugee status should they flee their posts (usually called desertion).

Our approach goes beyond demanding protection understood in a narrow way. It demands the possession of effective political rights. Hugo Storey, “The Internal Flight Alternative Test: The Jurisprudence Re-Examined,” *International Journal of Refugee Law* 10, no. 3 (1998): 499–532; Ninette Kelley, “Internal Flight / Relocation / Protection Alternative: Is It Reasonable?,” *International Journal of Refugee Law* 14, no. 1 (2002): 4–44; James C. Hathaway and Michelle Foster, “Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, ed. E et al Feller (Cambridge: Cambridge University Press, 2003), 357–417; Reinhard Marx, “The Criteria of Applying the ‘Internal Flight Alternative’ Test in National Refugee Status Determination Procedures,” *International Journal of Refugee Law* 14, no. 2 (2002): 179–218.

Shortly, the case of civil war involves the risk and the presence of harm, which typically annul all effective remedies and political rights. While we acknowledge the possibility of civil wars in democratic settings, they occur typically in non-democratic countries, which deny political freedoms.¹⁶⁷ In such cases, the normative foundation of refugeehood is not harm, but the lack of political freedom – the inability of persons to be in control of their own lives. We can extend this civil war scenario to concede that situations in which harm is so pervasive as to make the exercise of political freedoms impossible can exist. Yet, they occur rarely. Even in cases such as environmental degradation, the presence of public autonomy often means that other remedies remain available.

Let us briefly show this with reference to the famous “sinking islands”. Such islands face much of the same dangers as other countries affected by rising sea levels. Rising tides cause land erosion, saltwater intrusion into the ground water and wetland losses, deteriorating livelihoods. In the case of the ‘sinking islands’, however, the danger is of a different magnitude. The sea will claim so much land that these entire islands will become uninhabitable and consequently submerge completely under the water.¹⁶⁸ Yet, here too, public autonomy is decisive in discerning who ought to receive refugee status. Despite a risk of serious harm threatening to eclipse the possibility of exercising political freedoms in the future, the possibility of exercising public autonomy in the

¹⁶⁷ Bethany Lacina, “Explaining the Severity of Civil Wars,” *Journal of Conflict Resolution* 50, no. 2 (2006): 276–89; Matthew Krain and Marissa Edson Myers, “Democracy and Civil War: A Note on the Democratic Peace Proposition,” *International Interactions: Empirical and Theoretical Research in International Relations* 23, no. 1 (1997): 109–18; Marta Reynal-Querol, “Does Democracy Preempt Civil Wars?,” *European Journal of Political Economy* 21 (2005): 445–65.

¹⁶⁸ Martin J. Bush, *Climate Change Adaptation in Small Island Developing States* (Oxford: Wiley, 2018), 193.

present allows for various avenues to remain open, such as the generation of alternative migration paths.

Take the case of Kiribati. Kiribati already suffers from the consequences of rising sea levels. Fresh water supply and food security are in jeopardy. Due to its low-level atolls, none of the measures listed above can prevent these hazards from causing serious harm to its population and the islands will eventually be completely submerged under water.¹⁶⁹ Yet, Kiribati is a parliamentary representative democracy and the people of the islands possess the public autonomy to address the dangers they face. To that end, the people of Kiribati have purchased land in Fiji and have developed a migration policy designed to prevent its citizens from becoming refugees.¹⁷⁰ Democratic control thus allows the people of Kiribati to pressure decision-makers in finding solutions to the issues they face even if the dangers are grave. In this instance, the people have collectively developed remedies that allow for forms of orderly migration elsewhere. The same would not be possible in cases in which the people of a ‘sinking island’ lack the public autonomy to effectuate the necessary changes and develop alternative options of migration. The availability of such remedies thus distinguishes planned and often safer forms of migration that are also more attuned to the desires of the peoples involved than flight.¹⁷¹

Environmental disruptions and disasters thus pose severe threats of harm to affected populations. Should such threats of serious harm qualify a person for refugee status? If the determining factor

¹⁶⁹ Bush, 193.

¹⁷⁰ Jonathon Barnett, “The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries,” *Asia Pacific Viewpoint* 58, no. 1 (2017): 8.

¹⁷¹ Jane McAdam, “Swimming against the Tide : Why a Climate Change Displacement Treaty Is Not the Answer,” *International Journal of Refugee Law* 23, no. 1 (2011): 20.

for claims to refugee status is a threshold of harm, all persons suffering from such threats should possess claims to refugee status. Yet, significant differences exist between cases that bear normative consequences. As Jane McAdam notes, “[...] by contrast to many other triggers of displacement, the slow onset of some climate change impacts, such as rising sea levels, provides a rare opportunity to *plan* for responses, rather than relying on a remedial instrument in the case of spontaneous (and desperate) flight.”¹⁷² This alone should not qualify for dismissing the claims of “environmental refugees”. After all, we may imagine situations in which persons are systemically barred from planning responses to environmental hazards, being deprived of the ability to voice concerns about such hazards and seeking remedies to these even despite their slow onset. It is the ability to control such hazards in combination with their slow onset that could bar a claim to refugee status. Environmental disruptions and disasters pose serious threats to those affected, but a number of instruments have been developed to prevent them or make adaptation to such scenarios possible. Rising sea levels may be prevented from flooding lands by erecting dikes, surge barriers and other coast defenses. The regulation of land use planning, sediment management and fresh water injections play a large role in limiting the effects salt water intrusion may have on available farming lands.¹⁷³ When these fail, hazard planning schemes may involve making available “internal flight alternatives” for those affected. Given the slow onset of environmental hazards, such instruments serve as adequate tools to adapt to or prevent environmental disruptions and disasters. Political freedoms allow a people to safeguard their autonomy, holding authorities accountable and issuing joint control over the instruments and measures that allow alleviating or resolving specific situation such as these. There may thus be scenarios in which such instruments

¹⁷² McAdam, 4–5.

¹⁷³ Robert J Nicholls and Richard S J Tol, “Impacts and Responses to Sea-Level Rise : A Global Analysis of the SRES Scenarios over the Twenty-First Century,” *Phil. Trans. R. Soc.* 364 (2006): 1075.

are available, but the affected population lacks political freedom. These are cases akin to the scenario of famine discussed above. The approach from political oppression would include such cases as warranting refugee status – after all, they possess no means of battling the threats they face. The same holds for scenarios in which the threat of harm is not only imminent but also so pervasive as to make political freedoms un-exercisable.¹⁷⁴ In these scenarios, the form of the threat of harm wrenches control over the situation from the hands of affected people. Certain threats of harm make control over it impossible. Harm may thus at least theoretically be so pervasive as to make the exercise of one’s political freedom impossible. The approach from political oppression argues, however, that in scenarios in which environmental or other factors cause a threat of harm but in which the population possesses recourse to their particular situation, refugee status is not warranted. This does not mean that such scenarios and situations are not normatively worrisome. It means only that other forms of recourse exist. A threat of harm is not yet sufficient for a claim to refugee status. What matters is that a people lack the ability to battle such threats.

Our approach thus leads to a re-conceptualization of refugeehood. Refugees are not those fleeing from individual persecution for specific reasons. They are not those fleeing from a fear of harm. Rather, they are those fleeing from political oppression and the lack of political freedom. They should be recognized because they have lost all means to being in control of their own lives. This understanding of who should be recognized as a refugee has important consequences on how we interpret specific scenarios – both those that legal and philosophical understandings of

¹⁷⁴ As in the case of famines, the inability to control instruments that prevent environmental disruptions and disasters results in the vulnerability of persons. It is the reason for their claim to refugee status, rather than the threat of harm itself. As Boano, Zetter and Morris put it: “As in the case of famine, so too in most areas of environmental change, recognising the role of human agency and the need for states to articulate and address the protection of rights in relation to environmental stresses leading to displacement, is a pressing issue.” “Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration,” 2007, 11..

refugeehood have traditionally struggled with such as poverty and war, but also those that appear as new challenges, such as environmental degradation and disasters. It allows us to introduce new and clearer standards for evaluating who should be recognized as refugees in these circumstances. The approach argues that the events do not matter themselves. Strictly speaking, environmental refugees do therefore not exist. The normative foundation of refugeehood is political oppression or the otherwise absence of political freedoms that allow persons to possess (political) recourse. This approach thus distinguishes between those who face events such as environmental degradation but have recourse to state institutions, and who are able to demand and facilitate political change leading to changes with regards to their situations and those who are faced with environmental degradation and disasters but have nowhere to turn: who have lost all control over their own lives. This means, as this part of the chapter has intended to show, that harmful situations are not *prima facie* excluded from leading to a claim to refugee status. What it means, however, is that they do neither *prima facie* result in refugee status. Refugees, I have sought to argue here, are not those fleeing from persecution or harm, but those fleeing from political oppression and the lack of political freedom. This not only has consequences for evaluating and qualifying harmful scenarios, but also for scenarios in which harm is absent altogether. This will be the focus of the next section.

2.4.3 Refugeehood in the absence of harm

The previous sections have discussed scenarios involving threats of serious harm. I have argued that the human rights and the Humanitarian Approach set a normatively inadequate standard for

determining refugee status and are either over- or under-inclusive. Focusing on the lack of public autonomy avoids these pitfalls. It represents a better normative standard than a threat of serious harm. This section will turn to scenarios in which a threat of harm is absent.

Why should political oppression lead to a right to refugeehood even if individuals are not harmed? I argue that there are two reasons. First, political oppression manifests itself in many different ways that are not normatively less significant than the specific consequence of suffering overt forms of harm at the hands of the regime. Second, political oppression serves as a better standard in more practical terms than standards based on harm. We will discuss these two reasons in turn.

Political oppression does often, though not always, cause overt forms of harm to those oppressed. In some cases, it leads to persecution. In others, as we have shown above, it leads to indiscriminate forms of harm. In many cases, however political oppression leads to consequences that fall short of physical, bodily harm. The politically oppressed will not be able to protect themselves against regime actions. They cannot safeguard their autonomy. Nor will they be in a position to voice their concerns and point towards situations, decisions, regulations, and laws that they see as violating their autonomy, or inform decision makers about the threats they face. Individuals may thus suffer in many different ways from the laws made by unaccountable authorities and the unpredictability of powers used by actors of the executive, ranging from issues concerning laws of public decency to confiscation of property or family size regulations, such as the Chinese One-Child Policy to practices of domination from local authorities and security forces. Political oppression leaves deep imprints on the lives of those oppressed. It changes and steers their behavior not by subjecting everyone to harm, but by a continuous threat thereof, often coupled with insecurity about the scope and severity of its use. Political oppression thus manifests itself in many ways that significantly change and influence the lives of individuals and that are not normatively less important than

suffering overt forms of harm. To illustrate this point, let's turn to examples in which laws and regulations both significantly impact the lives of individuals and potentially violate their personal autonomy. Let us turn to "laws of decency" in Iran: the headscarf requirement.

The Iranian revolution brought with it a number of changes in regulations and laws that significantly impact both public and private life in Iran. One of these changes was the enforcement of the Islamic dress code. Although it results in the control of men and women (male government employees are, for instance, supplied with written codes regulating their attire, restricting them from wearing specific types of pants, short sleeves, shirts that expose the chest, as well as jewelry), women are significantly more affected by such laws, requiring them to "appropriately cover their body" by wearing different forms of veiling garments (ranging from orthodox to non-orthodox looks).¹⁷⁵ While some scholars argue that the hijab laws represent decency regulations that do not differ in principle from laws restricting public nudity in western countries¹⁷⁶, a significant difference exists between the two. The difference between the two does not lie in the substance of the laws.¹⁷⁷ Just as in the case of environmental change in which it is not the fact of a specific

¹⁷⁵ See: Faegheh Shirazi-Mahajan, "The Politics of Clothing in the Middle East: The Case of Hijab in Post-revolution Iran," *Critique: Journal of Critical Studies of Iran & the Middle East* 2, no. 2 (1993): 54–63.

¹⁷⁶ cf. Price, *Rethinking Asylum: History, Purpose, and Limits*, 118–20.

¹⁷⁷ This is a hotly debated issue. The arguments range from those defending freedom for both sides, upholding both the right for women to wear what they want and the right of women to abide by their religious convictions, all the way to arguments relating to the value of secularism. Many will mention at this point that western countries have sometimes restricted women to wear the hijab. While we may discuss such cases, weighing the merits of these decisions, what matters here is that such issues are in fact discussed in these countries: they are brought to the arena of public discourse, reassessed, perhaps re-affirmed, or scrapped altogether. What matters here is, however, not any substantial argument. We should (and possibly cannot) engage with every substantial argument for or against various issues that possibly violate the personal autonomy of the population, but leave the debate of such issues to the people itself. We can draw on and explicate on the procedure. What matters in the end is that the two cases differ in exactly this point. On the one hand, a form of procedural openness, that allows information channels to remain open, that allows for the grievances of the population to be voiced, limits to rights and to the private sphere to be defined and that allows for their personal autonomy to be safeguarded. On the other hand, we find subjection to rule without accountability and legitimacy. We find a system in which some decide and others have to abide; and we find that these people have no ability to voice their grievances, no opportunity to define the limits of rights and their private sphere, and no avenues for safeguarding their autonomy. What we are pointing towards is thus not the justifiability of any specific decision or law, but the difference in procedure. The ability of a people to react, and to change what concerns them.

event occurring, but the ability of a people to react to such an event, what differs in these two cases is not the substance of the two laws, but the fact that women (and men) in Iran cannot react. They are subjected to illegitimate power. They are forced to live their life in a particular manner without having the opportunity to exercise their political freedom in the three ways discussed at the outset of this chapter. They do not have the opportunity to identify what (if anything) regarding these decency laws is violating their autonomy. They lack the ability to inform decision-makers about the consequences and manners in which they experience dangers, threats, violations of personal autonomy. And even if they could, the authorities remain unaccountable to them. They are unable to safeguard their autonomy. We know from specific legal cases, however, that laws such as the hijab laws have severe consequences, influencing the lives of those to whom they apply in significant and normatively important manners.

One of these cases concerns Saideh Hassib-Tehrani, a woman who fled Iran in 1984 and applied for refugee status in the United States. She describes the restrictions of the dress code in Iran as significantly affecting her well-being. Following an incident at a party in which she saw the host in his bathing suit – an offense to the dress codes – she was detained and questioned by the authorities. Being stopped by the police and, at gunpoint, reprimanded for wrongfully accidentally exposing some of her hair, she suffered from traumatic stress, severe psychological and physical illnesses causing her to miss several months of work.¹⁷⁸ The hijab laws had a significant effect in her life. It changed her behavior without her having the possibility to challenge these laws.

Laws of decency are, of course, only one example in which clear physical and bodily harm is absent, or cannot be directly attributed as a form of persecution, but in which political oppression

¹⁷⁸ Fisher v. I.N.S., 79 F.3d 955 (9th Cir. 1996) at 4000-1

manifests itself in ways that significantly impacts the lives of those oppressed. We can think of a number of other examples, such as expropriation (note that western states also expropriate their citizens if, say, they build highways. Yet, the citizens of liberal democracies usually have recourse. They are able to battle such issues politically, or in the courts. Expropriation in non-democratic states impacts persons in ways that they often cannot battle), or laws regulating family life (think about the one child policy in China and especially all those families who abide by the law in fear of consequences). Political oppression can thus manifest itself in a myriad of ways that fall short of the most gruesome forms of violence. They may nonetheless significantly impact the lives of individuals merely as a result of abiding politically repressive regimes.

Note the difficulty the other three approaches would have with such cases. We know from the ruling in this specific case that the Human Rights Approach would face problems in determining whether Saideh should be recognized as a refugee. The Human Rights Approach, and by extension also the Classical Approach, would view her situation as a case of prosecution rather than persecution. They face difficulties when dealing with the consequences of political oppression that differ from harm, especially when discriminatory backgrounds are (allegedly) missing.¹⁷⁹ The focus on specific forms of discriminatory harm blocks the view to the illegitimacy that marks her treatment and the situation of the politically oppressed more generally.

The Humanitarian Approach would not fare much better. It could react in one of two ways, both problematic. First, it could simply argue that anything beneath a specific threshold of harm should

¹⁷⁹ This is curious in this case. After all, one could credibly argue that Saideh experienced this form of treatment as a consequence of her being a woman, and women being significantly and differentially treated not only by the law but by the police, too. Yet, the Human Rights Approach, though more inclusive than the Classical Approach, has always shied away from all-inclusive integration of groups such as “women” into the Convention reason “membership of a specific social group”, even if it should logically possess such a consequence. As a consequence, Saideh was judged not only not to have experienced harm sufficient for triggering a right to refugeehood, but that her claims were not based on Convention grounds.

not count towards claims to refugeehood, which leads to the re-surfacing of the problem of defining a threshold of harm.¹⁸⁰ Second, it could stretch the conceptual understanding of harm. Yet, this too is doomed to fail, since it would effectively reduce the standard of harm to a non-standard – if anything counts as harm, what is excluded? Such a reaction would lack a qualifier for harm experienced. It would indeed raise the worry pointed out by the other two approaches: the inability to distinguish between prosecution and persecution.¹⁸¹

What remains is the standard defended here: a standard that takes seriously the condition of political oppression and the consequences it has on the life of individuals, even if such consequences are not manifested in the experience of serious forms of harm. It argues that political oppression leads to a myriad of ways in which the lives of individuals are impacted and in which they have no say but to listen and abide by unaccountable power. It holds that even if we do not see the sovereign beating down doors and exposing all of its citizens to violence, the threat of violence indiscriminately looms, changing the behavior and actions of individuals. The approach defended here argues that we should take seriously these consequences. They are not less normatively significant than specific outbursts of violence, often leading to large and persistent changes in the lives of individuals. The fact that these people have no ability to determine what they perceive as violating their personal autonomy (remember Saideh), to inform decision-makers of threats to their rights and personal autonomy, or to safeguard them through holding authorities

¹⁸⁰ Again, see Annex 1 for an example in how such a threshold can result in deep normative problems.

¹⁸¹ Interestingly, International refugee law does not take into consideration what matters for the legitimacy of a specific law. This is interesting, since it argues that the difference between prosecution and persecution needs to consider the legitimacy of the law in question. Yet, it assumes that a law is legitimate when it is general and fairly administered. Michael English, “Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law,” *Okla. L. Rev.* 60 (2007): 126.. This, however, does not in itself provide legitimacy to a law. Legitimacy is, after all, dependent on fair political procedures. A law is legitimate only if the persons it applies to are also its authors. The legitimacy of a law hence depends on the consent of the people who are subject to it. It necessitates democratic decision-making. In turn, such an understanding would entail that the difference between prosecution and persecution takes into consideration the form of government itself, which these approaches do not.

accountable is what grounds their claim to refugee status if they decide to flee. Political oppression should thus lead to a claim to refugeehood even if it does not also manifest itself in perceptible forms of harm. Yet the approach defended here has advantages that go beyond the core normative argument. It is a better standard for determining refugeehood practically, as well.

Standards based on harm face difficulties, as mentioned, with cases in which harm is absent. Since both the classical and the Human Rights Approach are forward looking, however, they both include the possibility of individuals claiming refugee status despite not being harmed *yet*.¹⁸² What this means is that an individual would need to prove that confrontation with the regime, and consequently harm, is unavoidable: that they are going to clash.¹⁸³ In some respects it might be possible to show this. The classical cases are the organization of private religious meetings of which the government disapproves, the participation in labor unions that the government suppresses, oppositional parties or even being part of a social group that is on the watchlist of the regime. But what happens if individuals are able to successfully conceal their religious beliefs; what if they simply do not express their political oppositional opinions? The two approaches mentioned have considered such cases, yet face serious challenges when suggesting a way to include them according to their own standards. They simply apply the same idea as previously mentioned to the situations of unexpressed political opinions. They require that the regime will eventually and undoubtedly find out about clandestinely held political or religious beliefs and that

¹⁸² After all, if persecution were demanded for a claim to refugee status, it would ask persons to put themselves at danger of serious harm. Hathaway and Foster, *The Law of Refugee Status*, 407–9; Peter J. Smith, “Suffering in Silence: Asylum Law and the Concealment of Political Opinion as a Form of Persecution,” *Conn. L. Rev.* 44 (2012): 1021–56.

¹⁸³ Hathaway and Foster, *The Law of Refugee Status*, 407–8; See also: Isaac T R Smith, “Searching for Consistency in Asylum’s Protected Grounds,” *Iowa L. Rev.* 100 (2015): 1899; and Aleinikoff, “The Meaning of ‘persecution’ in United States Asylum Law,” 7. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states that this may occur when “[d]ue to the strength of his convictions [the applicant’s], however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities.” United Nations High Commissioner for Refugees, “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,” 17, Para. 82.

persecution will ensue. While such a standard may work with regards to held religious beliefs – most religious practice includes praying or congregating with fellow believers and thus activities that can be detected if those who practice it do so daily – the same proves harder with regards to unexpressed political beliefs. Political beliefs do not require a person to act upon them. Even if one does possess political beliefs and is able to conceal them successfully, both the regime and the deciding authorities for asylum claims will never find out if the applicant actually holds such beliefs (otherwise, they would not be concealed). After all, if a person is able to effectively conceal her political opinion, how would the state find out? The onus of proof in these cases is laid on the applicant, which makes such cases difficult to judge. In other words, these approaches are faced with an impasse: they both demand proof of future persecution for unexpressed political opinions, and argue that persons should not be asked to put themselves in harm's way to prove it. They should not be asked to test the government's seriousness in persecuting those who dissent before being able to claim refugee status. Otherwise, the asylum claims of political activists could simply be rejected on the grounds that they could continue prudently concealing their political opinions, being less openly activist in their country of origin.¹⁸⁴ The mentioned standards do not find a way out of this dilemma. They either have to give up on the forward looking standard and thus on proof regarding unexpressed political opinions, or they have to give up on their stance that persons should not be asked to test the seriousness of political regimes to deliver on their promises to punish them. In other words, they must either base decisions on claims for refugee status on pure conjecture into the future behavior of the applicant (behavior that would lead to the detection of politically dissenting opinions in the future) or demand previous action on behalf of the

¹⁸⁴ Otherwise, the asylum claims of political activists could be rejected simply on the grounds that if they were sent back to their countries, they could act prudently in being less openly activist. Yet, such a standard for determining refugee status would effectively not protect political activists. As the main proponents of the Human Rights Approach themselves state. See: Hathaway and Foster, *The Law of Refugee Status*, 117..

applicant.¹⁸⁵ Either is morally problematic. The ways these approaches have tended to go is to soften the latter. Their standard seems to require some form of proof, which in turn requires some form of action on behalf of the applicant. Applying a similar standard to the case of religious beliefs (as might work with regards to proving religious beliefs in clandestinely taking part or organizing religious meetings) to unexpressed political opinions effectively asks such people to seek harm's way. But such people have, in fact, acted on their political opinions. Those that were able to effectively conceal their political opinions from their potential persecutors consequently possess no evidence to prove it, or otherwise they would have done a bad job in concealing it.

The approach defended here offers a practical way out of this impasse. It agrees with the underlying normative commitment these approaches possess: individuals should not be asked to place themselves in harm's way just to solidify the asylum cases they might open. What matters is not the specific events that political oppression generates in each case, but the fact of political oppression itself. What suffices, as we have argued for above, is that individuals are politically oppressed. It is the fact of their inability to determine what violates their personal autonomy, to inform decision makers of the threats they face and to safeguard and defend their rights and autonomy that grounds their claim to refugee status, not any individual event that may or may not follow from these factors. Focusing on political oppression and unfreedom rather than the possible harm that may follow from it, thus allows to sidestep the practical problems that the other approaches face when determining refugee status in the absence of harm.

¹⁸⁵ This holds for different interpretations of this standard. It equally applies to interpretations that require proof that future confrontations with state authorities are unavoidable (Mogharrabi approach), interpretations that aim at showing that continuously concealing political opinions would amount to something assembling torture (Fatin approach) and to interpretations that require that a person holds genuine beliefs but would face persecution if she were to express them (Muhur approach). See: Smith, "Suffering in Silence: Asylum Law and the Concealment of Political Opinion as a Form of Persecution."

In this section, we argued that political oppression and unfreedom functions as a better normative and practical standard than standards focusing on harm. Political oppression manifests itself in many different ways other than overt forms of serious harm that are nonetheless not less normatively significant to the lives of those oppressed. Switching to such a standard also allows us to avoid the dilemmas that the other approaches face when being confronted with cases in which a threat of serious harm is not obviously present. It allows individuals to claim refugee status without having to test the seriousness of oppressive regimes to deliver on their threats and thus without them having to seek harm's way for claiming refugeehood. The reader might intervene with the question whether this approach would not in itself lead to a form of over-inclusion. After all, many more people would principally have a right to claim refugee status on this account, if they fled their countries of origin. While it is correct that all those politically oppressed should be recognized as refugees if they leave their countries, the charge of over-inclusion on the basis of sheer numbers is normatively irrelevant. Scales do not matter to rights. They do not themselves turn a right into a wrong.

2.5 Conclusion

This chapter sought to provide a normative foundation of refugeehood. It argued that refugees are not individuals who flee from individual persecution for specific reasons, or for any discriminating reasons. Neither are refugees persons who flee from a fear of serious harm more generally. The approach I have put forward argues, instead, that it is those politically oppressed and unfree who should be recognized as refugees. I have outlined what I mean by the term. Political oppression

can be understood as a lack of public autonomy and it can be formally (legally) expressed as a lack of legal political status. I have shown why political oppression and unfreedom matter normatively not only in themselves, but for the conceptualization of refugeehood. In the process of this argument, I hoped to show that the approach need not compromise in including individuals fleeing serious indiscriminate harm. Rather, political oppression offers a better standard of including cases involving harm than standards that are based on harm themselves. It allows us to include all sorts of events and scenarios in which harm occurs, not only because harm is often caused by political oppression (this holds not only for the classical case of individual persecution, but for indiscriminate forms of harm, too), but also because some threats of harm are so pervasive that they result in an effective loss of political freedoms. What matters in these scenarios, however, is not that a threat of harm exists. Threats of harm do, after all, exist in nearly all contexts of social life. What matters is that the people confronted with such threats are incapable of reacting to them other than by flight. What matters is that they possess no recourse that allows them to battle these threats. What matters is that they are barred from safeguarding their autonomy and rights, from determining what they perceive as violations of their personal autonomy and from informing decision-makers of the threats they face. In other words, what matters is that they are politically unfree. Such an approach thus allows us not only to include cases involving threats of harm, but also provides an important qualifier to it: not all harm should count towards refugeehood. Yet, it allows also for a better standard in cases in which harm is arguably absent. Political oppression, I have argued, manifests itself in many different ways other than the experience of serious harm but that are nevertheless not less normatively significant. Political oppression leads to the change of a populations' behavior in many ways, to significant changes in the lives of individuals that they are not able to battle. This forced change of behavior – adaptation to an unaccountable sovereign –

matters normatively, and it matters for refugeehood because it is the only way out other than seeking harm's way. The approach thus offers a standard for determining refugeehood that is also practically superior to standards based on harm. It does not require individuals to test the seriousness of oppressive regimes to deliver on their threats of harm. What matters for a claim to refugee status is only that they are politically oppressed and unfree.

Part 2

II. Political Rights in Displacement?

The first part of this thesis was concerned with the question “who should be recognized as a refugee?”. It discussed the normative foundations of legal and philosophical understandings of refugeehood and argued that neither persecution nor a fear of harm function as sound normative bases for understanding who should be recognized as refugees. I argued that we should instead turn to political oppression and unfreedom as a normative foundation for refugee status. Such a foundation allows building a theory that is better equipped with dealing with a number of scenarios, being better situated in explaining when and which situations involving harm should lead to refugee status, and why the absence of overt forms of harm do not bar a claim to refugee status. What matters, I have argued, is that individuals possess no recourse to the particular situations they face. They cannot control the conditions that govern their lives. Refugees, then, are not those persecuted or those fearing harm, but those politically oppressed: the unfree and the legally-politically disenfranchised. But what does such an approach entail for the rights of refugees in displacement? This is the question with which this second part of my thesis will be concerned with.

When refugees leave their countries of origin, one of the first possible points of refuge they encounter often lie directly beyond the borders their home states. Refugee camps have been established often in close proximity to the countries refugees flee from. Governed by international organizations who subscribe to the full list of human rights, including political and social rights, refugee camps may be thought to feature some political freedoms. Yet, the reader would be dearly mistaken in such a belief. The UNHCR and contracting NGO's govern the camps in a top-down fashion. Refugees living in the camps are all but politically free. But should they be? Should refugees govern refugee camps? Are the conditions in place to allow for a democratization of the camps? These are the questions of the first chapter of this second part (chapter 3 of the dissertation). In the second chapter constituting this part (chapter 4), I will ask whether refugees who have made it to the liberal democracies of the Global North should receive political rights. Both chapters will consult what political theorists call the "all-subjected principle". The principle states that all those subjected to rule should have a say in such rule. The two scenarios – refugees residing in refugee camps and refugees residing in liberal democracies – require us to turn to different facets of the principle. Asking whether refugees should govern refugee camps demands of us to show that the basics of the principle apply to this context, too. The two core questions are whether refugee camps constitute political units, and whether the condition of refugees in the camps satisfy the requirement of subjection to political rule. The specific situation of refugees living in refugee camps will also require returning to the previously discussed relationship between public and personal autonomy. It will allow us to answer the question: why should we care about refugees governing themselves? Here, I take an ecumenical approach – although democratization can be defended intrinsically, I will proceed with an instrumental account to show why democratization in cases such as refugee camps can lead to immediate benefits for refugees.

The case of refugees living in liberal democracies is somewhat different. The existence of a political unit and of political rule are quite obviously present and hence less of a concern. Whether the all-subjected principle applies to refugees in liberal democracies too will hinge on considering different aspects of the principle. I will focus on showing that there are no reasons to exclude refugees from the scope of the principle; the principle applies to refugees residing in liberal democracies, too. We will discuss whether and why transients should be excluded from possessing political rights and show that refugees are not transients in the same way as are tourists or visiting students. I will also show that the principle applies to refugees specifically, and thus despite them not yet (or never) possessing citizenship. I will thus need to show that the principle applies to non-citizen residents, and that political rights can be had without having citizenship. As you will see, the thesis advances in the order of the journey of our unnamed refugee, but also moves from a case that demands explaining the basics of the principle guiding our analysis, to a case that demands highlighting clauses that could serve as potentially excluding refugees from its purview. In both cases I hope to demonstrate the need to providing those fleeing political oppression and unfreedom with what they have lost: the ability to control the conditions that govern their life. In other words: political freedom.

3. Should Refugees Govern Refugee Camps?

3.1 Introduction

This chapter will ask the question: should refugees govern refugee camps? I will answer with ‘yes’. Before we delve into the argument, let me begin with a justification for asking the initial question and with delineating the scope of the argument.

The justification for the question is premised on what political theorists call “non-ideal theory”. So far, the ethics on refugees has primarily focused on the ethics of admission. Theories have tackled the question whom liberal democratic states should grant asylum to, how many refugees they ought to admit, who they can justifiably exclude and whether there are any cessation clauses that limit the time refugees ought to stay in such states.¹⁸⁶ Scholarship has also focused on the

¹⁸⁶ See: Matthew J. Gibney, “Liberal Democratic States and Responsibilities to Refugees,” *American Political Science Review* 93, no. 1 (1999): 169–81; Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*; David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, Mass. et. al.: Harvard University Press, 2016); Joseph H. Carens, “Refugees and the Limits of Obligation,” *Public Affairs Quarterly* 6, no. 1 (1992): 31–44; Carens, *The Ethics of Immigration*; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983), 48–51; David Miller, “Justice in Immigration,” *European Journal of Political Theory* 0, no. 0 (2015): 1–19; A notable exception is the work of Serena Parekh. See: Serena Parekh, *Refugees and the Ethics of Forced Displacement* (New York and London: Routledge, 2016); and: Serena Parekh, “Beyond the

duties liberal democracies possess towards refugees once in the country, and issues such as citizenship¹⁸⁷ and deportation.¹⁸⁸ Such research is, without doubt, still valuable, but then a question still remains: what about the ethics regarding refugee situations other than pertaining to issues of admission to liberal democracies?¹⁸⁹

We will concentrate here on one specific case – refugee camps¹⁹⁰ – and ask what the ethical prescriptions would be for a world that is non-ideal, and thus for a world in which we should not take for granted idealizations in the construction of normative arguments, but depart from descriptions of the world and the problems we encounter within it.¹⁹¹ The normative argument will

Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations,” *Philosophy and Social Criticism* 40, no. 7 (2014): 645–63.

¹⁸⁷ Joseph H Carens, “The Integration of Immigrants,” *Journal of Moral Philosophy* 2, no. 1 (2005): 29–46; Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge et. al.: Cambridge University Press, 2004).

¹⁸⁸ Matthew J. Gibney, “Is Deportation a Form of Forced Migration?,” *Refugee Survey Quarterly* 32, no. 2 (2013): 116–29.

¹⁸⁹ As part of the non-ideal analysis this chapter attempts, one should not forget that most refugees do remain outside of liberal democracies. Turkey alone hosts more refugees than all EU countries combined. For an explanation of why this is not only the choice of refugees but also due to a regime of fortification by liberal democracies, see: Matthew J. Gibney, “‘A Thousand Little Guantánamos’: Western States and Measures to Prevent the Arrival of Refugees,” in *Displacement, Asylum, Migration*, ed. Kate E. Tunstall (Oxford and New York: Oxford University Press, 2006), 139–69; Sarah Collinson, “Visa Requirements, Carrier Sanctions, ‘safe Third Countries’ and ‘Readmission’: The Development of an Asylum ‘buffer Zone’ in Europe,” *Transactions of the Institute of British Geographers* 21, no. 1 (1996): 76–90; Kim Rygiel, Feyzi Baban, and Suzan Ilcan, “The Syrian Refugee Crisis: The EU-Turkey ‘Deal’ and Temporary Protection,” *Global Social Policy* 16, no. 3 (2016): 315–20. Liberal democracies thus not only pose a danger to refugees but also contribute to protracted refugee situations in the global south. Some have made a direct connection between the two, arguing that protracted refugee situations were partly caused by the restrictive policies of liberal democratic states of the global north. See: Amy Slaughter and Jeff Crisp, “A Surrogate State? The Role of UNHCR in Protracted Refugee Situations,” *New Issues in Refugee Research Series*, 2009. For an elaboration on why liberal democracies condone human rights violations at the EU external border, see: Felix Bender, “Abolishing Asylum and Violating the Human Rights of Refugees. Why Is It Tolerated? The Case of Hungary in the EU,” in *Europe and the Refugee Response A Crisis of Values?*, ed. Elżbieta M. Goździak, Izabella Main, and Brigitte Suter (London: Routledge, 2020), 59–73.

¹⁹⁰ Not all refugees outside of liberal democracies remain in camps. UNHCR estimates that about 60% of refugees live outside of camps (not counting the millions of Palestinians living in camps).

¹⁹¹ Non-ideal theory has been described in different forms. Sometimes, it takes the form of Rawls’ non-compliance theorem, other times it means a more fact-sensitive account to normative questions, and sometimes it is conflated with normative realism. For an elaboration on what non-ideal theory is and which different forms it can take, see: Laura Valentini, “Ideal vs. Non-Ideal Theory: A Conceptual Map,” *Philosophy Compass* 7, no. 9 (2012): 654–64; John A. Simmons, “Ideal and Non-Ideal Theory,” *Philosophy & Public Affairs* 38, no. 1 (2010): 5–36; For a defense of non-ideal theory, see: David Miller, “Political Theory for Earthlings,” in *Political Theory: Methods and Approaches*, ed.

thus depart from the non-ideal situation of protracted refugee situations. That means that we will begin with the assumption that protracted refugee situations are just that: protracted, and that they will hence not change in the foreseeable future. Refugees in such situations are stuck. None of the three durable solutions outlined by the UNHCR are available to them. No option for repatriation is available, they will not be resettled and will not be locally integrated.¹⁹² Since none of these options are available to them, they typically remain in such situations for long periods of time. At the end of 2014, the UNHCR estimated that refugees remain in protracted refugee situations on average for more than 25 years.¹⁹³ Not all these refugees live in camps, of course. Some remain in rural areas, many in cities. Here, we will consider only one aspect of protracted refugee situations: the life in refugee camps, and ask how to make it more bearable to its inhabitants.¹⁹⁴ What, thus, are the ethical prescriptions in a world in which refugees do not make it to liberal democracies, but remain in refugee camps for the foreseeable future?

At this point, I would like to insert a disclaimer. The question what would make life in a refugee camp more bearable does not entail that it is not preferable that refugees make it to liberal democracies (if they so want) and enjoy the full scope of rights ideally available to refugees there,

David Leopold and Marc Stears (Oxford: Oxford University Press, 2008), 29–48 and: ; Amartya Sen, “What Do We Want from a Theory of Justice?,” *The Journal of Philosophy* 103, no. 5 (2006): 215–38.

¹⁹² Simon Turner, “What Is a Refugee Camp? Explorations of the Limits and Effects of the Camp,” *Journal of Refugee Studies* 29, no. 2 (2015): 142; James Milner, “Protracted Refugee Situations,” in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh et al. (Oxford: Oxford University Press, 2014), 151–62; See also: Jeff Crisp, “No Solution in Sight: The Problem of Protracted Refugee Situations in Africa,” 2003.

¹⁹³ See the statistics provided by UNHCR. Available under: <https://www.unhcr.org/innovation/10-infographics-that-show-the-insane-scale-of-the-global-displacement-crisis/> Last accessed: 4.3.2019.

¹⁹⁴ As you will see below, the reason for focusing on refugee camps lies in their specific evolution. Refugees living in the cities and rural areas of (often) autocratic states operate in the economic and legal systems of the host states, being governed by their political systems. The case of refugees living in refugee camps differs in this regard. The retreat of the host states from the camps allows us to ask whether democratization is possible and normatively desirable in their specific case. The same does not apply to refugees living in cities or rural areas of autocracies. Demanding democratization would be demanding the democratization of the entire host state. This can be done, of course, but such analysis would then move from a non-ideal to an ideal level. It requires too many other assumptions to fall in place before it can materialize.

just as scholarship on the ethics of admission of refugees does not entail that it wouldn't be preferable if there were no refugees at all, no wars and persecuting states. It does not mean that there are not better options for refugees other than staying in camps. Far from it. What it does mean, however, is that we cannot ignore the conditions that we find. Camps exist and the protracted nature of refugee situations indicate that they will remain for the foreseeable future. We will not engage with the question whether camps are good or bad.¹⁹⁵ Rather, we intend to ask: given the existence of camps, how should they look like? What would make life in a camp ethically acceptable? How can life in camps be improved? Now, most camps subject their inhabitants to a cruel form of life. Scholarship by anthropologists and sociologists has shown the detrimental conditions existing in camps.¹⁹⁶ Refugees suffer from human rights abuses. They suffer from threats of violence, are restricted in their right to free movement¹⁹⁷, the right to work¹⁹⁸ as well as rights in their freedom of expression and assembly.¹⁹⁹ Life in camps is often confined to

¹⁹⁵ For the benefits of refugee camps, and why states often prefer refugee camps as the primary form of sanctuary in the global south Jeff Crisp and Karen Jacobsen, "Refugee Camps Reconsidered," *Forced Migration Review* 3, no. 1 (1998): 27–31; Oliver Bakewell, "Encampment and Self-Settlement," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh et al. (Oxford University Press, 2014), 134; Elizabeth Holzer, "What Happens to Law in a Refugee Camp?," *Law and Society* 47, no. 4 (2013): 846; For arguments against refugee camps as solutions to refugee movements, see: Barbara Harrell-Bond, "Camps: Literature Review," *Forced Migration Review* 2 (1998): 31–33; Richard Black, "Putting Refugees in Camps," *Forced Migration Review* 2 (1998): 4–7; Tania Kaiser, "Between a Camp and a Hard Place: Rights, Livelihood and Experiences of the Local Settlement System for Long-Term Refugees in Uganda," *The Journal of Modern African Studies* 44, no. 4 (2006): 597–621.

¹⁹⁶ Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York and Oxford: Berghahn Books, 2005) Chapter 4; Jeff Crisp, "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps," *African Affairs* 99 (2000): 601–32; Crisp, "No Solution in Sight: The Problem of Protracted Refugee Situations in Africa"; Bram J. Jansen, "Two Decades of Ordering Refugees: The Development of Institutional Multiplicity in Kenya's Kakuma Refugee Camp," in *Disaster, Conflict and Society in Crises*, ed. Dorothea Hilhorst (New York: Routledge, 2013), 114–31.

¹⁹⁷ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 179–82; Maja Janmyr, "Spaces of Legal Ambiguity: Refugee Camps and Humanitarian Power," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 7, no. 3 (2016): 413–27; Kaiser, "Between a Camp and a Hard Place: Rights, Livelihood and Experiences of the Local Settlement System for Long-Term Refugees in Uganda."

¹⁹⁸ Alexander Betts, Naohiko Omata, and Olivier Sterck, "Refugee Economies in Kenya" (Oxford, 2018); Guglielmo Verdirame, "Human Rights and Refugees: The Case of Kenya," *Journal of Refugee Studies* 12, no. 1 (1999): 57.

¹⁹⁹ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 198–200; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge et. al.: Cambridge University Press, 2011), 286.

distribution (and as we shall see, redistribution) of aid. What is then often suggested is that refugees ought to have certain rights that prevent these violations. In what follows, I will present an argument for why democratizing refugee camps will help in that regard. I will first outline why I employ the all-subjected principle over other principles of democratic inclusion and which conditions must hold for the principle to apply to the specific case of refugee camps. Then, I will show that refugee camps constitute distinct governance structures that subject individuals to rule. Finally, I will demonstrate that democratization can in fact have immediate and beneficial impact on the lives of refugees in the camps.

3.2 Democratic justification: the all-subjected principle and autonomy

Why should refugees govern themselves? To answer this question, I turn to the “all subjected principle”. This principle simply states that all those subjected to rule within a political unit ought to have a say in such rule.²⁰⁰ For the principle to apply, two conditions need to be fulfilled that both reduce the number of presuppositions and make the argument more persuasive than other forms of democratic justification if these conditions are fulfilled. What is required is 1) a distinct governance structure, which we identify as a political unit, and 2) subjection to rule.²⁰¹

²⁰⁰ See: Sofia Näsström, “The Challenge of the All-Affected Principle,” *Political Studies* 59 (2011): 116–34 and: ; Nancy Fraser, “Abnormal Justice,” *Critical Inquiry* 34, no. 3 (2008): 393–422.

²⁰¹ Näsström, “The Challenge of the All-Affected Principle,” 117; Fraser, “Abnormal Justice,” 411.

Merely being affected by a decision is not enough for a claim to participate. More is required. Basing a claim to participation on being affected by a decision would lead to a “boundary problem” of demarcating the demos. It would either lead to giving everyone a say who is somehow affected by a decision, which would potentially give way to a “reductio ad absurdum of the butterfly effect”, as every decision affects everyone in some way somehow.²⁰² Alternatively, it would lead to the problem of discerning a unified demos if the group that is affected by a decision changes with every decision taken.²⁰³ Finally, the impact of a decision can vary across different people, making it difficult to assess the “morally relevant” relations for constituting a demos.²⁰⁴ One would need to set a threshold for how much a decision is to affect a person.²⁰⁵ And how should this be done? Perhaps even more problematic: who should participate in making *that* decision? For answering the question whether a specific person or group of persons should have a say in a decision taken, it would thus be easy to consult and apply an “all-affected principle”, and very hard to find reasons why they should not. For our purpose, it will then not be enough that refugees are affected by decisions taken within refugee camps. We must show that they are not only affected but subjected to rule – subjected to a governance structure that sets the ground rules for interaction.²⁰⁶

²⁰² See this objection in: Fraser, “Abnormal Justice,” 411; and Nancy Fraser, “Who Counts? Dilemmas of Justice in a Postwestphalian World,” *Antipode* 41 (2010): 292; This is especially the case since one could be said to be affected by a decision not only through its immediate outcome, but through the courses of action that result from such decision and, in fact, from the courses of action that do not. One could be said to be affected by a decision as soon as it presents a form of opportunity cost. See for this and other objections: Robert E. Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” *Philosophy & Public Affairs* 35, no. 1 (2007): 40–68.

²⁰³ That is, of course, if we are interested in discerning a local demos. The argument of the all-affected principle may be sufficient for more ideal endeavors such as the justification of world-wide political institutions. We will return to it in the next chapter.

²⁰⁴ Fraser, “Who Counts? Dilemmas of Justice in a Postwestphalian World,” 292.

²⁰⁵ Some ways in which the interests of a person may be affected may lead to a claim to be considered in the decision making process, but is not itself sufficient for claiming a political right to participation. See: Arash Abizadeh, “On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem,” *American Political Science Review* 106, no. 4 (2012): 867–82; cf. Ludvig Beckman, *The Frontiers of Democracy: The Right to Vote and Its Limits* (New York: Palgrave Macmillan, 2009), 47.

²⁰⁶ cf. Fraser, “Abnormal Justice,” 411.

We will here also introduce a distinction between coercion and subjection to rule. Although many formulations of the “all-coerced principle” cannot be clearly distinguished from the all-subjected principle in that they both refer to generalized subjection to the coercive power of a political unit²⁰⁷, some formulations of the all-coerced principle refer to single coercive decisions as being sufficient to trigger a right to participation.²⁰⁸ This understanding of the all-coerced principle has led to debates discussing whether single potentially coercive decisions violate the autonomy of individuals or whether they sometimes form restrictions of the set of choices available to individuals that do not require democratic inclusion.²⁰⁹ We can here set aside the debate surrounding the autonomy infringing aspects of single decisions, not because we could not show that this applies to refugee camps, but because we do not need to show that refugees in camps should have a right to govern the camps based only on the impact of specific decisions. We will show that a more stringent version of the all-subjected principle applies to the context of refugee camps. The all-subjected principle can be understood as claiming that all those subjected to political rule in a given territorially bounded political unit should have a say in such rule. We interpret subjection to rule not as being subject to potential coercion with regards to specific decisions, but as subject to continuous threats of coercion. If a person is subject to the coercively

²⁰⁷ Antoinette Scherz, “The Legitimacy of the Demos: Who Should Be Included in the Demos and on What Grounds?,” *Living Reviews in Democracy* 4 (2013): 4; Marco Verschoor, “The Democratic Boundary Problem and Social Contract Theory,” *European Journal of Political Theory* 17, no. 1 (2018): 3–22; David Owen, “Constituting the Polity, Constituting the Demos: On the Place of the All Affected Interests Principle in Democratic Theory and in Resolving the Democratic Boundary Problem,” *Ethics & Global Politics* 5, no. 3 (2012): 129–52.

²⁰⁸ Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (London: Springer, 2015), 95.

²⁰⁹ Arash Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,” *Political Theory* 36, no. 1 (2008): 37–65; David Miller, “Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh,” *Political Theory* 38, no. 1 (2010): 111–20; Arash Abizadeh, “Democratic Legitimacy and State Coercion: A Reply to David Miller,” *Political Theory* 38, no. 1 (2010): 121–30.

backed collectively binding decisions in a political unit, she will also have satisfied the less strict condition of being coerced by specific decisions.

The all-subjected principle then possesses advantages with regards to other forms of democratic justification. It does not require pre-political membership in the form of nationality or citizenship. But neither does it result in a boundless demos as would be the risk with applying an all-affected principle. What is required is merely subjection to rule in a territorially bounded governance structure we call a political unit. Traditionally, these were assumed to only incorporate states. But political units can differ in form. We can both observe political units within states, such as municipalities, counties, cities, regions, or federal units, as well as transnational political units such as the European Union. All that is necessary is that they form governance structures distinct from other governance structures. While subjection to rule allows us to identify “who” has a claim to political participation, the existence of a distinct governance structure is necessary to identify “where” it should apply. It allows us to identify within which institutions persons have a right to political participation. Sometimes, distinct governance structures may be identified by existing borders. Yet, this is not always the case, as subjection to rule may stretch beyond or not cover the territory a political unit claims to control. Historically, we can observe that territorial boundaries have played a significant, yet not a necessary condition for political units to exist.²¹⁰ While refugee camps, as we shall see, are often territorially bounded, what matters for the all-subjected principle to apply is merely that within distinct governance structures, individuals are subjected to political rule. What is necessary, thus, is that these governance structures exert political rule understood as making collectively binding decisions.

²¹⁰ See: Hendrik Spruyt, “The Sovereign State and Its Competitors: An Analysis of Systems Change” (Princeton: Princeton University Press, 1994).

But even if those conditions apply, why would we care about the principle that all those subjected to rule should be its authors? We have provided an answer to this question in chapter two, when discussing the relationship between political and personal autonomy. We can here summarize the three ways in which political autonomy matters with regards to the personal autonomy of individuals, that we will later (last section of this chapter) use to show how democratic structures could instrumentally benefit refugees living in refugee camps. To recapitulate, public autonomy leads to improving the lives of refugees in helping to 1. *Safeguard* their personal autonomy through being in control of the conditions that govern their everyday lives, 2. *define* what violates their personal autonomy and what could tentatively amount to legitimate restrictions and 3. *inform* decision-makers of threats and violations of their autonomy.

3.3 The Conditions of the All-Subjected Principle: Do They Hold for Refugee Camps?

Does the all-subjected principle apply to the case of refugee camps, too? And if it does, how would it contribute to resolving the issues we witness arising in refugee camps on a frequent basis? I will answer these questions in turn, showing first why the conditions for the all-subjected principle also hold for refugee camps. Then I will show how democratizing refugee camps can help in resolving issues pertaining to the protection of rights of refugees, the identification of threats and the information of decision-makers in refugee camps.

Recall that the two conditions that must be met for the all-subjected principle to hold are: first, a distinct governance structure, forming a political unit; second, subjection to political rule of its inhabitants. These conditions hold for refugee camps, too.

While refugee camps are established on the territory of host states and should, according to international refugee law, be part and parcel of their legal and economic systems, *de facto*, they are not. Refugee camps are often located in remote areas of host countries. Often in relative proximity to the countries refugees have left, they are typically far away from bigger cities of host countries, and function as near complete separate entities. Many camps have developed their own distinct social, economic, legal and even political systems. This means that refugees in camps are subjected to rules and regulations specific to the camps and distinct from those of the host states. Thus, although not ideal, refugee camps are already largely isolated from the broader institutional context of the host country. This provides the reason for focusing on the right to self-governance within the camps, as opposed to asking whether refugees should have a right to participate in the host countries' political institutions. We will return to the latter scenario in the next chapter, when we discuss whether refugees should receive political rights in liberal democracies.

Arguing for the right to self-governance does not aim at justifying or further entrenching the existence of refugee camps, but rather at bettering the situation of refugees in an already entrenched setting. This does not, however, mean that refugee camps operate autarkically. As we shall see, they have developed their own economic, legal and political microcosms, given the parameters that the host states set. Host states provide different degrees of leeway to refugee camps, due to the concern with the effects that refugee camps may have on surrounding communities. Some have implemented specific restrictions on the economic activities of refugees in order to protect local communities, others have implemented varying degrees of freedom for refugees to self-regulate

security or adjudicate crimes. For this reason, I will not argue for specific democratic institutions. Which democratic institutions and which powers refugees ought to possess depends very much on the different contexts that refugees encounter. Some powers may appear to be immediately feasible for refugees to assume in some contexts, while the parameters set by a host state may exclude the same range of options for other camps. Similarly, different traditions, experiences and (ethnic) compositions within camps make prescribing specific democratic institutions for all camps difficult. While consociationalism, for instance, may be best suited for some, the conditions within other camps may lead to different democratic institutions being preferable. I will thus not ask which democratic institutions are best, nor which specific powers refugees should assume across all camps. This would need to be determined for each specific camp. Just as with different states, different democratic institutions may seem differently well suited depending on the specific contexts. Sidelining the important question whether camps are supposed to implement majoritarian, proportional, mixed or consociationalist systems does not, however, bar asking the question of justification for democratic rule. I will thus not ask how democratic rule should look like but present an argument for why refugee camps should be ruled democratically. Although refugee camps thus differ in their individual set ups and the specifics of the restrictions imposed, the following section will demonstrate why the conditions for the all subjected principle to apply hold in a generalized fashion for closed refugee camps, too. The claim this article makes will thus be generalizable to all refugee camps that satisfy the two conditions named. We will now turn to the different distinct subsystems that have developed in refugee camps: economic systems, legal systems, and political systems.

3.3.1 Markets: the distinct economic systems of refugee camps

Markets do develop in refugee camps, even though they face severe restrictions from host countries and camp administrations. According to international law, refugees ought to have the right to work within host states.²¹¹ This is often not respected. While host states often deny refugees the right to work, their retreat from refugee camps and the establishment of legal pluralism²¹² allow refugees to establish markets and work within refugee camps, as is the case in the two big refugee camps in Kenya and elsewhere such as in Thailand.²¹³ Depending on the region, additional restrictions on the economic behavior of refugees living in refugee camps may be applied by host states.²¹⁴ The Kakuma refugee camp, for example, denies refugees the right to produce charcoal or hold livestock as both make for the main income sources of the local Turkana.²¹⁵ Camp administrations often restrict economic activity additionally. One such example is the necessity to seek permits from the camp commander for travelling beyond the perimeters of the camps.²¹⁶ Refugees may, in principle obtain such permits for either medical or economic reasons.²¹⁷ In practice, however, refugees are often denied permits to travel for economic reason without justification. It often takes a long time

²¹¹ See: UN General Assembly, Convention and Protocol Relating to the Status of Refugees, Article 17 (1).

²¹² Meaning that states allow for the existence of multiple legal orders within its territories. We will discuss the creation of distinct legal orders in refugee camps further below. See also: Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (New York: Routledge, 2014).

²¹³ Betts, Omata, and Sterck, "Refugee Economies in Kenya," 22; Regarding Burmese refugee camps in Thailand, see: McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism*, 105; For Uganda, see: Alexander Betts et al., *Refugee Economies: Forced Displacement and Development* (Oxford: Oxford University Press, 2017), Chapter 6.

²¹⁴ Karen Jacobsen, "Livelihoods in Conflict: The Pursuit of Livelihoods by Refugees and the Impact on the Human Security of Host Communities," *International Migration* 40, no. 5 (2002): 95–123.

²¹⁵ Betts, Omata, and Sterck, "Refugee Economies in Kenya," 23; For restrictions in the Dadaab camp, see: Cindy Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (New York and Oxford: Berghahn Books, 2007), 81.

²¹⁶ Eric Werker, "Refugee Camp Economies," *Journal of Refugee Studies* 20, no. 3 (2007): 464.

²¹⁷ Betts, Omata, and Sterck, "Refugee Economies in Kenya," 24.

to receive such a permit, and even if one does, they are restricted in duration, not allowing refugees enough time to travel the often-long distances to the most lucrative markets beyond the camp. These restrictions obviously impact economic performance, but markets still exist within the camps.²¹⁸ Refugees operate small businesses, trade humanitarian aid for food baskets more appropriate to their diets or for other goods such as cooking fuel or other necessities.²¹⁹ Refugee camp economies function as distinct economic microcosms, which even feature their own taxation systems. In some camps, the host governments do not levy any taxes at all. In others, municipal taxes may apply, but the camp authorities also charge additional taxes in the form of market participation fees, annual taxes or per bags of produce purchased.²²⁰ This is not to say that no ties exist between refugee camp economies and the economy of the host state. Supply chains connect refugee camps to markets within the host state.²²¹ The restrictions on travel for refugees often mean lucrative opportunities for locals who offer transport services of goods produced in refugee camps, often for incredibly high prices.²²² Refugee camp economies also experience capital injections from remittances sent from abroad.²²³ All these, however, do not change the fact that refugee camp economies have developed separately, featuring their own economic imperatives, regulations, customs and connections. Just as the development of markets as autonomous systems in different

²¹⁸ For the difficulties of obtaining travel documents for economic purposes and the impact on economic performance in refugee camps, see: Werker, "Refugee Camp Economies," 464–65.

²¹⁹ For trade and other forms of capital generation, including trade of humanitarian aid and food rations to satisfy traditional diets in refugee camps in Northern Kenya, see: Marc-antoine Perouse de Montclos and Peter Mwangi Kagwanja, "Refugee Camps or Cities? The Socio-Economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya," *Journal of Refugee Studies* 13, no. 2 (2000): 212, 216–17; For an overview of livelihood activities in Kakuma refugee camp, see also: Naohiko Omata, "Refugee Economies in Kenya Preliminary Study in Nairobi and Kakuma Camp," Refugee Studies Centre Working Paper Series, 2016, 15–16; For economic activities in the Dadaab camp, see: Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya*, 85–86.

²²⁰ Werker, "Refugee Camp Economies," 467.

²²¹ Betts, Omata, and Sterck, "Refugee Economies in Kenya," 27; Betts et al., *Refugee Economies: Forced Displacement and Development*, 121–26.

²²² Werker, "Refugee Camp Economies," 467–68.

²²³ Montclos and Kagwanja, "Refugee Camps or Cities? The Socio-Economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya," 216.

regions of the world have not meant an autarkic closure and have developed in unison with ties to other economic regions of the world, refugee camp economies are not completely cut off from markets in their host or, in fact, their states of origin. Capital injections, imports and exports, however, are processed internally according to the specific rules, regulations and practices of refugee camps – and this makes them distinct economic systems from those of host or origin countries.

3.3.2 The law: the distinct legal systems of refugee camps

From the description of the distinct economic systems developing in refugee camps, one may already sense differences in regulatory frameworks between refugee camps and host states. Refugee camps often develop de facto separate legal systems from those of host states. Many scholars argue that refugee camps are devoid of all law.²²⁴ They argue that refugee camps are spaces governed in modes of exceptionalism and by means of decisions akin to decrees. This is, however, only the case if one observes refugee camps with the expectation of finding the legal structures of the host states. Then, indeed, refugee camps are devoid of law. If one looks for legally binding structures, the administration of the law and for court systems different than those of the

²²⁴ See especially scholarship that operates with the concept of “bare life”, suggesting that de facto no law applies in refugee camps. While there is certainly some truth to the claim that national law does not apply and that many decisions within refugee camps are made without being subject to checks and balances, we can observe the establishment of alternative systems of adjudication and conflict settlement. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 168 et. seqq.

host states, however, one will find distinct legal systems developed in refugee camps.²²⁵ Despite their international legal obligations to grant refugees access to the domestic justice system, refugees living in camps are often denied such access. There are various reasons for this, ranging from the simple fact that refugee camps are often located in remote areas of the country, to the host state simply refusing to properly administer the law in refugee camps.²²⁶

This leaves refugee camps to themselves, but it does not coincide with a complete absence of legal structures. Rather, it has given rise to the creation of distinct legal systems within the camps. Most crimes and disputes occurring in camps are also resolved within them.²²⁷ Again, this may either be because refugees cannot access the host state's justice system, because of pressure within the camp, or because of issues of trust regarding the adjudication of the host state.²²⁸ In most refugee camps, traditional justice systems have replaced the justice system of the host country.²²⁹ Even though their power is limited to resolving personal and civic issues, they decide over a wide range of cases stretching from rape to defilement and even murder.²³⁰ One example of traditional justice systems evolving in camp settings are the Kakuma and Dadaab refugee camps in Kenya. In Kakuma, Sudanese refugees have established bench courts that apply a mix of Sudanese customary and

²²⁵ We do not need to understand legal systems as hierarchical structures in the Kelsenian sense. No reference to higher levels of values and norms is necessary for a legal system to exist in the positivistic sense. Legal operations refer to any communication that is oriented by the binary code legal/illegal and that applies to disputes that need to be resolved with reference to applicable law. Understood in this way, legal structures can appear as positive law in an evolutionary sense wherever legal communication reproduces itself. It does not require a holistic framework and is (ultimately) self-set. In short: a legal system is understood as an autopoietic social system in which its operations reproduce themselves and thus exists wherever people communicate in the language of law, and that means with the aforementioned binary scheme legal/illegal. This means that there is no internal barrier against legal systems to exist beyond the boundaries of nation states. See: Niklas Luhmann, *Law as a Social System* (Oxford and New York: Oxford University Press, 1993).

²²⁶ For barriers to the justice systems of host states, see: Rosa da Costa, "The Administration of Justice in Refugee Camps: A Study of Practice," *Legal and Protection Policy Research Series*, 2006, 27–31.

²²⁷ McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism*, 12–13; Ilse Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives," *Refugee Reports* 27, no. 2 (2006): 2.

²²⁸ da Costa, "The Administration of Justice in Refugee Camps: A Study of Practice," 37.

²²⁹ See: Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives."

²³⁰ Griek, 3; See also: Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 122.

sharia law. When a conflict occurs in the camp, refugees first turn to their group leaders in their respective blocks, refugee caseworkers, or Sudanese security officials, who in turn refer the case to elders for arbitration in the bench courts. Only when these fail to resolve the issue, the case may be reported onwards to the UNHCR protection unit, other NGO's or, ultimately, to the Kenyan police. Dadaab features a similar system, albeit without specific locations for the proceedings of the Somali Maslaxad courts.²³¹ The Kenyan camps are not, however, unique in this regard. Conflict resolution is left to the inhabitants of camps in other countries as well, as is the case for the Burmese refugees in Thailand, and in the refugee camps of Ghana, Ethiopia, Pakistan, Bangladesh, and Yemen.²³²

The legal systems that have developed in the camps are not only distinct in terms of adjudication of conflict. They are also separate from the legal systems of the host states in terms of the execution of sentences. They reach and execute these independently from the host state, often with the active help of the UNHCR.²³³ The camps often operate their own prisons. In Kenya each bench court runs its own detention cells.²³⁴ Sentences do not only include payment of fines and compensation to the victims or their families, but also corporeal punishment such as lashing and caning or imprisonment and do not necessarily correspond with the legal codes of the host countries.²³⁵ The evolution of distinct legal systems in refugee camps thus also poses dangers to refugees. The courts are not subject to rule of law regulations, meaning that their power to adjudicate often extends to

²³¹ Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives," 2–4.

²³² For the case of Burmese refugees in Thailand, see: McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism*, 12–13; For the case of refugee camps in Ghana, see: Holzer, "What Happens to Law in a Refugee Camp?," 858; See also: da Costa, "The Administration of Justice in Refugee Camps: A Study of Practice," 37.

²³³ The courts and prison cells are funded by the UNHCR. See: Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 123.

²³⁴ Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives"; Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 121–22.

²³⁵ See: Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives," 3–5; See also: Verdirame, "Human Rights and Refugees: The Case of Kenya," 63.

an unchecked power to legislate.²³⁶ This leads to the elders regularly abusing their power. The fines and monetary compensations that they impose on the perpetrators of crimes and misdemeanors often do not end up with the victims and their families but are kept by the elders.²³⁷ Such a system that runs largely independently from the host state's judicial system, in which the elders are unchecked and representation of minorities and women is rare, is wide open to discrimination. Consequently, such vulnerable groups and individuals often suffer under the sentences reached in the camps. For instance, when unmarried women are raped or abducted in the camps, the perpetrators are often charged with paying a compensation or fine to the family and, if they accept the ruling, the woman is sent to live with the rapist or abductor.²³⁸ If this happens, the cases do not appear as rape or abduction cases, but are treated as cases in which the man has failed to pay a dowry or compensation and appear hence as elopement, adultery or dowry issues. The lack of checks and balances on the courts thus often especially hurt the ones most vulnerable and results in a blatant lack of concern for women's rights and well-being. Without such controls²³⁹, the legal systems of refugee camps often suffer from lacking key features of the rule of law such as the equality before the law or due process.

²³⁶ Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives," 5; da Costa, "The Administration of Justice in Refugee Camps: A Study of Practice," 8.

²³⁷ Verdirame, "Human Rights and Refugees: The Case of Kenya," 63.

²³⁸ Griek, "Traditional Systems of Justice in Refugee Camps: The Need for Alternatives," 3–4; for discrimination against women, see also: Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 121–23.

²³⁹ We could think of the introduction of higher courts, but what must be addressed is the way these courts are put into place so that dominant power structures are not reproduced. Think of the election of judges by a representative assembly, or by direct election.

3.3.3 Power: the distinct political systems of refugee camps

The retreat of host states from refugee camps leaves the UNHCR and contracting NGOs in charge of a clearly defined territory with its own population, legal and economic systems and its own governance structure.²⁴⁰ The competencies of host states are transferred nearly completely to humanitarian actors, leaving them in charge not only of organizing security, but also with significant power through setting the ground rules of interaction by controlling the distribution and composition of aid, registering and documenting refugees, administering and managing the camps, ensuring access to shelter, food, water, health care and education.²⁴¹ They have assumed the role of sovereigns in refugee camps, ruling without checks and balances.²⁴²

The UNHCR governs refugee camps in several distinct ways. Their power begins quite literally at the camps' doorsteps. In many cases, the host states have ceded the responsibility to determine refugee status to the UNHCR, giving it the power to decide over access to the camps and, in a metaphorical but not too distant way, over "citizenship" within it.²⁴³ The power of the UNHCR does not extend in any direct way beyond the perimeters of the camps. Locals have no access to

²⁴⁰ Slaughter and Crisp, "A Surrogate State? The Role of UNHCR in Protracted Refugee Situations," 8.

²⁴¹ cf. Simon Turner, "Negotiating Authority between UNHCR and 'The People,'" *Development and Change* 37, no. 4 (2006): 767.

²⁴² Some even argue that the humanitarian government possesses resorts akin to government ministries. For this and more generally the idea of humanitarian government in refugee camps, see: Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government* (Cambridge and Malden: Polity Press, 2011), 81, 201; That the UNHCR de facto governs refugee camps is a little disputed fact amongst scholars in refugee studies. See: Barbara Harrell-Bond, "Can Humanitarian Work with Refugees Be Humane?," *Human Rights Quarterly* 24, no. 1 (2002): 59; See also: Janmyr, "Spaces of Legal Ambiguity: Refugee Camps and Humanitarian Power," 414; Jansen, "Two Decades of Ordering Refugees: The Development of Institutional Multiplicity in Kenya's Kakuma Refugee Camp," 116; Ralph Wilde, "Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of 'Development' Refugee Camps Should Be Subject to International Human Rights Law," *Yale Hum. Rts. & Dev. L.J.* 1, no. 1 (1998): 107.

²⁴³ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 81 et. seqq.; cf. Harrell-Bond, "Can Humanitarian Work with Refugees Be Humane?," 64; See also: Niamh Kinchin, "The Implied Human Rights Obligations of UNHCR," *International Journal of Refugee Law* 28, no. 2 (2016): 251–75.

the services offered within the camps and do not receive aid. Even though the presence of refugee camps severely impacts the regions around them, they are part and parcel of different regulatory, economic and political systems, which may, at best, be irritated but are never directly controlled in the way these systems operate in the refugee camps.²⁴⁴

The UNHCR and contracting NGOs also control the budget and the exercise of nearly all services provided in the camps. Education, health and sanitary services are coordinated by them, with refugee employees on their payroll. The same is the case for security officers. Even though host states have committed to providing for security within the camps, refugee security officers paid and coordinated by the UNHCR have taken over policing functions in many cases.²⁴⁵ The UNHCR is also in charge of the distribution and composition of aid. To that end, it regularly performs headcounts in the camps in order to re-evaluate needs and food rations.²⁴⁶ The power to distribute food should therefore not only be regarded as a humanitarian service and thus as only a positive sanction. Dependency on food rations, especially in the light of refugees being economically constrained, can be easily turned into threats of negative sanctions. The power to distribute food is also the power to withhold it. In two separate occasions this power was exercised by the UNHCR in the Kakuma refugee camp. Following a protest over a change in the distribution of aid in 1994, the UNHCR simply suspended the distribution of food for 21 days and again in 1996 for 14 days.²⁴⁷

²⁴⁴ See: Montclos and Kagwanja, "Refugee Camps or Cities? The Socio-Economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya," 218; See also: Betts, Omata, and Sterck, "Refugee Economies in Kenya."

²⁴⁵ For security in refugee camps in Tanzania, see: Turner, "Negotiating Authority between UNHCR and 'The People,'" 763.

²⁴⁶ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 139; See also: Barbara Harrell-Bond, Eftihia Voutira, and Mark Leopold, "Counting the Refugees: Gifts, Givers, Patrons and Clients," *Journal of Refugee Studies* 5, no. 3/4 (1992): 205–25.

²⁴⁷ See: Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 193–94.

The UNHCR quite literally sets the ground rules for interaction in the camps and has not shied away from disciplinary actions in cases in which refugees have disobeyed. In several instances, camp administrations have simply deported critical refugees to other camps or fired them when they were employed by humanitarian agencies.²⁴⁸ Even when refugees were allowed to set up popular committees in the camps²⁴⁹, the UNHCR has remained in charge.²⁵⁰ Where refugees are allowed to delegate representatives, they assume roles akin more to those of aides to the camp administration rather than representatives of their constituency. Often, these representatives are therefore distrusted by the refugees who see them instead as collaborators of the camp commanders. This is not surprising. These committees usually do not possess any real decision-making power and the representation of refugees is allowed only as long as the camp administration sees it fit.²⁵¹ In several instances, the UNHCR has simply cancelled elections when the outcomes were not to their liking or have exchanged elected representatives with refugees more friendly to the camp administration.²⁵² The UNHCR and contracting NGOs thus exercise political rule in the camps not only by means of administering the services and controlling the rules tied to

²⁴⁸ See: Jansen, “Two Decades of Ordering Refugees: The Development of Institutional Multiplicity in Kenya’s Kakuma Refugee Camp,” 126; Clara Lecadet, “Refugee Politics: Self-Organized ‘Government’ and Protests in the Agamé Refugee Camp (2005–13),” *Journal of Refugee Studies* 29, no. 2 (2016): 197; Verdirame, “Human Rights and Refugees: The Case of Kenya,” 64–65.

²⁴⁹ These are, for example, Camp Management Committees, Block Management Committees and Food Management Committees of Burmese refugees in Thailand and Bangladesh. Such committees, however, do not provide refugees with any real powers, but are used as a tool by international organizations to gather information while remaining in power themselves (setting goals, making decisions). Elisabeth Olivius, “(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid,” *Journal of Refugee Studies* 27, no. 1 (2013): 48–49.

²⁵⁰ For popular committees in the Palestinian refugee camps in Lebanon, see: Sari Hanafi and Taylor Long, “Governance, Governmentalities, and the State of Exception in the Palestinian Refugee Camps of Lebanon,” *Journal of Refugee Studies* 23, no. 2 (2010): 134–59.

²⁵¹ Olivius, “(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid,” 48.

²⁵² See: Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government*, 156–57.

accessing these, but also by wielding direct executive power over individuals.²⁵³ They make collectively binding decisions within the perimeters of the camps in setting the ground rules for interaction within them.

3.3.4 A Summary

To bring these empirical observations into theoretical context, we can revisit the two conditions that need to be fulfilled for the all-subjected principle to apply and situate our observations with regards to them. The first condition is the existence of distinct governance structures that enable us to speak of separate political units. The evolution of distinct economic systems operating according to their own logics and regulations, the establishment of legal systems that adjudicate separately and feature distinct structures from those of host states and finally the creation of political systems that differ from those of host states point towards the existence of distinct governance structures within the camps. This is not to say that the legal structures that have evolved and by which the daily life of refugees in the camp is normatively ordered is that of a legal system we would endeavor to create. Neither is the political system one that we seek when we talk about democratic governance. What we witness, however, is that they form spaces of social interaction that are sufficiently different from those of host states to the degree that we can speak of distinct governance structures. Refugees abide by legal structures that possess authority only

²⁵³ Janmyr, “Spaces of Legal Ambiguity: Refugee Camps and Humanitarian Power,” 414; For other forms of control, see: Rose Jaji, “Social Technology and Refugee Encampment in Kenya,” *Journal of Refugee Studies* 25, no. 2 (2011): 221–38.

within the confines of the camp. They are bound by the decisions made by Humanitarian agencies, which rule not primarily by law, but by decisions akin to decrees. This brings us to the second condition mentioned: individuals must be subjected to political rule. Refugees are subjected to political rule primarily though being subject to the decisions made by humanitarian organizations. Even where other actors step in – even refugees in their capacity to police, or in their capacity as members of specific councils - humanitarian agencies such as UNHCR and contracting NGO's function as de facto sovereigns. They are the ultimate instance of decision-making within the camps. In the words of some theorists, they are those who decide over the exception.²⁵⁴ Practically, they oversee and govern nearly all aspects of life in refugee camps, ranging from controlling the distribution and composition of aid, registering and documenting refugees, administering and managing the camps, ensuring access to shelter, food, water, health care and education. The humanitarian government, possessing resorts akin to government ministries, set the ground rules for interaction within the camps. This is not to say that they rule only by threatening negative sanctions. They offer a wide array of positive sanctions for correct behavior – positive sanctions that can be taken away once refugees no longer abide. This allows us to ultimately speak of refugee camps as distinct political units within which collectively binding decisions subject refugees to political rule.

The conditions for the all subjected principle to apply, thus hold. Refugee camps have developed their own economic, legal and even political systems. They function as separate entities that subject individuals to rule in a clearly distinct governance structure making for a specific political unit. Hence, they ought to have a say in such rule.

²⁵⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, ed. George Schwab (Chicago and London: The University of Chicago Press, n.d.), 5.

3.4 Why Should Refugee Camps Govern Themselves?

So far, we have established that the conditions for the application of the all-subjected principle hold. What remains is to show what makes political self-government in refugee camps valuable. To answer this question, we will apply our three arguments for the importance of public autonomy for personal autonomy to refugee camps. Recall that public autonomy matters for 1) controlling the conditions in which refugees live and thus for protecting personal autonomy, 2) defining what constitutes a violation and what may count as a legitimate restriction of personal autonomy, and 3) informing decision-makers of violations of personal autonomy in refugee camps.

3.4.1 Safeguarding personal autonomy

The lack of security for refugees and the violation of their human rights in refugee camps is often a consequence of a lack of accountability of the institutions that govern them. One example is the prevalence of sexual violence in refugee camps. The lack of accountability of institutions in the camps results in such issues often remaining unaddressed, where women have no power of changing structures and rules that endanger them, or remain unresolved and hidden where the perpetrators are the ‘protectors’ in local and state security forces. In many instances, cases of sexual violence also remain unresolved and hidden because the perpetrators are part of the governing bodies. Rape at the hand of police and security forces is not uncommon, and the powerless positions of refugees leave little room for reporting and charging those responsible. If

the institutional structures of refugee camps would put women in a position to change the conditions in which they live, much would be won. In some instances, one of the biggest problems is that women are not allowed to move away from the perpetrators of sexual violence and are, as a consequence, in constant danger without being able to escape.²⁵⁵

In the Dadaab refugee camp, women are required to fetch firewood as cooking fuel from outside of the camps, and this is where 80% of the rapes occur that make for a near daily phenomenon in the lives of the women in the camp.²⁵⁶ If these women were in a position of power that would allow them to control the conditions that govern their lives, these structures and practices that pose imminent dangers to them could be easily challenged. Such structures should be more than window-dressing practices of inclusion. They should not include women only for offering opinions on already developed agendas and questions set by others.²⁵⁷ We can think of democratic institutions that feature gender specific working groups at stages of agenda setting, that guarantee a representative share in the legislative assembly or that allow women to be primary decision makers in areas that especially concern them. Such structures could lead to relatively simple solutions protecting the safety and interests of women in the camps. One such solution would, for instance, be to simply require men to fetch the firewood beyond the perimeters of the camps instead of sending women into scenarios of danger.²⁵⁸ Since rapes also often occur at night, women have pressed for installing lighting systems along the main paths of the camps.²⁵⁹ Another structure giving rise to sexual abuse is tied to the distribution system for food. Where men are in charge for

²⁵⁵ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 143.

²⁵⁶ Crisp, "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps," 605; Rebecca Napier-Moore, "Entrenched Relations and the Permanence of Long-Term Refugee Camp Situations Sussex Migration Working Paper No. 28 Rebecca Napier-Moore," Sussex Migration Working Paper Series, 2005, 8.

²⁵⁷ See: Olivius, "(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid."

²⁵⁸ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 148.

²⁵⁹ Crisp, "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps," 632.

distributing food, they are put into a position of power that is frequently abused by demanding sexual favors in exchange for food.²⁶⁰ Here, too, the solution would be to make institutions that set the rules and control the environments that pose imminent dangers to women accountable to them. Women need to be in positions of power to protect their security. Yet, in camps in which the voices of refugees count for little to nothing, their concerns will remain unheard and unaddressed. The reason for this is simple. The UNHCR and the NGOs are not accountable to those they govern, but to their donors, and to them little matters other than the food per refugee ratio.²⁶¹

Refugees would also benefit from controlling the institutions that govern camp economies. Many of the restrictions put in place by camp administrations reflect bad governance, hinder economic performance of refugees and could be easily overcome. One such barrier are the already mentioned permits that refugees require in order to travel outside the camps for business. Where the camp administration is not accountable to refugees and no transparency exists, these permits are sometimes given to refugees and sometimes not, without justification for either decision, and despite them possessing the right to obtain such permits for economic reasons. The same goes for taxes levied in the camps and other similar restrictions. Such arbitrary rule and regulatory uncertainty have detrimental effects on the economic possibilities for refugees and small changes could have great positive effects for refugees.²⁶² It is for such a lack of accountability and uncertainty that refugees themselves must control the institutions that govern them.

²⁶⁰ Amy R. Friedman, "Rape and Domestic Violence: The Experience of Refugee Women," *Women & Therapy* 13, no. 1–2 (1992): 68; Carolyn Fowler, Julie Dugan, and Paul Bolton, "Assessing the Opportunity For Sexual Violence Against Women and Children in Refugee Camps," *The Journal of Humanitarian Assistance*, 2000, 2.

²⁶¹ Harrell-Bond, "Can Humanitarian Work with Refugees Be Humane?," 68; See also: Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 17; For the lack of voice of refugees, see: Liisa H. Malkki, "Speechless Emissaries: Refugees, Humanitarianism and Dehistoricization," *Cultural Anthropology* 11, no. 3 (1996): 377–404.

²⁶² Werker, "Refugee Camp Economies," 466.

3.4.2 Defining limits and informing on violations of personal autonomy

The issue of sexual violence in the camps also allows us to show how and why public autonomy is valuable for personal autonomy in the two other ways we discussed at the outset of this chapter and in chapter two. There, we held that public autonomy and personal autonomy are interrelated over and above the classical liberal understanding of the connection. Public autonomy not only possesses the function of safeguarding personal autonomy. It also serves an informing function, in this case allowing refugees to inform decision makers about the threats they face in time. Finally, we will explore the determining function that public autonomy possesses with regards to personal autonomy. It allows refugees to determine which practices and rules they perceive as violations of their personal autonomy as compared to legitimate restrictions thereof.

Only where refugees can effectively exercise their right to freedom of expression, assembly, as well as political rights, can they publicly identify what goes wrong in refugee camps and where threats to them lie. Even where humanitarian actors do not intentionally violate the rights of refugees, they are often unaware of threats. The case of sexual violence described above is just one example in which humanitarian actors often do not know exactly where threats originate or do not find out about them in time. Other examples include the distribution and composition of aid and issues surrounding cooking fuel provision in the camps. Being governed in a top-down fashion, humanitarian organizations are sometimes not aware of the traditional diets of those they provide food for. When refugees sell their food rations, this is often not a sign of affluence but of distress and a result of the lack of information decision-makers have. Sudanese refugees in Kakuma, for instance, sell their wheat flour not because they have too much of it, but because they

need to acquire food that matches their traditional diet – millet, sorghum, maize flour and cassava flour.²⁶³

As a consequence of not including refugees in the process, humanitarian agencies essentially operate in the dark.²⁶⁴ The demand for supplementary food rations in refugee camps is normally expected to slope downwards and level off, as only newly arriving children, pregnant mothers or those suffering from diseases need supplementary food rations. Yet, for instance, in Somali camps, the demand for supplementary food rations spiked in cycles. The World Food Program (WFP) and the UNHCR assumed that the spikes are due to fewer children showing up to the supplementary distribution centers than should have or because the estimates of those needing the food rations were inaccurate and the food distributing officers merely handing out additional food even though they should not.²⁶⁵ They were, in fact, wrong. As Waldron points out, knowledge of Somalia and its culture would have provided the governing humanitarian agencies with the requisite information.²⁶⁶ The reason for the spikes in demand, she shows, is directly or indirectly related to the rainy seasons in Somalia. The need for providing supplementary food ration was related to the cyclical availability of food supplies. The rain either made it difficult to transport food to the

²⁶³ Montclos and Kagwanja, “Refugee Camps or Cities? The Socio-Economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya,” 217. Democratic participation may, of course, not always lead to refugees being able to receive everything they need. The provision of food also depends on food donors and the World Food Program (WFP) which often have limited capacities. Yet, providing refugees with the ability to voice their concerns, and advocate for what they need may be an important step in better coordinating donor capacities and recipient needs. This is crucial, not only for the well-being of refugees, but for the ability of Organizations such as the WFP to fulfil its obligations. The WFP’s general regulations and rules include the provision that refugee’s food needs must be met. See: Edward J Clay, “Responding to Change: WFP and the Global Food Aid System,” *Development Policy Review* 21, no. 5–6 (2003): 702. Food needs, however, are not only defined by the number of calories a person requires to survive, but also by the composition of food baskets specific to a population. The participation of refugees may allow for a better allocation of funds to meet the specific needs refugees identify.

²⁶⁴ Sidney R Waldron, “Working in the Dark: Why Social Anthropological Research Is Essential in Refugee Administration,” *Journal of Refugee Studies* 1, no. 2 (1988): 155.

²⁶⁵ Waldron, 162–63.

²⁶⁶ Waldron, 163.

camps, spiked market prices and thus affected refugee's access to food or caused diseases such as malaria or diarrhea, making supplementary food rations necessary.²⁶⁷ The problem was that the governing humanitarian agencies did not know what was going on. Being in charge of food distribution in such circumstances and judging that the spikes in demand of supplementary food rations are due to misvaluation of the need in the camps could have disastrous consequences. Such misinformation of decision-makers could easily be avoided by installing a representative system, allowing refugees to voice their grievances.

There are, of course, a number of other instances in which the public autonomy of refugees in the camps would have led to earlier and better detection of violations of their personal autonomy. One such example refers to the lack of cooking fuel in the camps. Because humanitarian organizations provide refugees in the camp mainly with food that requires cooking, but not with cooking fuel, refugee women venture beyond the perimeters of the camp in search for firewood. As elaborated on above, this often poses real dangers to them, and sexual violence is frequent. Yet, it also puts severe strain on their health otherwise. Camps of the size of Kakuma and Dadaab quickly deplete the available resources outside of it. The women thus have to walk for up to 15 km outside of the camp in order to find firewood – and return with the wood (weighing between 60 and 90lb) by foot in one day. For many women, this has severe consequences on their health, not only because of carrying the heavy loads, but also because the food rations provided do not account for such heavy work – the WFP calculates food needs for ‘moderately active persons’.²⁶⁸ For many, this is a task they cannot perform, and families need to sell food in order to buy firewood from others.²⁶⁹ This has, of course, detrimental effects, as food in the camps is often scarce. In a functioning

²⁶⁷ Waldron, 163–64.

²⁶⁸ Waldron, 157.

²⁶⁹ Waldron, 156 et. seqq.

democratic political system, the need for alternative cooking fuels could have become known before the lack of firewood evolved into a crisis - both for the refugees involved and the environment around the camps.

Here, we will turn to the other way in which public autonomy matters for personal autonomy: allowing individuals to express and debate what they perceive as violations of their personal autonomy, rather than as legitimate interventions, rules, and regulations. Public autonomy would allow refugees to be able to distinguish what violates as opposed to what restricts personal autonomy in camps.²⁷⁰ Take the case of the headcounts performed by the UNHCR in refugee camps. To the governing bodies of camps, these are instruments for evaluating and adapting how camps are administered. They are a form of revalidation for the amounts of aid needed. In the process of counting refugees, new ration cards are distributed and the periodic headcounts thus serve as monitoring and documenting accurate numbers which are, in turn, needed to assure funding from donors.²⁷¹ For refugees, however, headcounts represent clear violations of their personal autonomy, as shown by their oft expressed discontent with the processes and by protests against them.²⁷² They perceive the underlying assumption to be that refugees are generally not trustworthy and that headcounts need to be performed to discover cheating in obtaining more than one ration card. Yet, they also view these as violations because of the procedures involved in counting refugees in the camps. Harrell-Bond and Verdirame describe the procedure as follows.

“Refugees are forced in enclosures, sometimes referred to as ‘corrals’, like cattle, often having to wait in the scorching sun for many hours; the whole process is managed in a cold,

²⁷⁰ We refer here to the distinction between an illegitimate and a legitimate regulation of personal autonomy. Public autonomy matters with regards to personal autonomy because it allows individuals to raise their concerns and debate them publicly about various issues they perceive as violating and thus unjustifiably cutting into their personal autonomy. The same process may, of course, also result in a re-affirmation of specific regulations of personal autonomy.

²⁷¹ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 139.

²⁷² Harrell-Bond, “Can Humanitarian Work with Refugees Be Humane?,” 61.

impersonal, and bureaucratic manner, engendering a sense of humiliation. Finally, body markings, albeit not indelible, are seen as debasing. For individuals who have already suffered a loss of social status and whom aid has made 'powerless', an imprinted symbol of humiliation can seem like a stigma."²⁷³

Contrary to the humanitarian actors governing the camps, headcounts are perceived by refugees not as legitimate restrictions of their personal autonomy, serving administratively necessary functions, but as deep violations of their personal autonomy and as treatment undeserving for human beings. Public autonomy would allow refugees to determine the scope that restrictions of personal autonomy may take. It would allow them to set the parameters for what qualifies as violations of their personal autonomy. And it is for this reason that public autonomy and the democratization of refugee camps is of such great importance with regards to identifying what violates their autonomy.

3.5 Conclusion

This chapter has argued that refugees should govern refugee camps. It has departed from the non-ideal assumption that protracted refugee situations will remain just that: protracted and that refugees living in camps will do so for the foreseeable future. It has argued, using the all-subjected principle, that all those subjected to rule in a political unit should have a say in such rule. It has demonstrated that refugee camps function as separate economic, legal and political systems,

²⁷³ Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, 140; See also: Jennifer Hyndman, "Refugee Self-Management and the Question of Governance Refugee Camps Kenya," *Refuge: Canada's Journal on Refugees* 16, no. 2 (1997): 20.

constituting distinct political units in which the UNHCR and contracting NGOs govern the lives of refugees by setting the ground rules for interaction in the camps. The conditions for the all-subjected principle to apply, thus hold. The last section of the chapter has demonstrated the value of democratization for refugees living in camps. It has argued that possessing public autonomy is important for safeguarding personal autonomy, defining what constitutes violations and for informing decision-makers of dangers to the personal autonomy of refugees.

It should be said that democratizing refugee camps does not provide a guarantee for solving all issues occurring within them, but it wrests the control over the lives of refugees out of the hands of UNHCR and NGOs, who are ultimately only accountable to donors, and places it into the hands of those whose lives are at stake: refugees themselves. While not guaranteed to resolve all issues, democratizing refugee camps may go a long way in making life in refugee camps more bearable. It may help refugees in seize control over the environment that shapes their lives, safeguarding their personal autonomy. It may help them inform decision-makers of dangers and violations, and, finally, it may help them determine what counts as a violation and not as an administrative restriction of their personal autonomy. The chapter has thus explored the normative justification for democratizing refugee camps. What we have not done is provide a full-fledged institutional design for different camps. We have sought to answer whether refugee camps should be ruled democratically, and not with which precise institutions. This would undoubtedly be of interest in itself. It would, however, necessitate deeper empirical analysis into the differences between the camps, the powers refugees enjoy and the parameters the host states have put in place and within which refugee camps operate. These, however, are differences in degree. They may matter for recommending different institutions for different camps. They do not change the observation that refugee camps have developed as distinct political units within which refugees are subjected to

rule. We may thus return to the question with which this chapter has begun. It read: “Should refugees govern refugee camps?” The answer is: “yes”.

4. Should Refugees Receive Political Rights in Liberal Democracies?

4.1 Introduction

Should refugees receive political rights in liberal democracies? In this chapter, I will argue that they should.

Before I begin, I would like to clarify the scope and the ambition of the argument. From the initial question it would be easy to assume that what we are concerned with is the eventual possible acquisition of political rights by refugees after they become the citizens of a liberal democracy. The chapter, however, is about something else. I want to argue that refugees should receive political rights as soon as they receive refugee status. This does not mean that refugees should not have the option of becoming citizens. Here, I treat these two questions as separate, for two reasons. First, although perhaps an ideal option for refugees, naturalization processes often take years (if not decades) and are frequently riddled with hurdles in practice that are difficult for refugees to overcome. Second, and as I shall explain below, citizenship and political rights do not have to be banded together and can be had independently of each other.

Let us first address the question of naturalization. Why would refugees not simply acquire the citizenship of a country and receive political rights following their change from refugee status to citizenship status?²⁷⁴

In many liberal democracies this is an option theoretically open to refugees. In practice, however, refugees are often made to wait years for such an option to materialize, leaving them without political rights and thus without the rights to participate in shaping the conditions that govern their lives. In many cases, it never does. International law does not oblige states to naturalize refugees.²⁷⁵

Only in a few states are refugees entitled to naturalization. In the EU, refugees are entitled to citizenship in only six countries: Austria, Germany, Hungary, Netherlands, Poland, and Spain.²⁷⁶

An entitlement to citizenship here means that if refugees fulfil specific criteria, they have a right to citizenship in that country. This also means, however, that the conditions that refugees need to fulfill in order to qualify as entitled for citizenship are often difficult to fulfill and present hurdles that often prevent refugees from easily accessing their rights.

In the European Union, for instance, refugees are indeed entitled to naturalization in some states. This does not mean, however, that it is easy to acquire citizenship. In fact, additional conditions for receiving citizenship apply in all countries in which naturalization is an entitlement, which make naturalization all but a guaranteed outcome for refugees. Such conditions include language

²⁷⁴ “Local integration” or naturalization is one of the three durable solutions to refugeehood the UNHCR prescribes. Acquiring the citizenship of another country effectively ends refugee status. James C. Hathaway, “Refugee Solutions, or Solutions to Refugeehood?,” *Refuge: Canada’s Journal on Refugees* 24, no. 2 (2007): 4; United Nations High Commissioner for Refugees (UNHCR), “Solutions For Refugees,” in *Refugee Protection and Mixed Migration: The 10-Point Plan in Action* (Geneva, 2011), 183–206, <https://www.unhcr.org/50a4c17f9.pdf>.

²⁷⁵ Cathryn Costello, “On Refugeehood and Citizenship,” in *The Oxford Handbook of Citizenship*, ed. Ayelet Shachar et al. (Oxford: Oxford University Press, 2017), 732.

²⁷⁶ Maria Margarita Mentzelopoulou and Costica Dumbrava, “Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues,” 2018, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI\(2018\)625116_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf).

requirements (Germany, Netherlands, Poland), citizenship exams that include knowledge tests of the host country's legal and political regime (Austria, Germany, Hungary, Netherlands), expressions of loyalty to the state or its institutions (Germany, Spain), clean criminal records (Hungary), secure income (Austria), the ability to support oneself without making use of social security (Germany), and not constituting a threat to national security, defense, public order (Poland) or national "interests" (Hungary).²⁷⁷ It is easy to see how these conditions function as effective barriers against refugees acquiring citizenship even if they have lived in a country for a long time.

In countries in which naturalization is not an entitlement, acquiring citizenship is even more difficult. In such countries, refugees need to satisfy a number of conditions for receiving citizenship and naturalization remains at the discretion of the state. Whether refugees fulfill the conditions is thus decided by the (local) authorities²⁷⁸ and by individuals in such institutions. These procedures are wide open for subjective and biased decision-making, which leads to uncertain outcomes for refugees' naturalization. In Italy, for example, the denial of citizenship may be motivated by a lack of sufficient Italian language proficiency, or insufficient social inclusion. In the latter case, fulfillment of the requirement is often evaluated based on the income refugees have earned in the last three years, which should be equal to or higher than the minimum income

²⁷⁷ This data can be found on GLOBALCIT, the Global Database on Modes of Acquisition of Citizenship, available under: <http://globalcit.eu/acquisition-citizenship/>. See also: Mentzelopoulou and Dumbrava; and David Owen, "Refugees, EU Citizenship and the Common European Asylum System: A Normative Dilemma for EU Integration," *Ethical Theory and Moral Practice*, 2019, 1–23. Note that the countries listed here are only those in which citizenship acquisition is an entitlement for refugees. Many of these conditions apply in other countries in which naturalization is discretionary, too.

²⁷⁸ Decisions on whether refugees satisfy the conditions laid out are often made locally by regional or municipal offices.

guaranteed by the state. This is an arbitrary requirement, not mandated by the law.²⁷⁹ Such problems are common wherever naturalization is a discretionary matter. Informal administrative practices that vary across regions, offices, and even individuals then determine citizenship acquisition. As Bauböck et. al show with regards to immigrant naturalization procedures, discretionary decision-making leads to naturalization rates that vary significantly between similar groups of applicants over time.²⁸⁰ In such cases, acquiring citizenship becomes a matter of luck for those who apply.²⁸¹ Of particular concern are conditions requiring sufficient language skills, integration assessments and economic requirements, which are especially prone to subjective discretionary decision making. As a result, even if refugees meet the residency requirements of states, which allow them to apply for citizenship only after a specified number of years (in the EU up to 10 years), naturalization is not a sure outcome.

Even in the cases in which refugees do acquire citizenship and thus political rights, they will have spent many years without political representation and without the rights that would allow them to influence the rules and regulations that govern their lives. Considering this state of affairs, it becomes crucial to not look towards citizenship acquisition as a means for refugees acquiring political rights, but rather to ask whether those who receive refugee status should at once receive political rights.

To that end, this chapter seeks to explore whether refugees should possess political rights prior to or despite of never acquiring the citizenship of the host state. In order to argue for such rights, we

²⁷⁹ See: ECRE on Naturalization in Italy, available under:

<https://www.asylumineurope.org/reports/country/italy/content-international-protection/status-and-residence/naturalisation>. Last accessed: 28.10.2019

²⁸⁰ “Access to Citizenship and Its Impact on Immigrant Integration: European Summary and Standards,” 2013, 14, <https://cadmus.eui.eu/bitstream/handle/1814/29828/AccessToCitizenshipandItsImpactonImmigrantIntegration.pdf?sequence=1>

²⁸¹ Bauböck et al., 14.

will return to the “all-subjected principle” and proceed to ask whether it holds in this specific case, too. This requires answers to two questions. First, we need to see whether political rights can be had without citizenship. Second, it necessitates discussing whether refugees are transients and therefore fall outside the purview of the principle. Finally, we will show that refugees are subjected to rule in liberal democracies, beginning with their reception, lasting through their stay and even shaping the conditions for their possible return. The chapter is structured as follows. Section 4.2 revisits the all-subjected principle. Section 4.3 discusses the exclusion criterium for transients. It asks why we should exclude transients and argues that refugees are not transients the way that visiting students and tourists are. Section 4.4 turns to the question whether political rights can be had without citizenship. I answer in the affirmative. Section 4.5 then argues that refugees differ from other non-citizen residents and that democratic inclusion is of specific urgency in their case. I argue that refugees represent a specific case not only because they are not enfranchised elsewhere, but because they lack the same exit options that other migrants possess. I then show that they have a claim to democratic inclusion on the national level as opposed to only regional or municipal level. Although there are no reasons not to include them on this level as well, the policies and laws making the deepest imprints on refugees’ lives are national ones. Finally, I provide an outlook on how refugee enfranchisement could impact the life of refugees. Section 4.6 offers a brief conclusion for this chapter.

4.2 The All-Subjected Principle Revisited

Why should refugees possess political rights in liberal democracies? Here, we return to the all-subjected principle already discussed in the previous chapter. We will briefly recount what it implies and then explain which aspects we need to scrutinize in more detail when it comes to the democratic inclusion of refugees in liberal democracies.

While we have used the all-subjected principle for justifying the democratization of refugee camps in the previous chapter, it has traditionally been used in the literature to justify the demarcation of the demos in liberal democracies.²⁸² To recount, the principle demands that all those subjected to rule should have a say in such rule.²⁸³ Subjection to rule is taken to mean something more than merely being affected by the decisions that liberal democracies make. It also implies something else than straightforward coercion by single decisions. This is important for this specific context and for the question whether and in which state refugees should receive political rights.

While the all-affected principle may be used to argue for a global state and inclusion of refugees in a global democratic political regime, it tells us relatively little regarding the specific non-ideal situation of a world divided into nation-states, in which we need to discern with regards to which states refugees should (if at all) possess political rights. The all-affected principle argues that everyone affected by decisions ought to possess a right to have a say in them. The upshot is either

²⁸² The demos refers to the populace of a polity, possessing political rights and should be understood in the following as such. It should thus be distinguished from the concept of “citizenship”. That these two can differ from each other, see pages 8-10 below.

²⁸³ Näsström, “The Challenge of the All-Affected Principle”; Fraser, “Abnormal Justice.”

the necessity of an establishment of a world-government or a network claim of democratic inclusion regarding ever existing polity. After all, many decisions affect individuals globally. Think of such issues as climate change or the global economic system in which decisions produce consequences not only for specific countries but that reverberate globally. Alternatively, the all-affected principle would lead to a network claim of democratic inclusion, providing everyone with a justification for inclusion in (nearly) all states. The reason for this upshot is, as we have already briefly discussed before, that consequences of decisions travel. One decision made in one country (take for example increased taxes on automobiles in Germany) has effects on individuals in other countries (livelihoods in countries that produce cars), but also has effects on the decisions made in such countries (e.g. tax reliefs, public money for car manufacturers etc.).²⁸⁴ With regards to our specific topic here, this means that the all-affected principle is poorly suited for discerning which refugee has a claim with regards to which state. To illustrate this, think of the refugees in displacement everywhere, those on the move and even the individuals which have not technically been termed refugees because they have not yet left their states of origin. We can credibly argue that decisions made by all liberal democracies have significantly affected them. If not contributing to the causes for flight by exporting weapons, condoning political oppression and backing regimes, they certainly have played a role in shaping the journey that refugees have to take. After all, it is liberal democracies that have implemented restrictions on air travel, and that legally shift their borders outwards with the demand for visas and the fulfilment of other requirements. This necessitates refugees to travel by other means, leading not only to taking dangerous routes, but

²⁸⁴ Cf. Fraser, "Abnormal Justice," 411; Fraser, "Who Counts? Dilemmas of Justice in a Postwestphalian World," 292; Goodin, "Enfranchising All Affected Interests, and Its Alternatives."

also to them being stranded in displacement in other countries.²⁸⁵ Liberal democracies have also been one major reason for the establishment of refugee camps themselves. The restrictions they have implemented and the money they are willing to contribute to hosting refugees in other places have led other countries to react by establishing camps.²⁸⁶

While the all-affected principle would credibly tell us that we owe *something* to those refugees²⁸⁷, or that we should establish a world government²⁸⁸, it does not help us with discerning which refugees should possess political rights in which liberal democratic state, assuming the existence of nation states as a non-ideal starting point. What we are interested in here is not the question whether refugees possess claims to inclusion in global institutions, but which refugees have a specific claim with regards to a specific liberal democracy. We want to know whether refugees who have arrived and received refugee status in a liberal democracy should receive political rights there. The all-subjected principle is better suited for specifically this form of inquiry. It takes as a starting point the existence of governance structures and asks who should have a right to democratic inclusion with regards to these political institutions. The scope of the all-subjected principle then also differs from what other similar principles such as the all-coerced principle justifies. In its narrower version²⁸⁹ it can be used to ask whether we should incorporate specific

²⁸⁵ Cf. Gibney, “‘A Thousand Little Guantanamos’: Western States and Measures to Prevent the Arrival of Refugees”; Collinson, “Visa Requirements, Carrier Sanctions, ‘safe Third Countries’ and ‘Readmission’: The Development of an Asylum ‘buffer Zone’ in Europe.”

²⁸⁶ Slaughter and Crisp, “A Surrogate State? The Role of UNHCR in Protracted Refugee Situations.”

²⁸⁷ see: Owen, “Constituting the Polity, Constituting the Demos: On the Place of the All Affected Interests Principle in Democratic Theory and in Resolving the Democratic Boundary Problem,” 146; Abizadeh, “On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem”; Beckman, *The Frontiers of Democracy: The Right to Vote and Its Limits*, 47.

²⁸⁸ See, for instance: Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” 64.

²⁸⁹ When referring to a narrower interpretation of the all-coerced principle, I refer to an understanding of the principle applying only to the coercive effects of single decisions, and not to an understanding as being generals subject to the coercive might of the state. The latter would differ from the all-subjected principle only in name, and many scholars have used it in this fashion. See, for example: Verschoor, “The Democratic Boundary Problem and

individuals or groups into the process of making specific decisions who are commonly not regarded as part of the demos, such as including people seeking to migrate into immigration decisions.²⁹⁰ When it comes to discerning whether those residing in liberal democracies should receive political rights, however, we are less interested in whether individuals and groups should be consulted in specific substantial decisions, but whether they should receive political rights with regards to all decisions made, and thus whether they should be treated as political equals. This is why we return to the all-subjected principle in this chapter. We will, however, focus on different aspects of the principle. While we have previously discussed what exactly should be understood as a political unit (a distinct governance structure) to find whether refugee camps could count as such, and while we have discussed the condition that individuals must be subjected to rule, we will here focus on the exemption conditions of the principle.

Typically, two exceptions to the principle are mentioned. The first exempts those “mentally defective” from its scope.²⁹¹ This exclusion criterion has been widely debated and rejected. It is, at best, far from clear that those with mental problems should be excluded from the vote and, at

Social Contract Theory”; Owen, “Constituting the Polity, Constituting the Demos: On the Place of the All Affected Interests Principle in Democratic Theory and in Resolving the Democratic Boundary Problem.” For the narrower reading of the all-coerced principle, see Tomlinson *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness*, 95., for different readings of what coercion implies, see Scherz “The Legitimacy of the Demos: Who Should Be Included in the Demos and on What Grounds?,” 4–5.

²⁹⁰ For this argument, see: Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders”; For a counter-argument, see: David Miller, “Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh,” *Political Theory* 38, no. 1 (2010): 111–20. Miller argues that immigration decisions may be coercive, but that their autonomy is not violated. Those barred from entering usually possess many other options of travel and autonomy only requires a range of options, and not all conceivable options being open to an individual. The same counter argument does, of course, not apply to the all-subjected principle. Being subjected to rule means a form of control that spans over (nearly) all aspects of life, concerning (nearly) all choices available or not available to individuals. There is no way out, no possibility to evade rule other than a life underground and it would seem hard to justify such a life as consisting of a sufficient range of choices.

²⁹¹ Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 129.

worst, normatively wrong.²⁹² But of more interest in our case is the second exemption criterium: the argument that transients should be excluded from the vote.²⁹³ If this exemption can be normatively justified and if refugees count as transients according to it, then they should be excluded from the purview of the principle. It would then simply not apply to them. The following section will thus explore the arguments behind the claim that transients should be excluded, outline its correct normative interpretation and show that refugees should not be considered transients. Finally, we will turn to another aspect of the all-subjected principle that matters in this context. It has traditionally been used to argue for naturalization. We will ask whether it can be applied to refugees as refugees, and thus to non-citizens. I will argue that it can: political rights can be had independently from having citizenship. But for now, let us discuss the first exemption criterium: the exclusion of transients and the question whether it justifies excluding refugees from the scope of the all-subjected principle.

4.3 Excluding Transients From the Demos: Are Refugees Transients?

The claim that transients should be excluded from the demos is a widely followed one.²⁹⁴ But who are transients? Commonly, they are referred to as those staying only temporarily within the

²⁹² Kay Schriener, Lisa A Ochs, and Todd G Shields, “The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities,” *The Journal of Federalism* 27, no. 3 (1997): 75–96.

²⁹³ Robert A. Dahl, *On Democracy* (New Haven & London: Yale University Press, 1998), 78.

²⁹⁴ That is, if one follows the all-subjected principle. The same conclusion does not follow from the all-affected principle, which must argue that transients such as tourists are affected by the laws of the state they pass through and that they should therefore receive voting rights. This, perhaps, is one reason why the all-affected principle has been confronted with criticism. It is not intuitively evident that tourists should have a lasting claim on the determination of

boundaries of the state. They are those who are just passing through, remaining on the state's territory for only a specified amount of time. Visiting students and tourists are the classical examples, although some also refer to migrant workers as possibly being transients.²⁹⁵ Who exactly qualifies as transients and who, on that basis, should be excluded from the demos depends on the underlying arguments for excluding transients. We will explore the different arguments for excluding transients, propose the most normatively robust one and ask whether refugees should be excluded on its basis.

A first route of argumentation claims that transients should be excluded because they are not members of the society in question.²⁹⁶ This argument states that the longer one stays in a given community, the stronger are the connections and social attachments to other people within it.²⁹⁷ Transients should therefore be excluded from the demos, because they have not yet formed strong ties and social attachments that would make them “members” of that society. But this argument begs the question in two ways. First, if being a “member of society” means being a member of the political community, then the formulation begs the question, because the purpose is exactly to find out who the members of a political community are. It would make the argument circular.²⁹⁸ If what is meant, however, is not a political community but membership of society, then we need to ask why the extent to which persons possess social ties to each other matters for a claim to political

the lives of those living in a state they just briefly visit. For reasons why, see below. For such claims, nevertheless, see: Beckman, *The Frontiers of Democracy: The Right to Vote and Its Limits*, 82.

²⁹⁵ For the debate about the inclusion of temporary guest workers, see: Alex Sager, “Political Rights, Republican Freedom, and Temporary Workers,” *Critical Review of International Social and Political Philosophy* 17, no. 2 (2014): 189–211.

²⁹⁶ See: Carens, “The Integration of Immigrants,” 33; and: Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States*, 21–33.

²⁹⁷ See also: Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, Mass. and London: Harvard University Press, 2009), 168–69.

²⁹⁸ For this objection, see: Rainer Bauböck, “The Rights and Duties of External Citizenship,” *Citizenship Studies* 13, no. 5 (2009): 482.

participation. This formulation assumes that the web of social interactions can be clearly demarcated. This is, however, only the case if we assume societies to be islands of communication with economic, cultural, legal and religious interactions spanning over the same population. Yet, we can observe that economic interactions span across state boundaries in a different way than religious communications, legal and cultural interactions. In modern societies, one cannot share the same social habitus. Rather, one participates in different social sub-systems at different times, without these being geographically limited to the boundaries of states and without these forming social entities that are holistically different from others. Even if being a "member of society" refers to a shared cultural habitus, and thus the norms informing the form of social interactions, we cannot exclusively identify a geographically demarcated culture of which persons can be part or not. Different cultural affinities and shared norms of interactions can be assumed by individuals in vastly different geographical areas. A person in the Netherlands may share similar communicative norms with regards to gender equality with a person in Japan, while they differ in the way they communicate when relating to economic matters. This means that it is both possible to live in different territories but still share the same social norms, and that it is possible to live on the same territory and share none of the same social norms. This is not only a point about the possibility of social seclusion – persons living in remote parts of the country or labor migrants housed separately from the local population. It is also a point about the scope of the territory that should count towards such a claim. If a person lives in Bavaria and (nearly) never travels beyond regional territorial boundaries to the north of Germany, can we say that living in Bavaria leads to social connections regarding persons in the rest of the country? Yet, the social-membership argument is not primarily defective because of its underlying assumptions regarding the possibility of integration into a holistic and clearly demarcated society, but because its claim regarding political

participation does not follow. Even if we set all this aside and simply assume that one can be a “member of society” in this definite and exclusive form and that persons within share “deeper” social ties (and should this mean: communicate more regularly?) with each other, then we are still confronted with the question why this should matter for a claim to political participation.

Take the following hypothetical example. In a group in which every member is subjected to rule, why should it matter that Peter has deep ties to Mary and to Angela, but John does not? John is equally subjected to rule and the fact that he does not really have deep ties to any other member of the group stands in no relation to his political claim of participation. Should John be excluded from having a say in the decision-making process of the group merely because he has fewer close ties to others? The all-subjected principle argues that the answer is “no”. Full-inclusion means just that: full-inclusion. It simply does not matter whether John interacts more or less often with other members of the group, takes part in the same activities or likes the same food. All that matters for his claim to participate is that he is subjected to the rule of the group. This argument, then, cannot lead us to the conclusion of excluding transients.

A second strand of argumentation is similarly inconclusive in this regard. It argues that time spent in a country functions as a proxy for knowing its political system. It holds that transients should be excluded because they have not yet spent enough time in the political community and thus do not have sufficient knowledge for voting (well).²⁹⁹ There are two problems with this position. First, it argues that knowing the political system and its nuances is tied to living in that country. But this is doubtful. Citizens of a country may lack knowledge of its political system despite living in it their entire lives. The opposite may also be true. Not living in a country still allows for in-depth

²⁹⁹ cf. Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (London and New York: Routledge, 2006), 78–80; Stanley A. Renshon, “Center for Immigration Studies,” 2008, 10.

knowledge of its political system. In fact, nationals often do poorly when confronted with elements of citizenship tests that include questions on the political system and its history.³⁰⁰ Living in a country is simply not a necessary condition for knowing the nuances of its political system.³⁰¹ Secondly, and perhaps even more problematic, is the claim that the right to vote should be conditional upon being able to vote well. It is problematic not only because it implies that a person knows what it means for another person to “vote well”. Even if we were able to pre-democratically establish what best serves the interests of others subjected to rule – which would arguably make democratic decision-making superfluous – it remains questionable whether the duty to vote well can trigger anything more than a recommendation to those who are already voters.³⁰² While it would thus be preferable if persons informed themselves to their best ability before casting a vote, this argument does not lead to a justification for excluding people from the vote.³⁰³ Used in this fashion, it has historically served to justify the exclusion of large segments of the population, such

³⁰⁰ In the US, a survey found that only 36% of US Citizens would pass the citizenship test. See: <https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/>.

³⁰¹ Sager, “Political Rights, Republican Freedom, and Temporary Workers,” 206.

³⁰² For the duty to vote well not resulting in a claim to exclude from the franchise, see: Brennan “Polluting The Polls: When Citizens Should Not Vote,” *Australasian Journal of Philosophy* 87, no. 4 (2009): 535–49., for the opposite argument, paradoxically also see: Brennan “The Right to a Competent Electorate,” *The Philosophical Quarterly* 61, no. 245 (2011): 700–724..

³⁰³ This has a simple reason. If it is a test that ought to decide whether a person is sufficiently capable of voting well, we are confronted invariably with the question how we could possibly decide when a person sufficiently follows her own interests. Even if we asked only consistency questions, this would beg the question how this can be a criterion for knowing that a person will vote well. If we do not rely on tests, the decision to exclude someone from the franchise must be outcome based. This would entail that we exclude those from the franchise who vote in a fashion that hurts either themselves or others. This seems intuitively implausible. Who should possess the power and insight into making such a decision? Yet, even if we were able to connect a causal chain between voting for a candidate and a specific issue, we would only know whether someone voted poorly in this way after the election has already occurred. The basis for excluding someone from the franchise can then only occur for the following election. The problem here is not only that we then simply stipulate that such a person would vote for the same candidate / party in the following election. The problem is also that we would then punish persons for not casting the right vote and not prevent a poor vote.

as black people and women, arguing that they (still) lack the requisite political knowledge to vote well.³⁰⁴

A presumed lack of knowledge for voting (well) can thus not justify excluding transients either. But what can? I argue that the reason lies in the logic of the all-subjected principle itself. It is forward- and not backward-looking. It does not state that a person must first be subjected to rule and consequently possess a right to participation in all further decisions taken. This would make participation a reward for being subjected to rule in the past. Rather, it argues that a person should participate in the rule that subjects her.³⁰⁵ If the principle would be backward-looking, it would defeat the purpose of providing persons with the ability to participate in decisions that subject them to rule. Take, for instance, a group of people in which one person makes a decision that significantly impacts all others. If the all-subjected principle were backward looking, that person would not need to consult or incorporate any other person in making that decision. All that such argument would call for is participation of these people in other decisions in the future. This is obviously incorrect. The principle provides the grounds for taking part in rule and is not a compensation for past subjection. Transients should therefore be excluded not because they have not yet spent sufficient time in the political community or because they presumably lack the requisite knowledge to participate, but because they will not be subjected to rule in the future. If given the vote, they would participate in making decisions that will not subject them.

Note that this argument only refutes claims that hold that time spent in a community matters directly for a claim to participation either because it leads to social-connectedness or to requisite

³⁰⁴ cf. Schriner, Ochs, and Shields, "The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities," 90; Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States*, 79.

³⁰⁵ For a similar argument, see: Anna Goppel, "Aufenthaltsdauer Und Wahlrecht," *Archiv Für Rechts- Und Sozialphilosophie* 103, no. 1 (2017): 34.

knowledge of the political system. It does not refute the claim that time spent in the community can serve as a proxy for estimating if individuals remain in the polity in the foreseeable future. This makes sense especially with regards to regular immigrants. Entering a country, their status as immigrants does not yet guarantee that they will remain in the country for the foreseeable future. That is because they possess a number of exit options, including the possibility to return to their country of origin at any time. The “time spent in the community” standard makes sense as a proxy for them, but not because it shows that they are more connected or better educated, but because spending a significant amount of time in a polity is a good indicator for that they will remain there in the foreseeable future too. Time spent can thus be interpreted as a proxy for future residence.³⁰⁶ Yet, this neither means that other proxies may not exist for estimating likely future residence of immigrants - think about marriage to a resident national, the acquisition of the language or following one’s family residing in the country - nor that different proxies could not exist for non-citizens that are not regular immigrants. I will argue that the latter is the case for refugees, and that the acquisition of refugee status itself can function as a proxy for the likelihood of long-term future stay, and as a consequence, future subjection to political rule. We must thus first demonstrate that refugee status is not only temporary but that it implies long term residence.

After the end of the Second World War, during the time when the Geneva Convention Relating to the Status of Refugees was negotiated, the idea that refugees ought to return to their countries of origin seemed either unthinkable or impossible. In the case of the many Jews fleeing Nazism, it seemed a cruel proposition that they return to the country that had systematically murdered them by the millions. Likewise, it seemed impossible to demand that those who were previously Soviet prisoners of war in Germany and that had, after the war, turned into refugees, return to a home

³⁰⁶ Bauböck, “The Rights and Duties of External Citizenship,” 479.

where they faced punishment for having been captured.³⁰⁷ During this time, refugee status was not viewed as a temporary status. This changed in the 1990's and with the gradual introduction of alternative forms of protection, such as Temporary Protection Status (TPS) in the US and subsidiary protection in the EU, which granted temporary protection to those who were fleeing war and other generalized forms of violence.³⁰⁸ Known as the “decade of repatriation”, refugee status began to be perceived as temporary, implying that individuals should return home once the circumstances that caused their flight had subsided.³⁰⁹

Yet, refugee status did and does differ from other forms of temporary migration. It differs from the legal status of transients such as tourists or visiting students in that their legal status is not fixed. Rather, it is indeterminate, and thus open ended.³¹⁰ This is not to say that refugee status cannot end, or that refugees do not sometimes change their country of asylum. The latter is the case when refugees are resettled. Yet, resettlement usually exists as an option for refugees who reside in refugee camps or in precarious situations in countries neighboring their states of origin. Liberal democracies are not sending but receiving countries in virtually all cases of resettlement.³¹¹ Yet even where this option exists for refugees, it often remains a far distant possibility that will never materialize for many. Most refugees wait indefinitely for their resettlement to take place.³¹² This is because the quotas offered by (mostly liberal democratic) states are filled based on need,

³⁰⁷ Costello, “On Refugeehood and Citizenship,” 731.

³⁰⁸ See: B. S. Chimni, “From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems,” *Refugee Survey Quarterly* 23, no. 3 (2004): 55–73.

³⁰⁹ Costello, “On Refugeehood and Citizenship,” 731; Chimni, “From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems,” 59.

³¹⁰ Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge: Cambridge University Press, 2017), 211.

³¹¹ See the data provided by UNHCR on resettlement, available under: <https://rsq.unhcr.org/en/#Dbi3>

³¹² Elibritt Karlsen, “Refugee Resettlement to Australia: What Are the Facts ?,” Research Paper Series 2014-15, 2015, 4, <https://apo.org.au/sites/default/files/resource-files/2015/02/apo-nid52632-1117511.pdf>.

resulting in an indefinite delay for most refugees.³¹³ In total, only about 1% of the global refugee population is resettled, and nearly exclusively to liberal democracies.³¹⁴

The stay of refugees may, however, come to an end on the basis of another option. It can end because refugees are repatriated. This can happen once refugees return and “voluntarily re-establish” themselves in their country of origin.³¹⁵ Note that simply returning to their state of origin is not enough for refugee status to end, but that such return must be “durable”, with the causes for their displacement no longer existing.³¹⁶ While many refugees do indeed return, they often do so from countries that experience conflict themselves. These are primarily countries neighboring the conflict zones that refugees have fled and are often territories within which refugees are insecure, being subject to threats by inhabitants or refugee militias.³¹⁷ This means that refugees often return without the help of the UNHCR, and often in an unsecure and premature manner. The voluntariness of these returns is thus generally questionable. Refugees often return “voluntarily” not because the circumstances in their countries of origin have sufficiently changed to the extent that a durable “re-establishment” is possible, but because the circumstances in their place of refuge are perceived to be more threatening than what they expect in their countries of origin.³¹⁸ Voluntary returns thus happen, and they cut the stay of refugees short in some cases. Yet, they nearly exclusively happen from countries neighboring conflict zones and not from the liberal democracies of the Global North. According to the UNHCR statistical yearbook of 2016, no “voluntary

³¹³ UNHCR estimates that about 691000 refugees are in need of resettlement. Yet, only about 86000 spots are made available by resettlement countries. See: Karlsen, 4.

³¹⁴ See: Shauna Labman, “Queue the Rhetoric: Refugees, Resettlement and Reform,” *U.N.B.L.J.* 55 (2011): 55–56.

³¹⁵ UN General Assembly, Convention and Protocol Relating to the Status of Refugees Art. 1C(4).

³¹⁶ James C. Hathaway, “The Right of States to Repatriate Former Refugees,” *Ohio St J Disp Resol* 20, no. 1 (2005): 180; Hathaway, “Refugee Solutions, or Solutions to Refugeehood?,” 5.

³¹⁷ Barry N. Stein and Frederick C. Cuny, “Refugee Repatriation during Conflict: Protection and Post- Return Assistance,” *Development in Practice* 4, no. 3 (1994): 177.

³¹⁸ Stein and Cuny, 181.

repatriations" have occurred from the EU. This suggests that the measure is mainly one restricted to countries in which refugees choose one dangerous situation over another.³¹⁹

Finally, the stay of refugees may come to an end following a decision that the circumstances that have caused their flight in their country of origin have fundamentally changed.³²⁰ This decision is made by the host state, and the UNHCR provides only little guidance in this regard. Such changes must be both fundamental and enduring. They must lead to practical and lasting changes in the country of origin.³²¹ Such changes include regime change, reflected in free and fair democratic elections, the repeal of oppressive laws, amnesties, the removal of security forces, or the restoration of the rule of law.³²² Even though the clause exists, and is sometimes invoked, it represents a scenario that does not materialize for the vast majority of refugees. Where it was recommended by the UNHCR, such recommendations were regularly prematurely made, leading refugees to be sent back into conflict zones.³²³ The liberal democracies of the Global North only very rarely make use of this clause.³²⁴ In 2018, a revocation examination in Germany had only withdrawn or revoked protection to 0.9% of the cases. Yet, none of these cases were revoked due to fundamental changes in the country of origin of the refugees involved, but rather on the grounds of "erroneous" decisions

³¹⁹ United Nations High Commissioner for Refugees (UNHCR), "Statistical Yearbook," 2016, <https://www.unhcr.org/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html>.

³²⁰ Hathaway, "Refugee Solutions, or Solutions to Refugeehood?," 5; Hathaway, "The Right of States to Repatriate Former Refugees," 177.

³²¹ Hathaway, "The Right of States to Repatriate Former Refugees," 216.

³²² See the UNHCR guidelines regarding the cessation clause: United Nations High Commissioner for Refugees (UNHCR), "Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)," 2003, <https://www.unhcr.org/3e637a202.pdf>.

³²³ Hathaway, "The Right of States to Repatriate Former Refugees," 195, 199; See also: B. S. Chimni, "Refugees, Return and Reconstruction of 'Post- Conflict' Societies: A Critical Perspective," *International Peacekeeping* 9, no. 2 (2002): 163–80.

³²⁴ European Commission, "Evaluation of the Application of the Recast Qualification Directive," 2019, 101–3, <https://op.europa.eu/en/publication-detail/-/publication/e9528006-1ec1-11e9-8d04-01aa75ed71a1/language-en>.

for granting refugee status in the first place.³²⁵ Even though cessation of refugee status remains a legal possibility, for the vast majority of refugees it will never materialize.³²⁶ In practice, refugees are often unable to return home.³²⁷ Thus, once they enter liberal democratic states, they tend to stay for long periods of time.³²⁸ Even though their status is thus indeterminate, it is by no means temporary. In the EU, for instance, about 90% of refugees have spent more than 4 years, 50% more than 10 and 35% more than 20 years in their host states at the time of data collection in 2014.³²⁹ Refugees thus remain in liberal democracies for long periods of time, if they ever leave.

The argument that transients should be excluded from the demos thus holds. Yet, this condition is forward- not backward-looking. Time spent in the polity is only valuable insofar as it functions as a proxy for knowing that the individuals concerned will remain in the polity in the future, and that they will be subject to the rules they participate in making. Are refugees transients on this forward-looking account? I have argued that they are not. Their legal status is not limited in time. It is indeterminate. In practice, refugees remain in liberal democracies for long periods of time, if they ever leave. Just as time spent in the country, receiving refugee status functions as a proxy (and arguably a better one at that, since it is often extremely difficult for refugees to return or move on) regarding the likelihood that they will remain in the country in the future. Refugees clearly

³²⁵ Informationsverbund Asyl und Migration, “Cessation and Review of Protection Status: Germany,” European Council on Refugees and Exiles, n.d., <https://www.asylumineurope.org/reports/country/germany/content-international-protection/status-and-residence/cessation-and-review>.

³²⁶ Even where cessation of the causes of displacement has occurred, refugees tend to stay in Western Europe and North America, as has happened for instance with the Eritrean Diaspora. See: Gaim Kibreab, “Citizenship Rights and Repatriation of Refugees,” *International Migration Review* 37, no. 1 (2003): 59.

³²⁷ Costello, “On Refugeehood and Citizenship,” 731–32.

³²⁸ Some authors have even suggested that the practical impossibility of a timely return is the reason why liberal democracies have increasingly sought to limit the numbers of refugees reaching their shores. See: Jeremy R. Tarwater, “Analysis and Case Studies of the Ceased Circumstances Cessation Clause of the 1951 Refugee Convention,” *Geo. Immigr. L.J.* 15, no. 3 (2001): 617.

³²⁹ Jean-Christophe Dumont et al., “How Are Refugees Faring on the Labour Market in Europe? A First Evaluation Based on the 2014 EU Labour Force Survey Ad Hoc Module,” 2016, 11, <https://ec.europa.eu/social/BlobServlet?docId=16130&langId=en>.

differ in their status from transients such as tourists or visiting students. The condition that transients should be excluded from the demos does thus not apply to refugees. Yet, this does not yet tell us whether refugees are qualified to receive political rights as refugees. Is receiving political rights not tied to citizenship? This is the question we will explore in the following section.

4.4 Political Rights and Citizenship: Do They Necessitate Each Other?

Finally, if we want to know whether refugees should receive political rights in liberal democracies, we need to show that political rights can be had without citizenship. The two are, although often assumed to be, not inseparable. Citizenship has not (and does not) always imply possessing the right to vote.³³⁰ Vice versa, the right to vote has not always necessitated possessing citizenship. Historically, there are plenty of examples to show that citizenship could be held without possessing political rights, and that political rights could be had without citizenship.³³¹ Rather, such rights

³³⁰ cf. Sarah Song, “Democracy and Noncitizen Voting Rights,” *Citizenship Studies* 13, no. 6 (2009): 607–20.

³³¹ Women were excluded from the franchise in most democratic states until the beginning of the 20th century, despite possessing citizenship. Other examples include restricting voting right to property owners, wealthy citizens or ethnicity. For this, see: Jamin B. Raskin, “Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage,” *U. Pa. L. Rev.* 141, no. 4 (1993): 1391–1470.. Today, one of the most salient examples of citizens being excluded from the franchise is the voting age qualification. All those under a certain age are excluded from the demos, despite possessing citizenship. Whether that should be the case is a matter of active discussion. Yet, note that the arguments appearing in the discussion on the enfranchisement of children do not refer to citizenship as the triggering claim for such a right, but to their lives being significantly determined by the decisions they are subject to. For the debate on the enfranchisement of children, see: John Wall, “Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage,” *Children, Youth and Environments* 24, no. 1 (2014): 108–23; Claudio López-Guerra, “Enfranchising Minors and the Mentally Impaired,” *Social Theory and Practice* 38, no. 1 (2012): 115–38.

were connected to the economic position a person had, their ethnicity or gender.³³² It was, thus, dependent on the social status of persons in the upper echelons of society and not to citizenship. In modern societies, where participation in the political system is no longer tied to the social status of a person, such qualifications of voting rights seem outdated and normatively indefensible. What matters is simply the political relation between rulers and the ruled. But if only subjection to political rule matters for a claim to political participation, why should citizenship be a necessary condition for it? Many scholars have consequently argued for a position that disaggregates citizenship and political rights.³³³

They have outlined many different ways in which non-citizens are politically similar to citizens. Some argue that they contribute to the state similarly as do citizens, paying taxes and even serving in the military.³³⁴ They argue that immigrants share the same obligations and should therefore share the same rights as citizens, including the right to vote.³³⁵ Interestingly, this was also the argument

³³² Ironically enough, this has also meant that there was no reason for excluding non-citizens from the right to vote. If what matters is simply the social status of a person, then there is no reason to exclude non-citizens that match such status. Consequently, what we observe historically, is that persons possessing the right social status also possessed the right to vote. This was the case in the United States both on the federal and state level. It is suggested that up to 40 different states allowed non-citizen voting at different times. On the federal level, immigrants were allowed to vote in US elections until 1928. For the history of non-citizen voting, see Chapter 2, Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States*; Rainer Bauböck, "Expansive Citizenship — Voting beyond Territory and Membership," *PS: Political Science & Politics* 38, no. 4 (2005): 684; Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage"; and Gerald M. Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote?," *Mich. L. Rev.* 75, no. 5–6 (1977): 1092–1136.

³³³ See: Ziegler, *Voting Rights of Refugees*, 119.

³³⁴ Raskin shows that non-citizens have fought in all major American wars. See: Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage," 1442. Another such example is the involvement of non-citizens in the French army, serving in the "Foreign Legions".

³³⁵ For such arguments, see: Joaquin Avila, "Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population," 2003; Tara Kini, "Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections," *Calif. L. Rev.* 93, no. 1 (2005): 271–321; Virginia Harper-Ho, "Non-Citizen Voting Rights: The History, the Law, and Current Prospects for Change," *Immigr. & Nat'lity L. Rev.* 21 (2000): 295; Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage"; and Aleinikoff and Klusmeyer in: Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States*, 43.

of the first judge to decide in favor of alien voting rights in the United States.³³⁶ Others have argued that voting rights lead to better integrating immigrants in the future³³⁷, or that such rights could lead to better outcomes for minority groups in general, assuming that these groups begin voting en bloc to support each other's interests.³³⁸ These are, undoubtedly, valuable arguments, but they can only serve as auxiliary arguments for triggering a right to political participation. They provide additional reasons for why non-citizen voting rights would benefit immigrants or even other groups of the population. Yet, such benefits do not explain why they ought to possess the right to political participation. Showing that you benefit from something is not yet ground enough for arguing that you should have a right to it. Just because I would benefit from getting a tenure-track job does not yet mean that I have a right to it (although I would certainly be happy). The same holds for the above arguments. They correctly show the benefits for migrants and the host population that non-citizen voting would result in, but this argument does not yet justify why they should possess political rights on its own. A full explanation and justification for why non-citizens should receive political rights would need to resort to one form of the all-subjected principle. This does not mean, of course, that the benefits to non-citizens do not matter at all. Otherwise any instrumental defense of the all-subjected principle would be normatively fruitless. Yet, what matters is not *only* benefiting from a right to political participation, but that one is subjected to political rule, too. This distinction seems clear. I (as a non-citizen) may be benefitted from voting in the US elections simply because its foreign and economic policies have a big impact on my life. Yet, a significant difference exists between a scenario in which I am a long-time resident in Germany or a long-time

³³⁶ Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage," 1443. Citing Justice Blackenridge in *Stewart v. Foster*, 2 Binn. (Pa.) 110 (1809).

³³⁷ Patti Tamara Lenard, "Residence and the Right to Vote," *Journal of International Migration and Integration* 16, no. 1 (2015): 119–32.

³³⁸ Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States*.

resident in the US. What matters is that immigrants are, just as citizens, subjected to political rule.³³⁹ The state makes collectively binding decisions that govern the lives of citizens just as it does the life of immigrants. Without political rights, non-citizens would lack the power to participate in shaping the conditions that govern their lives.³⁴⁰ Both citizens and non-citizens are equally concerned and impacted by the decisions made and should thus have a say in making them.³⁴¹

Citizenship, then, simply does not matter for the right to political participation from a normative point of view.³⁴² This is because citizenship provides persons with a specific legal and not a specific political status. Citizenship is a legal status that provides its holders with a set of rights and duties and distinguishes them as members of a legal community. Citizenship can then be described as serving the legal function to allocate populations to specific sovereign states in international law. It becomes apparent that it is primarily a legal and not a political status when observing the many political communities that have formed both on national as well as international levels without fundamental changes in the citizenship status of the concerned persons.³⁴³ I can be a member of a

³³⁹ For such arguments, see: Ludvig Beckman, "Citizenship and Voting Rights: Should Resident Aliens Vote?," *Citizenship Studies* 10, no. 2 (2006): 153–65; Goppel, "Aufenthaltsdauer Und Wahlrecht."

³⁴⁰ Lenard, "Residence and the Right to Vote"; Kini, "Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections"; See also: Lea Brilmayer, "Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality," *Fla. St. UL Rev* 15, no. 3 (1987): 389–416.

³⁴¹ Aleinikoff and Klusmeyer (2002): *Citizenship Policies for an age of Migration*, in: Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States*; For a similar argument, stressing that consent of the governed is necessary, see: Harper-Ho, "Non-Citizen Voting Rights: The History, the Law, and Current Prospects for Change."
³⁴² Note that this also leads to the opposite conclusion. If what matters for a claim to political participation is not citizenship but subjection to rule, expatriates should be excluded from the right to vote. For this argument, see: Claudio López-Guerra, "Should Expatriates Vote?," *The Journal of Political Philosophy* 13, no. 2 (2005): 216–34.

³⁴³ Rainer Bauböck, "Citizenship and Migration – Concepts and Controversies," in *Migration and Citizenship: Legal Status, Rights and Political Participation*, ed. Rainer Bauböck (Amsterdam: Amsterdam University Press, 2006), 16–17.

regional or transnational political community such as the EU without my political membership changing my citizenship status.

Citizens hold a number of rights that go over and above holding political rights. Just as refugee status remains a specific legal status that confers certain legal rights to refugees, citizenship status confers upon its holders a specific set of rights. If we want to know who should be part of the political community we must introduce a distinction here between those who are citizens and those who are political subjects. Being a member of a political community should not depend on the specific legal status that one holds (just as any other differences say in wealth or gender should not matter), but on whether one is subjected to political rule.

Although many citizens have a claim to the right to vote, this does not follow from their citizenship status, but from their political status as persons subjected to rule. Many citizens are excluded from the right to vote, such as children, or should be excluded on the basis of the all-subjected principle, such as expatriates.³⁴⁴ This does not mean that either of these two are banned from voting in the future. Citizenship guarantees a person a bundle of rights, such as the right to unconditionally return to one's country of citizenship and retain the right to vote. It may include other rights that non-citizens do not possess, such as welfare rights, and, as other scholars have noted, rights to diplomatic protection abroad, and rights securing against deportation.³⁴⁵ What it does not automatically guarantee is the right to political participation. Citizens only possess such a right because they are subjected to rule. Political rights can thus be had without possessing citizenship.

³⁴⁴ cf. López-Guerra, "Should Expatriates Vote?"

³⁴⁵ See: Sager, "Political Rights, Republican Freedom, and Temporary Workers."

Yet, do refugees qualify for such a right, too? In the following sections we will show that refugees are not transients the way that tourists are, and that they are subjected to rule by their host states.

4.6 Urgent and National Enfranchisement: The Special Case of Refugees

So far, our argument could be applied to other non-citizen resident groups, too. This would, of course, require a few tweaks as we have specifically shown that refugee status can function as a proxy for long-term residence. The argument for democratic inclusion on the basis of the all-subjected principle, the argument that past residence only works as a proxy for future stay and the argument that membership of the political community and citizenship are two different forms of membership could, however, also be applied to other non-citizen residents. It could equally apply to undocumented immigrants, for instance. That may be true, and some scholars have argued to that end. Here, I would, however, like to present some additional arguments for why the case of refugees is substantially different from that of other migrants. I will also show that the all-subjected principle warrants not only municipal or regional claims to democratic inclusion, but a claim to democratic inclusion on the national level.

Refugees differ from other groups of immigrants in one specific and relevant way. While regular immigrants possess a number of exit options, and thus the ability to move on or return to their countries of origin, and hence possess alternatives to subjecting themselves to the political rule of their host countries, refugees lack such options. While international law guarantees every citizen the right to return to their country of origin, refugees are barred from doing so. They lack the

protection of their home state and are at risk of persecution if they were to return home. Simultaneously, onward movement is equally often not possible for refugees. Regulations such as the “first country of asylum” or the “third country of asylum” clauses restrict onward movement of recognized refugees or those who could have applied for international protection. While we can doubt the moral justification for these clauses themselves, they do exist. This results in a situation in which refugees essentially lack any reasonable option other than being subjected to political rule when residing in liberal democracies. Their predicament, and thus the lack of exit options, thus differs from the predicament of other non-citizen resident groups. Where other immigrants can avoid subjection to rule, refugees cannot. Yet, this is not the only reason why refugees may be special in comparison to other non-citizen residents. Although not triggering the right to vote itself, we could argue that enfranchisement is a matter of greater urgency for refugees than for regular immigrants.

Over and above the rules and regulations that apply to all other citizens and residents of host countries, a number of specific rules apply to refugees. These often govern large parts of and possess great (often negative) impact on their everyday lives. I will not be able to list all such rules and regulations but will provide examples of how refugees are subjected to rule and where their lack of participation has caused flaws and often dangers for refugees while living in the liberal democracies of the Global North. While also being impacted by local and regional decisions, I will show that most rules and regulations concerning refugees specifically are national ones. This should provide us with a claim that refugees should possess rights to democratic inclusion not only on a regional or municipal, but on a national level. I will group these rules and regulations into those that shape the period of their reception and stay and those that impact the condition for their possible return to their countries of origin.

Refugees who arrive to liberal democracies are often in particularly vulnerable situations. The experiences that have shaped their flight and journey often wear heavily on their physical and mental health. Yet, it is not only the pre-arrival situations that place refugees at risk of experiencing mental health issues. Often, they are carried over and then reinforced or even created by the conditions prevailing in liberal democracies. Refugees are ten times more likely to suffer from Post-Traumatic Stress Disorder than the populations of countries where they receive asylum.³⁴⁶ Several studies have found that the social policies of receiving countries play a large role in causing or contributing to mental disease in refugees.³⁴⁷ Lacking involvement of refugees in designing such policies, they are often prone towards stereotypization and homogenization of the medical needs and backgrounds of refugees.³⁴⁸ In fact, only two countries in the EU have developed mechanisms that involve refugees in determining and specifying the needs of refugees regarding mental health issues.³⁴⁹ Yet, it is not only the lack of participation regarding the reception of refugees that cause and prolong mental health issues. It is also the lack of participation and meaningful contribution of refugees to a variety of social policies that in turn have detrimental impacts on refugee's mental health.³⁵⁰ Especially policies geared towards "rapid integration" of refugees have caused mental health issues.³⁵¹ Refugees are often subject to dispersal policies that aim at precluding people of

³⁴⁶ Niall Crumlish and Killian O'Rourke, "A Systematic Review of Treatments for Post-Traumatic Stress Disorder Among Refugees and Asylum-Seekers," *The Journal of Nervous and Mental Disease* 198, no. 4 (2010): 237.

³⁴⁷ See: Alastair Ager, "Mental Health Issues in Refugee Populations: A Review," 1993; Charles Watters, "Emerging Paradigms in the Mental Health Care of Refugees," *Social Science & Medicine* 52, no. 11 (2001): 1709–18.

³⁴⁸ Watters, "Emerging Paradigms in the Mental Health Care of Refugees," 1710.

³⁴⁹ Watters, 1710.

³⁵⁰ The literature on mental health issues suggests that increased participation of refugees in decision making could ameliorate or prevent mental health problems for refugees. See: Ager, "Mental Health Issues in Refugee Populations: A Review," 17–18.

³⁵¹ Watters, "Emerging Paradigms in the Mental Health Care of Refugees," 1711; Ager, "Mental Health Issues in Refugee Populations: A Review."

the same ethnicity to settle in the same area of a country and thus to form ethnic enclaves.³⁵² Yet, with the lack of services that sufficiently aid refugees in dealing with welfare, housing, health institutions as well as adapting to new local environments, dispersing refugees and thus breaking up refugee networks have caused distress and mental health issues amongst refugees themselves. Policies that require refugees to settle in specific areas of the country thus subject them to rule in a specific manner that directly and greatly impacts their daily lives in a negative manner.

Such dispersal policies do not, of course, only affect the mental health of refugees. They have also shown to have detrimental impact on the economic performance of refugees.³⁵³ Being forced to live in often remote areas of the country, where housing is cheaply available due to poor economic conditions, refugees are far more likely to be disadvantaged economically even compared to other migrants. As a consequence of such dispersal policies, they are 22.1% more likely to be unemployed than other migrants with the same characteristics.³⁵⁴ This has far more than just temporary consequences. According to the same study, it takes refugees on average 15 years to bridge the gap in economic performance to other migrants not confronted with the same regulatory constrictions.³⁵⁵ Regulations such as these thus specifically govern refugees and shape their lives in a profound and long-term manner. Allowing them to participate in making decisions regarding such regulations would have allowed to better take into consideration their needs and would have arguably resulted in better outcomes for refugees themselves.³⁵⁶

³⁵² Such policies were in effect in Sweden and Denmark and are still employed in Ireland, the Netherlands, Norway and the UK. See: Francesco Fasani, Tommaso Frattini, and Luigi Minale, "(The Struggle for) Refugee Integration into the Labour Market: Evidence from Europe," 2017, 26.

³⁵³ cf. Per-Anders Edin, Peter Fredriksson, and Olof Åslund, "Settlement Policies and the Economic Success of Immigrants Population Economics," *Journal of Population Economics* 17, no. 1 (2004): 133–55.

³⁵⁴ Fasani, Frattini, and Minale, "(The Struggle for) Refugee Integration into the Labour Market: Evidence from Europe," 5.

³⁵⁵ Fasani, Frattini, and Minale, 15.

³⁵⁶ See: Watters, "Emerging Paradigms in the Mental Health Care of Refugees," 1711.

The lack of participation of refugees has also led to a number of issues remaining either undetected or unresolved in other policies affecting them. This is not only the case with regards to labor market access, housing or education.³⁵⁷ With their specific backgrounds and origins, refugees are confronted with barriers to the labor market that are not immediately visible to locals. Sometimes, the laws of host states require documentation that refugees simply cannot provide, such as birth certificates, and that in turn impact their ability to access other documents necessary for participating in the labor market (such as driving licenses).³⁵⁸ Some policies make labor market access difficult even though refugees possess the right to work in most liberal democracies. Such difficulties are not necessarily the result of bad intentions but have unforeseen consequences that affect refugees negatively. In the UK, for instance, the change to a 5-year fixed term of stay for refugees has not only made refugees feel insecure about their ability to remain, but has deterred employers from hiring them. Refugees simply lack the leverage to change such policies.

Other times, application processes do not sufficiently guard against discrimination. Refugees in Australia, for instance, regularly face problems finding employment because of a lack of Australian work experience.³⁵⁹ In other instances, issues are more glaring but are only insufficiently tackled as refugees possess no political leverage to change them. One such issue is access to education. Educational facilities are often not geared towards insufficient or different levels of education that refugee children possess. This is not only an issue of providing sufficient

³⁵⁷ Eileen Pittaway, Chrisanta Muli, and Sarah Shteir, “‘I Have a Voice — Hear Me!’ Findings of an Australian Study Examining the Resettlement and Integration Experience of Refugees and Migrants from the Horn of Africa in Australia,” *Refuge: Canada’s Journal on Refugees* 26, no. 2 (2009): 133–46.

³⁵⁸ This was, indeed, a court case in Germany, which was ultimately won by the refugee. What it shows is that such small details often go unnoticed by policy makers, making policies for a specific segment of the population but not for others that are not represented (eg. Refugees). It shows that what follows are policies that are not sufficiently fine-tuned to the situations of those whom they affect. For the German court case, see: Hessischer VGH, Urteil vom 09.06.2015 - 2 A 732/14, available under: <https://openjur.de/u/775783.html>

³⁵⁹ Pittaway, Muli, and Shteir, “‘I Have a Voice — Hear Me!’ Findings of an Australian Study Examining the Resettlement and Integration Experience of Refugees and Migrants from the Horn of Africa in Australia,” 138.

language courses, but also often follows a lack of institutional awareness and training of teachers in dealing with the specific needs of refugees.³⁶⁰

Many refugees are also profoundly affected by family reunification programs. This is a right widely respected in liberal democracies. Yet, refugees are often confronted with difficulties stemming from a lack of awareness by institutions which decide over family reunification without consultation or participation of refugees. One such example refers to diverging definitions of what a family is. Pittaway et. al. show that death and destruction which characterize the scenarios that refugees leave behind often impact family structure. Nieces and nephews are raised by uncles and aunts often without formally being adopted.³⁶¹ The lack of such official documentation, which is often not available in conflict situations or in specific institutional settings in the countries of origin, then impact the ability of such persons to reunite their families. Integrating and consulting refugees in the decision-making processes that determine such rules would undoubtedly help in generating more fine-grained policies that are more aware and can better adjust to the specific experiences that refugees encounter.

Finally, refugees are not only subjected to rule in that the decisions of liberal democracies specifically shape and govern their lives during their period of reception and their stay. They are also significantly impacted by liberal democracies making decisions regarding the conditions for them to return home. We have already brushed upon the topic of cessation of refugee status above. Yet, what we have not sufficiently discussed is that the evaluation and the decision for triggering the cessation clause is entirely in the hands of liberal democracies themselves. This means that it is liberal democracies which evaluate and decide when the circumstances in the countries of origin

³⁶⁰ Pittaway, Muli, and Shteir, 138.

³⁶¹ Pittaway, Muli, and Shteir, 140.

of refugees have sufficiently changed for triggering a (possibly non-voluntary) repatriation of refugees. Such decisions undoubtedly affect the lives of refugees to an immense degree. Often, they are decisions over life and death. Refugees themselves are most likely to be aware of the conditions pertaining to their countries of origin. Yet, the decision to trigger the cessation clause does not include participation or consultation on behalf of those it affects most: refugees. In many cases, such lack has resulted in detrimental outcomes, as recommendations and decisions are prematurely made, paying only insufficient attention to the actual circumstances in the country of origin or to the perceptions of security by refugees themselves.³⁶² The UNHCR, for instance, began promoting and facilitating the return of refugees before cessation standards were fully met in the 1990's.³⁶³ This has led to the facilitation of return of refugees in cases in which conflicts were officially resolved, but where little attention was paid to the sense of security of refugees themselves. This was the case with Afghan refugees and the promotion for their return from Pakistan. The decision for facilitating return and triggering the cessation clause was made after the withdrawal of Soviet troops from the country but did not take into consideration the internal political divisions and conflicts between ethnic groups in the country.³⁶⁴ Similar decisions have been made with regards to refugees from Sri Lanka, Cambodia and Angola.³⁶⁵

All of these policies, regulations, laws and decisions are currently made without involving or consulting refugees. It is the often negative impact such policies have on refugees – policies that are made for but not by refugees, and thus policies that arguably represent the interests of groups

³⁶² See: Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (Oxford: Oxford University Press, 2013), 166.

³⁶³ Hathaway, "The Right of States to Repatriate Former Refugees," 194–95.

³⁶⁴ B. S. Chimni, "The Meaning of Words and the Role of UNHCR in Voluntary Repatriation," *International Journal of Refugee Law* 5, no. 3 (1993): 455.

³⁶⁵ Stein and Cuny, "Refugee Repatriation during Conflict: Protection and Post- Return Assistance," 177.

other than refugees themselves – that make the specific conditions of refugees precarious and that add to the urgency for their democratic inclusion. These laws, regulations and decisions are furthermore predominantly made on a national level. Housing and relocation schemes, decisions that affect the economic performance of refugees and even decisions impacting specific educational needs are all a matter of national decision-making. Even if some scholars thus hold that other immigrants may have a particularly strong reason for being enfranchised on a municipal or regional level because of their specific subjection to local rule, the same does not apply to refugees. The matter of enfranchising refugees does thus not only possess greater urgency than the enfranchisement of other non-citizen residents, it should also imply receiving political rights not only on municipal or regional, but on the national level.

Liberal democracies thus decide over the conditions that govern the lives of refugees. They subject refugees to rule in very specific ways for long periods of time. Not being transients the way that tourists or visiting students are, refugees should thus have a say in such decisions. They should possess political rights in liberal democracies.

But how would the life of refugees look like were they to receive political rights? This is a difficult question to answer, nonetheless because refugees are rarely empowered in this manner. We can thus not learn from practice. It should not discourage us to learn from other examples, however, and we may return to our theoretical discussions on the worth of public autonomy in chapter 2 when imagining how and why refugees would benefit from being politically free. In chapter 2, we outlined three different ways in which public and personal autonomy interrelate. Public autonomy possesses 1. a safeguarding function for, 2. a defining function of and 3. an informing function regarding the personal autonomy of individuals. We can translate these three functions into the context of refugees.

Receiving political rights will lead refugees to better safeguard their autonomy. The laws that bind the citizens of a country also bind refugees. Yet, as we have discussed, refugees are the subject of several distinct laws and regulations that only concern them. We know from history that whenever a minority lacks political freedom, their interests will be, at best, discounted by those who rule or, at worst, harmed. Rulers care little about those who have no say, no political leverage and thus constitute no threat to the political ambitions of those who seek re-election. This can both lead to disregarding the interests of such groups, and to scapegoating and using minorities for other political gains, harming their interests. Refugees are in a similar position. Receiving political rights would provide refugees with a status within the political system of the host state that allows them to build political leverage. Decision-makers would no longer be able to decide on issues that matter greatly for refugees while having in mind only the interests of disgruntled Wutbürger. Democratic authorities would need to seriously consider the interests of refugees, if not as voters then as politically active members of the community.³⁶⁶ There are, of course, plenty of examples of political activism of refugees. Yet, more often than not, their status is one of political precarity – the status of a political pariah. Political action with this background can only hope to instill change in others: influence citizens, change their minds, and change their votes. It is, however, ultimately done against a background of a lack of political status and a lack of political leverage themselves: it counts on a hope of influencing those who have political leverage to step in on their behalf. The absence of political leverage when it comes to decisions made regarding refugees is widely noticeable in the laws and regulations that specifically concern them. We have already discussed

³⁶⁶ This follows when we observe the impact that minority voting rights have had on the protection of the interests of those minority groups. Take for an example (though with ample room of improvement), the case of minority voting rights in the US. See: McDonald, “The Quiet Revolution in Minority Voting Rights.”

some of them above. They range from housing conditions³⁶⁷ to health care regulations³⁶⁸, all the way to restrictions on the economic performance of refugees, such as laws that do not recognize foreign diplomas or do not foresee specific options to regain or claim such qualifications when documents are lost.³⁶⁹ Possessing political rights may not guarantee that everything changes to the better immediately, but it may provide refugees with the political status and leverage necessary for pressuring decision makers to take into account their interests when deciding on matters that predominantly concern them.

Second, political freedom would allow refugees to define what constitutes legitimate restrictions versus violations of their personal autonomy. Feedback loops are an important part of discerning the boundaries of the personal autonomy of individuals in the general population. They matter even more when it comes to protecting the personal autonomy of minorities. Without consulting minorities on specific regulations, laws and bureaucratic practices that concern them, such decisions run the risk of reproducing the idea of what authorities believe to be legitimate restrictions, rather than possible violations of the autonomy of minorities. Receiving political rights in liberal democracies would allow refugees to better define what they perceive as acceptable interventions into their private sphere and what they perceive as unacceptable. We may think of a number of different issues discussed above, such as housing regulations and resettlement policies.³⁷⁰ In many countries, the state views the distribution of refugees across regions and the

³⁶⁷ Nihad El-Kayed and Ulrike Hamann, “Refugees’ Access to Housing and Residency in German Cities: Internal Border Regimes and Their Local Variations,” *Social Inclusion* 6, no. 1 (2018): 135–46.

³⁶⁸ For an example of the issues refugees face in the German health care system, see: Christian Pross, “Third Class Medicine: Health Care for Refugees in Germany,” *Health and Human Rights* 3, no. 2 (1998): 40–53.

³⁶⁹ cf. Iván Martín et al., “From Refugees to Workers: Mapping Labour-Market Integration Support Measures for Asylum Seekers and Refugees in EU Member States,” vol. II, 2016.

³⁷⁰ El-Kayed and Hamann, “Refugees’ Access to Housing and Residency in German Cities: Internal Border Regimes and Their Local Variations”; Edin, Fredriksson, and Åslund, “Settlement Policies and the Economic Success of Immigrants Population Economics.”

mandatory stay of refugees in particular areas of the country as legitimate restrictions of the autonomy of refugees that serves the purpose of boosting economic activity in particularly remote areas. To refugees, however, such regulations may in fact represent violations of their personal autonomy, often impacting their ability to engage in communities of compatriots, and slighting their chances at economic success. There are, of course, a number of other specific aspects of regulations and practices that decision-makers do not notice – not because they would not want to, but because the lack of feedback loops prevent them from knowing what their policies imply for refugees. Think of the educational needs of refugees and the particular cultural, ethnic and national backgrounds that may make specific practices (food choices in schools, language requirements, absence of adapted school curriculums) to be perceived as normal by locals, but as infringing on the personal autonomy by refugees. We can also think of the involvement of refugees in particular decision-making processes that mainly concern them, such as the decisions regarding the conditions pertaining in their home country and thus the decisions on when it is safe to issue a recommendation for returning home.

Third, receiving political rights would allow refugees to inform decision-makers of the problems that some of their measures and bureaucratic practices generate, the impact some of the regulations have on them and other aspects of life in liberal democracies that constitute threats to their well-being. Policies and laws often do not take into consideration the needs of refugees. This may not be intentional. They simply do not know what and how laws, regulations, services and bureaucratic practices affect refugees. We have briefly touched on one such example above. The many different integration policies that liberal democracies impose on refugees can often have detrimental effects on their mental health and well-being. The lack of representatives and being in the position of outsiders to the political community results in decision-makers often having little knowledge of

the way their practices impact refugees. Politically enfranchised refugees could organize pressure groups, possess representatives that defend their interests and to whom information channels exist for refugees to access.

Receiving political rights, refugees would thus be able not only to better safeguard their personal autonomy, but to participate in demarcating the boundaries of what constitutes acceptable regulations of their personal autonomy, as well as inform decision makers regarding the practices that do and do not work. Even if it would not instantaneously solve all issues refugees face, being full standing members of a political community could go a long way in improving their situation.

4.7 Conclusion

Should refugees possess political rights in liberal democracies? This chapter has sought to provide an answer to this question by consulting the all-subjected principle. This principle holds that all those subjected to rule should have a say in that rule. It is a principle of full-inclusion, shedding from political weight all characteristics external to the relation between the rulers and the ruled. Arguing that no factors such as wealth, social status or ethnic origin should matter for the right to political participation, it has commonly included one exception: the exclusion of transients. This chapter has tried to show that a justification for excluding transients cannot stem from a lack of time spent in liberal democracies in the past. The all-subjected principle is forward, not backward looking. And so, the reason for excluding transients can only stem from such logic. They ought to be excluded because they are not subjected to rule in the future. If they were to participate in

making such rule, they would make decisions to which they are not subjected. Whether refugees ought to possess political rights thus hinges on the question whether they are, just like tourists or visiting students, transients. This is not the case. After showing that political rights can be had without possessing citizenship, I have showed that refugees differ from transients in two regards. First, even though their status is not permanent, it is indeterminate, and so is their time of stay. Even though cessation clauses exist that can cut short the time refugees spend in liberal democracies, they are rarely invoked (if ever) and then only after significant amounts of time has passed. Secondly, refugees differ from transients in the way they are subjected to rule. The last section has argued that refugees differ from other non-citizen residents in the way that they lack any meaningful exit options. This makes the claim for democratic inclusion of refugees a matter of greater urgency than for regular immigrants. Finally, the section has outlined that refugees are subjected to rule over and above other residents and that the laws and regulations most impacting and specifically concerning refugees are national ones. This leads to a claim of democratic inclusion not only on a municipal or regional, but on a national level. The section then has concluded with showing how we could imagine the democratic inclusion of refugees in liberal democracies. We may thus return to the initial question and ask: should refugees possess political rights in liberal democracies? Since they are not transients and since liberal democracies subject them to rule, the answer needs to be “yes”. Refugees in liberal democracies should be able to participate in controlling the conditions that govern their lives.

Conclusion

This thesis has begun with the story of the politically unfree and oppressed. It has characterized the flight of a refugee from a country in which she had no freedoms to design her life. Being incapable of participating in shaping the conditions that govern her life, she set out to leave her country of origin. Yet though hopeful, she would not find what she had left behind in displacement. Arriving at a refugee camp, she found that it was ruled by International Organizations. Living in squalid environments, refugees had no say over the conditions that governed their everyday lives. In our story, she left the camp and survived the arduous journey to one of the liberal democracies in the global north. Yet, here too, she would not retrieve her lost freedoms. Though affording their own citizens the political freedoms necessary to control the conditions that govern their lives, this did not apply to her. Her predicament was and remained one of political unfreedom.

This thesis has followed the narrative of this journey. It has begun with exploring the normative foundations of refugeehood. Who should be recognized as a refugee? Should it be those persecuted for specific reasons, or those persecuted for any reason? Should it be those who fear harm coming to them? In the first chapter of this thesis, I argue that it is neither. I show that neither persecution nor harm can function as a sound normative foundation for us to build a theory of refugeehood. Rather, I argue in chapter two, it is political oppression and unfreedom that makes for a solid normative foundation. The plight of those politically oppressed and unfree is not only defined through and appears as persecution or overt forms of harm, although they can be. Both may matter, but they matter because the individuals that experience them have no means of seeking (political) recourse. They are incapacitated in controlling the conditions that govern their lives. It is thus

political oppression and unfreedom, understood as a lack of public autonomy and formally expressed as the lack of legal-political status, that qualifies harm, explains why persecution matters and thus provides us with an answer to the question who should be recognized as a refugee: those politically oppressed and unfree.

The second part of this thesis turns to the predicament of refugees in displacement. Even if the story we have told at the outset of this thesis is a rather unlikely one in reality – after all, the current conditions for being recognized as a refugee bar many from leaving, those that do arrive at refugee camps tend to stay there for decades, and many do not reach the liberal democracies of the global north – each stage in this journey truly represents the plight of refugees in displacement. They continue to be politically disenfranchised. The second part of this thesis asks whether this should stay as it is. It asks whether refugees should govern refugee camps and whether they should receive political rights in liberal democracies. To both, I have answered with “yes”.

I have employed the “all-subjected principle” to show why refugees should receive political rights in displacement. It argues that all those subjected to political rule should have a say in such rule. The conditions for the principle to apply to refugee camps, I have argued in chapter 3, hold. With the near complete withdrawal of host states, refugee camps have developed their own economic, legal and even political systems. International Organizations, namely the UNHCR and contracting NGO’s, have taken the role of governing the camps in what can be described as authoritarian fashion. I show that the conditions of the all-subjected principle to apply hold in the case of refugee camps: they form political units that have developed distinct governance structures from those of the host states, and subject refugees to rule. I show not only that refugees should govern the camps, but that the democratization of refugee camps may be contribute to their well-being. It allows refugees to safeguard their personal autonomy, define what violates it, and inform decision-makers

about violations. In other words, it would allow refugees to being in control of the conditions that govern their everyday lives.

The last chapter of this thesis – chapter four – has asked whether those refugees arriving in liberal democracies should receive political rights. I hope to have demonstrated that the all-subjected principle applies to them, too. To show this, we needed to move from the basics of the principle to its nuances. The principle typically excludes transients from its scope. I have shown that this is the case because time spent in liberal democracies is taken as a proxy for remaining in the country. I have argued that refugee status can function as such a proxy. Despite refugee status not being a permanent status, it is indeterminate in character. Refugees do remain in liberal democracies for long periods of time, if they ever leave. This means that refugee status can be seen as a proxy for remaining in liberal democracies in the foreseeable future. Refugees are thus not transients the way that tourists or visiting students are. In a second step, we needed to show that the principle also applies to non-citizens. We needed to demonstrate that political rights can be had independently from having citizenship. I have argued that this is the case. Citizenship status makes for a specific legal status that promises those who hold it many more rights than just political rights. I have argued that what matters for receiving political rights is merely the political relation between the rulers and the ruled. All that matters is that individuals are subjected to rule. It is subjection to rule that grounds a right to political participation, and not the specific legal status a person holds. In other words, the principle applies to refugees in liberal democracies, too. I have concluded this chapter by showing that refugees are indeed subjected to rule in liberal democracies in ways that go over and above the rule that other citizens are subjected to and the national origins of these laws and their specific situation provides them both with an urgent as well as a national

claim for democratic inclusion. Refugees, I have hoped to show, should receive political rights in liberal democracies. They should be able to control the conditions that govern their lives.

In doing so, I hope to have uncovered the normative difficulties at the heart of contemporary understandings of refugeehood, offered a different normative foundation and provided a justification for the enfranchisement of refugees in displacement. Considering the foundations for a normative concept of refugeehood, the thesis has sidelined specific questions that could now be addressed in a new light. These are questions regarding the duties of liberal democratic states, particularly when it comes to the ethics of admission. How does the understanding of refugees as those politically oppressed change the duties liberal democracies have regarding the admission of refugees? Should autocratic states host refugees, or should it be mainly liberal democracies that do so? Should they facilitate resettlement from non-democratic countries, or should they encourage the creation of democratic pockets wherever this is possible? But the thesis does not only raise questions regarding the ethics of the international refugee regime, but also opens up avenues for research in the democratic theory concerning different aspects of refugeehood. The normative argument for the democratization of refugee camps has left us with a general justification but not a more specific non-ideal democratic theory of camps. It allows further research to ask more specific questions. Which are the specific democratic institutions that would best fit refugee camps? How should the ‘foreign policy’ of refugee camps look like when it comes to relations with the host state or other refugee camps? How should a fair system of checks and balances look like and how can it be combined with the traditions and practices that refugees already operate according to? Questions of democratic institutions could also arise when it comes to refugees residing in liberal democracies. Should refugee participation go beyond the enfranchisement of refugees? Should it include the creation of committees, advisory boards and political as well as

administrative channels for influence groups to address regulations and policies that especially concern refugees? These are fascinating questions that arise as a result from this thesis and which warrant further research by all those interested in the ethics and democratic theory concerning refugees.

This, then, concludes the journey this dissertation has followed. What does it leave us with? I hope to have showed that we should not blindly take for granted any legal or philosophical understanding of refugeehood if we are interested in the correct normative evaluation of refugeehood. I have showed that what stands at the center of refugeehood, what makes for its foundation, is their political unfreedom. If we depart from this foundation, new beams and rails will emerge for building a theoretical construction of refugeehood that stands on solid normative footing. Showing the great importance that political freedom plays not only for the condition of refugeehood, but for the lives of refugees in displacement, I hope to have provided ample argument for why their political unfreedom should not extend to their lives elsewhere. I hope to have shown that refugees should receive political rights in displacement wherever this is possible and that they should recover what they have lost: political freedom.

Annex 1

Chapter one has provided a critique of three approaches that determine refugeehood on the basis of harm. Throughout chapter two, we have referred to the problems that these approaches face when determining which situations involving harm should warrant refugee status. In this annex, I will use the example of poverty to show exactly which difficulties approaches based on harm face. The two ways in which the three approaches have tackled the topic of poverty is either by arguing that socio-economic harm can be inflicted on persons in a persecutory and discriminatory manner (Classical and Human Rights Approach), basically using socio-economic deprivation as a tool of persecution. Such an interpretation leads, however, to ignoring the indiscriminate harm caused by poverty. I will show how and why this is normatively problematic. The other possible interpretation results from the Humanitarian Approach. It would result in an argument to include poverty as such as a factor triggering refugee status. Here, the question of determining the threshold of harm appears. How poor must a person be to have a claim to refugee status? Several different ways of trying to resolve this question have failed.

A Threshold of Harm? The Classical and the Human Rights Approach

Which cases involving threats of serious harm should lead to a claim to refugee status? In this section I discuss whether the Human Rights Approach (and by extension the Classical Approach)

employs a correct standard in determining when harm should lead to refugee status. I take the example of poverty. I discuss when poverty should lead to a claim to refugee status according to the Human Rights Approach. In attempting to include poverty as a possible scenario covered by the Human Rights Approach, it is confronted with two difficulties. The first arises when broadening the understanding of persecution, shifting the requirement for claiming refugee status from a threat of serious harm to the violation of human dignity. This results in difficulties determining the boundaries of who should qualify for refugee status. The second arises because of its requirement that such violations must have been inflicted in a discriminatory fashion. The approach leads to troubling results. It is incapable of including indiscriminate harm, resulting in the inclusion of minor forms of discriminatory harm while not considering the indiscriminate nature of harm constitutive of most forms of poverty.

Socio-economic deprivation is widely understood as a form of harm. Colloquially, it is perhaps recognized as one of the most pertinent forms of harm that comes to human beings. As such, socio-economic harm has entered the legal understanding of who is deserving of refugee status, albeit in a very specific sense, namely when it appears as persecution. But when should economic hardship lead to recognition as a refugee?

It is acknowledged as a form of persecution in nearly all cases in which the deprivation of economic rights amounts to physical harm. Yet, precisely how to understand harm as counting towards persecution has changed over time. In the United States, the decision in the seminal case of *Dunat v. Hurney*, in which a Yugoslav seaman applied for asylum based on the reason that he would be denied an opportunity to earn a livelihood in Yugoslavia due to his Catholic faith, set the standard for requirements regarding cases involving economic hardship until 1965. Such

requirement included that economic hardship may amount to persecution if a person is denied “an opportunity to earn a livelihood”.³⁷¹

In 1965, the US Congress amended the law that proscribed that persecution must be physical in nature, which had implications for how cases of economic hardship were interpreted.³⁷² Such cases were often not interpreted as involving “physical” persecution since the respective persecutor does not come into physical contact with the persecuted.³⁷³ Following this shift of interpretation, the threshold for what amounts to economic persecution has, however, only been somewhat relaxed in practice in the US. Take, for instance, the case of *Kovacs vs. INS*, in which a Yugoslav citizen of Hungarian extraction applied for asylum in the United States following his refusal to mingle with Hungarian refugees following the 1956 revolution and provide the Yugoslav secret service information on Hungarian underground activities. The secret police consequently contacted his employers and caused him to lose several jobs and be turned away from other job opportunities. In its decision, the Board stated that it is not necessary that economic sanctions be “so severe as to deprive him of all means of earning a livelihood”.³⁷⁴ The Board held that a “probability of deliberate imposition of substantial economic disadvantage” should suffice.³⁷⁵ Note that this represents a change in the interpretation of what suffices for a claim to economic persecution.

Despite this shift in interpretation, however, courts have continued to demand a high threshold of serious harm in cases of economic persecution. While it is widely recognized that the most egregious forms of deprivation of economic rights satisfy the persecution requirement, deprivation

³⁷¹ *Dunat v. Hurney*, 297 F.2d 744 (3d Cir. 1962)

³⁷² Lauren Michelle Ramos, “A New Standard for Evaluating Claims of Economic Persecution Under the Convention Relating to the Status of Refugees,” *Vand. J. Transnat’l L* 44 (2011): 507.

³⁷³ *Ibid.*

³⁷⁴ *Kovac v. INS* 407 F.2d 102 (9th Cir. 1969) at 105

³⁷⁵ *Kovac v. INS* 407 F.2d 102 (9th Cir. 1969) at 107

of economic rights that are not tied directly to violations of political and civil rights such as the right to life have often not been recognized. Take as an example *Matter of Acosta*, in which the United States Board of Immigrant Appeals (BIA) held that economic persecution must amount to “economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom.”³⁷⁶ This is the case not only in the United States. The Australian Migration Act of 1958 acknowledges economic claims only if they threaten “a person’s capacity to subsist”³⁷⁷ and the UK Asylum and Immigration Tribunal (AIT) has stated that “[e]conomic hardship must be extreme and the discrimination must effectively destroy a person’s economic existence before surrogate protection can be required.”³⁷⁸ This interpretation is rather uncontroversial.³⁷⁹ Such cases are not substantially different from cases in which civic rights are violated in any other manner. After all, “[...] the sustained or systemic denial of the right to earn one’s living is a form of persecution, which can coerce or abuse as effectively as imprisonment or torture”.³⁸⁰

Here, socio-economic deprivation is merely seen as one means of violating civic and political rights of a person such as the right to life. Socio-economic deprivation only amounts to economic persecution, according to this interpretation, if they can be interpreted as violations of civic and political rights. By themselves, violations of socio-economic rights do not. According to the Human Rights Approach, setting the threshold of economic persecution to require violations of civic and political rights is insufficient. It disregards that socio-economic deprivation may

³⁷⁶ *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985)

³⁷⁷ Parliament of Australia, “Migration Act” (1958) (Cth) s 5J (5 d to f).] (Austr.).

³⁷⁸ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge et. al.: Cambridge University Press, 2007) supra note 2, at 124 Quoting *El Deaibes v. Secretary of State for the Home Department* [2002] UKIAT 02582, para. 13 (‘El Deaibes’).

³⁷⁹ Atle Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff, 1966), 208.

³⁸⁰ Hathaway, *The Law of Refugee Status*, 121.

constitute a specific form of harm that may qualify for refugee status and that tying it to civic and political rights constitute too high of a threshold.

Michelle Foster defends this interpretation. Applying the Human Rights Approach to socio-economic deprivation, she argues that cases such as the above effectively reduce economic claims of persecution to violations of rights listed in the ICCPR. She claims that economic persecution may not always involve a direct threat to life or liberty. A state may target its population in a number of ways that fall short of such a high standard. It may impose restrictions on the right to work, intervene in denying persons the right to education or bar access to health services. These result, she holds, not only in serious long-term consequences for the individuals targeted, but also in severe violations of their human dignity.³⁸¹ Foster argues that to take serious economic persecution means to account for a much wider spectrum of socio-economic harms that states may inflict in targeting individuals. She proposes to align refugee law with international human rights law and holds that economic persecution must then be understood as the violation of rights not only as listed in the ICCPR but also as those listed in the relevant international human rights document specifying economic, social and cultural rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR). Such rights include the rights to work (Art. 6), favorable conditions of work (Art. 7), the right to an adequate standard of living (Art. 11), to physical and mental health (Art. 12) and the right to education (Art. 13). If refugee status determination is tied to violations of the ICESCR, a threat of serious harm (such as a threat to life) is not always necessary for triggering refugee status. It shifts the requirement for claiming refugee status from demonstrating a threat of serious harm to the violation of human dignity.

³⁸¹ Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, 102–3, 130.

To understand what this means and why the Human Rights Approach has favored such an interpretation, take, for instance, the decision in the case *R.M.K. (RE)*, decided by the Canadian Refugee Protection Division (RPD). In this case, ethnic Turkish tobacco growers in Bulgaria applied for asylum in Canada claiming economic persecution. The applicants claimed that Bulgarian employers do not hire persons from ethnic minorities even if jobs do not require any skills or qualifications. The only work left for the claimants was in tobacco cultivation in a village nearly entirely consisting out of ethnic Turks and Roma. After the collapse of the communist regime in 1991, the ethnic Turks and Roma began demanding their rights. As a reaction, the government withdrew all health, transportation and telephone services from the village of the claimants and repeatedly suspended the payments for the farmers. When payments were made, the government also reduced the tobacco price to 15 percent of the sale price, leaving the farmers in poverty and hunger. The board denied the asylum claim, arguing that although such treatment was discriminatory and resulted in “serious problems for tobacco farmers in sustaining themselves and their families, and that a number of tobacco farmers and their families experienced hunger”³⁸², it did not amount to treatment that was sufficiently serious to amount to persecution. The board held that it did not result in the ethnic Turks ability to earn a living at an extreme level since the claimant had “managed to eke out a meager living, despite these actions, and continued to cultivate, harvest and sell their crop to [the government owned enterprise], being left with little choice to do otherwise.”³⁸³

According to the Human Rights Approach, this decision applies a wrong standard for economic persecution. The Turkish tobacco growers need not show that the measures of the state have

³⁸² Foster, 126 quoting RMK (Re), No. TA1-06365 [2002] CRDD No. 300, 16 May 2002, at para. 35.

³⁸³ Foster, 126–27 quoting RMK (Re), No. TA1-06365 [2002] CRDD No. 300, 16 May 2002, at para. 36.

violated their civic rights. They need not demonstrate that their socio-economic deprivation is so severe as to constitute a direct threat to their lives. What suffices, the approach argues, is that the acts of the state targeted the Turkish tobacco farmers and subjected them to conditions violating their rights according to the ICESCR. The acts of the Bulgarian state might not have caused an immediate threat to their lives, but the conditions of poverty and hunger they were subjected to constitute severe violations of their human dignity. It is such treatment infringing on human dignity that provides the Turkish tobacco growers with a claim to refugee status, the Human Rights Approach argues.³⁸⁴

The Human Rights Approach thus shifts the threshold of harm to a standard that requires the infringement on human dignity based on violations of economic (and social) rights. Yet, this leads to difficulties in setting a normatively defensible threshold in deciding who should be able to claim refugee status on the basis of poverty. Should a person be recognized as a refugee merely because she is not hired by a state's administration despite being qualified? Should she be recognized as a refugee if she does not possess equal chances in competing for public contracts and faces economic hardship as a consequence?

One of the difficulties with this approach is that it leaves the door wide open for interpretation of when human dignity is violated. A second worry is directly related to this. As specified in the previous chapter, the violation of human rights do not suffice for triggering a claim to refugee status in themselves. What must be demonstrated is that such a violation occurs as a consequence of discrimination. The person must thus show a nexus between persecution and a discriminatory reason. The Human Rights Approach has expanded the list of admissible reasons that amount to discrimination. As specified in the last chapter, it has especially attempted to widen the

³⁸⁴ Foster, 127, 130.

interpretation of one of the reasons listed in the Geneva Convention to incorporate a wide array of discriminatory grounds: membership of a particular social group. The same holds for Foster's attempt of applying the Human Rights Approach to socio-economic deprivation. Not any form of such deprivation automatically leads to refugee status. Rather, socio-economic deprivation must be inflicted on the basis of a discriminatory reason. A person may have a claim to refugee status if she is pushed to the poverty line, say, as a result of her being part of a specific minority that the government deprives of economic or social rights. The same person would not, however, qualify for refugee status if it could not be shown that her economic condition is the direct result of state action (or it condoning such an action by a third party) aimed at her for any discriminatory reason. The "membership of a particular social group" requirement can be interpreted widely also in the case of socio-economic deprivation. Foster argues that the immutable or innate characteristics of some groups such as cultural minorities, disabled persons or children sets these apart as specific social groups. Yet, she also argues that the same is possible for entire economic classes. She argues that while some economic classes can be more easily identified as specific social groups, such as some castes in the Indian caste system, the same is principally possible for the economic class of the poor.³⁸⁵ She holds that poverty may function as a unifying characteristic on the basis of which persecution may occur. In other words: a person can be subjected to persecutory acts because she belongs to the specific social group of the poor.³⁸⁶

This provides a threshold for which situations involving poverty should lead to refugee status. Yet, such a threshold is normatively unsatisfactory. The (revised) Nexus Clause leads the approach to deal with cases involving similar harm in different ways. Since it requires that socio-economic

³⁸⁵ Foster, 304.

³⁸⁶ Foster, 308–9.

deprivation be the result of a discriminatory reason, it excludes a great many cases in which people suffer extreme forms of poverty (to the extent of their conditions being life-threatening) without the state discriminating against them. It does not consider extreme poverty itself as a valid reason in the determination of refugee status.³⁸⁷ What remains necessary is that socio-economic rights are either actively withheld or that the violation of such rights is condoned by the state and that such violation is the consequence of discrimination for triggering a claim to refugee status.³⁸⁸ This seems strange, however. Focusing on poverty as a means of persecution or making particular social groups vulnerable to other forms of rights violations, neglects the specific harm poverty represents in itself. In many cases, poverty is a form of harm that is generally suffered by persons indiscriminately. The persecution and discrimination requirement of the Human Rights Approach deny refugee status to all those people that experience the distinct harm of being poor for no particular reason. It thus treats cases involving the same form of harm differently in ways that are not ethically different.

Take, for instance, the decision No 72189 – 72195 by the Refugee Status Appeal Authority of New Zealand, in which a family from Tuvalu claimed asylum based on economic reasons. The family argued that, as a cause of climate change, Tuvalu is a slowly sinking island, causing their property to be partly submerged by rising tides and the coastline to erode. They claimed that they lacked adequate shelter on Tuvalu, having no access to clean drinking water and medical facilities. They held that “Constant high food prices and lack of employment opportunities mean that the family is frequently without food. The lack of higher education facilities for children mean that there is

³⁸⁷ Foster, 310; Jane McAdam, “Review Essay: From Economic Refugees to Climate Refugees?,” *Melb. J. Int’l L.* 10 (2009): 580; Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford: Oxford University Press, 2012), 44.

³⁸⁸ McAdam, “Review Essay: From Economic Refugees to Climate Refugees?,” 589.

no hope of them breaking the poverty cycle.”³⁸⁹ The Refugee Status Appeal Authority acknowledged that the family suffered from economic and environmental difficulties. Yet, it rejected their claims based on the fact that the harm suffered by the family was suffered indiscriminately by the citizens of the whole island. It held that “[a]ll Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide.” It concluded that the family was not differentially at risk compared to other inhabitants of the island and that the harm suffered did hence not amount to persecution.

The Human Rights Approach would agree with the ruling in this case. While the very same conditions of poverty would suffice for claiming refugee status if the family from Tuvalu had experienced such poverty as a result of being discriminated against, the fact that everyone else had experienced similar conditions lead to their claim being denied. While poverty thus suffices as a ground for determining refugee status when it is the outcome of deliberate infliction by the government, poverty in itself is insufficient for a claim to refugee status even though it often amounts to the same detrimental conditions for the person in question. The Human Rights Approach does not protect people suffering from indiscriminate poverty. There is, however, no ethical difference between a scenario in which the family from Tuvalu had experienced poverty as a result of discrimination and a scenario in which it suffers from the same condition indiscriminately. What we can see from these examples is that the Human Rights Approach fails in setting a normatively adequate standard for including or excluding cases involving serious harm,

³⁸⁹ Refugee Appeal No. 72189 – No. 72195 /2000, RSAA, 17 August 2000 at ¶ 8-9

and in this case, for deciding when economic deprivation should lead to refugeehood. It lacks the adequate normative foundations for qualifying harm as relevant for refugeehood.

A threshold of harm? The Humanitarian Approach

Does the Humanitarian Approach provide us with a better way for qualifying harm? A number of scholars have proposed that poverty itself should suffice for a claim to refugee status. This claim lies at the core of the Humanitarian Approach. Matthew Gibney argues that “The attempt to escape situations of famine and below subsistence poverty are obviously economic reasons for migration. Yet they are every bit as violent and life threatening as political or military causes of departure [...]” and should therefore be included in the determination of refugee status.³⁹⁰ Similarly, Roberts argues that “It is blindingly obvious that there has long been a case for extending the formal definition of refugee to encompass those fleeing from war, anarchy, economic catastrophe, destitution and famine, as well as from persecution.”³⁹¹ and Collinson maintains that “Future years will almost certainly witness increasing levels of ‘distress’ or ‘survival’ migration within the region, fuelled by a complex combination of political, economic and social causes. In this context, it is likely that two key bases of the traditional refugee regime [...] will appear less and less relevant

³⁹⁰ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 13.

³⁹¹ Adam Roberts, “More Refugees , Less Asylum: A Regime in Transformation,” *Journal of Refugee Studies* 11, no. 4 (1998): 381.

to the needs of those who move to escape economic and/or political threats to their lives and livelihoods.”³⁹²

The concept of survival migration, coined by Alexander Betts, also falls into this category.³⁹³ Betts defines survival migrants as “persons outside their country of origin because of an existential threat to which they have no access to a domestic remedy or resolution.”³⁹⁴ The first part of the definition, the requirement that a person needs to be outside her country of origin, will not be considered here at any great length. The second and third part of his concept, the condition of an existential threat and the lack of domestic remedies, are of more interest when assessing whether the Humanitarian Approach sets normatively desirable thresholds for identifying which harms should lead to refugee status. Betts argues that a person should have a claim to international protection once she faces an existential threat. He defines such threat in resorting to Henry Shue’s concept of basic rights. Shue argues that basic rights are those without which no other rights can be enjoyed. He holds that there are three kinds of such rights: rights to basic liberty, basic security and basic subsistence.³⁹⁵ Betts argues that while the international refugee regime protects rights of basic security and to some extent of basic liberty, it does not include the protection of basic rights to subsistence.³⁹⁶ Betts holds that it is the lack of rights to basic subsistence that should define “existential threats”, arguing

³⁹² Sarah Collinson, “Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime,” 1999, 25.

³⁹³ Although Betts’ distinguishes refugees from survival migrants, the distinction seems to merely point towards a gap between the legal definition of who has a claim to refugee status and the normative claim of who should have a similar status resulting in international protection. In Betts’ words: “[...] [T]he reality is that there is a significant group of people who are fleeing a serious threshold of human rights deprivation and yet are outside the dominant interpretation of a refugee within existing state practice. The concept of survival migration serves to draw attention to that gap. It is useful precisely because it highlights the fact that many people whom one might believe to be refugees fall outside the dominant legal interpretation of a refugee.” Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Ithaca: Cornell University Press, 2013), 27.

³⁹⁴ Betts, “Survival Migration: A New Protection Framework,” 362.

³⁹⁵ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 20-29 as well as chapter 3; Betts, “Survival Migration: A New Protection Framework,” 365; Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, 24.

³⁹⁶ Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, 24.

that such a threat need not only include the threat to the right to life, but also threats to human dignity.³⁹⁷ The condition of the loss of access to domestic remedies differs from the loss of legal political status. Betts understands the lack of domestic remedies to entail that a person has both lost the ability to access domestic courts as well as lacking an “internal flight alternative”, providing security in another part of her country. He asserts that the requirement of a lack of domestic remedies ensures that flight is a solution of “last resort”.³⁹⁸ The issue of flight as a last resort will be dealt with further below. What is of interest here is the second condition: the existence of an existential threat.

The Humanitarian Approach employs different terms when it comes to the harm involved in poverty. Some use the term of extreme poverty³⁹⁹, others “below subsistence poverty”⁴⁰⁰, deprivation and “existential threats”⁴⁰¹. Although these suggest slight differences in their approaches to what threshold of harm is required for claiming refugee status, they all set normatively unsatisfactory thresholds.

In attempting to set a threshold for how much harm is necessary to qualify for refugee status, some Humanitarian Approaches use the term “extreme poverty”. This seems to imply that a person must fall beneath a poverty line to qualify for refugee status. The World Bank uses such a standard. It sets a global poverty line, currently at \$ 1,9 a day to signify that everyone beneath this line suffers from extreme poverty. It uses a monetary standard to compute a line below which a person’s minimum nutritional, clothing and shelter needs cannot be met. Yet, a global poverty line may become insignificant in more wealthy countries in which the basket of goods needed to meet

³⁹⁷ Betts, “Survival Migration: A New Protection Framework,” 365.

³⁹⁸ Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, 25.

³⁹⁹ Price, *Rethinking Asylum: History, Purpose, and Limits*, 200.

⁴⁰⁰ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 13.

⁴⁰¹ Betts, “Survival Migration: A New Protection Framework,” 365.

nutritional, clothing and shelter needs requires higher spending. As the Committee on Economic, Social and Cultural Rights points out,

“[p]overty is not confined to developing countries and societies in transition, it is a global phenomenon experienced in varying degrees by all States. Many developed States have impoverished groups, such as minorities or indigenous peoples, within their jurisdictions. Also, within many rich countries there are rural and urban areas where people live in appalling conditions – pockets of poverty amid wealth.”⁴⁰²

The question then becomes: which poverty line should one use in the process of determining claims to refugee status? Should it be the global poverty line of \$1,9, or national poverty lines? Using the former may exclude a vast amount of people who live in conditions of poverty that exceed the monetary calculus of a global poverty line but still fall beneath a national poverty line. Such a threshold may also exclude cases such as discussed by the Human Rights Approach. It may exclude all those people that fall above a global poverty line but whose conditions can nevertheless be said to significantly violate their human dignity. These are cases in which a state curtails and infringes on certain rights such as the right to education or health.

Using the latter would include a great number of people that may be considered living in poverty but to which the attribute “extreme” may not always be attributed. As the report of the Committee on Economic, Social and Cultural rights above shows, poverty exists in nearly all countries. Should then, for example, a person that is considered poor according to the national poverty line of the United States have a claim to refugee status on the basis of the harm suffered by her through her poverty? This seems odd. Living beneath the poverty lines in countries such as the United States implies a different form and scale of harm experienced as compared to the forms of harm involved

⁴⁰² UN General Assembly, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights” (2001), 4.

in countries where living below the national poverty line is synonymous with a complete lack of the ability to survive. This does not mean that living beneath the poverty line in the US is something we should approve of. Yet, it signifies that if the threshold for claiming refugee status were set at national poverty lines, there would be no clear boundaries as to how much harm a person needs to suffer in order to qualify for refugee status. The different poverty lines of countries imply vastly different forms of harm that persons suffer. Using national poverty lines as a standard in determining claims to refugee status would thus mean an incapability of setting a threshold for how much harm is required for a claim to refugee status.

It is, perhaps, for this reason that some Humanitarian Approaches attempt to bypass the term “extreme poverty”. It is too vague for setting a substantive threshold of how much harm is required for triggering a claim to refugee status. Some Humanitarian Approaches have reacted by arguing that what may suffice for a claim to refugee status is poverty that is life threatening. Matthew Gibney suggests such a standard. He holds that a person may have a claim to refugee status if she suffers from “below subsistence poverty”.⁴⁰³ Others, such as Betts, use a similar term in holding that a person must face an “existential threat”.

Even though this sets a more tangible standard to evaluate claims to refugee status, it is normatively unsatisfactory for several reasons. First, it seems to point to situations in which a person is no longer able to maintain her physical efficiency.⁴⁰⁴ It seems to require that she is so poor that she is unable to meet her basic nutritional needs. In other words, it seems to point to cases of hunger and famine. Yet, arriving at the point of starvation, many persons will no longer be in the position to flee. While this point seems not to be of normative importance (since the inability to flee does not

⁴⁰³ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 13.

⁴⁰⁴ To use an expression by Seebohm Rowntree, *Poverty: A Study of Town Life* (London et. al.: MacMillan, 1908), 40.

disqualify one from the normative claim to refugee status if they were to flee), the second point is. Secondly, setting the threshold to life-threatening harm disregards elementary aspects of poverty and excludes a vast amount of people suffering from extreme harm without technically falling below a level of survival. It excludes all cases in which poverty violates human dignity. A person may satisfy the condition of meeting nutritional needs without having access to the basic standard basket of goods in their region. She may also satisfy such a standard without possessing access to clean drinking water, sufficient shelter or education. This is, perhaps, the reason why the concept of survival migration by Alexander Betts includes not only life-threatening harm as requirements to claims of refugee status, but also threats to human dignity.⁴⁰⁵ Yet, including the violation of human dignity as a threshold for determining refugee status blurs the boundaries of what should count as a sufficient harm. The point of referring to “existential threats” was to provide a substantial threshold of harm. If a person falls below such a threshold, according to such an approach, she would possess a claim to refugee status. Including violations of human dignity blurs such a standard. It would be difficult to discern where the threshold lies. Again, at national poverty lines? At the violation of economic and social rights? At chronic hunger? The lack of employment opportunities? These may all violate human dignity, albeit to different degrees. If this is the case, then which degree proves to be sufficient for a claim to refugee status? We need a tangible threshold for determining refugee status. We need to be able to distinguish between cases that involve harm and violations of dignity that should lead to a claim to refugee status from those that should not.

The Humanitarian Approach fails at setting such a threshold. It is both under-inclusive in cases where just life-threatening harm counts in determining refugee status, and over-inclusive in cases

⁴⁰⁵ Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, 23.

in which any harm and violation of human dignity counts. It ultimately fails in providing a qualifier for harm, and thus a standard that can reliably tell us when harm should lead to refugeehood, and when not.

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