The Evolving Psychology of Inclusion and Exclusion in European Human Rights and Asylum Frameworks

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Dissertation submitted in partial fulfillment of requirements
for the degree of Doctor of Juridical Science (S.J.D)

February 2020

Under the supervision of Professor Marie-Pierre Granger
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Declaration of Originality

This dissertation does not contain materials accepted by any other institution for any other degree nor materials previously written and/or published by another person unless otherwise acknowledged.

s/ Magdalena Smieszek

Abstract

The dissertation applies an interdisciplinary analytical framing, drawn from theories of social psychology of inclusion and exclusion, to a discussion of legal discourse and the development of legal frameworks in Europe concerning asylum seekers, refugees, and other beneficiaries of international protection vis-à-vis European citizens. An emphasis on legal categorizations of statuses as well as distributions of social and economic rights in particular draws attention to the links between social psychology and international law. What emerges in the analysis is that a process of creating value is present both at its psychological roots and the expressions of value in the law.

The research applies a psycho-historical perspective to discuss the evolution of international and European law with respect to rights of citizens and asylum-seeking non-citizens, since its inception following the Second World War up until present-day laws and policies. It shows an embrace of a European identity based on human rights as the common feature in the European treaties and institutions, one that is focused on European citizens and has inclusionary objectives. However, a cognitive dissonance is present as this common identity-making is in contrast to national proclivities, as well as securitized, threat-perception-oriented perspectives that have exclusionary manifestations concerning persons seeking asylum. Fundamentally, the emergence of laws and policies that place the human being with human dignity at the center, when understood from a psychological and emotion-based perspective, has the potential to transcend the dissonances.

Preface

There is a lack of words for the most important things anyway.[1]

– Olga Tokarczuk

There are two people that have my gratitude first and foremost, and they are my parents, Emilia and Krzysztof Smieszek, for their immeasurable support, and for having the courage and resilience that gave me the path in life that informed this dissertation. The story was shaped by the journey that our family started in Poland. Against many obstacles, we left Krakow in 1985, when I was a little girl, driving through the Slovak part of then-Czechoslovakia, via then-communist Hungary, through the Slovenian part of then-Yugoslavia, into Italy where we drove up to a refugee camp and claimed asylum. A year and a half later, we were resettled to Canada, where I received the education and opportunities for a career in international human rights law. After many years working with the UN High Commissioner for Refugees in different parts of the world, my last posting was in Budapest in the regional office for Central Europe, on the subject of refugee integration. Full circle back, I was working in the same countries that I travelled through with my parents in our asylum-seeking voyage, now part of the European Union.

With this history, it was appropriate that I pursue my doctoral studies on a subject that considers human rights and asylum in Europe, the shifting borders and identities, belonging and not belonging, and the social and economic struggles. More so fitting that I do this at the Central European University, the institution that explores these transitions and the goals of an open society.

There have been many significant and meaningful moments, conversations, and insights that motivated this dissertation. One of those was the escalated movement of a large number of people into Europe in 2015, coming primarily from Syria, Afghanistan, and Iraq. This situation invoked in the public realm what can be characterized as a panic-stricken response, hence the

[1] Olga Tokarczuk, *House of Day, House of Night* (Writings from an Unbound Europe) (Northwestern University Press, 2003).

construal of it as a crisis, but it also spurred responses of great compassion, generosity and the humanitarian spirit. That year, I presented a paper at the Nordic Asylum Law Seminar in Uppsala, Sweden, where Alice Edwards, legal scholar and UNHCR senior advisor, stated something in her keynote address that rang especially true – she said that this subject is emotional. At the time, I was also taking a doctoral course with Professor András Sajó on cognitive science and the law, with an emphasis on emotions in constitutional law, and I had a longstanding interest in psychology more broadly. I made the decision to adjust my doctoral research, to better understand what brought us here in the first place, and thus be better equipped to address it.

CEU and Budapest have been my home for many years, which means that there are numerous people to thank for this chapter in my life, many friends and colleagues who have encouraged me and enriched this experience along the way. I'm immensely grateful to Professor Marie-Pierre Granger for taking on this project, for supporting me and the opportunities that came up, for the extensive guidance and comprehensive feedback, and for being empathetic to the struggles I've had along the way. Likewise, a special thanks to the heads of the Legal Studies doctoral program during my time at CEU, particularly Professor Csilla Kollonay-Lehoczky, for advising me, sharing wisdom, and always engaging with kindness. And of course, thank you to my CEU colleagues, friends, faculty and students that I had the pleasure of working with, all of whom deepened my knowledge.

I am conscious of the historical moment in which I complete this research and writing, just as CEU is transitioning from Budapest to Vienna. I am honoured to have been part of this university, the programs, the learning and teaching, and everything that CEU represents.

Table of Contents

Chapter 2 – Methodology and Conceptual Framework

Chapter 3 – The Conflicted Making of International Refugee Law

Chapter 4 –Common European Identity Formation and Asylum

Chapter 5 – Legal Categories in Europe and the Spectrum of Inclusion/ Exclusion

Abbreviations and Acronyms

AFSJ	Area of Freedom, Security, and Justice
CEAS	Common European Asylum System
CESCR	UN Committee on Economic, Social and Cultural Rights
CIIM	Common In-Group Identity Model
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EC	European Community
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECRE	European Council on Refugees and Exiles
EEC	European Economic Community
EU	European Union
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
MS	Member State (of the European Union)
RCD	Reception Conditions Directive
SCT	Self Categorization Theory
SIT	Social Identity Theory
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCNs	Third Country Nationals
QD	Qualification Directive
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics

Introduction

There is unity where there is community of pleasures and pains.[1]

– Plato

We are ruled by the power of memory. We are ruled by the power of imagination. We are ruled by the power of knowledge. And we are ruled by the power of emotion.[2]

– Philip Allot

1. Europe at a Crossroads: Crisis and Cognitive Dissonance

This study was propelled into being at an emotional point in our shared history – the 2015 migration-related "crisis" in Europe, a crisis that has had many names [3] – a time when persons from war-torn countries came in larger numbers into the European Union (EU) to seek asylum and aid, a situation that abruptly challenged the self-definitions and structures of European institutions and laws. While it has been viewed from policy, legal and economic perspectives, the crisis in Europe has also been a psychological one that concerns the question of how European states should respond to the situation. Crisis is psychological distress in response to what is perceived as circumstances threatening a particular way of being, when systems and values are put under stress. In general terms, a crisis is an uncomfortable confrontation that creates high levels of uncertainty

[1] Plato, *The Republic*, Book V, para 462.

[2] Philip Allot, *Eutopia: New Philosophy and New Law for a Troubled World* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2016) at para 8.1 at p 149. Philip Allott is Professor Emeritus of International Public Law at Cambridge University and a Fellow of Trinity College Cambridge. His work aligns with the themes in this thesis. Among his many roles, between 1960 and 1973 he was Legal Adviser for the British government including as Legal Counsellor for the British Permanent Representation to the European Communities in Brussels (1972-73) when the UK became a member of the European Communities. He specializes in Constitutional Law, European Union Law, and International Public Law with a focus on re-conceiving international systems in through the philosophy of Social Idealism.

[3] Simon Goodman, Ala Sirriyah, and Simon McMahon, "The Evolving (Re)Categorization of Refugees Throughout the 'Refugee/ Migration Crisis'" (2017) 27(2) *Journal of Community & Applied Social Psychology* 97-178; Celine Cantat, Eda Sevinin, Eqa Maczynska, and Tegiye Birey (eds), *Challenging the Political Across Borders: Migrants' and Solidarity Struggles* (Budapest: Central European University, CPS Books, 2019).

about the direction to respond to a situation. Individuals and groups have varied impulses in such situations, whether acting out of moral obligation towards the human good, or self-interest or another kind of reasoning. If the right standards are not set in place amidst a diversity of views and inclinations, the crisis can linger. But which is right, and which is good, and for whom? How do we determine this?

Europe is at a crossroads, a civilizational one, as some would call it. The evolving migration story in Europe and globally touches the crux of what it means to be human because it confronts our conceptions of how we conceive of ourselves, how we treat each other, how we imagine and manage our societies, and how we determine who is the "we" making decisions about any of these things. The question that is applicable in the deliberations over migration is "whose Europe?" – does it belong to the European institutions or the nations states or the people within the states, and if so, which people? The tension exists between transnational bodies that unite for commonness, and the persistence of nation states and communities that seek to retain their distinctiveness and autonomy.

This dissertation attributes the tensions within the laws, policies, negotiations and adjudications to an underlying social psychology of inclusion and exclusion that is pervading within them. The relationship between law and psychology inspired the present research, an inquiry into the psychological underpinnings and evolution of asylum laws and related human rights at the pan-European level. More specifically, the analytical focus of the dissertation is on the inclusion and exclusion of refugees and asylum seekers within the European laws and how this links with their rights vis-à-vis other legal status categories, particularly their social and economic rights, emphasizing the evident dissonances that arise out of the social psychology of inclusion/ exclusion.

2. Opening Literature Review

The interconnection of law and psychology, particularly human rights and social psychology, is an emerging interdisciplinary approach. There has been an increased interest among psychologists and social scientist generally with regard to the importance of human rights as it relates to social science research, social justice and global issues – particularly peace and conflict research.[4] Studies have shown that social psychology can be powerful in shedding light on human rights matters in relation to the self and group membership.[5] For example, empirical research has measured how relating to levels of abstraction about the human and group relations can determine the level of agreement with human rights[6]; how meanings of rights are entrenched in cultural or linguistic contexts and associated with perceptions of deservingness;[7] how social representation relates to different language translations of human rights;[8] and generally how identity, social conditions and intergroup processes affect rights-related thinking and behavior.[9] In turn, as some have claimed, "virtually every aspect of legal rules and procedures relies on assumptions about

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4 Christian Staerklé, Alain Clémence, and Dario Spini, "A Social Psychology of Human Rights Rooted in Asymmetric Intergroup Relations" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 133–141 [hereinafter Staerklé et al]; Gabriel Twose and J. Christopher Cohrs, "Psychology and Human Rights: Introduction to the Special Issue" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 3–9.

5 *Ibid* Staerklé et al at p 133.

6 Sam McFarland, "Culture, Individual Differences, and Support for Human Rights: A General Review" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 10 –27.

7 Kathleen Malley Morrison, Ross Caputin, Ellen Gutowski, Tristin Cambell *et al*, "Engaging Moral Agency for Human Rights: Outlooks from the Global South" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 68–88.

8 Willem Doise, *Human Rights as Social Representations* (London, UK: Routledge, 2002).

9 Dominic Abrams, Diane M. Houston, Julie Van de Vyver and Milica Vasiljevic, "Equality Hypocrisy, Inconsistency, and Prejudice: The Unequal Application of the Universal Human Right to Equality" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 28–46; Jost Stellmacher, Gert Sommer, and Elmar Brähler, "The Cognitive Representation of Human Rights: Knowledge, Importance, and Commitment" (2005) *11*(3) *Peace and Conflict: Journal of Peace Psychology* 267–292; J. Christopher Cohrs, Jürgen Maes, Barbara Moschner, and Sven Kielmann, "Determinants of Human Rights Attitudes and Behavior: A Comparison and Integration of Psychological Perspectives" (2007) 28 *Political Psychology* 441– 469; Andrew K. Woods, "A Behavioral Approach to Human Rights" (2010) 51(1) *Harvard International Law Journal* 51 [hereinafter Woods].

human psychology – about how individuals think, feel, and make decisions."[10] Overall, psychological findings, especially from social psychology, have begun to illuminate and challenge some of the implicit assumptions about human behaviour embedded within laws and legal practices.[11]

Such research can provide insights for scholars, advocates and practitioners to enhance respect for human rights.[12] Inroads in this field have come more from the side of psychologists than from legal scholars incorporating psychology in the study of international law. Certainly there is a need for deeper scrutiny, as some international legal scholars themselves have pronounced when challenging the effectiveness of international law and human rights, noting the inability of international legal regimes to live up to their stated promises and actually decrease violations.[13] Overall, the observation has been that in legal scholarship there has been a "preoccupation with mechanisms for enforcing treaty commitments on recalcitrant states" in relation to human rights and "no systematic attempt by legal scholars" to consider psychology as a component of international law.[14]

This is undoubtedly the case within legal inquiry on asylum matters, and the present dissertation aims at bridging this gap. That is not to say that there are is no existing research or literature making some of these connections, but the originality of this dissertation lies in the broad encompassing of interrelated issues of justice, minds and behaviours. A number of social

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[10] Janice Nadler and Pam A. Mueller "Social Psychology and the Law" [in:] Francesco Parisi (ed.) *The Oxford Handbook of Law and Economics*, Volume 1 (Oxford University Press; 1 edition, 2017) at p 124.
[11] *Ibid* at pp 124-125; Margaret Bull Kovera and Eugene Borgida "Social Psychology and Law" [in:] Susan T. Fiske, Daniel T. Gilbert, and Garnder Lindzey (eds.), *Handbook of Social Psychology* 5th edition (John Wiley & Sons Inc, 2010) at pp 1343–1385.
[12] Woods, *supra* note 9 at p 53.
[13] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Eric A. Posner, *The Twilight of Human Rights Law* (New York, NY: Oxford University Press, 2014); Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).
[14] Woods, *supra* note 9 at p 54-56.

psychologists have considered inclusion and exclusion as it relates to refugees and asylum seekers, or "integration" and "mental" aspects more broadly, hence touching on matters related to legal scholarship.[15] Different studies also engaged on issues of psychology particular to refugee status assessment.[16] Legal scholars that have investigated psychological aspects of law have done so most vividly in the field of "law and emotions" as will be discussed more closely.[17] The roots of European identity, for instance, have been researched at length, and of note are scholars who look at the concept of Europe as a whole but also delve into the psychology of identity.[18] Finally, although the literature that broadly considers social and economic rights of asylum seekers and refugees is scant, there is a recognized need that this is a critical issue in Europe needing more attention.[19] The dissertation aims to bring together these otherwise disconnected bits and pieces as part of the overall research.

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[15] *See* Victoria M. Esses, Scott Veenvliet, Gordon Hodson, and Ljiljana Mihic, "Justice, Morality, and the Dehumanization of Refugees" (2008) 21 *Social Justice Research*: 4–25; Nick Haslam and Anne Pedersen, "Attitudes Towards Asylum Seekers: The Psychology of Prejudice and Exclusion [in:] Dean Lusher and Nick Haslam (eds), *Yearning to Breathe Free: Seeking Asylum in Australia* (Sydney: Federation Press, 2007) at pp 208-218.

[16] *See* Jane Herlihy, "What Do We Know So Far About Emotion and Refugee Law? (2013) 64(1) *The Northern Ireland Legal Quarterly* 47–62; Cecile Rousseau and Patricia Foxen, "Look Me in the Eye: Empathy and the Transmission of Trauma in the Refugee Determination Process" (2010) 47(1) *Transcultural Psychiatry* 70-92.

[17] *See* Martin L. Hoffman, "Empathy, Justice and the Law" [in:] Amy Coplan and Peter Goldie (eds), *Empathy: Philosophical and Psychological Perspectives* (Oxford Scholarship Online, 2011); Martha C. Nussbaum Political Emotions: *Why Love Matters for Justice* (Harvard University Press, 2013); Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (2006); Susan Bandes (ed) *The Passions of Law* (Critical America) (NYU Press, 2000).

[18] *See* Emanuele Castano, "European Identity: A Social-Psychological Perspective" [in:] Richard K. Herrmann, Thomas Risse-Kappen, Marilynn B. Brewer (eds), *Transnational Identities: Becoming European in the EU* (Lanham, MD: Rowmann & Littlefield Publishers, 2004); Christoffer Kølvraa, "Psychoanalyzing Europe? Political Enjoyment and European Identity" (2018) 39(6) *Political Psychology* 1405-1418.

[19] *See* Liam Thorton, "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe" (draft paper for forthcoming book: The Socio-Economic Rights of Asylum Seekers in Economic Rights of Asylum Seekers in International and European Law), a version presented at The European Database of Asylum Law Conference (EDAL) January 2014; Ryszard Cholewinski, "Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations – Education and Employment", ECRE Conference on Social and Economic Rights of Refugees and Asylum Seekers - Education and Employment 18–19 November 2004, Odessa, Ukraine; UN High Commissioner for Refugees (UNHCR), *Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced Persons: A Comparative Perspective*, December 2009. Organised jointly by UNHCR and the Council of Europe's Department of the European Social Charter; Emanuela Pistoia, "Social Integration of Refugees and Asylum-Seekers Through the Exercise of Socio-Economic Rights in European Law" (2018) 3(2) *European Papers* 781-807 at p 787.

From scholarship that was consulted in developing this project, the one that comes close to the approach taken in the present dissertation is the work by Tal Dingottt Alkopher on the "socio-psychological reactions in the EU to immigration," in which she examines the reactions to the 2015 refugee crisis coming from EU institutions and Member States, doing so through three socio-psychological lenses.[20] The three lenses she uses are: 1) "securitize-the-self" feelings of anxiety and insecurity among States in their national narratives that come "at the expense of supranational European policies;" 2) "managing securitization" by the European Commission reaffirming EU identity and "preserving a global discourse on human rights and refugee-related inclusive norms;" and 3) viewing the crisis through the lenses of empathy and desecuritization where states, primarily Germany but also Sweden, maintained an open door policy which the author argues stems from "psychological lack of perceived threat from the immigrant-other" and a collective identity based on civilian power.[21]

Developing her own typology, Dingottt Alkopher reflects, through the socio-psychological lenses on the asylum policies, primarily from the point of view of the EU and Member States. Whereas Dingottt Alkopher focuses specifically on the crisis response, the focus in the present dissertation is on the evolution of the international and European laws with the claim herein that socio-psychological lenses as analytical tools are likewise applicable to the broader history of these legal developments. The research here thus considers a wide range of actors – including refugees themselves. Moreover, the dissertation looks specifically at a distinctive aspect of asylum policies, that being the two versions of inclusion and exclusion – the one defined by status category demarcations and the other determined through provision or denial of social and economic rights

[20] Tal Dingott Alkopher, "Socio-Psychological Reactions in the EU to Immigration: From Regaining Ontological Security to Desecuritisation" (2018) 27(3) *European Security* 314-335.
[21] *Ibid* at p 314.

to the category holders. The overlapping areas with Dingott Alkopher's work are related to the meaningfulness and relevance of psychological concepts of threat-perception, collective identities and empathy in relation to the European laws and policies on asylum. Her sources are primarily from political psychology and International Relations literature on securitization, and interestingly, those conclusions largely match some of the findings derived directly from the social psychology theories that this dissertation employs. Importantly, Dingott Alkopher's experimental approach brings additional emphasis to the issue of psychological uncertainty at a time of perceived crisis as a key motivator of policy and legal reactions.

3. Pertinence of the Topic: Migration and the European Way of Life

Precisely because of the uncertainty in present-day Europe, migration and asylum have been among the touchiest of topics in both the public realm and the halls of European institutions. A key example came in July 2019 when the newly elected European Commission President, Ursula von der Leyen, the first woman to fill the role, put forth in her agenda for Europe six points that she called "headline ambitions," among which was "protecting the European way of life."[22] Two months later when appointing Margaritis Schinas as commissioner/ VP with that title and portfolio, the phrase became an international news headline drawing controversy, a mix of criticism and support.[23] The backlash was in response to the semantics and the content of the portfolio that linked migration with security issues. The reactions were swift with accusations that the title acquiesced

[22] Ursula von der Leyen, "A Union That Strives for More: My Agenda for Europe" Political Guidelines for the Next European Commission 2019-2024 online at <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> [hereinafter von Der Leyen, Agenda for Europe]

[23] Matina Stevis-Gridneff, "Protecting Our European Way of Life? Outrage Follows New E.U. Role" *New York Times* (Brussels, September 12, 2019) <https://www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html> [hereinafter Stevis-Gridneff, New York Times]

and gave credence to far-right populist rhetoric concerning migrants. By linking migration with security, the title can imply that Europe needs to be protected from migrants that pose it a threat. Marine Le Pen, the French far-right populist, said the position confirmed an "ideological victory" because it forced the EU to "admit that immigration poses questions about the future of Europeans' way of life."[24] In contrast, the outgoing European Commission President Jean-Claude Juncker did not like it, and Guy Verhofstadt, leader of the Liberal bloc was uncomfortable with the term. French MEP, Karima Delli, called the name completely unacceptable because the link was a "direct validation of the words of the far-right for whom immigrants are barbarians who threaten our way of life", adding: "[w]e cannot use the same semantics as people who oppose our European values" and that "if you know the history in Europe, you know Europe was made with immigration."[25] Molly Scott Cato, a UK Green MEP, said that it may look like a portfolio against fascists, "but only by adopting their divisive rhetoric around strong borders."[26]

The response from von der Leyen was that "home-grown populist with cheap nationalistic slogans" should not be allowed to "hijack the definition" and that "they want it to mean the opposite of what it is."[27] She asserted that, for some, "the European way of life is a loaded and politically charged term. But we cannot and must not let others take away our language from us: this is part of *who we are*."[28] In her version, Europe and its espoused values need to be protected from both the assertions of the far-right extremists and terrorist threats. And yet, the lack of clarity

[24] Simon Carraud, "France's Le Pen Hails EU 'Way of Life' Job as Victory on Path to Elyse" *Reuters* (Frejus France, September 15, 2019) online at <https://uk.reuters.com/article/uk-france-politics-farright/frances-le-pen-hails-eu-way-of-life-job-as-victory-on-path-to-elysee-idUKKBN1W00NC?il=0>
[25] Stevis-Gridneff, New York Times, *supra* note 23.
[26] Michael Falzon, "Protecting the European Way of Life: We Can't Let Others 'Take Away Our Language" *Malta Today* (September 24, 2019) online at <https://www.maltatoday.com.mt/comment/blogs/97613/protecting_the_european_way_of_life#.XYycYVUzaJA>
[27] Zoya Sheftalovich, "Von der Leyen on 'European Way of Life'" *We Politico* (September 16, 2019) <https://www.politico.eu/article/von-der-leyen-on-european-way-of-life-we-cant-let-others-take-away-our-language/>.
[28] *Ibid*. Emphasis added.

and shared meaning of protecting the European way of life is potentially doublespeak, and has been referred to as a dog whistle – coded political language, with different resonance for its intended targets.[29]

Indeed, words are loaded with meaning and discourse creates reality. The language of the political guidelines and priorities that von der Leyen put forward, as well as the controversy that followed, are telling. Even though ultimately the title was changed to "promoting" the European way of life instead of "protecting" it, a change that is seen as being open to others and less fascist sounding, the issues remain as do newly raised conversations about European values and the original content of the portfolio on the "migration and security" issue.[30]

A reflection on this aspect of the European Commission agenda is therefore a fitting starting point in the dissertation, because it touches on the major themes that will be discussed: the tension between European institutions and nation states as having a social psychological undercurrent, the divisiveness over the issue of migration in regards to inclusion and exclusion, questions about European identity, and human rights pronounced as a unifying force regarding European values of justice and rule of law. In von der Leyen's version, the meaning of the European way of life, and the values on which the Union is founded, are stated in the Lisbon Treaty from 2007. This refers to inclusionary concepts like dignity and equality for all as foundational values along with freedom, democracy, rule of law, and respect for human rights. These values, according to the Treaty, are common to Member States, Europe described as a society with

[29]Georgi Gotev, "Schinas Puts on Good Performance but MEPs want 'European Way of Life' Title Ditched" Euractiv.com with Reuters (October 4, 2010) online at <https://www.euractiv.com/section/future-eu/news/schinas-puts-up-good-performance-but-meps-want-european-way-of-life-title-ditched/> [hereinafter Goteve, Euractiv] Dutch liberal Sophie in 't Veld said, "The title needs to go. Full stop. So my advice to you: drop the dog whistle and work with us for the next five years for a European Union that is open and inclusive".

[30] "EU Commission Incoming Chief Changes Title for Migration Portfolio After Controversy" *Euronews* (November 13, 2019) online at < https://www.euronews.com/2019/11/13/eu-commission-incoming-chief-changes-title-for-migration-portfolio-after-controversy>.

prevailing notions of pluralism, non-discrimination, tolerance, justice and solidarity.[31] The Treaty states that the aim of the Union is the promote peace, its values and well-being of its peoples.[32] It goes on to state that "the Union offers its citizens an area of freedom, security and justice" within its borders, and freedom of movement is ensured by measures concerning "external border controls, asylum, immigration and the prevention and combating of crime."[33] This means that in the EU Treaty framework, issues of (im)migration and asylum are enshrined and always connected with security, a conceptual connection that translates into numerous layers of exclusionary laws, policies and practices. As the dissertation will discuss, all these concepts have a philosophical, contextual, historical and psychological source that made them of value. Those sources intersect with present-day particulars that will also determine the direction for the future of Europe.

Extracting the psychology of the values within the laws and policies is of concern here. For example, in her agenda and speech to European Parliament in July 2019, von der Leyen invoked a string of references to the "feeling" that citizens of Europe are experiencing in response to disruptive developments referred to as meta-developments which include demographic change, globalization of the world economy, rapid digitalization of working environments, and climate change.[34] She concluded that all the developments have "left people with a feeling of losing control," [35] looser ties within communities, and across Europe "a feeling of unease and anxiety."[36] This, she posits, is prompted by reactions of authoritarianism, corruption and protectionism. But

[31] Article 2. European Union, *Consolidated Version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01.
[32] Article 3.
[33] Article 3(2).
[34] von Der Leyen, Agenda for Europe, *supra* note 22 at p 4; Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission (July 16, 2019) online at: <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230> at p 1 [hereinafter von Der Leyen, Opening Statement].
[35] Ibid von Der Leyen, Opening Statement at p 2.
[36] von Der Leyen, Agenda for Europe, *supra* note 22 at p 4.

"the European way" she purports is one of multilateralism, fair trade, and rule-based order.[37] It requires rediscovering European unity, strengthening internal unity, creating trust and confidence through tighter enforcement of legislation, through judgments of the Court of Justice; the rule of law, defending core values, and standing up for justice as a hallmark of Europe's accomplishments and central to her vision for a "Union of equality, tolerance and social fairness"[38] because the European Union is a "Community of Law" with the Commission as "an independent guardian of the Treaties."[39]

The rule of law is universal, says von der Leyen.[40] Referencing the vast number of people that have drowned in the Mediterranean that is among the world's deadliest borders, she repeatedly invokes the legal and moral duty of Europe to help refugees and respect the dignity of every human being, values enshrined in the Treaties that she says must be honoured and defended. What is needed, she says, is "empathy and decisive action."[41] She recounts how in 2015 she welcomed in her home a 19-year old Syrian refugee, someone who did not speak German and "was deeply scarred by his experience of civil war and flight" but today is fluent in German and English in addition to his Arabic, a community leader, a student, and an inspiration.[42] But then she notes that "one day, he wants to go home," [43] perhaps her sincere reflection on his genuine wishes but also an unwitting nod to the view of a temporary nature of asylum, indicating that in the end, Europe or Germany are not the young man's home in spite of him learning the language and becoming a community leader.

[37] von Der Leyen, Opening Statement, *supra* note 34 at p 2.
[38] von Der Leyen, Agenda for Europe, *supra* note 22 at p 14.
[39] *Ibid* von Der Leyen, Agenda for Europe at p 15 and Opening Statement at p 3.
[40] von Der Leyen, Opening Statement, *supra* note 34 at p 3.
[41] *Ibid* at p 4.
[42] *Ibid*.
[43] *Ibid*.

In short, the tone of the guidelines and overall agenda proposed by von der Leyen is tempered. The agenda calls for humane borders and empathy, but the next line refers to stricter securitization measures for irregular migration. There is an inclusionary sentiment followed quickly by one of threat-perception. This is pervasive in European law, as the dissertation will reveal. Since "everything is linked"[44] according to von der Leyen, alongside an agenda for protection and integration of newcomers, there is a clear articulation of the need for internal security to protect European citizens with "cross-border cooperation to tackle gaps in the fight against serious crime and terrorism in Europe."[45] The calls for new initiatives do not appear to be very new – an emphasis on stronger borders and renewed commitments to established standards.

The same tone came from Margaritis Schinas, as the designate of the title for protecting the European way of life, before it was changed to promoting, at his nomination hearing before the European Parliament. In his opening statement and when questioned repeatedly about what exactly the European way of life refers to, he said that being European, "*at is core*, means protecting the most vulnerable in our societies. It means access to healthcare, welfare and having the same opportunities"[46] which is a positive statement and yet still ambiguous enough to shape-shift into different meanings as to who is deemed as the most vulnerable and what same opportunities look like. Members of parliament commented that there is not necessarily content agreed upon concerning the European way of life, that the meaning has not been defined.[47] In this

[44] von Der Leyen, Agenda for Europe, *supra* note 22 at p 16.
[45] *Ibid* at p 16.
[46] Goteve, Euractiv, *supra* note 29.
[47] *Ibid*.

regard, Schinas echoed von der Leyen that being European means standing up for values of peace, freedom, equality, democracy and respect for human dignity.[48]

4. A Broader View of Europe and the Law

The question within what constitutes Europe or European, or any place or idea for that matter, is what do its members have "in common" that would separate them from any other set of people – essentially a process of self-definition, an evolving one always rooted in some origin. Moreover, how is any of this determined? What are the underlying sources? While the "origin stories" for Europe are multifaceted, and constructions likely exaggerated and romanticized, there is general agreement about European culture having a legacy of Graeco-Roman antiquity. This legacy was noted by Ursula von der Leyen when she said that European values are drawn from the cradle of European civilization, this being Greek philosophy and Roman law which prompted, after dark epochs when dictators had prevailed, the best tool to defend freedoms and protect those that are vulnerable – the rule of law.[49] The philosophical, cultural and political beginnings of Europe, ones that separate "east" and "west" trace back to ancient Greece.[50] Of central influence have been the structures towards freedom coming out of ancient Greece, where cultures and mental spaces generally were not to be dictated by monarchs and aristocrats, but by the citizens of a *polis* that shaped their communities, with the common denominator being the attempt towards

[48] Annabelle Timsit, "Your Questions About the New EU Job for "Protecting Our European Way of Life," Answered (October 3, 2019) online at <https://qz.com/1721178/the-eu-job-for-protecting-our-european-way-of-life-explained/>.
[49] von Der Leyen, Opening Statement, *supra* note 34 at p 3.
[50] Jonathan Jones, "And Greece Created Europe: the Cultural Legacy of a Nation in Crisis" *The Guardian* (November 3, 2011) online at <https://www.theguardian.com/artanddesign/jonathanjonesblog/2011/nov/03/greece-europe-cultural-eurozone-crisis> .

compromise and balance rather than use of power.[51] Europe is said to retain this ancient Greek conception of freedom as its core value to this present day, and professes an identity rooted in human rights. Further, insights about origins can be found in the name. The etymology of Europe is uncertain, though one proposal is linked to the Greek word *eurus* that means "wide" or "broad".[52] Another suggestion has a Semitic origin – *erebu* referring to sunset or *ereb* meaning evening, both references signifying "west", referring to the separation of Eurasia into Europe and Asia. Generally, the prefix *eu* in ancient Greek means "good" and "well" as an adjective and "right" and "good cause" as a noun.[53] It also has the sense of "true" in scientific references.[54]

Likewise, the foundations of universal human rights, those conceptions of what is moral and good for human beings in general, also have numerous origins, with the concept of dignity often named as *the* foundational concept for human rights. The usual story goes that the birthplace of these human rights concepts as they are now was none other than Europe.[55] That is debatable, as origins tend to be, but also a tall order for the idea of Europe – to encompass and represent the universal good, the right and the true. French political journalist Edwy Plenel asserts that "no people, no nation, no continent and no civilization can lay claim to owning what is universal" as it "infers hierarchies between cultures, origins and identities" and such views about the "clash of civilizations automatically creates the prophecy of a global path of conflict and disorder."[56] Indeed,

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[51] Christian Meier, *A Culture of Freedom: Ancient Greece & The Origins of Europe* (Oxford: Oxford University Press, 2011) at pp 8-11.
[52] Etymology Online Dictionary, entry on "Europe" online at <https://www.etymonline.com/word/europe>.
[53] Etymology Online Dictionary, entry on "eu" online at <https://www.etymonline.com/word/eu->; Stanford Encyclopedia of Philosophy, entry on "moral character" online at <https://plato.stanford.edu/entries/moral-character/>.
[54] Dictionary, entry on "eu" online at <https://www.dictionary.com/browse/eu->.
[55] Though it is the view of the author that the sources of human rights go much deeper and have a longer more universal foundation than what emerged in Europe during the Enlightenment, the French Revolution and the post-World Wars, time periods that are usually attributed to giving life to human rights as they are now.
[56] Edwy Penel, "This Shameful Europe" *Euronews* (16/09/2019) online at <https://www.euronews.com/2019/09/16/this-shameful-europe-view>.

conflicts between nations deemed as *world wars* in the first half of the twentieth century were centred primarily in the place that even then defined itself as Europe. The commandments of international human rights took a more comprehensive form in response to wide-scale expressions of the worst aspects of humanity. The aftermath of World War II not only created human rights as we know them today, but they also created a Europe based on supranational institutions that claim human rights as foundational.[57]

Goodness, wellness, rightness and truth, all these expressions of positive value have a long history that is still evolving. We carry around these determinations of value in our genes, our psyches, and our communities throughout generations. The good, the right and the true is reasoned in the individual and collective mind and body, and we recognize or determine value through thoughts and emotions. Our thoughts and emotions are shared, they are social. These values are enshrined in the texts and practices of law, with justice as a balance of competing notions and feelings. The values – determinations of what behaviour serves the good – are further encapsulated in the form of laws in communities that form nation states or unions of nations and states. They are additionally defined by borders that are conceptual in the form of laws and physical in the form of walls, fences and technologies. Movement of people across the borders of these different communities that have been established to create civilizational and cultural order and meaning in an increasingly complex, populated, interconnected and mobile world, challenge established identities and trigger emotions, our psychological and embodied expressions of value. The issues are emotional, embedded deeply into our reflexes; they stir us, sometimes prompting compassion, and other times fear, along a spectrum of what is deemed as reasonable and unreasonable.

[57] Gráinne de Búrca, "The Road Not Taken: The European Union As a Global Human Rights Actor" (2011) 105 (4) *The American Journal of International Law* 649-693.

Legal instruments and institutions for human rights and asylum laws have often been created in the context of crisis to deliver fought-over and hard-won solutions to problems of the human condition. But the laws themselves can also reflect the cognitive dissonances in that legal and institutional space. Cognitive dissonance, like crisis, is a mental discomfort that occurs when there are contradictions in values; there is an experience and feeling of uncertainty because the situation challenges the consistency of how things are or perceptions of how things ought to be. The title for "protecting the European way of life" is an example of such a friction, a double entendre, a discord and duality of meanings that shows up in laws, policies, jurisprudence and negotiations. The crises and cognitive dissonances occur in Europe when there is a confrontation of moral responsibility aligned with compassionate impulses to help fellow human beings *versus* fears of these persons creating threats to one's identity, values, safety and economy. The human mind, in both its individual and collective sense, one which takes the institutionalised form of rules and laws, is paradoxical. On the one hand, laws in Europe emphasize a perspective towards social inclusion and integration in line with universal values and a human rights-based European identity. On the other hand, related laws create restrictive, even degrading and undignified environments that prevent inclusion and integration. These conflicts, crises, cognitive dissonances, however defined, need all the tools at their disposal to be better understood in order to resolve the ongoing conundrums.

5. Research Question, Hypothesis, Originality and Approach of Research

The starting premise of the research is the common understanding that inclusion and exclusion, defined in multiple ways, are at the heart of asylum and human rights law. Therefore, the research question considers: *how is the psychology of inclusion and exclusion reflected in the*

evolution of Europe-wide human rights and asylum laws and frameworks? This is both a question for the research project but also an assertion based on an original *hypothesis* that there would in fact be an underlying psychology to be found, one that has not been explored but in any case lays barefaced. With that as a starting point, new insights emerge about the numerous topics related to the current state of affairs in Europe concerning not only inclusion/ exclusion of migrants seeking asylum but more broadly the interactions of human beings within groups and organizations.

Finding and articulating this as part of an interdisciplinary undertaking is not an easy task. The methodology that will be employed, described in detail in the chapter 2, is analytical framing, a method from discourse analysis. Frames derived from social psychology theories are used to examine, compare, and critique the evolution of the laws. Thus, the overall purpose of the dissertation will be to analyse both human rights and asylum laws at the international level and within European frameworks, exploring their evolution that is inclusionary in some respects and exclusionary in others, through a lens of social psychology of inclusion and exclusion. But the interdisciplinary aspect does not stop at the two disciplines of social psychology and legal studies. It is further informed by other schools of psychology as well as sources in political science, international relations, history, philosophy, sociology, biology, media studies and even finding inspiration in behavioural economics and neuroscience.

In a way, it is an attempt and invitation to use modern interdisciplinary insights to re-think, re-read and re-tell the European normative story concerning its human rights identity in relation to what is conceived of as European and non-European. The complex issue of migration, displacement and movement of people between nation states concerns the relationships between communities and their members – whether a worldwide community, European, or a more local one. The relationship between Europe and the world, and between those within what is defined as

Europe at any given time, impacts the view of migration. The suggestion is that having a consciousness of this underlying psychology as being a driver of how value systems are created and sustained is important in re-considering and making more effective policies.

As noted, in legal scholarship literature there are occasional references to human psychology underlying the concepts but few outright explorations. In legal studies generally, there is a longstanding tradition to focus on "objective" factors and law as an affect-free rationality-based project. As scholars have noted, there has been a dichotomization between reason and emotion.[58] This split is especially apparent in arguments in the migration context that have involved one side calling the other side as "irrational" in their reasoning. However, new fields of scholarship see emotions as unavoidably intertwined with rational reasoning and a legitimate human experience worthy of exploration within legal spheres. Therefore, this dissertation aims to add to existing scholarship in this regard, with a focus on Europe, asylum and human right law.

The research takes a psycho-historical perspective to examine the evolution of the laws, primarily from their inception following the establishment of the United Nations and the European institutions after the Second World War. This post-war context produced the beginnings of international human rights law, the 1951 Refugee Convention, the European Communities founding treaties as well as the European Convention of Human Rights. All of these will be discussed, while also taking into consideration the much longer and richer history of asylum and human rights, said to be an offspring of the European Enlightenment but in fact having a much more complex lineage that can be articulated as being rooted in human psychological inclinations.

[58] Renata Grossi, "Understanding law and Emotion" (2015) 7(1) *Emotion Review* 55-60; Kathryn Abrams and Hila Karen "Who's afraid of law and emotions?" (2010) 94 *Minnesota Law Review* 1997-2074 at p 2021; Terry A. Maroney, "Law and Human Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30 *Law and Human Behaviour* 125-133.

In some cases, an evolution can be observed, while in others, the situation is surprisingly the same as in the past. The same rhetoric reverberates to the present day, one perspective warning of the threats of unrestrained migration and primacy of national interests, the other pointing to moral and humanitarian duties towards innocent victims – or in other words, "a long-established dance – and everyone knows the steps."[59] As one author notes:

> The value of comparing the treatment of refugee 'issues' in the past with the present reveals both how much and how little has changed. Many legal instruments are now in place…at the same time, much anti-refugee discourse is almost identical with that of more than a century ago. To read the Daily Mail's anti-alien stance of the early twentieth century is to know how it stands with respect to Syrian refugees today.[60]

In particular, the comparison and connection to the World War II context is meaningful for a number of reasons. The migration-related crisis in Europe since 2015, and around the world for much longer, as well as the context in which it emerges – rise of right-wing populism and authoritarianism – has stoked comparisons with the situation in WWII and its aftermath. Numerous comparisons have been made about the present-day displacement of refugees as a result of the wars, whether in Syria or Afghanistan or elsewhere, being of the same critical global significance as the WWII context. The figure of 60 million forcibly displaced persons around the world, mostly taking refuge in the least developed countries, have been compared to the estimated figure of 60 million Europeans that were displaced as a result of World War II.[61] Headlines alert that a crisis

[59] Derek Hawes, "Refugees in Europe 1919–1959: A Forty Years' Crisis?" (2018) 26(1) *Journal of Contemporary European Studies* 137-139.
[60] Dan Stone, "Refugees Then and Now: Memory, History and Politics in the Long Twentieth Century: An Introduction" (2018) 52(2-3) *Patterns of Prejudice* 101-106.
[61] UNHCR, Facts and Figures about Refugees online at <http://www.unhcr.org.uk/about-us/key-facts-and-figures.html>.

of this scale not seen since the Second World War is a catalyst for major legislative and institutional changes.[62]

And yet, while there are comparisons of similarity, things have changed significantly. Thus, a final point on originality is its multi-perspectival approach that considers multiple sources in the development and impact of the laws and their psychological underpinnings. The discussion considers both the negotiations of legislators as well as their products – the laws themselves – how they can be described as psychological inclinations by considering the texts and reasoning of policy-makers, judges, asylum adjudicators, European society, asylum seekers/ refugees and other non-European category-holders.

6. Overview of Chapters

Chapter 1 lays out the legal groundwork concerning rights of asylum seekers and refugees with a primary focus on the global instruments before looking more specifically at the European laws and policies. The chapter includes an overview of key provisions in international law, primarily the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the 1951 Refugee Convention, and other conventions to a lesser extent, as they are related to asylum seeker reception and refugee integration. It includes only a brief introduction to relevant European law as this is further elaborated in subsequent chapters. The emphasis is placed on provisions concerning the right to asylum, refugee and other definitions, non-discrimination, naturalization/ assimilation, and

[62] UN News Centre, UN Warns of 'Record High' 60 Million Displaced Amid Expanding Global Conflicts (2015/06/20) online at <https://ourworld.unu.edu/en/un-warns-of-record-high-60-million-displaced-amid-expanding-global-conflicts>.

the gradations of treatment concerning rights to housing, employment and social benefits – all of these are broadly related to inclusion and exclusion of persons under the asylum system.

Chapter 2 goes on to outline the methodology and conceptual framework, this being frame analysis, drawing on established theories from the social psychology of inclusion and exclusion, with reliable generalizations that support the selected frames. The methodology is an "integrated and interdisciplinary" one weaving language from social psychology into a discussion of laws and policies. The approach falls within the "critical legal studies" perspective from which "law and emotion" scholarship was borne, as well as "socio-legal" and comparative methods. The conceptual framework introduces the premises of the dissertation, and the main frames of analysis informed by the social psychology of inclusion and exclusion that will be applied throughout in reflecting on European laws and policies concerning rights of asylum seekers and refugees. The main frames include 1) *identity formation of self and other* which focuses on social psychology theories of social identity and self-categorization; 2) *cost-benefit calculation* referring to the psychology behind helping behavior – altruism, empathy, and their lack; and 3) *threat-perception* that refers to theories and models about the different layers of threat that social groups experience and how this can be counteracted. Throughout the chapter, references are made to sources from disciplines outside of social psychology and law that have used similar frames, namely international relations, political science, and media studies.

The focus of Chapter 3 is on the drafting of the 1951 Refugee Convention, particularly Article 1, concerning the refugee definition, also known as the inclusion/ exclusion clauses. The chapter considers first the post-WWII state of mind coming into the negotiations and reflects on their preliminary stages. At this time, a dissonance emerges among the drafters as to whether the definition of refugee should be broad and more inclusive or narrow and more exclusionary. A

gradual dwindling of the humanitarian spirit can be observed. Relying on the *travaux préparatoires* of the last stage of negotiations at the Conference of the Plenipotentiaries, a picture appears about the underlying psychological forces that produced the Convention. The analysis of the drafting documents is unique in that the social psychological frame is applied and an emphasis here is placed on some of the emotionally-laden language used with at-times heated exchanges between the conference delegates. Much of the discussion concerns whose interests are being served by the provisions of the Convention – whether the State parties or the refugees. The crux of it centers on whether the refugee definition should apply to European refugees only, or whether it should have a universal application. Several other social psychological phenomena can be observed in the negotiations, including a weighing of socio-economic burdens as well as perceived threats to security.

Taking cues from political scientists and theorists in applying social psychological interpretation to a macro-level analysis, Chapter 4 considers Europe as an in-group that is defining its self-identity through laws and institutions, a process that has involved identifying the non-European Other. The chapter describes the evolution of European law concerning Europeans vis-à-vis migrants, and specifically asylum seekers and refugees. Following WWII, human rights emerged as a defining feature of European identity, certainly within the Council of Europe, but also within the European Community, as evident in the founding treaties. At this time, there was an omission of the "alien" and ultimately, the refugee, as to how far these European human rights would be extended, showing a more confined and exclusionary sentiment embedded in the treaties. As the European Community evolved into the European Union, freedom of movement became a defining feature which also meant that borders had to be redefined. The introduction of the legal concept of the European citizen coincided with the development of the laws that formed the

Common European Asylum System. This resulted in the ongoing European Union dilemma about its multiple and at times conflicting identities being both cosmopolitan and communitarian.

Building on this, Chapter 5 explores legal categorizations of the citizen, European citizen, and non-European (specifically asylum seeker, refugee, and beneficiary of international protection). Firstly, legal categorization is described in terms of its social psychological nature akin to social categorization. The characteristics of the concept of citizenship are unpacked and then applied to the legal category of European citizenship. From the perspective of a psychological and emotional attachment, European citizenship does not have the salience of national citizenship, and this is reflected in the provisions of European Union law. Finally, the European Union's legal system of assessing who qualifies for international asylum protection creates a hierarchy of categories, referred to as a two-tier system, that feeds into perspectives of those that are deserving and undeserving. This ultimately affects their access to human rights, and notably social and economic rights. The system of this legal category stratification has a detrimental impact.

Chapter 6 proposes that the legal concept of dignity, drawing its evaluative substance from emotions, is an inclusionary concept. Tracing back some highlights in the evolution of the dignity concept, from its historic roots to its modern iterations codified in international and European laws, shows dignity featuring increasingly and more prominently. Dignity in this chapter is further unpacked in its psychological and philosophical sense. Case-law from the European Court of Human Rights on the vulnerability and dignity of asylum seekers, particularly in terms of their living conditions during the reception phase, do make use of emotions-based language and reasoning. Likewise, in recent years, shifts in rulings have taken place in the Court of Justice of the European Union as well as within recommendations that have come out from the Committee on Economic and Social Rights presiding over the European Social Charter. The recent legislative

and jurisprudential advancements show that "dignity as humanity", "dignity as inclusion", and "dignity as a human-self identity" can be potent in addressing categorized distinctions that pervade a dissonance in European policies.

The conclusion ends on an optimistic note aiming to incorporate new interdisciplinary insights that links legal discourse with psychological knowledge, towards paradigm shifts and new legislative, and even cultural, European co-creations. While legal scholars hint at references to psychology in a general sense or suggest the need for psychological linking and evaluation, this dissertation goes ahead with an earnest attempt and the goal of making some indents in the arduous task of linking knowledge from social psychology to a deeper comprehension and analysis of inclusion/ exclusion in human rights and asylum law in Europe.

Chapter 1 – Overview of International and European Laws Concerning Inclusion/ Exclusion Rights of Asylum

> We become aware of the existence of a right to have rights…and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.[1]
>
> – Hannah Arendt

1.1 Introduction – Starting with the Law

Starting with a focus on legal doctrine, this chapter gives an overview of the rights concerning asylum under international law and the gradations of inclusion and exclusion. The inclusion/exclusion throughout the dissertation refer broadly to status determination based on category definitions as well as asylum-related social and economic rights and integration, particularly rights in regards to employment, housing, and social benefits. The reason for this choice is that inclusion and exclusion are expressed vividly in the provisions that will be discussed, and because, as will be discussed in subsequent chapters, the substance of these rules and rights can be viewed as determinants of social value that are in turn tied up with social psychological inclinations. Therefore, to balance out the different interdisciplinary streams that this dissertation weaves, as well as the historical aspects and the nature of the laws and policies concerning refugees and asylum seekers in Europe that will be discussed throughout, this chapter begins by first introducing some of the international human rights and asylum-related laws agreed at the United Nations, and closes off key European laws. Importantly, what is not in this chapter but will be

[1] Hannah Arendt, *The Origins of Totalitarianism*, 1968 at p177 [cited in:] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004) at p 51. This quote is preceded by: "Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights."

referenced in later chapters are the relevant laws concerning other non-asylum status groups, namely European citizens. Laws such as the EU treaties, specific case law, and policies concerning asylum, migration, and European citizenship will be referenced in subsequent chapters. This chapter is intended to outline some of the asylum-related provisions at the global and regional level to streamline the vastness of the laws contained in a complex web and as a necessary reference point for the analysis.

1.2 Dissonance in the Universal Declaration for Human Rights

The former UN Special Rapporteur on the rights of non-citizens, David Weissbrodt, noted that "the architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should equally enjoy all human rights" but that this architecture of equal treatment between nationals and non-nationals is not absolute.[2] The universal applicability of human rights refers specifically to the language of the Universal Declaration of Human Rights (UDHR) of 1948 and its offspring conventions that address "every human being", stating that "everyone has a right", "everyone is entitled", and "no one shall be" deprived of the delineated rights and freedoms.[3] Nonetheless, the specific provisions come with caveats where the extension of that right meets some boundaries and "everyone" does not in fact mean "every human being" because non-discrimination provisions do allow for limitations on rights according to nationality. The distinctions between human beings based on nationality are viewed as "non-discriminatory with regard to certain issues that are deemed to require a specific link between the State and the

[2] David Weissbrodt and Michael Divine, "International Human Rights of Migration" [in:] Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds) *Foundations of International Migration Law* (Cambridge University Press, 2012) (Kindle edition) at p 157.
[3] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

individuals."[4] Nationality is not included as a prohibited ground for discrimination, neither in the UDHR offspring covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[5] This feature is a glaring inconsistency in international human rights law since the list of enumerated grounds on which discrimination is not permitted includes "national origin".[6] In order to permit limitations, however, jurisprudence has at times separated the grouping of "national origin" as socially based from that of "nationality" that is viewed as a political arrangement.[7]

The source of nationality discrimination is longstanding, as long as nation states exist, although nation states themselves are a fairly new phenomenon – from the nineteenth century in Europe, even if it is disputed as to which came first, the nation (and its nationalism) or the nation state.[8] As liberal democracies developed over the centuries and equality was amongst the primary ideals, this equality was not absolute and remained to the exclusion of certain groups of people.[9] At the same time, inequalities stand against the ideals of the universal human rights established in

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4 Norman Weiss, "Integration, Aliens" [in:] Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

5 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p 171; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p 3.

6 ICCPR, Art 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ICCPR, Art 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7 Dagmar Shiek, Lisa Waddington, and Mark Bell, Cases, *Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) at p 57.

8 Andreas Wimmer and Yuval Feinstein, "The Rise of the Nation-State across the World, 1816 to 2001" (2010) 75(5) *American Sociological Review* 764–790; Jonathan Hearn, *Rethinking Nationalism; A Critical Introduction* (New York: Palgrave Macmillan, 2006); Rogers Brubaker, *Nationalism Reframed: Nationhood and the Question in the New Europe (*Cambridge: Cambridge University Press, 1996); Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishers, 1983); Benedict Anderson, "The Origins of National Consciousness" [in:] John Hutchinson and Anthony D. Smith (eds.) *Nationalism: Critical Concepts in Political Sciences, Volume I* (London: Routledge, 2000).

9 Sandra Fredman, *Discrimination Law* (Second Edition, Claredon Law Series) (Oxford University Press, 2011) at p 5.

the twentieth century. The provision of non-discrimination is a primary principle in all human rights treaties, described as "fundamentally entangled with broader cause of fostering greater recognition and acceptance of the universality of human rights" and its converse a "blatant negation of the equal value, humanity, and dignity of individuals and groups."[10] Nonetheless, the jarring contradiction in international human rights law is the venerating of dignity, equality, humanity and non-discrimination, but simultaneously allowing for a distinction between nationals and non-nationals, often within the same legal frameworks, which can in turn lead to indignity, inequality, inhumanity and discrimination.

1.3 The Right to Asylum

Asylum itself of course has a long history as "an ancient practice, privilege and problem."[11] The practice of extending benevolence and love to the vulnerable migrant fleeing harm can be found in Biblical and Koranic references.[12] Asylum as a right is said to originate in ancient Greece and Rome, having progressed from a "right of sanctuary" given by a sovereign authority or church available to persons persecuted in their own state.[13] The concept and practice evolved alongside cosmopolitanism that was construed in parallel to the concepts of citizenship, also initially thought

[10] Sandra Ratjen and Manav Satija, "Realizing Economic, Social and Cultural Rights for All" [in:] Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014).
[11] Otto Kirchheimer, "Asylum" (1959) 53(4) *The American Political Science Review* pp 985-1016 at p 985.
[12] Moshe Greenberg, "The Biblical Conception of Asylum" (1959) 78 (2) *Journal of Biblical Literature* pp 125-132; Jeffrey Stackert, "Why Does Deuteronomy Legislate Cities of Refuge? Asylum in the Covenant Collection (Exodus 21:12-14) and Deuteronomy (19:1-13)" (2006) 125(1) *Journal of Biblical Literature*, pp 23-49; UNHCR, "Islam and Refugees" *UN High Commissioner's Dialogue on Protection Challenges. Theme: Faith and Protection English* (12-13 December 2012); Kirsten Zaat, "The Protection of Forced Migrants in Islamic Law" (2007) UNHCR New Issues in Refugee Research. Research Paper No. 146; Sami A. Aldeeb Abu-Sahlieh, "The Islamic Conception of Migration" (1996) 30(1) *The International Migration Review, Special Issue: Ethics, Migration, and Global Stewardship* at pp 37-57.
[13] Robert Kogod Goldman and Scott M. Martin, "International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law" (1983) 5(3) *Human Rights Quarterly* 302, at p 309; *Edwards, infra* note 18 p 299.

up by the ancients. The Stoics are credited as the first to develop the idea of "a metaphysical conception of human beings as all equally under the sway of a universal moral order ordained by the gods."[14] As of the Enlightenment in the eighteenth century, Immanuel Kant had reflected in *Perpetual Peace* on the laws of hospitality as universal rights to be in a foreign territory by virtue of humanity and not solely due to the altruism of a state that would otherwise perceive and treat the foreigner as an enemy.[15]

The modern notion of sanctuary and cosmopolitan hospitality is encapsulated in the UDHR that states in its Article 14 that "everyone has the right to seek and enjoy in other countries of asylum from persecution." This is followed by a qualification, that the right to asylum "may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[16] The limitation refers to an individual that is fleeing prosecution and not persecution.[17] Otherwise, volumes have been written about the right to seek asylum that is placed equally amidst other human rights and led to the provisions of the 1951 Refugee Convention that will be discussed forthwith. Alice Edwards has suggested, however, that the forgotten second component of the right to *enjoy* asylum in addition to seeking it refers to social and economic rights.[18] This distinction between seeking and enjoying is partly attributed to the desire of states to keep refugee law apart from international human rights

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[14] Stan Van Hooft, *Cosmopolitanism: Philosophy for Global Ethics* (New York: Routledge, 2009) (Kindle Edition) at Loc 389 of 5668; Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton, 2006).

[15] Emmanuel Kant, *Perpetual Peace* (Cosimo Classics Philosophy, 2002); Pauline Kleingeld, *Kant and Cosmopolitanism: the Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012); Garrett W. Brown, "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right A Kantian Response to Jacques Derrida" (2010) 9(3) *European Journal of Political Theory* 308–327.

[16] Article 14(2).

[17] Sibylle Kapferer, "Article 14 (2) of the Universal Declaration of Human Rights and Exclusion form International Refugee Protection" (2008) 27 (3) *Refugee Survey Quarterly* 53-75 at p 54.

[18] Alice Edwards, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum, 2005 (17) (2) *International Journal of Refugee Law* 293–330 [hereinafter Edwards].

law in order to "flout minimum standards."[19] Indeed, even the seeking asylum dimension is often not fulfilled by states that obstruct asylum seekers in numerous ways – not least through fenced borders, detentions, safe third-country agreements, visa restrictions, deportations, and just flat-out rejections. There were proposals in the initial drafts of the UDHR to incorporate an obligation for the states to "grant asylum" but this did not go through.[20] Likewise, the right to asylum did not make it into the ICCPR (signed in 1966, effective as of 1976) at all due to resistance from States, nor did the right to nationality, except in reference to children.[21] The argument was that these concepts were already covered in the 1951 Refugee Convention, the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.[22] Things differ at the regional levels. Both the Inter-American and African human rights instruments specify that persons have the right to seek and be granted/ obtain asylum.[23] The European Union, however, did not instil a right to asylum until the Charter of Fundamental Rights of the European Union EU Charter in 2000.[24]

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[19] *Ibid* at p 294.
[20] *Ibid* at p 299; Richard Plender and Nuala Mole, "Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments" [in:] Frances Nicholson and Patrick Twomey (eds.) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) at p 81.
[21] Edwards, *supra* note 18 at p 298.
[22] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p 137; UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p 117; UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p 175.
[23] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969 in Article 22 (7) states that "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) states in Article 12 (3) that "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions"; Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45 states in Article 2 (2) "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State" and subsequent sections repeatedly mention the granting of asylum.
[24] "Article 18: Right to asylum: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

1.4 Limited Rights to Leave, Enter, and to Move with Freedom

The trope in asylum law discussions is the lacuna presented by the right to leave any country but not the right to enter another one. Article 13(2) of the UDHR and Article 12(2) of the ICCPR state that "everyone has the right to leave any country, including his own", save for the ICCPR Article 12(3) exception that permits restrictions by law that are deemed "necessary to protect national security, public order, public health or morals or the rights and freedoms of others" (this exception is absent in the UDHR).

These are the "freedom of movement" provisions that begin in the UDHR with "everyone has the right to freedom of movement and residence" but this is "*within* the borders of each state"[25] while the ICCPR goes even further in qualifying this freedom as being for "everyone lawfully within the territory of the State."[26] In both documents, the UDHR and the ICCPR, the freedom of movement provision precedes the right to asylum. The logic is that the right to asylum in another country follows the right to leave one's own, but considering that there is otherwise no other right to enter, that asylum is largely restricted around the world, and that the unofficial "right to migration" is in present day hotly contested, it is illogic that pervades.

1.5 Non-discrimination

Discrimination, the result of negative bias in the form of prejudice concerning different categories of people, is a cornerstone concept in both social psychology and international human rights law. Both social psychology and human rights can explain discrimination from a theoretical

[25] Article 13. Emphasis added.
[26] Article 12.

and empirical perspective and both offer tools for its elimination. Therefore, the inter-weaving of the insights of the disciplines that developed in parallel in the twentieth century, even if done from a broad conceptual perspective as this dissertation attempts, can be a valuable experiment in the context of an evolving social consciousness towards non-discrimination. Reflections on group and inter-group bias will be discussed in later chapters, and here is a brief discussion of non-discrimination as described in the legal sources.

The entire premise of human rights protection begins from the basic and general principle of "non-discrimination, together with equality before the law and equal protection of the law without any discrimination", as stated by the UN Human Rights Committee (HRC).[27] In terms of citizens and non-citizens, the basic rule is that the rights within the ICCPR and the ICESCR are non-exhaustive, they must prohibit "discrimination of any kind", and the provisions of the covenants "must be guaranteed without discrimination between citizens and aliens."[28] However, with reference to the non-discrimination provisions regarding civil and political rights, the HRC has noted that while most of the "rights set forth in the ICCPR apply to everyone, irrespective of reciprocity, and irrespective of a person's nationality or statelessness", certain rights of non-nationals may be qualified by limitations, specifically political rights explicitly guaranteed to nationals and some cases of freedom of movement, if justified.[29] The HRC added that enjoyment of rights and freedoms on equal footing does not mean identical treatment in every instance as

[27] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.
[28] UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens under the Covenant*, 11 April 1986 at para. 2. Reference to "discrimination of any kind" refers to ICCPR Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" and ICESCR Article 2(2): "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[29] *Ibid General Comment No. 15* at paras 1, 8; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

some provisions of the ICCPR explicitly allow for distinctions.[30] Likewise, the Committee for the Elimination of Racial Discrimination has commented that State Parties can make distinctions between nationals and non-nationals only if such distinctions do not have the effect of limiting the enjoyment by non-nationals of rights enshrined in other instruments.[31] Both treaty bodies and stemming jurisprudence have affirmed that where distinctions are made, they have to be part of a legitimate objective and proportional in regard to that objective.

At the same time as limitations on rights of non-nationals are permitted, the established indivisibility of social and economic rights from civil and political rights necessitate greater protection to be offered by the right to life and the prohibition on inhuman or degrading treatment. The right to life in Article 6 (1) of the ICCPR can be interpreted more broadly as not only prohibiting threats to human life from intentional killing, but also protecting life from malnutrition and life-threatening illnesses that come from the denial or restriction of socio-economic conditions.[32] In fact, the right to life in this article has been described by the HRC as a supreme right that "should not be interpreted narrowly."[33] Likewise, denying someone the necessities of life may contravene ICCPR's Article 7 on the prohibition of cruel, inhuman, or degrading treatment or punishment. This supports the principle that everyone should be able to enjoy their basic needs under conditions of dignity without having to endure degrading circumstances, and that this is a right protected in various forms by Article 7 and its derivatives.

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[30] UN Human Rights Committee (HRC), *General Comment 18, Non-discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at para 8.

[31] UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30, Discrimination against Non-citizens* (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

[32] James C. Hathaway, *The International Rights of Refugees Under International Law*, (Cambridge University Press, 2005) at p 465 [hereinafter Hathaway, Rights of Refugees].

[33] UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 at para 1.

The limitations permitted by the ICESCR apply specifically to "developing" countries, which implies outside of Europe and certainly outside the European Union. The non-discrimination provision of Article 2 (3) "with due regard to human rights and their national economy" permits developing countries to "determine to what extent they would guarantee the economic rights recognized in the ICESCR to non-nationals."[34] Nevertheless, even in countries that are categorized as "developed", the lack of financial resources is a reason cited by States for limiting social and economic rights. The "asymmetrical impact of the economic crisis in the Eurozone" has been proposed as contributing to the socio-economic disparities in the asylum context.[35] The overall ICESCR position is that States have to undertake steps, individually and through international assistance and cooperation "to the maximum of their available resources" to achieve progressively the full realization of the rights.[36] However, the Committee on Economic, Social and Cultural Rights (CESCR) has emphasized that this does not imply that States can defer the full realization of rights, and that they are obliged to take immediate steps, with a core minimum duty imposed on governments to ensure that everyone at least has access to essential levels of economic and social rights.[37] Importantly, the Committee has asserted that States have the obligation to assemble national budgets and prioritize resources with the aim of meeting obligations even during times of severe resource constraints, and *especially* for the protection of the most vulnerable individuals. The CESCR has stated that "even in times of severe resource

[34] ICESCR, Article 2 (2) The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: Article 2 (3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.
[35] Ferruccio Pastore and Giulia Henry, "Explaining the Crisis of the European Migration and Asylum Regime" (2016) 51(1) *The International Spectator* 44-57.
[36] ICESCR, Article 2.
[37] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23 at para 10.

constraints, disadvantaged and marginalized individuals and groups must be protected by the adoption of relatively low-cost targeted programs."[38] Discriminatory treatment must prove to be "compatible with the nature of Covenant rights" and be reasonable, objective, and proportional between aims and omissions.[39] Justifying discriminatory treatment because of a lack of available resources does not stand unless the state can show that every effort has been made to address and eliminate the discrimination.[40] In circumstances in which states are unable to meet their obligations, there is a responsibility through international cooperation for assistance from the international community.[41]

In general, the ICESCR gives rise to positive duties which requires the state either to provide the right directly or to ensure that it is provided.[42] This is especially relevant for persons seeking asylum and recognized refugees, given their status and trajectories, as most often they do not have the same opportunity as nationals to achieve an adequate standard of living on the basis of their own efforts and thus require direct assistance until conditions are established where they can be self-reliant.[43] Formal equality of treatment, therefore, may itself result in discrimination.

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[38] *Ibid at* para 12.

[39] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20 [hereinafter CESCR, General Comment No. 20] at para 13: "Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority."

[40] *Ibid*.

[41] ICESCR, Articles 11(1), 22 and 23.

[42] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) (Kindle edition) at 1966 [hereinafter Fredman, Human Rights Transformed].

[43] Ryszard Cholewinski, "Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations – Education and Employment. Paper presented at ECRE conference on Social and Economic Rights of Refugees and Asylum Seekers" in Odessa, Ukraine November 18-19, 2004 ; Inga T. Winkler

As Sandra Fredman writes, "treating people in the same way regardless of their differing backgrounds frequently entrenches difference."[44] The principle of equality is not just consistent treatment in treating likes alike, but may also require *equality of outcomes* in the sense that identical treatment can reinforce inequalities that are deeply embedded in social structures.[45] Equality principles also aim for public authorities to take positive measures towards *equality of opportunity* between groups in addition to ensuring that there is no discrimination.[46] A balance of outcomes and opportunities, combined with dignity, can be summarized as factors in *substantive equality* that aims at policies and practices to address the particular needs of specific groups of people. Although its meaning has been contested, Fredman has proposed that the overall aims of substantive equality are "to redress disadvantage; counter stigma, stereotyping, prejudice, humiliation and violence; enhance voice and participation; and accommodate difference and achieve structural change, countering both political and social exclusion" in order to, in considering social context, "be responsive to those who are disadvantaged, demeaned, excluded, or ignored."[47]

Achieving substantive equality is often met with reluctance when it means giving special accommodation, particularly to non-nationals. The present state of international law gives some leeway in state discretion concerning equality of all kinds. Decision-making is largely left to state legislatures to consider the socio-economic needs of a given society which has had the effect of

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and Clauda Mahler, "Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?" (2013) 13 (2) *Human Rights Law Review* 388-401.

[44] Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2001) at p 66.

[45] Sandra Fredman, *Discrimination Law*, *Second edition* (Oxford: Oxford University Press, 2011) at p 14 [hereinafter Fredman, Discrimination 2011].

[46] Christopher McCrudden, "Equality and Discrimination" [in:] David Feldman (ed) *English Public Law* (Oxford: Oxford University press, 2004) at at para. 11.71; Hathaway, Rights of Refugees, *supra* note 32 at pp 124-125.

[47] Sandra Fredman, "Substantive Equality Revisited" (2016) 14 (3) *International Journal of Constitutional Law* 712–738 at p 713, 727; Amartya Sen, *Inequality Re-examined* (Oxford: Carendon, 1995) at p 1 wrote: "the effect of ignoring the interpersonal variations can, in fact, be deeply inegalitarian, in hiding the fact that equal consideration for all may demand very unequal treatment in favour of the disadvantaged."

placing issues of social and economic rights of non-nationals outside of the scrutiny of international law – though this is changing.[48] In any event, economic and social rights in international human rights law exist largely to support the most vulnerable in a given society and so these rights should naturally extended to those who have fled persecution and are under the protection of the asylum country. However, when states are resisting positive duties to economic and social rights for their own nationals, there is even more reluctance to extend them to non-nationals, particularly those groups that states are trying to keep out in the first place. Until the rights are solidified and enhanced, asylum seekers in particular are not positioned to benefit from a number of rights guaranteed to nationals, and therefore are susceptible to discrimination.

1.6 Overview of the 1951 Refugee Convention

1.6.1 Article 1 Inclusion/ Exclusion and Article 33 Non-Refoulement

The history of the inclusion clause within the 1951 Refugee Convention will be discussed extensively in Chapter 3, and thus only a brief introduction is made here about its components. As noted, there is no reference in the Convention to a 'status' of seeking asylum, but only a process of being granted or refused asylum according to the definition provided. Simply, there was no such terminology at the time and no such distinction – the asylum seeker label came up only in the

[48]The often cited case is that of *Oulajin and Kaiss v. the Netherlands*, where the Human rights Committee states, concerning the discrimination provision in the ICCPR: "with regard to the application of art 26…in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of a social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties" Communication, No. 426/ 1990, *Oulajin and Kaiss v. the Netherlands*, Views adopted on 23 October 1992, paragraph 7.5.

1990s in Europe, as will be discussed in Chapter 5. The 1951 Refugee Convention provides in Article 1 (A) 2 the definition of refugee who is a person that:

> …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.

The contracting states included a temporal limitation to their obligations to refugees that were known at the time, but this was removed with the 1967 Protocol.[49] It is noteworthy that the element of "fear" was included in the definition, described as "a state of mind and a subjective condition" supported by objective criteria to make the fear "well-founded".[50] This subjective element is said to be "inseparable from an assessment of personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions."[51]

The 1951 Refugee Convention outlines minimum standards of treatment and basic rights that refugees are entitled to, as will be discussed. Along with the juridical status of refugees come provisions on their rights to gainful employment, welfare, identity papers and more. Expulsion or forcible return of those with refugee status is prohibited. Article 33 states that "no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of

[49] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4 at para 7. [hereinafter UNHCR Handbook 2019] Events was understood as "happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes" at para 36 of UNHCR Handbook 2019; UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p 267.

[50] *Ibid* UNHCR Handbook 2019 at para 38.

[51] *Ibid* at para 40.

territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

As noted, an emphasis is placed in the present dissertation on the inclusion clauses that either recognize or reject refugee status, as well as the inclusion and exclusion that occurs through provision or denial through social and economic rights. A separate area of consideration from a psychological perspective, but one that is outside the scope of this research, is the *exclusion clause* which is a recognition *and* rejection combined. The 1951 Refugee Convention contains provisions for persons the meet the refugee definition but are nonetheless excluded because they either a) already receive protection and assistance from the United Nations (Article 1 D – and this applies to Palestinian refugees), b) not in need of *international* protection (Article 1 E) as this refers mostly to national refugees, or c) do not "deserve" international protection (Article 1 F) because of having committed a crime against peace, a war crime, crime against humanity, a serious non-political crime, or an "act contrary to the purposes and principles of the United Nations."

1.6.2 Gradations of Treatment

The 1951 Refugee Convention has a wide-ranging list of rights, but they are not universally applicable equally to all. Rather, they are accrued incrementally based on attachment to the host state, with the acquisition of that attachment determined by the host state. That is, before any given right can be claimed, the nature of attachment to the host state must be defined, and more benefits are granted based on the depth of the relation. The object and purpose of the Convention imply that the spectrum of rights included should be available to refugees once their status is recognized according to Article 1 provisions. That is not quite the case, and what is equally at issue is the availability of those rights to asylum seekers since, as the UNHCR asserts – "every refugee is,

initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined."[52]

International refugee law allows for these "gradations of treatment" that depend on notions such as "lawfully staying" or merely present in the territory.[53] Specifically, the 1951 Refugee Convention refers to refugees that are "in", "within", "lawfully in", "lawfully present in" and "lawfully staying", and those with "habitual residence" in the territory. If no absolute or contingent standard is specified for a given right, refugees benefit from the usual standard of treatment applied to non-citizens present in the asylum state. This especially affects the question of who should access social and economic rights, and how legal status and presence on the territory affects entitlements.

There is a semantics disagreement among legal scholars about what the terms in the Refugee Convention refer to, whether "lawful stay" is the same as "lawful presence"[54] for example, whether it refers to legal status at all and whether lawful stay "must show something more than mere lawful presence."[55] Guy Goodwin-Gill argues that not all rights apply upon granting of status because the extent of a refugee's rights may be determined by four categories he outlines: "simple presence", "lawful presence", "lawful residence" and "habitual residence".[56] According to James Hathaway, the terms determining legal status in the 1951 Refugee Convention cover the following categories of "physical presence", "lawful presence", "lawful stay", and "durable residence."[57] For

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[52] UNHCR, "Note on International Protection" UN Doc. A/AC.96/815 (1993), at para 11.
[53] UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17 at para. 3.
[54] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (A.W. Sijtohoff-Leyden, 1972), at 374.
[55] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford University Press, 2007) at pp 525-526. [hereinafter Goodwin-Gill and McAdam].
[56] *Ibid* at pp 524–526.
[57] Hathaway, Rights of Refugees, *supra* note 32.

Hathaway, *physical presence* refers to persons who are simply in the territory of the state, which is distinguished from presence that is deemed legal.[58] Therefore, *lawful presence*[59] means being legally admitted to the state's territory, and this includes the time while seeking asylum or under temporary protection. Most of the social and economic rights, and therefore prospects for integration, are not acknowledged as applicable until the person has acquired *lawful stay*[60] or *durable residence*.[61] The common interpretation is that the conditions of the 1951 Refugee Convention are not meant to apply to asylum seekers at all, and certainly not the social and economic rights that have the requirement of lawful stay and residence. Then again – the gradations are said to define reception standards for asylum seekers in that the Convention's "provisions that are not linked to lawful stay or residence would apply to asylum seekers in so far as they relate to humane treatment and respect for basic human rights."[62]

Moreover, the gradations of treatment based on stay are in addition to the "most favoured national treatment"[63] or "as favourable as possible and in any case not less favourable than that accorded to aliens generally in the same circumstances".[64] In this regard, the American

[58] *Ibid* at p 171. In the 1951 Refugee Convention, this refers to articles concerning freedom to religion (Article 4), to receive identity papers (Article 27), freedom from penalization for illegal entry (Article 31), and to be subject to only necessary and justifiable constraints on freedom of movement (Article 26).
[59] *Ibid* at p 173. This refers to freedom of movement (Article 26) and right to engage in self-employment (Article 18) within the Refugee Convention.
[60] *Ibid* at p 186. This refers to freedom of association (Article 15), the right to engage in wage earning employment (Article 17) and to practice a profession (Article 19), access to public housing (Article 21) and welfare (Article 23), protection of labour and social security legislation (Article 24), intellectual property rights (Article 14), and entitlement to travel documentation (Article 28).
[61] *Ibid* at p 190. Right to legal aid and to receive national treatment in regard to the posting of security for costs in court proceedings (Article 16).
[62] Edwards, *supra* note 18 at p 304 [citing:] UNHCR, 'Reception of asylum-seekers', at 1, referring to Executive Committee Conclusion No. 82 (XLVIII) on 'Safeguarding Asylum', 1997.
[63] This is found in provisions concerning freedom of non-political association (Article 15) and right to engage in wage earning employment (Article 17) in the 1951 Refugee Convention.
[64] This is found in provisions concerning self-employment (Article 18), liberal professions (Article 19), housing (Article 21) and acquiring movable and immovable property (Article 13).

representative to the Ad Hoc Committee succinctly observed that "when the Convention gave refugees the same privileges as aliens in general, it was not giving them very much."[65]

The varied stipulations on treatment in the 1951 Convention have some perplexing and inconsistent results. For example, the overall right to work under the Convention has the imprecise categories of "refugees lawfully staying in" and most "most-favoured-nation treatment" for wage-earning employment (Article 17) and liberal professions (Article 18) but only "lawfully in" the territory of a state party and subject to treatment "as favourable as possible" for self-employment. Therefore, to engage in wage-earning employment and liberal professions on a most-favoured-nation basis, refugees must be *lawfully staying* in the territory of a State party, while to engage in self-employment activities they must only be *lawfully in*, meaning they must be *lawfully present*. The "lawfully staying" provision means that the presence must be officially sanctioned and on-going.[66] This is indicated by permanent residence status, recognition as a refugee and the issuance of a travel document or re-entry visa. In that sense, asylum seekers would not fulfil the criteria for wage-earning employment and liberal professions but could for self-employment.

1.6.3 Article 34: Assimilation, Integration, and Naturalization

The 1951 Refugee Convention in Article 34 urges States to as far as possible facilitate the assimilation of refugees, including every effort to expedite naturalization.[67] This is framed in a discretionary language in regards to "the natural end point of long-term stay in the country of asylum."[68] More broadly, the term 'assimilation' has held a negative connotation of not

[65] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/ SR.37, Aug 16, 1950, at 7.
[66] Goodwin-Gill and McAdam, *supra* note 55 at p 526.
[67] The Statute of the UNHCR further calls on Governments to co-operate with them in this regard.
[68] Edwards, *supra* note 18 at p 307.

recognizing diversity. In fact, this point was raised by the Israeli representative at the second session of the Ad Hoc Committee responsible for drafting the Convention, when he noted that "the word 'assimilation', well-known in sociology, bore a rather unpleasant connotation vaguely related to the notion of force."[69] He suggested instead to use the words 'adaptation' or 'adjustment' as being more suitable. The concern, however, was not ubiquitously shared among Committee members. Rather, a matter of semantics arose as to the intention behind the word and whether assimilation as expressed in different languages suggested compulsion or not. The conclusion was to retain the term in its connection to acquisition of nationality.

Commentators on this provision agree that the Ad Hoc Committee intended the term to be understood in the sense of "integration" into the economic, social and cultural life of the country.[70] Integration, as opposed to assimilation, is understood as a two-way process, with obligations on the State to ensure the refugees' access to economic, social, cultural and civil life, and the refugees to respect the values of the host society without having to relinquish their own identity.[71] UNHCR had since concluded at its Global Consultations that "the international community has always rejected the notion that refugees should be expected to abandon their own culture and way of life, so as to become indistinguishable from nationals of the host community."[72] Indeed, the *travaux préparatoires* support the view that there was a sensitivity about refugees having a "feeling" of loss, and that "nationality should not be imposed on a refugee in violation of his inmost feelings."[73]

69 UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990 on Article 34: Naturalization [hereinafter Travaux with Commentary by Paul Weis].
70 Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, 1953, re-published by UNHCR, 1997, p 142, and UNHCR, *Local Integration* at p 2.
71 UN High Commissioner for Refugees (UNHCR), *A New Beginning: Refugee Integration in Europe*, September 2013 at p 13.
72 UNHCR, (2002) "4th Meeting: Global Consultations on International Protection" EC/GC/02/6, 25 April 2002.
73 Travaux with Commentary by Paul Weis, *supra* note 69.

This was the argument against compulsory naturalization, even after a significant period of time such as fifteen years. In fact, several state representatives in the negotiations expressed an expectation that refugees would want to retain their national identity, both culturally and formally, in order to return to their countries of origin once circumstances would allow. This naturally fed into the state-serving perspective that naturalization would not be an easy process with the justification that this would not benefit refugees. The rights-driven counterargument was that many refugees would remain stateless if the provisions of the article on assimilation and naturalization was not accommodating towards granting of full citizenship. The discussion among representatives about expediting proceedings towards naturalization resulted in the final wording of the article which obliged parties to "make every effort to expedite naturalization proceedings and reduce as far as possible charges and costs of such proceedings."[74]

Although granting of citizenship is the final step by formalizing integration as a durable solution,[75] local integration happens along a continuum which consists of social and economic rights.[76] UNHCR has separated this process into "self-reliance" and "local integration", with the latter being the "end product of a multifaceted and ongoing process, of which [the former] is but

[74] *Travaux with Commentary by Paul Weis*: The UK representative was not satisfied with the text as he did not think that high Government could reduce the period of residency that their law required for naturalization in order to expedite proceedings to give priority to refugees over others, or to lower the procedural costs that were already very low. The Belgian representative noted that in some countries it was necessary to encourage an acceleration of the procedure and reduction in fees where it was not as swift and inexpensive as the UK. A significant clarification came from the French representative that the reference to expediating proceedings in the Article did not refer to the duration of residence "but only to the administrative formalities taking place between the submission of the application and the decision." A forceful comment at the Ad Hoc meeting that was follow by a reservation to the article at the Conference of Plenipotentiaries came from Italy that the Italian Government could not accept a clause that would "embitter - even slightly - the internal situation at present causing the gravest concern due to over-population and unemployment." The result was that, in accordance with the view of the UK representative, the article became a recommendation rather than a binding legal obligation, with the non-committal language compelling States only "as far as possible" and to "make every effort".

[75] One of three durable solutions, the other two being resettlement and voluntary repatriation.

[76] Edwards, *supra* note 18 at p 307.

one part."[77] Local integration is described as "a legal process, whereby refugees are granted a progressively wider range of rights and entitlements by the host state that are broadly commensurate with those enjoyed by its citizen."[78] Among the enumerated rights are freedom of movement, the right to education, access to the labour market and public assistance, the ability to acquire and dispose of property, the ability to travel with valid identity documents, and family reunification. Rosa De Costa has referred to these socio-economic rights as "integration rights" because their gradual acquisition linked to permanent residence and citizenship. [79]

Henceforth three specific socio-economic integration rights will be discussed: the right to work, housing, and social assistance, as these are of a particular importance during reception for asylum seekers that ultimately affect refugee integration. The rights are indicators of integration.[80] These sets of rights are among the most pertinent as it concerns human dignity and their connection with psychological self-worth and recognition of worth. They also best exemplify the gradation issue of incremental rights, more so because, as noted, there is lack of clarity among legal scholars as to whether the socio-economic rights provisions of the 1951 Refugee Convention apply to asylum seekers at all. A widely-held interpretation is that they do not.

[77] UNHCR, "Local Integration" Global Consultations on International Protection, 4th Meeting, UN doc. EC/GC/02/6, 25 Apr. 2002, para. 5.
[78] *Ibid* para 6.
[79] Rosa Da Costa, Report for UN High Commissioner for Refugees (UNHCR), *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, June 2006, POLAS/2006/02. [hereinafter Da Costa, Refugee Integration].
[80] UN High Commissioner for Refugees (UNHCR), *Refugee Integration and the Use of Indicators: Evidence from Central Europe* , December 2013

1.7 Social and Economic Rights of Refugees under International Law

1.7.1 The Right to Employment

The right to work articulated in Article 23 of the UDHR[81] and its offspring conventions is seen to be intrinsically linked to human needs for security, social participation, psychological and physical health, and a sense of identity, as well as the enabling of access to other socio-economic rights, such as housing, health and education.[82] Evidence has shown that being deprived of the right to employment has dire consequences, among which are social exclusion, loss of skill, psychological harm, illnesses, loss of motivation, disruption of family life, heightening of racial and gender inequalities, and an overall weakening of social values.[83] These consequences are contrary to the underlying purposes of human rights as well as the long term objectives of integration, and a further impediment to both. Conversely, the freedom to work "provides a sense of identity and belonging, promotes social interaction, and can be a source of enjoyment" in addition to income and general self-reliance.[84] The ILO notes that "the importance of work and productive employment" is highlighted due to "the social role which they confer and the feeling of self-esteem which workers derive from them."[85] As the CESCR has noted, earning one's living

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81 Article 23.
(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

82 Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: Perspective on its Development* (Oxford, Claredon Press, 1995).

83 Amaryta Sen, "Inequality, Unemployment and Contemporary Europe" (1997) 136 (2) *International Labour Review* 156-171.

84 Fredman, Discrimination 2011, *supra* note 45 at p 107.

85 ILO Convention No. 168 concerning Employment Promotion and Protection against Unemployment (adopted 21 June 1988, 1654 UNTS 67, entered into force 17 October 1991) states in the preamble: " …the importance of work and productive employment in any society not only because of the resources which they create for the community they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them."

is essential for human dignity, even an inherent part of it, and a significant element of participation in a community and society.[86] Even more vehemently, the American representative to the Ad Hoc Committee as part the process of drafting the 1951 Refugee Convention said that "without the right to work, all other rights are meaningless."[87] Likewise, refugee rights scholar Alice Edwards notes:

> The right to work is particularly important to refugees and asylum seekers as a means of survival and as a contribution to their sense of dignity and self-worth. It provides them with an opportunity to participate in and contribute to their host community, while improving language and other skills. Economic independence reduces reliance on social assistance and avoids the creation of an under-class of persons dependent on welfare.[88]

And yet, in spite of this premise and the immense value of the right to work for all human beings as well as for human relations, it is globally restricted for asylum seekers and limited for refugees. The restriction for asylum seekers is based on the view that entering a country for asylum should be separated from economic reasons.[89] For refugees, the legal entitlement may be available upon status recognition, but what is limiting are employment opportunities and the requirements of education, language, transfer of qualifications, not to mention outright discrimination. While it is true that many people around the world struggle economically and may be unable to work because of a series of social and political impediments, it is particular to non-nationals and unique to asylum seekers that the legal restriction of the right to work applies.

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[86] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18 para 1: "The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/ her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/ her family, and insofar as the work is freely chosen or accepted, to his/ her development and recognition within the community."

[87] Cited in Travaux with Commentary by Paul Weis on Article 17: Wage-earning employment; cited in Hathaway, Rights of Refugees, *supra* note 32 at p 231.

[88] Edwards, *supra* note 18 at p 320.

[89] Steve Kirkwood, Simon Goodman, Chris McVittie, Andy McKinlay, "Asylum-Seekers and the Right to Work" [in:] *The Language of Asylum* (Palgrave Macmillan: London, 2016).

1.7.1.1 Right to Work in the ICESCR

International human rights provisions are indistinct in their stance for addressing the inequalities and vulnerabilities faced by asylum seekers and refugees' inability to access a state's labour market. The UDHR and the ICESCR seemingly provide an unequivocal statement on employment by specifying the right of everyone to work, without distinction, and the right to the free choice of employment without discrimination.[90] The ICESCR's Article 6 stipulates "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The provision correlates to Article 11, which provides for an "adequate standard of living" even though this standard is not conditional on the right to work.[91] In practice, however, governments restrict access to the labour market in the case of non-nationals, and this limitation can find its justification under Article 4 of the ICESCR as a means of "promoting general welfare in a democratic society."[92] Proving the indistinctness of the provision, there is some disagreement among scholars whether this clause permits limitations or not. Matthew Craven argues that restrictions on work for non-nationals would have to be extraordinary and justified on the basis of the general welfare. Morten Kjaerum claims that this can be invoked when there is a recession and unemployment that makes the general public opinion too hostile towards letting refugees in the labour market and this in turn endangers general welfare. Klerk contends that discrimination is always incompatible with these rights and therefore cannot promote general

[90] Article 23 of the UDHR.
1948; and article 6 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), of 16 December 1966.

[91] This means that everyone has a right to an adequate standard of living with or without having earned it through work, though the opportunity to earn it is its own right.

[92] Article 4 of the ICESCR reads as follows: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society."

welfare if it comes at the expense of one part society over another.[93] The UN Committee on Economic Social and Cultural Rights attempts to clarify the situation by stating that the purpose of Article 4 "is primarily to protect the rights of individuals rather than to permit the imposition of limitations by States."[94] In any case, international law does not provide for an unqualified right to work of a non-national whilst sovereign states have "discretion to control the admission, presence and expulsion of aliens, subject to any bilateral or international refugee law."[95] In the absence of drafting history and state practice with a more nuanced and sympathetic interpretation of Article 6 of the ICESCR, states impose restrictions on non-nationals access to the labour market because this is deemed to be permitted under international law.[96]

Special measures in favour of disadvantaged groups are not deemed discriminatory, as concluded by the CESCR in a number of country specific reports.[97] While the CESCR has commented extensively in regard to the right to work and the prohibition of related discrimination, it has stayed conspicuously silent in relation to asylum seekers specifically. Under international law, there is no provision or commentary that specifically obliges states to grant the right to work to asylum seekers, and thus any form of protection must be taken from the abovementioned human rights provisions and the equally uncharitable refugee law discussed below. The most that the CESCR has stated is that States Parties have a 'core obligation' to "ensure the right of access to

93 Da Costa Refugee Integration, *supra* note 79 at p 20, fn 47 summarizes these arguments as described in John A. Dent, *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, prepared for the European Council on Refugees and Exiles (ECRE), November 1998 at p 11.
94 Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, 2003, p 85.
95 Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014) at pp 315-316 [hereinafter Saul et al].
96 *Ibid* at pp 316-317.
97 *Ibid* at p 292.

employment, *especially for disadvantaged and marginalized individuals and groups*, permitting them to live a life of dignity" and to "avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups."[98] The allowance for discrimination must meet the criteria of reasonableness, objectivity and proportionality as per CESCR's General Comment 20, which further stipulates that the non-discrimination provision "is immediately applicable and is neither subject to progressive implementation nor dependent on the available resources. It is directly applicable to all aspects of the right to work."[99]

1.7.1.2 Right to Work in Refugee Law: Articles 17-19 Wage Earning Employment, Self-Employment and Liberal Professions

Unlike the ICESCR's broad provisions for a right to work, the 1951 Refugee Convention does not provide a right to employment on equal terms with nationals, but affords "most favoured national treatment" as accorded to other aliens "in the same circumstances", or treatment "as favourable as possible", and so this remains of a discretionary nature. Essentially, refugees do not have a right to work on equal terms with nationals, and the 1951 Refugee Convention does not extend the right to gainful employment to asylum seekers so protection for this particular group lies primarily within international human rights law. The right is extended to refugees *staying lawfully in* (Art 17 wage-earning employment and Article 19 on liberal professions[100]) and *lawfully*

[98] CESCR, General Comment No. 20, *supra* note 39 at para 31.
[99] *Ibid* at para 33. Emphasis added.
[100] Da Costa, Refugee Integration, *supra* note 79 at p 55 explains: "Liberal professions usually refers to lawyers, physicians, architects, dentists, pharmacists, engineers, veterinarians, artists, and probably other professions such as accountants, interpreters, scientists etc. "While "profession" denotes the possession of certain qualifications, such as

in (Article 18 – self-employment[101]). Wage-earning employment is not defined, but can be considered as encompassing all forms of employment separate from self-employment or a liberal profession.[102] The rights to self-employment under Article 18 and liberal professions under Article 19 are seen as even less generous than the wage-earning provision.[103]

The justification for providing refugees the most favourable treatment given to those from other countries is that they cannot benefit from the agreements made by their state of nationality for any protections and exceptions.[104] As they cannot access diplomatic protections through agreements by their country of origin, they rely on the preferential treatment that is negotiated with most favoured states.[105] Technically, if the Refugee Convention is applied directly, this means that European Union Member States should provide refugees the same treatment as European citizens, that is nationals of States that received the most favoured treatment.[106] Some commentators go even further and argue that the provision on wage-earning employment requires that State Parties to consider granting all refugees equal treatment with nationals.[107] It is striking that Article 17 concerning wage-earning employment has the most State Party reservations, even though states cannot make reservations to the non-discrimination provision of the 1951 Refugee Convention.[108]

a diploma or license for example, the term "liberal" suggests that this professional works on his own rather than as a salaried employee or State agent."

101 Article refers specifically to self-employment in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

102 UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997 written by Professor Atle Grahl-Madsen in 1963; re-published by the Department of International Protection in October 1997 [hereinafter Atle Grahl-Madsen, Commentary].

103 Da Costa, Refugee Integration, *supra* note 79 at p 54.

104 UN High Commissioner for Refugees (UNHCR), *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, available at: A commentary by Nehemiah Robinson, Institute of Jewish Affairs, World Jewish Congress, 1955. Reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees at p 83 [hereinafter Robinson, History and Interpretation].

105 Da Costa, Refugee Integration, *supra* note 79 at p 49.

106 *Ibid.*

107 Robinson, History and Interpretation, *supra* note 104 at p 83.

108 Hathaway, Rights of Refugees, *supra* note 32 at pp 746-747.

The second part of Article 17 provides for an exemption from the restrictive measures imposed on non-nationals to refugees who have a special tie to the receiving country, including refugees who have completed three years of residence in the host country, are married to and still with a national or children possess the nationality of the country of residence (unless the spouse or children are abandoned).[109] However, refugees cannot benefit from the more generous access to wage-earning employment provided under article 17(2), if the employment is reserved for nationals for a reason other than the protection of the labour force, such as national security. Finally, Article 17(3) calls for State Parties to give "sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals", and again the wording is highly discretionary on the part of the State.

1.7.2 Right to an Adequate Standard of Living

In her book on the human right to housing, Jessie Hohmann refers to an adequate house or shelter as connoting "the essential elements of space, privacy, and identity in the social existence of individual human beings" explaining that "the way identity is recognized, socially and legally, is often mediated through relationships with the house and home, both as a physical thing and as an ideological construct."[110] That is in addition to the simple fact that shelter is a basic human need for survival, hence enshrined in the UDHR and other international human rights instruments, all while homelessness and inadequate housing continues to be a problem even in the most developed countries.[111] Even though there has been a proliferation of human rights instruments and

[109] Atle Grahl-Madsen, Commentary, *supra* note 102.
[110] Jessie Hohmann, *The Right to Housing: Laws, Concepts, Possibilities* (Hart, Oxford, 2013) at p 167 [cited in:] Saul et al, *supra* note 95 at p 927.
[111] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant),* 13 December 1991, E/1992/23.

"considerable attention from [the CESCR], academics, commentators and specialists housing NGOs"[112] along with two Special Rapporteurs dedicated to the issue, and "despite apparently enormous efforts to address the problem, the situation is estimated to have become worse, not better."[113]

1.7.2.1 Right to Housing in International Law

The right to housing stems from the right to an adequate standard of living enshrined in Article 25 of the UDHR and Article 11 of the ICESCR, both of which specifically refer to a right to *adequate* housing.[114] The freestanding right to housing was reaffirmed by the CESCR, which has determined that housing is only adequate if it is affordable; accessible to all, in particular the disadvantaged; located in a place that is not impractically remote and which affords reasonable access to services, material, facilities and infrastructure; legally secure; habitable in terms of safety and protection of health and wellbeing; and, culturally appropriate.[115] Thus, the CESCR had made clear that the right to housing should not be viewed in a narrow sense to simply mean a shelter or a roof over one's head, but rather a place to live in security, peace and dignity. [116] Moreover, unlike

[112] Saul et al, *supra* note 95 at p 927.
[113] *Ibid* at 929.
[114] Article 25 of the UDHR states the right of everyone "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Article 11 of ICESCR says that State parties shall "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."
[115] *Ibid* at para 8.
[116] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions, 20 May 1997, E/1998/22; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 13 December 1991, E/1992/23. Para 7: "In the Committees view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusive as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive requires that the

the right to employment where the limitation for non-nationals has been either excused or not contested by the treaty bodies for lacking justifiable aims, the right to housing is viewed more clearly as applying to everyone without exception.[117] But there is still wiggle room for an exception to "everyone" because of the general limitation clause in Article 4 of the ICESCR stating that limitations on rights are permitted if they are for promoting general welfare in a democratic society. This gives room for monitoring bodies to "permit states a certain amount of discretion to differentiate in favour of their own nationals (vis-à-vis aliens), unless such differentiations are unreasonable."[118]

The CESCR reaffirms that the right to housing requires the fulfilment of the criteria of adequacy (legal security of tenure, affordability, habitability, accessibility, location factors, cultural appropriateness, and availability of service, materials, facilities and infrastructure).[119] Significantly, the CESCR has written that governments must give due priority to housing needs of those social groups living in unfavourable conditions by giving them particular consideration.[120] This was further supported by the Special Rapporteur for Adequate Housing who has reiterated

term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources." [hereinafter CESCR General Comment No. 4, Housing].

117 *Ibid* General Comment No. 4, Housing, para 6: "The right to adequate housing applies to everyone. …individuals as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination."

118 Da Costa, Refugee Integration, *supra* note 79 at p 68.

119 Fredman, Human Rights Transformed, *supra* note 42 at 1953; *CESCR General Comment No. 4, Housing*, *supra note* 116 at paras 6-8.

120 CESCR General Comment No. 4, Housing, *supra note* 116 at para 11: "State parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others." Para 13: "Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations under article 11 (1) it must demonstrate , inter alia, that is has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C. 121991/1) emphasize the need to 'provide detailed information about those groups within…society that are vulnerable and disadvantaged with regard to housing'. They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in 'illegal' settlements, those subject to forced evictions and low income groups."

that the housing of vulnerable groups shall be accorded a measure of priority in laws and policies.[121] It is clear, however, that the right to housing as developed through international human rights law has focused more on the State ensuring access to adequate housing through its policy framework rather than an outright obligation for a state to provide housing.[122] This can be viewed as the limiting caveat that is stagnating progress, if not outright contributing to the right being undermined by states.

1.7.2.2 Right to Housing and Social Assitance in Refugee Law – Article 21 Right on Housing and Article 23 Public Relief (Social Benefits)

The 1951 Refugee Convention does not contribute significantly to protection of housing rights of refugees specifically. It does include a right to housing in Article 21 for lawfully staying refugees, but it only obliges Contracting States to accord these rights to refugees to be "as favourable as possible, and not less favourable than those accorded to aliens generally in the same circumstances."[123] The provision therefore shows the hesitation of governments to grant refugees the same housing rights as they do to their own citizens. Article 21, therefore, is intended to regulate housing policies, which may include rent control, landlord-tenant laws, or schemes to assist construction.[124] In situations of limited social housing options or other patterns that lead to homelessness among refugees, governments often assert that the problem applies to their own nationals and hence refugees cannot be given preferential treatment. In such a case, it is beneficial

[121] UN Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, Raquel Rolnik,* 4 February 2009, A/HRC/10/7.
[122] Saul et al, *supra* note 95 at p 931.
[123] Refugee Convention, Article 21.
[124] Hathaway, Rights of Refugees, *supra* note 32 at p 824.

for both asylum seekers and recognized refugees to rely on the right to housing under human rights law as more effective in enforcing a right to housing and preventing homelessness.

A related provision in the 1951 Refugee Convention is on public relief in Article 23 which calls for states to ensure that refugees staying lawfully in their territory shall receive the same treatment with respect to public relief and assistance as the state's nationals. According to the Statement of the French delegate of the Ad Hoc Committee, "it was desirable and even necessary that refugees should be placed on the same footing as nationals in the matter of public relief" and that it "would be inhuman to deny that assistance to refugees."[125] In this regard, Hathaway refers to Article 23 as "a provision without parallel in general international human rights law."[126]

The higher threshold for the right to housing in Article 21 than public relief in Article 23 is related to the general hesitation of states to provide housing directly. In this case, the treatment required under Article 23 right to public relief is potentially far greater than that required under Article 21 right to housing. However, while Article 23 does provide stronger protection than Article 21, it does rely on the state actually having an effective public welfare system in the first place, and in any case, placing refugees on the same level as nationals does not take into account their particular circumstances, nor does this allowance include asylum seekers. Refugees do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts and may require more assistance than the ordinary public or a tailored assistance through direct provisions until they achieve conditions in which they are at par with nationals. This is made more so complicated by the non-applicability of these provisions to asylum seekers.

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[125] Statement of Rain (France), Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.15 (1950) [in:] Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford (2011) at p 1048.
[126] *Ibid* at p 806.

1.8 Overview of Related European Law

European laws will be explored in subsequent chapters, but here is an introduction to some of the key provisions available, as they relate to inclusion/ exclusion and the social and economic rights already outlined. Significantly, there is a complex interplay that has and will continue to emerge between the different sets of laws produced and upheld by the Council of Europe and the European Union.

1.8.1 The ECHR, ESC and the Charter of Fundamental Rights of the European Union

The development of the European Convention on Human Rights (ECHR) with reference to non-Europeans will be discussed in Chapters 4 and 6, its shortfalls as well as how ECHR rights have been applied to socio-economic deprivation concerning asylum seekers.[127] For now suffice to say that the ECHR does not have provisions specific to asylum, but Article 1 of the ECHR does require that states "secure" the rights within the Convention to "everyone within their jurisdiction" and socio-economic rights have been linked to the civil and political rights enshrined in the convention. The other Council of Europe instruments, the European Social Charter (1961) and the Revised European Social Charter (1996) also extend to nationals of state parties and those who are lawfully present.[128] This means that states may restrict rights contained within the charters when it comes to nationality or legal status. However, as will be discussed in Chapter 6 concerning the

[127] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[128] Council of Europe, European Social Charter (ESC), 18 October 1963, *E.T.S* 35; Council of Europe, European Social Charter (Revised), 03 May 1996, *E.T.S* 163.

decisions of the European Committee of Social Rights, the concept of human dignity has in some cases overridden this status-based denial of social and economic rights in certain cases.

As already noted, since 2000 the "right to asylum" is included in the Charter of Fundamental Rights of the EU in its Article 18[129]. The provision is based on Article 78 TFEU which states that the EU's common policy on asylum has to be in compliance with the 1951 Refugee Convention and the 1967 Protocol.[130] This reference is also included Article 18.[131] The following provision, Article 19, is essentially a non-refoulement clause as it protects against removal, expulsion or extradition of persons to a place where there could be a serious risk of the them being subject to the death penalty, torture or other inhuman or degrading treatment or punishment. Much of the Charter is based on the ECHR, the European Social Charter and jurisprudence of the Court of Justice of the European Union (CJEU). The scope of the Charter is defined in Article 51(1) – it applies to the EU institutions and bodies and to Member States when they are implementing EU law. Most of asylum law is under EU competence, hence the Charter applies.

As of 1999, the EU has been adopting the legislative acts that form the Common European Asylum System (CEAS) with the aim of harmonizing common standards among Member States.

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[129] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 Dec. 2009, as the Treaty confers on the Charter the same legal value as the Treaties.

[130] Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences Official Journal C 326 , 26/10/2012 P 0001 – 0390; Article 78 1. "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

[131] More on the right to asylum explanations of the charter on the site of the EU Fundamental Rights Agency (FRA) online at <https://fra.europa.eu/en/charterpedia/article/18-right-asylum>.

Amongst these, the Qualifications Directive (as of 2004) and the Receptions Conditions Directive (as of 2003), herein introduced, featured prominently with respect to inclusion and exclusion and provisions concerning social and economic rights. It should be noted that not all EU Member States are abound by all legislations within the asylum *acquis*. Specifically, with respect to the Qualifications Directive and the Reception Conditions Directive that will be discussed forthwith, the UK, Ireland, and Denmark have opted out.[132]

1.8.2 The EU Qualification Directive

The Qualification Directive (QD) will be considered in Chapter 5 in terms of the legal status categories, and the differentiations of rights. The QD is a key feature of the CEAS and its quest for a "common policy on asylum" in its "objective of progressively establishing an area of freedom, security and justice" that is made available to those that "*legitimately* seek protection in the Union."[133] The QD, in its inception in 2004[134] as part of the first phase of the CEAS (2000-2005) following the Tampere Conclusions in 1999, had expanded and made more precise the refugee definition as initially set out in the Article 1A of 1951 Refugee Convention, while still maintaining omissions and derogations that gave room to Member States for different recognition

[132] Both the Qualifications Directive, Recital 50 and the Reception Conditions Directive, Recital 33 state: "In accordance with Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application." Both the Qualifications Directive, Recital 51, and the Reception Conditions Directive, Recital 34 state: "In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application."

[133] Recital (2) emphasis added.

[134] Council Directive 2004/83/EC of 29 April 2004 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.

of status of beneficiaries of international protection across the EU.[135] It had allowed for certain ‘‘optional mechanisms and exclusive procedures’’[136] that deviated from standards set out by international human rights and refugee law, and resulted in rebuke by various bodies, including the ECJ, the ECtHR, UNHCR, and ECRE.[137] In response, a proposal was made by the European Commission to recast the QD in order to respond to the inconsistencies and seek better harmonization in line with the rulings.[138] This led to the adoption of the Recast Directive in 2011 which, significantly, was the “the first major piece of legislation to have been adopted under the co-decision procedure” in the field of asylum following negotiations between the European Parliament and the Council.[139] This meant a shift in decision-making power from the Member States’ governments to the EU supranational institutions, a move for “a common approach less sensitive to national interests.”[140] The 2011 version of the QD is again being reviewed, and in July 2016 a draft proposal for a new Qualification *Regulation*[141] as opposed to a Directive has been

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135 Samantha Velluti, *Reforming the Common European Asylum System — Legislative developments and judicial activism of the European Courts* (Berlin, Heidelberg: Springer Berlin Heidelberg: Imprint: Springer, 2014) at p 4. [hereinafer Velluti].

136 Jens Vedsted-Hansen, “Common EU Standards on Asylum – Optional Harmonization and Exclusive Procedures? [in:] Elspeth Guild and Paul Minderhoud (eds) *The First Decade of EU Migration and Asylum Law* (Leiden: Martinus Nijhoff Publishers, 2011) at pp 255–271, 225.

137A number of cases came from the ECJ and the EctHR concerning the QD provisions overall. Referring to non-discrimination between the categories reference was made in ECtHR, *Niedzwiecki v. Germany*, Application No. 58453/00 and ECtHR, *Okpisz v. Germany* Application No. 59140/00, 25 October 2005; UNHCR, *Asylum in the European Union: The Study of the Implementation of the Qualification Directive*, Nvember 2007; ELENA, *The Impact of the EU Qualification Directive on International Protection*, October 2008, ELENA is the European Legal Network on Asylum coordinate by the European Council on Refugees and Exiles (ECRE); Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted’ (recast), 2011/C 18/14, point 4.7. ; Antonio Di Marco. “The Subsidiary Protection: The Discriminatory and Limited Protection of the “New Refugees” (2015) 20 *Mediterranean Journal of Human Rights* at p 201.

138 European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final/2, 23.10.2009 (“Recast Proposal).

139 Velluti, *supra* note 135 at p 52.

140 European Council on Refugees and Exiles, *Comments from the European Council on Refugees and Exiles on the Commission Proposal to Recast the Qualification Directive*, 12 March 2010 at p 4.

141 European Commission Brussels, 13.7.2016 COM(2016) 466 final 2016/0223 (COD) Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless

borne, an effort that again aims to strengthen and harmonize the rules in the EU, as well as respond to the latest case law of the CJEU and other bodies. Of course, a regulation as opposed to a directive, having direct applicability and legal force rather than requiring transposition into national laws, would be even more of an incursion into the sovereign decision making of the Member States, and give more significance to the EU.

The current QD proclaims to build on the Tampere meeting, the 1951 Refugee Convention, the Hague Programme (2005-2010) adopted in 2004, the European Pact on Immigration and Asylum of 2008, and the Stockholm Programme (2010-2014).[142] The Preamble of the QD states that the Charter of Fundamental Rights of the EU is to be respected with its principles recognized and that Member States are bound by their obligations under international treaties (Recital 17). It takes into account the Charter's references to respect for human dignity (Article 1) and the right to asylum (Article 14).[143]

1.8.2.1 Inclusion and Exclusion

The QD provides the standards for Third Country Nationals (TCNs) or stateless persons to qualify for international protection as well as to have a uniform status and content for refugees and subsidiary protection (Article 1). International protection under EU law includes two statuses in Article 2: refugee and subsidiary protection which makes such a person a "beneficiary of international protection", the latter two terms being particular to Europe. A refugee in the QD has a standard definition that is in all refugee law, which is a person outside the country of origin that

persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[142] Recital 3-9.

[143] Recital 16.

has a well-founded fear of persecution based on the five grounds, with the exception being that the applicant in Europe has to be in another category of stateless or a third-country national, that is, not a European citizen. The QD elaborates in Article 9 on the 1951 Refugee Convention in adding that an act of persecution must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, and extends this to a number of acts of violence (physical, mental, sexual) and discriminatory practices (ie. disproportionate prosecution, denial of judicial redress, as well as acts that are "gender-specific or child-specific nature"). The grounds for persecution are elaborated in the QD (Article 10) to specify what is meant by race, religion, nationality, and membership in a particular group. Exclusion in Article 12 echoes the terms of the Refugee Convention. An applicants is excluded from international protection when he or she has committed a crime against peace, a war crime, a crime against humanity, has committed a serious non-political crime outside the country of refuge, or has been guilty of acts contrary to the purposes and principles of the UN.

These are standard definitions but the category of a person that qualifies for subsidiary protection is unique in European law in that such a person, or third-country national, that is eligible for this status is someone that:

> 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 real risk of suffering serious harm as defined in Article 15… (Art 2 (f))

The QD sets out that the "serious harm" may consists of "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or armed conflict (Article 15 (c)). It then stipulates that qualification for subsidiary protection

requires recognition of serious harm that consists of the death penalty or execution, torture or inhuman/ degrading treatment or punishment, and "serious and individual threat to civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict" (Article 15).

1.8.2.2 Social and Economic Rights

The Qualification Directive also has provisions on economic and social rights in Articles 26 to 30 that include access to employment, related educational opportunities and vocational training, access to education, access to procedures of recognition of qualifications, social welfare and healthcare. This series of articles is said to mirror the Charter's articles on education and vocational training (Article 14), right to work (Article 15) and social security and assistance, including housing (Article 34) in line with non-discrimination provision (Article 21) and the right to asylum (Article 18).[144] According to the QD, same conditions are to be provided to beneficiaries of international protection as for nationals, with the exceptions in the provision on adult education that provides for the same conditions as TCNs, then social assistance that can be limited to core benefits for subsidiary protection holders, and accommodation in which the equivalent conditions are to be ensure as they are to legally resident TCNs.

Concerning access to employment, beneficiaries of international protection are able to work or engage in self-employment activities only once protection has been granted (Article 26). This means that there is no right to work for asylum seekers. Once protection is granted, the provision obliges Member States to ensure that education activities related to employment (ie.

[144] Emanuela Pistoia, "Social Integration of Refugees and Asylum-Seekers Through the Exercise of Socio-Economic Rights in European Law" (2018) 3(2) *European Papers* 781-807 at p 787.

vocational training) are available to beneficiaries of international protection "under equivalent conditions as nationals." Access to education for all minors is also to be granted "under the same conditions as nationals" (Article 27), and for adults entering the education system the conditions for training are the same "as third-country nationals legally resident." Recognition of qualifications in Article 28 states that beneficiaries of international protection are to be given equal treatment as national for recognition of diplomas, certificates, etc.

Social assistance is to be provided to beneficiaries of international protection as it is to nationals of the Member State (Article 29), but the option of limiting social assistance to core benefits specifically for beneficiaries of subsidiary protection is available. If the assistance is limited to core benefits, beneficiaries are to be provided this "at the same level and under the same eligibility conditions as nationals." Policies concerning access to accommodation should aim to prevent discrimination, and aim to ensure equal opportunities for beneficiaries of international protection, according to the QD. Access to healthcare, which includes mental health, in the following Article 30, also involves the same eligibility conditions as nationals.

As mentioned, access to accommodation, in terms of conditions is to be equivalent to that provided to other TCNs that are resident in the Member State (Article 32) with a language that is weaker and more ambiguous than other provisions in that "national practice of dispersal" is allowed and Member States "shall endeavour" for policies to be implemented in a way that prevents discrimination and ensures equal opportunities.[145] Only after beneficiaries obtain a long-term staying residence do their rights align with that of nationals.[146] The QD also provides in Article 34 access to integration facilities for beneficiaries of international protection, this

[145] *Ibid.*
[146] *Ibid* at p 785.

integration is to be facilitated by Member States by ensuring access to integration programs which Member States consider appropriate in responding to the specific needs of the beneficiaries. This access, however, can have "pre-conditions" to benefit from the integration programs.

1.8.3 The EU Reception Conditions Directive

Within the Common European Asylum System, the Reception Conditions Directive (RCD) is concerned with the standard of living and assistance that include housing, food, clothing, healthcare and education, provided to asylum seekers waiting for the decision concerning their application. The current RCD was adopted in 2013[147] to replace its predecessor from ten years prior[148] and a proposal as of July 2016 for another recast has been put forward by the European Commission.[149] The RCD as part of the CEAS aims for harmonized standards in the EU. Like its counterparts in the CEAS, the RCD is to be in compliance with the principles of the Charter of Fundamental Rights of the EU (in particular provisions on dignity), the ECHR, and other international instruments.[150] The discrepancies concerning the harmonization and the case law regarding to specific provisions will be discussed in Chapters 5 and 6.

The right to employment is outlined in Article 15 in which Member States are obliged to ensure that asylum seeking applicants can effectively access the labour market within nine months

147 European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU. This Directive was jointly adopted by the European Parliament and the European Council. It entered into force 20 July 2013, applied as of 21 July 2015.
148 European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC.
149 European Commission, *Proposal for a Directive of the European Parliament and of the laying down standards for the reception of applicants for international protection (recast)* Brussels, 13.7.2016 COM(2016) 465 final 2016/0222 (COD) [hereinafter European Commission Proposal for RCD recast, 2016].
150 As stated in Recitals 9 and 10 of the RCD.

of lodging a first instance application. Access to the labour market may be denied if the application is rejected within this period, even if an appeal is lodged. Moreover, conditions for granting access can be applied, such as a work permit for example, and priority may be given to EU citizens, nationals and to legally resident TCNs as it concerns labour market policies (Article 15 (2)). Regardless of access to the labour market, applicants should be allowed access to vocational training (Article 16). States are to take account of the specific needs of "vulnerable persons" – minors, persons with disabilities or mental disorders, elderly persons, pregnant women, single parents, victims of trafficking, seriously ill persons, survivors of torture, sexual violence or other forms of physical and psychological harm (Article 21).

Material reception conditions must ensure adequate standard of living guaranteeing subsistence and the protection of physical and mental health of the applicant (Article 17 (2)). If this is provided in the form of financial allowances or vouchers, *less* favourable treatment may be granted to applicants than to nationals (Article 17 (5)). At the same time, Member States are given leeway to provide *more* favourable provisions for applicants and their relatives accompanying them (Article 4). A lengthy Article 20 of the RCD is dedicated to reduction or withdrawal of material reception conditions if a number of criteria are not met: abandonment of place of residence without information, request or permission from the authorities; non-compliance with reporting duties; and lodging a subsequent application; not lodging an application in a timely manner upon arrival; the concealment of financial resources; and any breaches of rules in accommodation centres or serious violent behavior.

The way that these rights are framed in the European context is significant. In fact, Liam Thorton has taken issue with the term "reception conditions" altogether and instead proposes the

framing focus should be on social and economic rights of asylum seekers, relying on the placement of "dignity of the human person as the ultimate purpose of law."[151] He commented:

> Principles of equality and non-discrimination have been described as the linchpin of the international human rights regime wherein all persons are equal before the law, entitled to equal protection of the law and are entitled to benefit from the law without distinctions of any kind. The recognition of the "inherent dignity and of the equal and inalienable rights of all members of the human family" suggests that demarcations of international human rights norms between citizens and non-citizens does not bode well with an inclusive cosmopolitan system of international human rights law.[152]

Thorton also noted that the progression of the proposals within the EU institutions concerning reception standards show a concern about abuse of the asylum system that led to a downgrading within the RCD of socio-economic rights protection, in accordance with a more punitive approach for reception support argued by the European Parliament and the Council of the European Union.[153] In her thorough assessment of the negotiations of the RCD between the 2003 and the 2013 versions, Lieneke Slingenberg likewise concludes that EU Member States have increasingly used reception policies as a means of migration control to deter asylum applications, prevent integration, exert control over asylum and facilitate expulsion.[154] The proposal for the next recast round aims for further harmonization of the legislative acts, a reduction of "incentives for secondary movement" and importantly, a shift in a positive direction – an increase in the self-

[151] Liam Thorton, "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe" (draft paper for forthcoming book: The Socio-Economic Rights of Asylum Seekers in Economic Rights of Asylum Seekers in International and European Law), a version presented at The European Database of Asylum Law Conference (EDAL) January 2014 at p 8.

[152] *Ibid.*

[153] *Ibid* at pp 21-22; European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] *O.J*. C-212E/348 (05 August 2010); European Economic and Social Council, *Opinion of the European Economic and Social Committee on the RRCD*, SOC/332 (16 July 2009) and Committee of the Regions, *Opinion of the Committee of the Regions on the RRCD*, CONST-IV-021 (5-7 October 2009).

[154] Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Studies in International Law Book 51) 1st edition, Kindle edition (Hart Publishing, 2014).

reliance and integration of applicants through a reduction of the time before access to the labour market is granted.[155]

1.9 Conclusion – Setting the Stage

The goal of this chapter was to give an overview of some of the international and European laws of inclusion/exclusion rights concerning asylum, as well as some introductory background. From the laws themselves, we can see a "gradation of treatment" both in terms of status recognition and the social and economic rights that are attached. There is also a dissonance in the laws that, on the one hand, encompass rights for everyone based on non-discrimination and equality, but on the other, permits nationality-based limitations or alternatively, provides for formal equality that may ultimately not take the specific needs of refugees and asylum seekers into consideration. In the European context, distinctions are made between categories of persons seeking asylum, as well as their entitlements as to socio-economic inclusion and exclusion within the specified category – whether this set of rights is referred to as reception, integration, or social and economic rights. The person in an asylum situation is always compared to another status category in terms of their rights. The overall combination of these laws show the fine grained distinctions that are permitted concerning non-nationals seeking asylum and this sets the stage for the following discussion that the rights have a psychological source and impact.

[155] European Commission Proposal for RCD recast, 2016, *supra* note 149.

Chapter 2 – Methodology and Conceptual Framework

> To a certain extent, the critic must be a foreigner (to his own tradition),
> a degree of incomprehension must enter and colour her most accurate description
> and intimate evaluation.[1]
>
> – Costas Douzinas

2.1 Introduction: Framing the Critique

The principal inquiry of the dissertation explores how the psychology of inclusion and exclusion is reflected in human rights and asylum laws in Europe in order to analyze, compare, and critique the evolution of the European laws and legal dissonance concerning reception, integration, and rights of asylum seekers and refugees. Informed by the analysis, the subsidiary inquiry considers the role of law in moving beyond these dissonances. This is done by applying an interdisciplinary methodology to an analysis of the evolution of asylum and human rights frameworks at the international and pan-European levels, an approach that will be introduced in this chapter. The discussion will go on to describe the conceptual framework based on the social psychology of inclusion and exclusion that will be applied to the analysis. The chapter will outline relevant social psychological theories, terminology, and scholarship that will serve to underpin the content of a conceptual framework for discussing the "psychology" of the international and European human rights law concerning asylum. The approach relies on a "frame analysis" using three frames that are based on theories from social psychology that will be used to understand, explain, and critique the law. The frames are similar to themes used in other disciplines that were not explicitly connecting social psychology with legal developments.

[1] Costas Douzinas, "Oubliez Critique" (2005) 16 *Law and Critique* 47-69 at 58.

In order to be clear about the psychological aspects within law that will be referenced in subsequent chapters, the focus herein will lean more on input from fields of psychology. An emphasis on social psychology and other disciplines as a starting point could make the legal points imprecise at the beginning. However, the discussion of the laws in the subsequent chapters will be more intelligible from the psychological points of view once the methodology, conceptual framework, and psychological backing have been adequately explained. That said, the descriptions of social psychology and complementary disciplines are at times constrained, as there are limits of what can be encompassed within one chapter or even one dissertation that takes an interdisciplinary approach.

2.2 Methodology

Scholars have remarked on a methodology deficit in legal research.[2] Some assert that in "traditional legal research, academic lawyers usually do not refer to any methodology at all" and that "validity issues are ignored altogether."[3] The need for methodologies is evident when interdisciplinary knowledge comes into play, as non-legal disciplines have well defined methodological approaches. Hence what is proposed forthwith is a composite approach inspired by new movements within legal research, ones that combine different fields of study. The approach here falls within the field of "law and emotion" that was borne from "critical legal studies"[4] as

[2] Rob van Gestel and Hans-Wolfgang Micklitz, "Why Methods Matter in European Legal Scholarship" (2014) 20 (3) *European Law Journal* 292-316.

[3] Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, and Wibo van Rossum, "Methodology of Legal Research: Challenges and Opportunities" (2017) 13(3) *Utrecht Law Review* 1–8 at p 2.

[4] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at the Century's End* (NYU Press 1995). Although law and emotion scholarship only emerged in recent decades, it had its origins in a more modern subset of legal realism – critical legal studies (CLS). Drawing on postmodernism, these legal movements challenged the perception of law as logical, ordered, objective and coherent in order to deconstruct the concepts, theories and language of law and reveal the disorder and diversity that lies underneath.

well as "socio-legal"[5] and comparative methods. The discussion expands on law and emotion by making it broader – from a wider psychological perspective. Moreover, as already noted, the methodology applied in the dissertation consists of frame analysis, a cousin of discourse analysis, both of which will be discussed.

2.2.1 Interdisciplinary Approaches: Law, Emotion, and Psychology

The approach here is interdisciplinary in that it synthesizes knowledge and methods from distinct disciplines: the integrated approach weaves language from social psychology into a discussion of laws and policies while extracting psychological expressions in the laws and policies themselves. Interdisciplinary socio-legal research is not an exact science, rather a progression of interlinking knowledge for a more nuanced articulation and critique of past and present-day policies. This intermixing – using theories and concepts from social psychology and other disciplines to explain and analyze key aspects in the evolution of human rights of asylum seekers/ beneficiaries of international protection in Europe – is inspired by the overall field of "law and emotion" and an elaborated version of the sub-field of "law and psychology".

Law and psychology is one of the new movements within legal research that forms part of law and emotions scholarship, which also includes "behavioural law and economics" and "law and neuroscience." The first – behavioural law and economics – uses the tools of economic analysis, to consider how humans have "bounds" concerning "utility maximization, stable preferences,

[5] Caroline Morris and Cian Murphy, "Legal methodologies" [in:] *Getting PhD in Law* (Hart Publishing 2011) at p 35: "By its nature, socio-legal research is inter-disciplinary, drawing on tools and insights of disciplines such as sociology, social policy, anthropology, criminology, gender studies, ethics, economics and politics to explain and critique law and legal practices. Socio-legal research may also be theoretical, attempting to provide a social theory of law, asking what role does law play in society, or examining law as a form of power or a social system or a cultural practice."

rational expectations, and optimal processing of information."[6] The method has been employed to explain the behaviour of actors in the legal system, showing how law can affect human behaviour.[7] Likewise, law and neuroscience "explores the non-rational (as well as the rational) dimensions of cognition" and this "neuro-law" research has garnered attention within academia as well as from the courts.[8] Research that informs law and psychology "examines emotion in legal judgment and decision making, whether judges, juries, bureaucrats, legislators, or citizens."[9] These approaches are appealing because they use scientific models that claim impartiality by examining the brain, and they use measurable statistical indices and empirical studies that give credence to results of scientific approaches.

There is also a long-standing relationship between law, emotion, and literature, with emotions expressed in literature seen as affecting the outcome of the law.[10] "Law and literature" is a sibling of "law and emotion" and in line with this, law is also considered in the dissertation as a narrative that both informs and is informed by social psychological processes. Law is viewed *as* literature in the sense that the European laws are a reflection of psychological, cultural, and political attitudes pervading in what's defined as "Europe" and "European" and these laws in turn

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6 Christine Jolls, Cass R. Sunstein and Richard H. Thaler "A Behavioral Approach to Law and Economics" (1998) 50 *Stanford Law Review* 1571-1606 at p 1476. [hereinafter Jolls *et al*]; Daniel Kahneman, "Maps of Bounded Rationality: Psychology for Behavioral Economics" (2003) 93 *American Economic Review* 1449 at p 1457.

7 *Ibid* Jolls *et al* at p 1476.

8 Kathryn Abrams and Hila Karen "Who's Afraid of Law and Emotions?" (2010) 94 *Minnesota Law Review,* 1997-2074 at p 2021 [hereinafter Abrams and Karen (2010)]. At p 2022: "Like behavioral law and economics (and unlike law and emotions), law and neuroscience work is not exclusively or even primarily focused on emotions." At p 2023: "The normative dimension of law and neuroscience scholarship is still largely unformulated."

9 Amy Voss, "Emotion and the Law: A Framework for Inquiry" (2006) *Faculty Publications, Department of Psychology*. Paper 181; Finkel Moghaddam, *The Psychology of Rights and Duties: Empirical Contributions and Normative Commentaries* (American Psychological Association 2005); James R. P. Ogloff, "Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) of the 20th Century" (2000) 24(4) Law and Human Behaviour 457.

10 Nancy E. Johnson, "Introduction" [in:] Nancy E.Johnson (ed), *Impassioned Jurisprudence: Law, Literature, and Emotion, 1760–1848* (Bucknell University Press, 2015).

contribute to that evolving self-definition.[11] The approach more broadly concerns legal interpretation, and the desire of theorists "to distill clear meaning from legal texts" and a bigger desire for validity, correctness, truth, and objectivity within the meaning of legal texts.[12] Robert Cover wrote that:

> We inhabit a *nomos* – a normative universe…The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning... In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse…[13]

Abrams and Karen describe law and emotions research as constituting and having further potential for "...a triumphal narrative of scholarly innovation and integration: a body of work that combines doctrinal critique, interdisciplinary inquiry, and normative contribution."[14] Noting the "interdisciplinary complexity of law and emotions studies" in his book *Constitutional Sentiments*, András Sajó outlines the specifics of his methodology as to "what is what and why" by being mindful of "methodological promiscuity."[15] He suggests that even "in the shadow of methodological promiscuity, it is imperative, even more than in non-interdisciplinary studies, to outline the applicable theoretical framework. However, the level of the analysis shifts, and very

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11 Mark Kingwell, *"*Let's Ask Again: Is Law Like Literature?*"* (1994) 6 *Yale Journal of Law & the Humanities* at 318 <https://digitalcommons.law.yale.edu/yjlh/vol6/iss2/8>. The view of law as literature is supported by Ronald Dworkin, and challenged by Richard Posner.

12 *Ibid* at 318.

13 Robert M. Cover, Foreward: Nomos and Narrative, (1983) 97 *Harvard Law Reviw* 4 at pp 4-5.

14 Abrams and Karen (2010), *supra* note 8 at p 2013.

15 András Sajó, *Constitutional Sentiments* (New Haven, Conn: Yale University Pres, c2011) at pp 6-7. Remainder of quote: "However, the level of the analysis shifts, and very different theoretical frameworks will therefore be applicable. I start by describing phenomena at the brain level, moving to social interactions shaping constitutions and constitutional institutions at the macro-social level in different and formative historical contexts. Finally, I look into the interaction of specific constitutional law arrangements with social emotion regulation, which is partly legal theory (how emotions are handled) and partly social theory about the regulation of emotions in law. While I examine the specific emotions behind specific constitutional solutions, I try to refrain from developing predictions and related explanatory theories to determine how specific emotions generate or contribute to specific legal problem-solving".

different theoretical frameworks will therefore be applicable."[16] Similarly, in the research and analytical approach of the present dissertation, the theories and frameworks will be outlined but there will also be shifting between theories, frameworks and levels of analysis, all while taking great lengths to ensure that specifics are as clear as possible in an otherwise complex field of study.

Having done an extensive review of law and emotion scholarship, Terry Maroney suggests that this methodological promiscuity is frequently applied by scholars, this being acceptable as long as the approach is "deliberate and thoughtful."[17] Maroney notes that there are few "pure" methodologies, and most of the law and emotions scholarship she studied did in fact cross boundaries and combine methodologies.[18] With a thorough review of the emergent law and emotions scholarship, Maroney took on the arduous task of grouping six most common methodological approaches, what she sees as "interrelated, but theoretically distinct, foci."[19] Of the six approaches, two describe well the approach within the present dissertation: the *emotion-theory* approach that considers "how accepting that particular theory"' relates to the laws considered.[20] Likewise, *theory-of-law* is complementary as it takes theories of emotion and considers how it is embedded in the theoretical view of law.[21]

An integrated and interdisciplinary methodology will have to implement purposeful omissions of certain theories or research while placing a greater emphasis on others.[22] Law and emotions scholars have noted that "the challenge is to avoid oversimplification" while aiming for

16 *Ibid*.
17 William Ian Miller *The Anatomy of Disgust* (Cambridge: Harvard University Press, 1997).
18 Terry A. Maroney, "Law and Human Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30 *Law and Human Behaviour* 125-133 at p 133 [hereinafter Maroney]. Quote: "the law and emotion literature contains few examples of "pure" applications of the six approaches delineated in the taxonomy. Rather, they are commonly combined."
19 *Ibid* at p 120.
20 *Ibid* at pp 126, 128.
21 *Ibid* at pp 126, 131.
22 Abrams and Karen (2010), *supra* note 8 at p 2048.

a "useful synthesis that will sort and arrange the non-legal knowledge in a manner which responds to the context and legal questions at hand."[23] The emergence of these scholarly endeavors shows the benefits of crossing disciplines to form a new "common language" that makes the results of interdisciplinary collaboration more complex but also more accessible.[24]

To this end, socio-legal research is employed to examine and inform the social context of law. This approach sees law as a social phenomenon with the goal of uncovering the previously unquestioned nature of law.[25] The interdisciplinary nature of socio-legal research can draw on tools and insights of disciplines such as the sociology of emotions, social psychology, social policy, anthropology, and politics to explain and critique law and legal practices.[26] The insights that will be applied will be primarily drawn from social psychology (and its related schools of thought) on the process of motivations and effects of social inclusion and exclusion, social categorization among its main features. The scientific goal of social psychology is to study how "thoughts, feelings and behaviours are influenced by the actual, imagined or implied presence of others."[27] The methods of social psychology contribute to explanations underlying human emotion, motivation, thought and behaviour.[28] Likewise, the sociology of emotions, examines how emotions create and are part of social structures, roles, norms, and institutions. A growing literature on the sociology of emotions takes the view that "emotion is not simply an inward, bodily affair, but is inevitably conditioned and directed by a rich array of norms, practices, and structures."[29]

[23] Abrams and Karen (2010), *supra* note 8 at p 2048.
[24] Maroney, *supra* note 18 at p 136.
[25] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford and Portland Oregon, 2005).
[26] *Ibid*.
[27] Gordon Allport, *The Nature of Prejudice* (1954) at p 5 [in:] Kopano Ratele and Norman Duncan, *Social Psychology: Identities and Relationships* (UCT Press, 2007) [hereinafter Allport 1954].
[28] Are W. Kruglanski and Edward Tory Higgins (eds.), *Social Psychology: Handbook of Basic Principles* (The Guilford Press; 2nd edition, 2007) at p 759.
[29] Abrams and Karen (2010), *supra* note 8 at p 2028.

These disciplines observe how and why people interact and organize in the way that they do, whether it is in relation to status and power,[30] or in response to "ideological and cultural standards."[31]

2.2.2 Frame Analysis of Legal Discourse

A key method applied in the dissertation is frame analysis. Frame analysis is understood as a form of discourse analysis that is, in turn, an umbrella term for a broad range of approaches, a methodological framework with many ways of doing research. Discourse analysis, an approach to interdisciplinary research with its origins in sociology, social psychology, anthropology, linguistics, philosophy, communications studies, and literature, is a method of analyzing texts looking at both the linguistic content and the social context.[32] In discourse analysis, the task is to identify context taking into account that language does not have fixed objective meanings but is shaped by social context.[33] Norman Faircloughm, the founder of critical discourse analysis, views discourse as a social practice, a meaning structure which signifies and constructs social identities, relations and the knowledge and meaning systems of the social world, one that both reflects and produces the ideas and assumptions relating to the ways these identities, relations, and systems are constituted.[34]

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30 Theodore D Kemper, *A Social Interactional Theory of Emotion* (New York: Wiley, 1978).
31 A.R. Hochschild, *The Managed Heart: The Commercialization of Human Feeling* (Berkeley: University of California Press, 1983).
32 David Grant, Grant Michelson, Cliff Oswick, and Nick Wailes, "Guest editorial: Discourse and Organizational Change" (2005) 18(1) *Journal of Organizational Change Management* pp. 6-15.
33 Dawn Snape and Liz Spencer, "The Foundations of Qualitative Research" [in:] Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (London: Sage Publications, 2003).
34 Norman Fairclough, *Analyzing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003); Norman Fairclough, "*Critical Discourse Analysis, Organizational Discourse, and Organizational Change*" (2005) 26 *Organization Studies* 915-39; Norman Fairclough, *Discourse and Social Change* (Cambridge: Polity Press, 1996) at pp 64-66.

Researchers have also proposed a "discourse analytic reading of legal texts."[35] As Niemi-Kiesiläinen *et al* have commented:

> Legal scholarship and discourse analysis have much in common. They both concern reading and interpreting texts, both are preoccupied with the meaning of texts, and both seem to assume that texts have a life of their own that is independent of their authors. Law is after all, an inherently societal discourse, albeit quite a specific one.[36]

Reality and language are deeply intertwined, and languages describe reality in the search for truth.[37] In discourse analysis, which is based on a social constructionist theory, concepts do not exist independently of law but are constructed socially in the legal discourse.[38] Moreover, as legal scholar Susan Bandes has observed, laws "may function as one of the social and institutional influences that directs, structures, and gives meaning to particular emotions" [39] and those emotions are intertwined with the discourse.

Frame analysis, as a subset of discourse analysis, has been described as "a theoretical, methodological, and critical tool for exploring processes of meaning making and influence among governmental and social elites, news media, and the public."[40] Frames permit us to dissect experience into easily manageable wholes. Several scholarly disciplines have employed frame analysis to group the many elements of migration into digestible pieces for further examination. While frame analysis is often associated with the assessment of communication that comes via

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[35] Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen, "Legal Texts as Discourses" [in:] Eva Maria Svensson, Åsa Gunnarsson and Margaret Davies M. (eds) *Exploiting the Limits of Law* (Ashgate 2007) pp 69- 88.
[36] *Ibid*.
[37] Vivien Burr, *An Introduction to Social Constructionism* (London & New York: Routledge, 1999) 9–14 at p 6.
[38] David Silverman, *Interpreting Qualitative Data. Methods for Analyzing Talk*, Text and Interaction (London: Sage Publications, 1993) at p 90.
[39] Susan A. Bandes, "Group Conflict Resolution: Sources of Resistance to Reconciliations: Victims, "Closure," and the Sociology of Emotion" (2009) 72 *Law and Contemp. Probs*. 1, 11-13.
[40] Mike Allen *The Sage Encyclopedia of Communication Research Methods* (Vols. 1-4) (Thousand Oaks, CA: SAGE Publications, 2017).

news outlets, it has been used more broadly as an interdisciplinary research method and a way of argumentation, or in the words of one author, "rhetorical perspectives."[41] Thus, frames are methods of interpretation that "define problems, diagnose causes, make moral judgment, and suggest remedies. Frames are often found within a narrative account of an issue or event and are generally the central organizing idea."[42]

The frames used in the dissertation are based on well-researched and supported theories. The intention of this approach in applying insights from social psychology to a discussion and analysis of legal frameworks and contexts is not to prove or disprove the theories or reasoning of either discipline. Rather, the objective is to use the insights from non-legal disciplines, primarily social psychology but also history, political theory and international relations, as they link to the subject matter, in order to provide framings that are not explicitly being recognized or utilized in the legal field but can be useful tools for closer scrutiny.

Finally, by emphasizing specific words used in relation to particular concepts, and this is done liberally and often through italics, the aim is to identify and point out the overlap in language between the disciplines to highlight their convergence. For example, within social psychology of inclusion and exclusion, *solidarity* is a key marker of social cohesiveness and shared values and has been studied in different contexts. International human rights law refers to solidarity when referring to international cooperation, the concept often used as a rhetorical tool in negotiating harmonized asylum laws currently within the European Union. This focus on solidarity concerning state cooperation regarding refugees goes as far back as the drafting of the 1951 Refugee Convention, and presumably further. Significantly, solidarity is also an overall category for social

41 Jim A. Kuypers, *Rhetorical Criticism: Perspectives in Action* (Lexington Press, 2009).
42 *Ibid*.

and economic rights as the case with one of the six basic principles under the Charter of Fundamental Rights of the European Union. Thus, solidarity refers to both concepts, within law and within psychology, simultaneously. Emphasizing the language used to refer to shared concepts of the disciplines will clarify the common language that can be used when making reference to a law that has a social psychological underpinning, or an aspect of social psychology that manifests itself in law. By identifying these commonalities in language, our cognitive categories will not only reflect on our default 'disciplined' understanding of the subject matter, such as the rights of asylum seekers from a legal perspective but will be able to connect this to sources from other disciplines within our expanded frame of reference.

2.2.3 The Comparative Dimensions: Temporal, Institutional, and Substantive

The objective in the research is also to reflect on the evolution of European legal frameworks concerning refugees and asylum seekers as a narrative seen through the conceptual lens of social psychology of inclusion/ exclusion. This includes a view on the progression of laws as well as progression of their institutional containers at the European and international levels. Accordingly, the comparative aspect of analysis is from three overlapping perspectives: firstly, from a *temporal* perspective, comparing the development of pan-European asylum laws and human rights laws concerning asylum after the Second World War with more recent and emerging ones. Secondly, an *institutional* comparison will be considered between the relevant bodies within the United Nations, the Council of Europe, and the European Union. The third line of comparative analysis will be on the *substantive content* between international laws and institutions and European ones – considering specific provisions and jurisprudence that show the overlap, divergence, conflicts and development of inclusion and exclusion within relevant treaties, as

drafted, interpreted and applied. That said, the three-fold comparative aspect is unassuming in this study, hence it is not applied rigorously but as one of several interlocking dimensions that serve the analysis.

From the side of the law, the primary sources that will be referenced include the international and European conventions, the drafting documents (*travaux préparatoires*) of relevant conventions (ie. Refugee Convention, European Convention on Human Rights), and case-law from the European courts. Scholarly interpretations as well as organization and policy reports will serve as secondary sources. From the side of social psychology and other disciplines, concepts are extracted directly from theories, and while overall there is more reliance on secondary sources, results of empirical research from these sources are also incorporated and referenced directly.

2.3 Overview of the Conceptual Framework

The conceptual framework consolidates a diverse array of motives relating to social exclusion and inclusion that have been proposed by social psychologists into three overarching and overlapping frames of *identity formation*, *cost-benefit calculation* and *threat-perception*. One additional cross-cutting concept that falls into all three of these themes and deserves its separate mention is the conceptual and psychological notion of *empathy*. The conceptual frames are drawn from well-established findings and the analysis of social psychologists, as a starting point from Abrams, Hogg and Marquez (hereinafter Abrams *et al*) who have proposed some "central conclusions and themes"[43] which have emerged from research, as well as their conceptual

[43] Dominic Abrams, Michael A. Hogg, Jose M. Marques, "A Social Psychological Framework for Understanding Social Inclusion and exclusion" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) [Kindle edition] at p 15 of 355. [hereinafter Abrams *et al*].

"framework for understanding the psychology of social inclusion and exclusion."[44] These themes and conclusions have been divided by the authors into *motives* and *effects* of exclusion/ inclusion, *reactions* to exclusion and *avenues for intervention*.[45] Although all these aspects will be referenced throughout to varied extents, the focus in the dissertation's conceptual framework is mainly on the motives behind inclusion and exclusion that can illuminate the outcomes that take the form of exclusionary or inclusionary law or policy. That is, extracts from the frameworks on inclusion and exclusion proposed by social psychologists are used to create a conceptual framework that can be applied to the analysis of the European human rights and asylum laws in order to consider the divergent directions the laws have taken and could alternately take.

The premise here is that what we know about the psychological motives for inclusion and exclusion will illuminate the laws and policies concerning asylum seekers and refugees in Europe as both inclusionary and exclusionary, and hence, in conflict. This refers to the "cognitive dissonance" that can be observed in European policies (and possibly all migration and asylum policies globally to varied degrees), that include cosmopolitan human rights laws on the one hand with compassionate social and economic rights attached, and more security and sovereignty-focused provisions on the other hand that are at worst inhumane. The psychology-based framing can ultimately serve to inform the effects, reactions and avenues for intervention when it comes to reconciling these conflicts within laws concerning the socio-economic rights of asylum seekers at the reception stage and refugees at the integration stage of the overall asylum to citizenship trajectory. For example, it is not an overreach to assert that the extent of empathy towards asylum seekers and refugees, whether within a society or institutionally entrenched, directly affects the

[44] *Ibid* at p 17.
[45] *Ibid* at p 15.

formulation of policies that provide for access to any set of rights. This can be an intuitive deduction, but also evident in the public, political and policy responses to tragic situations such as the surfacing of a Syrian child's dead body on the Mediterranean coast.[46] The more difficult question, however, concerns whether the empathic motive is gaugeable within the existing law itself, the positions of the lawmakers and the law implementers. The dissertation aims to answer this in the affirmative, and this becomes more tangible with the application of a psychology-based perspective to the analysis. Thus, the proposal herein is that an understanding of how psychological processes such as empathy work, and using this perspective as part of overarching theoretical frames of analysis, as well as mining the interdisciplinary intertwining of the language used (which proves to be much more alike than distinct), will shine a light on the texts that govern the rights of asylum seekers and refugees.

The chosen analytical frames are inspired and informed by the framework on the social psychology of inclusion and exclusion proposed by Abrams *et al* are as follows:

1. ***Identity Formation of Self and Other*** refers to theories concerning social identity, social categorization, and social comparison, as part of self-identity that is formed through belonging to one group or category in contrast to another. Amongst the key theories are the *Social Identity Theory*, the *Self-Categorization Theor*y and the *Common In-Group Identity Model* in social psychology. This frame considers legal categories of human vis-à-vis categories of social group membership, such as nationals vs. non-nationals. Conceptually,

[46] Jack Moore, "Images of Syrian Child Washed Up on Turkish Beach 'Wake-Up Call" for EU Leaders *Newsweek* (9/2/2015) <https://www.newsweek.com/syrian-child-turkey-beach-drowned-368045>
In this article, Peter Bouckaert, emergencies director for Human Rights Watch, is quoted saying: "There's an increasing divide between the European public, who are showing a lot of empathy towards the Syrian refugees and European policy makers who are unwilling to come face-to-face with the reality of this crisis and to take the steps necessary to resolve it".

this frame also refers to application of universalism and cosmopolitanism as opposed to sovereignty, citizenship and membership-based rights.

2. ***Cost-Benefit Calculation*** refers to self-interest of a state versus cooperation between states, as well as the calculations that states make in terms of gains and losses within social, economic and to a lesser extent cultural schemes when considering taking in or rejecting asylum seekers. This frame also refers to *altruism*, and its relation to *welfare* and *humanitarianism*, which will be discussed in its relation to the social contract, reciprocity, and finally, *empathy*.

3. ***Threat – Perception*** is interlinked with the above two frames and refers to perceived threats to identity, to certain social structures when calculating gains and losses, as well as to physical security, reflecting primarily on *inter-group threat theory*. Perception of threat, and generally a sense of uncertainty, can override more inclusive inclinations within the other two frames because it triggers the primal force of exclusion – fear.

The frames will overlap significantly and the analysis cannot suss out a specific law, policy or government action that can be explained by only one social psychological perspective. This is largely because psychological behaviours are part of complex integrated systems, meaning that causal factors are many. Rather, the frames are used as overarching themes, with several sub-themes, that can be distinguished when useful in discussing the social psychology of laws concerning the rights of asylum seekers and refugee integration as well as European frameworks more broadly. Moreover, the interaction between the frames will be discussed throughout.

2.4 Precedents of Frame Analysis Concerning Migration and Asylum

Other scholarly analyses that have used framing to dissect the complex web of migration research, noting the overlap in the frames coming from different disciplines. Firstly, in his analysis of asylum policies in Hungary within the EU system as a whole, Boldizsar Nagy uses theoretical frames to consider "extra-legal factors" in understanding how and why Hungarian laws came into conflict with European ones.[47] By analyzing asylum laws and policies in Hungary, he concludes that an overview of legal developments alone cannot show an inherent logic behind the otherwise "seemingly irrational and grossly harmful measures adopted by the Hungarian government regarding refugee law and its neighbouring branches of law in 2015-2016."[48] Nagy turns to non-legal frames, relying on them heavily, asserting that: "migration lawyers, including refugee lawyers, rarely bother with locating their research beyond a positivist-comparitivist jurisprudential space."[49] The analytical frames that Nagy considers include "securitization", a well-established frame within migration analysis, "majoritarian identitarian populism", a hybrid he proposes, and what he refers to as "crimmigration", a category Nagy attributes as being specific to Hungary, all of these frames largely drawing on sources from political science.[50]

Likewise, in *The Politics of Insecurity*, Jef Huysmans refers to the overall frame of "societal security" referring to developments within society, such as migration, being perceived as threatening the identity of a people[51], and under this, he discusses three related frames. He

[47] Boldizsar Nagy, "Hungarian Asylum Law and Policy in 2015-2-16: Securitization Instead of Loyal Cooperation" (2016) 17 (6) *German Law Journal* 1034.
[48] *Ibid* at 1034.
[49] *Ibid*. Nagy justifies this non-legal focus as follows: "the seemingly unsolicited actions of the Hungarian government in starting an anti-immigration campaign at a time when immigration was a total non-issue in Hungary, and later, the harsh treatment of the asylum seekers, combined with large scale violation of both domestic and European law, call for explanations that are not offered by classical international law or European law scholarship" at p 1040.
[50] *Ibid* at 1034.
[51] Jef Huysmans, *The Politics of Insecurity* (Routledge, 2006) at p 64 [hereinafter Huysmans]; Ole Wæver, Barry Buzan, M. Kelstrup and P. Lemaitre (eds) *Identity, Migration and the New Security Agenda in Europe* (London: Pinter, 1993)

describes the fear-focused political debate in Europe as "a multidimensional process in which immigration and asylum are connected to and float through a variety of important political debates covering at least three themes: internal security, cultural identity and welfare."[52] He refers to the interconnection between these themes, stating that the "construction of immigration, asylum and refuge into objects of fear is tied into a number of complex but interrelated developments and debates that are directly relevant for the regulation and constitution of belonging in the European Union."[53]

What is particularly significant about Huysmans' analysis is that the "security framing of migration and asylum took place long before" events that created a heightened sensitivity to terrorism as in the present European situation.[54] He traces these longstanding developments in policies, as will be similarly done here in the subsequent chapters. His observations support the overall assertion of the dissertation about the psychological underpinning being both exclusionary and inclusionary throughout the years, indicating a consistency in these psychological tensions being present to various degrees. Huysmans emphasizes that,

> […] the politics of insecurity is thus always also a politics of belonging. Security framing impinges on and is embedded within struggles…over cultural, racial and socio-economic criteria for the distribution of rights and duties and over acceptable instruments of control through which people are integrated in a community.[55]

The first of Huysmans' three themes, *internal security*, refers to the EU's policies concerning the internal market that focused on abolishing internal border controls but strengthening external ones, with a focus on restricting asylum and migration generally, also

[52] *Ibid* at Huysmans p 64.
[53] *Ibid* at p 63.
[54] *Ibid*.
[55] *Ibid*.

dubbed by others as creating a "fortress Europe".[56] The second theme of *cultural identity* refers to the political rendering that can involve "forms of new and radical conservatism, which include the clash of civilization discourses" in response to the presence of immigrants, asylum seekers and refugees that challenge "the myth of national cultural homogeneity."[57] Viewing migration as a cultural danger as part of the European integration process, Huysmans argues, involves the "cultural significance of border control and the limitation of free movement", it questions "the integration or assimilation of migrants into the domestic societies" and brings up "the relationship between European integration and the development of multicultural societies."[58]

Finally, Huysmans' third theme of *welfare* refers to limitation of access to social and economic rights, by curbing social assistance through welfare provisions for immigrants, asylum seekers and refugees.[59] Huysmans brings it back to the issue of belonging, that is, "not only mediated through cultural identity – or nationalism – and through policing borders…" but "also crucial in the governance and politicization of belonging in welfare states."[60] This "welfare chauvinism" is often supported by EU policies by framing security in a way that "make[s] the inclusion of immigrants, asylum, seekers and refugees in European societies more difficult".[61]

In addition to Nagy's and Huysmans' reflections through the use of frames and themes, another example is an analysis put forth by Gereth Mulvey who assesses the progression and regression of UK's migration and asylum policies. Mulvey considers specifically the asylum policy within the UK and argues that asylum seekers are construed as a threat, and this occurs

[56] *Ibid* at p 69.
[57] *Ibid* at p 73 citing Goran Dahl, *Radical Conservatism and the Future of Politics* (London: Sage, 1999); John P. McCormick, *Carl Schmitt's Critique of Liberalism. Against Politics as Technology* (Cambridge: Cambridge University Press, 1997)
[58] *Ibid* Huysmans at p 73.
[59] *Ibid* at p 77.
[60] *Ibid*.
[61] *Ibid* at p 64.

through four interconnected dimensions namely threats to *security*, *welfare*, *economy*, and *community cohesion*.[62] This construal, he argues, occurs within a context that generally problematizes immigration through policy, and imbues the migration-focused discourse with a sense of crisis that in turn creates general hostility within the public towards asylum seekers, further having a negative effect on the integration of refugees and all migrants more generally.

Finally, Greussing and Boomgaarden, in their study of the framing by the Austrian media of the 2015 "refugee crisis",[63] also identify a number of well-known frames. They note that framing around migration evolves as a response to uncertainty.[64] As a result, the coverage of migration matters by the media serves to construct "socially shared understandings and dominant representations of newly arriving people, which have further consequences for attitudes, emotions, and behavior towards them."[65] Relying on computer-assisted text analysis, the study sketched the most dominant frames that were used in the media surrounding the refugee crisis in Europe, and related this to frames from well-established empirical literature. The focus on the study was on Austria, which, like other countries in Europe, had shifted from a culture that was welcoming to refugees to more anti-immigrant sentiments. The study therefore focused on the dominant themes as means to understand the public discourse that affects and is affected by political and cultural discourses.[66]

Mining the extensive scholarly work that the authors have noted include:

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62 Gareth Mulvey, "When Policy Creates Politics: the Problematization of Immigration and the Consequences for Refugee Integration in the UK" (2010) 23(4) *Journal of Refugee Studies* 437-462 [hereinafter Mulvey].
63 Esther Greussing and Hajo G. Boomgaarden, "Shifting the refugee narrative? An automated frame analysis of Europe's 2015 refugee crisis, (2017) *Journal of Ethnic and Migration Studies* 43: 11, 1749-1774 [hereinafter Greussing and Boomgaarden].
64 *Ibid* at pp 1749 – 1750; Elizabeth M. Perse, *Media Effects and Society* (London: Routledge, 2001) at p 81.
65 *Ibid*; Sharon Quinsaat, "Competing News Frames and Hegemonic Discourses in the Construction of Contemporary Immigration and Immigrants in the United States" (2014) 17(4) *Mass Communication and Society* 573–596 [hereinafter Quinsaat].
66 Greussing and Boomgaarden, *supra* note 63 at pp 1749 – 1750.

> Key themes or frames that have consistently recurred over time and across countries, constructing an ambivalent portrayal of refugees and asylum seekers as innocent victims and, simultaneously, as invaders and threat to the physical, economic, and cultural well-being of the respective host country.[67]

They grouped the framing of refugee and asylum issues in mass media into three common types: the first sees refugees and asylum seekers as passive victims, the second sees them as a threat to the culture, security and welfare of the host country, and the third depicts the foreigners as a dehumanized and anonymous out-group.[68] Victimization focuses on the plight of refugees and asylum seekers and portrays them as in need of help creating an emotional and personal perspective to the events.[69] This relates to the humanitarian questions concerning legal and moral obligations towards asylum seekers and refugees.[70] On the other hand, the delegitimizing of asylum seekers has a number of frames that take their plight and turns it against them, presenting asylum seekers as dependent on support,[71] and therefore a burden on resources that belongs to the citizens.[72] The legitimacy of asylum seekers and whether they deserve sympathy and support is called into

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[67] *Ibid* at 1751; Eda Gemi, Iryna Ulasiuk, and Anna Triantafyllidou, "Migrants and Media Newsmaking Practices" (2013) 7(3) *Journalism Practice* 266–281 online at:; Karina Horsti, "Europeanisation of Public Debate: Swedish and Finnish News on African Migration to Spain" (2014) 15(4) *Javnost – The Public* 41–53; Natascha Klocker, Kevin M Dunn, "Who's Driving the Asylum Debate? Newspaper and Government Representations of Asylum Seekers" (2003) 109 (1)*Media International Australia* 71–92; Baldwin Van Gorp, "Where is the Frame? Victims and Intruders in the Belgian Press Coverage of the Asylum Issue" (2005) 20(4) *European Journal of Communication* 484–507.

[68] Greussing and Boomgaarden, *supra* note 63.

[69] Karin Horsti, "Hope and Despair: Representation of Europe and Africa in News Coverage of 'Migration Crisis'" (2008) 3 *Communication Studies* 125–156; Sarah J Steimel, "Refugees as People: The Portrayal of Refugees in American Human-Interest Stories" (2010) 23(2) *Journal of Refugee Studies* 219–237.

[70] Greussing and Boomgaarden, *supra* note 63 at p 1751; Barbara Harrell-Bond, "The Experience of Refugees as Recipients of Aid" [in:] Alastair Ager (ed), *Refugees: Perspectives on the Experience of Forced Migration* pp 136–168 (London: Continuum, 1999).

[71] Lillie Chouliaraki, "Between Pity and Irony – Paradigms of Refugee Representation in Humanitarian Discourse" [in:] Kerry Moore, Bernhard Gross, Terry Threadgold, *Migrations and the Media* (New York, NY: Peter Lang, 2012) at pp 13–31.

[72] Sean P Hier and Joshua L. Greenberg "Constructing a Discursive Crisis: Risk, Problematization and Illegal Chinese in Canada" (2002) 25(3) *Ethnic and Racial Studies* 490–513; Yahya M. Madra and Fikret Adaman, "Neoliberal Reason and Its Forms: De-politicisation through Economization" (2014) 46 (3) *Antipode* 691–716.

question.[73] This goes as far as associating asylum seekers and refugees with crime and terrorism.[74] The quantity of persons coming in also is reflected through metaphors, such as "flooding"[75] indicating an inability to stop the flow of people coming in, and this coming at a cost to the host society. Overall, the use of metaphors has a dehumanizing effect on the depiction of asylum seekers and refugees,[76] construing them as "deviant or alien to the host society, disrupting its cultural identity, language, and values."[77]

Based on this general grouping, Greussing and Boomgaarden defined eight distinct frames. The first, the *settlement frame*, reflects the debate concerning whether the refugees would settle temporarily or permanently, and this is related to the second, the *reception and distribution frame* which concerned provision of temporary shelters as well as policy debates on reception quotas and maximum limits. The third, prominent, *securitization frame* considers border crossing, stereotyped depictions of asylum seekers as uncontrollable, and concerns of national security, restrictive asylum policies, and attempts to regulate human movement.[78] The fourth, the *criminality frame,* associates asylum seekers with illegal modes of transportation, and creates an atmosphere of suspicion and prejudice. The fith, the *economization frame,* portrays refugees as economic burdens that threaten the welfare and prosperity of the receiving state. The sixth *humanitarianism frame* highlights the host society's voluntary help, and their contribution to a welcoming culture, thus

[73] Nick Lynn and Susan Lea, "A Phantom Menace and the New Apartheid: The Social Construction of Asylum-Seekers in the United Kingdom" (2003) 14(4) *Discourse & Society* 425–452;
[74] Samuel Bennett, Jessika ter Wal, Artur Lipiński, Malgorzata Fabiszak and Michal Krzyżanowski, "The Representation of Third-Country Nationals in European News Discourse: Journalistic Perceptions and Practices" (2013) 7(3) *Journalism Practice* 248–265; Simon Goodman and Susan A. Speer, "Category Use in the Construction of Asylum Seekers" (2007) 4(2) *Critical Discourse Studies* 165-185.
[75] Costas Gabrielatos, Paul Baker, "Fleeing, Sneaking, Flooding. A Corpus Analysis of Discursive Constructions of Refugees and Asylum Seekers in the UK Press, 1996–2005" (2008) 36(1*) Journal of English Linguistics* 5–38.
[76] Victoria M. Esses, Stelian Medianu and Andrea S. Lawson, "Uncertainty, Threat, and the Role of the Media in Promoting the Dehumanization of Immigrants and Refugees" (2013) 69(3) *Journal of Social Issues* 518–536.
[77] Liette Gilbert, "The Discursive Production of a Mexican Refugee Crisis in Canadian Media and Policy" (2013) 39(5) *Journal of Ethnic and Migration Studies* 827–843.
[78] Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse" (2005) 43(5) *International Migration* 163–187.

calling for a humanitarian stance in the public discourse. The seventh, the *background/ victimization* frame relates to the back-story of flight and broader geo-political affairs such as fighting ISIS and the situation at the border or on the seas focusing on the plight of migrants as passive victims.[79] Finally, the last one, the *labour market integration frame*, emphasizes long-term consequences including concerns regarding social integration, economic change, and employment.[80]

The frames discussed by the abovementioned authors are the general frames that have been put forward by asylum and migration policy-makers, the media, and the public and scholarly discourse. At the same time, scholars use these frames to encapsulate their analysis. Primarily used for political analysis, these themes are akin to the frames proposed in the dissertation. The social psychology inspired frames concerning inclusion and exclusion (identity formation, cost-benefit calculation, and threat-perception) are similar to theoretical frames employed by these scholars analyzing migration and refugee law who turn to references and over-arching themes within political theory. Broadly, the political frame of securitization correlates with the psychological frame of threat-perception. The identity focused frame exists in both the political sciences as well the psychological framework proposed. The welfare and economization frames relate to cost-benefit calculation.

There is an important distinction to be made however. Many of the frames referred to in other studies are the actual *act or behaviour*, such as securitization of borders or criminalization of migrant entry through legal acts. The act itself as well as the the source, intention, and perception of the act, are framed, perhaps unwittingly, as one and the same. However, the psychological

[79] Greussing and Boomgaarden, *supra* note 63 at p 1757.
[80] Quinsaat, *supra* note 65.

frames point to an underlying *motivation* for the behaviour such as a fear-based perception of threat *that leads to* securitization and criminalization, or a sense of altruism as part a cost-benefit calculation (whether the motivation is self-interested or to help another) that *that leads to* humanitarian law and policies – both described later in this chapter. Indeed, this division is an extremely delicate task, and since the acts and motivations largely overlap in much of the literature referenced, this is at times indistinguishable. Often all we know is the behaviour based on state policy or the enshrined legal act and conclude about motivations based on the *reasoning* available. But this is the task of the analysis, to point to otherwise indiscernible qualities.

One of the contentions here is that the focus within legal analysis is on legal reasoning, usually referenced as logical reasoning, and that any emotional reasoning should be separate. The emotional reasoning is part of the overall reasoning process, and in order to understand how we come about or can change any particular law or policy, the logical and the emotional aspects must be discussed as one psychological package. In slightly different words, the social psychological frames (intermixed with other sources of knowledge from history, political theory and the sciences, etc) give us the *roots* of inclusion and exclusion, while the rest of the reflection (the laws and policies) are the *outcomes*. The discussion will refer to the outcomes (exclusionary and inclusionary laws and policies) with reference to the roots of exclusion and inclusion from social psychology. However, that being said, the laws also in turn affect the psychology in a reflexive way, so again, this is not a definitive distinction. The analysis will also include reflections the psychological impacts of the laws but will leave the thorough investigation for subsequent research.

2.5 Frame one: Identity Formation of Self and Other

Describing the first frame of *identity formation of Self and Other* is extensive and thus broken down into three parts: a) highlighting the evolutionary roots of this psychological process, b) offering a more in-depth exploration of the contemporary theories concerning social identification, and c) detailling how the process of categorization in particular connects social psychology to policies concerning the rights of asylum seekers and refugees.

2.5.1 Belonging and Group Formation

Social psychologists concur that the starting premise within the relational frameworks of social life is that people seek inclusion and belonging. This may in turn be defined by boundaries that exclude others.[81] Belonging is the "first among equals" concerning core social motives that have been identified to "enhance people's integration into groups and thereby their physical and psychological survival."[82] This sense of belonging serves a foundation for the remaining four motives – "understanding, controlling, self-enhancing, and trusting."[83] The motive to belong also benefits the group by increasing the likelihood that members will engage in cooperative and coordinated action. An increase in theoretical and empirical work has led to agreement within social psychology that inclusion requires "frequent positive interactions with one or more others in the contest of stable, supportive relationships."[84] Political or cultural alliances can provide a basis for inclusion or exclusion of whole sections of the global community. Authors in the social

[81] Abrams *et al, supra* note 43 at p 3 of 355.
[82] John M. Levine and Norbert L. Kerr, "Inclusion and Exclusion: Implications for Group Processing" [in:] Arie W. Kruglanski and Edward Tory Higgins (eds.), *Social Psychology: Handbook of Basic Principles* (The Guilford Press; 2nd edition, 2007) at p. 759 [hereinafter Levine and Kerr].
[83] *Ibid*; Susan T. Fiske, *Social Beings: A core Motives Approach to Social Psychology* (New York: Wiley, 2004).
[84] *Ibid Levine and Kerr*; Roy F Baumeister and Mark R Leary, "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117 (3) *Psychological Bulletin* 497-529.

psychology literature refer to this as the "macro-level" where countries attract or repel individuals on the basis of race, ethnicity, occupation or other statuses. This process, they say, explains the "human passion for walls...and ditches" as a way of managing exclusion.[85]

What is of key concern here is the underlying nature, or the "root causes" of inclusion and exclusion that inform policies. Social psychologists identify a number of reasons,[86] and a very broad one to begin with argues that social inclusion is a product of evolutionary processes.[87] Our early ancestors relied on group membership for survival, reinforcing an inherent drive for humans to seek out group inclusion, and have a tendency towards exclusion when that survival is felt to be threatened. Anthropological evidence supports that humans always lived in groups, suggesting that "this preference of collective social organization may have predated the beginning of our species. The apparent universality of collective social organization in modern (as well as primitive) human societies is likewise consistent with an innate drive to affiliate."[88] While evolutionary theories indicate a pull towards sociality within a species, a number of theoretical models point to cooperative behaviour being a result of creation of boundaries within the group, ones that regulate social systems by reinforcing group behaviours.[89] The evidence shows that the human instinct is the same – for cooperation – but that is both an emotive drive to cooperate as well as a response to pressures to delineate the boundaries of group membership that required a certain behaviour in which the member would cooperate, or behave in a way that would ensure the collective welfare, with punishments for those that fail to do so.[90]

85 Abrams *et al*, *supra* note 43 at p 279.
86 Levine and Kerr, *supra* note 82 at p 760.
87 *Ibid*.
88 *Ibid*.
89 *Ibid*.
90 *Ibid*.

2.5.1.1 The Social Identity Approach

Within the field of the social psychology of inclusion and exclusion, a number of theories can be grouped under the "social identity approach". One of the mainstay theories is Henri Tajfel's Social Identity Theory (SIT).[91] SIT considers how inter-individual behaviour is determined by intergroup behaviour, asking how membership in a group affects relations between individuals.[92] Tajefl's SIT posits that a person's sense of self relates back to that person's membership in a group, where the group provides pride and self-esteem to its members. Membership in groups gives a sense of belonging in the social world and therefore a sense of social identity. Enhancing one's self-image involves elevating the status of the group to which one belongs, and by contrast, decreasing the view of those outside the group, which can take the form of discrimination or prejudice.[93] Thus, the main hypothesis of SIT posits that in-groups discriminate against out-groups by finding negative traits in order to enhance their own self-image. Tajfel further proposed that the normal cognitive process does involve the tendency to group things together, and hence placing people in groups and categories results in stereotyping. This further involves exaggerating differences between groups or similarities within the in-group.

Significantly, SIT was developed in reference to analyzing the context of postwar societies,[94] and this reference is noteworthy in relation to the laws of asylum being that the Refugee Convention, asylum rights provisions, and generally provisions concerning rights of non-citizens,

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[91] Henri Tajfel and John C. Turner, "An Integrative Theory of Intergroup Conflict" [in:] William G. Austin and Stephen Worchel (eds.), *The Social Psychology of Intergroup Relations*, at pp. 33-47 (Monterey, CA: Brooks/Cole, 1979) [hereinafter Tajfel and Turner] The theory was founded by Tajfel and developed in collaboration with John Turner who went on to propose an extension of the theory called the Self-Categorization Theory (SCT).
[92] Hakan Ovunc Ongur, *Minorities of Europeanization: The New Others of European Social Identity* (London: Lexington Books, 2015) at p 70 [hereinafter Ongur].
[93] Stereotype is the broad generalization or shortcuts about the traits of a particular group. Prejudice is the pre-judgment of negative traits of the group. Discrimination, in psychological terms, is the behavior as a result of the prejudice.
[94] Henri Tajfel, "Social Categorization, Social Identity and Social Comparison," in Henri Tajfel (ed.) *Differentiation between Social Groups: Studies in the Social Psychology of Intergroup Relations* (New York: Academic Press, 1978) at p 61.

were developed in a postwar context. In fact, Tajfel's writing makes clear that his interest in studying intergroup behaviour, and consequently proposing his theoretical question of "when does inter-individual behaviour become inter-group behaviour" is of more than an "academic" interest, because it has a political component.[95] Tajfel argued that a particular social psychology can be "determined by the previous social, economic, and political processes."[96]

In defining the concept of a group, Tajfel saw it as being identical to the definition of a "nation" proposed by the historian Emerson (1960) who wrote that: "[t]he simplest statement that can be made about a nation is that it is a body of people who feel that they are a nation."[97] He further qualifies that Emerson's simplified but definitive statement as being:

> …essentially a social psychological one: it is not concerned with the historical, political, social and economic events which may have led to the social consensus now defining who is 'in' and who is 'out'. But there is no doubt that these events were crucial in the establishment of the nature of this consensus; and equally true, the consensus, once established, represents those social psychological aspects of social reality which interact with the social, political and economic events determining the present and the future fate of the group and its relations with other groups.[98]

This description is akin to the "imagined communities" view of nations proposed by political scientist and historian, Benedict Anderson, who argues that the boundaries of a community where one belongs are psychological because they are imagined, constructed and entrenched through political institutions.[99] Likewise, international law scholars have described the countries of concern to international law as "the imaginary lines on the surface of the earth which

95 Henri Tajfel, *Human Groups and Social Categories: Studies in Social Psychology* (Cambridge University Press, 1981) at p 22 [hereinafter Tajfel Human Groups, 1981].
96 Henri Tajfel, "Social Identity and Intergroup Behaviour" (1974) 13 (2) *Social Science Information* 65-93 [cited in:] Ongur, *supra* note 92 at p 70.
97 Tajfel Human Groups, 1981, *supra* note 95 at p 229.
98 *Ibid* at p 230.
99 Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso 2006).

separate the territory of one state from that of another."[100] The psychological aspect of a sense of identity as defined by boundaries is undeniable. A community and its attachment to a particular territory exist because of a shared idea and *feeling* of attachment to a place, the people within it and its wider representations where one considers oneself to belong. Thus, historians, political scientists and international lawyers alike are referring to the psychological nature of creating a group and calling it a nation or another category that may be seen to not belong to the nation as the case with refugees and non-citizens generally.

Moreover, Taifel perfectly described the dissonance that occurs in the process of inclusion and exclusion, when he wrote in 1979 in his discussion of "differentiation" between social groups, that:

> [w]e live in a world in which the process of unification and diversification proceed apace, both of them faster than ever before. In some ways, large-scale human groups communicate with each other more than ever; know about each other more than ever; and have become increasingly interdependent. At the same time, there is a powerful trend, to be seen virtually all over the world, aiming at the preservation or the achievement of diversity, of one's own special characteristics and identity.[101]

This statement gets to the crux of the present dissertation's argument that there is a cognitive dissonance in how states in Europe legislate concerning asylum seekers and migrants generally. The dissonance links back to this underlying process of simultaneous interconnection and drive towards separation, both of which are compelled, at least partly, by group identity formation. SIT offers some insight into why and how this happens. According to Tajfel's theory, from a social psychological view, describing a group may include:

[100] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn) (Harlow: Longman, 1992) 661 (para 226) [cited in:] Alison Kesby, *The Right to Have Rights* (Oxford University Press, 2012) at p 15.
[101] Tajfel Human Groups, 1981, *supra* note 95 at p. 223.

> …a *cognitive* component, in the sense of the knowledge that one belongs to a group; an *evaluative* [component], in the sense that the notion of the group and/or one's membership of it may have a positive or a negative value connotation; and an *emotional* component in the sense that the cognitive and evaluative aspects of the group and one's membership of it may be accompanied by emotions (such as love or hatred, like or dislike) directed towards one's own group and towards others which stand in certain relations to it.[102]

Concerning the evaluation process of grouping into us and them, SIT refers to three mental steps: social categorization, social identification, and social comparison.[103] Given the centrality of the self in social perception, *social categorization* involves a basic distinction between the group containing the self and other groups – the creation of in-groups and out-groups.[104] Just as we categorize objects, we categorize others and ourselves as part of making sense of the social environment. In this default mode, with the categorized information at hand, we know something about the others and in contrast, about ourselves. *Social identification,* the second stage of the process, involves adopting the group identity and conforming to appropriate behavior and group norms. This results in emotional attachment as the sense of worth, the self-esteem is now related to the membership in the group. Having categorized within a group and become attached to identity, the third stage of *social comparison* involves relating with other groups in a way that ensures the in-group is compared positively.[105]

A primary goal of social inclusion and exclusion that these mental steps respond to is a reduction in *uncertainty*. Social identity and the process of categorization and comparison aim to reduce "subjective uncertainty by prescribing how group members should act."[106] This is the

[102] *Ibid at* p 229 [emphasis added].
[103] Tajfel and Turner, *supra* note 91; Tajfel Human Groups, 1981, *supra* note 95 at p 254.
[104] *Ibid.*
[105] *Ibid.*
[106] Michael Hogg and Dominic Abrams, "Towards a single-process uncertainty reduction model of social motivation in groups" [in:] Michael A. Hogg and Dominic Abrams (eds.), *Group motivation: Social Psychological Perspectives*

critical point to emphasize in analyzing human rights of asylum seekers under the analytical frame of social identity formation, as the presence of asylum seekers is seen to disrupt the certainty of a particular identity. Oldmeadow notes that "subjective uncertainty is a central part of group-based influence because it leads people towards social comparison and renders them open to influence from others."[107] The laws can be said to respond to that need for reduction of uncertainty. As Hogg and Mullin explain:

> People have a fundamental need to feel certain about their world and their place within it – subjective certainty renders existence meaningful and thus gives one confidence about how to behave, and what to expect from the physical and social environment within which one finds oneself…People join or form groups to reduce uncertainty; they join or form one group rather than another group because it is more relevant to uncertainty reduction for that person in that context…and specific groups become contextually salient because they reduce uncertainty in that context.[108]

The threat to social identity causes the social perceivers to form stereotypes about the in-group and the out-group. Since social identity is not fixed, but rather "a repertoire of social identities" that is contextually established for each individual and group, stereotyping of others also changes in form and content along with circumstances.[109] Over the years, studies have supported social identity approaches by observing how the experience of social inclusion and exclusion influences social perception, affect, cognition, and behavior on members of both the in-

(Hertfordshire, UK: Harvester Wheatsheaf, 1993) at pp. 173–190; Barbara-Ann Mullin and Michael A. Hogg, "Motivations for Group Membership: The Role of Subjective Importance and Uncertainty Reduction" (1999) 21(2) *Basic and Applied Social Psychology* 91–102 [cited in:] Angela M. Nickerson and Winnifred R. Louis, "Nationality Versus Humanity Personality, Identity and Norms in Relation to attitudes Toward Asylum Seekers" (2008) 38(3) *Journal of Applied Social Psychology* 796-817 at p 797 [hereinafter Nickerson and Louis].

[107] Juliana Oldmeadow et al., "Self-Categorization: Status, and Social Influence" (2003) 66 *Social Psychology Quarterly* 138-52, 140 [cited in:] Ongur, *supra* note 92 at p 75.

[108] Dominic Abrams and Michael A. Hogg, "Comments on the Motivational Status of Self-Esteem in Social Identity and intergroup Discrimination" (1988) 18 *European Journal of Social Psychology* 317-34. [cited in] Ongur, *supra* note 92 at p 75.

[109] Tim McNamara, "Theorizing Social Identity: What do We Mean by Social Identity? Competing Frameworks, Competing Discourses" (1997) 31 *TESOL Quarterly* 561-67 [cited in] Ongur, *supra* note 92 at pp 76-77.

group and the out-group. In terms of perception, when people are categorized, differences are minimized or ignored between members in the same category while differences related to other groups are exaggerated.[110] From the emotional standpoint, there is an observable valence in affect that is more positive to members of the same group, and more negative to those outside of it.[111] Cognitively, memory is better at retaining more detailed information concerning group members as opposed to out-groups, and again, in a more positive light.[112] Behaviour is affected and in-group members are more helpful to each other,[113] work harder for each other,[114] and are less trustworthy of out-groups that are socially categorized as opposed to their relation to individual members of an out-group.[115]

[110] John F. Dovidio, Samuel L. Gaertner, Gordon Hodson, Melissa A. Houlette, and Kelly M. Johnson, "Social Inclusion and Exclusion: Recategorization and Perception of Intergroup Boundaries" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) [hereinafter Dovidio *et al* Recategorization] [citing:] Henri Taijfel, "Cognitive Aspects of Prejudice" (1969) 25(4) *Journal of Social Issues* 79-97; Dominic Abrams, "Focus of Attention in Minimal Intergroup Discrimination" (1985) 24 *British Journal of Social Psychology* 65-74; John C. Turner, "Social Categorization and the Self-Concept" (1985) 2 *Advances in Group Processes* 77–121 [hereinafter Turner 1985].

[111] Sabine Otten & Gordon B. Moskowitz, "Evidence for Implicit Evaluative In-Group Bias: Affect-based Spontaneous Trait Inference in Minimal Group Paradigm" (2000) 36 *Journal of Experimental Social Psychology* 77-89.

[112] Bernadette Park & Myron Rothbart, "Perception of Out-group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-group and Out-group Members" (1982) 42 *Journal of Personality and Social Psychology* 1051-1068; David A. Wilder, "Perceiving Persons as a Group: Categorization and Intergroup Relations" [in:] David L. Hamildon (ed.), *Cognitive Processes in Stereotyping and Intergroup Behaviour* (Hillsdale, NJ: Erbaum, 1981) at 213-257; John M Howard and Myron Rothbart, "Social Categorization for In-group and Out-group Behaviour" (1980) 38 *Journal of Personality and Social Psychology* 301-319.

[113] John F. Dovidio, Sameul L. Gaertner, Ana Validzic, Kimberly Matoka, Brenda Johnson, and Stacy Frazier, "Extending the Benefits of Re-categorization: Evaluations, Self-disclosure and Helping (1997) 33 *Journal of Experimental Social Psychology* 401-420.

[114] Stephen Worchel, Hank Rothgerber, Eric Anthony Day, Darren Hart and John Butemeyer, "Social Identity and Individual Productivity with Groups" (1998) 37 *British Journal of Social Psychology* 389-413.

[115] Chester A Insko, John Schopler, Lowell Gaertner, Tim Wildschut, Robert Kozar, Brad Pinter, Eli J. Finkel, Donna M. Brazil, Matthew R. Montoya, "Interindividual-Intergroup Discontinuity Reduction Through the Anticipation of Future Interaction" (2001) 80 *Journal of Personality and Social Psychology* 95-111.

2.5.1.2 The Process of Categorization

Another key social psychological concept is the Self-Categorization Theory (SCT), a cousin of SIT, which was developed by John Turner *et al*, and informed by cognitive psychology.[116] SCT posits that individuals create categories of identity at different levels of abstraction. At the highest level of abstraction is identifying as human, whereas the lower levels include the category of the individual self and the category of a particular social identity through membership of an in-group in contrast to an out-group.[117]

Creating a self-identity within a group is part of self-categorization, as a European citizen for example, and related to a perceived Other, a non-European citizen in this case, that is separate from one's affiliation. Here again, the ability to sort people into meaningful groups by group membership, and doing so with minimal effort, involves minimizing of differences between individuals within a group and exaggeration of differences between groups.[118] One example is the exclusionary 'Idea of Europe' based on beliefs about Judeo-Christian affiliation that is cited as being a source of discrimination against non-Europeans by Europeans.[119] In this case, Europe and European membership is a social in-group in contrast to other perceived out-groups.

The norms of the social category of Europe and European membership, or the category of a state within European boundaries and national membership, may conflict with human rights standards that are, at least partly, intended to have the all-encompassing *human* identity at the centre in order to protect *individual* rights. These three levels of abstraction when it comes to

116 John C. Turner, Michael A. Hogg, Penelope J. Oakes, Stephen D. Reicher, Margaret S. Wetherell, *Rediscovering the Social Group: A Self-Categorization Theory* (London: Blackwell, 1987) at p 1.
117 Turner 1985, *supra* note 110.
118 *Ibid*; Henri Taijfel, "Cognitive Aspects of Prejudice" *Journal of Social Issues* 25(4) (1969) 79-97; Dominic Abrams, "Focus of Attention in Minimal Intergroup Discrimination" *British Journal of Social Psychology* 24 (1985) 65-74.
119 Ongur, *supra* note 92.

identity – human, social group, and individual – can come in conflict with one another when it comes to rights of citizens versus rights of migrants versus rights of humans. In this sense, European institutions and related policies may be creating out-groups that are not able to benefit from *human* rights within European boundaries, when it comes to rights dependent on group membership such as social and economic rights.

The process of categorization, however, is malleable. The categorization process can be redirected and reduced "by modifying a perceiver's goals, motives, perceptions of past experiences, and expectations, as well as factors within the perceptual field and the situational context."[120] Re-categorization can reduce bias towards more inclusionary ways. According to the *Common In-group Identity Model*, if members of different groups are induced to conceive of themselves more as a single, superordinate group rather than separate groups, attitudes toward former out-group members will become more positive through processes involving pro-in-group bias. The re-categorization changes the intergroup bias by changing the nature of inclusion and exclusion. Re-categorization involves restructuring a definition of a group to a higher-level category of inclusiveness. The benefit of in-group status is then accorded to the formerly out-group members now perceived as in-group members. The evidence concerning the theories have demonstrated consistently that common one-group representations can reduce negative intergroup affective reactions and bias as well as influencing behaviours.[121]

Where the biases are especially impervious or where biases are increased in order to re-establish group distinctiveness, emphasizing "dual identity" can reduce bias by moderating group status and social values.[122] Individuals can belong to multiple identities and do not have to forsake

[120] Dovidio *et al* Recategorization, *supra* note 110.
[121] *Ibid* at pp. 253-256.
[122] *Ibid* at p 254.

particular identities. That said, researchers caution that "the effectiveness of a dual identity may be substantially moderated by the nature of the intergroup context."[123] This can be affected by who is in the majority and who in the minority group, meaning that majority groups may be inclined for one group assimilation whereas minority groups prefer pluralistic integration to maintain distinctiveness.[124]

The *Common In-group Identity Model* is complemented by the longstanding *Contact Hypothesis* which states that for bias to be reduced, contact between the groups must meet certain criteria that include "equal status between the groups, cooperative (rather than competitive) intergroup interaction, opportunities for personal acquaintance between the members, and supportive norms by authorities within and outside the contact situation."[125]

One way to illustrate the theories is by reference to a study that considered attitudes towards asylum seekers from participants that identified strongly either with their nationality or as humans.[126] The results of the study showed that participants who identified more or equally with their human identity vis-à-vis their national identity were more likely to be sympathetic to asylum seekers. Participants who identified more strongly with their national identity were more hostile to asylum seekers.[127] Conversely, persons who identified as humans more strongly than their national identity had more positive "attitudes, feelings, and behaviors toward asylum seekers."[128] this being line with the common in-group identity model and social identity theory.

123 *Ibid* at p 255.
124 *Ibid* at p 256.
125 Dovidio *et al* Recategorization, *supra* note 110 at p 247.
126 Nickerson and Louis, *supra* note 106 at pp 796-817.
127 *Ibid* at p 809. The study results: "As predicted, people who strongly identified with their nationalities, and those who perceived national norms as negative, exhibited less favourable responses to asylum seekers."
128 *Ibid*.

The concept of humanity as an in-group poses an interesting methodological challenge to social psychology scientists because of there is no comparative out-group from which members of the in-group can derive a sense of self-esteem and reduction of uncertainty.[129] However, the authors note that abstractions of temporal comparisons can be used for this comparative function of identity. That is, humans in the present can consider humans of the past as a psychological out-group and feel a positive distinction in the evaluation.[130] We can become more identified with our humanity by considering the inhumanity of the past, and even without empirical studies, one can say that this is already the case with how humans assess themselves. By reflecting on the evolution of human rights within Europe and globally, a positive inclusiveness may become apparent.

What we can say for now is that using the social psychological theories to understand the current European context as it interacts with the tensions between categories of "the *human* in human rights" and "the *citizen* in sovereign European states and Europe as a whole" can be a useful methodological tool of analysis. One source of inspiration is from international relations scholar, Hakan Ovunc Ongur, whose monograph considers whether the common European identity is created by historical connections between Europeans by applying the psychological concept of social identity.[131] In his conclusions, he reflects on how this Europeanization comes about in relation to minorities within Europe as constituting an Other, a distinction, he argues, on which the European social identity has relied. Overall, scholars have noted that the social identity approach through SIT/ SCT can provide many political and social applications concerning categorizations, which could be applied in the field international politics, but the research has been limited. [132]

[129] *Ibid*; Allport 1954, *supra* note 27.
[130] Nickerson and Louis, *supra* note 106 at p 809.
[131] Ongur, *supra* note 92.
[132] Ongur, *supra* note 92 at p 77; David Druckman, "Nationalism, Patriotism and Group Loyalty: A Social Psychological Perspective," (1994) 38 *Mershon International Studies Review* 44 [hereinafter Druckman].

In particular, David Druckman's study combines SIT/ SCT and the process of nationalism. Ongur remarks that "traditionally, social, political and economic grounds for nationalism are analyzed, whereas Druckman goes with the social psychological roots of the concept."[133] Druckman's argument is that the national level provides for economic, social, cultural, and political needs, and gives persons a feeling of security and feeling of belonging. He writes that "the nation achieves personal relevance for individuals when they become sentimentally attached to the homeland (affectively involved), motivated to help their country (goal oriented), and gain a sense of identity and self-esteem through their national identification (ego involved)."[134] The extension of rights, particularly socio-economic rights, can have a direct impact on the sense of identity with the state to which one belongs. Thus the "motive" behind an extension or limitation of rights is connected with the sense of group membership, one that is formalized by laws and institutions.

2.6 Frame Two: Cost-Benefit Calculation

The next key psychological frame that applies to the analysis of inclusion /exclusion taking place in refugee policy-formation is that of a *cost-benefit* calculation that states assume, or to put it differently, the perception of socio-economic gains and losses that relates to the motivation for inclusion or exclusion of asylum seekers and refugees. In reading asylum-related jurisprudence, both in drafting of laws and its interpretation, there is an evident reasoning behind inclusion and exclusion that takes into account costs and benefits of helping asylum seekers. In socio-economic terms, the *costs* of taking in asylum seekers are often based on how much social assistance will have to be provided to the newcomers or what aspects of the economy will be at risk. As discussed

[133] Ongur, *supra* note 92 at p 77.
[134] Druckman, *supra* note 132 at p. 44.

above, this can also be extended to perceptions of cultural identity being diluted, or what security risks are perceived, which are intertwined with socio-economic factors, but here for the sake of drawing some analytical categories, socio-economic arguments are isolated. In this case, the professed net loss is seen to justify restrictive and more exclusionary policies towards asylum seekers in the form of denial of socio-economic rights (right to work, housing, social assistance, etc). On the other hand, socio-economic *benefits* are argued in terms of what incoming foreigners can provide, mostly in terms of net gains in boosting the economy, this latter position promoting more inclusive policies that aim for socio-economic integration of refugees. Again, the benefits on this side of the argument may be deemed to extend beyond socio-economic factors that are considered, such as the duty to uphold treaty obligations, cooperation among States, or a moral imperative.

This cost-benefit calculation is largely from a state-centred point of view. In this way, the cost-benefit approach is similar but not the same as *utilitarianism* and this distinction becomes especially critical when it comes to motivations for inclusion and exclusion that stem from moral inclinations. There is scholarship that addresses this overlap and differentiation between cost-benefit and utilitarianism, pointing to the ego-centrism of the cost-benefit approach as opposed to the "maximum happiness for the greatest number" in utilitarian considerations.[135]

What has the power to undermine the costs-benefit calculation is the humanitarian position of *altruism*, but that position is itself challenging to define, hence the long-standing query whether there is ever pure altruism without self-interest. Conceptually, altruism may compete, as will be

[135] Rosemary Lowry and Martin Peterson, "Cost-benefit analysis and non-utilitarian ethics" (2011) 11(3) *Politics, Philosophy & Economics* 258–279.

discussed, with the different sides of the cost-benefit analysis primarily because it is helping behaviour that is considered to not be self-interested.

To emphasize again, the cost-benefit frame in the present research corresponds to the *welfare, economization* and *humanitarian* frames used in other fields when reflecting on socio-economic assistance. Welfare here refers to provision of basic social assistance to citizens or residents of a state who have difficulty providing for themselves. Humanitarianism, cited consistently from the onset of international refugee law as the reasoning for inclusion and social assistance policies towards non-citizens,[136] can be broadly defined simply as "the promotion of human welfare" that comes from a position of benevolence and morality, for the benefit of humanity as a whole. As indicated, most often in scholarship, the welfare and humanitarian framing of the asylum issues juxtaposes the securitization frame, particularly within negotiations of the European institutions.[137]

2.6.1 The Psychology of Cost-Benefit and Helping Behavior

The cost-benefit calculation in social psychology is also referred to as *gains/losses* and as *cost-reward* perspectives and is considered as part of "helping behaviour". The cost-benefit analysis assumes that people are motivated to maximize rewards and minimize costs and thus takes on an economic view of human behaviour.[138] This is categorized into the costs and rewards for

[136] Details on this history in the following chapter.
[137] Jef Huysmans, "The European Union and the securitization of migration" (2000) 38 (5) *JCMS: Journal of Common Market Studies* 751-777; Sarah Leonard, "The 'Securitization' of Asylum and Migration in the European Union: Beyond the Copenhagen School's Framework", Paper presented at the SGIR Sixth Pan-European International Relations Conference, 12-15 September 2007, Turin (Italy) Section 9: Security, Politics, Critique Panel 9-14: 'Securitization and the Other: Theorising Immigration and Asylum Policies'.
[138] Anthony S. R. Manstead and Miles Hewstone (eds), *The Blackwell Encyclopedia of Social Psychology* at p 291 [hereinafter Blackwell Encyclopedia]; Jane Allyn Piliavin and Hong-Wen Charng, "Altruism- A Review of Recent Theory and Research (1990) 16 *Annual Review of Sociology* 27-65.

helping and the costs and rewards for not helping, with behaviour decided by net costs.[139] Both cognitive and affective influences determine helping behaviour. The values that are given to something being a cost or a reward can be affected by the social environment.

As discussed, social identity affects the extent of helping behaviour in the sense that persons are more likely to help those that they identify with and whom they consider to be in their social group. There is an inference of reward from helping fellow group members. Helping behaviour is also considered within social psychology to be part of a broader category of "pro-social behaviour," analyzed as part of research on *norms*, *social responsibility*, *reciprocity*, and altruism, which govern the act of helping.[140] In considering why people help, research has aimed to understand the "fundamental motivational processes, often distinguishing egoistic helping from altruistic helping."[141]

Research within social psychology has collected evidence that the main components of a helping response include first noticing that need for help, then considering it as an emergency, deciding whether to take responsibility, determining the type of help and finally, implementing the decision. In assessing the situation, social information aids in addressing ambiguity. When it is perceived that others are able to help, a *diffusion of responsibility* can take place, especially if this is supported by the permitting norms.[142]

The *social learning* perspective states that the motivation to help others comes from past reinforcement.[143] From the cognitive perspective, people learn that helping is a positively valued social behaviour and when to do so, even though this process may involve differences based on

139 *Ibid.*
140 Blackwell Encyclopedia, *supra* note 138 at p 290.
141 *Ibid.*
142 *Ibid* at p 291.
143 *Ibid* at p. 292.

culture, development, the social situation, and the individual internalized standards.[144] The learning process is further crystallized through internalized *social standards*, personal norms, moral values, and reciprocity.

> Normative theories of helping emphasize that people help others because they have expectations based on previous social learning or the current behaviour of others that it is a socially appropriate response. Two types of social norms related to helping have generally been proposed. The first is the social responsibility norm, which states that people are supposed to help others who are dependent upon them. The second type of norm relates to feelings of fairness, and involves perceptions of reciprocity, equity and social justice. People will help others who have helped them.[145]

The *arousal: cost-reward model* implies that being exposed to the distress of another may be so unpleasant that it motivates helping behaviour in order to reduce the distress.[146] The origin of the theory came from considerations of emotional responses to emergency situations.[147] The empathic arousal that is generated by distress of another motivates a cost-reward analysis and the direction of the response.[148] This can explain the sudden empathic response from the public and European policy-makers when there is news about migrant deaths when crossing the Mediterranean, a response that subsides as the events becomes more commonplace. The model indicates that the motivation to help is mostly egoistic and depends on the emotional consequences that can be anticipated.[149] The arousal-affect motivations intersect with the social learning because

144 *Ibid* at pp 293-294.
145 *Ibid*.
146 *Ibid* at pp 292-293; John F. Dovidio, Jane A. Piliavin, Samuel L. Gaertner, David A. Schroeder, Russell D. Clark III "The Arousal: Cost-Reward Model and the Process of Intervention: a Review of the Evidence" [in:] M. S. Clark (ed.) *Review of Personality and Social Psychology: Prosocial Behavior* (Vol. 12) (Newbury Park, CA: Sage, 1999) at pp. 86-118; Nancy Eisenberg and Richard A. Fabes, "Pro-Social Behavior and Empathy: a Multi-Method Perspective" [in:] M. S. Clark (ed.) *Review of Personality and Social Psychology: Prosocial Behavior* (Vol. 12) (Newbury Park, CA: Sage, 1999) at pp. 34-61.
147 John F. Dovidio, Jane Allyn Plain, David A. Schroeder, Louis A. Penner, "The Social Psychology of Prosocial Behaviour" (Psychology Press, 2006) (google books, no page numbers available) [hereinafter Dovidio *et al,* 2006].
148 *Ibid*.
149 Blackwell Encyclopedia, *supra* note 138 at p 293.

"through socialization and experience, people learn that helping may be personally rewarding and thus capable of eliminating the negative state."[150]

Related to the arousal cost-reward model is the *negative state relief model*. Alleviating a negative emotion is considered an egoist psychological reason for helping behaviour.[151] According to the model, the negative emotions can arise from guilt or sadness from seeing another person harmed, and helping reverses these feelings by improving self-esteem or heightening ones sense of integrity.[152] Supported by numerous studies and a generally accepted framework, the model shows that from a self-interested perspective helping has a direct reward for the helper and this can be the basis for assistance.[153] However, the negative emotion may precede the plight of the persons in need of help, and this is where the two models differ. In the negative state relief model, the concerns for the reward are "feeling good" and not only alleviating the arousal that is directly linked to the situation.

The above models all imply an egoistic motivation as the undercurrent for helping and pro-social behaviour. Another perspective is that there can be other-focused motivations, and these are defined as altruism and empathy.

2.6.2 Cost-Benefit, Altruism, and Empathy

A fundamental issue in asylum law concerns obligations to help persons that are not within an immediate circle delineated by citizenship but the widest possible circle of humanity. The

150 *Ibid.*
151 *Ibid Blackwell* [referencing:] Robert B. Cialdini, Mark Schaller, Donald Houlihan, Kevin Arps, Jim Fultz, Arthur L. Beaman, Empathy-Based Helping: Is it Selflessly or Selfishly Motivated? (1987) 52 *Journal of Personality and Social Psychology* 749-568.
152 Dovidio *et al*, 2006, *supra* note 147 (google books, no page number available).
153 *Ibid.*

widening of the circle has been the most troubling to researchers and theorists because of the perceived cost overweighing the benefit, all while a presumption persists that humans are primarily motivated by self-interest, hence the accusation of idealism with references to altruistic intentions and self-interest seen as being "realistic". As will be discussed in the subsequent chapters, the altruistic versus egoistic conduct of states was a deliberated factor in the drafting of international refugee law back in 1951 and this continues in present-day Europe in reference to rights of asylum seekers, refugees and other categories of non-citizens, both in policy-making and jurisprudence. For now, some key aspects of altruism are considered within the social psychological frame of cost-benefit weighing that we can link further to asylum-policy making and implementing.

Described as a form of "motivation for benefiting another", altruism has been studied from a variety of perspectives in a cross-array of disciplines including philosophy, economics, biology, and sociobiology.[154] In considering the "biological foundations of human rights", Chris A. Robinson has proposed that "the biological capacity to develop laws that provide protection for the basic human rights depends on an aptitude that may be uniquely human: the ability to be altruistic toward individuals outside of one's family or immediate group."[155] From a biological perspective, altruism has evolved in humans as a result of kin selection based on a "theory of inclusive fitness" in order to perpetuate genes.[156] Helping behaviour towards individuals outside of group membership has been explained by *reciprocal altruism* – essentially motivation to help

[154] Daniel T. Gilbert, Susan T. Fiske, Gardner Lindzey, *The Handbook of Social Psychology*, Volume Two, Fourth Edition (The McGraw-Hill Companies, Inc. Oxford University Press, New York and Oxford, 1998) at p 25 [hereinafter Gilbert *et al* Handbook].
[155] Chris A. Robinson, "Biological Foundations of Human Rights" [in:] Dinah Shelton (ed.) *Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) at p 55 [hereinafter Robinson].
[156] *Ibid* at p 59 [citing:] JBS Haldane, "Population Genetics" (1955) 18 *New Biology* 34 and WD Hamilton, "The Genetic Evolution of Social Behavior, Part 1" (1964) 7 *Journal of Theoretical Biology* 1.

by feelings of reciprocity.[157] This may include *direct reciprocity* where there is a cost incurred by one individual that is less than the benefit provided to that individual. This imbalance is temporary until the person receiving the benefit incurs a temporary cost in providing a greater benefit to the initial person.[158] *Indirect reciprocity* replaces direct reciprocity when group size or dispersal between groups increase, in that the same system of cost-benefit return applies just via larger communities and not individuals.[159] Neither, however, explains "true altruism" where there is no expectation of direct or indirect reciprocity.

While the contributions from the different disciplines in defining altruism overlap, all deserving mention, henceforth the reference will be primarily to psychological altruism. A general definition of altruism in the psychological sense is – the *behaviour* that confers benefit on others, at some cost to oneself, and not *motivated* by the benefit to oneself but the benefit in welfare to others.[160] Social psychologist Daniel C. Batson writes that although altruism has been referred to as pro-social behaviour, it is a motivational concept: "altruism is motivation to increase another person's welfare; it is contrasted to egoism, the motivation to increase one's own welfare."[161] The emphasis is on the direction of benefits, whether to others or to oneself, rather than the costs incurred. Altruism has also been referred to as "a vital pillar of cooperation in social and economic

[157] *Ibid* Robinson at p 61 [citing:] Robert L Trivers, "The Evolution of Reciprocal Altruism" (1971) 46 *The Quarterly Review of Biology* 35.
[158] *Ibid* Robinson [citing:] Tim Clutton-Brock, "Breeding Together: Kin Selection and Mutualism in Cooperative Vertebrates" (2002) 296 *Science* 69 online at <https://science.sciencemag.org/content/296/5565/69.long>; Martin A. Nowak, "Five Rules for the Evolution of Cooperation" (2006) 314 *Science* 1560; Martin A. Nowak and Karl Sigmund, "Evolution of Indirect Reciprocity" (2005) 437 *Nature* 1271.
[159] *Ibid* Robinson at p 63.
[160] Elliot Sober and David Sloan Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behaviour* (Cambridge, MA: Harvard University Press,1998).
[161] Daniel C. Batson, *The Altruism Question: Toward a Social-Psychological Answer,* (Lawrence Erbaum Associates, Inc. 1991) at p 6 [hereinafter Batson]. Gilbert *et al* Handbook, *supra* note 154 at p 282.

life" where individuals take actions at a cost to themselves that will benefit others as part of a division of labour and cooperation within a group.[162]

Much of the debate about altruism is whether there is a self-serving motive behind the altruistic act. The debate can be traced as far back as philosophies of Greek antiquity to present day international relations theories. From its beginnings, the term altruism, initially coined by French philosopher, Auguste Comte in 1875, has been juxtaposed with egoism in both philosophy and psychology.[163] Batson comments on the normalized acceptance of universal egoism, "from Aristotle and St Thomas Aquinas, through Thomas Hobbes and Jeremy Bentham, to Friedrich Nietzsche and Sigmund Freud, the dominant view in Western thought has long been that we are, at heart, exclusively self-interested."[164] He notes that before Comte, the question of helping was considered under headings of "benevolence, charity, compassion, and friendship", but Comte brought the issue into sharper focus.[165] Comte did not deny the existence of self-benefiting impulses and the self-gratification of egoism, but believed that some social behaviour came from unselfish desires and this he called altruism.[166]

In response to the debate concerning the motivational source of altruism, Batson poses "the altruism question" asking whether "we are capable of having another person's welfare as an ultimate goal" rather than directed at ourselves.[167] He sees it as "one of the most fundamental

[162] David Sander and Klaus R. Scherer (eds.), *The Oxford Companion to Emotions and the Affective Sciences*, [kindle edition, hereinafter Oxford Companion]; James Andreoni J, "Impure Altruism and Donations to Public Goods: A Theory of Warm Glow Giving" (1990) 100 *Economic Journal* 464-77; Ernst Fehr and Urs Fischbacher, "Why Social Preferences Matter – The Non-Selfish Motives on Completion, Cooperation and Incentives" (2002) 112 (478) *Economic Journal* online at < https://onlinelibrary.wiley.com/doi/full/10.1111/1468-0297.00027>.
[163] Batson, *supra* note 161.
[164] *Ibid* at p 3.
[165] *Ibid at* p 5.
[166] *Ibid.*
[167] *Ibid.*

questions we can ask about human nature,"[168] and posits that "social psychology is the scientific sub-discipline best suited to provide an answer."[169] The proposal that other-oriented emotion felt for someone in need produces altruistic motivation to relieve that need has been called the *empathy-altruism hypothesis* and is presented in contrast to the previously mentioned egoistic models of helping.[170] Batson is the originator of the empathy-altruism hypothesis, and like Comte, he acknowledges that "true altruism" exists to coincide with the egoistic altruism that is based on costs and benefits. There is substantial evidence to suggest that the source of psychological altruism is an other-oriented emotional reaction to seeing another person in need, this emotion otherwise referred to in both philosophical and psychological literature as empathy, compassion, pity, and sympathy, all of which describe sentiments for another with a desire to help. Whereas negative emotions of sadness and personal distress produce egoistic motivations to help, *empathic concern* (e.g. sympathy, compassion) creates altruistic motivation that may or may not have the reward of a positive emotion.[171]

Batson's assessment evaluates the three different paths to helping. Path 1 involves the negative state relief model that is based on based on social learning and reinforcement. Path 2 involves tension is the arousal: cost-reward model that focuses on reduction of tension. Path 3 consists of empathy-altruism where the need of another person along with the relationship to that person (ie. perspective taking) generates empathic concern that evokes altruistic motivation. In testing whether path 3 exists, Batson's experiments gauged this by systematically modifying the helping situation to rule out alternative explanations for why helping occurred. For example, making it easy for a person to remove themselves from the situation, and in this case, low-empathy

[168] *Ibid* at p 3.
[169] *Ibid* at vii.
[170] *Ibid*.
[171] Batson, *supra* note 161; Dovidio *et al*, 2006, *supra* note 147.

egoistically motivated persons concerned about their welfare would leave, whereas high in empathy altruistically motivated persons would remain for the welfare of the other person, even if this were not the most efficient way to respond to arousal and personal distress. Thus, empirical support for this comes in the form of research that shows that persons with high levels of empathic concern will be motivated to help even if avoidance of helping is easy, distress can be evaded and there is no mood-improving incentive. [172]

The empathy-altruism hypothesis has withstood the test of time and myriad of challenges by consistently demonstrating that this pure form of altruism, focused on a benefit to the other at a cost to the self, does exist.[173] In the past several decades, more than 30 experiments have tested this hypothesis against various egoistic alternatives. This has had important implications by challenging the assumption of inherent self-interest within human nature. The broader implications concerning cost-benefit is that human behaviour is on a spectrum from self-oriented to other-oriented, and such an understanding of these mechanisms can contribute to cultivating more pro-social, humane, and inclusive human behaviour.

2.7 Frame Three: Threat-Perception

The final analytical frame of *threat-perception,* a correlate of the emotion of fear, interlinks the previous two frames of identity formation and cost-benefit calculation. The fear-based perception of threat is one of the underlying motives behind social exclusion.[174] Fear is an activation of an "aversive emotional state that motivates attempts to cope with events that provide

[172] Blackwell Encyclopedia, *supra* at p 293; Batson, *supra* note 161.
[173] Batson, *supra* note 161.
[174] Abrams *et al*, *supra* note 43 at p 3 of 355.

threats to the survival or well-being of organisms."[175] It naturally flows that the higher the fear and perception of threat concerning an out-group, in this case asylum seekers, the higher the likelihood of exclusionary policies.

As discussed from a frame analysis perspective, asylum seekers in Europe are construed as problematizing migration generally. They come unannounced, often "illegally" without documentation and not through prescribed official routes, often from some of the least developed or war-torn countries. Primarily coming from Africa or Asia, particularly the trouble spots of the Middle East, asylum seekers may be viewed as "culturally different" and the difference is not valued as an asset but seen as a threat to homogeneity of a European or national culture. They are not sought out, selected, or pre-approved by governments. They are not primarily viewed as coming to contribute to the economy as other migrants but rather, are seen as a drain on welfare systems, and possibly a threat to jobs and therefore not genuinely to seek refuge but for economic gains. Moreover, the correlation between terrorism and migration results in restrictive policies that are justified and endorsed by concerns over security. In short, asylum seekers and refugees generally are seen as posing any number of "threats" that are used to justify exclusion.

These are casebook scenarios from a social psychological point of view, and have been explained from another theoretical position in addition to the ones previously discussed, that of *inter-group threat theory,* also referred to as *integrated threat theory,* where members of one group perceive another group as being able to harm them, and consequently form prejudices.[176] The

[175] Oxford Companion, *supra* note 162 at p 182.
[176] Walter G. Stephan and C.W Stephan, "An Integrated Threat Theory of Prejudice" [in:] Stuart Oskamp (ed.), *Reducing Prejudice and Discrimination* (Mahwah, NJ: Lawrence Erlbaum Associates, 2000) at pp. 23-45.

theory goes that there are two basic types of threats: realistic and symbolic.[177] These may involve "threats to the in-group as a whole and threats to the individual members, in which individuals experience threat as a function of their membership in a particular in-group."[178] They are differentiated as follows:

> Realistic *group* threats are threats to a group's power, resources, and general welfare. Symbolic *group* threats are threats to a group's religion, values, belief system, ideology philosophy, morality, or worldview. Realistic *individual* threats concern actual physical or material harm to an individual group member such as pain, torture, or death, as economic loss, deprivation of valued resources, and threats to health or security. Symbolic *individual* threats are concern loss of face or honor and undermining of an individual's self-identity and self-esteem.[179]

Since the theory is primarily concerned with *perceptions* of threat, the issue is not whether there is an actual threat posed by the out-groups, but rather the process and impactful consequences of the degree of perceptions by the in-group.[180] The theories are supported by studies that show how perceived threats concerning migrants correlate to exclusionary attitudes.[181] These conceptualizations relate to social identity theories concerning threats to group status.[182]

According to the theory, the variables that affect threat perception are said to include intergroup relations, cultural dimensions, situational factors, and individual difference variables.[183]

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177 Walter G. Stephan and C. Lausanne Renfro, "The Role of Threats in Intergroup Relations" [in:] Diane E. Mackie and Eliot R. Smith (eds.) *From Prejudice to Intergroup Emotions* (New York: Psychology Press, 2002) at pp.191-208 [hereinafter Stephan and Renfro, 2002]

178 Walter G. Stephan, Oscar Ybarra and Kimberley Rios Morrison, "Intergroup Threat Theory" [in:] Todd D. Nelson (Ed.), *Handbook of Prejudice, Stereotyping and Discrimination* (New York: Psychology Press Taylor & Francis Group, 2009) at p 44 [hereinafter Stephan *et al*].

179 *Ibid*.

180 *Ibid*.

181 *Ibid*; Moshe Semynov, Rebeca Raijman, Anat Yom Tov, and Peter Schmidt, "Population Size, Perceived Threat, and Exclusion: A Multiple-Indicators Analysis of Attitudes Toward Foreigners in Germany 33 *Social Science Research* 681-701.

182 *Ibid*; Nyla R. Branscombe, Michael T. Schmitt, and Richard D. Harvey, "Perceiving Pervasive Discrimination Among African-Americans: Implications for Group Identification and Well-Being (1999) 77(1) *Journal of Personality and Social Psychology* 135–149.

183 Stephan *et al*, *supra* note 178.

Intergroup relations concerns the relative power of groups, notably that low power groups are more likely to experience threats, but high power groups will react more strongly to threat.[184] However, even equal power relations may result in high perception of threat.[185] The influences may be the history of conflict between groups and the group size.[186]

Cultural dimensions refer to aspects such as individualism-collectivism, power distance and uncertainty avoidance.[187] Cultures focused on individualism where the individuals self is valued as unique and distinctive may be less susceptible to group threat perception than collectivist cultures that define themselves in terms of group affiliations.[188] Power distances refers to cultures where there is an expectation that some will be more powerful than others and these cultures are said to be more susceptible to perceiving threats.[189] Cultures that value avoidance of uncertainty and social order are also seen to be more prone to threat perception.[190]

Situational factors may include historical and political contexts. The situations where threat perception is likely include those where there is uncertainty as to how to behave, including unfamiliar settings, being outnumbered, feeling unsupported by authority figures, and where there is competition against an out-group that can produce harm.[191] The individual difference variables

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184 Stephan *et al, supra* note 178.; Blake M. Riek, Eric W. Mania, Samuel L. Gaertner, "Intergroup Threat and Outgroup Attitudes: A Meta-Analytic Review" (2006) 10 *Personality and Social Psychology Review* 336–353.
185 Stephan *et al, supra* note 178.; Stephan and Renfro, 2002, *supra* note 177; Victoria M. Esses, John F. Dovidio, Lynne M. Jackson, Tamara L. Armstrong, "The Immigration Dilemma: The Role of Perceived Group Competition, Ethnic Prejudice, and National Identity" (2001) 57 *Journal of Social Issues* 389–412.
186 Stephan *et al, supra* note 178.; Michal Shamir and Tammy Sagiv-Schifter, "Conflict, Identity, and Tolerance: Israel in the Al-Aqsa Intifada" (2006) 27(4) *Political Psychology* 569–595; Lauren M. McLaren, "Anti-Immigrant Prejudice in Europe: Contact, Threat Perception, and Preferences for the Exclusion of Migrants (2003) 81 *Social Forces* 909–936; Olivier Corneille, Vincent Y Yzerbyt, Anouk Rogier, *Geneviève* Buidin, G. Threat and the Group Attribution Error: When Threat Elicits Judgments of Extremity and Homogeneity (2001) 27 *Personality and Social Psychology Bulletin* 437–446;
187 Stephan *et al, supra* note 178 at p 47.
188 *Ibid;* Harry Charalambos Triandis, *Individualism and Collectivism* (Boulder, CO: Westview, 1995).
189 Geert H. Hofstede, *Cultures and Organizations: Software of the Mind* (London: McGraw-Hill, 1991).
190 Stephan *et al, supra* note 178.
191 *Ibid* at p 48.

include strength of in-group identity, amount and type of contact between the groups, the knowledge about the out-group, how the group is oriented towards social dominance, the amount of support for group-based inequality and right-wing authoritarianism, and the extent of desire for social order.[192]

The consequences of threat have cognitive, affective, and behavioural aspects, and this is said to depend on the whether the threats are symbolic or realistic. Perception of symbolic threat – again, these are related to religion, values, beliefs, ideologies, morality or worldview and concern loss of honour, identity or self-esteem – are said to be more likely to lead to "dehumanization, delegitimation, moral exclusion of the out-group, and reduced empathy for the out-group" than when it is a case of realistic threats, ones that are related to loss of resources and welfare, concerning physical or material harm.[193] Symbolic threats are connected with higher conformity with the norms and values of the in-group, and there is a preference to expect assimilation of out-groups in response to these symbolic threats. With realistic threats, the response to the out-group is one of withdrawal, avoidance, and aggression that in a migration context may mean having preference for separation rather than assimilation.[194] Interestingly, the symbolic threats correspond more with the frame of identity formation while realistic threats correspond with cost-benefit calculation. Accordingly, these different psychological perceptions of threats can be linked to policy responses.

192 *Ibid* at p 49.
193 *Ibid* at p 52.
194 *Ibid* at p 52.

2.8 Conclusion – The Complexity of Integrated Parts

Whether it is threat-perception, identity formation, or a cost-benefit calculation, these psychological frames give insights to the motivations underlying laws and policies as they are analyzed and assessed in their evolutions. This chapter therefore has outlined an overall methodology and conceptual framework with an emphasis on describing these social psychology theories, as well as some of the frames used in legal scholarship, political science, and international relations. The objective from here onwards is to utilize these key insights from disciplines outside of law in the process of analysis, comparison and assessment, for a critical understanding of the underlying psychology of the reasoning in European human rights and asylum laws and its related jurisprudence.

To borrow from one school of psychology, a "gestalt" approach is proposed here, suggesting that the human experience cannot be reduced to its parts, but to the extent possible, needs to be studied in its multi-layered form. This is akin to what sociologist Thomas J. Scheff calls part/whole analysis as a morphology that is "based equally on single cases and comparative study" of human understanding.[195] Certainly when it comes to a complex subject concerning social and economic rights of asylum seekers, as they relate to refugee integration, multiple variables are interdependent. The parts can be analytically dissected, but their complex interaction is where important insights emerge. From here, with this interdisciplinary framework sketched out, the inclusionary/ exclusionary conflicts in international and European laws and policies concerning the rights of asylum seekers can be more cogently discussed from a psychological perspective.

[195] Thomas J. Scheff, *Emotions, social bond and human reality: part/whole analysis* (Cambridge University Press, 1997) at p 2.

Chapter 3 – The Conflicted Making of International Refugee Law

> The *travaux préparatoires* at various levels, concerned article 1 of the 1951 Convention Relating to the Status of Refugees, amount to approximately one-quarter of their total volume, and the representative of Venezuela in the Third Committee of the UN General Assembly probably reflected the general sentiments when he expressed the opinion that "the definition of the term 'refugee' was the most difficult problem to be settled."[1]
>
> – Jerzy Sztucki

> In the first place, we don't like to be called "refugees".[2]
>
> – Hannah Arendt

3.1 Introduction: Historical Conflict of Inclusionary and Exclusionary Reasoning

These days, refugee law literature focuses extensively on contemporary legal manifestations – and there is plenty of material to reflect on with nearly daily developments in a state of the world that produces increasing numbers of refugees. The attention to the present-day legislation, in Europe and beyond, means that there is less in-depth reflection on the origins, understandably so as one must keep up with the current disarray. And yet, while human psychology and its legislative formations are malleable, they can also be stubbornly enduring. A psycho-historical reflection is needed, some of which was started in Chapter 1 on the origins of asylum and it is apt to continue with the beginnings of international refugee law as of the twentieth century with its focus on Europe. The idiom goes that hindsight is 20/20 with clarity when looking at the past, though it is difficult to get the full context and mindset of a different era, especially through

1 Jerzy Sztucki, "Who is a refugee? The Convention definition: universal or obsolete?" [in:] Frances Nicholson and Patrick Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) at p. 55 citing: GAOR, 5th Session, 3rd Committee, p. 338, UN Doc. A/C.325 (Summary Record of the 325th meeting, 24 November 1950, para. 40).

2 Hannah Arendt, "We Refugees" [in:] *The Jewish Writings* edited by Jerome Kohn and Ron H. Feldman (New York: Schocken Books, New York, 2007) at p 264.

the skewed lens of the present, looking back *does* permit a connecting of the dots. Importantly, this is best done through an updated set of tools and perspectives for understanding the evolution.

Accordingly, this chapter considers the deliberations and subsequent provisions of the 1951 Refugee Convention[3] drafted over two years starting in 1949, to highlight the dissonance among the States negotiating the treaty which arguably resulted in compromised substantive content that is the essence of refugee law to this present day. The approach, as described in Chapter 2 in reference to the methodology and the conceptual framework, is to use the frames of analysis inspired and informed by social psychology theories to analyze the discourse of negotiating the 1951 Refugee Convention. These refer to in-group identity formation that focuses on Europe, cost-benefit calculation that involves a tensions between motivations of altruism and self-interest, and a threat-perception primarily of the non-European Other.

The focus in this chapter is on the drafting of Article 1 of the Refugee Convention – the refugee definition, who is included and excluded – as this was the most contentious part of the discussions. The analysis will elucidate the negotiating states' positions that show both a desire for inclusionary provisions and policies towards asylum seekers and refugees,[4] based on humanitarian and altruistic reasoning in conflict with exclusionary positions that are more self-interested and even considered by certain delegates as contrary to the inclusionary collaborative values of the United Nations. Building on the analysis of the drafting history by previous commentators, the original contribution of this assessment is its consideration of both the convention drafters' positions as well as the content of the Refugee Convention itself through social psychological frames, fundamentals of which were described in Chapter 2.

[3] 189 UNTS 137, in force 22 April 1954.

[4] A side-point on language for this chapter: Unlike in present day usage, the term asylum seeker was not used at the time of drafting leading up to the convention in 1951. Therefore, in this chapter, the reference will be to *refugees* to include those that are seeking asylum when discussing the refugee definition in Article 1.

The analysis will discuss the conflicted reasoning among states negotiating the Refugee Convention that oscillated between humanitarianism, dubbed as the universal approach based on human rights, and the more restricted Eurocentric positions. There is plentiful evidence in the *travaux préparatoires* that the debate about the refugee definition and related articles concerned the position of the delegates in terms of altruistic generosity towards the refugees versus the more self-interested and cautionary approach that set to place limits on inclusion and assistance. Much of the discussion during the drafting process was whether the wider universal definition of refugee, while admittedly humanitarian in nature, would create a "blank cheque" for refugees particularly from outside of Europe. As part of the deliberation, the key issue at hand was whether the situation of refugees was a European problem that should therefore result in a Europe-focused convention. The drafters of the 1951 Refugee Convention and the debaters at various stages of the process were very concerned with the territorial and temporal limit – keeping the refugee definition limited to European refugees due to events before 1951.

Most importantly, as this chapter will go on to show, the psychology of inclusion and exclusion that underpins the Refugee Convention can be derived from the words expressed by the state representatives themselves. The sentiments that were expressed behind the motivations were often stated *as* sentiments – the use of emotional language is discernable. The fears and anxieties about numerous threats were referred to as such. The calculations of costs and benefits, gains and losses, humanitarian empathies and their lack, accusations of egoism, reflections on identities and categories, questioned altruistic motivations of generosity, and overall exclusiveness alongside inclusiveness were clearly conveyed, to the point of self-adulation during agreements and disgust during quarrels, all of this noted and coming through in the *travaux préparatoires*. All these aspect

of the discourse in law-making negotiations can be extracted and framed for inspection under psychological themes.

The discussion here does not argue that there were established groupings or even sides among the convention deliberators as some authors have debated, for example whether there was a West vs. The Rest alliance, or a clear divisions among the lines of Cold War positions. Those arguments are informative, significant, and well-reasoned, but not the purpose of the present analysis. Rather, the objective here is to draw out the psychological frames of reasoning in the deliberations of the Refugee Convention's Article 1 about the refugee definition, to show the persistent conflicts and longstanding dissonance concerning refugees, ones that inform international asylum alongside human rights laws to this present day. This psychological dissonance was present at the time of drafting of the Refugee Convention after the Second World War and the conflicted reasoning continues when it comes to the arguably still nascent asylum jurisprudence and policy formation in present-day Europe. Certainly, there is evidence in the Refugee Convention's *travaux préparatoires* of states taking positions on inclusionary and exclusionary sides of the equation, thereby forming groups amongst themselves, but positions of states changed throughout the drafting deliberations. Hence, the analysis will focus on the psychological frames of reasoning and not on group formation within the drafting process, which is in any case difficult to discern.

3.2 Pre-1951 Convention Refugee Categories

Refugee law began to take form after the end of World War I in response to masses of Russians and Armenians seeking protection.[5] At the time, a system of reciprocal diplomatic protection was in place – that is, bilateral agreements between states to take care of their nationals within the other state's territory. But refugees did not have identity cards and could not prove nationality or were otherwise stripped of nationality as was the case of refugees coming out of the Soviet Union. Temporary arrangements were made by the League of Nations, and representatives of the High Commissioner to provide refugees the "most favoured state" status, but without firm international law in place, the hospitality weakened during the Great Depression (1929-1939). Consequently, a number of treaties began to take form as of 1933 to codify refugee rights, and importantly, to treat them on the same terms as the nationals of most favored nations.

Thus, prior to the 1951 Refugee Convention, the refugee definition was found in "ad hoc" instruments. The method, characteristic of the League of Nations approach, was to use ad hoc instruments in response to refugee situations thereby tying protection to particular national groups.[6] The approach was to define refugees "by categories,"[7] the criteria for which would relate to "a particular national origin, lack of protection of government in the country of origin, and

[5] James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005); James C Hathaway, "The Evolution of Refugee Status in International Law: 1920– 1950" (1984) 33 (2) *The International and Comparative Law Quarterly* 348-38-; C A Macartney, *Refugees: The Work of the League* (League of Nations Union 1931) 46– 73; *Arrangement with respect to the Issue of Certificates of Identity to Russian Refugees* (signed 5 July 1922) 355 LNTS 238; League of Nations, "Armenian Refugees: Report by Dr Fridtjof Nansen High Commission for Refugees" (31 May 1924) LN Doc C 237 1924, Annex, 6; *Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements* dated July 5, 1922, and May 31, 1924 (signed 12 May 1926) 89 LNTS 47; *Arrangement relating to the Legal Status of Russian and Armenian Refugees* (signed 30 June 1928, entered into force 5 March 1929) 89 LNTS 53, 55.

[6] Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" [in:] Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) at 44 [hereafter Einarsen, Drafting History].

[7] Claudena M Skran, 'Historical Development of International Refugee Law' [in:] Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) at 2 [hereinafter Skran, Historical Development] at 98-103.

absence of a new nationality."[8] This was the case with the instruments in 1928 concerning refugees of Assyrian, Assyro-Chaldean, Syrian, Turkish, and Kurdish origins.[9] The approach carried over into the 1933 Convention.[10] However, Jews and political opponents in Nazi Germany did not benefit from this approach, deemed to be a great failure of the international system of the time.[11] The 1938 Convention was aimed at refugees from Germany, an instrument before the Second World War that was only ratified by Belgium and the United Kingdom.[12] This one included several restrictions, such as requirements for passports and visas, and marking of Jews with a 'J'. [13]

This protection by national group categories became more difficult. Within the 30 million Europeans that had to flee during the WWII, and the 10 million that were outside their countries of origin by the end of the war, there were several different groups. [14] Among them were Jewish Holocaust survivors; former Soviet Union citizens; slave labourers of the Nazis; many Volksdeutsche ("Ethnic Germans" that the Nazis defined by race rather than citizenship) from Eastern Europe, as well Eastern Europeans fleeing communist regimes.[15] New refugees were

[8] Einarsen, Drafting History *supra* note 6 at p 44 citing Skran, Historical Development at p 14.
[9] *Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees*, 30 June 1928, League of Nations, Treaty Series, 1929; 89 LNTS 63. Resolution (2) referred to any person of 'Assyrian or Assyro- Chaldean origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or who no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality'. Turkish refugee was any person who is "of Turkish origins, previously a subject of the Ottoman empire, who . . . does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality"; Skran, Historical Development, *supra* note 7 at at 19.
[10] *Convention relating to the International Status of Refugees* (signed 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663; Einarsen, Drafting History *supra* note 6 at at p 44 para 10; Skran, Historical Development, *supra* note 7 at 28-67.
[11] Einarsen, Drafting History *supra* note 6 at p 44 para 11.
[12] *Ibid* at p 45; Skran, Historical Development, *supra* note 7 at p 96.
[13] *Ibid;* Kjaerum, IJRL 6 (1994), at 444, 448.
[14] Astride R. Zolberg, Astri Suhrke, Sergio Aguayo, *Escape from violence: conflict and the refuge crisis in the developing world* (New York: Oxford University Press, 1089); Gunnel Stenberg, *Non-expulsion and Non-refoulement: The Prohibition Against the Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Iustu Forlag, 1989) at 48-49.
[15] Kim Salomon, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund University Press 1991) at 157, 161 cited in Einarsen, Drafting History *supra* note 6 at 45.

added after 1945 and the end of WWII, that included those fleeing the Greek civil war.[16] There was an element of moral judgement about the refugees, particularly the six to eight million Volksdeutsche that were not protected by the International Refugee Convention (IRO) (and later by the 1951 Convention as well). The refugee definition and the IRO, from the beginning had sided against European right-wing regimes (Nazi, Fascist, and Falangist).[17]

Therefore, up until the end of the Second World War the term "refugee" comprised different refugee categories that together formed a broad definition of refugees that included victims of persecution, war circumstances, or certain political regimes before, during or after the war.[18] Refugees and stateless persons also occupied the same conceptual conditions, until "their paths diverged"[19] legislatively after WWII.[20] There was a "shift" in the development of legal provisions that preceded WWII and those that followed it, with the prior approach being "group based" and the subsequent one more individual based.[21] The 1933 Convention concerned Russian, Armenian and assimilated refugees, and the 1938 Convention concerned refugees from Germany, giving them *prima facie* status.[22] The new individualized approach followed WWII with the practice of the IRO, established in 1946, which had the mandate to protect refugees that lay the

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16 *Ibid*.
17 Einarsen, Drafting History *supra* note 6 at p 46 para 15.
18 *Ibid*.
19 Guy Goodwin- Gill, "The Rights of Refugees and Stateless Persons" [in:] K P Saksena (ed), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (Lancers Books, 1994) 378, 389.
20 *Ibid*; Michelle Foster and Hélène Lambert, "Chapter 2: A Tale of Two Conventions: The History of International Law's Protection of Stateless Persons and Refugees" *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press, 2019).
21 Susan Kneebone, "Refugee as Objects of Surrogate Protection: Shifting Identities" [in:] Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds), *Refugee Protection and the Role of Law* (Routledge Research in Asylum, Migration and Refugee Law, 2016); James C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 2-6. Hathaway refers to three perspectives between 1920 and 1950: the juridical (membership of a particular group deprived of government protection), the social (casualties of social or political occurrences), and the individualistic (individual in search of escaped from injustice or incompatibility with her home state).
22*Convention relating to the International Status of Refugees* (signed 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663; *Convention concerning the Status of Refugees Coming from Germany* (signed 10 February 1938) 192 LNTS 59, arts 1 (a) and (b); *Additional Protocol to the Provisional Arrangement and to the Convention* (signed at Geneva on 4 July and 10 February 1938*); Status of Refugees Coming from Germany* (signed 14 September 1939) 198 LNTS 141, art 1(1).

groundwork for the extended refugee definition that reaches beyond national or ethnic membership. The IRO was succeeded by the United Nations High Commissioner for Refugees that was created in 1950 with the mandate set out in the Statute that under the authority of the General Assembly, the High Commissioner shall "assume the function of providing international protection … and of seeking permanent solutions for the problem of refugees."[23]

While the proliferation of agreements in the twentieth century relating to refugees, migration and human rights were important steps, they were formed in contrast to European governments otherwise enacting laws that have been deemed as self-interested in that they were "constrained in order to maximize the advantage of states."[24] But the recognized duty to protect displaced populations prevailed and the series of ad hoc and temporal agreements cumulated to form the Convention Relating to the Status of Refugees in 1951. As will be discussed extensively forthwith, the Refugee Convention was in any case regionally restricted at the time of passing to pre-1951 refugees in Europe, carrying on the traditions and concerns of previous arrangements in spite of universalizing inclinations. The protection was ultimately extended in the 1967 Protocol that removed the geographic and temporal restrictions in response to UNHCR's pressing concerns over global refugee flows some of which were from decolonization. Notably, states were given the option in the Protocol to retain the restriction, which Turkey – currently the host of the highest number of refugees worldwide – maintains to this present day.

[23] UN General Assembly resolution 428 (V) of 14 December 1950 (Annex); para 1 of the Statute of the Office of the High Commissioner for Refugees, as revised by General Assembly res. 58/153, 22 December 2003.
[24] James C. Hathaway, "Refugees and Asylum" [in:] Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (New York: Cambridge University Press, 2012) at p 177.

3.3 Post-WWII State of Mind

The perceived post-WWII state of mind among the founders of international human rights instruments is well documented. Two corresponding sentiments were in the air – one of shame for the atrocities of the war, the deaths and mass displacements, and the other a more responsive and intentional outlook, inscribing into the collective consciousness the adage of "never again."[25] Jack Donnelly, refers to the latter set, particularly the inclusionary proclamations of a shared humanity as "postwar optimism and goodwill."[26]

The collective guilt and humanitarian outreach was one of countering the shocking lack of empathy that resulted in the deaths of millions of during WWII.[27] The German philosopher Adorno, having traced the origins of the Holocaust, wrote that "apathy and indifference as sociological and historical facts of modern culture" and generally lack of sympathy that allows for identifying with others were among the key contributors of the WWII crimes.[28] The Second World War in Europe was seen generally as a "collapse of the Enlightenment and metaphysical morality," one that invited a renewed "ethics of sympathy", deflating "the omnipresence of idealist and

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[25] Ed Bates, "History," [in:] *International Human Rights Law*, ed. Daniel Moeckli et al. (Oxford University Press, 2010), pp. 32–33; Catherin Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart Publishing, 2015) at p 177 – "The next major stage in the development of constitutionalism as a form of humanism was a response to Europeans' traumatic experience of inhumanity under the Nazi regime, the Holocaust and the Second World War."

[26] Jack Donnelly, *Universal Human rights in Theory and Practice* (3rd edition) (Cornell University Press, 2012) at p 25.

[27] Forward by Richard A. Falk [in:] Roger Normad and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press, Bloomington Indianapolis, 2008 United Nations Intellectual History Project) - at forward xvi: "Without a doubt the strongest of all the antecedent developments to the rise of human rights was the psycho-political impact of the Holocaust and the sense of guilt felt within the liberal democracies about how little had been done to block Adolf Hitler's genocidal path of action."

[28] Jose Manuel Barreto, "Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty" *Law and Critique* (2006) 17: 73-106. Quoting Adorno: "The coldness of the societal monad, the isolated competitor, was the precondition, as indifference to the fate of others, for the fact that only very few people reacted. (...) The inability to identity with others was unquestionably the most important psychological condition for the fact that something like Auschwitz could have occurred in the minds of more or less civilised innocent people. (...) If coldness were not a fundamental trait of anthropology, that is, the constitution of people as they in fact exist in our society, if people were not profoundly indifferent toward whatever happens to everyone else except for a few to whom they are closely bound, and if, possible, by tangible interests, then Auschwitz would not have been possible" at 92.

rationalist ethics" and restoring "the rights of emotions in the realm of morality."[29] The apathy was to be turned around in the post-War II efforts of the United Nations.

Thus, the early stages of international human rights laws, and their subsequent etchings within refugee law, were shaped in the context of a divided and fatigued Europe coming together. The failures to protect refugees during the Second World War, to which a strict categorization can be attributed, resulted in the "never again" sentiment "as the bad conscience towards the victims of genocide and persecution eventually found expression among statesmen."[30]

3.4 Creating a Category: A Broad or Narrow Article 1

These post-WWII sentiments found their expression in the deliberations of the 1951 Refugee Convention. A contentious issue among refugee law scholars and historians alike concerns the intentions behind the provisions of the Refugee Convention, specifically the definition of refugee. Article 1, entitled "definition of the term refugee" is considered the "single most important provision" and was the primary focus within the convention's preparatory work.[31] The lengthy paragraphs in Article 1 outline the criteria for asylum, dubbed the '"inclusion clause" that enumerates grounds for refugee status, but also lists the situations where refugee status ceases, or further down the list, circumstances in which refugee status would not apply at all, these being reasons for exclusion. In a general sense, Article 1 is a key outcome of the inclusionary and exclusionary reasoning and deliberations of the convention drafters.

Firstly, a brief overview of the final result of Article 1, as introduced in chapter 1, which defines a refugee as any person who (1) has been a refugee under a previous convention and

[29] *Ibid* at p 105.
[30] Einarsen, Drafting History *supra* note 6 at p 45 para 11.
[31] *Ibid* at 49-50.

decision, and (2) "[a]s a result of events occurring before 1 January 1951" is outside of his or her country of nationality and has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion, further unable to avail him or herself of the protection of their country of origin and therefore unable and unwilling to return there. Section B. (1) further explains this to be understood as "events occurring *in Europe* before 1 January 1951" and this is followed by (b) "events occurring in Europe or elsewhere before 1 January 1951" with each Contracting State to declare at the time of signature, ratification or accession, which one of the meanings it will be applying. This is the series of compromises that the Convention came up with since the main concern in the negotiations was whether states would be willing to take in refugees from outside of Europe.

The article was amended many times during the drafting process, and the result is considered vague with numerous and greatly differing interpretations from contracting states, academics, and decision-makers, and no internationally authoritative jurisprudence providing a definitive clarification.[32] The key issue among those concerned in the debate is whether the definition was intended to be "broad," hence more inclusionary or "narrow," making it more exclusionary. In this regard, refugee law scholar James Hathaway has referred to the refugee definition as narrowly defined, "Eurocentric" and "strategic."[33] Hathaway notes that the focus on persecution is based solely on civil and political grounds in Article 1A (2), leaving out grounds based on violations of social and economic rights, and argues that this was a strategic Western position, this argument being in line with the deliberations at the General Assembly where there were heavy disagreements between the Soviet Bloc and Western countries concerning the place of

[32] Einarsen, Drafting History *supra* note 6 at p 45.
[33] James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harvard International Law Journal* 129 at pp 151-157; Hathaway, *The Law of Refugee Status* (1991) at p 6.

social and economic rights. In this sense, the refugee definition, according to Hathaway, is based on "an incomplete and politically partisan human rights rationale" in which political and economic interests were prioritized over humanitarianism.[34] The assertion of Eurocentric bias has been challenged by Terje Einarsen because the inclusion of Recommendation E urged "all nations to be guided by [the Convention] in granting....to persons their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."[35] Recommendation E only encourages states to accept refugees not covered by the Convention because of the 1951 dateline or the European geographical limitation. In addition, Article 1B of the Convention enabled states with a more universalistic approach to declare the Convention to apply to events occurring in Europe or elsewhere.

Both claims are valid. The refugee definition *is* Eurocentric, as per Hathaway's claim, in that the deliberations were largely Europe focused, with a primarily Europe-centred outcome in the refugee definition, and socio-economic and political interests discussed in the negotiations as being at stake, as well as socio-economic grounds for persecution omitted. At the same time, there *were* universalistic proposals and challenges to the Eurocentrism which ultimately did find their way into the compromise in the Convention, as per Einarsen's assertion. Ultimately, as noted above, "some" of this was put to rest with the 1967 Protocol that lifted the temporal and geographic limitations.[36] However, the 1967 Protocol was not State-led but an initiative of UNHCR in response to mass movements of refugees occurring throughout the world, where states were not

[34]James C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) pp 7-8.
[35] Conference of Plenipotentiaries, UN Doc. A/ CONF. 2/ 108/ Rev. 1 (1951), p. 9. "The Conference Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."
[36] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

bound by international law with protection obligations, and the situations necessitated the change. Hence many of the longstanding sentiments, interests and conflicted reasoning embedded in the refugee law remain.

3.5 A Dwindling Humanitarianism: Ad Hoc Committee, ECOSOC and the General Assembly

The first round of negotiations in the drafting of the Refugee Convention came in the form of the Ad Hoc Committee on Statelessness and Related Problems (Ad Hoc Committee) that was appointed by the Economic and Social Council on 8 August 1949.[37] During its first session in January and February 1950, the Ad Hoc Committee debated the main substance of the refugee definition.[38] They decided to name the characteristics of refugees so as to separate them from stateless persons who would not qualify for refugee status.[39] The Constitution of the International Refugee Organization provided the focus with a list of persecuted groups, among them victims of Nazi persecution.[40] One debate was whether and how much discretion should be permitted in how the definition is applied in state parties.[41] The other was whether the approach should be that of the League of Nations, by defined categories, or a universal refugee definition that could in any case be subject to temporal or geographical limitation.[42] On the side of a universal definition were representatives of Belgium, France and the United Kingdom, while the US and Canada favoured the earlier approach of determination by group origin or nationality, or with temporal and

[37] Economic and Social Council resolution No. 248 (IX) adopted 8 August 1949.
[38] Ad Hoc Committee on Stateless and Related Problems, UN Doc. E/AC.32/SR.33 (1950), p. 1.
[39] *Ibid*.
[40] Einarsen, Drafting History *supra* note 6 at p 54 para 33.
[41] *Ibid* at 55 para 34.
[42] *Ibid*.

geographical limitations.[43] Among the more ardent supporters of a narrower definition was Louis Henkin, the representative of the United States, who argued that refugee groups around the world were too large to be covered by a blank cheque universal definition.[44]

The issues continued to be debated when the Ad Hoc Committee report was carried over to the Social Committee of the Economic and Social Council (ECOSOC). During eight meetings from 31 July to 10 August 1950, the 15 country representatives rehashed the issues, focusing now on the temporal and geographical limitation.[45] The representative from Pakistan, taking the side of universal applicability, asserted that the Convention should not only be applicable to European refugees as refugees were not only a European problem.[46] France and Canada flipped their earlier positions of the Ad Hoc Committee. Canada now supported a broad definition,[47] while France changed its former universal approach in the spirit of the UDHR and instead proposed certain limitations. The statement of the French representative, Mr. Rochefort, was telling when he stated that: "Never before had a definition so wide and generous, but also so dangerous for the receiving countries, been put forward for signature by governments."[48] In this statement, he perfectly depicted the dissonance in the positions of the state representatives – the conflict between an inclusionary altruism of the receiving states on the one hand versus an exclusionary perception of threat and burden, even danger, on the other.

The votes in the ECOSOC round passed the definition of the Ad Hoc Committee and the draft convention continued to the General Assembly. The conflicting positions were once again

[43] *Ibid* 56 para 38.
[44] Statement of Henkin (USA), Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.3 (1950), p.9 (para 37).
[45] Australia, Belgium, Brazil, Canada, Chile, China (Taiwan), Denmark, France, India, Iran, Mexico, Pakistan, Peru, the United Kingdom and the United States.
[46] Statement of Brohi (Pakistan), ECOSOC, UN ECOSOCOR, 11th Sess., SR 399 (1950), paras. 29-30.
[47] Statement of Davidson (Canada) ECOSOC, UN ECOSOCOR, 11th Sess., SR 406 (1950), paras 89-90.
[48] Statement of Rochefort (France), ECOSOC, UN ECOSOCOR, 11th Sess., SR 406 (1950), para 55.

presented as "one advocating that the definition term 'refugee' should set out specific categories of refugees, while the other advocated a broad definition covering all legitimate refugees."[49] In a much-politicized debate, Western countries were accused by the representatives from the Union of Socviet Socialist Republic (USSR) and Poland for recruiting refugees for slave labour.[50] In the Third Committee of the General assembly proposed to remove the limitation to Europe but keep the temporal limitation, and this proposal was confirmed.[51]

3.6 Last Stage: The Conference of the Plenipotentiaries

The final set of negotiations of the drafting process took place in November 1951 during the Conference of the Plenipotentiaries (the Conference).[52] The Conference had a smaller representation from states than the earlier meetings, with fewer of the proponents of universal refugee definition. The remainder of this chapter draws out from the *travaux préparatoires* of the Refugee Convention the key arguments that were exchanged during the Conference in relation of Article in order to show how the negotiations that took place at the time reveal the underlying psychological frames.

While there were many noteworthy exchanges during the various stages of the drafting process, the Conference is of particular interest for the following reasons. Firstly, as noted, the Conference took place after the draft had been reviewed by several bodies and had already been enforced by the General Assembly. That is, the meetings as of November 1951 were the last steps to finalize the convention, by having State representatives at the Conference accede to the final

[49] Secretary-General, UN Doc. A/1385 (1950), para 9.
[50] Statement of Soldatov (USSR), GA, UNGAOR, 5th Sess., PM 325 (1950), paras.72-73; Statement of Drohojowski (Poland), GA, UNGAOR, 5th Sess., PM 325 (1950), paras. 111-113.
[51] GA, UNGAOR, 5th Sess., PM 325 (1950), para 97.
[52] Conference of Plenipotentiaries, UN Doc. A/ CONF. 2/ 108/ Rev. 1 (1951), p. 9.

draft. Thus, the discussions reveal a significant part of the sum of the negotiations that took place during the drafting process. The second point of significance is that this being the accession stage the conflicts between leading principles behind the Convention became particularly salient. In the concluding stages, the ideals of universal generosity in contrast with the reality of self-interest were prominent in the discussions. Of particular importance is that at this final stage fewer states participated in the Conference as opposed to the earlier sessions, and some delegates even reversed the earlier positions of their respective States. This underscores the claim of the dissertation, that there is a seamed-in dissonance within international refugee law as a result of the numerous compromises concerning inclusion of foreigners on humanitarian grounds.

The fundamental question that was addressed throughout the entirety of the Conference can be summed up in the simplest of terms – was the "refugee problem" to be limited to Europe in which case only Europeans should be helped, or would this be a universal situation where everyone would be taking on the responsibility to help everyone. The geographical limitation did not emerge until some of the other divisions were debated concerning the known refugee situations. However, the substance of the definition remained the same and did not invite further debate. What had caused the most dilemma was the far reach of a broad definition that was seen to present a "blank cheque."

3.6.1 In Whose Interest? Generous Altruism vs. Self-Interest

A telling indication of the tone and tenor of the discussions of state representatives as part the preparatory works of the Refugee Convention was expressed in the introductory statements of the meetings of the Conference of the Plenipotentiaries in November 1951, beginning with Mr. Rees, a representative of the Standing Conference of Voluntary Agencies working for Refugees,

composed of 23 international and nine national organizations that had been assisting refugees in partnership with the IRO. The work of these voluntary organizations was "carried out in camps, among human beings in the midst of human suffering and misery."[53] Mr. Rees noted that considering the imminence of adopting a legal definition of the term refugees, and in light of the works completed thus far, the voluntary agencies had the impression that "it was a conference for the protection of helpless sovereign states against the wicked refugee."[54] Appealing to the representatives at the conference "to ensure, at long last, that its deliberations sounded a note of generosity and liberalism, not one of fear and niggardliness,"[55] he stated a stark and damning observation:

> The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances. Even those who had constantly attended the Conference's discussions might easily have gathered the impression that the average refugee was a black marketeer in currency, a bankrupt, a dangerous criminal, an enemy agent, a menace to the labour market and a person unfit for higher education.[56]

Following this chastisement, the main issue at hand at the Conference was indeed the refugee definition, but the discussion of the content reflected the tussle over whose interests were ultimately being served. Mr. Chance, the Canadian representative, noted the tension about the subject that "had been impossible to agree" upon, stating that he was in favour of the "widest

53 Statement of Mr. Rees of the International Association of Voluntary Agencies, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, U.N. Doc. A/CONF.2ISR. 19, at 4 (1951).
54 *Ibid*.
55 *Ibid*.
56 *Ibid*.

possible definition."[57] Noting that the motivations of state representatives were being assessed, Mr. Chance put forward his consideration asking that "there should be no suspicion that any ulterior motives lay behind'" his argument.[58] His stance was on the side of inclusive policies that were deemed to benefit both the incoming refugees and Canada at large. The Canadian policy of assimilating newcomers immediately upon arrival to Canada[59] showed an attitude and objective that was "not determined by altruism, but by the conviction that that was the best policy for both parties to the bargain."[60] In that vein, he noted that the worst thing for a refugee would be to "have a sense of being apart from the rest of the community" because "psychological and economic integration was essential."[61] In other words, full membership as soon as possible was to be an objective of the law concerning refugee status, one that was not only evident economically but also in the mindsets of those being integrated and those doing the integrating. Acknowledging that a "particular attitude of mind was difficult to incorporate in the text of a legal document," he stated that the purpose of the Convention was nonetheless "to protect refugees, not states", confirming that a mindset of generosity versus state's self-interest were indeed the competing paradigms.[62] Finally, he concluded that it was in the refugee's best interest "to try and put the past behind them, and welcome their new life in Canada and their status as new Canadians."[63] In sum, refugees would not be considered as refugees upon intention to settle permanently in Canada, but rather as full members of society, as soon as possible.[64]

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[57] Statement of Mr. Chance (Canada), U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, U.N. Doc. A/CONF.2ISR. 19 (1951). [hereinafter Statement of Canada at 19th Meeting]
[58] *Ibid.*
[59] Through automatic granting of permanent residence along with civil rights, followed by citizenship within 5 years at the time. That was in later years reduced to 3 years.
[60] Statement of Canada at 19th Meeting, *supra* note 57.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.

The question of who's interest were being negotiated at the Conference – the receiving state or the incoming refugees – continued with the agenda-setting interjection of Mr. Rochefort of France. He did not parse his words in stating that giving governments the ability to separate "the wheat from the chaff" was also, in his view, "rooted in protecting the interest of the refugees."[65] That statement alone is indicative of at least a part of a sentiment that the "narrow definition" side of the Conference stood for – creating a legal instrument that would assess those that are deemed acceptable for inclusion, the wheat, and those that are not, the chaff. But the French representative saw this approach as benefitting those that are eventually included. That is, giving refugee status to "undesirable elements" would do a disservice to other refugees, he believed, at the risk of causing "a wave of xenophobia prejudicial to the mass of refugees as a whole."[66] In other words, the French representative was warning the Conference delegates that the psychological nature of the settled society in the receiving state would generalize an entire group of newcomers based on any deviation from the perceived norm. However, his statement may have already been tainted by prejudicial ideas about who refugees represent, and how defensive the French would be of their society. That sentiment could be understood from Mr. Rochefort's statement where he "felt that one of the most sacred rights of the individual was to be allowed to preserve his attachment to his native country."[67] He was referring to the view that a refugee was attached to his or her homeland, and hence should not be forced to assimilate, but this could also be understood in two other ways: the belief in France that refugees would not want to assimilate, and likewise the French being so attached to their homeland that there would be psychological barriers in assimilating newcomers.

[65] Statement of Mr. Rochefort (France), *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting,* 26 November 1951, A/CONF.2/SR.19 [hereinafter Statement of France at 19th Meeting].
[66] *Ibid*.
[67] *Ibid.*

This a reasonable deduction based on the psychological theories of attachment to social identity, whether territorial or cultural attachments, but also references to anything being of a sacred value.

3.6.2 Solidarity but only "in Europe"

Taking a prominent role overall, the French delegate, Mr. Rochefort, introduced at the nineteenth meeting an amendment that became the cornerstone of the discussions and debates of the Conference, this being the reinstatement of the words "in Europe" as it was in an earlier version adopted by the Economic and Social Council but taken out in the subsequent deliberations up until he General Assembly. Mr. Rochefort recalled that since 1949, there had been several positions and theories adopted and advanced at the international level in regard to status of refugees. One position was a definition "as narrow as possible" to be espoused in the Statute of the High Commissioner's Office, while the other was to be "as broad as possible" to be included in the Refugee Convention.[68] Throughout the deliberations, the French delegate was peeved that many state representatives were not present at the conference. Mr. Rochefort shared a theory about the lack of representation at the Conference that to him showed an intention by the non-attendees to not sign the Convention, which in that case for them could be as broad as possible as they would not be obliged. Meanwhile, the remaining mandate of the Office of the High Commissioner would not apply to refugees within the territory of the non-signing countries, so the discussion about broad or narrow definitions would not be an inconvenience to the signatories that were not present. Rather, the inconvenience would be placed on the mandate of the High Commissioner, a shared responsibility, and not that of any one Member State.

[68] *Ibid.*

The French delegate recounted the opposing views expressed during the Ad Hoc Committee meetings. The first position was that of the French delegation in putting forth a draft that "ensured that the Convention became an important instrument for the international protection of refugees as well as a *fine expression of international solidarity.*"[69] According to the French delegate, this first draft was "conceived in the most generous spirit and had prohibited any discrimination between refugees and non-refugees;" had endorsed state action "to enable refugees to enjoy human rights and fundamental freedoms," had supported the application of "an ever-widening scale;" and had emphasized harmonization of national legislation with the Convention as well as numerous accessions to ensure practical implementation.[70] Finally, this position was presented as a balance that included the duties of refugees but also a "sympathetic consideration for refugees" from states concerning both admission as well as responsibilities at the international level.[71] This position, however, did not survive the votes of the Ad Hoc Committee, of which two-thirds had opposed the draft and the majority rejected numerous sections.

As a result, the French representation deemed it necessary to abandon this earlier position, but not without throwing some blame around for that change of mind, first at the United Kingdom for expressing "no intention of modifying the fundamental principles applied within its territory, or of creating a class of aliens enjoying special privileges."[72] Further blame from the French delegate was directed at the Ad Hoc Committee as a whole for exhibiting "no sympathy for any of the generous principles embodied" in the draft proposed by France.[73] The other reason that the French abandoned their position was to "preserve within the dual framework of the Convention

[69] Statement of France at 19th Meeting, *supra* note 65. Emphasis added.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.

and the High Commissioner's Office the international solidarity of IRO's Member States" meaning that "any text which failed to command the widest measure of support on those two points would be of no practical value."[74] The way we can understand this sentiment of the French delegate is as follows: for as long as there was evidence of international *solidarity* concerning obligations towards refugees, the French were in support of generous and inclusive provisions. But as soon as Member States were pulling back, or deferring the responsibility, then the French response was to retreat.[75] In this sense, state self-interest and the emphasis on European solidarity prevails.

The French delegate then noted the remark of the United Kingdom representative, which perfectly summarizes the reasoning of self-interest and loss versus altruistic reasoning. The view by the UK representative, with which now the French representative agreed, was that the "Convention was not a treaty under which the Contracting States assumed certain obligations in exchange for certain advantages; it was rather a form of solemn declaration made in order to benefit a third party."[76] In other words, unlike other treaties, there was no benefit to be gained in taking in and assisting refugees if there was no international cooperation that came along with this, meaning that solidarity among the states was tenuous. Altruism, in the psychological sense, as motivation for the sole benefit of another, a stranger no less, was the goal of this supposed humanitarian and human rights treaty, and such a selfless motivation was new and jolting in the grand scheme of treaty-making.

[74] *Ibid*.
[75] The compromise solution proposed by the French delegation "while still trying to arrive at as liberal and generous a text as possible" was approved with the General Assembly resolution of 1949 (319 (IV)) and thereafter the Economic and Social Council in 1950 (Council resolution 319 (XI)). That draft had the words "in Europe" in article 1 concerning the refugee definition had been included in the drafts of the Ad hoc Committee and the Economic and Social Council, but were taken out at the last minute.
[76] Statement of France at 19th Meeting, *supra* note 65.

As noted, the major gripe of the French delegate was the underrepresentation of Member States at the Conference, meaning that the earlier support for the Convention (and its broader definition) was not being met with the same vigour for accession. It was therefore "out of the question" for the French Government to accede to a Convention "which included obligations towards the representative of the United Nations, unless countries represented in that Organization which were not taking part in the work of the Conference undertook similar obligations."[77] States may have committed themselves to the obligations of the UN as a whole but did not show up to the Conference in order to take on obligations themselves by acceding to the Convention. The States that had "accused the French delegation of a lack of generosity" were missing from the Conference, showing that it "was easy to be generous with words."[78]

The discussion turned up in temperature at the twentieth meeting of the Conference when a heated exchange took place between the representative of Belgium and the representative of France. In response to the disappointment of the French representative regarding the absence from the Conference of representatives of certain countries and the interpretation that the countries did not intend to reciprocate, Mr. Herment, the Belgian representative asked: "Was it not, however, a matter of obligations assumed by States vis-à-vis refugees, rather than one of commitments and obligations between States?"[79] The Belgian representative's position was that the draft Convention "was only intended to assure to refugees minimum rights and guarantees" and that the question as to which part of the world the refugees were coming from, or how many would benefit from the Convention, was irrelevant.[80] Pointing out the latent bias in the limitation, the Belgian delegate

[77] *Ibid*.
[78] *Ibid*.
[79] Statement of Mr. Herment of Belgium, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. 20 (1951).
[80] *Ibid*.

stated that the matter at hand "should be considered without regard to the past or to any national prejudice."[81] The Belgian delegate "found it extremely hard to believe that the French Republic would decline to play its part in a humanitarian act of that nature. It was regrettable that the Conference had on occasions adopted an attitude of self-defence vis-à-vis refugees."[82]

Mr. Rochefort's vigorous response was that "France's attitude... did not seem so morally embarrassing as the Belgian representative believed. Whether France acceded to the Convention or not, the French authorities had no intention of closing France's frontiers to refugees. France would continue to pursue the generous and sympathetic policy she had always adopted towards refugees."[83] According to Mr. Rochefort, the reasoning for the position of the French delegation, shared by others, was that "it was pointless to adopt an apparently generous text, if such generosity was vitiated by reservations and a limited number of accessions."[84] He pointed to the signatures and reservations to the 1933 Convention, which was indeed narrowly limited to cover Russian, Armenian and assimilated refugees that should have been supported, but nonetheless was ratified with a number of reservations, including by the United Kingdom and Belgium who now were challenging the French position. Mr. Rochefort was espousing the "realist" position so that the Refugee Convention would not "join the earlier conventions in the purple shroud for dead letters."[85] He closed by asserting that "no country was more eager than France that a convention protecting the rights of refugees should be drawn up, and that it should provide them with effective and real protection. He had therefore been astonished to hear France accused of egoism."[86] At this

81 *Ibid.*
82 *Ibid.*
83 Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. 20 (1951) [hereinafter Statement of France at 20th meeting].
84 *Ibid.*
85 *Ibid.*
86 *Ibid.*

point, an exchange took place between Mr. Rochefort and Mr. Herment that warranted being taken out from the record of the meeting, with agreement from the President of the Conference.

3.6.3 Weighing Risks and Burdens – Categories and Socio-Economic Calculations

The other aspect that troubled the French representative was that the text under consideration constituted the now ubiquitous reference to a blank cheque that was meant to depict the unrestricted nature of refugee movement and hence increased obligations of the states. The concern was that a broad definition would cover all future refugees from all parts of the world, making this a convention that had gone further than any other. Daunting to him was the uncertainty about the "total number of refugees" as well as "their distribution by nationality of origin" perceived to mean that a "whole series of problems" could present themselves in the absence of the words "in Europe".[87] By stating that "the idea of the right of asylum was bound up with that of the *type* of refugee concerned," the French representation was indicating that certain category of refugee could be deemed less worthy of having access to that right.[88]

Much of the argument, in the view of the French delegate, centred on the question of how far the generosity of a state should and could effectively go, and what kind of obligations Contracting States should have to different groups. The Arab refugees in Palestine were brought up as an example of a situation that needed targeted solutions. But the "realist" position expressed was that "progress in the international field was necessarily slow."[89] The one region that was "ripe for the treatment of the refugee problem on an international scale" was Europe.[90] Dealing with all

[87] Statement of France at 19th Meeting, *supra* note 65.
[88] *Ibid*. Emphasis added.
[89] *Ibid*.
[90] *Ibid*.

refugees in the same convention could "risk jeopardising what could certainly be done for the sake of something which could not perhaps be achieved."[91] The concern of the French representation was one of practicality in addition to the aforementioned solidarity. France was not willing to take on an even greater burden, further extending the generosity while others "took no interest in the solution of such problems."[92]

Mr. Petren of Sweden joined with the views of the French representative. While Sweden had a liberal policy concerning refugees, it had a limited absorption capacity as far as numbers, and there was also concern about national security considering the state of world affairs. The Swedish representative was further concerned about the opening words of sub-sub-paragraph (2) "As a result of events occurring before 1 January 1951". In his view, there was no way to know the number of persons that fled as a result of these events, and how many still could. Such a statement could "open the door of entry so wide that states might be obliged to treat as refugees some persons who were, in fact, able to return to their countries of origin."[93]

Likewise siding with the French position, the Italian delegate, Mr. del Drago, expressed that "the geographical scope had caused some uneasiness" noting a potential loss for Italy should they be obliged to take in refugees from outside of Europe.[94] The concern expressed was related primarily to economic reasoning since in Italy "the refugee problem was particularly serious because of its surplus population and high incidence of unemployment" raising for the Italian representation "the gravest misgivings."[95] What daunted the Italian representation was the deletion

91 *Ibid.*
92 *Ibid.*
93 Statement of Mr. Petren of Sweden, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).
94 Statement of Mr. del Drago of Italy, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).
95 *Ibid.*

of the words "in Europe" possibly enlarging the problem "to enormous proportions which were neither foreseeable nor measurable."[96] The Italian position was later reaffirmed at the twenty-first meeting where Mr. Del Drago confirmed support for the French proposal to reinstate the words "in Europe" adding that the "termination of the activities of the International Refugee Organization (IRO) implied a possible financial burden of unknown dimensions, which might become extremely onerous if a country in Italy's position had to assume obligations for refugees from all countries of the world."[97]

Thus, extending the category of refugee to a broader group was daunting to many delegates from a cost-benefit perspective, clearly an economic one, but also security and cultural identity concerns featured in. If the benefit of solidarity between states was ensured, the cost would be dispersed and less of a burden to any one states' generosity. The benefit to the refugees was presented by several delegates as a continued cost for the states. At this point in the asylum negotiations, there was no argumentation about the benefits that newcomers would bring to their host countries – an argument that is much more pronounced in present-day discourse concerning migrants based on years of experience, economic analysis and more.[98] Rather, the benefit at the time for states was one of nobleness and a sense of collaborative duty in a post-war environment – the perceived rewards were based on morality and aversion of further conflicts.

[96] "The Italian Government would find it extremely difficult to accede to the Convention if the original text of article 1 were not reinstated, so as to restrict the application of the Convention to European refugees alone."
[97] Statement of Mr. del Drago of Italy, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-first Meeting, U.N. Doc. A/CONF.2ISR. (1951).
[98] *See* Hippolyte d'Albi, Ekrame Boubtane and Dramane Coulibaly, "Macroeconomic Evidence Suggests that Asylum Seekers Are Not a "Burden" for Western European Countries", (2018) 4 (6) Science Advances online at <https://advances.sciencemag.org/content/4/6/eaaq0883>; d'Artis Kancs and Patrizio Lecca, *Long-term Social, Economic and Fiscal Effects of Immigration into the EU: The Role of the Integration Policy*, JRC Working Papers in Economics and Finance, 2017/4 (EU: Technical report by the Joint Research Centre (JRC), the European Commission's science and knowledge service, 2017).

At the twentieth meeting, non-governmental interventions gave perspectives on behalf of the public and the refugees. Mr. Bell of the organization called Friends' World Committee for Consultation opened on behalf of "considerable sections of public opinion" who had "misgivings about the effectiveness of the Convention."[99] One concern was that "a new group of under-privileged and unprotected refugees would be created."[100] He suggested that enabling the creation of such a group could in turn create political and economic risks greater than those that came along with accepting to integrate the refugees in the host societies. According to him, informed people and organizations favoured that the governments take "a whole series of calculated risks" in order to ensure a stable world order.[101] In a similar vein, the Ms. Sender from the International Confederation of Free Trade Unions intervened to state the refugees' point of view, stating that "the Conference must not allow the citizens of totalitarian countries to feel that they were being abandoned and isolated. Steps should be taken to prevent such persons from sinking into resignation, apathy and submission."[102]

3.6.4 The Non-European Others and Perceived Threats

The "right" action in a refugee context gets muddled when faced with identity-based perspectives. This becomes clear when the discussion at the Conference turned to whom it is exactly that the broader definition would apply. Mr. Mostafa Bey of Egypt addressed the issue of Arab refugees from Palestine, expressing the strong message that the return to their homes of those

[99] Statement of Mr. Bell of the Friends' World Committee for Consultation, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).
[100] *Ibid.*
[101] *Ibid.*
[102] Statement of Ms. Sender from the International Confederation of Free Trade Unions, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

that wished to return was already ordered by the General Assembly by the resolution of 11 December 1948, without practical result while "the situation had gone from bad to worse."[103] He introduced his amendment "to grant to all refugees the status for which the Convention provided."[104] His closing words were reproachful: "To withhold the benefits of the Convention from certain categories of refugee would be to create a class of human beings who would enjoy no protection at all."[105]

The representative of the United Kingdom, Mr. Hoare, proceeded to give the reasoning for supporting "the widest possible solutions" seemingly defensive of any perceptions of these being a result of "egotistical considerations" since the UK "was an island, and therefore better able to control the movement of refugees."[106] Rather, the position of the UK supported the notion that "the status of refugee should be granted to any person fleeing from persecution" since the focus of this international convention "drawn up under the auspices of the United Nations" and thus not focused to a particular area.[107] Mr. Hoare was of the opinion that an extension of the application of the Convention beyond Europe and any movement of refugees outside of Europe would not become a "serious burden on European countries" in the future. Palestinian Arabs were already excluded from the Convention, though he acknowledged the Egyptian representatives' amendment for future inclusion, and "even if an eastward movement were to take place, the European countries would be able to control it."[108]

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[103] Statement of Mr. Mostafa Bey of Egypt, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951) [hereinafter Comment of Egypt at 19th meeting].
[104] *Ibid.*
[105] *Ibid.*
[106] Statement of Mr. Hoare of the United Kingdom, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951) [hereinafter Statement of the United Kingdom at 19th meeting].
[107] *Ibid.*
[108] *Ibid.*

The discussion then addressed an almost omen-like subject from a present-day perspective – the general likelihood of refugees from Arab states, an exchange that is also revealing of the core of the hesitations behind a broad definition being applied universally versus a narrow one limited to Europe. The hesitation can be linked to Europe's longstanding and fundamental fear of Arab and Muslim threat.[109] To that end, Mr. Hoare of the UK was of the opinion that "the risk that European States might be faced with a vast influx of Arab refugees" was small, but if there was such an influx from Arab countries or elsewhere, he thought that "the matter would be one for each European country to deal with individually."[110] That is a pertinent point because of the contradiction in this position that highlights the conflict of the universal application versus national sovereignty sewed into the Convention even from the point of view of the self-professed universalist such as the UK – to have a wide definition that applies to every State, but then suggest that each State may narrow it when push comes to shove. Indeed, this is the wrangle in the present-day European Union context. Back then, Mr. Rochefort fittingly interjected that the question of Arab refugees was "a controversial one" in that the UK's position excluded them, while the Egyptian position left inclusion open.

The question of who should be covered and who should not indicates that the Refugee Convention was not perceived as an all-encompassing human rights treaty as such, but rather as an exceptional humanitarian document that extended the protection of rights to non-citizens, and the process of receiving this protection would not be intended to be an easy one. This was affirmed by another supporter of the French position, the United States of America. Speaking on behalf of

[109] Samuel P. Huntington, "The Clash of Civilizations?" (1993) 72(3) *Foreign Affairs* 22-49 at p 31; Paul Rich, "European Identity and the Myth of Islam: A Reassessment" (1999) 25 *Review of International Studies* 435–451 at p 436; Talal Asad, "Muslims and European Identity: Can Europe Represent Islam?" [in:] Anthony Pagden (ed) *The Idea of Europe: From Antiquity to the European Union* (Cambridge: Cambridge University Press, 2002) pp. 209-227.

[110] *Ibid.*

the American delegation, Mr. Warren noted the series of refugee-focused conventions, mainly in Europe, that were in force before the Second World War. Only after the war, with the result of a large number of refugees, did the United Nations step in. The key issue that concerned the US representative was the remainder of refugees in Europe that were still in need of legal status but not covered and protected under reciprocal treaty arrangements.

Mr. Warren continued by separating the work of the Conference and the previous agreements of the General Assembly. The discussion at the General Assembly, he pointed out, had a high representation of governments (around 60) and so the concept that was developed was of a universal nature that was to be applied to "all refugees to be applied by all the governments of the world" with a broad article 1 and "still wider provisions of the Statute of the High Commissioner's Office."[111] However, in taking "one constructive step…at a time", the first such step would be to meet the requirements within Europe.

In response, Mr. Hoare of the UK stated that one concession had already been made regarding adding the temporal limitation of 1 January 1951, and now there is a territorial limitation. He clarified his point being that "the *fears* of some countries that they would be overwhelmed by an influx of refugees unless the words "in Europe" were reinstated were not well-founded."[112] The influx of which they feared, he noted, was one from the "Far East," but indeed as per the French position "nothing was known of the numbers and needs of refugees in the Far East."[113] He anticipated that the measures required for the region would be different than those in the Convention. Similarly, a "refugee problem in the western Hemisphere" should require a regional

111 Statement of Mr. Warren of the United States, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951) [hereinafter Statement of the United States at 19th meeting].
112 Statement of the United Kingdom at the 19th meeting, *supra* note 106. Emphasis added.
113 *Ibid.*

response with regional conventions.[114] According to Mr. Warren, those that advocated for a broader definition, stating that millions would be excluded if "in Europe" was inserted, were asking governments "to enter into obligations in respect of such large numbers of unidentified persons" which, in his view was "wrong for a body such as the Conference to seek to legislate on that basis."[115] What Mr. Warren did not anticipate is that a regional refugee and human rights-oriented agreement for the "Far east" could not and would not materialize without the interjection of a universality, as migration and mobility increased in the subsequent decades.

By way of summary at the twenty-first meeting, Mr. Warren of the US noted that the "support appeared to be equally divided between the narrow and the broad definitions."[116] So far as the exclusion of the so-called millions was concerned, nothing was known of where they were or of their condition. On the whole, he argued that it would be unrealistic for the Conference to attempt to legislate for refugees in the Far East as the Convention had been drafted primarily in order to make possible a satisfactory life for refugees in Europe, the wording of most of the articles having been adapted to European legislation and conditions. He recalled the emphasis placed by the Egyptian representative on the difference between Middle East refugees and European refugees and submitted that the difficulty of applying to refugees in other parts of the world, where conditions were totally different, a Convention specifically drafted to meet European needs, could not be ignored. The Conference should conceive its objective as the preparation of an instrument to deal with the specific and immediate problem. Finally, he wondered whether the desire for universality could not more readily be given expression in the Statute of the High Commissioner's Office, and whether, in reaching out for something that might be achieved by other means, there

[114] *Ibid.*
[115] Statement of the United States at 19th meeting, *supra* note 111.
[116] Statement of Mr. Warren of the United States, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).

was not a risk of sacrificing the real benefits obtainable from a convention of more limited application.

Mr. Makiedo of Yugoslavia said that a limitation of the benefits of the Convention to certain categories of refugees would leave without protection a number of persons seeking asylum elsewhere and such an arrangement would not be in accordance with the principles either of the Charter of the United Nations or of the Universal Declaration of Human Rights.[117] Limitation of the application of the Convention to persons who had become refugees as a result of events which had occurred prior to 1 January 1951 would have the effect of rendering the instrument static in character and would take no account of persons who became refugees later. In the view of the Yugoslav delegation there was "no justification for any such restriction, for restriction implied discrimination."[118]

At the twenty-second meeting, Mr. Robinson of Israel said that of the three factors governing the definition of the term "refugee," practically no attention had been paid to the substantive requirements for qualification as a refugee.[119] For him the discussion on temporal and geographical factors debated between the "Europeanists" and the "universalists" were mostly academic since the history suggested that the words "in Europe" would make little difference. In his view, the universalists had failed to specify from what parts of the world, other than Europe, candidates for the status of refugee might come. Refugees from different regions would not satisfy the refugee definition except in the areas that recognized them as such. Hence, for the purposes of the Convention, his view was that there were essentially no refugees in the world by this definition

117 Statement of Mr. Makiedo of Yugoslavia, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).
118 *Ibid.*
119 Statement of Mr. Robinson of Israel, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).

other than those coming from Europe – apparently dismissing the Egyptian delegate's intervention about the plight of Palestinian refugees and not satisfied with the other delegates' examples.

This was also in contrast to the intervention of Mr. Habicht of the International Association of Penal Law earlier at the 19th meeting who said that forecasting political developments may not be possible but "that existing refugees in the Middle East alone numbered over 100,000" and that "a piecemeal treatment of the refugee problem by limitation as to time and region would be certain to exclude in the future millions of people."[120] This contrary to what the association was hoping to have from the Convention, "a Magna Carta for the persecuted" serving the interests of the refugees as well as the countries of asylum.

3.7 Decision Time

Mr. Rochefort of France concluded from the discussions that practically all delegations agreed that the Convention should apply at least to European refugees, while also acknowledging that some of the governments present were ready to commit to refugees from outside of Europe. He added that the basis of defining refugees had referred to European refugees and that "the rights and duties mentioned in the draft Convention fitted in much more closely with the social, economic and legal systems of European countries than with those of countries outside Europe, particularly those of Asia."[121] The problem of refugees had been a European problem since 1914 and as a result of two world wars, and hence "Europe should be considered as the centre of gravity of the

[120] Statement of Mr. Habicht of the International Association of Penal Law, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).
[121] Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, U.N. Doc. A/CONF.2ISR. (1951) [hereinafter Statement of France at the 22nd meeting].

problem."[122] Adding "in Europe" to the term "refugee" in the Convention would give European refugees a status that could later be extended to refugees from countries outside Europe. Some countries could enter reservations to go further "in the direction of greater liberalism."[123] But what the French delegate wanted to avoid "at all costs" was for countries to be "burdened by the refugee problem" and being obliged to enter reservations to the general scope of the Convention.[124]

The Norwegian representative, Mr. Anker, reminded the Conference that the original text of Article 1 had been adopted by 41 votes to 5, with 10 abstentions, by the General Assembly at its fifth session, "which would seem to indicate that most governments were in favour of making the Convention as broadly applicable as possible" to ensure that it covered refugees from all parts of the world.[125] He questioned the argument that the refugee problem was solely a European one, referring to the "victims of events in Palestine and Korea" that were mentioned, as well as (seemingly with irony) "a few Greek and Armenian refugees from Asia Minor" before the second World War.[126] In fact, his stance was the exact opposite the French representative in that Mr. Anker thought it fitting and more logical to enable governments to make reservations to an article extended to all refugees regardless of country of origin. Mr. Rochefort's retort was that he is referring to historical facts rather than abstractions, and the fact in his view was that "refugees principally involved had originated from a certain part of the world", and "any attempt to impart a universal character to the text would be tantamount to making it an Open Sesame."[127]

122 *Ibid.*
123 *Ibid.*
124 *Ibid.*
125 Statement of Mr. Anker of Norway, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, U.N. Doc. A/CONF.2ISR. (1951).
126 *Ibid.*
127 Statement of France at the 22nd meeting, *supra* note 121.

The deliberations continued until a compromise was finally reached at the twenty-third meeting when Msgr. Comte of The Holy See proposed to reconcile the divergent views with an option in sub-paragraph A 2 of Article 1 to read: "in Europe, or in Europe and other continents, as specified in a statement to be made by each High Contracting party at the time of signature, accession or ratification." The compromise was intended to satisfy both the French delegate and others, by achieving unanimous support.[128] The amendment to sub-paragraph (2) of paragraph A submitted by the representative of the Holy See was adopted by 22 votes to none, with 1 abstention. This made the President remark that he could not refrain from expressing "his pleasure at the unanimity."

However, the pleasuring unanimity was short-lived. After the subject had been set aside for a couple of meeting, Mr. Rochefort of France at the 30th meeting needed more clarification on the compromise that was accepted.[129] Concerning the choice of alternatives: between committing to "in Europe" or "in Europe and other continents", the French delegate still was not clear what this meant. Regarding the second option of "in Europe and other continents", it was not clear whether the Contracting States would commit to "refugees both from Europe and from other *specified* countries or ... in respect of refugees from the whole world."[130] In the view of the French delegate, the text "would enable government to enter into commitments which were *commensurate*

[128] Mr. Rochefort was supportive of this approach by calling it an "excellent solution" that had the "merit of reconciling the universalist principles upheld by the Vatican with a proper sense of the responsibilities involved". The proposal of the Holy See was further supported by Mr. Philon (Greece), Mr. Schurch (Switzerland), Baron van Boetzelaer (Netherlands), and Mr. Petren (Sweden). Mr. Hoare (United Kingdom) did as well, since he not only stood for a universalist point of view but also a unanimous solution. Mr. Herment (Belgium) was "very happy" for the proposal, hoping that the Conference would not again be divided.

[129] Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951) [hereinafter Statement of France at the 30th meeting].

[130] *Ibid*. Emphasis added.

with their resources and to extend them later should they be in a position to do so."[131] He offered a hypothetical situation where a state had in its territory "refugees of various origins" wishing to:

> bind itself in respect of some but might experience difficulty in binding itself in respect of others, if, for example, the latter were so numerous that application of the Convention in their case would create problems with which the state in question was not at that moment able to deal. Why should such a state not be permitted to restrict its commitments and subsequently to extend them as for as it wished when it was in a position to do so?[132]

From this view, a state should be able to extend the recognition to those from outside of Europe on an ad hoc basis based on capacity, essentially discriminatory against some and rendering the convention meaningless since up until then the system was already ad hoc based on categories (although the ad hoc-ness applied to European refugees as well as non-European ones). In this regard, Mr. Hoare of the United Kingdom, a proponent of the universalist approach, was of the view that a refugee was a refugee regardless where he or she was, and the Convention should ensure that Contracting States provide minimum rights and benefits. With that said, he thought that certain states that subscribe to that view may still feel that they are taking on "unduly onerous commitments in undertaking to grant those rights and benefits to all refugees irrespective of their country of origin."[133] While in his view this attitude was unjustified, "it was a matter for each state to decide" – a statement that is the crux of most asylum and migration policy acquiescing to this present-day.[134] The compromise provided by the Holy See put both views on the same footing. Giving states that wish to limit their obligations "the possibility of extending their commitments

[131] *Ibid*. Emphasis added.
[132] *Ibid*.
[133] Statement of Mr. Hoare of the United Kingdom, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).
[134] *Ibid*.

at a future date, would mean undoing the compromise and encroaching upon the basic conception of the universalistic approach." [135]

Mr. Rochefort was not concerned with opposing the universalist view because he did not feel that it was a question of views, but one of facts. The fact that he wanted to point out is that when France had admitted hundreds of thousands of Spanish refugees, there was no assistance from any other countries, and this included the universalist ones. Another fact was when France unilaterally extended the benefits of the 1933 Convention to those refugees, the other countries were not tasked to contribute. In most cases, refugees were a regional problem. While universalism ought to mean that every country accepted refugees in its territory, irrespective of colour, origin, age or state of health, this non-discriminatory universal approach was "a quite impracticable goal" he thought.[136] Mr. Rochefort further drew the attention to paragraph (a) of section 8, in Chapter II, of the Statute of the Office of the High Commissioner for Refugees, under which the High Commissioner was called upon to provide for the protection of refugees by promoting the conclusion and ratification of international conventions in the plural and not the singular.

Mr. Chance of Canada stated that,

> the discussion seemed on occasion to have degenerated into abstract polemics, utterly divorced from the practical considerations at stake. Surely representatives must be aware that every single provision in the convention which might have placed any government in any kind of difficulty had been so hedged about with qualifications as to have lost much of its practical significance.[137]

[135] *Ibid.*
[136] Statement of France at the 30th meeting, *supra* note 129.
[137] Statement of Mr. Chance (Canada), U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

After some further discussion, the President suggested that provision should be made in the Convention for the Contracting States to choose between the following alternatives: (a) Persons who had become refugees as a result of events occurring before 1 January 1951 in Europe alone; (b) Persons who had become refugees as a result of events occurring before 1 January 1951 in Europe or anywhere else in the world. This proposal was adopted by 13 votes to none, with 8 abstentions.

3.8 Conclusion – Revisiting Past Tensions

Past decisions continue to affect the present-day reality, as do the underlying mechanisms beneath those decisions. Although the coverage of the 1951 Refugee Convention was extended in the 1967 Protocol, many of the problematic issues remain. The sentiments expressed in 1951 during the drafting of the Refugee Convention are the type of arguments that still reverberate in the halls of the European Union. The arguments back then, as now, are based on a number of psychological phenomenon that were presented: perceptions of threats of refugee influxes or a particular kind of undesired refugee, calculations of interests and socio-economic losses versus obligations of altruism, and identity matters related to collaboration or its lack that depends on how vastly or limited inter-state solidarity is stretched. Back then, as now, the final result was a compromised solution.

As noted, the resulting Convention has been questioned by scholars who have challenged its status as a human rights treaty, James Hathaway most prominently though he does make a claim that the Convention is supported by the evolution of human rights and has its strengths in relation to socio-economic rights (noted in Chapter 1). The themes of the psychological frames discussed will be seen again as we move forward to focus on the evolution of European identity through its

foundational treaties, especially its connection to human rights, and how this stands in relation to how refugee rights and migration policies develop in an evolving Europe. The underlying mechanism is one of inclusion and exclusion – the universalist view which is wider/ broader and therefore more inclusionary, versus the Europeanist view that is narrower and therefore more exclusionary. The Europeanist view is primarily Eurocentric in its focus and the interests of the European states and the European refugees, while the universalist view is world-centric. This tension continues.

Chapter 4 – Common European Identity Formation and Asylum

> Everything which is now taking place before our eyes threatens to have explosive consequences for the whole of Europe…Europe must not stand in opposition to the will of Europe's citizens. Let us not forget…that those arriving have been raised in another religion, and represent a radically different culture. Most of them are not Christians, but Muslims…Europe and European identity is rooted in Christianity. If we lose sight of this, the idea of Europe could become a minority interest in its own continent. [1]
>
> –Viktor Orbán

> In the refugee crisis we must not give in to the temptation to fall back on national government action. On the contrary, what we need now is more Europe. More than ever we need the courage and cohesion that Europe has always shown when it was really important. [2]
>
> – Angela Merkel

4.1 Introduction - A Conflicted Europe

There have been calls for more Europe and European solidarity in regards to the refugee context with different versions of what that means exactly.[3] Since the events of 2015 that saw an influx of persons seeking asylum in Europe, a state of crisis has overtaken Europe, but the

1 Viktor Orbán "Those Who are Overwhelmed Cannot Offer Shelter to Anyone" *Frankfurter Allgemeine Zeitung* (September 3 2015) online at <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/those-who-are-overwhelmed-cannot-offer-shelter-to-anyone≥; See also: Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania) online at <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/≥.

2 Angela Merkel 2015. *Statement by Federal Chancellor Angela Merkel to the European Parliament*. Strasbourgx: The Federal Government. [Google Scholar] cited in Marie Wolf & Marinus Ossewaarde, "The Political Vision of Europe During the 'Refugee Crisis': Missing Common Ground for Integration" (2008) 40(1) *Journal of European Integration* 33-50 online at <https://doi.org/10.1080/07036337.2017.1404054>.

3 Gregor Noll, Evangelia (Lilian) Tsourdi, Madeline Garlick, Philippe De Bruycker, Nuno Piçarra, and Aikaterini Drakopoulou, *Searching for Solidarity in EU Asylum and Border Policies*: A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference 26-27 February 2016 Université libre de Bruxelles online at <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>.

psychology underlying this is very much connected to Europe's own identity crisis.[4] The nature of the crisis has been hotly debated, the response of the European Union institutions widely criticized, and what became evident is that Europe's asylum system was not up to par with its intended objectives. There are many analyses underway of the policies and legal frameworks concerning asylum in Europe, more so as these frameworks continue to change significantly on a continual basis. This chapter aims to make a contribution to these scholarly and policy debates by taking a step back and considering, through a social psychological lens, the evolution of European identity, since the Second World War until the beginnings of the Common European Asylum System (CEAS) at the end of the millennium, with respect to European treaties and institutional perspectives on human rights and asylum. The subsequent chapters will consider how this social psychology that feeds into a legal narrative, and vice-versa in a feedback loop, continued to evolve in the first two decades of the CEAS.

Zooming in on the frame of *identity formation of Self and Other* primarily, and *threat-perception* secondarily, a social psychology of inclusion and exclusion is visible in the founding documents and deliberations of European institutions, human rights, and asylum systems. Ultimately, a narrative about European identity formation and a perceived threat of the non-European Other can be seen in the evolution of legal texts and mechanisms that hold together the idea of Europe. In order to understand the conflicted phenomenon that continues to unfold in the

[4] See Claudia Postelnicescu, "Europe's New Identity: The Refugee Crisis and the Rise of Nationalism" (2016) 12(2) *Europe's Journal of Psychology* 203–209. *PMC*. Web. 18 Aug. 2018 online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4894286/≥; Natalie Nougayrède, "Refugees Aren't the Problem. Europe's Identity Crisis Is", *The Guardian* (31 Oct, 2016) online at <https://www.theguardian.com/commentisfree/2016/oct/31/refugees-problem-europe-identity-crisis-migration>. *Nougayrède writes in her opinion piece writes:* "The 2015 refugee crisis has held up a mirror to Europeans: it's forced them to ask themselves who they are, how they define themselves and their actions. If there was a crisis in 2015, it had less to do with the refugees – who knew what they were fleeing and where they wanted to go – and much more to do with the European governments and societies who did not all step up to the plate. In fact, Europe isn't confronted with a refugee and migrant crisis. It's the refugees and the migrants who are confronted with a crisis of Europe. The scandal is that, in the Mediterranean, they have been paying with their lives."

European response to migration, and to refugees in particular, the leading questions here consider if, and in what way, we can describe the European and EU's asylum laws/ policies as being the result of social psychological forces towards social identity and self-categorization. What is the evidence of identity formation in the evolution of European asylum and related human rights frameworks? What is the evidence of threat-perception? The overview points to a dissonance in the evolving European laws and policies that are both inclusionary and exclusionary.

4.2 Europe as an In-Group

The question "what is European identity?" can be answered in many ways. It is well-established within multiple realms of scholarship, from international relations to social psychology, that defining the Self largely involves the counter-point of an Other. Fortunately, although in limited supply, the social psychology theories (Social Identity Theory - SIT, Self-Categorization Theory - SCT) described in Chapter 2 have been applied by scholars of International Relations to the study of Europeanization and European identity. Commenting on the European Union as "an enlarged in-group, in SIT terminology", Ovunc Ongur reflects that there may be a common motivation for Member States to define themselves as a social group, and that this may be psychologically significant for them in that "they relate themselves subjectively for social comparison and the acquisition of norms and values."[5] The same could be said of other institutions that run in parallel to the EU, like the Council of Europe, under the premise that what binds Member States together is an idea of Europe and common shared objectives that may lead

[5] Hakan Ovunc Ongur, "Late-Modern European Self-Definition, the Other, and Social Identity Theory" [in:] Hakan Ovunc Ongur, *Minorities of Europeanization: The New Others of European Social Identity* (London: Lexington Books, 2015) p 51-82., at p 79 [hereinafter Ongur] citing John C. Turner, *Rediscovering the Social Group: A Self-Categorization Theory* (London: Blackwell, 1987) at p 1.

to heightened emotions of a sense of Self. Considering identity formation as not simply in regard to an Other, Trine Flockhart further adds in SIT/ SCT's terms that:

> identities are constructed through complex constellations of "we-groups", in a system of social groups consisting of the "Self/ We", placed in a hierarchical system between the "Other" and … the "Significant We". The "Other" defines what the "Self/ We" is *not* and what it seeks to distance itself from, whereas the "Significant We" defines what the "Self/ We" admires and strives to become.[6]

With this construction, the EU is the Self/ We that can be described as an in-group that "has positively provided its members with higher self-esteem either in the form of a better/more powerful place in world politics, or in the form of material richness, a better cognitive point of social comparison...and a form of higher-level (social) identity (e.g. European identity)."[7] Ongur notes that while Europeanization has defined the in-group, primarily in the form of the EU's "norms, its presence, its discourse, or its values", there remains an out-group, or the Others. In this case, the out-group of Europe's Others that have been frequently pinpointed include Muslims,[8] migrants,[9] Roma,[10] and "the East."[11] Refugees/ asylum seekers in Europe are an especially significant group of Others, firstly because their categorization overlaps with some of the mentioned out-groups (Muslims, minorities, migrants). Moreover, they stand out as an out-group

6 Trine Flockhart, "'Complex Socialization': A Framework for the Study of State Socialization" (2006) 12(1) *European Journal of International Relations* 89-118 at p 94.
7 Ongur, *supra* note 5 at p 80.
8 Talal Asad, "Muslims and European Identity: Can Europe Represent Islam?" [in:] Anthony Pagden (ed) *The Idea of Europe: From Antiquity to the European Union* (Cambridge: Cambridge University Press, 2002) pp 209-227; Fiona B. Adamson, "Engaging or Contesting the Liberal State? 'Muslim' as a Politicised Identity Category in Europe" (2011) 37(6) *Journal of Ethnic and Migration Studies* 899-915; Anthony D. Smith, "National Identity and the Idea of European Unity" (1992) 68 *International Affairs* 55-76.
9 Neil Fligstein, Alina Polyakova and Wayne Sandholtz. "European Integration, Nationalism and European Identity" (20112) 50(1) *JCMS: Journal of Common Market Studies* 106-122.
10 Gail Kligman, "On the Social Construction of 'Otherness': Identifying 'the Roma' in Post-socialist Communities" (2001) 7(2) *Review of Sociology* 61-78.
11 Iver B. Neumann, *Uses of the Other: "The East" in European Identity Formation"* (Minneapolis, University of Minnesota Press, 1999) at pp 39-63.

because asylum seekers, refugees and further sub-group variations, such as beneficiaries of subsidiary protection, are a construction of the European and international laws themselves. This Othering through legal categorization will be discussed in the subsequent chapter.

Two additional temporal conceptions have been proposed – first, the Other being Europe's own past,[12] and second, the assertion that European identity should be future-oriented, focused on democracy, respect for human rights, rule of law and a liberal market economy.[13] In this way, the EU's Others are anti-democratic and illiberal states that oppose the progress of rule of law as well as fundamental rights and freedoms, though this is increasing contested with other visions for Europe proposed. Identifying these Others that are seen to regress European values may bring together the Significant We of Europeanization.[14] The complication in all this is that the versions of the past (what Europe was – war-torn in a negative sense yet professed as civilized and enlightened in a positive sense) and the future (what Europe should become – either a cosmopolitan gateway or a communitarian fortress) are all embedded in the legal narratives that define Europe.

This view of Self and Other is relevant for the understanding of European identity concerning human rights values and how the EU develops systems concerning rights of non-Europeans and obligations of Member States. The Significant We of the European Union has become increasingly defined by human rights principles and the common European frameworks, which implies that the Other includes states that are in breach of human rights or individuals (non-Europeans primarily) that are suspect as to their loyalty to these European values. Ironically, States

[12] Ongur, *supra* note 5 at p 80; Ole Waever, "Insecurity, Security, and Asecurity in the West European Non-War Community" [in:] Emanuel Alder and Michael Barnett (eds), *Security Communities* (Cambridge: Cambridge University Press, 1998) at p 90.
[13] Yasemin Soysal, "Limits of Citizenship: Migrants and Postnational Membership in Europe" (Chicago: University of Chicago Press, 1994).
[14] Ongur, *supra* note 5 at pp 80-81.

and their leaders that are branded for breaching human rights standards also appear to perceive themselves as defending European identity. Viktor Orbán's rhetoric is a case in point as his quote at the chapter's opening makes clear – he is defending the perceived wishes of European citizens from the dilution of a Christian Europe perceived as threatened by a "Muslim invasion,"[15] one which the EU is seen to endorse. As noted in the introduction of the dissertation, this contention became evident during the controversy in September 2019 over the European Commission's portfolio on "protecting the European way of life" – one side defining European values as human rights principles in contrast to another side contending that non-European migrants are the Others from whom the European values should be protected.

Fair to say that most European state leaders, when in opposition to one another, are using the same ammunition – the policies of the European institutions and ideas about European identity that evolved over time and are still under negotiation. This happens because of a very human social psychology that is playing itself out with different variations about who belongs where and under what guise. This process is guided by positive and negative feelings of evaluation about which direction should be taken for members of the European in-group. In this case in Europe, an internal identity conflict occurs where states (forming a smaller in-group negotiating its own internal identity) are either not aligned with or have a different idea of European values (or what factors constitute Europe – a larger in-group), thereby colliding with evolving Self-perceptions.

[15] Numerous online sources reporting on these sentiments by Viktor Orbán, including: "Orban Calls Migrants Muslim Invasion Forces" The Hungary Journal online at <https://thehungaryjournal.com/2018/01/08/orban-calls-migrants-muslim-invasion-forces/≥ and "They Are Not Refugees, but a Muslim Invasion Force" said Viktor Orban visiting Bavaria" *Visegrad Post* (January 9, 2019) online at <https://visegradpost.com/en/2018/01/09/7373/≥. The original quote in the German news is here: Nikolaus Blome "Ihr wolltet die Migranten, wir nicht!" *bild.de* (07.01.2018) online at <https://www.bild.de/bild-plus/politik/ausland/viktor-orban/orban-interview-54403736,jsRedirectFrom=conversionToLogin,view=conversionToLogin.bild.html≥.

As explained in chapter 2, social psychology's Common In-group Identity Model (CIIM) tells us that changing perceptions of members of different groups into a single superordinate group changes attitudes to previously perceived out-group members, and consequently the attitudes can become more positive.[16] The re-categorization that involves a higher-level category of inclusiveness (that of European) changes the intergroup bias (between nationalities) by changing the nature of inclusion and exclusion. The evidence has consistently demonstrated that common one-group representations can reduce negative emotions and biases between groups and ultimately affect behaviours. That said, certain biases can be resistant or can even increase as a measure of re-establishing group distinctiveness, in which case, making space for holding multiple identities can make further space for moderating group status and social values. However, analysis of CIIM also show that some biases are moderated by the nature of the intergroup context. Majority groups have a preference for group assimilation while minority groups prefer pluralistic integration to maintain distinctiveness.[17] This can be seen in Europe both at the macro and micro levels, between an EU that aims for commonness and Member States that want to retain distinctiveness, or the desire of national common identity within Member States in contrast to its increasing pluralism.

Arguably then, a balancing act of this common identity formation is what the European Union is aiming to do – bring together nation-states with what is conceived as the boundaries of Europe into a single superordinate identity body, but still aligned with the motto of "unity in diversity." The repeated mention of common values, common heritage and ultimately a common asylum system as a narrative of European identity within legislative frameworks is prominent.

[16] John F. Dovidio, Samuel L. Gaertner, Gordon Hodson, Melissa A. Houlette, and Kelly M. Johnson, "Social Inclusion and Exclusion: Recategorization and Perception of Intergroup Boundaries" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005).
[17] *Ibid* at pp 253-256.

Simply, common identity requires common rules, and vice-versa, to produce a "commons" – a sharing of resources within groups or communities in which each stakeholder has an equal interest, and there is both individual and collective benefit.[18] This is what Ursula von der Leyen, the first female President of the European Commission, stated in her opening speech in July 2019 – "a Common European Asylum System must be exactly that – common."[19] In fact, in a speech in 1961, the first ever President of the European Commission, Walter Hallstein.[20] endorsed this sense of commonality in Europe, citing psychological underpinnings, stating that:

> amid all the differences there is a basic substance of identical elements, conditions, capacities, values, and a psychological as well as intellectual concepts held in common, a sense of independence in happiness or misfortunate, in jointly shaping or suffering our fate, in common weaknesses, but also in brilliant common achievements – cultural, economic and political.[21]

But another aspect of in-group formation that links with identity formation is that of threat-perception, which serves as one of the underlying motives behind social exclusion.[22] According to *inter-group threat theory*, also called *integrated threat theory*, described in Chapter 2, prejudices are formed based on perception of harm.[23] The theory divides this into realistic and symbolic threats, and the extent of their harm that is perceived.[24] What is proposed forthwith is that there

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18 Research on the Commons, Common-Pool Resources, and Common Property, Digital Library of the Commons online at <http://dlc.dlib.indiana.edu/dlc/contentguidelines>.
19 von der Leyen, Ursula, "A Union That Strives for More: My Agenda for Europe" Political Guidelines for the Next European Commission 2019-2024 online at <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> at p 15.
20 Serving from January 1958 – June 1967 as President of the Commission of the European Economic Community.
21 Speech by President Hallstein on receipt of the Charlemagne Prize, EC Bull 5-1961 at 20 cited in Williams, *infra* note 66 at p 166.
22 Dominic Abrams, Michael A. Hogg, Jose M. Marques, "A Social Psychological Framework for Understanding Social Inclusion and exclusion" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) [Kindle edition] at p 3 of 355.
23 Walter G. Stephan and C.W Stephan, "An Integrated Threat Theory of Prejudice" [in:] Stuart Oskamp (ed.), *Reducing Prejudice and Discrimination* (Mahwah, NJ: Lawrence Erlbaum Associates, 2000) at pp 23-45.
24 Walter G. Stephan and C. Lausanne Renfro, "The Role of Threats in Intergroup Relations" [in:] Diane E. Mackie and Eliot R. Smith (eds.) *From Prejudice to Intergroup Emotions* (New York: Psychology Press, 2002).

are multiple perceived threats that have been embedded in European laws, that are playing out on the European legal sphere. These may be perceived threats of both an outsider as well as an insider as potentially harming the idea of a European identity, one that is built on conceptions about commonality implanted in human rights.

4.3 Human Rights as European Identity after World War II

The assertion that European identity is premised on human rights values is by no means new. Coming out of a history of Enlightenment ideas that were the bedrocks of human rights, democracy and rule of law, at least some of these so-called European ideas were exported, paradoxically, by way of colonialism intended to "civilize" other parts of the world. In turn, the eventual rejection of European colonialism steered the evolution of human rights towards its ultimate global expansion, further challenging the notion that human rights are purely Western.[25] Moreover, as scholars have noted, the idea of Europe as civil and enlightened found its in-group superiority and Eurocentric ideals crushed by the Second World War.[26] Elements of psychological in-group exertion of power against an out-group, the Othering that took place on European territories, inclusion of some and exclusion (extermination!) of others, can be described as

[25] Paul Gordon Lauren, "Proclaiming a Vision – The Universal Declaration of Human Rights" *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press; 3rd edition: 2013) pp. 205 – 240; *Steven L. B. Jensen, "Decolonization – Not Western Liberals – Established Human Rights on the Global Agenda" Open Global Rights (September 29, 2016) online at* <https://www.openglobalrights.org/decolonization-not-western-liberals-established-human-rights-on-g/>. *More on the global sources of justice and human rights can be found in* Paul Gordon Lauren, "The Foundations of Justice and Human Rights in Early Legal Thought" [in:] Dina Sheldon (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015) at pp. 164-193; M. Christian Green and John Witte Jr, "Religion" [in:] Dina Sheldon (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015) pp. 9-31.

[26] Helle Porsdam, "Human Rights and European Identity since World War II"; Hagen Schulz-Forbes, "Before Integration: Human Rights and Post-War Europe"; Jay Winter, "From War Talk to Rights Talk: Exile Politics, Human Rights and the Two World Wars" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

nationalistic in-group bias, social categorization and social comparison that by today's (or even timeless) standards got beyond the bounds of humanity let alone civility.[27] If there were hints in the eighteenth and nineteenth centuries that emerging nationalistic sentiments within the nations that constitute Europe would be contradicting the newly minted ideals of equality and human dignity, the twentieth century's Second World War made it blatantly clear.[28]

Modern Europe, as some argue, was built on a self-conscious attempt to learn from and atone for past mistakes, with human rights as central to the European narrative.[29] The establishment of the UDHR, as described in Chapters 1 and 3, was also seen as an essential characteristic of this European identity.[30] Part of that creation of an international identity meant relinquishing the sanctity of state sovereignty, because, in the words of René Cassin, the French delegate to the UN Human Rights Commission "…we do not want a repetition of what happened in 1933, where Germany began to massacre its own nationals, and everybody...bowed, saying Though art sovereign and master in thy own house."[31] European intellectuals, politicians and professionals therefore sought out to construct the European narratives precisely to emphasize a political space that was also multicultural and cosmopolitan, one that evolves around human rights as a kind of "cultural glue in an increasingly multi-ethnic Europe" but very much connected with

[27] Paul Ricoeur, "Reflections on a New Ethos for Europe" [in:] Richard Kearny (ed) *The Hermeneutics of Action* (London: Sage, 1996) at 9. Paul Ricoeur writes: "The history of Europe is cruel: wars of religion, wars of conquest, wars of extermination, subjugation of ethnic minorities, expulsion or reduction of slavery of religious minorities; the litany is without end."

[28] Michael Wintle, "Editor's Introduction: Ideals, Identity and War: the Idea of Europe, 1939-70" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011) at p 1 [hereinafter Wintle].

[29] Helle Porsdam, "Human Rights and European Identity since World War II" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011) [hereinafter Porsdam].

[30] Jay Winter, "From War Talk to Rights Talk: Exile Politics, Human Rights and the Two World Wars" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

[31] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York : Random House , 2002) xvi at 60.

Enlightenment thinking, which still in typically egocentric fashion was seen as belonging specifically to Europe.[32]

4.3.1 Development of European Human Rights Identity in the Council of Europe

Just as the UDHR came into being, debates took place in 1948 and 1949 within the Congress of Europe and Council of Ministers that saw human rights advocated as defining concepts.[33] A narrative of post-war unity in Europe led to the development of the Council of Europe in 1949 with the principles of a pluralist democracy, respect for human rights and rule of law embedded in the raison d'être of the newly founded organization. Signed by governments of ten states[34] of "Western Europe," the Statute of the Council of Europe asserts that the aim of the CoE is "the pursuit of peace based upon justice and international co-operation", one that "is vital for the preservation of human society and civilization."[35] The preamble makes reference to certain European underpinnings and reaffirms "the devotion to the spiritual and moral values which are the common heritage" of European peoples. The ideals are sought in the interests of "economic and social progress" recognizing a "need of a closer unity between all like-minded countries of Europe."[36] Every member must accept the principles for the enjoyment by all persons within its jurisdiction.[37]

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[32] Porsdam, *supra* note 29.
[33] Hagen Schulz-Forbes, "Before Integration: Human Rights and Post-War Europe" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011) [hereinafter Schulz-Forbes].
[34] The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
[35] Preamble, Council of Europe (Treaty of London, preamble and ie. Article 1(a) of the Statue)
[36] *Ibid*.
[37] Article 3. The current Council of Europe's political mandate was defined by the third Summit of Heads of State and Government, held in Warsaw in May 2005. The current mission of the Council of Europe is to develop within

In 1949, negotiations in the CoE began to establish the European Convention on Human Rights and a court that would uphold the treaty, but this did not come without obstacles. The creation of the Convention came to be only after internal political tensions that involved in-fighting between the Committee of Ministers of the CoE and the Consultative Assembly concerning whether and which human rights should be on the agenda of the CoE. The Consultative Assembly had wanted human rights on the agenda, the Committee of Ministers did not. The final result has been referred to as a "watered-down project" and less ambitious proposal (according to the Assembly view).[38] The view of Andrew Moravcsik is that the ECHR cannot be explained solely by an emergence of idealism, altruism, and the appeal of values that transformed and socialized moral discourse into a shared identity in Europe to which states conformed, but rather that the ECHR negotiations show that states' self-interest guides political behaviour.[39] His reasoning is formed by the observation that it was the newly emerged democracies in particular that wanted binding human rights obligations and democratic governance in contrast to established democracies which were more resistant.

The ECHR maintained a universal intention in its preamble and considered that "the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms." The ECHR echoed the CoE Statute, and was meant to be "the collective enforcement of certain of the rights stated in the Universal Declaration" by

Europe common and democratic principles based on the ECHR and other texts, including promoting awareness and encouraging the "development of Europe's cultural identity and diversity".

[38] Dembour, *infra*, note 47 at p 40. The result was that two sets of proposals were submitted to the Committee of Experts - One for the enumeration of rights (as per the Consultative Assembly), the other for the definition in detail of rights (as per a British proposal on behalf of CoMs/ governments).

[39] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54(2) *International Organization* 54 217–252 online at <https://www.princeton.edu/~amoravcs/library/origins.pdf>.

"governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law." But in spite of a universalistic tone that meant to expand on and actualize the UDHR within a regional focus, scholars have noted that even the discourse on human rights retained some of its arrogance and sense of European superiority of virtue, with a continued post-war Eurocentrism.[40] This identity-making through social comparison, a heightened sense of collective worth, can be seen in the *travaux préparatoires* of the ECHR:

> This is the hope which Europe can and must hold out to the rest of the world, when it seeks to prove that it is a cradle of civilisation. It is through this that we have this respect, this solicitude for the most wretched, the most helpless of men, and that is evidence that we possess a civilisation, and that it is indeed, in this respect, superior to all others.[41]

Thus the Council of Europe, in its inception, had these definitive objectives about a unified Europe based on the common values that are rooted in the premises of human rights. This presumed-to-be shared peaceful, civilized, enlightened identity would bring stability, and therefore a psychological sense of certainty, to those within the self-defined continent. But in this process of self-definition of what a post-war Europe was to be, there hovered the development of a collective sense of what Europe was not.

[40] Schulz-Forbes, *supra* note 33 at p 8, Wolfgang Schmale, "Before Self-Reflexivity: Imperialism and colonialism in the Early discourses of European Integration" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

[41] Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949 at p 102.

4.3.2 Humans, Europeans, Aliens

The statutory self-definitions within Europe in the post-war context were supposed to align themselves with the decrees at the global level. The European Convention on Human Rights was intended to be a European version of the UDHR, but there were noteworthy omissions and insertions into the European treaty. Unlike the UDHR and like the 1951 Refugee Convention, there is no inclusive language of human dignity in the ECHR. This may be due to the intention of the ECHR to be a pragmatic instrument.[42] Indeed, the *travaux préparatoires* show that the intention of the ECHR was to build on the UDHR with more detailed definition and elaboration of a set of rights that is "necessary and practical to protect by the judicial process and court of law."[43] This non-insertion, however, is a glaring omission considering dignity has been viewed, certainly in the drafting of the UDHR, as a foundational concept for human rights and a beacon of European Enlightenment values. What is more, numerous references to dignity are made in grand statements throughout the deliberations of the ECHR, but none of this makes the final draft. Dignity and its relation to asylum in European law as an inclusionary concept will be explored in Chapter 6, including its progression into the CoE and EU laws over the years.[44]

Notably, "freedom of movement" is also missing in the original ECHR, again a deviation from the UDHR (Article 13). It was inserted in 1963 in the Protocol no. 4 to the European Convention, along with provisions on expulsion or denial of entry to nationals, and the prohibition of collective expulsion of aliens. Several decades later, the ECtHR developed a caseload on asylum

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[42] Jean-Paul Costa, "Human Dignity in the Jurisprudence of the European Court of Human Rights" [in:] Christopher McCrudden (ed.) *Understanding Human Dignity* (Oxford: British Academy by University of Oxford Press, 2013) at pp. 393-402; Antoine Buyse, "The Role of Human Dignity in ECHR Case-Law" ECHR Blog (Friday, 21 October 2016) online at <http://echrblog.blogspot.com/2016/10/the-role-of-human-dignity-in-echr-case.html>.

[43] M. Lannung (Denmark) speaking at the Consultative Assembly, 1st session page 50 of the Collected Edition of the "Travaux Préparatoires" of the European Convention.

[44] Note that even the 1961 European Social Charter did not have a reference to dignity in its original version. The 1996 version had a reference to dignity, but only in its relation to the "right to work".

seekers, that will be discussed further on. Nonetheless, the ECHR had also omitted the provision on the right to asylum, again in contrast to the UDHR (Article 14), and subsequent regional conventions.[45] One suggested reason for this refers back to the 1951 Refugee Convention, drafted at the same time as the ECHR, considered to be a *lex specialis,* governing the specific subject of asylum.[46] Otherwise, as Marie-Bénédicte Dembour infers in *When Humans Become Migrants*, the issue of asylum had "touched too sensitive a European nerve to be positively discussed as the Convention was debated."[47]

> If anyone had pushed for it, a right to asylum would assuredly have proved controversial, as it had been in the United Nations. But there is no indication that anyone did. Refugees, guest workers and other foreigners were left outside the parameters of protection devised by the Council of Europe. Their exclusion seems to have rested upon a consensual understanding.[48]

The ECHR was meant to have these precise boundaries at the time of drafting. While the omissions can be explained by a desire to be pragmatic, this reasoning also has to be weighed against what *was* inserted into the ECHR. In this case, scholars have pointed to the exclusionary elements in the ECHR, specifically Article 16. The Article allows signatory states to restrict the political activities of non-nationals without infringing the freedom of expression (Article 10), freedom of association (Article 11), and the prohibition of discrimination (Article 14). Hélène Lambert points out that this article that refers specifically to aliens is the only explicit exception to the non-discriminatory clause and has been criticized for conflicting with Article 1 (the

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[45] American convention on human rights (1969) has references to both asylum and dignity, as does the African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981, Entered into Force October 21, 1986
[46] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (*Human rights files No. 9* (revised) (Council of Europe Publishing, 2010).
[47] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015) at p 59. [hereinafter Dembour].
[48] *Ibid* at p 58.

enjoyment by everyone of the rights and freedoms in the ECHR) and for applying to wide provisions such as non-discrimination in Article 14.[49] Dembour concludes that "giving states such leeway can only be based on the idea that 'the alien' is a human being who does not and should not have the same rights as a citizen."[50] The Commission case of *Piermont v. France* in 1995 found the provision to be outdated considering the rights of aliens.[51] There have been calls by the Parliamentary Assembly for the Council of Europe to delete this article.[52]

Although the clause is contrary to the UDHR and in contrast to its counterpart in the American Convention of Human Rights, this restriction did follow a general practice of states in Europe since the late nineteenth century.[53] Until then, there was no relevance in distinguishing between national and non-national because for most there was no direct relationship with the state. In the late nineteenth century and early twentieth century, European countries began to form nationality legislation and policies concerning aliens, due to perceived threats to political exiles and aliens considered undesirable, heightened by the Second World War. The practice was meant to restrict the rights of the "socially imagined alien," hence at the time the exclusion of the alien under the European Convention was not considered an "oxymoron to the human rights logic."[54] The clause was adopted uncontested, and although it has not been applied over the years, it does surface in deliberations of the court.[55] From a historical standpoint, however, Dembour surmises

[49] Hélène Lambert, "The Position of Aliens in the Relation to the European Convention on Human Rights" (Council of Europe Publishing, 2007) at p 25 [hereinafter Lambert].
[50] Dembour, *supra* note 47 at p 35.
[51] *Piermont v. France* Application 15773/89 1995 Eur. Ct. H.R. 14 (27 April 1995). Series A. No. 314.; Roza Pati, "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective" (2005) 23 *Berkeley Journal of International Law* 223.
[52] Lambert, *supra* note 49 at p 25.
[53] *Ibid* Lambert referring to *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights*, Vol. III (1976), 266; Commission's statement in *Piermont v. France*, paragraph 58: "those who drafted [Article 16] were subscribing to a concept that was then prevalent in international law, under which a general, unlimited restriction of the political activities of aliens was thought legitimate".
[54] Dembour, *supra* note 47 at p 36.
[55] *Ibid* at p 51 and p 59.

the significance of the alien clause in Article 16 by pointing to "a possibly enduring European attitude of closure and discrimination towards the migrant."[56] She explains:

> Article 16 must be treated as a significant manifestation of the thinking which presided at the elaboration of the Convention. Going further, it is likely to be an expression of general European reflexes. If so, these reflexes would also be found within the benches of the European Court of Human Rights. The idea that the alien can be discriminated against by contrast to citizens might then still be a premise which remains at the heart of the way in which the European Court of Human Rights approaches migrant cases today.[57]

She concludes that a more elaborated reading of the history of the ECHR shows a greater interest "in curtailing than protecting the rights of aliens/ migrants."[58] The final result of the ECHR is viewed as a citizen-centred focus in a post-war context where the very intention of the human rights frameworks established was to restrain sovereignty.[59] Importantly, the purpose of the European Convention is observed to primarily "ensure liberty 'for us', citizens of states which had gone astray during World War II" and even though aliens were not fully excluded from the convention, it was clear that citizens were the primary consideration.[60]

Likewise, citizens within Europe were the primary consideration of the cousin of the ECHR, the European Social Charter ("Social Charter"), effective as of February 1965 and revised in 1996. Similar reflexes can be seen in this complementary law. However, unlike the ECHR, the Social Charter does not apply to everyone within the jurisdiction but to nationals of the state party

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56 *Ibid* at p 3.7
57 *Ibid* at p 60.
58 Dembour, *supra* note 47 at p 59.
59 Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) *International Organization* 54 (2), 217–252 at 219 .
60 Dembour, *supra* note 47 at p 42, citing Ed Bates "The Birth of the European Convention on Human Rights—and the European Court of Human Rights" [in:] Jonas Christoffersen and Mikael Rask Madsen (eds) *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011 17–42 at p 41; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010) at p 372.

and to nationals of other state parties that are either lawfully resident or working in the concerned state. The original Social Charter did not include a non-discrimination clause, but this was rectified in the Revised Social Charter in 1996, which includes a prohibited ground of "national extraction or social origin."[61] Nonetheless, the explanatory notes clarify that "whereas national extraction is not an acceptable ground for discrimination, the requirement of a specific citizenship might be acceptable under certain circumstances"[62] and so the exclusionary elements remain, as will be discussed in Chapter 6.

Hence, we can see the tension in the development of the ECHR and the Social Charter between these presumed to be universal values that are intended to apply to "everyone," that desire to have human rights values at the centre of an evolving European identity, but in fact the universality stopping at the mental borders of what is conceived of as belonging to Europeans in the quest to preserve peace and a European civilization as a heightened sense of Self. Inclusiveness of the non-European within the protection of European-wide treaties in later years will be discussed, and at the time of writing, the (in)applicability of certain provisions to ensuring the human rights of non-Europeans continues to be challenged. For now, a historical benchmark has been pinpointed, a legislative starting point that has a cognitive dissonance in its very roots.

4.3.3 The Early Hints of Human rights in the European Community

Human rights as part of an European identity-forming exercise can also be found in the early treaties that ultimately formed the European Union. In contrast to the clear objective of the Council of Europe as a human rights-focused institution, the beginnings of the European Union

[61] Article E, Part V, European Social Charter (revised).
[62] Explanatory Report, European Social charter (ETS no. 163).

and its intentions for "European identity" are a bit circuitous. Although the EU did not take on a specifically human rights agenda because, "human rights were by and large seen as sufficiently protected by each individual nation state"[63] under provisions of the Council of Europe and the United Nations, there is evidence that human rights protection was present in the initial deliberations behind the establishment of the European Economic Community, including its intentions for close cooperation with the Council of Europe under ECHR standards. Gráinne de Búrca challenges the usual narrative of the origins of EU law as having a solely economic focus and being silent in on human rights protection. Reviewing documents on early discussions before the adoption of the European Economic Community (EEC) Treaty in 1957 "reveals that a robust and comprehensive role of human rights protection within the new European construction was contemplated then."[64] She exposes how:

> …the formal constitutional framework for human rights in the EU today stands in marked contrast with the overt embrace by the drafters of the early 1950s of the EC as an organization committed to human rights protection and promotion in all of its spheres of action, both internal and external, which would be properly engaged in monitoring and scrutiny of its MS, and which would be an integral part of the emerging regional and international network of human rights regimes.[65]

The often-cited claim that the EU did not have a human rights objective,[66] but was solely committed to creating a common economic area can also be questioned simply by pointing to the language of the founding treaties themselves, and more so considering the later development of

63 Porsdam, *supra* note 29 at p 29.
64 Gráinne de Búrca, "The Evolution of EU Human Rights Law" [in] P. Craig and G. de Búrca (eds), *The Evolution of EU Law, Second Edition* (Oxford University Press, 2011) [hereinafter de Búrca].
65 *Ibid*.
66 Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, 2004) at pp 137-138 discussing a number of scholars that made this conclusion. [hereinafter Williams].

social and economic rights.[67] The preamble of the Treaty of Paris in 1951 that establishes the European Coal and Steel Community, signed by six governments[68] has a post-war tone of seeking to safeguard *world peace* through an organized Europe that brings *civilization* and takes concrete actions to create *solidarity* through the establishment of common bases for economic development. There is a direct link to development in the form of "expansion of production" to raise the standard of living that will further efforts towards peace. The signatories therefore resolved to "substitute for historic rivalries" and look for shared interests to establish an economic community "among peoples long divided by bloody conflicts" and direct them through institutions towards a "future common destiny."[69]

Between 1952 and 1953, selected committees drafted a European Political Community Treaty, which included provisions on human rights, articulated as being part of a longstanding objective of European political integration.[70] However, the project was abandoned after debates at an Intergovernmental conference in 1953, at least partly due to the "supranational nature of the approach."[71] A more restrained and pragmatic approach replaced the plans for European political integration, and this came in the form of European Economic and Atomic Energy Communities established in 1957.[72] Because of the failure of the European Defense Treaty in the early 1950s any ambitions for European integration and the creation of a European political community had scaled back.[73]

[67] Patrick Twomey, "The European Union: Three Pillars without a Human Rights Foundation" [in:] David O'Keefe and Patrick Twomey (eds), *Legal Issues of the Maastricht Treaty* (London: Wiley Chancery Law, 1994) at pp 121-2.
[68] Germany, Belgium, France, Italy, Luxembourg, and the Netherlands.
[69] The Treaty of Paris in 1951 establishing the the European Coal and Steel Community (Paris, 18 April 1951).
[70] de Búrca, *supra* note 64 at pp 467-475.
[71] *Ibid* 474.
[72] *Ibid* 475.
[73] *Ibid* 466.

Arguably, the objectives within the language of the founding treaties articulated the groundwork of what would in later decades, the second generation, be encompassed by social and economic rights, and even a third generation "right to development" with the objective to raise the standard of living of European peoples. The Treaty of Rome of 1957 creating the European Economic Community or 'common market' reaffirmed the earlier identity formation sentiments, determined to "establish the foundations of an *ever-closer union among the European peoples ...to ensure the economic and social progress* of their countries by common action in eliminating the barriers which divide Europe." By strengthening the unity of economies to "ensure their harmonious development", the means would involve reducing differences between the various regions and "mitigating the backwardness of the less-favoured", confirming "the solidarity which binds Europe and overseas countries", again with the goal of strengthening safeguards *for peace and liberty* by establishing this combination of resources, and calling upon the peoples of Europe who share their ideal to join in their efforts.[74]

The joint efforts within the founding treaty also called for the establishment of an economic area where *freedom of movement of persons,* alongside goods, services and capital, would be key.[75] Freedoms are considered rights in the liberal traditions, and while the treaty did not articulate the clause in terms of a *right to* the freedom of movement, as did the UDHR, there is an overlapping in language that proves to be significant. More so significant because this article in the Treaty of Rome is followed by a call for "abolition of any discrimination based on nationality between

[74] Treaty establishing the European Economic Community (Rome, 25 March 1957) and connected documents. Luxembourg: Publishing Services of the European Communities, [s.d.]. 378 p. "Treaty establishing the European Economic Community", p. 5-183 online at <https://www.cvce.eu/content/publication/1999/1/1/cca6ba28-0bf3-4ce6-8a76-6b0b3252696e/publishable_en.pdf>

[75] Art 3 of the Treaty of Rome: "an internal market characterised by abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. The free movement of workers to be achieved by the end of the transitional period in 1968" (Article 48. 1)

workers of the Member States, as regards employment, remuneration and other working conditions" that are "subject to limitations justified by reasons of public order, public safety and public health."[76] The onus was put on the states within the European Community to create a common area where freedom of movement would be permissible. It can be said, therefore, that *a* human right was already instilled in the founding text of the European Union, even if this was not overtly framed as a fundamental right. A reference to rights was implicit to the evolution of EU law, and these provisions were in the "nature of fundamental rights."[77]

That said, the freedom of movement envisioned was an insulated one, meant for Europeans. In the Treaty of Paris in 1951, free movement of persons was reserved for "workers who are nationals of Member States."[78] The Treaty of Rome in 1957 referred to the "freedom of establishment" (which includes the right to engage in and carry on non-wage-earning activities, and to set up and manage enterprise) as applicable to "nationals of a Member State in the territory of another Member State."[79] However, in a slight deviation, the Treaty also permitted the Council[80] to extend the scope to cover free movement of "services" to "nationals of any third country who are established within the Community".[81]

These early hints of human rights in the founding treaties of the European Community that ultimately led to the establishment of the EU expressed the underlying desire of unity, solidarity,

[76] Article 48: 1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period. 2. This shall involve the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions. 3. It shall include the right, subject to limitations justified by reasons of public order, public safety and public health.
[77] Manfred Dauses, "The Protection of Fundamental Rights in the Community Legal Order" (1985) 10 *EL Rev* 399 cited in Williams, *supra* note 66 at p 142.
[78] Article 69.
[79] Article 52.
[80] This refers to the Council of the European Economic Community that was established in 1958 and is now the Council of the EU.
[81] Article 59.

freedom, development, and peace by means of social and economic progress. The goal undoubtedly was to diminish the negative biases of rival inter-group conflict and instil positive feelings of interconnection as one European Community and its union of peoples. This lay the foundations for a common European human rights identity to come.

4.3.4 The European Court of Justice and Political Declarations in the 60s and 70s

The thirty years that followed the Treaty of Rome that established the EEC in 1957 would see a gradual criss-crossing of concepts within the European legal sphere in defining the scope of "European" vis-à-vis European institutions and national responsibility for a cross array of interlocking issues that concerned human rights, migration, and ultimately, the source and outcome of what is intended to be a European identity. As part of this process, a series of cases in the 1960s and 1970s, nationally and within the European Court of Justice (ECJ), began to redefine and solidify the European Communities' connection to human rights. In the 1960s, the ECJ declared the autonomy of the Community legal order enabling European citizens to invoke Community law against domestic measures in national courts. The *Van Gen den Loos* ruling (1963) introduced the doctrine of direct effect into Community law, which allows individuals to rely on Treaty provisions, the "spirit" of which not only related to states but the citizens of the states, or European "peoples."[82] Thereafter, the ECJ begun to adjudicate on "the supremacy of European law vis-à-vis the legal systems of the Member States" – EEC law rules supreme over conflicting national legislation.[83] That same year, the ECJ ruled in the *Hoekstra* case, concerning free movement of

[82] *Van Gend en Loos v. Nederlandse Administratie der Belastingen* Case 26/62 [1963] ECR 1.
[83] Porsdam, *supra* note 29 at p 29; *Flaminio Costa v. ENEL* Case 6/64 [1964] ECR 585; Morten Rasmussen, "From Costa v. ENEL to the Treaties of Rome: a Brief History of Legal Revolution" [in:] Miguel Poiares Maduro and Loic Azoulai (eds) *The Past and the Future of European Law: The Classics of EU Law Revisited in the 50th Anniversary of the Rome Treaty* (Oxford: Hart, 2010) at pp 69-86.

workers, that the definition of worker would not be left to national legislation, inching forward the idea of European citizenship by protecting individuals under European Community law.[84]

Moreover, starting in the late 1960s, the ECJ developed a doctrine under which Member States should protect fundamental rights as part of the general principles of European Community law when they act within the scope of EU law.[85] Over the years during which the human rights doctrine has evolved, the ECJ has identified several different normative underpinnings that include the Treaty of Rome, the constitutional traditions of the Member States, and international treaties, in particular the ECHR.[86] Recognizing human rights as "general principles" followed the insistence of the national courts in several Member States that the supremacy of EU law as asserted by the ECJ would not stand if it contradicted constitutional human rights protection at the national level.[87] This means that the national traditions would feed the Community's general principles in their mutual evolution. This mirroring mechanism is also a statement of a European constitutional identity based on human rights, because even though an explicit reference to human rights was left out of the EU founding treaties, they nonetheless made their way in through the principles invoked by the national courts. This interaction between European Community law and national legislation, as per their human rights dimensions and origins, would prove in later decades, as we shall see, to be the point of contention as it concerns cases of asylum seekers and others that fall into the legal categories of non-Europeans.

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[84] *Hoekstra v. Bestuur der Bedrifsvereniging voor Detailhandel en Ambachten* Case 75/63 [1964] ECR 177.
[85] Case 29-69 *Erich Stauder v City of Ulm* Judgment of the Court of 12 November 1969; Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* Judgment of the Court of 17 December 1970
[86] Porsdam, *supra* note 29 at p 29 quoting Henry Steiner and Philip Alston (eds) *International Human Rights in Context: Law, Politics, Morals. 2nd edn* (Oxford: Oxford University Press, 2000) at p 790.
[87] Steve Peers, "Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law" [in:] Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff Publishers. Leiden. Boston, 2006) at p 116.

The 1970s brought about further developments for European identity-making, starting with the "European Political Cooperation" on foreign policy that led to the "Declaration of European Identity" affirmed by nine Member States of the European Community at the Copenhagen European Summit in December 1973. The Declaration pronounced that although the states "might have been pushed towards disunity by their history and by selfishly defending misjudged interests," they have overcome this enmity and decided that a United Europe was necessary for "the survival of the civilization which they have in common."[88] There is again an assumption of having the same common basis of law, politics and morality, and even attitudes about life in order to build a society.[89] The Declaration reads:

> The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity.[90]

For the maintenance of peace, the Nine declared to preserve "their own security" through military alliances[91], while subsequently stating that "European unification is not directed against anyone, nor is it inspired by a desire for power,"[92] but to "benefit the whole international community in order to create equilibrium and basis for co-operation."[93] The 1977 Joint Declaration

[88] Para 1.
[89] Para 3 "The diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism."
[90] Para1.
[91] Para 8.
[92] Para 9.
[93] Para 9.

of the European Parliament, Council, and Commission further reaffirmed the prime importance that the institutions "attach to the protection of fundamental rights, as derived in particular from the constitutions of Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms."[94] This statement of the three political institutions is seen to have a symbolic importance.[95] Thereafter, the 1978 Copenhagen Declaration on Democracy was the first to refer to respect for human rights as "essential elements of membership" in the European Community, further reaffirming this identity vis-à-vis external actors.[96]

In sum, early ECJ case law directed at strengthening the reach of European Community Law on behalf of European citizens as well as the political strategizing that reaffirmed the aims of establishing an internal commonness with human rights as a basis show the progress of embedding a European identity within the institutional frameworks that occurred in the 60s and 70s.

4.3.4. An Invented Identity?

The European Community certainly grew into having human rights as an identity, and this continued more assertively in later decades. But whether human rights were always part of the

[94] Reference Joint Declaration by the European Parliament, the Council and the Commission, *Official Journal of the European Communities* No C 103/1 (27. 4. 77) online at <https://op.europa.eu/en/publication-detail/-/publication/82268663-99a1-467e-bb1f-8d09f2a9599a>.
[95] de Búrca, *supra* note 64 at p 479.
[96] European Council, *Conclusions of the Presidency* (Copenhagen April 20, 1978) online at <https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf≥ at p 13. The declaration reads: "The Heads of Government confirm their will, as expressed in the Copenhagen Declaration on the European identity, to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy of the rule of law, of social justice and of respect for human rights. The Heads of State or of Government associate themselves with the Joint Declaration by the European Parliament, the Council and the Commission whereby these Institutions expressed their determination to respect fundamental rights in pursuing the aims of the Communities. They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities".

initial intentions of the foundational identity of the European Community – as suggested earlier and asserted by several scholars – can weigh equally on both the affirmative and negative sides of the argument. Seemingly, the language of cooperation in a social psychological sense or the "spirit of the Treaties" was intended to create a belief in a European identity that would bring together rivalling states in a larger common in-group, a common identity, one that gathered around joint social and economic development. In other words, cooperation towards peace rather than competition that leads to war, whether or not it was precisely encapsulated in what we now consider human rights language.

But with scepticism about the authenticity of the human rights emphasis, Andrew Williams focuses more on a later reading into the EEC treaties of human rights as being the "spirit of Europe" and common heritage into the treaties as a way to establish this shared identity and norms of behaviour. [97] Williams points to the notion of an "invented tradition", articulated by Eric Hobsbawm and Terence Ranger, as seeking "to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past."[98] The suggested purposes of such a process are "establishing or symbolizing social cohesion or the membership of groups, real or artificial communities;" "establishing or legitimizing institutions, status or relations of authority;" and "socialization, the inculcation of beliefs, value systems and conventions of behaviours."[99] Williams takes this invented tradition perspective and asserts that the origins myth about the tradition of human rights in the European Community provided a sense that community

[97] Williams, *supra* note 66 at p 142 writes: "[…]the imputation of a spirit within the Treaties, reasonably enough assumed to substantiate the political designs of the institutional actors, required some extra ballast if it were to contribute to the search for authenticity beyond the economic. The response was to allude to another spirit, a spirit of Europe, a far deeper and older concept that entailed the adoption of a rhetoric of tradition and common heritage that was incorporated into the European enterprise by implication."

[98] *Ibid* Williams at p. 144; Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge: Canto, 1992) at p 1.

[99] *Ibid* Hobsbawm and Ranger at p 9.

cohesion was being established.[100] Whether human rights objectives were intended in the origins of the European project or from a later socialization and inculcation, there is clear evidence of a strong push for creating an in-group membership in a superordinate body based on common values and decision-making authority at a pan-European level.

4.3.6 Refugees Excluded in Early European Community Law

While an identity based on human rights for the European peoples can be read both into and within the founding treaties of European institutions, this initial process of in-group formation did not extend to include refugees. Elspeth Guild argues that "it is not as a result of oversight that the EU failed to embrace refugees. There was, even from the beginning of the EU project, an antipathy towards them which resulted in their exclusion from the benefits of EU free movement rights. This antipathy remains."[101] As described in Chapter 3, there was a tension among states in the development of international refugee law that vacillated between humanitarianism and states' self-interest. Although elements of humanitarianism in several respects prevailed under international law, the refugees of concerns to the original European agreements between the inter-war periods until the Cold War – among them Armenians, Jews, Spanish Civil War émigrés, and refugees from Soviet states and others – were not wanted.[102] That said, the reception attitude

[100] Williams, *supra* note 66 at p 144 writes: "The concept of the underlying influence of human rights relied upon a *belief* that they were fundamental its adaptation signified a transformation of the text from the functional to encompass a spiritual dimension. In this sense, the embrace of human rights acted as a means of making explicable and authenticating not only past events and decisions but also present activities and future intentions. This returns us to the role of narrative and myth in establishing origins and justifying behavior of an institution. On that basis the story told so far has all the hallmarks of a myth in the making."[100]

[101] Elspeth Guild, "The Europeanization of Europe's Asylum Policy" (2006) 18 (3-4) *International Journal of Refugee Law* 630–651 at p 633 online at <https://doi.org/10.1093/ijrl/eel018> [hereinafter Guild 2006] referencing Art. 3(2)(c) and (d) Directive 2003/109.

[102] Marrus Michael Robert, *The Unwanted: European Refugees in the Twentieth Century* (Oxford: Oxford University Press, 1985).

evolved as the demographics changed with the shifting of source countries. Refugees that were dissidents from communist states had a moral-political value related to the Cold War and thus generally received protection in (Western) Europe, even seen as heroic – "white, male, anticommunist."[103] This label of the refugee transformed when migration/ migrants from the Global South (largely connected to decolonization) were increasingly coming to Europe.[104]

The exclusion can be understood from a social psychological point of view concerning the Other, perceived through realistic and symbolic threats, but it is self-contradictory within the European identity-formation exercise for a number of reasons. Firstly, refugee status is determined through a process that involves adjudication about a violation of human rights of the applicants in order to protect their human rights, hence just as the European identity is human rights-based, so is the refugee identity. However, two divergent systems emerged in international law, separating refugee rights from general human rights, and only in later years these groups of rights have progressively intersected more consciously.[105] Secondly, the commitments to the 1951 Refugee Convention, as described in Chapter 3, obliges states to treat refugees as favourably as another foreigner (an "alien" as was the term back then) in the same circumstances, and at the time of drafting of the Convention, this included European aliens because the refugees were by and large European. Finally, as discussed, provisions for integration of refugees and their socio-economic rights are reasonably generous within the 1951 Refugee Convention itself (referred to as "assimilation" at the time of drafting), which means that the obligations of European states towards

[103] B.S. Chimni, "The Geopolitics of Refugee Studies: A View from the South" (1998) 11(4) *Journal of Refugee Studies* 350–374 at p 357.
[104] Diana Thomaz, "What's in a Category? The Politics of Not Being a Refugee" (2018) 27(2) *Social & Legal Studies* 200–218 at p 203.
[105] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2016); Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford : Oxford University Press, 2019).

the socio-economic rights of refugees, *and* arguably asylum seekers, since the 1951 Refugee Convention does not distinguish between the two, is to include refugees within the social and economic development of the state.

Elspeth Guild notes that there was pressure in the early EEC deliberations to include refugees in the implementing legislation on free movement of workers that took effect in 1968, but there is no such reference in the regulation.[106] Only a non-binding resolution was agreed by the Member States to treat requests by recognized refugees "favourably" with regard to their work and movement in other Member States, when possible.[107] In subsequent years, when references to human rights began to appear in ECJ judgements and EEC policies, this did not extend to asylum-related rights. Refugees were later included in a 1971 Regulation concerning social security schemes.[108] However, as Guild notes, when the implementation of the regulation came up in 2001, the ECJ did not interpret this in favour of the refugees. A requirement by the Regulation for the individual to have an affiliation with the social security system of more than one Member State meant that refugees could no access this right because they did not have the right of free movement between Member States, and therefore this protection could not apply.[109] Guild observes that the Regulation is "perhaps, the first EU example of apparent inclusion of refugees into the rights

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[106] Guild 2006, *surpa* note 101 at p 633; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, No L 257/2 *Official Journal of the European Communities* 19.10.68.

[107] *Ibid* Guild.

[108] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

Article 2 - Persons covered

1. This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of workers who have been subject to the legislation of one or more Member States, irrespective of the nationality of such workers, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

[109] Guild 2006, *surpa* note 101 at p 633 referencing 95/99 Khalil [2001] ECR I-7413.

system of EU law" but as the ECJ ruling shows, it is a further example of "their actual exclusion because of the territorial restrictions on their movement which have the effect of rendering them invisible in law."[110]

Not surprisingly, migration was a contentious issue from the beginning of the creation of Community law, seen as "a 'challenge to the Nation- State' and potentially posing a security threat."[111] The exclusionary European reflexes that Dembour notes concerning the ECHR's alien clause, Guild likewise observes in the early European Community policies: "[t]he failure to include refugees as a central part of the EU project was not simply an oversight by an economic entity which was focused on market integration, it was a positive choice."[112]

4.4 Freedom of Movement in Defining European Unity

The choice to exclude refugees from the early EU project connects back to the nation-states' monopoly over the right to authorize and regulate movement. This is done through codified mechanisms for identifying persons that belong and do not belong within defined territories, and has been central to the very construction of state identity since the French Revolution and amplified by the Second World War.[113] Against persistent opposition, nation-states within the European Community came to an agreement on freedom of movement between their territories, one in which they mutually abandon their sovereign authority over borders and checks by eliminating them altogether. But a commitment to freedom of movement had a historical precedent in Europe –

110 *Ibid* Guild.
111 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial and Refugee Rights Under EU Law* (Oxford: Oxford University Press, 2017) at p 15 [hereinafter Moreno-Lax].
112 *Ibid Guild* at pp 632-633.
113 John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000) at p 2. He makes this contention through a thorough historical reflection.

eased restrictions on internal movement in France following the French Revolution and reduced barriers on free movement in Germany as part of the unification process in the nineteenth century.[114] Creating a closer union with freer internal mobility, therefore, went hand in hand with solidifying identity and external boundaries.

In this respect, the year 1985 was a game-changer. Straight away in January, the newly appointed President of the European Commission, Jacques Delors, called for the creation of the single market as being the main objective of the EEC treaty.[115] A White Paper by the Commission on the subject followed suit on June 14th with a now-or-never tone that recognized Europe to be "at a cross-roads",[116] then a conference held in Milan at the end of the month to draft the treaty on the finalization of the internal market. Impatient with the slow pace of realisation (partially due to British objections),[117] on that same date, a select number of countries – Belgium, France, Germany, Luxembourg and the Netherlands – went ahead and signed the Schengen Agreement for the abolition of border controls, a pact that became part of EU law 14 years later. Within the Schengen Agreement lay an objective of assigning responsibility to review asylum claims to one state so as

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[114] Willem Maas, *Creating European Citizens (Europe Today series)* (Lanham: Rowman & Littlefield Publishers, 2007) at p 6.

[115] Jacques Delors (1985) *The Thrust of Commission Policy. Statement by Jacques Delors, President of the Commission, to the European Parliament and extracts from his reply to the ensuring debate. Strasbourg, 14 and 15 January 1985. Bulletin of the European Communities Supplement 1/85.* [EU Speech] online at <http://aei.pitt.edu/8525/>.

[116] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985) COM(85) 310, June 1985 (Brussels: Commission of the European Communities, [10.05.2007]) <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf>.
Conclusion of the paper: para 222: "Just as the Customs Union had to precede Economic Integration, so Economic Integration has to precede European Unity. What this White Paper proposes therefore is that the Community should now take a further step along the road so clearly delineated in the Treaties. To do less would be to fall short of the ambitions of the founders of the Community, incorporated in the Treaties; it would be to betray the trust invested in us; and it would be to offer the peoples of Europe a narrower, less rewarding, less secure, less prosperous future than they could otherwise enjoy. That is the measure of the challenge which faces us. Let it never be said that we were incapable of rising to it" at p 9.

[117] Moreno-Lax, *surpa* note 111 at p 19.

to reduce administrative costs and to prevent multiple asylum claims.[118] Overall, Schengen can be considered as the start of the European migration and asylum policy.[119]

A common legal space in Europe for Europeans was becoming solidified. The proposals for a single framework were finalized by the Ministers of Foreign Affairs Meeting at an Intergovernmental Conference January 27, 1986, in the form of the Single European Act (SEA) to amend the EEC treaties. The provisions for freedom of movement had been in the EEC treaties from their onset, as noted above, followed in 1968 with legislation on provision of free movement of workers.[120] But the SEA, which came into effect on July 1, 1987, effectuated the changes by introducing the objective of abolition of border controls among Member States and amending the treaties for enhanced European political cooperation. The European Parliament was given more legislative powers by the SEA, and further rules were amended regarding the powers of the European Commission and Council.[121] All of this gave renewed momentum for European integration and completing the internal market by January 1, 1993.

The SEA therefore was momentous in regards to several parallel "collective identity" trends in the constitutional history of the European Union: abolition of border controls, increased supranational decision-making, and the first explicit reference to human rights and the ECHR. The preamble of SEA echoed the preceding EC Treaty sentiments, but this time explicitly stating that

118 Emek M. Uçarer, "The Area of Freedom, Security and Justice" [in:] Michelle Cini and Nieves Perez-Solorzano Borragán (eds.) *European Union Politics*. 4th ed. (Oxford: Oxford University Press, 2013) at p. 281–295 [hereinafter Uçarer].

119 Raphaëlle Faure, Mikaela Gavas and Anna Knoll, *Challenges to a Comprehensive EU Migration and Asylum Policy* (London: European Center for Development Policy Management Report, 2015) online at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10166.pdf> [hereinafter Faure *et al*].

120 Regulation 1612.68 and Directive 68/ 360.

121 As noted earlier, this reference to "the Council" refers to what is now the Council of the EU, previously the Council of the European Economic Community. The SEA also formalized the establishment of the *European Council*. The extended powers introduced by the SEA were that the Council, in cooperation with the European Parliament, "could take decisions by a qualified majority rather than by unanimity" but this did not extend to decisions concerning freedom of movement of persons which were still governed by unanimous ruling.

"the European idea" as expressed through economic integration, and now an added reference to political cooperation, needs to "correspond to the wishes of the democratic peoples of Europe."[122] This Europe would now "aim at speaking ever increasingly with one voice and to act with consistency and solidarity" for the protection of its "common interests" that are attached to the "principles of democracy and compliance with the law and with human rights," circling back to the point of the union being "the preservation of international peace and security in accordance with the United Nations Charter."[123] The mechanism for all this involves improving social and economic conditions through "common policies" in line with "Community interests" and continued "progress towards European unity."[124] In short, social and economic realities of the people of Europe, the safety of which relied on laws and human rights, were viewed as intertwined and requiring unified cooperation for the shared interest of progress and the maintenance of peace.

All this came with a caveat. The retention of sovereignty of Member States, their decision-making power, remained very much in place and even reinforced in the field of migration concerning non-Europeans. A General Declaration on Articles 13 to 19 of the Single European Act, this being the entire section the internal market,[125] stated the following:

> Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.[126]

[122] Single European Act, Preamble, *Official Journal L 169 , 29/06/1987 P. 0002*
"Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."
[123] *Ibid.*
[124] *Ibid.*
[125] The entirety of sub-section 1 on the internal market, under the section on "provisions relating to the foundations and the policy of the community".
[126] General Declaration no 6 on Articles 13 to 19 of the Single European Act (concerning the internal market).

Clearly here migration matters concerning third-country nationals are presented as concomitant to illegality via terrorism and other crimes. Immigration from outside of Europe is linked and expressed in the text as a potential threat. Moreover, the SEA itself did not address the movement of refugees and asylum and this was at the time left to the Member States.[127] Guild sees this omission of refugees in the SEA as pivotal:

> By leaving this part of the population out of the free movement equation, the EU became a hostage to its own failure towards refugees as these became the people on the basis of whom the creation of substantial coercive flanking measures to compensate for the loss of control at the intra-Member-State borders was based. Refugees became the issue with which some actors at the national level were able to beat those in favour of EU territorial integration[128]

A series of working groups and policy documents of European Commission took form at the time that the SEA and Schengen agreements were produced, show the directions at play concerning migration – more freedoms internally seen as requiring more securitization externally. In a Bulletin in 1985, the European Commission had proposed the Guidelines for a Community Policy on Migration in which freedom of movement was seen "in its widest sense" to further the concept of European citizenship.[129] A commitment was made by the Commission to develop Community legislation for migrants that are citizens of Member States to ease the free movement of people but also respond to the social and political realities of the day (an economic decline in

[127] Guild 2006, *surpa* note 101 at p 634.
[128] *Ibid* at p 635.
[129] Guidelines for a Community Policy on Migration. Commission communication transmitted to the Council on March 1985. COM (85) 48 final, 7 March 1985. Bulletin of the European Communities. Supplement 9/85. Council resolution of 16 July 1985 on guidelines for a Community policy on migration. Commission Decision of July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries. at para 10 online at <http://aei.pitt.edu/1256/>.

the 1980s that was preceded by a growth in the 60s and 70s), which included an outlining of extended efforts for social integration. The Bulletin notes a trend in national policies for a reduction of permitting immigrants from non-member states to settle, as well as a "determination to combat illegal immigration and misuse of refugee status."[130] Thereafter, the Palma Document in June 1989, written by an ad hoc intergovernmental "Coordinator's Group on the Free Movement of Persons", concluded that "the creation of an area without internal frontiers would necessitate tighter controls at external frontiers" and that "to this end … criteria [would] need to be harmonized on treatment of non-Community citizens."[131] As a follow-up to Palma, a convention was drafted on the abolition for intra-EC checks, that was ultimately scrapped due to territorial disputes between the UK and Gibraltar, leaving the Dublin Convention on responsibility for claims of asylum as the remaining legal measure from this timeframe.[132]

In sum, enshrining legally the freedom of movement and the single market was a defining moment for European unity, identity-making, and desire for superordinate commonness. That development at that juncture went fully in line with an eye to more stringent measures based on perceived threats from those outside of newly defined borders. While some state sovereignty was given up within Europe in exchange for these freedoms, the sovereignty concerning outsiders remained very much in place.

130 *Ibid* at para 9.
131 "The Palma Document" Free Movement of Persons. A Report to the European Council by the Coordinators' Group (Madrid, June 1989) online at <http://www.statewatch.org/semdoc/assets/files/keytexts/ktch1.pdf>.
132 Moreno-Lax, *surpa* note 111 at p 18.

4.4.1 Identity and Threat Meet at the Redefined Border of Europe

Borders between nation-states have been described as a construction that demarcate belonging and non-belonging and serve as a "tool of exclusion" that can "be strengthened and fostered to protect a community and a society against a phantasmic threat of otherness."[133] The boundaries that signify an "us" and "them" encapsulated by rules of behaviour, are described as constructed by people's "mental maps and virtual checkpoints" that "incorporate elements of the meaning people attach to special configurations, the loyalties they hold, the emotions and passions that groupings evoke, and their cognitive ideas about how the world is constructed."[134] The social group's feelings of security "rest on a sense that checkpoints and markers separate the familiar…from the unfamiliar" and reassures the mental image that separates groups.[135] The border, therefore, is the space where the psychological processes of identity formation and threat-perception intersect.

Following several revolutions in the Eastern Bloc based on movements of solidarity for human rights, the fall of the Berlin Wall in November 1989, a border that had separated East from West and capitalism from communism during the Cold War, was one of the most meaningful events in the history of European identity. It brought with it a reunification of Germany, a reunification of Europe, and a "crumbling of the extensive regime of border controls that had stemmed migration into the west for three decades."[136] However, the historic transition came with

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133 Prem Kumar Rajaram and Carl Grundy-Warr (eds), *Borderscapes: Hidden Geographies and Politics at Territory's Edge* (University of Minnesota Press, Minneapolis, 2007) at introduction, x.

134 Joel S. Midgal, "Mental Maps and Virtual Checkpoints: Struggles to Construct and Maintain State and Social Boundaries" [in:] *Boundaries and belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004) at p 7.

135 *Ibid* Midgal at p 10.

136 Rosemary Byrne, Gregor Noll, Jens Vedsted-Hansen, "Western European Asylum Policies for Export: the Transfer of Protection and Deflection Formulas to Central Europe and the Baltics" [in:] Rosemary Berne, Gregor

fears of new migratory movements from or via these refugee-producing countries that had no asylum and immigration measures in place and possibly porous borders.[137] As Ludger Kühnhardt notes: "Instead of rejoicing about the end of Europe's division in happy anticipation of European unification under the banner of freedom, democracy and market economy, skeptical concern, fear and immobility soon filled the air."[138] The "historical coincidence" of the Eastern bloc opening up just as a more restrictive regime concerning migration in Europe was being institutionalized influenced in the following years the relationship of the European Community with the Central and Eastern European countries on matters of asylum and migration.[139]

Overall, the narration of a "single Europe" identity through abolition of border controls internally, an inclusionary solidarity-building process, had compelled new exclusionary security driven policies. Violeta Moreno-Lax poignantly observes that "completion of a borderless internal market has co-existed, from the start, with a constitutional understanding of 'common' external frontiers as both a EU polity-building tool and a security-premised perspective, conceiving of borders as a defensive, threat-avoiding mechanism."[140]

The period therefore brought about the Schengen Implementing Convention and the first Dublin Convention in 1990.[141] This was the first time that the issue of asylum is addressed in Europe-only treaties, not from a refugee protection-oriented stance but in the context of allocating

Noll and Jens Vested-Hansen (eds) *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002) at p. 5 [hereinafter Byrne *et al*].

[137] Sandra Lavenex, "Asylum, Immigration, and Central-Eastern Europe: Challenges to EU Enlargement" (1998) 3 European Foreign Affairs: 275-294 at 277 [hereinafter Lavenex].

[138] Ludger Kühnhardt, "The Fall of the Berlin Wall and European Integration" [In:] *20 Years After the Fall of the Berlin Wall* (Singapore: Konrad Adenauer Stiftung, 2009) at p 47.

[139] Lavenex, *supra* note 137 at p 276.

[140] Moreno-Lax, *surpa* note 111 citing Roderick Parkes, "Borders: EU Institutions Fail to Reconcile their Agendas Despite Communautarisation" [in:] Florian Trauner and Ariadna Ripoll Servent (eds), *Policy Change in the Area of Freedom, Security and Justice* (Routledge, 2014) at p 53.

[141] Guild 2006, *surpa* note 101 at p 636 citing H. Meijers, "Refugees in Western Europe ''Schengen'' Affects the Entire Refugee Law" (1990) 2(3) *International Journal of Refugee* Law 428-441.

responsibility for asylum seekers. Provisions of the first Schengen agreement from 1985 concern approximating visa policies, easing checks at borders, and reinforcement cooperation between customs and police authorities to counter crime, for protection against illegal migration.[142] Notably, the Schengen agreement was constructed in secret outside European institutions, which justifiably raised eyebrows, the secrecy presumed to be a result of the heavy emphasis on police and judicial cooperation, linking migration with crimes and terrorism.[143] Even so, the objective of Schengen was made explicit in Article 17 of the agreement:

> With regard to the movement of persons, the Parties shall endeavour to abolish checks at the common borders and transfer them to their external borders. To that end they shall endeavour first to harmonize, where necessary, the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the check are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities.[144]

Supplementing the original agreement, the Convention Implementing the Schengen Agreement in 1990 mostly concerns tightening restrictions since the abolition of internal borders was seen to require internal surveillance and securitized external borders.[145] While external borders were being tightened by Schengen, internal systems concerning asylum seekers were established. Fears about the "pull factors" and asylum shopping prompted the Dublin Convention concerning criteria for examining and asylum application as to which state is responsible – generally where

[142] Schengen Agreement 1985, Arts 7-9. Reprinted in Gert Vermeulen and Ellen Desmet (eds), Essential texts on European and International Asylum and Migration Law and Policy (Maklu Publishers, 2017).
[143] Marco Martinielo, "The New Migratory Europe: Towards a Proactive Immigration Policy? [in:] Craig A. Parsons and Timothy M. Smeeding, (eds.) *Immigration and the Transformation of Europe* (Cambridge: Cambridge University Press, 2006) at p 316.
[144] Schengen Agreement 1985, Art 17. Reprinted in Gert Vermeulen and Ellen Desmet (eds), Essential texts on European and International Asylum and Migration Law and Policy (Maklu Publishers, 2017).
[145] Theodora Kostakopoulou, "Security Interests. Police and Judicial Cooperation" [in:] John Peterson and Michael Shackleton (eds.), *The Institutions of the European Union.* 2nd ed (Oxford: Oxford University Press, 2006) at pp. 231–251.

the asylum seeker first entered.[146] The system is based on a presumption of equal chances in Member States for refugee status recognition and human rights protection, based on the idea of *mutual trust* and assumption that each state will meet its obligations under international law based on agreement about common interests. Trust of the insiders who had now presumably established a shared European identity based on a notion of human rights that is applicable to Europeans, and fear of the outsiders who are imagined as posing a threat to this European sense of Self, was the basis on which the Schengen and Dublin agreements developed. At this juncture, however, the absence of universal human rights language in the treaties is palpable. As Guild notes, in reference to the Schengen and Dublin agreements:

> Among the most telling aspects of the treatment of asylum seekers in these two conventions is that they are the objects of state acts. They have no effective rights, nor is either instrument designed to give voice to their protection. They are the passive bodies on whom is visited the will of the Member States.[147]

Overall, the "communitarization of asylum and immigration" involved an approach and rationale that was seen to necessitate a restrictive immigration policy within Europe, and thus Member States were urged to "approximate [their] policies *restrictively* to take account of their economic and social situation" which included "co-operation on border controls" and "harmonization of conditions for combating unlawful immigration […]."[148] Moreno-Lax aptly summarizes the intersection of identity-formation and threat-perception in the

[146] Andrew Geddes, *The Politics of Migration and Immigration in Europe* (London: SAGE Publications Ltd, 2003) at p 133; Uçarer, *supra* note 118 at p 287.
[147] Guild 2006, *surpa* note 101 at p 636.
[148] Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, Brussels, 3 Dec. 1991 (05.12) (OR.f) SN 4038/ 91 (WGI 930).

policy evolution within the European Union concerning this action plan that led from Dublin/Schengen to the Maastricht Treaty that followed:

> The plan epitomizes the convoluted process of giving birth to the EU's external frontiers policy, highlighting its security-oriented, sovereignty-friendly intergovernmental core. These origins have decisively marked the nature and evolution of EU border integration thereafter. The exclusion of TCNs [Third Country Nationals] from free movement rights and their objectification as potential liabilities for the accomplishment of the internal market have had important ramifications in the conceptualization of "illegal immigration" as a security threat to be countered, among others, by means of *enhanced, restrictive* border control.[149]

She adds that the removal of internal borders in the EU is seen to create a security deficit and so the choice to tighten external borders is to "compensate for the perceived security deficit" that further rationalizes the "constitutionalization" of EU borders, all of this encompassing "an identity-building/ integration-achieving tool."[150] But the approach of creating stronger boundaries for the benefit of internal cohesion was also "a trusted means that 19th-century nation-states employed to cement their "identity," a policy that "endangered the peace and hindered transnational communication," a mistake the EU should not repeat.[151]

[149] Moreno-Lax, *surpa* note 111 at p 19.
[150] *Ibid.*
[151] Ute Frevert, "Does Europe Need a Cultural Identity? Ten Critical Remarks" [in:] Krzysztof Michalski, *What Holds Europe Together? (Conditions of European Solidarity)* (Budapest: CEU Press, 2006).

4.5 The European Citizen and "Matters of Common Interest"

The story of European identity takes a more definitive turn in 1992, when the Maastricht Treaty was signed by twelve Member States,[152] ratified in 1993, with the goal of an "ever-closer union among the peoples of Europe,"[153] taking out "economic" from the title of the founding text,[154] transforming the European Economic Community into a Union.[155] Emphasizing that the Treaty on European Union (TEU), or Maastricht Treaty, as it would come to be known, does not just concern an economic alliance, referred for the first time in the body of the treaty to the human rights obligations of the Member States to respect the European Convention of Human Rights and fundamental rights as they "result from constitutional traditions common to Member States."[156] That is, unlike the SEA that did refer to human rights in the preamble, the Maastricht Treaty gave more formal recognition to human rights as part of EU law.[157] Notably, the human rights provision in the Maastricht Treaty is preceded with the Union being formally obliged to "*respect national identities* of its Member States", at least the ones "whose systems of government are founded on the principles of democracy."[158]

Among the Union's proclaimed objective is the unequivocally Eurocentric intention "*to assert its identity* on the international scene," mainly by implementing a common European

[152] Belgium, Denmark, Germany, Greece, France, Spain, Ireland, Italy, Luxembourg, The Netherlands, Portugal, United Kingdom.
[153] Treaty on European Union, [1992] OJ C 191/ 01Article A/.
[154] Article G (a).
[155] Treaty of Maastricht was signed on 7 February 1992, entered into force on 1 November 1993. Treaty of Amsterdam was on 2 October 1997, entered into force on 1 May 1999. The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997, entered into force on 1 May 1999.
[156] Article F 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
[157] de Búrca, *supra* note 64 at p 480.
[158] Article F 1. Emphasis added.

security policy.[159] That assertion is followed with the aim of strengthening "the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union."[160] Here the Maastricht Treaty for the first time injected the notion of the *European citizen* by awarding the nationals of the Member States the complementary status of EU citizenship "as part of its shift towards a more supranational style of governance."[161]

Matters of asylum policy entered the picture prominently in a declaration that the Council was to now consider this subject "as a matter of priority" in order to adopt common action to harmonize Member States policies by the beginning of 1993. In the body of the Treaty, Article K covered "cooperation in the fields of justice and home affairs" and clumped together "matters of common interest", which *inter alia*, included asylum policy, external border control, immigration policy, conditions of entry/ movement/ residence, combatting unauthorized immigration, criminal matters, trafficking and terrorism, again "for the purposes of achieving the objectives of the Union, in particular the free movement of persons."[162] Although these matters were to be dealt in compliance with the ECHR and the 1951 Refugee Convention, appropriately in line with human rights standards, that did not preclude "responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security,"[163] thereby falling back on the trope of seeing asylum and immigration as a threat.

159 Article B. Emphasis added.
160 *Ibid.*
161 Alex Warleigh, "Frozen: A Citizenship and European Unification" (1998) 1(1) Critical Review of International Social and Political Philosophy 113-151 at p 114.
162 Articles K and K.1.
163 Article K. 2.

4.5.1 The Communitarization of Asylum

The intricacies of the "three pillars" of the EU that were introduced by the Maastricht Treaty show how the EU initially envisioned to govern asylum with a sharing of competencies between the Member States and EU institutions – how this evolved to be communitarized with a harmonization and commonness aim at the centre of asylum policies.[164] The Maastricht Treaty's *first pillar* on European Communities concerned matters where sovereignty of Member States had been to a large extent transferred to the European Community institutions. This included the Community being tasked to make the "single market" work through harmonious and sustainable economic activities, and European citizenship was under this pillar. [165] The *second pillar* was Common Foreign and Security Policy, where in the spirit of loyalty and mutual solidarity, the aim of this pillar was "to safeguard the common values, fundamental interests, independence and integrity of the Union" as well as "to strengthen the security of the Union in all ways."[166] The *third pillar* on cooperation in the field of Justice and Home Affairs concerned Member State cooperation to "provide citizens with a high level of safety within an area of freedom, security and justice" and to that end, clumped together under this pillar issues of asylum, illegal immigration, and combatting serious crimes like terrorism and human trafficking.[167]

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[164] This ultimately changed with subsequent treaties, abandoned altogether in 2009 when Lisbon came into effect and EU acquired legal personality.

[165] As set out by Article 3 and Article 4 of the EC Treaty, plus article 5 concerning proportionality and subsidiarity. European Parliament's policy departments and the Economic Governance Support Unit, "Fact Sheets on the European Union – 2019, "The Maastricht and Amsterdam Treaties" online at <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf> [hereinafter Factsheet on EU].

[166] *Ibid* Factsheet on EU at p 2.

[167] *Ibid*. The pillar covered the following areas: 1) rules and the exercise of controls on crossing the Community's external borders; 2) combating terrorism, serious crime, drug trafficking and international fraud; 3) judicial cooperation in criminal and civil matters; 4) creation of a European Police Office (Europol) with a system for exchanging information between national police forces; 5) controlling illegal immigration; 6) common asylum policy. factsheet, page 1: The second and third pillar (according to Tiles V and VI of the Treaty) spoke to "intergovernmental cooperation using the common institutions, with certain supranational features such as involving the Commission and consulting Parliament."

However, the system established by the Maastricht Treaty was viewed as having inadequacies, primarily concerning "matters of common interest", their lack of structure, goals and timetables.[168] Consequently, draft revisions were proposed in December 1996 in a report on *The EU Today and Tomorrow*, the result of the Conference of Representatives of the Governments and Member States. The report's leading assertion was that the EU belongs to European citizens who are at the centre of the Union's functions, therefore, "the Treaties establishing the Union should address their most direct concerns."[169] The priorities outlined include ensuring that the citizens' fundamental rights are fully respected; living and moving freely within the Union, without fear of threats to their personal security; the importance of employment; institutions which function openly and transparently and decision-making procedures which are comprehensible and effective; enhanced external action of the Union that "can exercise a more effective political and economic influence in the world commensurate with its size and potential."[170] Consequently, the Report states that the "Union's foreign and security policy structures must be strengthened" and the Treaty needs further developments on security and defence, for an external policy that is effective in promoting "peace, stability and prosperity."[171] Accordingly, the European Union was established as an "area of freedom, security and justice" (AFSJ) in which thriving is directly connected to being free from threats to personal security, and this security reliant on "effective and credible

168 Moreno-Lax, *surpa* note 111 at p 23.
169 Conference of the Representatives of the Governments of Member States, *The European Union Today and Tomorrow Adapting the European Union for the Benefit of its Peoples and Preparing for the Future: A General Outline for a Draft Revision of the Treaties* (Brussels, December 5 1996) CONF 2500/96.
online at <http://www.proyectos.cchs.csic.es/euroconstitution/documents/Outline%20draft%20revisions.pdf≥
170 *Ibid* at p 7.
171 *Ibid*.

checks at external borders."[172] This establishment of the AFSJ was also referred to as *communitarization* – creating a supranational governance mode for those policy areas.[173]

The Treaty of Amsterdam (singed in 1997, entered into force in 1999) followed up on these sentiments and reasoning for the empowerment of the Union with a focus on the European citizen vis-à-vis security-centred measures concerning non-Europeans, with the objective of enlarging the Union and making adjustments for it "to function more efficiently and democratically."[174] Among the adjustments was shifting the asylum and refugee agenda from the third pillar, which had involved state-to state or intergovernmental decision-making, to the first pillar, which was supranational with a Community legislative competence.[175] Cooperation would now be dealt through the Community method rather than based on an intergovernmental one. This move permitted EU institutions to, as of 2002, propose and adopt instruments on behalf of the Community, such as Directives and Regulations, that had primacy over national laws.[176] An exception was made for Denmark, Ireland and the UK who could choose to opt-in or not.[177] The shift also increased the influence of the European Commission, and the European Parliament, as well as of the Court of Justice, which obtained jurisdiction in the area of asylum.[178] This major move that transferred legislative competence more prominently to the EU and thus set the stage for Europeanization of Member States' practices and legislation, what ultimately has become the

[172] *Ibid* p 10-11, 19, 22.
[173] David Phinnemore, "The European Union: Establishment and Development" [in:] Michelle Cini and Nieves Perez-Solorzano Borragán (eds.) *European Union Politics*. 4th ed. (Oxford: Oxford University Press, 2013) pp. 26–40 at p 32.
[174] Factsheet on EU, *supra* note 165 at p 1.
[175] Carl Levy, "European Asylum and Refugee Policy after the Treaty of Amsterdam: the Birth of a New Regime" [in:] Alice Bloch and Carl Levy (eds) *Refugees, Citizenship and Social Policy in Europe,* at p 37 (Google books) (Palgrave Macmillan UK, 1999) [hereinafter Levy].
[176] Kay Hailbronner and Daniel Thym (eds.), *EU Immigration and Asylum Law: A Commentary*. 2nd edition (München: C.H. Beck; Oxford; Hart, 2016) at p 2.
[177] Faure *et al*, *supra* note 119 at p 10.
[178] Levy, *supra* note 175 at p 37.

point of contention between the EU leaders focused on supranational identity with human rights at its centre, and nation-state leaders adamant about keeping their sovereign decision-making powers firmly fixed.[179]

4.5.2 Human Rights and Collective Decision-Making

The Treaty of Amsterdam was also significant in reaffirming, primarily in Article 6, many of the earlier commitments to human rights standards as its core identity, these standards viewed as common principles among Member States.[180] Importantly, Article 6 makes a foundational claim, stating that the "EU is *founded* on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law." According to Andrew Williams, Article 6 TEU is meant as "a declaratory statement of interpretation, an interpretation of what was and has ever since been, a fundamental precept underpinning the whole European Project and the institutions that have given it form."[181] Williams goes on to say that the European Community "*forged* a retrospective institutional account of its own formation" and that human rights "were not only within the minds of the 'founding fathers', or 'European saints' as Alan Milward calls them, but also buried subtly within the Treaties themselves. They were imputed over time into the very structure of the Community, into the core of its Project."[182] Williams calls this a "myth of human rights as a founding principle of the Community."[183]

[179] Samantha Velluti, "The Road to the Common European Asylum System: From Amsterdam to Lisbon and Beyond", *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism in the European Courts* (Berlin, Heidelberg: Springer Berlin Heidelberg: Imprint: Springer, 2014) at p 13 [hereinafter Velluti].
[180] Porsdam, *supra* note 29 at p 30 citing Henry Steiner and Philip Alston (eds) *International Human Rights in Context: Law, Politics, Morals. 2nd edn* (Oxford: Oxford University Press, 2000) 790-1.
[181] Williams, *supra* note 66 at p 140.
[182] *Ibid.*
[183] *Ibid.*

To tighten this view of an in-group identity based on human rights, now clearly stated in the treaties of the European Union, involved another significant new insertion – a penalty for non-abiders in the form of "suspension of rights". According to Article 7 TEU, a Member State that seriously and persistently breaches principles referred to in Article 6 (freedom, democracy, the rule of law, respect for human rights and fundamental freedoms), could now have its rights derived from the Treaty suspended. Notably, this suspension of rights was amended by the Nice Treaty in 2001 – after the "Haider affair" that concerned Austria's extreme right wing (and allegedly racist) Freedom Party – for the EU to respond to situations of "clear risk of serious breach" rather than values being fully violated. Even more noteworthy is the historic vote within the European Parliament that "triggered" Article 7 in 2018 in response to Hungarian laws that, *inter alia*, targets migrants and refugees, contrary to a series of human rights obligations, as outlined in the "Sargentini Report".[184] This move by the European Parliament was a significant statement about the human rights as identity priorities of the EU, the common rules of membership and the consequences for non-abiders to in-group behaviour. However, the collective decision-making process ultimately poses problems when like-minded governments form their own in-group in opposing EU's penalties, notably the Visegrad 4 countries (Czech Republic, Hungary, Poland and Slovakia). The countries tend to be in synch when it comes to deflecting responsibility on asylum, a tendency with which most EU Member States are afflicted.

[184] European Parliament 2014-2019 Plenary sitting A8-0250/2018 4.7.2018 REPORT on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Judith Sargentini (Initiative – Rule 45 and 52 of the Rules of Procedure) online at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2018-0250&language=EN≥.

4.6 European Enlargement, Identity and Asylum

In fact, EU enlargement as of 2004 that included the Visegrad countries, starting with applications from states as of the 1990s,[185]particularly from the Eastern Bloc after the fall of the Soviet Union,[186] impacted and challenged the evolution of a common European identity in parallel to, and one of the main reasons for, the development of the common asylum system. Significantly, what was once "the Other" to Europe – the Communist bloc that produced refugees fleeing into the European Community in "the West" – was now becoming part of this broader institutionally more unified conception of Europe.[187] These new accession countries did have to fulfill obligations concerning democracy, rule of law, and human rights protection, among other commitments concerning the market economy, but in regards to asylum, they were committing themselves to fulfilling the *principles* within the obligations not yet in place but nonetheless applicable *as the laws evolve*.[188] At the time of application of most of these countries, there were limited number of European instruments in this regard, aside from the non-binding Dublin and Schengen Conventions, and of course all had to adopt the 1951 Refugee Convention.[189] Most of the initial EU legislation for a common asylum system emerged between 1999 and 2005. The benefit for the

[185] Malta and Cyprus, the two Mediterranean island and former British colonies, former formally applied in 1990.
[186] In 1994, Hungary and Poland applied for EU membership, followed by Slovakia, Estonia, Latvia and Lithuania in 1995 and the Czech Republic and Slovenia in 1996. In 1995, Austria, Finland, and Sweden had also *joined* the EU.
[187] Brigitta Busch and Michał Krzyżanowski, "Inside/ Outside the European Union: Enlargement, Migration Policy and the Search for Europe's Identity" [in:] Warwick Armstrong and James Anderson (eds), *Geopolitics of European Union Enlargement: The Fortress Empire* (New York, NY: Routledge, 2007) p. 108 [hereinafter Busch and Krzyżanowski].
[188] Conclusions of the Presidency (Copenhagen Summit Conclusions) reprinted in BULL. EUR. COMMUNITIES, 1.1-1.4 (June 1993); European Commission, Agenda 2000: For a Stronger and Wider Union, BULL. Of European Union, Supplement 5/97, p.131.
[189] Byrne *et al*, *supra* note 136 at pp 8-9.

earlier EU Member States of this new common asylum scheme was an increased space for asylum recipients as well extending the burden to new frontiers of the European Union.[190] This meant tighter controls on the redefined borders that correspond to increased threats perceived and political agendas apparent in their link with media discourse:

> In parallel with the consolidation and expansion of the Schengen area, migration, and in particular, 'illegal immigration' became the key topics in the political and media discourse around borders. Discursive strategies include the explicit designation of in-groups and out-groups (us and them), dominated by an overall strategy of positive *self*-presentation and negative *other*-presentation. Immigrants are stereotypically represented as being different, deviant and a threat to 'us'…and this serves to justify a corresponding rhetoric and practice of fortifying and securing the border.[191]

European enlargement, and the corresponding policies concerning migration and asylum that developed, amplified a construct of "EUrope" and "a self-legitimizing EU-ropean identity."[192] With enlargement, a dissonance in the identity formation of Europe over the decades became clear. On the one hand is the use of human rights, of Europeans primarily, depicted as a common thread of European-ness. On the other is the retention of national sovereignty that at times clashes with the supranational nature of the European institutions, sometimes on the side of human rights and sometimes on the side of migration control. Amidst the development of these in-groups is the perceived threat of the non-European Other that translates into an enhanced security mechanism.

[190] *Ibid* Byrne *et al*; European Commission, Agenda 2000: For a Stronger and Wider Union, COM (97) 2000 final at 131-132.
[191] Busch and Krzyżanowski, *supra* note 187 at p 113.
[192] *Ibid* at p 116.

4.7 The Common Beginnings of the CEAS

The interplay of these elements had come to fore in October 1999 at a special summit meeting in Tampere, Finland, where representatives met to talk about matters of justice and home affairs, and among the topics was asylum. The establishment of the Tampere Program is also marked as the official starting point for the development of the Common European Asylum System. The Tampere Program was established for a five-year term. The meeting's concluding document restates the shared commitment among EU Member States to human rights, democratic institutions and rule of law, in which European integration has been "*firmly rooted* […] *from its very beginning.*"[193] It goes on to acknowledge the challenge in ensuring "that freedom, which included the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all."[194] The next line is critical:

> This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be *in contradiction with Europe's traditions* to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.[195]

This was followed with the aim of the Tampere Program for "an *open* and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity."[196] The program also aimed for the development of a common approach to ensure the integration of

193 European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999 online at <https://www.refworld.org/docid/3ef2d2264.html> [hereinafter Tampere Conclusions].
194 *Ibid* Tampere Conclusions at para 2.
195 *Ibid* at para 3. Emphasis added.
196 *Ibid* at para 4. Emphasis added.

TCNs lawfully in the European Union to ensure fair treatment and a "more vigorous integration policy" that grants TCNs "rights and obligations comparable to those of EU citizens."[197] The goal was enhancement of "non-discrimination in economic, social and cultural life" and development of measures against racism and xenophobia.[198]

Ultimately, the Tampere Conclusions created the CEAS with the goal of harmonizing asylum policies among Member States and create one single asylum space within the EU, including a consistent process that ensures equal levels of protection across the European Union in accordance with the 1951 Refuge Convention. The CEAS was intended to be built on a foundation of mutual trust, where States assume that they can rely on each other to fulfil their responsibilities in an equal way as members of a social group are expected to do according to norms and values that they have mutually established. The Tampere Conclusions called for:

> a clear and workable determination of the state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.[199]

The Council and the European Parliament were called to adopt legislation to help establish a common asylum procedure and a uniform status in accordance with Article 78 TFEU by 2012.[200] However, commentators note that details of the Tampere Program remained ambiguous and vague,

[197] *Ibid* at para 18.
[198] *Ibid*.
[199] *Ibid* at para 14.
[200] Council of the European Union (2008) European pact on immigration and asylum (13440/ 08), 24 September 2008 65. European Commission (2010) Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions of 20 April 2010—Delivering an area of freedom, security and justice for Europe's citizens—action plan implementing the Stockholm programme COM (2010) 171 final.

without specific guidance on the "nature and degree of harmonization to be achieved."[201] Moreover, as Guild remarked, in just two years following the program, "the temperature had changed" and what surfaced was the extent of the conflict between EU policies and national legislation.[202] With additional post 9/11 security issues as of 2001, Member States are said to have "put a break on progress towards the objective of equality at the EU level in favour of exclusion and discrimination in the name of national security."[203] The security-focused response was not fully antithetical to the Tampere Program and the beginnings of the CEAS itself. The reference to "management of migration flows" within the Tampere Conclusions, as egalitarian and forward-thinking as parts of the overall document were, highlighted the strengthening of external border controls "as a consequence of the integration of the Schengen *acquis* into the Union."[204] In other words, the texts reaffirm that ensuring freedom for those within the EU in-group, which involves creating a sense of trust and security within one's We/Self, is always contrasted with whatever Other is perceived as potentially threatening that freedom.

4.8 Conclusion – Either Cosmopolitan or Communitarian

The tragic legacy of the Second World War is the image that a post-war Europe has been contending against in its development of institutions and norms over the last decades. A predominant perspective has been that nationalism, a more fragmented version of the Self or a lower level abstraction than the universal notion of a human, had degenerated the idea of Europe, and that European unity was the answer to interstate rivalry. Although Europe may have lost some

201 Velluti, *supra* note 179 at p 17.
202 Elspeth Guild, *Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International, 1 ed. 2004) at p 170.
203 *Ibid.*
204 Tampere Conclusions, *supra* note 193 at para 25.

of its smugness as a result of the Second World War, the self-centric sentiments crept back in over the years, largely attributed to economic and institutional recovery.[205] Wintle notes:

> There was something of a rollercoaster, then, of feelings about European identity in much of the twentieth century: overbearing arrogance, despair at World War I and the Depression, recovery in the 1930s and horror at the effects of the Second World War and the Holocaust, only to be followed by yet another revival in the 1950s and 1960s; thereafter the positive bent of Europeanism began to ebb away again with the effects of the 1970s economic crises and 1980s recession, despite the energetic attempts of the European Commission to instil a European identity into its citizens.[206]

Therefore, it may be that the old standing nationalistic tendencies remain, along with Othering that continues under the guise of European agreements that proclaim universality but are still premised in remnants of an idea of Europe that is self-righteous and exclusionary. Supra-nationalism is taking over against great resistance, while interstate competitions continue over the self-definition about the kind of Europe that should emerge, and the extent that a narrower self-identity, a national or cultural one, remains. Consequently, the asylum system in Europe, and generally the system concerning the human rights of asylum seekers, walk that very fine line between being aligned with its universal human rights values, and simultaneously undermining them.

Indeed, it has been observed that the CEAS has a "tense relationship with human rights law" and has "focused primarily on the prevention of abuses of the asylum system, the restriction

[205] Wintle, *supra* note 28 at p 4: "Feelings of Euro-assertion or even Eurocentrism, were repressed by the effects of the Second World War and the Holocaust, but when the economic prosperity of the 1950s and the 1960s was accompanied by peace and the absence or postponement of nuclear Armageddon, it was hardly surprising that an element of self-satisfaction and assertion crept back into the European self-image"
[206] *Ibid* at p 5.

of secondary movements, efficient refugee status determination, rather than providing adequate protection of asylum seekers' human rights."[207] The tense relationship can be largely attributed to these conflicts with European Union frameworks, human rights-concerned on one end, restrictive on the other, all of which evolved within the constraints of state sovereignty. The CEAS system gets to the heart of that inclusionary/ exclusionary dichotomy from a social psychological point of view. It represents an attempt at configuring a common in-group identity as well as a social identity, as per the CIIM and SIT theories, combined with ongoing perceptions of threat.

The problems within the CEAS are driven by an identity conflict. The conflict, again, refers to opposing perspectives on European identity, one as inclusive, cosmopolitan, solidarity driven and based on human rights, versus an exclusionary identity that is compelled to strictly defend its external boundaries from (certain) non-Europeans perceived as threats and internal political boundaries when it concerns EU Member State sovereignty. In other words, the CEAS fundamentally shows the tension between the European identities based on human rights, the We of the EU taking action by means of solidarity vis-à-vis the identity of nation-states that a) have a vision/ideology of Europe that is not multicultural, or one that is limited to a Christian distinctiveness and b) are holding onto their national identities by rejecting EU impositions. The European institutions – or "Brussels" – are seen to be imposing this contested European identity. This is the identity crisis.

From here we move to consider further developments within and related to the CEAS as of the turn of the century, which can be usefully analysed through a social psychological lens. In particular, a focus on legal categorization within the asylum *acquis* and surrounding European

[207] Velluti, *supra* note 179 at p 105 [in:] Chapter 5 CEAS, Asylum-Seekers and EU Human Rights Post-Lisbon: Closing the Gaps in the European Protection Regime.

frameworks can be seen as maintaining a dissonance between inclusion and exclusion that contributes to the inconsistencies in European human rights and asylum frameworks. Fundamentally, the categorization that takes places can be simplified into this: *who* is included as *us*, a European identity that deserves access to human rights, and who should be excluded, whether due to fear of threat or another justification, such as a cost-benefit calculation.

Chapter 5 – Legal Categories in Europe and the Spectrum of Inclusion and Exclusion

> Identity in Europe is in flux. The differentiation between the citizen and the foreigner as rights holders is the site of struggles at national and supranational levels. The result is a three-way tension in policy and law over the right to define identity among the Member States, the EU institutions and the Council of Europe.[1]
>
> – Elspeth Guild

5.1 Introduction – Europe's Identity Crisis and Categories of Self and Other

The site of struggles, this continual and changing sense of crisis, even if seen as being of a temporary nature related to particular contexts, is complex with multiple factors challenging European self-definitions. Within this identity crisis ridden context in Europe, the aim of this chapter is primarily to give closer attention to this legal categorization and point to its psychological nature in relation to laws that distinguish rights of humans when placed in certain categories within the Europe-wide frameworks. Categorizations in the form of legal status, separating nationals, migrants, refugees, and asylum seekers, are embedded within international and national laws.[2] The contention here is that laws with a purpose of inclusion and exclusion that rely on categories, as is the case with the concept of European citizenship and asylum laws, have a psychological source and a psychological impact that is both direct and far-reaching. Categorizations that the laws rely on, create, and reinforce, are not simply abstract and

1 Elspeth Guild, *Legal Elements of European Identity: EU Citizenship and Migration Law* (London: Kluwer Law International, 2004) at p 252 [hereinafter Guild Legal Elements 2004].
2 Liza Mügge and Marleen van der Haar, "Chapter 5: Who is an Immigrant and Who Requires Integration? Categorizing in European Policies" [in:] B. Garcés-Mascareñas and R. Pennix (eds), *Integration Processes and Policies in Europe* (IMISCOE Research Series. Springer, Cham, 2016) at p 79 [hereinafter Mügge and van der Haar]; Douglas S. Massey, *Categorically Unequal: The American Stratification System* (New York Russel Sage, 2007) at xvi and at p. 7.

disembodied in the form of law, rather the process of categorizing is deeply embedded in the human psyche.

Legal categories of citizens, European citizens, and non-citizens (many, but here the focus is on asylum seekers, refugees, and beneficiaries of international protection) are based on evaluations that involve giving value to human beings via status recognition and the provision of rights. Since the legal process of citizenship assertion and asylum assessment is one of inclusion and exclusion, it is also a process of cognitive and social categorization, and this can be in the form of othering (inclusion of what is constituted as the Self and exclusion of the Other). The claim here is that the process is identity-based and psychological because it involves positive and negative assessments that result in either inclusion or exclusion. The categories are hierarchical based on this evaluation and the content of rights. In particular, social and economic rights are extensions of these positive/negative or inclusionary/exclusionary psychological evaluations.

For better or worse, human psychology is malleable, categorization can be rigid or fluid, and likewise legal categorizations are evolving concepts. What is significant is the role of laws in enshrining hierarchies of categories as they relate to human rights. Refugee law is part of human rights law, the latter which places the human at the center of concern, and yet the asylum process itself can be at odds with spirit of human rights, as noted earlier, because the process entrenches unequal categorization. In fact, legal scholar James Hathaway has argued in the past that the nature of refugee law places it outside the ambits of humanitarian and human rights law due to its exclusionary nature that focuses on the self-interest of the refugee-receiving state.[3] Therefore,

[3] James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31(1) *Harvard International Law Journal* 129 at pp151-157; James C. Hathaway, *The Law of Refugee Status* (1991) at p 6. He has since then walked back on that position and focused more on the intersection of refugee law and human rights/ humanitarian law.

categorizations are political actions that may act as instruments of discrimination and gain validity through laws and discourse.[4] This has been noted especially in regards to the hierarchical divisions within the European Union system concerning the rights of migrants that are European citizens on the one hand and non-Europeans, TCNs, on the other, a system which has the effect of producing "implicit and sometimes explicit unequal treatment at the national and local levels."[5] The hierarchies are considered to be tied to markers of identity and further connected with national contexts, especially as they relate to access to social, political and economic rights.[6] In all cases, the categories create "stereotypes that persist over generations, resulting in patterns of social stratification,"[7] with the note that while categories cannot be undone altogether, policymakers and scholars should be mindful of their "use, scope, and impact."[8] In other words, legal categories that instill hierarchies in terms of access to rights can perpetuate further inequalities, both perceptual and formal. In particular, scholars of political and media discourse have shown how categories are used as "a powerful political and rhetorical strategy for participants in the asylum debate as they attempt to impose their own system of classification…and, in doing so, justify the (more or less) harsh treatment of asylum seekers."[9]

This chapter first reviews in brief again some of the social psychology input on identity and categorization used as overall conceptual frames that inform the review of legal discourses. From there, a discussion of the concepts of citizenship, and specifically European citizenship, will

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4 Simon Goodman and Susan A. Speer "Category Use in the Construction of Asylum Seekers" (2007) *Critical Discourse Studies*, 4:2, 165-185 [hereinafter Goodman and Speer]; Roger Fowler, *Language in the News* (London: Routledge, 1991); Pierre Bourdieu, *Language and Symbolic Power* (Cambridge, UK: Polity, 1991) at p. 22. 3

5 Mügge and van der Haar, *supra* note 2 at p. 88.

6 *Ibid* at p. 80.

7 *Ibid* at p. 88.

8 *Ibid*.

9 Goodman and Speer, *supra* note 4; Nick Lynn and Susan Lea, "A Phantom Menace and the New Apartheid: The Social Construction of Asylum-Seekers in the United Kingdom" (2003) 14(4) *Discourse and Society* 425–452 at p 434 [hereinafter Lynn and Lea].

be considered with reference to these psychological expressions being entrenched in laws. Finally, taking into consideration the proliferation and Europeanization of a myriad of labels in regards to migration, rights attached to legal categories of asylum seekers, refugees, and beneficiaries of international protection will be considered. This chapter reflects on some of the established legal categories concerning citizenship and asylum, though there are other ambiguous categories, like economic, irregular, or undocumented, migrants or climate refugees. These categories require attention in this type of analysis, with a note for further research as well as the acknowledgement of what Stefan Schlegel writes, that "not only is it impossible to pin down a qualitative difference between refugees and other involuntary migrants; it is also impossible to distinguish between political, economic and environmental causes for migration."[10] The legally-specific categories that will be discussed here are tied up with the broader conceptual meanings about the nature of migration generally. In reflecting on the legal content of the different categories, an emphasis here is placed on considering the social and economic rights as this is where the valuation and relationship between the categories becomes especially apparent.

5.2 The Psychology of Legal Categorizations as Social Categorizations

From the view of social psychology, as discussed in Chapter 2 and here again as a reminder, social categorization is fundamental to human functioning and perception and allows for interdependent cooperation among group members, something humans need for short and long-term survival.[11] Social categorization is the first of three mental steps that are described by the

[10] Stefan Schlegel "A 'Basket of Goods Approach' as an Alternative to Strict Legal Distinctions Between Migrants and Refugees" [in:] Rainer Bauböck, Christoph Reinprecht, Wiebke Sievers (eds.), *Flucht und Asyl – internationale und österreichische Perspektiven* (Vienna: Austrian Academy of Sciences Press) Pre-print of forthcoming publication.

[11] John F. Dovidio, Samuel L. Gaertner, Gordon Hodson, Melissa A. Houlette, and Kelly M. Johnson, "Social Inclusion and Exclusion: Recategorization and Perception of Intergroup Boundaries" [in:] Dominic Abrams,

Social Identity Theory (SIT), the other two being social identification and social comparison.[12] Social categorization involves a basic distinction between the group containing the Self and other groups. This is followed by social identification which means adopting the group identity and conforming to appropriate behavior and group norms, as defined by the category which has an emotional attachment that gives a sense of worth. Emotion provides a corporeal valuation to a conceptual or cognitive evaluation. The third stage of the process, social comparison, involves a relationship with other groups that ensures one's in-group is viewed in a positive way.[13] Adding to this, the Self-categorization Theory (SCT), inspired and informed by cognitive psychology, posits that individuals create categories of identity at different levels of abstraction: the human at the highest level and the lower levels include the individual self and the social in-group categories.[14]

This sorting of people into meaningful groups by group membership is a process of cognitively minimizing of differences between individuals within a group and exaggerating differences between groups.[15] The value given to an in-group, as discussed in Chapter 2, creates more positive feelings towards in-group members compared to those outside of the group.[16] These

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Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) at pp 246 – 247.

[12] Henri Tajfel and John C. Turner, "An Integrative Theory of Intergroup Conflict" [in:] William G. Austin and Stephen Worchel (eds.), *The Social Psychology of Intergroup Relations* at pp. 33-47 (Monterey, CA: Brooks/Cole, 1979); Henri Tajfel, *Human Groups and Social Categories: Studies in Social Psychology* (Cambridge University Press, 1981) at p 254. [hereinafter Tajfel Human Groups, 1981].

[13] *Ibid.*

[14] John C. Turner, "Social Categorization and the Self-Concept" (1985) 2 *Advances in Group Processes*, 77–121; Angela M. Nickerson and Winnifred R. Louis, "Nationality Versus Humanity Personality, Identity and Norms in Relation to Attitudes Toward Asylum Seekers" (2008) 38 (3) *Journal of Applied Social Psychology* 796-817.

[15] *Ibid* Turner 1985; Henri Taijfel, "Cognitive Aspects of Prejudice" (1969) 25(4) *Journal of Social Issues* 79-97; Dominic Abrams, "Focus of Attention in Minimal Intergroup Discrimination" (1985) 24 *British Journal of Social Psychology* 65-74.

[16] Sabine Otten and Gordon B. Moskowitz, "Evidence for Implicit Evaluative In-Group Bias: Affect-based Spontaneous Trait Inference in Minimal Group Paradigm" (2000) 36 *Journal of Experimental Social Psychology* 77-89; Michael A. Hogg and Sarah C. Hains, "Intergroup Relations and Group Solidarity: Effects of Group Identification and Social Beliefs on Depersonalized Attraction" (1996) 70 (2) *Journal of Personality and Social Psychology*, 295–309.

values are emotion/cognition-based and reinforced, whether we are aware of them or not. Copious empirical studies show how in-group members' memory is more positive towards one another, they are more helpful to each other, work harder for each other and are less trustworthy of out-groups that are socially categorized as opposed to their relation to individual members of an out-group.[17]

Categorizations of in-groups can be contrasted to out-groups, which stems from perception of threat as one of the underlying motives behind social exclusion.[18] The theories are supported by studies that show how perceived threats concerning migrants correlate to exclusionary attitudes.[19] These conceptualizations relate to social identity theories concerning threats to group status.[20] Accordingly, these different psychological perceptions of threats can be linked to policy responses. In this process, laws and policies have been referred to as "identity technologies" because they construct collective identities in accordance to what is envisioned by political figures, and this applies to both the national and European level.[21] As Ireneusz Karolewski notes, political figures create the salience of the identity in that they "categorize and classify people by assigning them to

[17] Bernadette Park & Myron Rothbart, "Perception of Out-group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-group and Out-group Members" (1982) 42 *Journal of Personality and Social Psychology* 1051-1068; David A. Wilder, "Perceiving Persons as a Group: Categorization and Intergroup Relations" [in:] David L. Hamildon (ed.), *Cognitive Processes in Stereotyping and Intergroup Behaviour* (Hillsdale, NJ: Erbaum, 1981) at 213-257; John M Howard and Myron Rothbart, "Social Categorization for In-group and Out-group Behaviour" (1980) 38 *Journal of Personality and Social Psychology* 301-319; Stephen Worchel, Hank Rothgerber, Eric Anthony Day, Darren Hart and John Butemeyer, "Social Identity and Individual Productivity with Groups" (1998) 37 *British Journal of Social Psychology* 389-413; Chester A Insko, John Schopler, Lowell Gaertner, Tim Wildschut, Robert Kozar, Brad Pinter, Eli J. Finkel, Donna M. Brazil, Matthew R. Montoya, "Interindividual-Intergroup Discontinuity Reduction Through the Anticipation of Future Interaction" (2001) 80 *Journal of Personality and Social Psychology* 95-111.

[18] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) at p 3 of 355 (Kindle edition).

[19] Moshe Semynov, Rebeca Raijman, Anat Yom Tov, and Peter Schmidt, "Population Size, Perceived Threat, and Exclusion: A Multiple-Indicators Analysis of Attitudes Toward Foreigners in Germany 33 *Social Science Research* 681-701.

[20] *Ibid*; Nyla R. Branscombe, Michael T. Schmitt, and Richard D. Harvey, "Perceiving Pervasive Discrimination Among African-Americans: Implications for Group Identification and Well-Being (1999) 77(1) *Journal of Personality and Social Psychology* 135–149.

[21] Iraneusz Pawel Karolewski, *Citizenship and Collective Identity in Europe* (London; New York: Routledge, 2010) at p 47 [hereinafter Karolewski].

categories which are associated with consequential identities. Thus they enhance and freeze the salience of certain collective identities through political practices of categorization."[22] Moreover, Karolweski writes that collective identity relates to a cognitive function of reducing social complexity and decreasing social uncertainty.[23] In Chapter 2, it was noted that social identity and the process of categorization and comparison aim to reduce subjective uncertainty by giving prescriptions for behaviour to group members.[24] Thus, psychological uncertainty is what drives individuals and groups to form a collective identity, precisely to undo this uncertainty.

Hence, it goes to reason that legal categories of citizens and non-citizens are the result of these human tendencies to group and separate, the result of ever-evolving conceptions about who is the We and who is the Other, adhered with conditions in the form of rights and duties that establish a relationship that can widen or lessen the separation or connection. The law, by granting or withholding specific rights to particular groups, from civil-political to socio-economic rights, entrenches categories with an ascribed value placed on individuals within these categories. The law and its processes of categorization informs, or even itself forms, a narrative about who and what we are, and how "we" group members should and should not behave towards each other, what we are entitled to as group members and what we are not. As part of this narrative-making, legal categories are the character titles that give meaning to particular roles. Fundamentally, legal categories stipulate and reinforce the value of a human being based on their connection to a defined

[22] *Ibid*; Nikos Prentoulis, "On The Technology of Collective Identity: Normative Reconstructions of the Concept of EU Citizenship" (2001) 7(2) *European Law Journal* 196-218.
[23] Karolewski, *supra* note 21 at p 46.
[24] Michael Hogg and Dominic Abrams, "Towards a single-process uncertainty reduction model of social motivation in groups" [in:] Michael A. Hogg and Dominic Abrams (eds.), *Group motivation: Social Psychological Perspectives* (Hertfordshire, UK: Harvester Wheatsheaf, 1993) at pp. 173–190; Barbara-Ann Mullin and Michael A. Hogg, "Motivations for Group Membership: The Role of Subjective Importance and Uncertainty Reduction" (1999) 21(2) *Basic and Applied Social Psychology* 91–102 [cited in:] Angela M. Nickerson and Winnifred R. Louis, "Nationality Versus Humanity Personality, Identity and Norms in Relation to Attitudes Toward Asylum Seekers" *Journal of Applied Social Psychology* 38, 3, (2008) pp. 796-817 at p 797.

nation-state or agreements between nation-states. In-group identity, via social categorization or in this case legal categorization, is accompanied by emotions and cognitive appraisals. From a cognitive and emotion-based perspective, the value of another human being is made either equal or unequal through both the process of categorizing and the category itself. Hence, legal categorization *is* self and social categorization in the form of classification, with particularities that will be further discussed. Therefore, what is known about categorization from social psychology can apply equally true to the underlying motivations as well as the impact of legal categorization.[25]

5.3 The In-Group Category and Concept of Citizenship

Before considering the European legal categorization and its relation to non-Europeans seeking asylum, it is apt to begin with a consideration of the legal category of citizenship. Having a longer history than that of European citizenship or asylum status, citizenship is clearly a category with a social psychological underpinning that begs to be unpacked.[26] But in spite of the extensive cognitive and social psychology literature on categorization, identity and status more broadly, citizenship specifically has not been studied as a psychological concept until a more recent field of interdisciplinary inquiry began to consider the intersection of scholarship covering topics of collective identity, solidarity, pro-social behaviour, group boundaries, and intra and inter-group

[25] This is applied as a conceptual framework of analysis and not as a hypothesis for empirical study, at least not at this stage of research. While there are obvious limits to this analysis in being a mainly conceptual one, this is also an invitation for exploring identified interlinkages in further areas of study.

[26] Clifford Stevenson, Nick Hopkins, Russell Luyt, and John Dixon, "The Social Psychology of Citizenship: Engagement with Citizenship Studies and Future Research" (2015) 3(2) *Journal of Social and Political Psychology* 192-210; Susan Condor, "Towards a Social Psychology of Citizenship? Introduction to the Special Issue" (2011) 21 *Journal of Community & Applied Social Psychology* 193-201 [hereinafter Condor].

conflict.[27] Even so, the connections are still not fully articulated as scholars "attempt to discern common aims and values across the current social psychology of citizenship."[28]

Citizenship is also an essentially contested concept.[29] Like all concepts, it is a product of cognition, serving as a mental representation, an abstraction, object or state of the mind that forms into thoughts, beliefs, or behaviours. It is an idea supported by clusters of other ideas, located in the mind, with the ability to be fixed or fluid. Additionally, citizenship is a category that defines a "class" or group of people in which the group members or their representatives determine to have shared characteristic. The characteristics are defined to give substance to the category of the concept of citizenship. Those definitions in turn affect how the concept resonates, how groups and individuals connect to it in a way that makes it meaningful for social relations.[30]

Most scholarship defines citizenship in some amalgamation that refers to status, rights and duties, political activity and identity.[31] For example, Derek Heater has described citizenship as one of the forms of "socio-political identities" that "involves the individual in having a status, a feeling about the relationship, and competence to behave appropriately in that context."[32] He reflects on this relationship as between the individual and the abstract concept of the state rather than between

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[27] Clifford Stevenson, John Dixon, Nick Hopkins, and Russell Luyt, "The Social Psychology of Citizenship, Participation and Social Exclusion: Introduction to the Special Thematic Section" (2015) 3(2) *Journal of Social and Political Psychology* 1-19.

[28] *Ibid* at p 2.

[29] Condor, *supra* note 26. This is also stated in Lister and Pia, *infra* note 31, in introducton: "Citizenship is a concept which speaks to the relationship between the individual and political communities. Yet, increasingly in Europe the precise terms of this relationship are subject to the question. What citizenship means is contested among academics, as established liberal theories of citizenship are confronted with communitarian, multicultural and post-national critiques which challenge the conception of what the relationships between individuals and political communities should look like"

[30] That concept fits into a category when it is related to something it resembles or differentiates itself with – hence membership…in the sense that it has to compare itself to something else to give it value for it to have meaning – ie.to be entrenched "in the mind.

[31] Michael Lister and Emily Pia, *Citizenship in Contemporary Europe* (Edinburgh: Edinburgh University Press, 2008) [hereinafter Lister and Pia].

[32] Derek Heater, *A Brief History of Citizenship* (Edinburgh University Press, 2004) at p. 1.

individuals.[33] Engin Isin refers to citizenship as "the art of being with others, negotiating different situations and identities and articulating ourselves as distinct yet similar to others in our everyday lives, and asking questions of justice."[34] From all angles, citizenship does refer to social relationships concerning the individual and groups of individuals in the political community.[35]

The relationships are affected by and representative of the legal *status*. The status that one holds is conferred on them, and the legal status gives content and meaning to the categories of belonging. The etymology of the word status itself refers to the "height" or "legal standing of a person" derived from its Latin version, status refers to "condition, position, state, manner, attitude."[36] In sociology, status is referred to in the sense of stratification – a system of "layers, classes, or categories", and social stratification is a way of organizing people by their socioeconomic strata. Status in the sociological sense has been described as one of the most critical incentives for motivation underlying social behaviour.[37] Pinpointing the significance of legal status in this discussion is vital because status denotes either an equality or a hierarchy of value.[38] As Stephen Hall notes, "the idea of citizenship strongly suggests that people who possess a common citizenship status are entitled to be treated on the basis of (at least formal) equality with each other."[39] This reference to the status of a person, as supported by the rules of the law, is a status of

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[33] Engin F. Isin and Patricia K. Wood, *Citizenship & Identity* (London: Sage Publications, 1999) at p 3 [hereinafter Isin and Wood] referencing Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (London: Longman Group, 1990).
[34] Engin F. Isin (ed) *Recasting the Social in Citizenship* (Toronto: University of Toronto Press, 2008) at p 6.
[35] Lister and Pia, *supra* note 31 at p 1.
[36] Etymology online entry for "status": 1670s, "height" of a situation or condition, later "legal standing of a person" (1791), from Latin *status* "condition, position, state, manner, attitude" from past participle stem of *stare* "to stand". Sense of "standing in one's society or profession" is from 1820. *Status symbol* first recorded 1955; *status-seeker* from 1956. *Status-anxiety* is from 1959 online at <https://www.etymonline.com/word/status>.
[37] Adam Waytz, "The Psychology of Social Status" *Scientific American* (December 8, 2009) onine at <https://www.scientificamerican.com/article/the-psychology-of-social/>.
[38] Etymologically, hierarchy refers to "an arrangement of items (objects, names, values, categories, etc.) in which the items are represented as being "above" "below", or "at the same level as" one another." In essence, a hierarchy is inequality, though the latter has a negative connotation, and the former is seen as inevitable.
[39] Stephen Hall, "European Citizenship – Unfinished Business" Leslie Holmes and Philomena Murray (eds), *Citizenship and identity in Europe* (Aldershot, Hants, England: Ashgate, c1999) at 40 [hereinafter Hall].

equality in relation to other in-group members, and a status in relation to the state, via the "social contract," that represents the interests of the group members overall. But importantly, citizenship can also be a status of superiority.

Status must be *recognized* by others to give a person value, equal or otherwise, under the law. *Legal recognition* is part of a process of granting citizenship as well as refugee status, though citizenship is meant to be an equalizing concept for those that hold the citizen membership card. Etymologically, recognition means to become cognizant of, as in "to come to know your-Self," however defined, in an-Other, a process that makes the Other become part of the Us or the We.[40] This recognition creates the legal relationship between the individual and the polity, giving formality to the rights and responsibilities of the individual in relation to the state. That is, giving and receiving recognition of citizenship is a process of *identification,* meaning that what is recognized is other people's attributes or properties to be either identical or similar to each other, thereby providing "an index of individual position and disposition."[41] Identification has been defined as a "psychological orientation of the self in regard to something (such as a person or group) with a resulting feeling of close emotional association" or "a largely unconscious process whereby an individual models thoughts, feelings, and actions after those attributed to an object that has been incorporated as a mental image."[42] In this sense, identity is more the result of "resemblance and repetition" rather than "uniqueness or distinction."[43] Identity, therefore, is a

[40] From the 15th century Latin *reconitio*, from the verb *recognoscere* "know again, recall to mind". It refers to the "action or process" of "identification of a thing or person from previous encounters or knowledge", "acknowledgement of the existence, validity or legality" and "appreciation for achievement".
[41] Isin and Wood, supra note 33 at p 19; Richard Jenkins, *Social Identity* (London: Routledge, 1996).
[42] Merriam-Webster Dictionary online at <https://www.merriam-webster.com/dictionary/identification>.
[43] Isin and Wood, supra note 33.

relational concept because it "presupposes a dialogical recognition of the other."[44] As Isin and Wood note:

> Thus, the formation of group identity is a process whereby individuals recognize in each other certain attributes that establish resemblance and affinity. This becomes the basis of identification whereby individuals actively produce and reproduce equivalent dispositions. The dialogical process of recognition is an ongoing negotiation of habituating, inculcating, defining, redefining and reproducing these dispositions. Identity allows for the effective formation of groups.[45]

In turn, *citizenship as identity* is most often described in the most emotive terms, as a "feeling of belonging" to a collectivity, referring to the "affective ties of solidarity with a group."[46] The literature refers to collective identity in relation to citizenship in terms of identifications and solidarities with the nation-state as a "powerful identifier" that delivers "the material and symbolic resources to provide classificatory schemes and categories" (ie. laws).[47] This means that, as Heater has noted, "the feeling of belonging is institutionalised in the form of citizenship, socialisation agencies, ethno-national narratives of historical memory, boundaries of sovereignty between us and them and a notion of familiarity within the specific territory."[48] Among the different identities one can feel, citizenship, when seen as a universalistic concept that applies to a larger in-group, is distinguished by requiring a "moral maturity" (ie. virtue) that is supposed to moderate the divisiveness of other identities that are particularistic (ie. gender, religion, race, class, nation).[49]

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[44] *Ibid*.
[45] *Ibid* at 20.
[46] Lister and Pia, *supra* note 31 at p 74.
[47] *Ibid* 75- 76.
[48] *Ibid*.
[49] Derek Heater, *Citizenship: The Civic Ideal in World History, Politics, and Education* (London: Longman Group, 1990).

Further, the belonging based on identity, the feeling of oneness that creates certain duties and expectations of entitlements is enforced by way of *reciprocity* where you put something in, and you get something out. Thus, citizenship as identity is based on social reciprocity and common interests that may be "based on a sense of tradition, ethnicity or lifestyle, and heightened by systems of beliefs, ceremonies and symbols."[50] This reciprocity comes, in part, in the form of institutionalized rights within a given community. Hence, the reciprocal aspect of rights and duties by way of membership in a political community has viewed *citizenship as rights*. The combination of certain practices (cultural, symbolic and economic) alongside legal rights (civil, political, economic and social) is what "defines an individual's membership in a polity."[51]

Overall, the modern concept of national membership reflects historic philosophies concerning the reciprocity of citizens' allegiance in exchange for state protection.[52] But the view of the interdependence of rights and practices was most influentially developed by T.H. Marshall, a British sociologist, in his essays on *Citizenship and Social Class* (1964) in which he argued that citizenship is a way to ensure that everybody is treated as a full and equal member of society, achieved by granting people an *increasing number of citizenship rights*.[53] For this reason, Marshall believed that the fullest expression of citizenship occurs in the liberal democratic welfare state that becomes the guarantor of civil, political, economic and social rights for all and ensures that every member of the society enjoys full participation and enjoyment of the common life of society.[54] Significantly, Marshall's premise was that that citizenship must be expanded beyond civil and

50 Isin and Wood, supra note 33 at p 3.
51 *Ibid*.
52 David Weissbrodt and Michael Devine, "International Human Rights of Migrations" [in:] Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (New York: Cambridge University Press, 2012) at p. 94.
53 Thomas Humphrey Marshall, *Class, Citizenship, and Social Development/ Essays by T.M. Marshall* (Garden City, N.Y.: Doubleday, 1965).
54 Lister and Pia, *supra* note 31 at p 63.

political rights to include social rights, this referred to as social citizenship, and with citizenship as a unified concept between the sets of rights which have an impact on one another.

5.4 The Category of European Citizenship

European citizenship, in its extension of the concept of citizenship to the supranational level, albeit with attachment to an EU Member State, is internationally and historically a legal category of its own. It is still an inclusionary/exclusionary in-group *identity* formation exercise, that involves *recognition* of the European Self in the form of a specified category, accentuated with the provision of a *status* that comes with a set of *rights*. Although not necessarily guaranteed, it is an assertion of cognitive and emotional *value*, intended as a self-esteem booster for those recognized and included as European vis-à-vis non-Europeans.[55] Those within the broad category of European citizens, as members of the European Union in-group, are accorded a higher value via rights than non-Europeans by virtue of their membership in the social group of the EU. As such, European citizenship is said to have been created as an attempt towards a feeling of belonging to a construct of Europe.[56] In short, in both European citizenship and national citizenship vis-à-vis non-Europeans and non-nationals, a higher valuation via legal rights (ie. social inclusion) is intended to reflect a higher emotional and cognitive valuation and therefore stronger social cohesion (aka solidarity) among the citizenry (members of the category). That's the objective, and not necessarily the reality as there is stratification within the citizenship categories themselves. The valuation is entrenched by the legal categories and their content in terms of rights, and in in

[55] Karolewski, *supra* note 21.
[56] Marco Martinello, "European citizenship, European identity and migrants: towards the post-national state?" [in:] Robert Miles and Dietrich, Thränhardt (eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Pinter Publishers1995) at p 46 [hereinafter Martinello].

this regard in Europe there is a visible discrepancy between the categories of member states nationals, European Union citizens, migrant EU citizens and non-citizens. At times, the inequality in valuation of the categories clashes with human rights objectives, ironically the values that are the bedrocks of a European identity.

5.4.1 Valuation and Limits in Legal Content

The value of European citizenship and its legal content are still being assessed by individual and institutions, while the laws are aiming to create an in-group. Notably, the legal notion of European citizenship is said to trace its beginnings to the original European Economic Community (EEC) Treaty of 1957 regarding the free movement rights of workers.[57] Thus, the concept has a migration-oriented origin in creating a common level of rights for the common good of the nationals of the separate nations, so that national rivalries would no longer be necessary, making way for mutual economic benefit. The rights within the EEC treaty were available to individuals that were immigrants in another Member State as workers, self-employed, or service providers.[58] The European Community rules set the context of the freedom of movement of workers by embedding non-discrimination based on nationality in the legal framework from the onset of the EEC.[59] There was a direct link between movement across borders, labour, and the provision of rights, indicating the relevance of reciprocity: labour in exchange for rights and their protection. Labour in particular is significant as a contributory aspect in connecting an individual to the society and support from the state. The social value of a person within a community is linked

[57] Lister and Pia, *supra* note 31 at p 163.
[58] Guild Legal Elements 2004, *supra* note 1 at p 239.
[59] Article 51 states: "The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers […]".

to the perception of their contribution to that community versus what they are perceived to be taking from the community – deservingness of shared benefits.[60] In the case of the EEC, equality was presumed.

These EEC provisions did not completely invoke the fullness of a European citizen until it was enshrined in law decades later. The *political* origins of European citizenship are said to have begun following the aptly named report on European identity of 1973 at the 1974 Paris summit where a working group considered which citizens of the member state were to have social rights.[61] Whereas *social and economic rights* normally go together under a general rubric, in the case of European citizenship *economic* rights (related to work primarily) fall within the *raison d'être* of a common market and union, while guarantees of *social* rights (housing, food, health, social security, welfare) have been more contentious. The social rights aspect made European citizenship subject to heated debate, with two different interpretations at stake, represented by the concepts of universalism on the one side that was more inclusionary, and particularism on the other that was more exclusionary.[62] The Council was deadlocked for ten years concerning the competency of the Community to legislate on this, and concerning the need for provisions that would require proof to show that persons moving between countries possessed sufficient resources to sustain themselves and had medical insurance coverage.[63] Socio-economic rights were always at stake.

[60] Carolyn L Hafer, "The Psychology of Deservingness and Acceptance of Human Rights" [in:] Elisabeth Kals & Jürgen Maes (eds) Justice and Conflicts (Berlin, Heidelberg: Springer, 2011).

[61] CEC (1974), *Bulletin of the EC, 12-1974/7: item 11;* Lister and Pia, *supra* note 31 at p 164*;* Martinello, *supra* note 56 at p 38.

[62] Lister and Pia, *supra* note 31 at p 162.

[63] Siofra O'Leary, "The Free Movement of Persons and Services" [in:] Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) at p 381.

Eventually the legal category of EU citizenship came about in the Maastricht Treaty in 1992, that made "[e]very person holding the nationality of a member state" a citizen of the Union.[64] The recognition of European citizenship is automatic, meaning that everyone that is a Member State citizen effectively gets two citizenships. But just to clear up any ambiguities about the connection to member states as its primary locus of citizenship, the Amsterdam Treaty introduced amendments to the principle of European citizenship by adding that "[c]itizenship of the Union shall complement and not replace national citizenship."[65]

The treaties only provide for a limited set of rights under European citizenship, chiefly civil and political, granted by the provisions regarding free movement, elections, diplomatic protection, and petition.[66] As discussed, freedom of movement and residence is the mainstay of a European identity, and this right is said to be what citizens use and appreciate the most.[67] The remainder of the provisions arguably have had less traction. The provision to stand as a candidate in elections of the European Parliament and municipality in a Member State other than that of his or her nationality, meant to extend the political community, has been described as one of the most "spectacularly underused rights in Europe."[68] Voting in European elections has also been low, though this may be turning around as of the European parliament elections in May 2019 with a significant uptick in voter turnout.[69] Diplomatic protection – that traditional notion from which

64 Article 8(1) European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002
65 Article 8.1 European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997.
66 Article 20.
67 Elspeth Guild, "Migration, Security and European Citizenship" [in:] Engin F. Isin and Peter Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge, 2014) at 418 referencing Isin, Englin F. (2012). [hereinafter Guild, Routledge Handbook 2012].
68 *Ibid* at p 420.
69 European Parliament Press Release, "Final Turnout Data for 2019 European Elections Announced" (October 29, 2019) online at <https://www.europarl.europa.eu/news/en/press-room/20191029IPR65301/final-turnout-data-for-2019-european-elections-announced>.

citizenship stems – is now applied to European citizenship, with the right to seek help of consular authorities of another Member State when in a third country, but this right "barely exists at all, except on paper, not least because it is not within the power of the European Union or its member states to tell other countries how they have to treat European citizens."[70] Finally, the clause that permits the petition of the European Parliament and the European Ombudsman further strengthens the procedural access for European citizens as well as non-Europeans, but such institutions are seen to lack hard power and are seen to "only really be effective where habits of constitutionalism are well established and believed in."[71]

Even though the formal establishment of EU citizenship has been described as "[o]ne of the most significant steps on the road to European integration taken by the authors of the Treaty on European Union,"[72] enthusiasm towards the insertion of EU citizenship varied.[73] The two countries against the idea of European citizenship on the premises of granting rights were Denmark and the United Kingdom.[74] In fact, the Maastricht treaty was rejected in a referendum in Denmark in May 1992, and this rejection was seen by commentators as being due to the Danish voters' fear of loss of identity and citizenship.[75] Likewise, the United Kingdom leaving the European Union via Brexit is greatly premised on resentments against migration and the identity crisis it presents.[76]

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[70] Guild, Routledge Handbook 2012, *supra* note 67 at p 420.
[71] Anne Peters, "The European Ombudsman and the European Constitution" (2005) 42(3) *Common Market Law Review* 697-743 at pp 741-743 Guild, Routledge Handbook 2012, *supra* note 67 at pp 419-420.
[72] Commission of the European Communities, Report form the Commission on the Citizenship of the Union COM (93) 702 final, 1.
[73] Hall, *supra* note 39 at p 49.
[74] Colette Mazuccelli, *France and Germany at Maastricht: Politics and Negotiations to Create the European Union* (New York: Garland Publishing, 1997) at p 145; Lister and Pia, *supra* note 31 at p 164.
[75] Rey Koslowski, "European Union Migration Regimes, Established and Emergent" [in:] Christian Joppke (ed), *Challenge to the Nation-State- Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1994).
[76] Satnam Virdee and Brendan McGeever, "Racism, Crisis, Brexit" (2018) 41(10) *Ethnic and Racial Studies* 1802-1819; Claudia Postelnicescu, "Europe's New Identity: The Refugee Crisis and the Rise of Nationalism" (2016) 12(2) *Europe's Journal of Psychology* 203-9; James Dennison and Andrew Geddes, "Brexit and the Perils of 'Europeanised' Migration" (2018) 25 (8) *Journal of European Public Policy* 1137-1153; Michał Krzyżanowsk,

In connection to this, as a significant side note, the United Kingdom and Denmark have also requested "opt out" provisions from aspects of the Common European Asylum System. Overall, reflecting on what European states want from European citizenship, Elspeth Guild argues that the message is clear.

> First, and foremost, what the member states want from European citizenship is a form of identity which does not seduce their citizens away from them. They want their citizens to remain embedded in their national identity and to have European citizenship as an additional identity to their national one. A number of European states are particularly keen not to be obliged to extend social solidarity to European citizens who are not their "own" nationals, irrespective of how long they have worked in that state or however substantial the social and tax contributions they may have made there. The idea is that these European citizens should not be a burden on the national accounts.[77]

The fear of socio-economic burden has resulted in curtailing certain rights within European Union citizenship provisions that refer to this bare minimum of civil and political rights. Reference to economic and social rights is clearly absent in this delineation of European citizenship, in contrast to the citizenship definition that necessitates the whole scope of rights proposed by T.H. Marshall. The social rights of EU migrant citizens – that is, European citizens in another EU country – are tentative.[78] Access to the welfare regime for an EU migrant and the extent of provisions of socio-economic rights varies by country and depends on "residency and/or registration requirements and on the propensity of individual Member States to implement rules limiting access of these rights for EU migrant citizens."[79]

"Brexit and the Imaginary of 'Crisis': a Discourse-Conceptual Analysis of European News Media", (2019)16 (4) *Critical Discourse Studies* 465-490.

[77] Guild, Routledge Handbook 2012, *supra* note 67 at p 423.

[78] BEU Citizen, *Social Rights of EU Migrants: A Comparative Perspective* (July 15, 2015) at p 5. [hereinafter BEU Citizen report] 'EU migrant citizens' are "EU citizens that have migrated to another EU Member State, excluding tourists, cross-border mobile workers or posted workers within the EU."

[79] *Ibid* at p 30.

EU rules regulate the exportability of social rights as well as EU citizens' access to social security benefits in the host EU country.[80] The principle of non-discrimination takes effect when the worker takes up residence, with a number of stipulations.[81] Member States can withhold social assistance during the first three months after the arrival of an economically inactive EU migrant citizen and this may extend to five years. After a residency period of five years, with proof, governments can no longer discriminate between national citizens and resident EU citizens from another Member State as the EU citizens become permanent citizens entitled to enjoy complete equality of treatment.[82] Nonetheless, during the phase between three months and five years of residence, the presence of EU migrants has been described as "a theatre of conflict for a number of claims, such as a state's right to maintain the integrity of its welfare system and to shelter it from the claims of 'outsider insiders' and claims to equal treatment that EU citizenship law and policy have generated."[83]

EU Member states have different rules concerning welfare and there is no uniform meaning of social rights in regard to citizenship.[84] However, the rulings of the ECJ made explicit that Member States can no longer limit benefits to their "own" citizens.[85] Further rights were extended with the entry into force of the Lisbon Treaty and the EU Charter of Fundamental Rights and

[80] Frans Pennings, "EU Citizenship: Access to Social Benefits in Other EU Member States" (2012) 28(3) *The International Journal of Comparative Labour Law and Industrial Relation* 307–334; BEU Citizen report, *supra* note 78 at p 7.
[81] European Commission (2013a) Press Release – Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards, Brussels [30 May 2013].
[82] Article 16 European Union, *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, 29 April 2004, 2004/38/EC.
[83] Dora Kostakopoulou, "European Union Citizenship Rights and Duties: Civil, Political and Social" [in:] Engin F. Isin and Peter Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge, 2014) at p 430.
[84] BEU Citizen report, *supra* note 78 at p 5.
[85] Stephan Leibfried and Paul Pierson, "Semisovereign Welfare States: Social Policy in a Multitiered Europe" [in:] Stephan Leibfried and Paul Pierson (eds) *European Social Policy – Between Fragmentation and Integration* (Washington, DC: Brookings, 1995) 43-77 at p 54; BEU Citizen report, *supra* note 78 at p 6.

Freedoms. This gives European citizenship a standing of equality before the law in which Member states are obliged to grant social benefits to citizens of the Union from other Member States, in accordance with national laws and practices.[86] Nonetheless, the CJEU finds the highest number of cases on citizenship related to social benefits, showing the contested nature of the issue as well as the complexity of EU rules on social security that require a "seemingly endless demand for clarification from the courts."[87] Guild notes that this has been viewed as a contestation over solidarity in which European citizens want the same solidarity that nationals of the member states are entitled to.[88]

Hence this is the conflict of the nation versus a cosmopolitan EU system that has a category of EU citizen based on human rights. In this Self-categorization, the European Self may not know which level of abstraction it belongs to, who to compare with and who gives more of a sense of worth. The rights enshrined in the EU treaties aim to solidify this European identity, but the valuation of the legal content, how it is practiced and perceived, primarily focused on civil and political rights, with constraints on social and economic rights placed by member states, establishes limits and thus entrenches further categories within the European citizenship category itself.

5.4.2 European Values and Feelings of Attachment

The content of the law gives European citizenship its worth when it is the guarantor of equality across the European Union, a positive value to all its members, but it has had less impact as an eliminator of uncertainty. If persons join groups to limit uncertainty, this can be difficult

Guild Legal Elements 2004, *supra* note 1 at p 240. Article 15 of the Charter.
[87] Guild, Routledge Handbook 2012, *supra* note 67 at p 421; Gisbert Vonk, (ed.) *Cross-border Welfare State: Immigration, Social Security and Integration* (Mortsel: Intersentia, 2012).
[88] Guild, Routledge Handbook 2012, *supra* note 67 at pp 421-22.

when the options are between a national identity and a supranational one. The case of Brexit is a stark example. Therefore, the current legal apparatus of European citizenship is one aspect that still has a weak resonance with the majority of the European populace, in part because of the limited scope of rights outlined and its emphasis on national citizenship. That is, Europeans feel further removed from a connection to their rights as European citizens than as nationals. Movement between EU countries is still limited, although intra-EU mobility has been on the increase.[89] The Eurobarometer results show that Europeans still feel primarily attached to their nation state, even their city or village, as opposed to Europe as a whole. The nation creates a direct feeling about their rights because that is where most of their rights are exercised, and where their rights are given meaning. Even though EU law promotes the dual identity combination, one or the other may have a stronger resonance based on its identity forming factors – "salience and perception, fluidity and hybridity, as well as manipulation of symbols."[90]

European citizenship cannot remain solely at the level of an abstract cognitively conceived concept for it to be functional. For European citizenship to be effectuated, it requires the citizenry to have a *feeling* of European-ness, a collective identity, something that the European-wide citizenship project has generally lacked, and present trends are vacillating. The recent result of the Eurobarometer shows that most Europeans feel attached to their home country (93 %) while just over half (56 %) of the respondents feel attached to the European Union, and 65 % to Europe more broadly, with the lowest responses consistently coming from the United Kingdom.[91] Thus, while a majority of the Eurobarometer respondents feel attached to the EU, they are primarily attached

[89] Cinzia Alcidi and Daniel Gros, "Intra-EU Labour Mobility: From Too Little to Too Much?, *EconPol Opinion* 17, May 2019 online at <https://www.econpol.eu/opinion_17#_ftn1>.
[90] Karolewski, *supra* note 21 at p 46.
[91] Standard Eurobarometer "European citizenship": Survey requested and co-ordinated by the European Commission, Directorate-General for Communication (European Union, March 2018) [hereainafter Eurobarometer].

to their city/town/village and significantly more so to their country. There are significant differences between Member States in terms of attachment to the EU, where in some the majority of respondents feel attached to the European Union,[92] while in others it is a minority.[93] Attachment to a city or country increases with age and decreases with education, and this is consistent among socio-demographic categories.[94] However, persons that are unemployed or struggle to pay the bills feel a significantly lesser attachment to the EU than students and persons that see themselves as upper class. Attachment to Europe as separate from the EU sees a similar divide.[95]

But the continual shifts in statistics indicate that a connection to European identity is increasing in some places, while lessening in others. What is notable is that the personal values that Europeans are said to regard mostly highly, as proposed by the options, include in the first place *peace* (45%), in the second place *human rights*, (42 %) and in the third place *respect for human life* (37%) with religion in the last place (5%) preceding self-fulfillment (9%).[96] This corresponds to what the respondents say are the values that *best represent the European Union*, the first two are also peace (39%) and human rights (33%), while the third is democracy (32%), and again self-fulfilment and religion get the last spot.[97] Likewise, in terms of the EU's achievements, most respondents think "that peace among the Member States and freedom of

[92] *Ibid* at p 12. Luxembourg (79%), Poland and Latvia (71% in both countries) and Germany (69%)
[93] *Ibid* at p 12. Greece (37% "attached", vs. 63% "not attached"), the Czech Republic (38% vs. 60%) and Cyprus (39% vs. 60%)
[94] *Ibid* at p 9 – "A large majority in all socio-demographic categories feel attached to their city/town/village. Attachment increases with age (from 83% of 15-24 year-olds to 92% among those aged 55+), and decreases slightly with education (94% of those who left school at the age of 15 or earlier and 88% of those who studied up to the age of 20 and beyond); A very large majority of respondents in all the socio-demographic categories also feel attached to their country. This attachment is particularly strong among Europeans aged 55+ (95%) and retired people (95%), as well as managers (95%)."
[95] *Ibid* at p 14 "A majority of respondents in 26 EU Member States feel attached to Europe (the same number as in autumn 2017), with the highest levels in Denmark (81%), and Luxembourg and Sweden (80% in both countries). However only a minority of respondents feel attached to Europe in Greece (42% "attached", vs. 58% "not attached") and Cyprus (43% vs. 56%); this was also the case in autumn 2017."
[96] Eurobarometer, *supra* note 91 at p 53.
[97] *Ibid* at p 60.

movement are the European Union's most positive results."[98] The respondents' recognition of EU values of peace and human rights in the same vein as their personal values (again, of the list provided) indicate that the original intentions thought up by the founders of the EU and enshrined in the treaties are resonating with a subset of the European populace.

How Europeans feel towards each other, towards Europe and the EU as a whole, can also be contrasted to how Europeans feel about the category of non-Europeans that come and claim asylum. Overall a majority of Europeans that took part in the Eurobarometer study, two-thirds, agree that their country should help refugees (67%), while 27% take the opposite view.[99] The picture is different when broken by country. Most people in Sweden (91%), the Netherlands (89%) and Denmark (88%) think that refugees should be helped. However, in seven countries – the Czech Republic, Hungary, Bulgaria, Slovakia, Latvia, Estonia and Romania – the majority of respondents disagree. Asked whether "immigrants contribute a lot," a narrow majority of Europeans agree (48%), while 45% take the opposite view.[100] A similar trend is seen in terms of the split between "Western" and "Eastern" countries of Europe with generally high numbers in the west seeing migrants as a positive contribution, while in most of Eastern Europe, the majority respondents do not see positive migrants' contributions.[101] This is in line with a cross-national study of attitudes towards migration that examined the factors behind the differentiated attitudes, finding in some European countries a widespread fear and rejection of migrants while others an acceptance of diversity as a socially-shared norm.[102]

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[98] *Ibid* at p 20.
[99] *Ibid* at p 69 and 79.
[100] *Ibid* at p 69 and 76.
[101] Lowest scores in Latvia (10% vs. 85%), Estonia (13% vs. 79%), the Czech Republic (14% vs. 82%), Hungary (15% vs. 81%) and Bulgaria (15% vs. 72%).
[102] Vera Messing and Bence Ságvári, *Looking Behind the Culture of Fear: Cross-national Analysis of Attitudes Towards Migration" (European Social Survey)* (Friedrich-Ebert-Stiftung, 2018) at p 3 [hereinafter Messing and Ságvári].

A 2016 Pew study in ten EU countries about views of refugees had the majority of respondents in seven of the states fear that "refugees will increase likelihood of terrorism" this being highest in Hungary 76% and Poland 71 %, but also the Netherlands and Germany (61%), Italy (60%), Sweden (57%), Greece (55%) and United Kingdom (52%). Likewise, a median of 50 % of the respondents of the Pew study believe that "refugees are a burden on our country because they take our jobs and social benefits" again with the highest results in Hungary (82%) and Poland (75%) as well as Greece (72%). All of these correlated to negative view of Muslims at rates higher in Hungary (72%) followed by Italy (69%), Poland (66%), and Greece (65%).[103]

It may appear that the "refugee crisis" had influenced these strong sentiments. However, these result are also in line with a cross-national study just before crisis in the fall of 2014 and spring 2015, concerning attitudes towards migration that examined the factors behind the differentiated attitudes. The findings show in some European countries a widespread fear and rejection of migrants while others an acceptance of diversity as a socially-shared norm.[104] As scholars have noted, the label and categorization of people on the move has significant implications on legal and moral obligations and determines how "societies feel towards them."[105] The categories have a longstanding connection to the threat perceived, and consequently, the policies that are attached.

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[103] Richard Wike, Bruce Stokes and Katie Simmons, "Europeans Fear a Wave of Refugees More will Mean More Terrorism, Fewer Jobs" *Pew Research Center* (11 July 2016) online at <https://www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> and "Negative Views of Minorities, Refugees Common in EU" online at <https://www.pewresearch.org/global/2016/07/11/negative-views-of-minorities-refugees-common-in-eu/>.
[104] Messing and Ságvári, *supra* note 102.
[105] Nando Sigona, "The Contested Politics of Naming in Europe's "Refugee Crisis" (2018) 41 (3) *Ethnic and Racial Studies* 456-460.

5.5 The EU's Categories of International Protection

5.5.1 Deserving and Undeserving, Voluntary and Non-Voluntary

> Those whom the persecutor had singled out as scum of the earth – Jews, Trotskyites, etc. – actually were received as scum of the earth everywhere; those whom persecution had called undesirable became the *indésirables* of Europe. – Hannah Arendt, Origins of Totalitarianism

The various 'admission labels' in European policies put migrants into conceptual categories of those that are desirable and those that are not.[106] A criticism of present day European policies is that categorization of the non-European migrants creates an Other that justifies undesirability with utilitarian economic reasons as well security risks, but is in fact laced with racial and religious bias.[107] As Guild contends, "immigration control as a form of permissible nationality discrimination may also be a form of prohibited racial discrimination."[108] Thus, the speculation that the underlying reasons for permitting inclusion of one group of persons over another is discriminatory (of the prohibited kind) is what makes all the categorizations even more suspect.

Europeanization has contributed to new legal and conceptual migrant categories. In Europe now there are a myriad of categories and labels for newcomers from outside of Europe, the so-called Third Country Nationals (TCN) within the EU, only some of them are defined as *legal* categories, illegality itself a labelling issue. The labels are a mixed bag consisting of migrants that are deemed as voluntary, forced, economic, genuine, bogus, vulnerable and more. The legal categories and the other conceptual categories intersect in the public and policy discourse. In all

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106 Marlou Schrover and Deirdre Moloney, "Conclusion: Gender, Migration and Cross-Categorical Research" [in:] Marlou Schrover & Deirdre M. Moloney (Eds.), *Gender, Migration and Categorization: Making Distinctions Between Migrants in Western Countries, 1945–2010* (Amsterdam: IMISCOE Research. Amsterdam University Press, 2013) 255–263 at p 257.

107 Liza Schuster, "Common Sense or Racism? The Treatment of Asylum-Seekers in Europe" (2003) 37 (3) *Patterns of Prejudice* 233-256.

108 Guild Legal Elements 2004, *supra* note 1 at pp 202-203.

cases, they express a psychological evaluation, further embedded in the collective and individual psyches through provision and denial of rights.

Both the public and legislative discourse gets caught up in the differentiation between the migrant and the refugee: the former deemed to be of a voluntary nature seeking economic betterment and therefore illegitimate if there is an application for asylum, the latter is viewed as forced due to persecution and therefore vulnerable and a genuine asylum applicant.[109] The former is met with contempt while the latter receives empathy. In this vein, on top of legal categories, asylum seekers are further categorized as either deserving or undeserving of protection, and this categorization connects directly to a social system.[110] These distinctions have a longstanding history.[111] The categorization of refugee is seen as deserving of protection while economic migration is "commodified as labour subordinated to the economic needs of the host country or otherwise viewed as an economic or identity-based threat."[112] The "victims versus threats" constructs legitimize differentiated policies and further perpetuate the discourse on the European Self vis-à-vis the non-European Other.[113]

In the political and public dialogue within Europe and beyond, asylum seekers have been described as "bogus" and "clandestine," entrenching a negative construction of persons seeking

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[109] Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989) at p. 30. Anthony H. Richmond, "Reactive Migration: Sociological Perspectives on Refugee Movements" (1993) 6 *Journal of Refugee Studies* 7 at 7; Bimal Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhof Publishers, 1998) at pp 34-43.

[110] Rosemary Sales, "The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain" (2002) 22 (3) *Critical Social Policy* 456-478 [hereinafter Sales].

[111] Katy Long, "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection" (2013) 1(1) *Migration Studies* 4–26.

[112] Tazreena Sajjad, "What's in a Name? 'Refugees', 'Migrants' and the Politics of Labelling" (2018) 60 (2) *Race & Class* 40–62 at p 47 [hereinafter Sajjad]; Erin. K. Wilson and Luca Mavelli, "The Refugee Crisis and Religion: Beyond Conceptual and Physical Boundaries" [in:] Erin K. Wilson and Luca Mavelli (eds) *The Refugee Crisis and Religion: Secularism, Security and Hospitality in Question* (Lanham, MD: Rowman and Little, 2017) at p 11.

[113] *Ibid* Sajjad.

asylum.[114] This negative valuation has also been shown as a method for governments to justify minimizing their obligations towards the protection of asylum seekers and refugees.[115] The separation of "genuine" and "bogus" claims, as legislative acts have done, focuses the political attention on the idea some claiming asylum are not entitled, not deserving of sympathy and generosity.[116] In this way the focus is on the costs and financial drain of asylum seekers and refugees rather than on how they need assistance and how they can contribute.[117] Consequently, the category of asylum seeker has become synonymous with someone who potentially manipulates the national system.[118] Asylum seekers seen as a drain on the country's resources fuel demands "that the access of asylum seekers to European states and that their welfare systems be curtailed."[119] Mulvey adds another contradiction in the discourse, by pointing to the "juxtaposition of the good migrants (those who come as part of the labour migration schemes along with fee paying students), and the bad migrants (those who arrive illegally, some labour migrants and non-preselected refugees)." resulting in policies that lessened support for asylum seekers in an effort to make their reception increasingly uncomfortable and constrained.[120]

The reality is that human beings hardly ever fall neatly into the conceptual categories that are attributed to them, and the laws in place are not designed to respond to the complexities of a migration trajectory. Refugee advocates, migration scholars, and policy-makers acknowledge that

114 Mulvey, *supra* note 62 at p 443.
115 Guy Goodwin-Gill, "Refugees and Responsibility in the Twenty-First Century: More Lessons learned from the South Pacific" (2003) 12 *Pacific Rim Law and Policy Journal* 23-48 at pp 26-27.
116 Goodman and Speer, *supra* note 4 at p 167; Sales, *supra* note 110; Lynn and Lea, *supra* note 9 at p 434; Alice Bloch, "The Importance of Convention Status: A Case Study of the UK" (2001) 6 (1) *Sociological Research Online* at <http://www.socresonline.org.uk/6/1/ bloch.html> .
117 Goodman and Speer, *supra* note 4 at p 166.
118 Patricial Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996) at p. 70; Erika Feller, "The Evolution of the International Refugee Protection Regime" (2001) 5 *Washington University Journal of Law and Policy* 129 at 137.
119 Goodman and Speer, *supra* note 4 at p 168; Sales, *supra* note 110; Liza Schuster and Alice Bloch, "Asylum and Welfare: Contemporary Debates" 22 (3) *Critical Social Policy* 393–414 at p 393.
120 Mulvey, *supra* note 62 at p 11.

the binary voluntary/involuntary approach that they themselves use to describe migration phenomenon is a categorization that does not take into account the complex realities and motives.[121] In this regard, Michelle Foster has assessed whether the 1951 Refugee Convention, and subsequently regional and national laws that stem from this treaty, are "capable of encompassing claims based on economic destitution," a ground for asylum that would be closer to an economic migrant than a political refugee.[122] Thus, the starting point of Foster's analysis refers to the challenge of dichotomizing between "economic migrants," "political refugees" or even "genuine refugees" as "an endemic and perennial problem that continues to challenge states presented with 'economic' claims, and to which there remains no satisfactory framework for analysis."[123] Even though the distinction has been accepted by policy-makers and scholars alike, it is seen by Foster as too simplistic, one that dismisses the "range of emerging refugee claims."[124] The complexity of reasons for flight calls for a "debate and analysis within the confines of international refugee law," one that does not "ignore the fact that there is a grey area between the two extreme categories" of economic migrant and political refugee.[125]

There are multifaceted reasons for migration, and simplifying categories undermine the human rights of persons that migrate.[126] Moreover, these "discursive tropes" create hierarchies of "worthiness and legitimacy" with classifications of fraudulent or bogus asylum seekers, a labelling

121 Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*. (Cambridge Studies in International and Comparative Law, 2009), Kindle Edition. loc 1144 of 11966 citing Sally E. Findley, "Compelled to Move: the Rise of Forced Migration in Subsaharan Africa" [in:] M.A.B. Siddique (ed), *International Migration into the 21st Century* (Chelhtnam: Edward Elgar, 2001), p. 279.
122 *Ibid* Foster loc 1144 of 11966.
123 *Ibid* Loc 1168 of 11966
124 *Ibid* Loc 1181 of 11966.
125 *Ibid.*
126 Sajjad, *supra* note 112 at p 47; Oliver Bakewell, "Conceptualizing Displacement and Migration: Processes, Conditions and Categories" [in:] Khalid Koser and Susan Martin (eds) *The Migration–Displacement Nexus: Patterns, Processes and Policies* (Oxford: Berghan Books, 2011), pp. 14–28; Roger Zetter, "Protection in Crisis: Forced Migration in a Global Era" *Migration Policy Institute (MPI)*, 2015.

that leads to justifications of restrictive anti-immigrant policies.[127] The debate about who is a migrant or refugee limits protection as "labels transform realities" and determine who deserves protection via inclusion and who does not.[128] As scholars, studies and statistics demonstrate, and as noted earlier, categorizations and labels are not value-neutral.[129] The refugees definition in particular "exposes the complexity of values and judgments involved in, essentially, a subjective categorization."[130] The label of refugee is malleable and dependent on context, linked to "ideas of citizenship, the state, and understandings of the 'self' and the 'other' in any given period of time."[131]

While the citizenship category is intended to denote a common identity or having a quality of being "same as" in terms of recognition, status, rights, the asylum-seeker and refugee status categories denote an identification of *seeking rights in order to receive protection and assistance*. In a sense, refugee status is the converse of citizenship from a psychological perspective because of the "breakdown in the state-citizen relationship within a sustaining political community."[132] The "state protection" aspect of refugee status is similar to the historical view of citizenship as one that is related to extending diplomatic protection to "one's own" against threats outside of the boundaries of the state. In fact, refugee status is the converse of citizenship from a psychological perspective. While citizenship is described in terms of "a bond of trust, loyalty, protection, and

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127 Sajjad, *supra* note 112; Wendi Adelson, "Economic Migrants and Political Asylum Seekers in the United Kingdom: Crafting the Difference" (2004) 1 *The Michigan Journal of Public Affairs* 1–23; Petra Molnar Diop, "The "Bogus" Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's C-31', (2014) 30 (1) *Refuge* 67–80.

128 Sajjad, *supra* note 112 at p 41.

129 *Ibid* p 42.

130 *Ibid* at p 46.

131 *Ibid*; Martha Kuwee Kumsa, '"No! I'm Not a Refugee!' The Poetics of Be-longing Among Young Oromos in Toronto" (2006) 19 (2) *Journal of Refugee Studies* 230–55; Fiona McConnell, "Citizens and Refugees: Constructing and Negotiating Tibetan Identities in Exile" (2013) 103 (4) A*nnals of the Association of American Geographers* 967-983; B. S. Chimni, "The Meaning of Words and the Role of UNHCR in Voluntary Repatriation" (1993) 5(3) *International Journal of Refugee Law* 442–60.

132 Emma Haddad, "Who is (not) a Refugee?" *EUI Working Paper* SPS No. 2004/6.

assistance between the citizen and the state", this has been severed for the refugee in their country of origin.[133]

In all cases, whether as citizen or non-citizen in its different permutations, the conceptual categories designate the terms of the relationship between the individual and the state and the extent of the rights and responsibilities between them. Seeking asylum signifies a desire for empathy for one's plight and recognition as someone that should be treated the same as, similarly to, or as favourably as a citizen of the country of refuge, by virtue of being human.[134] In the case of Europe, the metric for empathy, recognition, and treatment is not just the citizen but the European citizen, and a long list of migrant categories, who are also seeking their own recognition and equality in terms of socio-economic rights. Whether asylum seekers/refugees are afforded the same or lesser rights and privileges relative to citizens in Europe involves a process of evaluation as to whether the applicants for asylum should be granted a set of rights that belongs to their particular legal status vis-à-vis the status of citizens. This evaluation is as much a psychological one as it is a determination of meeting legal criteria. Receiving and granting protection/assistance is a type of identification[135] – a recognition that there is a relationship, a bond, a commonality, albeit a legally enforced one. Providing protection and assistance is an exercise of empathy and recognition of need.[136]

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133 Andrew Shacknove, "Who is a Refugee?" (1985) 95 (2) *Ethics* 274 at p 275.
134 Julia Dahlvik, "The Human Individual vs. the Faceless Case" [in:] *Inside Asylum Bureacracy: Organizing Refugee Status Determination* (Springer, IMISCOE Research Series 2018) at pp 153-164. [hereinafter Dahlvik]; Cécile Rousseau and Patricia Foxen. "'Look Me in the Eye': Empathy and the Transmission of Trauma in the Refugee Determination Process" (2010) 47 (1) *Transcultural Psychiatry* 70–92 [hereinafter Rousseau and Foxen].
135 Entry on "identification" in Merriam-Webster dictionary defines it as a "a: psychological orientation of the self in regard to something (such as a person or group) with a resulting feeling of close emotional association. b: a largely unconscious process whereby an individual models thoughts, feelings, and actions after those attributed to an object that has been incorporated as a mental image" online at: <https://www.merriam-webster.com/dictionary/identification>.
136 Rousseau and Foxen *supra* note 134; Dahlvik, *supra* note 134.

Generally, the refugee-status/asylum determination process involves assessing whether a claimant has a genuine and credible need for protection based on a human rights violation in their country of origin. Protection in a formal sense means the provision of a legal measure intended to safeguard human rights, a recognition of a right and entitlement. In a psychological sense, on the part of the evaluator, it means a recognition of a need, identification or empathy with that need, acceptance, inclusion and providing of assistance. Asylum adjudicators are not the ones creating the policies per se, but they are interpreting and applying the narrative of the law, doing so within a social context, and therefore giving life to the categories as well as the mixed intentions behind the words. The empathy (or its lack) within this process is a symbiosis between the asylum adjudicator and claimant, as supported by results of studies conducted with both, that may culminate at what is referred to as the "human" element.[137] In this mental space, the adjudicator and the claimant may step outside the confines of their roles and categories and connect emotionally on a human level of equality. Others keep to their roles more rigidly. The roles of the officials have been described as having discretion based on two coexisting narratives as "state agents who act in response to rules, procedures, and law" but also as "citizen agents who act in response to individuals and circumstances."[138]

Foster further points to the psychological aspect of these categories when she considers how the dichotomies are entrenched in state practice, particularly during asylum determination procedures. A reference to a study on asylum determination in the Netherlands concluded that the distinction between "economic" and "political" is so deeply ingrained that the officials making the asylum determination are "scarcely aware" when they deem any mention of economic reasons in

[137] Dahlvik, *supra* note 134 at p 158 writes: "..the findings also show that empathy, sympathy and antipathy can play a role in the relation between caseworker and claimant even if the law prescribes impersonality and objectivity."
[138] Steven Maynard-Moody and Michael Musheno, "State Agent or Citizen Agent: Two Narratives of Discretion" (2000) 10(2) *Journal of Public Administration Research and Theory* 329–358 at p 329.

relation to flight as non-political and therefore outside the acceptable grounds for asylum.[139] The primary challenge, as Foster describes, is the deep entrenchment of categorizations and the "strong tradition of distinguishing between economic migrants or refugees and "genuine" political refugees."[140] She notes that the *meaning* behind the distinction is not clear, with labels remaining unexplained, but the implicit assumptions at work can nonetheless be ascertained.

5.5.2 Who Qualifies? Categories in the Qualification Directive

As noted in Chapter 1, the European legal process of refugee status categorization, that procedural aspect of inclusion/exclusion in EU's legislation is found in the Qualification Directive (referred herein as "QD").[141] The name is already telling as the general meaning *qualification* outside of the refugee context, is to "pass an examination"[142] especially one conferring status or otherwise or a "condition or standard that must be complied with for the attainment of a privilege."[143] Essentially, the qualification is for membership that can be described as a restriction or a necessary precondition for status of any kind. Notably, and unlike the 1951 Refugee Convention, where some of the drafters argued for the European only distinction in the refugee

139 *Ibid* Loc 1168 of 11966, citing Thomas Spijkerboer, *Gender and Refugee Studies* (Aldershot: Ashgate, 2000), p. 76-77.
140 *Ibid* Loc 1193.
141 European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.
142 Entry on "qualification" in Oxford Dictionary online at <https://en.oxforddictionaries.com/definition/qualification>.
143Entry on "qualification" in Merriam Webster Dictionary online at <https://www.merriam-webster.com/dictionary/qualification>.

definition (as described in Chapter 3), the QD applies *only* to *non*-Europeans, that is, Third Country Nationals and stateless persons, or non-EU citizens – a move that has been sharply criticized.[144]

The QD is a key feature of EU's quest for a "common policy on asylum" in an area freedom, security and justice, made available to those that "*legitimately* seek protection in the Union."[145] The QD, in its inception in 2004[146] as part of the first phase of the CEAS (2000-2005) had expanded and made more precise the refugee definition, while still maintaining omissions and derogations, certain "optional mechanisms and exclusive procedures"[147] that deviated from international standards, and resulted in rebuke by various institutions, including ECtHR, UNHCR and ECRE.[148] In response, a proposal was made by the European Commission to recast the QD in order to respond to the inconsistencies and seek better harmonization in line with the rulings.[149] This led to the adoption of the Recast Directive in 2011 which, significantly, was the first major

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144 Jane McAdam, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime" [in:] *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) at p 60; Amnesty International EU Office, "Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection", COM (2001) 510 final' (2 October 2002).

145 Recital (2) emphasis added.

146 Council Directive 2004/83/EC of 29 April 2004 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.

147 Samantha Velluti, *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts* (Berlin, Heidelberg: Springer Berlin Heidelberg: Imprint: Springer, 2014) at p 4. [hereinafer Velluti]; Jens Vedsted-Hansen, "Common EU Standards on Asylum - Optional Harmonisation and Exclusive Procedures" (2005) 7 (4) *European Journal of Migration and Law* 369-376.

148 *Niedzwiecki v. Germany*, Application No. 58453/00 and ECtHR, *Okpisz v. Germany* Application No. 59140/00, 25 October 2005; UNHCR, *Asylum in the European Union: The Study of the Implementation of the Qualification Directive*, November 2007; European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection*, October 2008; Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (recast), 2011/C 18/14, point 4.7; Antonio Di Marco, "The Subsidiary Protection: The Discriminatory and Limited Protection of the 'New Refugees'", (2005) 20 (1-2) *Mediterranean Journal of Human Rights* at p. 201.

149 European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final/2, 23.10.2009 ("Recast Proposal).

consensus co-decision legislation between the European Parliament and the Council.[150] This meant a shift in decision-making power from the Member States' governments to the EU supranational institutions, a move for "a common approach less sensitive to national interests."[151]

The QD, and international refugee law generally, responds to the effects of categorization and othering that leads to human rights abuses in the first place which leads persons to seek asylum outside their countries of origin. That is, the "*conditions for qualification* for refugee status" the QD states in Recital 29, in accordance with the meaning of the 1951 Refugee Convention, is the causal link between persecution and race, religion, nationality, political opinion or membership in a particular social group. Notably, these five grounds, the standard grounds of refugee law if persecution regarding these groupings is found, are all themselves social categorizations. Furthermore, in order to have a common concept of "membership in a particular social group", the QD says to give due consideration if persecution is arising because of the categorizations of gender, gender identity, and sexual orientation.[152] What this essentially comes down to is that an assessment is made about which social category the asylum applicant has had their human rights violated since human rights are intended to protect from discrimination and related harms (ie. persecution) based on categorization, and from there the applicants are placed in another social category as defined by the QD itself.

As noted in Chapter 1, the QD refers to two legal categories: refugee status and subsidiary protection[153] which makes such a person a "beneficiary of international protection"[154] – the latter

150 Velluti, *supra* note 147 at p 52.
151 European Council on Refugees and Exiles, *Comments from the European Council on Refugees and Exiles on the Commission Proposal to Recast the Qualification Directive*, 12 March 2010 online at: <https://www.refworld.org/docid/4b9e39e12.html> at p 4.
152 Recital 30.
153 Article 2.a.
154 Article 2.b.

two terms particular to European law. The category of a person that qualifies for subsidiary protection is unique in European law in that such a person, or third-country national, that is eligible for this status is someone that: does not qualify as a refugee but there are substantial grounds shown that if he/she returned to his/her country of origin or former habitual residence, would face real risk of suffering serious harm.[155]

The QD states that its main objective is to ensure that Member States apply common criteria for the identification of persons as *genuinely* in need of international protection, while also ensuring that a minimum level of benefits is available for those persons in all Member States.[156] The reference to an applicant seeking asylum *legitimately* and *genuinely* in need overtly expresses the suspicion that there are asylum seekers that are not in need of help as per the QD, but a desire to access the EU territory for other reasons, presumably socio-economic ones as earlier noted, a ground not in the QD. The related objective of the QD is "to limit the secondary movement of applications for international protection between Member States, where such movement is purely caused by differences in legal frameworks"[157] or in other words, to prevent asylum-shopping. Notably, Member States are given power by the Directive to "introduce or maintain more favourable provisions than laid down in the Directive."[158] Outside of the scope of the QD, there is also provision for providing protection "on a discretionary basis on compassionate or humanitarian grounds."[159]

155 As defined in Article 15… (Art 2 (f)) Article 15 … requires recognition of serious harm …and "serious and individual threat to civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict" (Art 15).
156 Recital 12.
157 Recital 13.
158 Recital 14.
159 Recital 15.

The 2011 version of the QD is again being reviewed, and in July 2016 a draft proposal for a new Qualification *Regulation*[160] as opposed to a Directive has been borne, an effort that again aims to strengthen and harmonize the rules in the EU, as well as respond to the latest case law of the ECJ and other bodies. Of course, a regulation as opposed to a directive, having direct application and legal force rather than transposition into national laws, would be even more of an incursion into the sovereign decision making of the Member States, and give more significance to the EU. The issues is that refugee status determination and protection measures are no longer a process of identification and recognition of the asylum-seeker vis-à-vis the national that either includes or excludes, but this is a matter of "qualifying" for membership in Europe, a system managed by European institutions under European laws. The identification process is no longer just national vis-à-vis asylum seeker, but rather European vis-à-vis non-European. The standards insist to be more in line with human rights, but there is more at stake. If the European identity is not yet fully in place, and national identities still dominate, or if there are different versions of this identity, different assessments of costs and benefits, and varied perceptions of threat – as discussed in the previous sections and chapters – the extension of this identification even further poses a challenge.

[160] European Commission Brussels, 13.7.2016 COM(2016) 466 final 2016/0223 (COD) Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. online at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf>.

5.5.3 Hierarchy of Categories – A Two-Tier System

Hierarchies are an arrangement of value – experienced through emotions vis-à-vis in-group and out-group members, intertwined with the value expressed through the provision of status and rights.[161] The QD had been subject to criticism and several revisions due to its two-tier system where the two categories – refugees and subsidiary protection holders – had received unequal treatment and created a hierarchy. Part of the reasoning of the discrepancy was to give Member States the discretion for the provision of protection of a temporary nature with fewer rights.[162] For example, the QD permits differentiation concerning beneficiaries of subsidiary protection in terms of their social welfare and health care which could be limited to "core benefits."[163] In the QD of 2004, Member States had received deference concerning standards relating to beneficiaries of subsidiary protection as opposed to refugees, so while refugees had immediate access to the labour market upon status recognition, limitations could be placed for holders of subsidiary protection in accordance with national rules and procedures.[164] The recast of 2011 made some corrections, and the current QD states that "beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the

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[161] An example of a psychological hierarchy is Maslow's hierarchy of needs, but here it refers to the hierarchies humans place in regards to their connections to others; Interesting origins of hierarchy as expressed in the Merriam Webster dictionary:
"The earliest meaning of *hierarchy* in English has to do with the ranks of different types of angels in the celestial order. The idea of categorizing groups according to rank readily transferred to the organization of priestly or other governmental rule. The word *hierarchy* is, in fact, related to a number of governmental words in English, such as *monarchy*, *anarchy*, and *oligarchy*, although it itself is now very rarely used in relation to government. The word comes from the Greek *hierarchēs*, which was formed by combining the words *hieros*, meaning "supernatural, holy," and *archos*, meaning. "ruler." *Hierarchy* has continued to spread its meaning beyond matters ecclesiastical and governmental, and today is commonly found used in reference to any one of a number of different forms of graded classification."

[162] European Commission, Proposal for a [recast Qualification Directive] – Explanatory Memorandum, COM (2009) 551, 21 October 2009, 8.

[163] Velluti, *supra* note 147 at p 52. European Council on Refugees and Exiles, *Refugee rights subsiding? Europe's two-tier protection regime and its effect on the rights of beneficiaries*, 2016, online at: <https://www.refworld.org/docid/58e1fc8e4.html> at p 6. [hereinafter ECRE report 2016] at p 27 referring to Council of the European Union, *Proposal for a Qualification Regulation*, 5402/1/17 REV 1 ASILE 2 CODEC 59, 21 February 2017, 76, fn. 128.

[164] Velluti, *supra* note 147 referring to Article 24 of the directive.

same conditions of eligibility."[165] This is intended to harmonize policies across the EU with the overall purpose of the QD which is to "lay down standards...for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted."[166] Nonetheless, a two-tier system persists in terms of recognition rates as well as the nature of protection and assistance. A 2016 proposal by the European Commission for a Qualification Regulation and repealing of the QD indicate that the inclinations towards emboldening this hierarchy could be making a comeback.[167]

Indeed, the "granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities" for beneficiaries of international protection is currently left to the discretion of the Member States "within the limits set out by international obligations."[168] Most provisions related to social and economic support stipulate that it should be equivalent to that provided for nationals (social welfare,[169] employment-related activities,[170] and health-care)[171] or other third-country nationals (education for minors and adults,[172] and accommodation).[173] Integration is mentioned in the QD, steering the Member States to consider specific needs and challenges of beneficiaries of international protection, but that taking these challenges into consideration "should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards."[174] Provision of social assistance is to be done without

165 Recital 39.
166 Article 1.
167 European Commission, *Proposal for a Qualification Regulation*, COM(2016) 467, 13 July 2016; ECRE, *Comments on the Commission proposal for a Qualification Regulation*, November 2016, 7.
168 Recital 40.
169 Art 29 (1) & (2).
170 Art 26 (1) & (2).
171 Art 30.
172 Art 27 (1) & (2).
173 Art 32.2.
174 Recital 41.

discrimination to avoid social hardship, with the "possibility of limiting such assistance to core benefits" having to at least include minimum income support.[175]

The discretionary approach is confirmed by national practice of renewed efforts in Member States during 2016 to "have lowered the level of rights conferred upon subsidiary protection holders compared to refugee status holders, often as far as EU law would allow" as noted by European Council on Refugees and Exiles (ECRE).[176] The divergent categorization translates into the types of benefits that are provided and ultimately, the prospects of integration. As the ECRE report notes:

> Persons granted protection are faced with dramatic disparities vis-à-vis most rights and entitlements crucial to rebuilding a life and becoming part of their host society. Rules on the duration and renewal of residence permits, the issuance and validity of travel documents, the conditions for family reunification and the status of family members upon arrival, the residence periods required for an application for naturalisation, as well as access to the labour market, freedom of movement and social assistance, draw sharp, unjustified distinctions between refugee status and subsidiary protection. The artificial divide between the two statuses often results from national practice, but it is also grounded in the design of the CEAS as a two-tier protection system.[177]

This difference in treatment creates further ambiguity rather than uniformity as to which status should be granted. While it can be said that the EU's QD had made the inclusion criteria broader than the Refugee Convention, by introducing subsidiary protection, the effect is that the criteria have made it more likely for states to limit granting refugee status and opt for more temporary status. Hence, even though the QD has integration provisions for subsidiary protection holders, the beneficiary is still not welcome for a longer stay. The 2011 recast was based on

[175] Recital 45.
[176] ECRE report 2016, *supra* note 163 at p 7.
[177] *Ibid* at p 24.

evidence shows that subsidiary protection holders do not in fact experience a more temporary stay, which leads to disadvantage, and this was confirmed by a draft report of the European Parliament rapporteur on 21 February 2017.[178] Thus, it becomes evident that the categorization of "beneficiaries of international protection" has been used as a way of loosening the obligations in terms of inclusion. In Europe, the likelihood of recognition in one of the categories of beneficiaries of international protection still depends on the location where the claim is made.[179] Statistics of the European Commission as well as analysis from organizations like the ECRE, show inconsistencies across Europe in terms of recognition rates in spite of the objective of the CEAS for harmonized policies in the European Union. The variances in refugee status recognition rates per country indicate that even if the criteria for inclusion is objective, status determination is not an objective exercise but always dependent on the lens being applied by those doing the assessment.

Simply, some states are more and less inclusionary than others, resulting in an "asylum lottery." An example that ECRE notes is of asylum seekers from Iraq and Afghanistan facing an asylum lottery depending on where they make the claim, with recognition rates between 100% in Spain and 12.5% in the United Kingdom for Iraqi applicants and 2.5% (Bulgaria) and 97% (Italy) for Afghani applicants.[180] This trend was apparent across Europe in 2016 and continued into 2017. In 2017, they were ranged between 83.1% in France, 58% in Belgium, 47% in Germany, 30 % in Hungary, and in Bulgaria Afghani claims are frequently found as "manifestly unfounded", noted

178 European Parliament, *Draft report on the proposal for a Qualification Regulation*, PE599.799, 21 February 2017, available at: http://bit.ly/2lCJhmH, Explanatory Statement, 61. "The current practice in the Member States and the very concept of protection does not effective provide grounds for the distinction between the two statuses. In particular the reality shows that the subsidiary protection is based on an unjustified assumption of more temporary nature of protection and limited in its effectiveness."

179 This underpins the claim that the determination process is a subjective one in spite of objective criteria.

180 ECRE report 2016, *supra* note 163 at pp 11-12.

as strikingly low and Bulgaria reprimanded by the European Commission.[181] The 47 % in Germany is a figure from 2017, whereas recognition rate for Afghani asylum seekers was 60.5 % in 2016 and 77.6 % in 2015. The dramatic drop in a short period of time was attributed to a prioritization of other countries of origin, and quick decisions made in a short period of time.[182]

Statistics also show divergences between the choice of refugee status and subsidiary protection.[183] For example, refugee status recognition rates for Syrians are between 100% in Ireland and 92% in the United Kingdom and Italy, while it is only 0.9% in Spain where predominantly subsidiary protection is granted.[184] The ECRE report notes: "People fleeing the same countries or circumstances may face widely different treatment depending on the country processing their claim: the same person could be granted refugee status in one country, subsidiary protection in another, or even have their claim refused in another."[185]

The differentiation in status that leads to differentiation in treatment and protection, especially concerning socio-economic right, is especially harmful for the category of asylum-seeker. Regression of socio-economic rights of asylum seekers has been used to minimize asylum protection as part of "migration management" to deter the "pull" of what have been deemed illegitimate asylum claims. Throughout Europe, asylum seekers in several European countries face substandard living conditions and discrimination concerning, *inter alia*, housing, social assistance

[181] ECRE, "Asylum statistics 2017: Shifting Patterns, Persisting Disparities" (19 January 2018) online at <https://www.ecre.org/asylum-statistics-2017-shifting-patterns-persisting-disparities/>.
[182] Informationsverbund Asyl und Migration, "Differential Treatment of Specific Nationalities in the Procedure: Germany" online at <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/treatment-specific-nationalities>.
[183] Council of the European Union, *Council conclusions on convergence in asylum decision practices*, 8210/16 ASIM 58, 22 April 2016.
[184] ECRE report 2016, *supra* note 163 at p 13.
[185] *Ibid* at p 12.

and employment, leading to destitution and homelessness.[186] In Europe, states may restrict asylum seekers from working in the first nine months of lodging their asylum application.[187] The employment restrictions varies from country to country, but EU Member States such as the United Kingdom, Denmark and Ireland, that have opted out of the EU's Reception Conditions Directive, are not bound by the nine-month stipulation. In countries where asylum seekers are not provided adequate housing and social assistance during this restricted time, they have no means to be self-sufficient.[188]

Examples across the European Union are plentiful, but notably, policies of discrepancy based on categories even affects the most inclusionary self-professed compassionate of Member States – Germany a case in point. In Germany, a policy change at the start of 2016 resulted in an exponential increase in granting of subsidiary protection rather than refugee status, a shift that affected Syrian asylum seekers primarily, but also Iraqis and Eritreans.[189] This shift in status

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[186] European Observatory on Homelessness Asylum Seekers, Refugees and Homelessness, "Asylum Seekers, Refugees and Homelessness: The Humanitarian Crisis and the Homelessness Sector in Europe" *Comparative Studies on Homelessness* (Brussels – December 2016).

[187] European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, online at: <http://www.refworld.org/docid/51d29db54.html>.

[188] Human Rights Watch, "At Least Let Them Work The Denial of Work Authorization and Assistance for Asylum Seekers in the United States" (2013) online at: <http://www.hrw.org/sites/default/files/reports/us1113_asylum_forUPload.pdf> .

[189] "For instance, 95.8% of Syrians had been granted refugee status in 2015, this rate dropped to 56.4% in 2016 and 35% in 2017. Conversely, the rate of Syrians being granted subsidiary protection rose from 0.1% in 2015 to 41.2% in 2016 and 56% in 2017. The policy change at the BAMF coincided with a legislative change in March 2016, according to which Family Reunification was suspended for beneficiaries of subsidiary protection until March 2018, with suspension recently being prolonged until July 2018 and becoming subject to strong restrictions after that date. Tens of thousands of beneficiaries of subsidiary protection have appealed against the authorities' decisions in order to gain refugee status ("upgrade-appeals"), with 55,538 pending appeals by Syrians out of a total 71,084 pending upgrade appeals at the end of 2017." Online at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/treatment-specific-nationalities≥. ECRE report 2016, *supra* note 163 at p 13: "Positive decisions by the BAMF for all nationalities shifted from 137,136 refugee status (55%) and 1,707 subsidiary protection (0.7%) in 2015, to 256,136 refugee status (42.1%) and 153,700 subsidiary protection (25.3%) in 2016." "Namely Syrians, who had a mere 0.06% subsidiary protection rate in 2015, witnessed a subsidiary protection rate of 42% in 2016. This has led to increasing "upgrade appeals" by subsidiary protection holders against refusals of refugee status, in which most German Administrative Courts and High Administrative Courts have accepted that Syrians were entitled to refugee status."

recognitions coincided with a legislative change that had suspended family reunification for beneficiaries of subsidiary protection between 2016 and 2018. The implication is clear – the right of family reunification, classified as a socio-economic integration right that comes with both costs and benefits to Germany and closely links to other socio-economic rights (welfare, housing, employment, etc), is a key marker of inclusion, while the alternative of granting a status with lesser rights is a way of directly blocking socio-economic integration.[190] Hence there is an exclusionary incentive for Germany to increase recognition rates for the category of beneficiaries of subsidiary protection as opposed to refugee status.

The risk of destitution may also be attributed to the reduction of withdrawal of assistance by the state that is permitted, even prescribed, by the Reception Conditions Directive, to restrict "the possibility of abuse of the reception system."[191] Thus, the construing of asylum seekers as suspicious in terms of their legitimacy, deservingness, and trustworthiness, is written into EU law. While the Directive aims to balance this migration control tactic with "at the same time" calling for a"dignified standard of living for all applicants"[192] and stating that decisions should be taken "individually, objectively, and impartially,"[193] the outcome is that the minimum standards are applied differently in legal systems and are "influenced by the presumption of abuse that underlies

[190] Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.
Recital 4 states that reunification facilitates integration because it "helps to create sociocultural stability"; UNHCR, Note on the integration of refugees in the European Union, May 2007, notes taht "[f]amily members can reinforce the social support system of refugees" (para. 35)

[191] European Council on Refugees and Exiles, "Withdrawal of reception conditions of asylum seekers: An appropriate effective or legal sanction?" (July 2018, AIDA Asylum Information Database). [hereinafter ECRE report 2018]; Reception Conditions Directive Recital 25: "the possibility of abuse of the reception system should be restricted by specifying the circumstances in which material reception conditions for applicants may be reduced or withdrawn while at the same time ensuring a dignified standard of living for all applicants."

[192] *Ibid* Recital 25.

[193] Article 20 (5): 5. Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicant.

these provisions."[194] Moreover, this standard of withdrawal or reduction does not have to be equal to nationals, but it may be more favourable than other third country-nationals,[195] as Member States "may grant less favourable treatment to applicants than to nationals as specified in this Directive."[196]

The egregious discrepancy between individuals that are considered an in-group identity that can benefit from protection and those that are considered an Other was evidenced by the refugee status recognition of Nikola Gruevski, former Macedonian prime minister, who has reportedly been granted asylum in Hungary in November 2018 within a matter of days after fleeing his country due to a prison sentence on corruption charges and abuse of power. Gruevski may have even received assistance from the Hungarian authorities to leave Macedonia in the first place. The psychological bias is on full display here. Hungary presents itself as one of the strictest EU Member States on asylum with draconian laws and public campaigns against migration emphasizing that refugees are not welcome – meaning refugees coming from certain countries that are outside of the perceived European in-group. But Gruevski, reportedly a friend of Hungarian Prime Minister Viktor Orbán, depicted in the news as another "strongman," occupies a different conceptual category and therefore a different connection and recognition than non-influential refugees that are coming from Africa and predominantly Muslim countries. The quick recognition and inclusion of Gruevski and the rejection of countless others is a stark example of how "qualification" for refugee status, assistance and protection, is an identity-based categorization of

194 ECRE report 2018, *supra* note 191 at p 1.
195 Recital 28: "Member States should have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State."
196 Recital 24: "To ensure that the material support provided to applicants complies with the principles set out in this Directive, it is necessary that Member States determine the level of such support on the basis of relevant references. That does not mean that the amount granted should be the same as for nationals. Member States may grant less favourable treatment to applicants than to nationals as specified in this Directive."

those who are desirable and those who are not, based on unseen criteria that are not written as per objective standards of the law.

5.6 Conclusion - The Impact of Legal Category Stratification

The determination of a status category is not simply an objective abstract legislative exercise where harmonized criteria are evenly applied, but very much an exercise of psychological inclinations about who belongs and who does not, who is desired for inclusion and who is not, what is valued and what is not and for whom. Legal status categories correspond with greater and lesser inclusion in terms of rights, social and economic rights having particular significance. Rights represent value of a particular group membership, and are part of an identity-making process of recognition of members, even in the case of human rights that are meant to be applied equally to all. The human instinct for Self and social categorization by its nature and design is meant to provide salience in identity and social cohesion by increasing a positive valuation towards the in-group and a negative (or less positive) valuation towards the out-group. Legal categorization within the European frameworks outlined, whether as a European citizen, a refugee, a beneficiary of subsidiary protection, or another in-group/out-group status on the spectrum of inclusion/ exclusion, is both a reflection of this psychology as well as a mechanism, an identity-making technology that reinforces this psychology. The impact of a hierarchical legal categorization cannot and should not be underestimated, though it is yet to be fully appreciated.

While it is outside the scope and permitted space of this chapter to outline all the impact of legal categorization that has the effect of social stratification via provision or denial of rights, it should be noted, and even intuitively evident, that the psychological effects bear a toll on both the newcomers and the society as a whole, feeding a self-serving loop. One study noted that legal

status stratification results in health disparities because the "hierarchy of legal classifications shapes corresponding social, political, and economic conditions that may influence health outcomes and health inequalities."[197] The authors see the health and legal status relationship as "reflective of a system of stratification that positions immigrants within a hierarchy of relative access to the rights and responsibilities enjoyed by citizens."[198] Other studies consider the legal status stratification having dire effects on long-term integration prospects.[199] That is – the socio-economic disparities suffered at the earlier stages of the migrant category trajectory have direct implications for refugees' social and economic integration.[200] A 2018 UN commissioned report[201] on refugees and social integration in Europe considers their psychological functioning, noting that integration is affected by numerous factors "including pre-migration experiences, the departure process and the post-arrival experiences and environment."[202] When asylum seekers enter Europe, they are coming in with extensive trauma – both physical and mental – that is aggravated by the problems they face in the new country, notably "family separation, language barriers, legal status, unemployment, homelessness, or lack of access to education and healthcare."[203] They are nonetheless expected to meet the demands of social integration and financial independence.

197 Jacqueline M. Torres and Maria-Elena D. Young, "A Life Course Perspective on Legal Status Stratification and Health" (2016) 2 *SSM-Population Health* 141–148 at p 142.
198 *Ibid* at146.
199 Janina So¨hn, "How Legal Status Contributes to Differential Integration Opportunities" (2014) 2(3) *Migration Studies* 369-391.
200 Liza Schuster, "Turning Refugees into 'Illegal Migrants': Afghan Asylum Seekers in Europe" (2011) 34(8) *Ethnic and Racial Studies* 1392-1407; Mihaela Robila, "Refugees and Social Integration in Europe", United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development, United Nations Expert Group Meeting. New York. 15 – 16 May 2018 [hereinafter Robila].
201 *Ibid* Robila.
202 *Ibid* at p 2.
203 Tom Craig, Peter Mac Jajua, Nasir Warfa, Mental Health Care Needs of Refugees (2009) 8(9) *Psychiatry* 351-354: "Psychiatric surveys of refugees indicated that 9% of adults were diagnosed with PTSD, 4% with generalized anxiety disorder and 5% with major depression, and 11% of children with PTSD" at p 352.

According to studies, post-migratory stress leads asylum seekers to have higher rates than refugees of post-traumatic stress disorder and depression.[204] This is attributed to the asylum process itself, which includes "delays in the application process, conflicts with immigration officials, denial of work permits, unemployment, and separation from families."[205] The emotional and somatic symptoms are worse for women, while for men detachment is higher, and this is attributed to barriers in socio-economic participation as well as a "legal basis for asylum."[206] The mental states are also noted in regards to young refugees and their experiences before and after migration.[207] There is a correlation between the different legal statuses and mental health with higher post-traumatic stress disorder (PTSD), anxiety and depression among asylum seekers, though still relatively high among refugees.[208] Rates of depression and anxiety varies and is linked to financial strain, and generally asylum seekers and refugees fare worse in this regard, more anxious and depressed than other categories of migrants.[209] Employment is cited as the most important factor in integration since those who are working adjust more easily to the host society,

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[204] Håkon Stenmark, Claudia Catani, Frank Neuner, Thomas Elbert, Are Holen, "Treating PTSD in Refugees and Asylum Seekers within the General Health Care System. A Randomized Controlled Multicenter Study" (2013) 51 *Behaviour Research and Therapy* 641-647.

[205] Robila, *supra* note 200 at p 3.

[206] *Ibid* at p 7; Walter Renner and Ingrid Salem, "Post-Traumatic Stress in Asylum Seekers and Refugees from Chechnya, Afghanistan, and West Africa: Gender Differences in Symptomatology and Coping. (2009) 55(2) *International Journal of Social Psychiatry* 99-108; Alice Bloch, Treasa Galvin, Barbara Harrell-Bond, "Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions" (2000) 38(2) *International Migration* 169–190.

[207] *Robiola* at p 8; Johannes Hebebrand, Dimitris Anagnostopoulos, Stephan Eliez, Henk Linse, Milica Pejovic-Milovancevic, Henrikje Klasen, "A First Assessment of the Needs of Young Refugees Arriving in Europe: What Mental Health Professionals Need to Know" (2016) 25 *European Child and Adolescent Psychiatry* 1–6.

[208] Christian Haasen, Cüneyt Demiralay, and Jens Reimer, "Acculturation and mental distress among Russian and Iranian migrants in Germany" (2008) 23 *European Psychiatry* 10–13: In the study, 54 % of asylum seekers and 41.4 % of refugees met the PTSD; as high as 84.6% asylum seekers reported anxiety and 63.1% of them reported depression, while for illegal migrants both anxiety and depression were at 47.6%."
Robila, *supra* note 200 at p 12: "An evaluation of the associations between the Gross National Product (GNP) of the immigration country as a moderating factor for depression, anxiety and PTSD indicated that the rates for depression were 20% among labor migrants vs. 44% among refugees and for anxiety 21% among migrants vs. 40% among refugees and higher GNP in the country of immigration was related to lower depression and/or anxiety in migrants but not in refugees"; Jutta Lindert, Ondine S. von Ehrenstein, Stefan Priebe, Andreas Mielck, and Elmar Brahler, "Depression and Anxiety in Labor Migrants and Refugees – A Systematic Review and Meta-Analysis, (2009) 69 *Social Science & Medicine* 246–257.

whereas the converse is that underemployment is the most significant barrier to successful integration of refugees into society.[210] As noted by a number of organizations, being denied access to the labour market leads to exclusion, prevents self-sufficiency and ultimately prevents integration.[211] Denial of assistance has been linked to the primacy of dignity, and NGOs have noted that law that prevent asylum seekers from accessing the labour market has severe consequence on their mental and physical well-being, contributes to isolation, and further promotes dependency.[212]

Without space to delve deeper, it is worth noting briefly that extensive studies also support that inclusive policies that provide access to social and economic support do facilitate integration via recognition, status, and rights, and thus result in an *increase* in psychological well-being of persons. Some of the research on this coming both from psychology and legal literature was noted in Chapter 1 and will be discussed further in the following chapter. In short, the value that is inserted into an individual's life via group membership and status recognition is supported by social psychology. This is the entire premise behind citizenship at the national or European level – forming an identity and equality of membership for shared benefits and mutual welfare. However, in present day Europe the tensions between the national, supranational, and the international self-definitions are in a continuing tug-of-war about where value is ultimately placed.

Robila, *supra* note 200 at p 11; Jenny Phillimore and Lisa Goodson, "Problem or Opportunity? As Asylum Seekers, Refugees, Employment and Social Exclusion in Deprived Urban Areas" (2006) 43(10) *Urban Studies* 1715-1736.

[211] Richard Cholewinski, "Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations – Education and Employment. Paper presented at ECRE conference on Social and Economic Rights of Refugees and Asylum Seekers" in Odessa, Ukraine November 18-19, 2004.

[212] *Ibid.*

Chapter 6 – The Evaluative Legal Concept of Dignity
Towards Psychological Inclusion of Asylum Seekers in Europe

We ask for humanity – for people to treat us like human beings.[1]

– Nada, refugee from Syria

Migration is a dignity seeking journey.

– Francois Crépeau[2]

6.1 Introduction – The European Dignity Fundamental

The extensive literature on human dignity highlights the elusiveness and potency of the concept, both from the side of its proponents as well its detractors.[3] Indeed, that evocative resonance and emotional charge of the dignity concept, that "phenomenological approach to the valuation of human life" which is awkward to define, contributes to concerns about its legal application.[4] Nevertheless, human dignity features prominently as a foundational concept for human rights across the globe, all while being essentially contested.[5] Dignity denotes universality and is emblematic within international and European human rights law.[6] In fact, the drafters of the Universal Declaration of Human Rights (UDHR) inserted dignity into the document as an effort

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[1] Report of the International Rescue Committee (IRC), *Are We Listening? Acting on Our Commitments to Women and Girls Affected By the Syrian* Conflict (September 2014) at p 5; Quotation also online at <http://feministing.com/2014/09/18/are-we-listening-to-syrian-women/>.

[2] Professor of International Law, McGill University and United Nations Special Rapporteur on the Human Rights of Migrants (2011-2017). Quotation from Inaugural Lecture at Université Catholique de Louvain (February 8, 2018) online at <http://www.europeanmigrationlaw.eu/en/articles/video/francois-crepeau-international-francqui-professor-inaugural-lecture.html>.

[3] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 (4) *The European Journal of International Law* 655 – 724. [hereinafter McCrudden 2008] McCrudden argues that judicial interpretation in particular makes the concept context-specific and open to judicial discretion, thereby varying between jurisdictions.

[4] Emily Kidd White, "Till Human Voices Wake Us" (2014) 3 *J.L. Religion & St.* 201 at p. 208 [hereinafter Kidd White].

[5] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 (2) *The American Political Science Review* 303-316.

[6] Jack Donnelly, "Dignity: Particularistic and Universalistic Conceptions in the West" *Universal Human Rights in Theory and Practice*. 3rd edition (Ithaca: Cornell University Press, 2013) at pp 121-130 [hereinafter Donnelly 2013]

to make human rights philosophically grounded and it passed without extensive deliberation.[7] Notably, as this chapter will explore, dignity also has a psychological underpinning and impact, and it can be considered an inclusionary concept. And yet, a definitive understanding of human dignity remains elusive and calls for unpacking in psychological terms.

A reflection on the notions of human dignity within human rights law also invites examples of how European laws and courts have deliberated these matters concerning cases of asylum seekers' socio-economic rights denial. This includes examples from European jurisprudence (ECtHR, CJEU and European Committee on Social and Economic Rights) on how dignity and related inclusionary concepts have addressed access to social rights for asylum seekers. The argument is that these cases are not only significant for their recognition of fundamental human rights and minimum standards of living conditions, but that they are psychologically meaningful for the prospect of social inclusion, from the side of the asylum seekers, European institutions, and societies at large. Dignity is inclusionary, it is argued, because it can have the effect of overriding other conflicts within the law – for example when rights under the European law are not extended to non-European citizens concerning certain provisions, a claim of dignity being violated can overrule these limitations. As a result, application of the human dignity concept in cases of asylum seekers' socio-economic rights has contributed to shifting the legal landscape in Europe to be more inclusionary.

Entire volumes have been dedicated to the concept of dignity, and the brief overview here is meant by way of introduction to the concept before continuing to consider its relevance in

[7] Klaus Dicke, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights" [in:] David Kretzmer and Eckhart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002) at pp 111- 120; Paul Gordon Lauren, "Proclaiming a Vision - The Universal Declaration of Human Rights", *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press; 3rd edition: 2013) at pp 205 – 240.

European law, its psychological components, its role as an evaluative legal concept, and finally, its emergence as a concept that emits an inclusionary sensibility towards asylum seekers, refugees and other categories of non-nationals in Europe. The focus on emotions considers concepts of humanity and dignity through inclusionary expressions of empathy and compassion in response to humiliation and pain. As numerous cases of denial of human rights to asylum seekers and non-nationals more broadly are contested on the grounds of dignity, it is pertinent to assess what dignity means generally, and then with respect to these groups with reference to socio-economic rights.

6.2 A Brief History of Dignity

6.2.1 Sacred and Sacralised

Historically, dignity has been ascribed to an elite group, but *human* dignity with reference to humanity and the human family has democratized dignity. In this sense, human dignity means the worth or deservedness of respect inherent to being.[8] The concept of human dignity is said to have these main historical sources: *Dignitas* of ancient Greeks and Romans, Biblical conceptions, Kant's philosophical musings, and the declarations of human dignity enshrined in the UDHR following WWII.[9] *Dignitas* in ancient Rome was a social concept, describing the particular social role of a person. [10] The bearers of the role and the people around them had to pay duty to this social role in their behavior.[11] This was reserved for officials that held a high rank in public life, accompanied by specific responsibilities that were reciprocated with respect to their

[8] Donnelly 2013, *supra* note 6 at p. 29.
[9] Ralf Stoecker, "Three Crucial Turns on the Road to an Adequate Understanding of Human Dignity" [hereinafter Stoecker] [in:] Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24, Springer 2011) at p 8 [hereinafter Kaufmann *et al*].
[10] *Ibid*.
[11] *Ibid*.

accomplishments.[12] The idea of dignity as rank was carried over in Christian doctrine, but through theology it gained universal standing as a measure of social behaviour.[13] Being made 'in the image of God' universalized the divine and natural attribute to be possessed by all human beings.[14]

Immanuel Kant secularized the notion, placing the emphasis on agency and reason – that is, dignity as not reliant on divinity but on human capability.[15] In developing the understanding of dignity, Kant distinguishes "value" as the price of something which allows for mutual exchange, from human dignity, which prevents such an exchange.[16] While value can generally connote price, the value of a human is priceless, and it is this view of dignity, according to Kant, that creates a categorical imperative and the obligation to never treat anyone as a means to an end.[17] While there are several interpretations, the consensus sees Kant calling for a "respect for the worth of humanity, in one's own person as well as that of another."[18] Significantly, Kant saw dignity as a psychological concept in that there must be a mutual respect between one's own *self-esteem* and that of others.[19]

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[12] Arnd Pollmann, "Embodied Self-Respect and the Fragility of Human Dignity: A Human Rights Approach" [in:] Kaufmann *et al, surpa* note 9 at p 246.

[13] *Ibid* at p 246 citing R. Kendall Soulen and Linda Woodhead (eds) *God and Human Dignity* (Grand Rapids, MI: Eerdmans, 2006).

[14] *Ibid*.

[15] *Ibid* Pollmann at p 246 referencing Thomas E Hill, *Dignity and Practical Reason in Kant's Moral Theory*. Ithaca, NY: Cornell University Press, 1992).

[16] Kant: "Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world, that are not human beings and yet can be used, and so over all things." *Doctrine of Virtue*: para 38 [in:] M Gregor (ed), *The Metaphysics of Morals* (Cambridge, Cambridge University Press, 2009); Stoecker, *supra* note 9 at pp 8-9; Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart Publishing, 2015) [hereinafter Dupré] at p 33-36.

[17] Stoecker, *supra* note 9 at pp 8-9.

[18] Samuel J. Kerstein, "Dignity and Preservation of Personhood" [in:] Kaufmann *et al, surpa* note 9 at p 233 referencing Allen W. Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999).

[19] Dupré, *supra* note 16 at pp 34-35 citing *Doctrine of Virtue*: para 38, M Gregor (ed), *The Metaphysics of Morals* (Cambridge, Cambridge University Press, 2009). Kant wrote: "But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the necessary self-esteem of others, as human beings, that is, he is under obligation acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being".

Through the years, the concept of dignity has been secularized but also sacralised, as argued by sociologist and social theorist, Hans Joas.[20] In its enumeration as the leading principle in human rights instruments, human dignity has acquired the status of sacredness, a protected value that is seen as "intrinsically good", and one that is charged with meaning about the sacredness of every human life, and thus institutionalized under the law. The self-evidence and "affective intensity" of dignity can therefore be explained by this sacredness that originates in religious conceptions but made its way into secular law through "reinterpretation and ethical advancement, at times generated in the wake of violent historical episodes that have produced a concept of human dignity charged with meaning but ultimately unbound by the history of its antecedent conceptions."[21] The indication here is that in spite of its ambiguous nature, dignity has an enduring resonance, one that is tied closely to social relations and consequently the evolution of rules that govern societies.

6.2.2 Codified in International Law and European Constitutions

Codification of human rights in the European context has its roots in the Enlightenment period that had continued a focus on the human and humanism from the Renaissance period, then was followed by the French Revolution and the 1789 Declaration on the Rights of Man and Citizen marking the "tipping point" for the concept of dignity.[22] The French Declaration made an explicit reference to dignity in its Article 6, stating that all *citizens* are equal in the eyes of the law and therefore eligible for its "dignities" still in the traditional sense of rank.[23] But the first reference to

[20] Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown University Press: 2013).
[21] Kidd White, *supra* note 4 at p 215.
[22] In her close review of the concept of dignity in European continentalism, Catherine Dupré documents this in the Age of Dignity. Here is a snippet of Dupré's findings with a focus on the sequence of the mention of dignity in the constitutions of Europe in order to highlight the "tipping points" that she discussed at pp 29-30.
[23] Dupré, *supra* note 16 at p 39.

human dignity within law is identified in a French Decree in 1848 stating "slavery is an assault upon human dignity."[24] Thereafter, the first constitutional codification of human dignity is attributed to the 1919 Weimar Constitution in its article 151 that states: "The organization of the economic life must conform to the principles of social justice with a view to guaranteeing a dignified existence to all."[25] The Irish Constitution in 1937 went on to "assure the dignity and freedom of the individual", this coming about during the Second World War in which Ireland remained neutral.[26] The first post-war codification of dignity was in the Italian constitution in 1947, referring to citizens having "equal social dignity" as well as reference to workers' remuneration for a "free and dignified existence" and the protection of human dignity from harm by private economic enterprise.[27]

Dignity as a constitutional concept is said to be connected to "social and political struggles, or indeed war"[28] after a total breakdown of sociality and social cohesion. Indeed, the concept of dignity was entrenched in the wake of WWII as a contrast to Nazi crimes and generally European totalitarianism that "outraged the conscience" of the world and led to proclamations of "never again".[29] The notion of a "shared humanity" and the "inherent dignity…of all members of the human family" is well grounded in international human rights law. The UN Charter in 1945 includes four principle objectives of the UN, one of which is "to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person."[30]

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[24] Dupré, *supra* note 16 at p 50 referencing Rebecca J. Scott, "Di*gnité* /Dignidade: Organizing Against Threats to Dignity in Societies after Slavery" [in:] Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford: Oxford University Press, 2013) 61-77.
[25] Dupré, *supra* note 16 at p 49.
[26] Teresa Iglesias "The Dignity of the Individual in the Irish Constitution: The Importance of the Preamble" (2000) 89(3) *Studies: An Irish Quarterly Review* pp. 19–34.
[27] Dupré, *supra* note 16 at pp 54-55.
[28] *Ibid* at p 51.
[29] Janet Holl Madigan, "The History of Human Rights in International Law", *Truth, Politics and Universal Human Rights* (Palgrave Macmillan, 2007) att pp. 5-13. The epithet of "outraged conscience is in preamble of the UDHR.
[30] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI].

But insertions of dignity in the human rights instruments were not automatic, and the deliberations concerning dignity as part of negotiations of the UDHR are telling of the complexity of its meaning.[31] In fact, mention of dignity was omitted in the first draft due to philosophical *vagueness, but once out of the hands of the original author, the C*anadian legal scholar John Humphrey, the final negotiated version incorporated five mentions inserted almost precisely for the same reason as its initial exclusion – as a theoretical underpinning to human rights generally.[32] One of the chief proponents, Eleanor Roosevelt, claimed that the inclusion of dignity was needed "in order to emphasize that every human being is worthy of respect...it was meant to explain why human beings have rights to begin with."[33] Yet, there was little discussion or consensus concerning the meaning of dignity.[34]

The preamble of the 1948 UDHR says that the recognition of this inherent dignity, as well as "equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Catherine Dupré notes the shift between the reference to human beings as "man and citizen" in 1789 Declaration and then in the 1948 Declaration as "the members of the human family", this shift being of a wide inclusionary significance in that "human beings are from then on explicitly defined as belonging to humanity."[35] Resembling Enlightenment ideals, the UDHR makes an interesting proposition in its first article – all human beings are *born* free and equal in dignity and rights – this indicating that dignity is already inherent in us and not conferred

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[31] Peter Danchin, Columbia University online at <http://ccnmtl.columbia.edu/projects/mmt/udhr/article_1/drafting_history_2.html> .

[32] McCrudden 2018, *supra* note 3 at p 677 referencing J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984) at p 44.

[33] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at p 144.

[34] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent* (Philadelphia: University of Pennsylvania Press, 1999).

[35] Dupré, *supra* note 16 at p 68 referencing D. Feldman, "Human Dignity as a Legal Value, Part 1| (1999) *Public Law* 682, 684.

upon us by others. By this birthright, humans are also endowed with reason and conscience and should act towards one another in a spirit of brotherhood (and sisterhood).

Notably, what is at times overlooked in discussions on human dignity is that beyond the preamble and Article 1 of the declaration, dignity is mentioned two more times in the UDHR and this is with reference to socio-economic rights: Article 21 concerning the "right to social security" as being indispensable for dignity, and Article 23(3) relating to remuneration that is "worthy of human dignity" within the right to work provisions.[36] The human rights Covenants affirm these principles in the proclamation that "these rights derive from the inherent dignity of the human person" and dignity appears in most human rights conventions that follow.[37] Accordingly, from the onset, there is an affirmed connection between socio-economic rights and a dignified life, which shows up prominently later on in dignity claims connected to living conditions.

Following the UDHR, the German Basic Law came into being in 1949, with Article 1 stating that human dignity is inviolable, and that it is the duty of the state to respect and protect it.[38] From there onward, human dignity appeared in constitutions throughout Europe, according to Dupré "in three broad waves", the first being the transitions of South Europe, followed by

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[36] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) Articles 22 and 23: "everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (Article 22). The following article on employment: "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (Art. 23 (3)).

[37] United Nations Covenant on Economic, Social and Cultural Rights, adopted by GA Res. 2200A (XXI) of 16 December 1966; United Nations Covenant on Civil and Political Rights, adopted by GA Res. 2200A of 16 December 1966.The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

[38] Doron Shultziner and Guy E. Carmi, "Human Dignity in National Constitutions: Functions, Promises and Dangers" (2014) 62(2) *The American Journal of Comparative Law* 461-490 at p 486 quoting GG. art. 1 (1949) as well as "It is the formative principle in terms of which all other constitutional values are defined and explained" Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 359 (2d ed. 1997).

democratic transitions of former Communist states in Central and Eastern Europe which had new constitutions, and finally, constitutional revisions in the 1990s in Belgium and Finland.[39] Several constitutional Preambles explicitly reflect these other manifestations of a never again spirit since "many constitutions adopted since 1945 in Europe marked the end of a war." [40]

The crowning glory in the codification of the concept of dignity is at the supranational level in Europe, enshrined in the Charter of Fundamental Rights in the European Union ('Charter') at the Nice Summit in 2000.[41] The Preamble of the Charter states some of the usual language of EU treaties – that of a "peoples of Europe", an "ever closer union", the content based on "common values" stemming from a "spiritual and moral heritage," and the Union itself *founded* on universal values, the first being human dignity, followed by freedom, equality, solidarity, democracy and rule of law. Citizenship of the Union is stated again in emphasizing the focus on the individual. Dignity is assigned its own chapter in the Charter as well as the first article stating that "Human dignity is inviolable. It must be respected and protected."[42] The Dignity chapter goes on to include the right to life, integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, and notably, the right of elderly which get a special mention of their rights to "lead a life of dignity". Dignity appears again in the Solidarity chapter in the now familiar area of "fair and just working conditions" that must be respected with health, safety, and dignity in mind.[43]

All to say that dignity features prominently in the Charter as of the year 2000, and then momentously in 2009 the Charter received constitutional status equal to the EU Treaties as per the

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[39] Dupré, *supra* note 16 at p 56
[40] *Ibid* at p 60. Second World War in France, Italy, Germany, or civil wars (Spain and Greece), as well as long regimes of (in most cases) harsh dictatorships (Portugal, Spain, Greece, Hungary, Bulgaria, Romania, Slovakia, Lithuania, Czech Republic, Latvia and Poland).
[41] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.
[42] Article 1.
[43] Article 31.

Lisbon Treaty, making it binding on Member States when they implement EU law. The Lisbon Treaty went on to reinforce human dignity as the first foundational value of the European Union.[44] Thus, although it has its critics, the significance of the concept of dignity in European constitutions cannot be understated. Enshrining dignity is said to be a response to the "negative historical experiences of collective traumata" in Europe, responding to *"*a memory of injustice and fear." [45] This further indicates that the history of human dignity goes beyond its various definitions and numerous cases to something much deeper that cuts through the ways the human beings differ by categories, and that "what they all have in common is the experience of pain and humiliation."[46]

6.2.3 Asylum Seekers in Europe

Catherine Dupré notes that "the codification of human dignity in the EU Charter has arguably led to a fuller recognition (and protection) of humanity by European constitutionalism, confirming that it is not limited to specific nationality or citizenship, but is inclusive of everyone."[47] Quite meaningful it is that the very first reference by the Court of Justice of the EU to the concept of dignity as espoused in the Charter was in a case concerning the rights of asylum seekers under the Dublin Regulation and the Reception Conditions Directive (RCD), indirectly making a claim about socio-economic rights in the form of reception conditions. This refers to the landmark case of *N.S.* v. *U.K.*,[48] a judgment of 21 December 2011 by the CJEU followed exactly

[44] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail."
[45] Klaus Günther*, "*The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on the Political Culture" [in:] Philip Alston (ed), *The EU and Human Rights (Oxford: Oxford University Press, 1999)* at p 126.
[46] *Ibid*.
[47] Dupré, *supra* note 16 at p 78.
[48] Case C-411/10 N. S. v Secretary of State for the Home Department et M. E. and Others (December 21, 2011) [hereinafter *N.S.*].

to the day eleven months after its matching case in the European Court of Human Rights, that of *M.S.S.* v. *Belgium and Greece* (discussed in detail below).[49] Until this case, the CJEU was reluctant to refer to the EU Charter.[50] The *N.S.* case makes sparse reference to dignity and does not provide extensive detail with insights into the psychology of dignity and the emotions involved as does the *M.S.S.* case, and this also will be discussed forthwith. Nonetheless, the brief reference by the CJEU to the Charter's Article 1 on dignity was the determinant of the ruling in favor of the applicant asylum seeker. Dupré notes that:

> [T]his case law confirms the irrelevance of nationality (or citizenship) with regards to human dignity protection and the CJEU issued a resounding reminder that articles 1 and 4 EU Charter protect all human beings. With this we are on familiar terrain of connections between humanity and dignity, on the one hand, and the connection between dignity and equality, on the other.[51]

Meanwhile, the Directives and Regulations within the EU's asylum *acquis* refer to dignity as part of a general statement with reference to the Charter and the respect of fundamental rights of asylum seekers. As with the UDHR's mention of dignity in the articles concerning socio-economic rights, and keeping in mind the *M.S.S.* case in the ECtHR and *N.S.* case in the CJEU as triggering dignity under the Charter, it is significant that most references to dignity within any one piece of legislation as part EU's asylum *acquis* are in the Recast RCD that lays down standards for the reception of applicants for international protection.[52] The first mention is in Recital 11 for states to ensure "standards for the reception of applicants that will suffice to ensure them a dignified standard of living." Recital 18 states that "applicants who are in detention should be

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[49] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 [hereinafter *M.S.S.*].
[50] Dupré, *supra* note 16 at 110.
[51] *Ibid* at p 111.
[52] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] Official Journal of the European Union L. 180/96.

treated with full respect for human dignity." Recital 25 considers restriction, reduction or withdrawal of material reception conditions to respond to abuse of the system, "while the same time ensuring a dignified standard of living for all applicants" and this is echoed in Article 20.5. Recital 35 refers to the Reception Directive having to respect and observe human rights principles, in particular the Charter and in particular respect for human dignity.

As briefly noted and will be explored further on, decisions of the European courts and committees also make this connection between dignity and material support in the form of socio-economic rights. But first, we turn to consider how psychology connects to the legal concept of dignity, and how consequently its function as an inclusionary concept can be seen as potentially enhancing the overall rights of asylum seekers and refugees in Europe. This is due to the increased reference to dignity in the European case law generally. Evidence shows that the dignity as inclusion of asylum seekers reference is already the case and this will be explored further on in the chapter.

6.3 The Psychology of Dignity as Inclusion in Humanity

Even the brief overview of the history of the concept of dignity points to some of the psychological notions that have been addressed throughout the dissertation, such as reciprocity, recognition, respect, worth, and the evaluative process. The relation between dignity and psychology has been repeatedly noted in scholarly literature. Oscar Schachter has described dignity in its emotive sense, stating that "the conception of dignity…can also be given more specific meaning by *applying it to actions of psychological significance*. Indeed, nothing is as

clearly volatile of the dignity of persons as treatment that demeans or humiliates them."[53] Likewise, András Sajó summarizes in *Constitutional Sentiments* the concept of dignity as a universalistic one coming from a psychological source, prompted by emotion, and a "desperate answer to a situation where the individual is denied membership."[54] In turn, human rights that are based on dignity "mean an inclusion into the (hypothetical and universal) moral community; it is an ultimate act of moral inclusion into an otherwise immoral body politic."[55]

Being inside a body politic, as any body that experiences pleasure and pain, comes with a certain social psychology and social emotions. Even if dignity itself is seen as a-psychological, and if its connections to psychological needs may "run the risk of localism, that in-group applicability" that Sajó purports, the meaning of dignity is still reliant on sociality and on a community that extends its circle as far and as wide as (psychologically) possible. Sociality defines humanity and so the problem is not as much with the concept of dignity but with our shared understanding of what is human and what constitutes a dignified life. What makes dignity credible with "deep emotional appeal in diverse cultures worldwide"[56] or "widespread psychological and intellectual resonance"[57] is that it pushes our conceptions of these fundamental human questions – what *are* we and how *should* we be? This is what philosophers, judges, human rights advocates, and humans all around are trying to get at, these underlying questions of what makes a life worth

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[53] Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77(4) *The American Journal of International Law* 848-854 [hereinafter Schachter].

[54] András Sajó, *Constitutional Sentiments* (New Haven, Conn: Yale University Press, 2011) at p 66. [hereinafter: Sajó, Constitutional Sentiments 2011] "Dignity is clearly a universalistic concept. This is what remains (to be respected) whatever happens to humans. This is the psychologically, even emotionally, desperate answer to a situation of total exclusion from society, to a situation where the individual is denied all membership, except what pertains to those who wait together to be massacred. Dignity-based human rights mean an inclusion into the (hypothetical and universal) moral community; it is an ultimate act of moral inclusion into an otherwise immoral body politic."

[55] *Ibid*.

[56] David J. Mattson and Susan G. Clark, "Human Dignity in Concept and Practice" (2011) 44(4) *Policy Sciences* 303–319 at p 303.

[57] *Ibid* at p 304.

living, what is at the height of meaning, not just for our inner circles that give us a quick answer to that question, but for all of humanity at any given time. As Jack Donnelly states,

> We have human rights not to what we need for survival but to what we need for a life of dignity. The human nature that is the source of human rights is a moral account of human possibility. It reflects what human beings might become, not what they "are" in some scientifically determinable sense or have been historically.[58]

Although the universality of human psychology – our shared emotions, cognition, and sociality – are continually being assessed by scholars, there is increasingly more evidence that human beings do have a common psychology across cultures, with socially interdependent emotions and behaviors, though their expression in relation to circumstances can differ between place and time.[59] In simplest terms, and this is undeniably universal even if varied in degree, human beings suffer pain when faced with social exclusion and benefit in the form of psychological rewards from social inclusion.[60] This is true in the abstract scientific perspective, but also true in the evidence of concrete experience, with numerous studies about the detrimental physical and

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[58] Jack Donnelly, *International Human Rights* (Fourth edition Dilemmas in World Politics series, Westview Press, 2013) at p 21.

[59] Larissa Z. Tiedens, Colin Wayne Leach, *The Social Life of Emotions* (Cambridge; New York: Cambridge University Press, 2004); Bo Shao, Lorna Doucet, and David R. Caruso, "Universality Versus Cultural Specificity of Three Emotion Domains: Some Evidence Based on the Cascading Model of Emotional Intelligence" (2015) 46(2) *Journal of Cross-Cultural Psychology* 229–251; Robert C. Solomon, "The Universality of Emotions: Evolution and the Human Condition" *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008).

[60] Geoff MacDonald and Mark R. Leary, "Why Does Social Exclusion Hurt? The Relationship Between Social and Physical Pain" (2005) 131(2) *Psychological Bulletin* 202-223; Sissa Medialab, "The Pain of Social Exclusion: Physical Pain Brain Circuits Activated by 'Social Pain'" *ScienceDaily.* 27 February 2014. <www.sciencedaily.com/releases/2014/02/140227101125.htm>. As noted in previous chapters, social inclusion evokes positive emotions associated with group belonging. Social exclusion does the exact opposite. In fact, neuroscientific studies show (here we briefly venture outside of social psychology to the realm of neuroscience) that our emotional responses to being socially excluded are in the exact same brain regions as physical pain. That is, humans experience actual pain through emotional pain as a result of exclusion. As discussed in previous chapter, denial of socio-economic and political rights, by the standards set in the European policies themselves, is a form of social exclusion. Persons can be more or less sensitive to exclusion. On the other hand, empathy (ie. feeling the pain of others) towards persons being excluded is also dependent on the extent of one's developed empathy.

mental health effects of exclusion of asylum seekers and refugees (due to trauma, detention, denial of care and assistance, etc.).[61] Some asylum seekers/ refugees, as is the case for all humans, are more resilient and resourceful than others, while personal sensitivity to the exclusion/inclusion of others, often experienced in the form of empathy, can also vary.[62]

In the current state of affairs, it is still group membership that gives us status, primarily because our sense of humanity can be limited to our experience of social groups. Hence the question of dignity hinges on the question of defining humanness and humanity in all its variations. The concept of dignity as a secularized sacred value is intended to bypass group membership because it predicates one's self-worth or self-respect as being directly linked to being a human and what is intended to follow is respect for all other human beings just by virtue of being. What becomes problematic is that, in reality and in practice, dignity is often ascribed to oneself and to other humans *like oneself*, rather than all humans. As Sajó pointed out, some form of social identity almost always creeps in.[63] If we gain our sense of worth from group membership that is particular and not universal, as most humans do, this also interferes with our conceptions of what is worthy of humanness. Moreover, the definition of a *human being* can and has been distinguished from

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[61] Ignacio Correa-Velez, Sandra M. Gifford, Adrian G. Barnett, "Longing to Belong: Social Inclusion and Wellbeing Among Youth with Refugee Backgrounds in the First Three Years in Melbourne, Australia" (2010) 71(8) *Social Science and Medicine* 1399-408; Derrick Silove, Peter Ventegoverl and Susan Rees, "The Contemporary Refugee Crisis: an Overview of Mental Health Challenges" (2017) 16(2) *World Psychiatry: Official Journal of the World Psychiatric Association (WPA)* 130-139; Giulia Turrini, Marianna Purgato, Francesca Ballette, Michela Nosè, Giovanni Ostuzzi and Corrado Barbui, "Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies"; (2017) 11 *International Journal of Mental Health Systems* 51; Mihaela Robila, "Refugees and Social Integration in Europe", United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development, United Nations Expert Group Meeting. New York. 15 – 16 May 2018.

[62] Martin, L. Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge: Cambridge University Press, 2000); Giovanni Novembre, Marco Zanon, Giorgia Silani, "Empathy for Social Exclusion Involves the Sensory-discriminative Component of Pain: A Within-subject fMRI Study" (2015) 10(1) *Social Cognitive and Affective Neuroscience* 153–164; Thomas Fuchs, "Empathy, Group Identity, and the Mechanisms of Exclusion: An Investigation into the Limits of Empathy" (2019) 38 Topoi 239-250.

[63] Sajó, Constitutional Sentiments 2011, *supra* note 54 at p 66.

being human.[64] The former has certain autonomous characteristics, biology being the first, while the latter is normally connected with values of sociality, like caring, compassion, and love. Therefore, persons whose behavior or other attributes are not perceived as representing these *being human* values are at risk of being excluded from the moral community. On this point, the UDHR and other international instrument have already stated – we have dignity if born a human – and say nothing about this all-encompassing concept of dignity being reliant on how that dignity is perceived in a particular social context.

We are born with inherent value, we are told, but also built-in systems for determining values and needs. A baby is born with love for the parent, but once the child becomes an independent self, the extension of love to others is acquired through interaction and the inclinations towards trust. To understand dignity outside of a particular social context or group, as many have noted, requires a love and respect for all of humanity. This has been consistently challenged with the view that such an inclusive emotion is too weak to affect jurisprudence. Much of western philosophy, on which modern laws are premised, boils down to exactly this point – how do you love a stranger and why should you? Meanwhile for others the reference to universal love is what gives human dignity its power in carrying the key point of universal human rights, natural law and religious traditions.[65] This is the political philosophy views of "love for all of humanity" proposed by the likes of David Hume, Jean-Jacques Rousseau, and Adam Smith, in contrast to the proposition that self-interest defines all humans attributed to Thomas Hobbes.[66] In the Abrahamic religious sense, it is God that loves all of humanity, and while humans are said to be *Imago Dei*,

[64] John H. Evans, *What is a Human? What the Answers Mean for Human Rights* (Oxford; New York, NY: Oxford University Press, 2016).
[65] Kidd White, *supra* note 4 at p 217.
[66] Christopher McCrudden, "Human Rights Histories" (2015) *Oxford Journal of Legal Studies*; Samuel Moyn. *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

that God-like ability for humans to love all humans is experiencing some glitches.[67] It is precisely this abstract nature of dignity that may evoke a weak emotional response as most people do not extend their love that far.[68] Indeed, the immense power or ultimate futility of the legal concept of human dignity could be dependent on the emotion of respect, if not love, for all of humankind.

6.3.1 Dignity as the Human-Self Identity

Social psychology perspectives can serve as useful heuristic tools to grapple with the abstraction of the legal concept of "dignity as humanity". Using the same frame analysis approach as done in previous chapters, the frame of identity formation is applicable in the case of dignity, but this identity is not of a particular group membership, as the case with citizenship, but at the highest level of abstraction, that of the human as it relates to the individual self. A reminder that the Self-Categorization Theory proposed by psychologist John Turner, used extensively in social psychology literature and essentially a mainstay of the discipline, presents a model where human beings categorize themselves at three levels of abstraction – (1) the individual self, (2) the groups to which they belong (social identity), and (3) the category of the human we as the highest all-encompassing level in contrast to non-humans.[69] People naturally attribute humanness to themselves, and yet, as noted, extension of that humanness to everyone as belonging to a group called all of humanity is met with obstacles. Even though that is precisely what dignity is said to conceptualize – that abstraction of humanity, or a configuration that Catherine Dupré proposes (in

[67] Robert Solomon, "Lecture on Love" in *Passions: Philosophy and the Intelligence of Emotions, The Great Courses Lecture Series.*
[68] Kidd White, *supra* note 4 at p 216.
[69] In reference to the Self-Categorization Theory, there is a direct connection between the abstraction of the human on the one hand and the individual Self on the other. The concept of dignity is usually discussed in these dichotomies – the description of the individual self in relation to his/her humanity, as perceived by that individual as well as the perception of others. This can be referred to as the Human-Self connection, all exhibiting inherent worth – an individual has worth by virtue of membership in humanity.

her review of development of dignity within European constitutionalism) as a richer definition of humanity that is "striving to embrace the complexity of evolving human identities."[70] She contends that it is precisely this abstract construction that has allowed for greater openness and inclusivity over the years.

At the other end of the spectrum, dehumanization, also a thorny psychological concept, is premised on exactly this denial of the humanity of a person or group of persons.[71] Dehumanization has been described as the negation of so-called human qualities that may include individuality, autonomy, personality, civility and dignity.[72] The act requires "an evaluative stance ...towards other humans that consists in drawing the line between individuals or groups (as in-group/out-group) according to an assumed concept of what it means to be human," one that involves a process of inclusion and exclusion.[73] Even though there may be degrees of dehumanization, they all share "their foundation in attitudes of exclusion, of which the psychological processes are alike, no matter the severity of the consequences."[74] Denial of community and identity, that should be accorded to a person perceived as fully human, has also been attributed to dehumanization.[75] This involves a perception by the in-group of the outsider as being "outside the moral kinship or scope of justice, and thus as a legitimate target for more active oppressions and exclusions."[76]

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[70] Dupré, *supra* note 16 at p 194.
[71] Sophie Oliver, "Dehumanization: Perceiving the Body as (In)Human" [hereinafter Oliver] [in:] Kaufmann *et al, surpa* note 9 at p 85.
[72] *Ibid* at p 87.
[73] Maria Kronfeldner, "The Politics of Human Nature" Final draft [in:] Michel Tibayrenc and Francisco J. Ayala (eds.) *On Human Nature: Evolution, Diversity, Psychology, Ethics, Politics and Religion* (Amsterdam; Boston: Elsevier/AP, 2017) at pp. 625-632: "…of holding a seemingly factual belief about being human, having an emotive evaluation leading to prejudice and the cognitive stance leading to behavioural consequence that is discriminatory"
[74] Oliver, *supra* note 71 at p 87.
[75] Herbert C Kelman, "Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers" (1973) 29(4) *Journal of Social Issues* 25–61 at p 48. Kelman's concept of community imagines humanity as "an interconnected network of individuals who care for each other, who recognize each other's individuality and who respect each other's rights" To be dehumanized is to be excluded from this community.
[76] Oliver, *supra* note 71 at p 87.

Psychological studies have demonstrated the extent to which perceiving others as less than human increases the opportunities for moral disengagement or indifference.[77] The dehumanized are perceived as "nonentities, undeserving, or expendable. Harm that befalls them does not prompt the concern, remorse or outrage that occurs when those inside the scope of justice are harmed."[78] This dehumanization as moral exclusion is circular and self-reflexive where "the perceived in/sub-humanity of the victim(s) is both the effect of and the justification for acts of humiliation, degradation and instrumentalizations."[79] All to say, and not surprisingly, this denial of humanity in the form of dehumanization has been directed at asylum seekers and refugees, as documented in social psychology research.[80]

Nick Haslam suggests that negative and excluding attitudes towards others are a means of confirming in our imagination our own humanity by contrasting it with the perceived inhumanity of those seen as having undesired attributes.[81] In this way, dehumanization is also viewed as a projection of unwanted aspects of the self onto others.[82] The relationship between (in)humanity and the individual self is key here. One's self-worth, self-identity, self-esteem and self-knowledge does not emerge in a vacuum, but is a mirror of the environment one finds him or herself in. Emotions give us internal information about our self-perception vis-à-vis the external world that

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77 Oliver, *supra* note 71 at pp 87-89 referencing Albert Bandura, Bill Underwood, and Michael E. Fromson, Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanisation of Victims (1976) *9 Journal of Research in Personality* 253–269.

78 Susan Opotow, "Drawing the Line: Social Categorizations, Moral Exclusion and the Scope of Justice" [in] (eds) Barbara Benedic Bunker and Jeffrey Z. Rubin, *Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutsch* (San Francisco, CA: Jossey Bass 1995) at pp 347-348

79 *Ibid*.

80 Victoria M. Esses, Scott Veenvliet, Gordon Hodson, Lijijana Mihic, "Justice, Morality, and the Dehumanization of Refugees" (2008) 21(1) *Social Justice Research* 4-25; Nick Haslam and Anne Pederson, "Attitudes Towards Asylum Seekers: The Psychology of Prejudice and Exclusion" [in:] Dean Lusher and Nick Haslam (eds), *Yearning to Breathe Free: Seeking Asylum in Australia* (Sydney: Federation Press, 2007) at pp 208-218.

81 Nick Haslam, "Dehumanization: An Integrative Review" (2006) 10(3) Personality and Social Psychology Review 252–264 at p 258.

82 Morton Deutsch, "Justice and Conflict" [in:] Morton Deutsch, Peter T. Coleman, and Eric C. Marcus (eds) The Handbook of Conflict Resolution: Theory and Practice (San Francisco, CA: Jossey Bass, 2006) at pp 43–68.

perceives us. In that regard, scholars have proposed that the pursuit and human need for positive self-worth are at the heart of what human rights are supposed to protect, connecting this psychology to the concept of dignity.[83] This is in line with the extensive social psychological research that has been done on the impact of self-evaluation for a positive self-worth in advancing optimal functioning and human development, and a negative self-worth connected with mental disorders, malfunctioning, antisocial behavior, and aggression to name a few.[84] Dignity, therefore, refers to that positive psychological self-evaluation, or as Jeremy Waldron defines it, an "uprightness of bearing; self-possession and self-control; self-presentation…not being abject, pitiable, distressed, or overly submissive in circumstances of adversity."[85]

Human rights laws, in their role of ensuring dignity, are linked directly to a positive psychology of the self, while denial of rights can link to the exact opposite, and this conceptualization, in addition to empirical evidence in psychology, has also been found in case law. Applying a comparative legal-psychological approach, Don Shultziner and Itai Rabinovici

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[83] Christian Bay, Self-Respect as a Human Right - Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community (1982) 4(1) *Human Rights Quarterly* 53–75; Tom Bryder, Patterns for Future Research on Self-Esteem and Human Dignity in Mass Society (1994) 15(3) *International Society for Political Psychology* 401–414; Daniel Statman, Humiliation, Dignity and Self-Respect, (2000) 13 *Philosophical Psychology* 523–540; David Weisstub, "Honor, Dignity and the Framing of Multiculturalist Values" [in:] David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2000).

[84] Don Shultziner and Itai Rabinovici, "Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach*"* (2012) 18 (1) *Psychology, Public Policy, and the Law* 105-143 [hereinafter Shultziner and Rabinovici] referencing: Albert Bandura, "Self-Efficacy: Toward a Unifying Theory of Behavioral Change" (1977) 84(2) *Psychological Review* 191–215; Albert Bandura, "Self-Efficacy Mechanism in Human Agency" (1982) 37(2) *American Psychologist* 122–147; Jennifer Crocker and Noah Nuer, The Insatiable Quest for Self-Worth (2003) 14(1) *Psychological Inquiry* 31–34; Jennifer Crocker and Lora E. Park, "Seeking Self-Esteem: Construction, Maintenance, and Protection of Self-Worth" [in:] Mark R. Leary and June Price Tangney (eds.), *Handbook of Self and Identity* (New York: Guilford Press, 2003); M. Brent Donnellan, Kali H. Trzesniewski, Richard W Robins, Terrie E. Moffitt, Avshalom Caspi, "Low Self-Esteem is Related to Aggression, Antisocial Behavior, and Delinquency (2005) 16 Psychological Science 328–335; Michael H Kernis, Toward a Conceptualization of Optimal Self-Esteem (2003) 14(1) *Psychological Inquiry* 1–26; Abraham H. Maslow, *Motivation and Personality* (2d Ed. New York: Harper & Row, 1970) at p. 45; Tom Pyszczynski and Cathy Cox, "Can We Really Do Without Self-Esteem? Comment on Crocker and Park" (2004) 130(3) Psychological Bulletin 425–429.

[85] Jeremy Waldron, *Dignity, Rank and Rights* (New York: Oxford University Press, 2012) at p 22. Like categories discussed in the previous chapter, dignity is seen by Waldron as denoting a status conferred upon persons by virtue of their humanity, demanding of respect, a concept that transformed from notions of rank to modern concepts of universal human rights.

have considered dignity claims as anchored in the psychology of the self, specifically in the universal human need for pursuit and maintaining of positive self-worth.[86] They illustrate how justices across jurisdictions, including the ECtHR, have construed human dignity as self-worth and employed this psychological approach both intuitively and consciously.[87] That is, in the authors' analysis of the use of dignity in a vast array of cases, they argue that a definition of human dignity as self-worth is evident, and violations of dignity can consistently be explained in terms of humiliation and other threats and injuries to people's self-worth, such as denials of social recognition.[88]

In sum, there is a clear connection between the human as part of all of humanity on the one side of the dignity equation and the individual self on the other hand as separate identity, a connection proposed in the Self-Categorization Theory. The concept of dignity is usually discussed in these dichotomies – the description of the individual self in relation to his/her humanity, as perceived by that individual as well as the perception of others. This can be referred to as the human-self connection, all exhibiting inherent worth. In human rights law, of course, it is exactly this interaction that is key – the worth of the individual in their unique place amidst the worth of all of humanity.

6.3.2 Dignity and Emotion – An Evaluative Legal Concept

Dignity has also been described as an evaluative legal concept that is anchored to emotion for judicial interpretation.[89] Evaluative legal concepts are those that "require judges to interpret

[86] Shultziner and Rabinovici, *supra* note 84.
[87] *Ibid* at 116 and 135.
[88] *Ibid* at 107.
[89] Kidd White, *supra* note 4 at pp 211-212. A thick concept in philosophy is a concept with descriptive content but also involves an evaluative statement. Evaluative concepts (good/ bad, right/ wrong) are thought of as thin, and thin

values in their application of the law."[90] The affective dimensions of human dignity in its role as a legal concept have often been skipped by scholars who focus on the content of the concept. In response, it has been proposed that emotions can assist in understanding the content of human dignity in its function as a legal concept.[91] Outside of legal conceptions, we know that emotions alone give a value judgement, with a positive or negative orientation based on physiological pleasure or pain.[92] In a social sense, this can refer to the connection between one's own emotions and the emotions of others. As noted in the conceptual framework in Chapter 2 and throughout, social psychology studies on inclusion/exclusion rely repeatedly on Henri Tajfel's Social Identity Theory which posits that creating a group and identifying with membership/ belonging (or alternatively, assessing who does not belong) involves three interdependent components - cognitive, evaluative and emotional.[93] The evaluative component means attaching a positive or negative connotation to the group and/or one's membership of it. The cognitive and evaluative components are accompanied by emotions, and here Tajfel refers to love, hatred, like or dislike, that is "directed towards one's own group and towards others which stand in certain relations to it."[94] Hence, it goes to reason that emotions that trigger dignity concerns are also related to group membership, and in this case, the human-self identity discussed above. If we think of dignity as a feature of the human-self identity group, in other words "dignity as humanity" vis-à-vis "dignity

concepts are seen as being at a higher level of abstraction. Thick concepts add descriptive features to thin evaluative concepts. Emotions are said to provide the thickness to otherwise thin evaluative concepts. Therefore, the reasoning goes that if dignity is a thin evaluative legal concept, emotions are said to provide the thickness by adding affective dimension to the descriptive content of the concept.

90 *Ibid* at 205.

91 *Ibid* at 221.

92 John Gardner, "The Logic of Excuses and the Rationality of Emotions" (2009) 43 *Journal of Value Inquiry* 328

93 The cognitive component is straightforward, referring to the knowledge about belonging to a group.

94 Henri Tajfel, *Human Groups and Social Categories: Studies in Social Psychology* (Cambridge University Press, 1981) at p 229.

as self-worth", in which an evaluative process is being conducted, emotions related to human membership are activated.

There is no question that violations of human rights stir strong emotions, and in turn these emotions connect to our assessment of value.[95] The entire premise of adjudicating refugee recognition is based on the assessment of the asylum applicant's *fear* of persecution. The universality in basic human emotions means that the mechanism of empathy allows for a recognition of the humanity of someone else's pain and suffering.[96] Conversely, "dehumanization is anecdotally and historically associated with reduced empathy for the pain of dehumanized individuals and groups and with psychological and legal denial of their human rights."[97] In turn, human dignity becomes best understood through the violations, in recognizing pain, humiliation, degradation and dehumanization.[98] A threat to human dignity, a concept that is so widely considered a sacred value, can have the effect of rousing emotion, thereby giving "lucidity and concreteness to support the task of judicial interpretation."[99] As Avishai Margalit contended in *The Decent Society*, the deeper a value is held, the stronger the emotional reaction will be to that value being threatened.[100] In a word, violations of human dignity stir up strong emotions – certainly those of the victims/claimants in a judicial hearing, but also the adjudicators, and lawmakers.[101]

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95 Richard Rorty, "Human Rights, Rationality, and Sentimentality" [in:] Stephen Shute and Susan Hurley (eds.) *On Human Rights* (New York: Basic Books, 1993) at pp 111-34

96 Cecile Rousseau and Patricia Foxen, "Look Me in the Eye: Empathy and the Transmission of Trauma in the Refugee Determination Process" (2010) 47(1) *Transcultural Psychiatry* 70-92. Paul Ekman identified six basic emotions (anger, disgust, fear, happiness, sadness, and surprise) and Robert Plutchik eight, grouped into four pairs of polar opposites (joy-sadness, anger-fear, trust-distrust, surprise-anticipation).

97 Gail B. Murrow and Richard Murrow, "A Hypothetical Neurological Association Between Dehumanization and Human Rights Abuses" (2015) *Journal of Law and the Biosciences* 1-29.

98 Kaufmann *et al, surpa* note 9.

99 Kidd White, *supra* note 4 231

100 Avishai Margalit, *The Decent Society* (Cambridge, Mass: Harvard University Press, 1998).

101 Martin L. Hoffman, "Empathy, Justice and the Law" [in:] Amy Coplan and Peter Goldie, *Empathy: Philosophical and Psychological Perspectives* (Oxford Scholarship Online, 2011) [hereinafter Hoffman 2011].

Emotions draw out the content of the legal concept of dignity and allow judges and lawmakers to understand the experience of the claimant, essentially placing themselves in the other's position.[102] The empathic desire for justice can be attributed to the empathic response to the distress of others. Judges and scholars have reflected on "judicial empathy" and how "impressions" in the courtroom give rise to feelings that affect judgments.[103] Martha Nussbaum has commented about the need for judicial empathy in reflection on how government or legislative acts harm an individual that the judge may have little in common with.[104] As Martin Hoffman asserts, legal institutions for justice, fairness and equity are in fact results of empathic sentiments.[105] Likewise, historian Lynne Hunt has premised the evolution of human rights altogether on the development of empathy, and this view and historical analysis was echoed by András Sajó.[106]

The empathy related epithet that Oscar Schachter has attributed to dignity is that "I know it when I see it even if I cannot tell you what it is."[107] This intuitive understanding of dignity violations is said to rest on a shared characteristic of humiliation as "diminishing and lowering a person physically, psychologically, symbolically, publicly, individually, or collectively."[108] Humiliation is a lowering of self-worth as well as social worth, hence social exclusion itself can be humiliating, more so when basic needs are deprived. Daniel Statement rightly notes that "this

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[102] Kidd White, *supra* note 4 at pp 128, 218 and 231.
[103] Nicole E. Negowetti, "Judicial Decision-making, Empathy, and the Limits of Perception" (2014) 47(3) *Akron Law Review* 693.
[104] Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Alexander Rosenthal Lectures) (Beacon Press; 1st edition, 1997) at p 90.
[105] Hoffman, *supra* note 101 at p 237.
[106] Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Co., 2007); Sajó, Constitutional Sentiments 2011, *supra* note 54.
[107] Schachter, *supra* note 53 at p 849.
[108] Shultziner and Rabinovici, *supra* note 84 at p 111; "The etymology of the word "humiliation" has a universal characteristic in the sense that in all languages the word involves "downward spatial orientation" in which "something or someone is pushed down and forcefully held there"; Evelin Lindner, *Making Enemies: Humiliation and International Conflict* (Westport, CT: Praeger Security International, 2006) at p. 5.

vulnerability to humiliation is the flip side of the human urge for social inclusion and recognition."[109] That is, in our bodies and affective states, we humans share the vulnerability to pain that also comes in the form of humiliation as a result of exclusion:

> Vulnerability speaks to our universal capacity for suffering in two ways. Firstly, I am vulnerable because I depend upon cooperation of others (including, importantly, the State) ...Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.[110]

If vulnerability is the wound result of suffering, on the flip-side it also has the effect of generating empathy, social interconnectedness and prospects to change social institutions.[111] Consequently, the reflections on vulnerability and vulnerable groups in their relation to dignity claims have appeared in the case law of the European Court of Human Rights and the Court of Justice of the EU. The concept of vulnerability has been subject to similar scrutiny as dignity as to whether it is group-based in its applicability to specific populations or universality-based in its "post-identity" scope.[112] The most reasonable answer has been a mix of both, at least on the conceptual level from scholars and from courts,[113] and it is related to the multiple levels of abstraction of the human-self identity herein proposed. That is, a case can and has been made for vulnerability as universally applicable to all humans (as noted by Fineman)[114] but also particular

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[109] Daniel Statman, "Humiliation, Dignity and Self-Respect" (2000)13(4) *Philosophical Psychology* 523–540 at p. 536. Statman also writes at p 535: "It is a plain fact about human beings that their sense of personal worth is shaped to a large extent by what other human beings think about them and the treatment they receive. That individuals are sufficient to bestow self-respect on themselves is an illusion. Humiliation takes advantage of this fact and seeks to injure self-respect by sending painful messages of subordination, rejection and exclusion."

[110] Mary Neal, "Not Gods but Animals: Human Dignity and Vulnerable Subjecthood*"* (2012) 33 *Liverpool Law Review* 177-2000 at pp 186–187.

[111] Martha Albertson Fineman, *"*'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*"* (2012) 20 *The Elder Law Journal* at p 101.

[112] Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1)(2) *Yale Journal of Law and Feminism* 1 [hereinafter Fineman 2008].

[113] Lourdes Peroni and Alexandra Timmer, "Vulnerable Groups: The Promise of An Emerging Concept in European Human Rights Convention Law" (2013) 11(4) *International Journal of Constitutional Law* 1056–1085 at p 1060. [hereinafter Peroni and Timmer].

[114] Fineman 2008, *supra* note 112.

in its relation to specific scenarios (as is done by the European courts) that render persons vulnerable in different ways and this being due to "economic, political and social processes of inclusion and exclusion."[115] The same applies to dignity – we all have it and we are all vulnerable to it being violated, but to know it when we see it may depend on a particular context. The interconnectedness of factors, many of them psychological, complex, and rooted in the evaluative and content filling role of emotion, is also why dignity in all its ambiguity serves as a powerful evaluative legal concept.

6.4 European Case-Law on Dignity of Asylum Seekers

As discussed in previous chapters, provisions concerning asylum seekers in Europe have been largely exclusionary because of the desire to keep "undesirable" newcomers at bay, and only incremental and conditional allowances provided in terms of social economic rights and integration based on status and legal category. Social exclusion of asylum seekers and refugees in Europe often hinges on the state's denial of certain assistance or access to the labor market and hence access to social and economic rights. Many national policies and pronouncements have been quite blatant in that regard. However, an increased emphasis on human dignity in European-level laws and jurisprudence, particularly in connection to socio-economic rights, potentially marks a more psychologically inclusionary turn at the European institutional level concerning asylum seekers and refugees. Dignity, in its role as an evaluative legal concept that relies for content on a triggering of emotions (on the side of applicants, adjudicators and policy-makers) for assessment of the violation, shows up loud and clear in cases of denial of human rights of asylum seekers.

[115] Peroni and Timmer, *supra* note 113 at 1061.

6.4.1 European Court of Human Rights

Although an explicit mention of human dignity is conspicuously missing in the European Convention of Human Rights, references to dignity in the jurisprudence of the European Court of Human Rights have become substantial. The ECtHR has stated that "human rights form an integrated system for the protection of human dignity" and that the "very essence of the Convention is the respect for human dignity and human freedom."[116] References to human dignity in ECtHR judgements were limited in the twentieth century, about a dozen per year, but have risen since 2001 to about a hundred per year, this statistic being in line with the scholarly observations that the concept of dignity has grown in importance at the European level.[117] A review of hundreds of judgements of the ECtHR shows dignity used primarily in the context of Article 3 – the prohibition of torture, inhuman or degrading treatment or punishment – in circumstance where physical or mental harm was inflicted on the applicant.[118] This is meaningful as the ECtHR is composed of judges with diverse legal backgrounds from forty-seven countries that are members of the Council of Europe, with varied political systems, and yet a core meaning of dignity cross-culturally has been deduced in relation to experiences of physical or psychological suffering, harm caused to individuals that are not valued and respected.[119]

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116 Shultziner and Rabinovici, *supra* note 84 at p 123 See for example: *Pretty v. United Kingdom*, Application no. 2346/02, 29 April 2002, para. 65; *Van Ku¨ck v. Germany*, Application no. 35968/97, 12 June 2003, para. 69; *Goodwin v. United Kingdom*, Application no. 28957/95, 11 July 2002, para. 90; *S.W. v. United Kingdom*, Application no. 20166/92, 22 November 1995, para. 44; *CR v United Kingdom*, Application No 20190/92, 22nd November 1995, para. 42.

117 Alexander Kuteynikov and Alexander Boyashov, "Dignity Before the European Court of Human Rights" [in:] Edward Sieh and Judy McGregor (eds) *Human Dignity: Establishing Worth and Seeking Solutions* (London: Palgrave Macmillan, 2017) at p 86.

118 *Ibid*. Statistic reference: "one-half of the dignity judgments refer to the violation of the prohibition against torture" at p 90; Shultziner and Rabinovici, *supra* note 84 at p 124.

119 Shultziner and Rabinovici, *supra* note 84 at 124.

The criteria that the ECtHR has developed in relation to Article 3 is firstly that ill-treatment must reach a minimum level of severity, but assessment of this is relative depending on specifics of each case, including the duration and its physical and mental effects on the victim in relation to their particularities.[120] Treatment is considered inhuman when premeditated and "applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering."[121] Treatment characterized as degrading is that which "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance."[122] It is sufficient that the humiliation is perceived by the victim alone and not by others.[123] Finally treatment does not have to have occurred with a purpose to humiliate or debase the victim to find a violation of Article 3.[124] Hence we see in the criteria the importance of psychological suffering on the part of the victim marked by being outside of ambits of what is considered "human" or humane and therefore undignified.

Vulnerability to dignity violations for the ECtHR is connected to group membership and not solely to being human, and this vulnerability that arises in the case law is observed to have the characteristics of being "relational, particular and harm-based."[125] The relational aspect of vulnerability is connected to the wider social circumstances that shapes "social, historical and institutional forces."[126] The individual applicant's vulnerability is connected to the particular group that one is in that creates and maintains the vulnerability, such as historical prejudice and

120 *M.S.S.*, *supra* note 49 at para 218 see, for example, *Kudła v. Poland,* Application no. 30210/96, 26 October 2000.
121 *Ibid M.S.S.* para 92.
122 *Ibid*; *Pretty v. United Kingdom*, Application no. 2346/02, 29 April 2002, para 52; *Price v. the United Kingdom*, Application no. 33394/96, 10 July 2001; *Valašinas v. Lithuania*, Application no. 44558/98, 24 October 2001.
123 See *Tyrer v. the United Kingdom*, Application no. 5856. 72, 25 April 1978.
124 *Peers v. Greece*, Application no. 28524/95, 19 April 2001, para 74.
125 Peroni and Timmer, *supra* note 113 at pp 1063-1064.
126 *Ibid* at p 1064.

stigmatization that leads to social exclusion. The *misrecognition* happens when "institutionalized patterns of cultural value…constitute some actors as inferior, excluded, wholly other, or simply invisible—in other words, as less than full partners in social interaction…"[127]

6.4.1.1 M.S.S. v. Belgium and Greece

The case that brings to the fore the points in the present discussion is that of *M.S.S.* v. *Belgium and Greece.*[128] In this case, the ECtHR considered the detention and living conditions of asylum seekers in the context of returns under the EU's Dublin Regulations, whether the acts and omissions of the State amounted to a violation of the ECHR.[129] The *M.S.S.* judgment broke new ground for a number of reasons concerning the asylum system in Europe, and in particular, the Court's finding that the substandard living conditions facing an asylum seeker amounted to inhuman and degrading treatment contrary to Article 3. The case concerned M.S.S., who fled Afghanistan in 2008, arrived in Greece but did not claim asylum until he reached Belgium. He was returned to Greece in June 2009 where he was detained.[130] In August 2009, M.S.S. again attempted to leave Greece but was arrested and again detained. When he was released, he had no means of subsistence and slept in a park. M.S.S. claimed that because of the deficiency of the asylum procedure and not having any assistance provided to him, he was rendered homeless, of which the Greek authorities were aware. Like many other Afghan asylum seekers, he had no means of

[127] Peroni and Timmer, *supra* note 113 at 1065 citing Nancy Fraser, "Rethinking Recognition" (2000) 3 *New Left Review* 107, 113.
[128] *M.S.S.*, *supra* note 49.
[129] Council Regulation 343/2003, 18 February 2003, [2003] OJ L 50.
[130] *Ibid* at para 34.

subsistence and lived in a park in the middle of Athens for many months, spending his days looking for food and occasionally receiving material aid from the local people in the church.[131]

International refugee law as well as European Union laws were considered in the deliberations of the case. Relevant references to the 1951 Refugee Convention cited the provision of *non-refoulement* which involves the obligation to not expel asylum seekers/refugees to territories where their lives or freedoms could be at threat. European Union law references were the primacy of human rights and human dignity within the EU Treaties (Articles 2 and 6 TEU), and the Charter of Fundamental Rights of the EU, specifically the right to asylum (Article 18). Key texts of the CEAS were the Dublin Regulation and Eurodac Regulation on mechanisms for Member State responsible for examining asylum applications, the Reception Conditions Directive on standards for material support, and the Qualifications Directive on criteria for international protection in the EU.[132] The ECtHR also considered previous cases on Greece, namely a 2007 case from the European Court of Justice in which Greece was found to have failed its obligations under the Reception Conditions Directive.[133] A direct reference to respect dignity of persons arriving at

[131] *Ibid* at para 238.

[132] European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003; European Union: Council of the European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention*, 11 December 2000, OJ L 316; 15 December 2000, pp.1-10; European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC; European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 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*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC.

[133] *Commission of the European Communities v. Hellenic Republic*, C-72/06; 2007/C 96/26, European Union: Court of Justice of the European Union, 19 April 2007.

the border was made in a Recommendation of the Council of Europe Commissioner for Human Rights.[134]

In the *M.S.S.* case, the ECtHR first tackled the conditions of detention in Greece and breaches that amounted to *degrading treatment* within the meaning of Article 3, as per preceding cases.[135] Based on information provided by numerous organization about the detention conditions, the Court ruling referred to "the feeling of arbitrariness and the feeling of inferiority and anxiety" associated with detention, and "the profound effect such conditions of detention indubitably have on a person's dignity."[136] Here we see a direct link between dignity and emotions, among which was a lowering of self-worth (inferiority). The Court did take into account the often-cited defense from the respondents, this being the burden and pressure that states cope with during an increase influx of migrants and asylum seekers, especially in the context of an economic crisis. However, the Court stated that Article 3 is of an absolute character and for this reason a state cannot be absolved of its obligation under the provision.[137] In finding a violation of Article 3, the Court stated that what is required of the state is:

> that detention conditions are compatible with *respect for human dignity*, that the manner and method of the execution of the measure do not subject the detainees to *distress or hardship of an intensity exceeding the unavoidable level of suffering* inherent in detention and that, given the practical demands of imprisonment, their *health and well-being* are adequately secured.[138]

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[134] Council of Europe: Commissioner for Human Rights, *Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion orders*, 19 September 2001, CommDH/Rec(2001)1; para 87 of *M.S.S.*, *supra* note 49.
[135] *Ibid* at para 222.
[136] *Ibid* at para 223.
[137] *Ibid*.
[138] *Ibid* para 218.

The second part of the ruling concerned the living conditions in Greece. The Greek Government pointed out that the Court itself had stated in *Chapman v. The United Kingdom* that "whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."[139] The Court replied that Article 3 is not to be interpreted as obliging the state parties to provide everyone a home, nor does it include a general obligation to assist refugees to maintain a certain standard of living.[140] However, the Court pointed out that the Greek government had transposed into national law the RCD[141] which obliges the State to provide accommodation and decent material conditions to impoverished asylum seekers. Therefore, the provision for support had entered positive law and Greece was bound to comply with its own legislation.[142]

Importantly, the Court's ruling opened up the category of a vulnerable group to be considered within the Convention boundaries taking into account the evidence of third parties that have been working directly with asylum seekers, as well as the "broad consensus at the international and European level."[143] The Court referred to the applicant's asylum seeker status and thus, "a member of a particularly underprivileged and vulnerable population group in need of special protection."[144] The Court took into account the psychological effects and particular vulnerability of the applicant as an asylum seeker "because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously"[145]

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139 *Ibid* at para 243; *Chapman v United Kingdom* (2001) 33 EHRR 399.
140 *Ibid* at para 249.
141 European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96 , available at: http://www.refworld.org/docid/51d29db54.html.
142 *M.S.S.*, *supra* note 49 at para 250.
143 *Ibid* para 251.
144 *Ibid* at para 251. Referencing see, *Oršuš and Others v. Croatia*, Application no. 15766/03, 16 March 2010.
145 *Ibid* para 232.

noting that his "distress was accentuated by the vulnerability inherent in his situation as an asylum seeker."[146]

The Court accepted the evidence that in Greece most asylum seekers were suffering deplorable living conditions that undermined their dignity, and moreover, that their destitution could be traced directly to constraints imposed by the State. Having considered the Reception Conditions Directive and the vulnerability of asylum seekers as a group, the Court considered whether a situation of extreme material poverty could raise an issue under Article 3. Relying on *Budina v. Russia,* the Court reiterated that the responsibility of the state may be engaged under Article 3 where an applicant was entirely dependent on State support and was met with the state's indifference of a situation of serious deprivation or want incompatible with human dignity.[147] In that regard, they noted the seriousness of the situation of the applicant:

> He allegedly spent months living in a state of the most *extreme poverty*, unable to cater for his most *basic needs*: food, hygiene and a place to live. Added to that was the *ever-present fear* of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of *insecurity and of material and psychological want* that he tried several times to leave Greece.[148]

We see that both physical as well as psychological suffering were given weight in the Court's ruling. As a result, in the case of *M.S.S.*, the Court found the applicant to be a "victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation."[149] The Court considered the level of severity having been reached under Article 3 of the Convention

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[146] *Ibid* para 233.
[147] *Ibid* at para 253 citing *Budina v. Russia*, dec. 45603/05, ECHR 2009.
[148] *Ibid M.S.S.* Para 254. Emphasis added here to highlight the connection the Court is making in regards to the psychological impact of depravation of basic material needs.
[149] *Ibid* at para 263.

due to the applicant having experienced "such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving."[150] Moreover, it was found that the "Greek authorities did not give due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living …without any means of providing for his essential needs."[151] In addition to acknowledging the detrimental effect of a dysfunctional asylum and support system, the Court also noted that the option for an asylum seeker to access employment is so burdened with administrative obstacles that expecting self-reliance from an asylum seeker cannot be considered a realistic alternative.[152]

Belgium was also found in violation of Article 3 by exposing the applicant to the risks that he had ultimately experienced in Greece. It is evident both in the indicators established by the ECtHR in relation to Article 3 violations, which includes dignity violations, as well as the reasoning within the ruling of Court in the *M.S.S.* case that evaluating the psychological experience of the applicant vis-à-vis the objective grounds of what would constitute a violation are largely informed by emotions.

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150 *Ibid* at para 263.
151 *Ibid* at para 263.
152 *Ibid* at para 261. "The Court also fails to see how having a "pink card" could have been of any practical use whatsoever to the applicant. The law does provide for asylum seekers who have been issued with "pink cards" to have access to the job market, which would have enabled the applicant to try to solve his problems and provide for his basic needs. Here again, however, the reports consulted reveal that in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative (see paragraphs 160 and 172 above). In addition, the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate."
Para 172. "Having a "pink card" does not seem to be of any benefit in obtaining assistance from the State and there are major bureaucratic obstacles to obtaining a temporary work permit. For example, to obtain a tax number the applicant has to prove that he has a permanent place of residence, which effectively excludes the homeless from the employment market. In addition, the health authorities do not appear to be aware of their obligations to provide asylum seekers with free medical treatment or of the additional health risks faced by these people."

6.4.1.2 Separate Opinion of Judge Sajó

The partly concurring and partly dissenting opinion by Judge Sajó is key to the present discussion. Judge Sajó did not find a violation attributable to Belgium and most of his assessment related to the ruling concerning Greece. Firstly, Sajó agreed that there was a violation regarding the detention conditions in Greece (because the authorities did not provide reliable counter-evidence) and so the conditions were deemed as "inhuman" causing "considerable humiliation" in spite of the short term that the applicant had spent there. However, Sajó did not find a violation of the reception conditions claim because he did not see M.S.S. as vulnerable or a victim.[153] The objection was to the categorization of the applicant within a vulnerable group, but also to the extension of responsibility of the authorities and relating Article 3 to a positive obligation for material assistance.[154]

While the main dissent that Judge Sajó had was in regards to placing of this asylum seeker into a vulnerable group category, he did affirm that many asylum seekers are indeed vulnerable. Then again, Judge Sajó questioned whether asylum seekers could be perceived as a "particular vulnerable group" altogether, thereby calling into question the open-endedness of vulnerability. In this regard, and in reference to the earlier jurisprudence of the Court, Sajó did not see asylum seekers as comparable to members of a group that deserve special protection "due to their adverse social categorization" such as persons with a mental disability.[155] For Sajó, the vulnerable group categorization had "specific meaning in the jurisprudence of the Court" that classifications being

[153] *M.S.S., supra* note 49 at p 100.
[154] Sajó: "There seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable".
[155] *M.S.S., supra* note 49 p 101.

a group that had been "historically subjected to prejudice with lasting consequences, resulting in their social exclusion."[156]

Determination of vulnerable group membership involves an intricate and not particularly clear distinction – hence the different views within the ECtHR. However, the position of the dissertation, and as argued in the previous chapters is that legal categorization of beneficiaries of international protection in Europe does largely reflect social categorization in a psychological sense and even stratification in the sociological one. Asylum seekers become vulnerable in that they are often socially excluded by design of the laws themselves, among which is denial of access to socio-economic rights, and there is a long and deeply embedded history of such. The argument that has been made in the previous chapters is that the cognitive bias within the laws that makes asylum seekers vulnerable is built into the system itself – the legal system reflecting a psychological predisposition, albeit a very human one, towards hierarchical categorization and threat-perception, that expresses itself through prejudice. In a circular way, the bias is fed and reaffirmed so that the discrimination against a particular group, in this case asylum seekers, is deemed within reason as prescribed by law.

The determination of vulnerability should not undermine the agency and resilience of the individual asylum seeker as well as the need for a case-by-case distinction. In contrast to the Court ruling, Judge Sajó did not find M.S.S. vulnerable, not only because of the applicant's language abilities and wherewithal to move around, but also because he saw the applicant as not having

156 Sajó: "Such prejudice may entail legislative stereotyping which prohibits the individualized evaluation of their capacities and needs (reference to *Shtukaturov v. Russia*, Application no. 44009/05, 27 March 2008 and *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010. "Asylum seekers differ to some extent from the above-identified "particularly vulnerable groups". "They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group."

cooperated and acted in good-faith, something that is seen to undermine the asylum system. However, Sajó did perceive a psychological underpinning to the vulnerability of asylum seekers generally due to their past experiences, them being in a new environment and their uncertainty about the future. Putting emphasis on the delays and deficiencies in the asylum determination process, which included the "well-documented insufficiencies of the Greek asylum system,"[157] Sajó assessed that being in a category of asylum seeker is psychologically painful, as per criteria of what constitutes degrading:

> Waiting and hoping endlessly for a final official decision on a fundamental existential issue in legal uncertainty caused by official neglect arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and therefore it may be characterized as degrading.[158]

In this regard, Sajó cited a study of the impact of long asylum procedure on health of Iraqi asylum seekers:

> Asylum seekers who remain in the asylum procedure for more than two years have a significantly higher risk of psychiatric disorders, compared to those who just arrived in the country. This risk is higher than the resign of adverse life events in the country of origin.[159]

This part of the opinion is additionally notable because Judge Sajó had earlier compared asylum seekers to persons with mental disabilities, saying that the latter is a more clearly defined

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[157] "The well-documented insufficiencies of the Greek asylum system (including the extremely low likelihood of success in the applications…turn such a system into a degrading one. An asylum system with a rate of recognition not exceeding1% is suspect per se in terms of the fairness of the procedure; the Greek Government failed to provide any justification for this apparent statistical aberration. This mismanagement was never explained by the Government. Such passivity precludes a timely and fair procedure; in the absence of such a procedure, existential angst will become common. I find it decisive that asylum seekers are negatively affected by the lack of timely evaluation of their asylum applications (a matter clearly to be attributed to the State) in a process where their claim is not evaluated fairly."

[158] *M.S.S.*, *supra* note 49 at p 106.

[159] *Ibid* at p 105 [citing:] Cornelis (Kees) J. Laban, *Dutch Study of Iraqi Asylum Seekers: Impact of a Long Asylum Procedure on Health and Health Related Dimensions among Iraqi Asylum Seekers in the Netherlands; An Epidemiological Study* (doctoral dissertation, 2010) at p. 151.

vulnerable group. But here we see that the mental condition and psychological suffering of asylum seekers is also deemed to be related to the inefficiencies of the asylum system, ones which have the effect, and arguably the purpose, of being exclusionary. Sajó notes that "given the high likelihood of a medical conditions resulting from the passivity of the state in a procedure that is decisive for the fate of people living in dependency" he would have found an Article 3 violation if he had seen the evidence of this in the case of M.S.S..[160] Nonetheless, Sajó was not persuaded by the evidence of third-party interveners concerning the situation of asylum seekers in Greece and how this situation is attributed to the state.[161] But mostly, he was not moved by the claim that any of this applies to the applicant directly.[162] This way of reasoning is highly meaningful for asylum and human rights law in Europe, and precisely what the dissertation is arguing – that the psychology of inclusion/exclusion is already within the law but that attention to it can and should affect the development of the law. Evidence of psychological distress of asylum seekers in connection to the exclusionary asylum policies in Europe do exist, as Sajó rightly noted, but they are still not always used in their full potential to affect the structures of the laws themselves.

The conclusion here regarding the *M.S.S.* case is that it was a giant leap towards recognition of the largely exclusionary nature of the asylum framework in Europe, and specifically the

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[160] *Ibid* at p 105: "Third-party interveners claimed that asylum seekers are deprived the right to provide of their needs (paragraph 246 of the judgment). If this were corroborated and shown to be attributable to the State (e.g. if the practical difficulties of employment that were mentioned originated from restrictive regulation or official practice), I would find the State responsible under Article 3 for the misery of the asylum seekers. This point was, however, not fully substantiated."

[161] *M.S.S., supra* note 49 at para 246: "According to the AIRE Centre and Amnesty International, the situation in Greece today is that asylum seekers are deprived not only of material support from the authorities but also of the right to provide for their own needs. The extreme poverty thus produced should be considered as treatment contrary to Article 3 of the Convention, in keeping with the Court's case-law in cases concerning situations of poverty brought about by the unlawful action of the State."

[162] *Ibid* at p 106: "The Court accepts that the applicant suffered degrading treatment as he alleges. This is based on general assumptions. The evidence relied upon is the general negative picture painted by international observers for the everyday lot of a large number of asylum seekers with the same profile of the applicant. For this reason, the Court sees not reason to question the truth of the applicant's allegations) para 255). I do not consider asylum seekers as a group of people who are incapacitated or have lost control over their own fate." "he cannot claim to be a victim of the system, which is otherwise generally degrading and humiliating."

European Union. But the references to human dignity in relation to the degrading treatment that was found to be evident in Greece, and other places as will be discussed – shows that the inclusionary elements of human dignity references in the European law can have a profound effect. In fact, the *M.S.S.* case impacted a number of cases that followed, including those outside of the ECtHR, and thus altered the shape of the EU laws. The Dublin Regulation, for one, now onto its third iteration, was revisited and revised following the sequence of cases since *M.S.S.*. At the same time, the reservations and cautionary notes that Judge Sajó inserted in the judgment in regard to the vulnerability group criteria as well as the extension of positive obligations to material support have been furthered within European jurisprudence.

6.4.1.3 Other ECtHR cases

Related cases of the ECtHR that have followed *M.S.S.* have not been fully consistent, this confirming that the situation of asylum seekers and the legal response in Europe is complex and hardly harmonized. There is indication of dignity as humanity and dignity as inclusion in the case law, even if not quite a love-of-humankind or human-self identity approach, but very much within the limitations that Judge Sajó suggested in his separate opinion of *M.S.S.* – that is, an assessment on a case by case basis, as dignity claims have generally been, presumably so as not to undermine the concept and its relation to group and individual vulnerability. These Article 3 claims that trigger the evaluative legal concept of dignity in emotion-induced assessments of acts as degrading and hence humiliating are consistently in relation to reception/living conditions, and thus, connected to positive obligations towards social and economic rights. This is important because, as explained earlier, the denial of social and economic rights is an overt expression of exclusion by most states

(to offset what is perceived as pull-factors), and here European case law is stating that there are limits to the denial of these rights when a dignity benchmark is applied.

In the ensuing case of *Tarakhel* v. *Switzerland* concerning an Afghan family of asylum seekers pending return from Switzerland to Italy under the Dublin Regulation, the ECtHR reflected on the systemic deficiencies of the Italian reception system.[163] The Court concluded that there could be a violation of Article 3 if the family were returned to Italy without guarantees of their living conditions having satisfied human rights standards. In this case, the Court not only considered the risk of destitution of the applicants if they were to be left without accommodation, but also the *conditions* of the accommodation that they would be provided. Thus, the case drew attention to the inadequate living conditions of asylum seekers in Italy, though the emphasis was primarily on the best interest of the children. The Court reasoned that,

> …in view of the current situation as regards the reception system in Italy, and although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded.[164]

However, in the subsequent case of *A.M.E. v. the Netherlands*[165] which concerned a single male adult asylum seeker from Somalia that challenged his return to Italy due to the prospect of severe hardship, the Court found the case to be inadmissible and the justices were not persuaded with the applicant's claim, having considered the same reception system as in *Tarakhel* and the

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[163] *Tarakhel v. Switzerland,* Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014.
[164] *Ibid Tarakhel* para 120 – paragraph goes on: "It is therefore incumbent on the Swiss authorities to obtain from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together."
[165] *A.M.E. v. the Netherlands,* Application no. 51428/10, Council of Europe: European Court of Human Rights, 5 February 2015.

possibility that the applicant would suffer material, physical and psychological harm. The differentiation in reasoning between the *M.S.S., Tarakhel* and the *A.M.E.* cases call into question the dignity benchmark and the threshold for living conditions to be considered as inhuman and degrading. The distinctions between *Tarakhel* and *A.M.E.* indicate that as it stands, it is not only the severity of the inadequate living conditions, which the ECtHR may constrain itself to assess due to the political sensitivity of the asylum issue, but rather the perceived ability of the particular individuals to be able to cope with the conditions. The cases opened the discussion on judicial assessment of vulnerability in respect to socio-economic deprivation among asylum seekers. Children are easily viewed as vulnerable and receive an extension of compassion that is linked to a protection of their dignity and rights, whereas adults, especially single men, are perceived to be able to fend for themselves. The issue of "deservingness" as raised in the previous chapter comes up when adult migrant men's socio-economic rights are at issue. A related concern is whether asylum seekers as a group in certain European states are distinctively vulnerable to a policy of restricting their socio-economic rights, an argument that the reasoning in the *M.S.S.* judgment could support, or whether the "case by case" standard continues to be applied in a discretionary manner, and therefore, be continuously prone to inconsistency in a way that can be either progressive or regressive in terms of inclusion/exclusion, or both.

6.4.2 The Court of Justice of the European Union

While there are numerous CJEU asylum related cases, the ones of note to this chapter relate to reception conditions, thus, the socio-economic rights of asylum seekers in the EU, and they reflect on human dignity in the context of asylum. The *N.S.* case of the CJEU, introduced above, mirrored the *M.S.S.* case as it concerned an Afghan national that was arrested in Greece but did

not make an asylum application, and after having been detained and expelled to Turkey, he escaped and travelled to the UK to lodge an application there.[166] The CJEU found that Article 4 of the Charter[167] must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker within the meaning of the Dublin Regulation to a place where there are systemic deficiencies in asylum procedures and the reception conditions if there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. The CJEU ruling simply mentions inhuman or degrading treatment "within the meaning of Article 4" and does not expand on this meaning, nor on its interpretation of dignity. In the ruling, the relationship between asylum and dignity are cited in terms of their presence in the Charter as well as the Reception Conditions Directive, and the relationship between the Directive and the Charter are referenced.[168] Several references were also made by the CJEU to the *M.S.S.* judgment of the ECtHR.[169]

Further cases also reference *M.S.S.* but, like *N.S,* they do not contain the emotive language in the evaluation of what constitutes a "dignified standard of living" and "dignified reception" as per the RCD that is transposed into national law, and "respect for human dignity" as per the Charter. However, the inclusionary approach can be deduced from the case law. In *Saciri and Others*, the question was one of dignity, but the CJEU focused on making clarifications about material reception conditions as described in the RCD, and specifically as it relates to the provision

[166] *N.S.*, *supra* note 48.
[167] Article 4 is the prohibition of torture and inhuman or degrading treatment or punishment.
[168] Para 15 "Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members."
[169] Paras 88-90, 112.

of housing.[170] The *Saciri* case concerned a family of five – parents and three children – that claimed asylum in Belgium in 2010. At the time of application, the Belgian agency responsible for reception of asylum seekers, Fedasil, was not able to provide accommodation in a reception centre and the family was referred to a social assistance centre but were denied assistance under Belgian law *because* they were not staying at a reception centre. Moreover, the financial support that the family was provided was not sufficient for them to be able to secure adequate accommodation. The Saciri family was then placed in a Fedasil facility, while a domestic court ruled that Fedasil owed the Saciri family payment for three months from the point of application that they were without assistance. Fedasil appealed to a higher court and the decision was referred to the CJEU.

The CJEU's decision in *Saciri* referred generally to clarification of the Reception Conditions Directive but was also linked directly to question of fundamental rights. The Court stated that material reception conditions must be available to the asylum seeker from the day of asylum application, whether directly from the responsible agency or by providing alternate means. The provision of assistance must reach a standard of living adequate for the health of applicants and capable of ensuring their subsistence. The adequacy must ensure a *dignified standard of living* to obtain housing, to provide for the special needs of minors and to ensure family unity.[171] The Court went further to state that "saturation of the reception networks" would not constitute a "justification for any derogation from meeting those standards."[172]

These decisions were a step forward in ensuring that the rights under the RCD are in line with fundamental human rights. Moreover, there is an evident interchange between the CJEU and

[170] *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others*, C-79/13, European Union: Court of Justice of the European Union, 27 February 2014 [hereinafter *Saciri*].
[171] *Ibid Saciri* at paras 45-48.
[172] *Ibid* at para 50.

the ECtHR. The CJEU referred to the *M.S.S.* case when deliberating *N.S.*, and the ECtHR reflected on *Saciri* in the *Tarakhel* case. These decisions are mostly aligned, and their emergence shows the flaws in the national systems. Still, in the *Saciri* case, as in *Tarakhel*, the particulars of the case were significant in that they concerned families with minors, thus the added weight of the children's "best interest," which includes the necessity of keeping the family together and therefore providing additional support. Details as to the "dignified standards of living" are still left to the discretion of the state. Neither the jurisprudence, nor the EU laws that aim at harmonizing minimum standards, provide the necessary specifics to give consistent understanding of what constitutes the dignity threshold. These have been some of the areas where the laws and jurisprudence fall short, and are competing with wider ideological pressures of what rights asylum seekers should be entitled to in the European context. More recent CJEU cases are shedding further light on the details thereby giving some more consistency to the weight of the dignity standard by considering a wider sample of circumstances, but also reaffirming some of the inconsistencies.

Overall, as noted, the CJEU mostly refers to precedents on technical matters and does not have the elaborative assessments in which the emotive language and inquiry stands out, as does the ECtHR. Nevertheless, the case law keeps accumulating and elaborating with reference to dignity as a threshold in asylum seeker cases concerning standards of living. The criteria was elevated in the case of *Jawo vs. Germany*,[173] in March 2019, that concerned a Dublin III Regulation transfer of a Gambian national from Germany back to Italy. The case had been referred by the High Administrative Court in Germany to the CJEU for a preliminary ruling as to whether the transfer to Italy would be lawful and whether the national court would have to consider the living conditions for the applicant in Italy. The Court deliberated on the extent that circumstances of the

[173] Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* [19 March 2019].

applicant after transfer should be considered with regard to the expected living conditions in another Member State. Referring to *N.S.*, thus in line with "settled" case law which had established that transfers violate Article 4 of the Charter when there are "systematic flaws in the asylum procedure and in the reception conditions for asylum applicants in the Member State responsible"[174] the Court went on to set the criteria for determining whether an applicant should *not* be transferred. The criteria is that national courts need to assess whether there are deficiencies in the reception system of the other Member State in question that attain a particularly high level of severity leading to a real risk of inhuman or degrading treatment.[175] The high level of severity that would justify a non-transfer would require a situation where:

> …the indifference of the authorities of a Member State would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.[176]

The Court then concluded that:

> the existence of shortcomings…of programmes to integrate the beneficiaries of that protection *cannot constitute a substantial ground* for believing that the person concerned would be exposed, in the event of transfer to that Member State, to a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter" (emphasis added).[177]

They added that "the mere fact that social protection and/or living conditions are more favourable" in one Member State versus another does not support the conclusion that the applicant,

[174] Para 86. The Court referred to "see, to that effect" *M.S.S.* case.
[175] Para 91.
[176] Para 92.
[177] Para 96.

if transferred, would be subject to a real risk of treatment causing suffering as per Article 4 of the Charter.[178] The Court emphasized that the principle of *mutual trust* between the Member States is a fundamental one with a premise of common values on which the EU is founded.[179] According to this principle Dublin III has a presumption that treatment of applicants will be in line with the Charter and the 1951 Refugee Convention.[180] This ruling shows again inconsistency of the Court's case law, and arguably short-sightedness that leans more on the principles of mutual trust between states rather than the experiences presented by and on behalf of the applicant, and likewise those in his situation, which was scantly mentioned.

In *Jawo*, the only ECtHR case law reference was *M.S.S*. That is notable because *Tarakhel* also concerned a return of applicants to Italy, assessing conditions and requesting guarantees *before* return rather than evaluating what had already happened. In this instance, in *Jawo*, the CJEU did not follow the ECtHR reasoning concerning Italy as *N.S.* had followed *M.S.S.* concerning Greece. The difference between the cases that was noted by the Advocate General is that the applicants in *Tarakhel* were a family with children, hence "extreme vulnerability and specific needs" is seen differently – a distinction that goes back to some of the concerns of Judge Sajó in *M.S.S.*[181] In short, the assessment of severity of ill-treatment is relative.[182] Mr. Jawo, "an unmarried adult in good health", is not seen as vulnerable because there is nothing particular observed about him that distinguishes him and "would result in his classification as a vulnerable person" within the meaning of the Qualification Directive.[183] The Advocate General does however find

178 Para 97.
179 Para 80.
180 Paras 82 and 89.
181 Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* (25 July 2018) Opinion of Advocate General Wathelet at endnote 41.
182 *Ibid* at endnote 66.
183 *Ibid* at paras 134 -135

"regrettable on a human level" that there is a distinction concerning access to accommodation in Italy between nationals and those seeking international protection, even if such a distinction is consistent with EU and international law.[184] Moreover, there are good arguments to be made on behalf of single adult men's vulnerability, as they often find themselves the key figures in the European case law but met with less empathy and potentially discriminated against.

Notably, the severity standard *was* met in the November 2019 case of *Haqbin* v. *Fedasil* in Belgium.[185] The case concerned Mr. Zubair Haqbin, an Afghani national and unaccompanied minor, that had his assistance and accommodation withheld after having engaged in a fight with other residents of the reception centre. The applicant was *excluded* for 15 days from material support as a form of sanction. Consequently, he lived in a park or otherwise stayed with friends and acquaintances. His assigned guardian lodged an application to suspend the exclusion measure, but this was "dismissed for lack of extreme urgency" and "had failed to show that [Mr. Haqbin] was homeless."[186] The applicant's guardian brought forth action to receive compensation for damage suffered by the applicant, which was dismissed as unfounded, then the guardian appealed the judgment to the High Labour Court that referred the case to the CJEU for a preliminary ruling.

The case concerns Article 20 of the RCD[187] with a question of interpretation, whether the Belgian public authority is required to make sure, by adopting necessary measures, that the asylum seekers being excluded from material reception conditions by way of sanction still goes on to enjoy a dignified standard of living or whether they should intervene only when other accommodations for the person concerned do not reach the standard.[188] Firstly, the Court found that it *is* possible

[184] *Ibid* at paras 136-137.
[185] Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers* [12 November 2019].
[186] Para 21.
[187] Article 20 outlines provisions on justifiable cases for reduction or withdrawal of material reception conditions.
[188] Para 28.

for Member States to reduce or withdraw material conditions for "serious breaches of the rules of the accommodation centres or seriously violent behaviour, since they are capable of disrupting public order and the safety of persons and property."[189] However, the sanction "must be objective, impartial, reasoned and proportionate to the particular situation of the applicant and must, under all circumstances, ensure access to health care and a dignified standard of living for the applicant."[190] A sanction that consists in the withdrawal, even if only a temporary one, of the full set of material reception conditions or relating to housing, food or clothing "would be irreconcilable with the requirement…to ensure a dignified standard of living for the applicant, since it would preclude the applicant from being allowed to meet his or her most basic needs."[191] Such a sanction would also amount to a failure to comply with the proportionality requirement.[192] In response to the claim of the authorities that the Member State cannot do more than provide the applicant excluded from accommodation a list of reception facilities, the Court said that "on the contrary" the *first* obligation is to ensure a dignified standard of living since Article 20(5) "requires Member States, by the very fact that the verb 'ensure' is used therein, to guarantee such a standard of living continuously and without interruption."[193] The Member State can take a number of measures to ensure that the applicant is not deprived of material reception conditions, such as being moved to a separate part of the reception centre, being prohibited from contacting certain residents, or being transferred altogether to another centre.[194] Of course, a key added element in the case, as with the previous ones mentioned, is that the applicant is an unaccompanied minor, hence the categorization as a "vulnerable person," so the best interests of the child are a primary

189 Para 44.
190 Para 45.
191 Para 47.
192 Para 48.
193 Para 50.
194 Para 52.

consideration.[195] Moreover, although this case is seen as strengthening and expanding jurisprudence for asylum seekers deemed vulnerable, it is also seen as affirming an "increasing latitude" in which Member States can "determine, explain and potentially justify restrictive policies in the provision of social goods to vulnerable categories" making human rights protection of asylum seekers conditional rather than absolute.[196]

6.4.3 The European Committee of Social Rights

The living conditions of asylum seekers in Europe with the question of dignity at stake have also been subject to scrutiny within the Council of Europe under the provisions of the European Social Charter and its revised version ('Social Charter').[197] Notwithstanding the limited reach of the Social Charter, the decision of the European Committee on Social Rights (ECSR) in *Council of European Churches v. the Netherlands*[198] had made headways. The case concerned adult migrants in an irregular situation, including asylum seekers pending appeal of their claims, being denied emergency social assistance to shelter, food and clothing under the Dutch legislation.[199] Crucial in this case was the ECSR's decision of applicability of Article 13 (4) (the right to social and medical assistance) and 31(2) (the right to housing), to adult migrants *without* regularized residency status, including asylum seekers. Unlike the European Convention of Human

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[195] Paras 53-54.
[196] Elspeth Guild and Claude Cahn, "Court of Justice of the European Union: Sanctions for Bad Behaviour in Reception Conditions: Nothing can undermine the Dignified Standard of Living Requirement - *C-233/18 Haqbin 12 November 2019 CJEU* [in:] ILPA (Immigration Law Practitioners' Association) European Update – December 2019 at p 10. online at <https://www.ilpa.org.uk/pages/ilpa-quarterly-european-update-.html≥ (login required).
[197] Council of Europe, *European Social Charter*, 18 October 1961, ETS 35; Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163; Council of Europe, European Code of Social Security, Strasbourg, 16.IV.1964.
[198] *Conference of European Churches (CEC) v. the Netherlands (decisions on the merits)*, Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 10 November 2014 [hereinafter *CEC v. Netherlands*].
[199] *Ibid*.

Rights, the Social Charter does not apply to everyone within the jurisdiction but to nationals of the State Party and to nationals of other State Parties that are either lawfully resident or working in the concerned State. The original Social Charter does not include a non-discrimination clause, but this was rectified in the revised Charter in 1996, which includes a prohibited ground of "national extraction or social origin."[200] Nonetheless, the explanatory notes clarify that "whereas national extraction is not an acceptable ground for discrimination, the requirement of a specific citizenship might be acceptable under certain circumstances."[201] This particular case did not concern a general right, but it was the denial of emergency assistance to the migrants among which were asylum seekers, that was rendering them destitute on the streets. Thus, the decision related to the established principle that there should be no exceptions to providing emergency assistance, and so the provision applies to all foreign nationals regardless of status.[202]

Article 13 (4) of the Social Charter delineates a right to social and medical assistance to anyone without adequate resources, and this provision is to be applied by State Parties "on equal footing with their nationals to nationals of other Parties lawfully within their territories." The provision obliges the State Party to provide in cash or in kind social assistance to persons in need, and this must be sufficient to ensure a decent life.[203] States are given considerable discretion to comply with this provision.[204] Significantly, in its 2013 Conclusions, the ECSR clarified that even

[200] Article E, Part V, European Social Charter (revised).
[201] Explanatory Report, European Social charter (ETS no. 163).
[202] Para 73 "With regard to Article 13§4 in particular, the Committee recalls that emergency social assistance should be provided under the said provision to all foreign nationals without exception (Conclusions 2003, Portugal). Also migrants having exceeded their permitted period of residence within the jurisdiction of the State Party in question have a right to emergency social assistance (Conclusions 2009, Italy). The beneficiaries of the right to emergency social assistance thus include also foreign nationals who are present in a particular country in an irregular manner (Conclusions 2013, Malta)."
[203] EU Charter, *supra*, Article 13.
[204] Jennifer Tooze, "Social Security and Social Assistance" [in:] Tamara Harvey and Jeff Kennar, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Portland: Hart Publishing, 2003) at p. 187.

though the scope of Article 13 applies to those persons that are lawfully residents in a given country, and only exceptionally to irregular migrants, it should not mean that the fundamental rights related to social and medical assistance, such as the rights to life and human dignity, can be violated.[205] Thus, there is an obligation to provide irregular migrants with urgent medical assistance and basic social assistance in order to protect their fundamental rights.[206] Article 31 speaks to "ensuring effective exercise of the right to housing" by undertaking measures "to prevent and reduce homelessness with a view to its gradual elimination," and to make the price of housing accessible to those without adequate resources.[207] Article 31, however, is not widely ratified.

These provisions, like the majority of the articles of the Social Charter,[208] apply only to foreign nationals of other Party States with lawful residence or regular employment in the host country and would normally exclude all migrants having overstayed their legal status or in another irregular situation. Not extending the right to non-State Party migrants had been the standard applied in previous decisions, even concerning undocumented minors, and in line with a permissible statement from the Netherlands that the State would not recede this limitation.[209] In this case, however, the Committee gave prominence to the "basic rights" of the Social Charter and the fundamental right to life, physical integrity and human dignity of these "migrants in an irregular situation" that included asylum seekers.[210] Significantly, the Committee considered the aim and purpose of the Social Charter in effectuating human rights.[211] A key aspect in this stance was the Committee's view that restriction on rights depends on the content and impact of the right itself,

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205 ECSR Conclusions 2013 cited in *CEC v. The Netherlands, supra* note 198.
206 *Ibid*.
207 Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Article 31
208 Articles 1 to 17 and 20 to 31
209 *Defense for Children International (DCI) v. the Netherlands*, Complaint No. 47/2003, decision on the merits of 20 October 2009; *CEC v. Netherlands*, supra note 198 at para 64.
210 *Ibid* para 66.
211 *Ibid* para 67

which could have varying outcomes that need to be assessed on a case by case basis.[212] With that, the Committee concluded that "in certain cases and under certain circumstances, the provisions of the Charter may be applied to migrants in an irregular situation."[213] This would be "justified solely" if the exclusion would have "detrimental consequences for their fundamental rights" due to the "unacceptable situation."[214] As noted, this case included asylum seekers awaiting decisions pending their appeals, but it is significant that this exception was made for the broad category of "irregular migrants" – those that do not even have the protection of an asylum system, but are reliant on the recognition of their humanity and that basic protection of their human dignity.

Another important thing to note again is a distinction made concerning "adult migrants" as opposed to children in related cases of both the ECSR and the ECtHR.[215] The government respondents insisted that the adult migrants concerned had made a conscious decision to not leave the Netherlands as a result of their irregular status, and that this is an overt migration related policy of the government. This also applied to rejected asylum seekers, who did not have access to assistance even pending their appeal of the asylum decision. The response of the government is a case in point about policy stemming from "pull anxiety." Reception services are temporary and conditional to encourage the migrants' return to country of origin.[216] However, in this case, unlike previous ones, the argument of inapplicability of these rights and corresponding services to adult migrants did not hold.

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[212] *Ibid* para 70
[213] *Ibid* para 71.
[214] *Ibid* para 71 citing *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009.
[215] *Ibid.*
[216] *Ibid* para 95.

While the Committee had made references to its own case law, they had also made important links with international and European sources to support the decision, while being clear that they are not calling into question a state's legitimate aim of controlling entry and exit regulations of their territory.[217] However, the denial of emergency assistance to adult migrants in an irregular situation was considered disproportionate to the stated goals.[218] There was recognition of an adequate standard of living under UN conventions, to include food, clothing and housing, without limitations on regularity of stay.[219] Moreover, core obligations of "access to basic shelter and minimum essential food, regardless of residence status" were accepted as non-derogable in view of the assessments made by the UN Committee on Economic, Social and Cultural Rights.[220] The Committee then referred to European human rights law acknowledging "the importance of preserving human dignity in connection with the minimum protection provided to migrants" including the Court of Justice's decisions.[221]

A significant aspect is that the Committee repeatedly referred to a "right to shelter" and specifically, emergency shelter, as opposed to a right to housing that is specified in the provision. In reference to Article 13, State Parties to the Social Charter had agreed to provide "appropriate short-term assistance to persons in a situation of immediate and urgent need" which includes accommodation, food, emergency medical care and clothing.[222] An emphasis on shelter in reference to Article 13 as opposed to housing in Article 31 shows the differentiation of rights of asylum seekers versus European nationals under European human rights law. As it stands under the Social Charter, an asylum seeker has a right to *shelter*, but a right to *housing* is violated only

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[217] *Ibid* para 120.
[218] *Ibid* para 124.
[219] *Ibid* para 113.
[220] *Ibid* paras 36-38.
[221] *Ibid* paras 115 – 116.
[222] ECSR Conclusions 2013, Malta cited in *CEC v. The Netherlands supra* note 198 at para 105.

if states do not take effective measures to prevent homelessness. These terms are separate but can be easily conflated in their legal significance. The decision of the ECSR opens up the need for further questioning whether emergency shelter, or any of the reception accommodation provided to asylum seekers, would meet the minimum standards that have been established under international law concerning the *adequacy* of housing. This is particularly significant because the Netherlands has maintained its original policy and instilled a "bed-bath-and-bread" compromise where adult migrants with irregular status, asylum seekers among them, will only receive nighttime shelter, a shower, and food on the condition that they cooperate in their return to their country of origin. This system has been referred to by Philip Alston, the UN Special Rapporteur on extreme poverty, as "inhumane" and a clear violation of human rights.[223]

6.5 Conclusion – The Promise of Dignity as Evolving

Invoking the dignity concept in the above cases does not automatically make evident that there are emotional underpinnings and psychological forces at play. That awareness requires an in-depth and interdisciplinary exercise of unpacking the dignity term in its evaluative legal function, as this chapter has done, to appreciate these underpinnings and forces. What is clear is that the concept of dignity has evolved over generations to be now embedded in European constitutions and related jurisprudence. This has involved recognizing the pain and humiliation that had been experienced within Europe during numerous wars, and then codifying a response in the spirit of "never again," an effort for empathic recognition. Dignity expresses values deeply entrenched in our humanness, our perceptions of self-worth, as well as respect and recognition, if

[223] Hague Asylum Deal "Inhuman": UN Rapporteur. NL times online (April 23, 2015).

not love, of others. That self-worth and respect of others requires a positive emotional evaluation, whereas in contrast, human rights violations trigger negative psychological experiences. The application of the evaluative concept of dignity involves understanding that human actions make others suffer, everyone is vulnerable, even if differently, and hence requires collective responsibility for alleviating that suffering. The role of collective trauma and resulting empathy cannot be underestimated.

The jurisprudence within the EU and Council of Europe on reception, material and living conditions for asylum seekers, indicate that the concept of dignity (in its relation to other concepts like vulnerability, degrading treatment, or inhumane conditions) has become pronounced. The progress is not yet earth shattering but there is an indication that dignity in the European laws and consequent case law increasingly serves a vital function in the inclusion of asylum seekers in protection of their humanity. If it is accepted that dignity as an evaluative legal concept triggers emotions, inclusionary ones, then the emotive wording in the case law does not have to be explicit, and the psychological experience is in fact already implicit. In fact, some of the emotive language in relation to dignity that has come from modern day scholars and judges matches the philosophies of the past. This encouraging view of the use of dignity is not meant to ignore its "problematic" nature that has been noted by many and can be observed in the diverging interpretation of jurisprudence around the globe. The point, rather, is that dignity, regardless of nuances of interpretations, has common features and that the "degrees" of dignity (whether restricted to certain groups, one's sense of self, or to all of humanity) relates to the degree of empathy and the extension to the human-self identity.

In an article on *Emotions in Constitutional Design*, András Sajó wrote a comprehensive reflection on dignity that is also fitting here by way of conclusion:

> Dignity is always compatible with other people's equal dignity. This is not always felt to be so because people— especially when their identity is group based and status oriented—will be concerned with maintaining their status (honor); the equality that comes with dignity is offensive to status-related feelings. However, the concept (that is, the social representation) of human rights allows for opposing groups to articulate their differences within the common frame, to find commonalities, and to negotiate opposing identities within that frame. [224]

Sajó notes that everyone is a potential victim to coercive power of the state and that human rights have the neutralizing effect of protecting all vulnerable people. The ability to claim rights means that people are not favoured on specific grounds, and this is because of the centrality of dignity, one that involves self-respect and respect for others and therefore promotes a win-win position if the dignity of others is recognized. One's own dignity therefore reflects the equal dignity of others. Such evaluation and equalizing through the lens of dignity is ongoing in the European legal landscape concerning asylum seekers in Europe. Dignity as humanity, dignity as inclusion, and dignity as the human-self identity, is part of this evolving process. In that sense, the application of dignity, as a legal concept and more generally, has the potential to transcend the dissonances built into the frames of identity formation, cost-benefit calculation and threat-perception, because it extends the value of a human being outside of the self *onto* another.

[224]András Sajó, "Emotions in Constitutional Design" (2010) 8(3) *International Journal of Constitutional Law* 354–384 (Oxford University Press and New York University School of Law) at p 381.

Conclusion – Transforming Legal Paradigms and New European Co-Creations

Homo sum, humani nihil a me alienum puto.
I am human, and I think nothing human is alien to me. [1]

– Terence (Publius Afer)

The challenge, then, is to take minds and hearts formed over the long millennia of living in local troops and equip them with ideas and institutions that will allow us to live together as the global tribe we have become. [2]

– Kwame Anthony Appiah

1. Tying the Common Threads

The overall research considered the evolution of Europe-wide human rights and asylum frameworks through the lens of the social psychology of inclusion and exclusion. Taking an interdisciplinary psycho-historical perspective, the aim was to consider the substrate of the laws and policies, the underlying "nature" of the legal frameworks. Psychological concepts, theories and studies were employed to frame the legal discourse and accompany the analysis of the legal frameworks and their development, with the starting premise that inclusion and exclusion is at the heart of European laws concerning citizens and asylum-seeking non-citizens. The three theoretically-informed interlocking frames described in Chapter 2 – identity formation of self and other, cost-benefit calculation and threat-perception – encapsulated and partially steered the analysis.

[1] The Latin quotation is from Roman playwright Terence (Publius Terentius Afer) that wrote this in his play Heauton Timorumenos, circa 163 BC. He was of Berber descent, brought to Rome as a slave, educated and freed.
[2] Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton, 2006) at xiii.

In broad terms, the common thread across all of these frames, both from a psychological as well as legal perspective, is the presence of a determination of value – an evaluation – concerning group membership, rights and generally "worth." Group membership is central to our human psychology of inclusion and exclusion. Value, and values more broadly, are not just determined through reason but also through emotions that evaluate what is good and just and for whom, and what is not. In other words, value-making is psychological, expressed through affect and cognition, and formally through laws. The frames of identity formation, cost-benefit calculation and threat perception are all psychological processes of (e)valuation. Law is itself a determination of value, of what is good, right, and moral, and our psychology – our emotions and cognition – are part of that process. Moreover, rights are directly linked to group membership. The more a person "belongs," the more rights they can access, and the opposite is also true, that provision of rights increases perceptions and experience of belonging. We give value to persons based on group membership, and to give higher value to ourselves as individuals, we increase the value of the group. This means that a direct line can be made between the social psychology of inclusion and exclusion and that which is written into law in terms of who is included/excluded, whether through social and economic rights, legal categorization or other means. The lowest worth of a person is when their treatment and their experience reaches the level of inhuman and degrading treatment, a debasing through humiliation, an entrenching of already existing vulnerability, a denial of the most fundamental of human rights, a lowering of value below that of a human with dignity.[3]

[3] Mary Neal, *"*Not Gods but Animals: Human Dignity and Vulnerable Subjecthood*"* (2012) 33 *Liverpool Law Review* 177-2000.

The concepts of inclusion/exclusion written into laws and policies were considered throughout the dissertation as identity-driven, socio-economic and fear or empathy-based, as it concerns in-group and out-group membership. Hence a focus in the chapters has been on rights concerning the labelling/categorizations around asylum in Chapters 3 and 5, as well as access to or denial of social and economic rights related to asylum-related reception, integration, adequate standard of living, and dignified treatment as described in Chapters 1 and 6. A focus on Europe broadly and the EU more specifically as an enlarged in-group aiming (and struggling) for common identity through laws was present in all the chapters. A particular emphasis was placed in Chapter 4 on the development of the European identity as having a human rights focus on Europeans with limited mention of non-Europeans seeking asylum until the 90s and early 2000s, coinciding with the expansion of the European Union.

A historical background was included throughout, beginning with an outline of international and European law in Chapter 1. The laws cited show on the one hand an objective of equality and non-discrimination between human beings, but also a distribution of certain rights in a legitimized yet unequal manner in relation to nationality and status, hence the "dissonance" in international law concerning nationality since nationality discrimination is permitted to some extent. Discrimination, therefore, is seen as being both a psychological and legal concept, and asylum laws as having an embedded discrimination because of social psychological inclinations towards inclusion of some and exclusion of others. Chapter 1 further introduced some of the key provisions of social and economic rights of asylum seekers and refugees in international and European law with a focus on rights concerning reception and integration in regards to employment, housing, and social assistance. This included a reflection on the relevant provisions in the 1951 Refugee Convention meant for both *seeking* and *enjoying* asylum as described in the

UDHR, the former via the definition of the refugee and the latter via socio-economic integration in the form of social and economic rights. The Convention legislates "gradations of treatment" based on who satisfies group membership criteria for access to rights in terms of employment, housing and social benefits.[4] Likewise, these different sets of rights were considered as giving psychological value to persons by virtue of the law itself.[5]

With some of the conceptual and theoretical basis for the analysis drawn out in Chapter 2, the discussion in Chapter 3 focused on the drafting of the 1951 Refugee Convention to show the tensions at play, particularly as to whether the refugee definition would include non-Europeans or be kept for Europeans. The drafters of the Convention struggled with the wording of the refugee definition, and debated whether it should be broad and more inclusive of a universal nature or narrow with an "in Europe" stipulation. There was a psychological tension present at the negotiations – compassionate calls for a broader universal definition in line with humanitarian and human rights principles, in contrast to fears about a "blank cheque" and "Open Sesame" for "undesirables elements" from outside Europe. Back then, a compromise was reached on the definition, tinged with Eurocentric tones, and while the issue appeared settled with the 1967 Protocol that had extended the refugee definition beyond European bounds to a universal application, the longstanding fears and reasoning behind the limitations have remained.

[4] Additional sets of rights that could be considered are rights to education and family reunification, but the focus remained on the former three (employment, housing and social assistance) because these have immediate survival impact and have been the topic of recent case law within the European courts that have greatly affected European legislation.

[5] From the state that gives a higher value to a person because they give them rights, but also because they respect them more fully as members and as humans, and also because the persons (asylum seekers/ refugees/ citizens) themselves are able to gain more self-worth, health and well-being, sense of security, independence and identity from the provision of rights. Equality and fair treatment implies respect which implies extending and experiencing a sense of worth.

Both Chapters 3 and 4 reflect on the Second World War and its aftermath as being the starting point for much of the texts of human rights and asylum laws as well as the start of the European institutions and the founding treaties. European values are said to represent Europeanness, and human rights belong to this identity. A continued reflection on the evolution of European laws saw them in Chapter 4 as part of an identity-forming exercise, creating an EU/European in-group, struggling between national inclinations towards distinctions and pan-European ones towards commonness. The human rights that developed in Europe focused on Europeans primarily and largely omitted those deemed as alien, though there was an increasing sense of responsibilities and legislating on migration as freedom of movement became the mainstay of relations between EU Member States. However, as it happened in the drafting of the 1951 Refugee Convention, the perceptions of threat of the non-European Other also crept into the policies that emerged in the progression towards the Common European Asylum System. Notably, the current EU system on matters of asylum is substantially more complex than the initial post-WWII legal formations. Numerous legal and conceptual categories of migrants have been devised to make sense of and "manage" the reality of human migration. As described in Chapter 5, the legal categories of citizenship, European citizenship and non-citizens seeking asylum entrench a hierarchization of status via rights and therefore of value, of the deserving and undeserving, the recognized and the suspect.

The overall assessment is that there has been progress in the laws that have come with numerous regressive trends – hence the continued cognitive dissonance within the policy and lawmaking. On the upside, European human rights and asylum laws have grown from a Eurocentric source gradually to include non-European Others in its realm of protection. While freedom of movement was missing in the ECHR, it became the mainstay of European Union laws.

While there was no mention of dignity in the ECHR as well as in the Refugee Convention and early European Community law, there has been a progression that ultimately made dignity fundamental in the Charter of Fundamental Rights of the European Union, the case law from the ECtHR and CJEU, and the decisions of the ECSR concerning asylum seekers' social and economic rights.

Arguably the most promising aspect in the evolution of European human rights and asylum law has been the emergence and grounding of the legal concept of dignity. An increased emphasis and use of the concept in cases concerning asylum seekers (including rejected asylum seekers/irregular migrants) is evident in the European courts case law – whether it is Article 1 of the Charter in the CJEU cases or the ECHR Article 3 in the ECtHR decisions. In Chapter 6, dignity has been described as an evaluative legal concept, an inclusionary one, that has the characteristics to go beyond group identity, beyond categories, to a notion of the human-self identity. From a social psychological perspective, what links the individual, the group members, and the all-encompassing category of human at the highest level of abstraction is the legal concept of dignity. Notably, in the provisions of international law as well as in the case law that has emerged in the European courts and committees, dignity has been invoked in cases of denial of social and economic rights, the ones that have been emphasized in present research – social assistance, housing and employment, which also includes access to basics such as food, shelter and clothing. Dignity is often associated with socio-economic rights and with inclusion/exclusion because it relates to membership within a group, but it extends group membership to the highest level of abstraction to that of the human identity, and what factors in is the basic premise of pain and suffering that human beings share – our vulnerability. The cases show that vulnerability and dignity as it concerns human and inhuman treatment are intertwined, which also includes

classifying persons as vulnerable – deserving or undeserving. Access to rights to participate in a community, provision of status in terms of membership, and rights that give basic human dignity, are a recognition of a person's worth and also provide the person the psychological experience of *self*-worth. They are determinants of value.

2. Further Research and Analysis

The dissertation was a broad endeavour to bridge the psychology insights with the legal discourse on human rights and asylum at the European level. This is an original but also admittedly modest contribution that is still in progress, and therefore it is accompanied by a call for more interdisciplinary exploration that can be expanded with the connections suggested. The next step is to peel back more layers, continuing with these links and connections, as well as the interpretive lens of this interdisciplinary language. More research can be done that links the interrelation between social psychology and social and economic rights, as it relates to the migration context. The introductory chapter began with a comparative outline of social and economic rights between the international provisions and the European ones, and more of a focus on this can be done as there is limited literature in this regard, or it is otherwise dated. Moreover, while there was an emphasis in the dissertation on inclusion/exclusion via social and economic rights, as well as the refugee categorization, another round of study can consider more closely the exclusion clauses (i.e. Article 1F of the 1951 Refugee Convention), whether and in what way there is an underlying threat perception and fear-induced mechanism at its core, perceiving persons excluded to be altogether outside the ambits of humanity.

One view towards further research is to consider more the existing psychological research on how different political proclivities between left-wing and right-wing – the left generally leaning towards cosmopolitanism and human rights identity, whereas right-wing lead more towards smaller in-group identities – produce different policy results on equality and justice. In other words, there are meaningful psychological differences within the broad in-group of Europe or Europeans generally concerning their perspectives about the out-group. These psychological differences between liberal and conservative positions that affect laws concerning inclusion/exclusion need further exploration. For example, a 2019 report of a study done by Vera Messing and Bence Ságvárireviewed data of the European Social Survey, to consider how attitudes about migrants throughout Europe changed since the 2015 migration "crisis", taking data from both before and after.[6] The authors conclude that, "those who place more importance on security tend to have the most negative attitudes towards migration, while those who emphasise equality and respect for others tend to have the most positive attitudes." [7] These findings can be connected to research in this dissertation, to consider how attitudes that determine negative/positive value towards humanitarianism versus security based on political leanings that can be linked to the resulting laws and policies.

3. Final Words: Co-Creating a European Way of Life

What is next for Europe at this time of self-defining, as it confronts its numerous crises, many of them related to migration and asylum? Whether factual or not, the story goes that Jean

[6] Vera Messing and Bence Ságvári, *Still Divided but More Open Mapping European Attitudes: Towards Migration Before and after the Migration Crisis* (Friedrich-Ebert-Stiftung, 2019).
[7] *Ibid*.

Monnet, often identified as *the* father of Europe, is known to have said towards the end of his life that if he had to begin again the Europe project, he would begin with culture.[8] Another founding father (one of the Inner Six), Robert Schuman, had the namesake of a declaration – the Schuman Declaration – which stated that world peace could not be safeguarded without "creative efforts proportionate to the dangers which threaten it" in which a "united Europe ...will not be made all at once, or according to a single plan" but rather "be built through concrete achievements which first create a de facto solidarity."[9] More recently, in her opening speech as European Commission President-elect, Ursula von der Leyen began with a reference to the "founding fathers and mothers of Europe" having created something out of the "ashes of world wars" and that something was peace.

The goal of peace in Europe was indeed the premise of the European institutions that followed the Second World War. As noted, the reasoning was that an interdependence of social and economic benefits for nationals of previously warring countries would create a reliance, and they would no longer have to compete to better their own circumstances. In her speech, von der Leyen stated that her father, Ernst Albrecht, was 15 years old "when the horrific war that, through the actions of [her] country, wrought death, destruction, displacement and devastation on our continent, came to an end."[10] At the end of his life, von der Leyen's father changed his narrative on Europe, no longer referring to war, but rather seeing it "like a long marriage" in which "love does not increase after the first day, but it deepens...because we never forget why we entered into

[8] Krzysztof Michalski, *What Holds Europe Together: Conditions of European Solidarity* (Budapest: CEU Press, 2006).
[9] Declaration of 9 May 1950: The Schuman Plan for European Integration.
[10] Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission (July 16, 2019) online at: <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230> at p 5.

the union in the first place."[11] And yet, as Jacques Delors famously stated in 1989, when he was President of the European Commission, that "you cannot fall in love with the single market," an acknowledgement that the formation of a unified identity, a European consciousness as he referred to it, needs a deeper-rooted sentiment than the benefits that come from economic integration.[12] In the same vein, and taking a social psychological perspective, Emanuele Castano claims that

> economic integration alone is insufficient to instill a sense of belonging at the European level. On the other hand, there is a strong argument to be made that this sense of belonging cannot be fostered through the formation of a single European cultural identity. Diversity, not homogeneity, is the slogan of European integration.[13]

Present-day policy makers, as the mothers and fathers of a new generation of Europe, can combine Monnet's reflection on culture as a vital foundation with Schuman's declaration on the need for solidartity, Albrecht's remembrance of the horrors of war towards an appreciation of a deepening love, and Delors' awareness about "human nature" – and they extend that beyond their European group membership. The European project may not be confronted by fullout warfare within its continually redefined borders, but it is still faced with wars and depravity happening elsewhere. In a globalized world, regional wars are "world wars," in a sense. Persons coming in

[11] *Ibid*.
[12] Address given by Jacques Delors to the European Parliament (17 January 1989). Full quote:
"as I have often said in recent months — you cannot fall in love with the single market. Fernand Braudel, a lucid observer of the moves towards integration in the early 1960s, was thinking of the same thing when he said: 'It would be mistaking human nature to serve up nothing but clever sums; they look so pallid beside the heady, though not always mindless, enthusiasm which has mobilized Europe in the past. Can a European consciousness be built purely on figures? Or is that not precisely what figures may fail to capture, what may develop in ways that cannot be calculated?' That is why I am constantly stressing the need not only for a frontier free area but also for the flanking policies which will open up new horizons for the men and women who make up this Community of ours."
[13] Emanuele Castano, "European Identity: A Social-Psychological Perspective" [in:] Richard K. Herrmann, Thomas Risse-Kappen, Marilynn B. Brewer (eds), *Transnational Identities: Becoming European in the EU* (Lanham, MD: Rowmann & Littlefield Publishers, 2004) at p 43.

increased numbers into the European Union, as it happened in 2015, had predominantly come from war-torn countries.

Coming back to where this dissertation opened up, that European migration and asylum policies connect with burgeoning ideas about "the European way of life" – whether this way of life should be *protected* – a more threat-oriented perhaps exclusionary approach – or *promoted* – a more open and inclusionary sounding approach. The phrase has been used repeatedly by the centre-right European's People's Party, as far back as 2016, though the reference then was to *preserving* rather than protecting or promoting.[14] In all cases, it has to be defined and agreed upon in a mutually satisfactory way among the vastness of players in Europe – the Member States, as the members of the large in-group that is Europe and the EU, which rely on diversity of the members of the smaller in-group of their nation-states, that is the European citizens and non-Europeans.

It has been stated that migration does not threaten or impoverish this way of life but what does it is "the rigidity of the wall and the closing-in of oneself."[15] The response to this "wall of identity" can rather be met with a relationship between identities that is "open to diversity and difference where one discovers oneself in the exchange with The Other."[16] Perhaps then what is more appropriate, and in line with the founders' goals, is *co-creating* the European way of life, an approach that takes into account psychological influences.[17] That is the premise of integration

[14] Juncker had used the phrase in a State of the Union Speech in 2016, The reference at the time was critical of Victor Orban and others for anti-migration rhetoric that is not in line with human rights.
Edwy Penel, "This Shameful Europe" *Euronews* (16/09/2019) online at <https://www.euronews.com/2019/09/16/this-shameful-europe-view>.
citing Édouard Glissant and Patrick Chamoiseau in their essay *Quand les murs tombent* published in 2007
[16] *Ibid*.
[17] Dora Kostakopoulou, "Co-Creating European Union Citizenship: Institutional Process and Crescive Norms" *Institutional Constructivism in Social Sciences and Law: Frames of Mind, Patterns of Change* (Cambridge University Press, 2018).

more generally in its multiplicity of meanings – a two-way process. Emile Durkheim saw social integration as the process of forming a collective consciousness where individuals and society unify their beliefs, values and norms.[18] It is the result of the "conscious and motivated interaction and cooperation of individuals and groups."[19] Tom Kulhman has proposed integration in socio-economic terms, but likewise considers the "psychological adjustment" that needs to take place in the process.[20] As researchers and practitioners have asserted, the integration process and the asylum process are "intrinsically linked, both conceptually and practically."[21] In fact, the European Commission portfolio on the European way of life put under one heading not only migration, integration and security but also issues of sports, education and culture.[22] This is a noteworthy combination and it will be important to follow if and how these issues intersect in the rolling out of the agenda.

This is also where an interdisciplinary focus like the present dissertation is needed in defining this European way of life. According to the Merriam-Webster dictionary, "a way of life" on its own includes "the habits, customs, and beliefs of a particular person or group of people,"[23]

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[18] Craig Calhoun (ed), *Classical Sociological Theory* (Oxford Blackwell: 2002).
[19] David Lockwood, "Social Integration and System Integration" [in:] George K. Zollschan and Walter Hirsch (eds.), Explorations in Social Change (London: Routledge and Kegan, 1964).
[20] Tom Kuhlman, "The Economic Integration of Refugees in Developing Countries: A Research Model" (1991)4 (1) *Journal of Refugee Studies* 1-20.
[21] Stephen Castles *et al*, *Integration: Mapping the Field*, Report of a Project carried out by the University of Oxford Centre for Migration and policy Research and Refugee Studies Centre contracted by the Home Office Immigration Research and Statistics Service (IRSS) (December 2002; Home Office Online Report 28/03).
[22]Responsibilities of Margaritas Schinas, online at <https://ec.europa.eu/commission/commissioners/2019-2024/schinas_en#timeline> involve: 1) Aiming to finding "a common ground on migration and asylum" among which is coordinating work on the New Pact on Migration and Asylum, pathways to legal migration, and facilitating integration into the job market. 2) Developing a European Security Union, that involves "strengthening prevention, detection and response measures to hybrid threats" 3) A focus on "skills, education and integration" that includes "inclusion and building a genuine Union of equality and diversity". The last category is especially interesting as it involves: "maximising the potential of culture and sport to bring communities together and opening up new experiences skills and opportunities for young people"; "coordinating work on improving the integration of migrants and refugees into society" and "dialogue with churches and religious associations or communities, and with philosophical and non-confessional organizations"; and lastly, "fight against anti-Semitism."
[23] Merriam-Webster online at <https://www.merriam-webster.com/dictionary/way%20of%20life>.

and Collins adds to this list behavior that is typical of the group.[24] Thus far in the public discourse, the European way of life has been defined in terms of laws formed by political establishments that some may consider far removed from the citizens of Europe. As noted in the introduction, the speech of Margaritas Schinas during his hearing at the European Parliament and the response of Ursuala von der Leyen imply that what is meant by protecting the European way of life is protecting against the attack against rule of law and the content of the Treaties, hence the threat comes from the leadership in the Member States that are not in line with the principles rather than from migration. The portfolio for a European way of life and the declared need for its protection is a meaning-making and identity-shaping exercise, with use of language to say that there is or can be a European way and it has everything to do with the law as defining habits, customs, beliefs and behaviours. This is happening in the context of the multiple crises within the European Union that have been linked to migration, with the United Kingdom Brexiting on the one side of the EU boundary, and on the other side Hungary is leading the pack in nationalistic illiberal notions on Europe having a Christian identity that is seen by its leader as being threatened by outsiders. Phillip Allot poignantly writes:

> The masters of European integration want also to convince themselves, and the European people that the EU is a form of mental re-engineering, a re-forming of the ego-psychologies of the European peoples. The problem is that the ego-psychology of the European peoples is not merely a psychology of their identity. In the course of European history, the peoples of Europe have developed substantially different constitutional psychologies, different stories about the nature of society and government.[25]

[24] Collins dictionary online at <https://www.collinsdictionary.com/dictionary/english/way-of-life>. Protection is defined as preventing harm or damage, according to Collins dictionary, and of course implies that there is an actual threat to the European way of life – its habits, customs, beliefs and beliefs and behaviors.

[25] Philip Allott, "The Opening of the Human Mind" (2007 1(1) *European Journal of Legal Studies*.

Therefore, the interdisciplinary connections between the mechanics of law and those of psychology invite a deepened reflection on how both can be understood in the broader social discourse as an experience of the mental – cognitive and emotional – construct of Europe. The social psychology of human beings is enduring, but it is also malleable, as are the laws with which they correspond. This dissertation aimed on the one hand for a simplified understanding of international human rights by analysing the underlying substance of the laws, the human psyche in its social relations, while on the other hand embracing the complexity of the interplay of the social psychology with the laws playing out in the public and intergovernmental discourse. Increased complexity creates an increased sense of uncertainty which has a rebound effect – when things get overly complex, there is a tendency to go back to a view of the world that gives a sense of security. The laws that govern human rights and asylum, in Europe and elsewhere, cannot be separated from the human social psychology of inclusion and exclusion that "governs" group membership. That is, human beings have evolved a psychology concerning groups and individuals, commonness and differentiation, and that psychology informs the laws that are created to either reinforce this psychology or challenge it – that has been the assertion of this dissertation. Fundamentally, a view of human rights that moves beyond strictly legal conceptions to include an understanding of their psychological substance and power expands the concepts of what it means to be human. The evolution of human rights and asylum laws continues, gradually, with occasional important paradigmatic leaps. Crisis may be triggering a shift in consciousness both within the European institutions as well as the public sentiments about the meaning and direction of Europe as whole.

Tables and Bibliography

Table of Treaties, Instruments and Legislation

International Law

Additional Protocol to the Provisional Arrangement and to the Convention (signed at Geneva on 4 July and 10 February 1938*)*

Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees, 30 June 1928, League of Nations, Treaty Series, 1929; 89 LNTS 63.

Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements dated July 5, 1922, and May 31, 1924 (signed 12 May 1926) 89 LNTS 47.

Arrangement Relating to the Legal Status of Russian and Armenian Refugees (signed 30 June 1928, entered into force 5 March 1929) 89 LNTS 53, 55.

Convention relating to the International Status of Refugees (signed 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663.

Convention concerning the Status of Refugees Coming from Germany (signed 10 February 1938) 192 LNTS 59, arts 1 (a) and (b)

Status of Refugees Coming from Germany (signed 14 September 1939) 198 LNTS 141, art 1(1).

UN Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956.

UN General Assembly resolution 428 (V) of 14 December 1950 (Annex); para 1 of the Statute of the Office of the High Commissioner for Refugees, as revised by General Assembly res. 58/153, 22 December 2003.

UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p 175.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p 137, in force 22 April 1954.

UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p 117.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p 171.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p 3.

UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p 267.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317.

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I.

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI].

Regional Law

Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45.

European Law

Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949.

Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights, Vol. III (1976), 266.

Council of Europe, *European Code of Social Security*, Strasbourg, 16.IV.1964.

Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Article 31

Council of Europe, *European Social Charter*, 18 October 1961, ETS 35; Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

Council of Europe, Treaty of London, 05/05/1949 ETS No.001.

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

Council of the European Union (2008) European pact on immigration and asylum (13440/ 08), 24 September 2008 65.

Declaration of 9 May 1950: The Schuman Plan for European Integration.

Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] Official Journal of the European Union L. 180/96

European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01).

European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990.

European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957.

European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01.

European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht* , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 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*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC.

European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC.

European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC.

European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 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, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC.

European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003.

European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003;

European Union: Council of the European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention*, 11 December 2000, OJ L 316; 15 December 2000, pp.1-10.

European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.

European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU. This Directive was jointly adopted by the European Parliament and the European Council. It entered into force 20 July 2013, applied as of 21 July 2015. available at: http://www.refworld.org/docid/51d29db54.html.

European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU.

European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999 online at <https://www.refworld.org/docid/3ef2d2264.html> .

European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997. Entered into force the 1st May 1999.

European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997.

Reference Joint Declaration by the European Parliament, the Council and the Commission, *Official Journal of the European Communities* No C 103/1 (27. 4. 77) online at <https://op.europa.eu/en/publication-detail/-/publication/82268663-99a1-467e-bb1f-8d09f2a9599a>.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, online at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31971R1408:en:HTML>.

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, No L 257/2 *Official Journal of the European Communities* 19.10.68 online at < https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31968R1612>.

Single European Act, Preamble, *Official Journal L 169 , 29/06/1987 P. 0002.*

The Treaty of Paris in 1951 establishing the the European Coal and Steel Community (Paris, 18 April 1951).

Treaty on European Union, [1992] OJ C 191/ 01Article A/.

List of Cases

European Cases

Council of Europe: European Court of Human Rights

Alajos Kiss v. Hungary, Application no. 38832/06, 20 May 2010.

A.M.E. v. the Netherlands, Application no. 51428/10, 5 February 2015.

Budina v. Russia, Application no. 45603/05, 18 June 2009.

Chapman v United Kingdom, Application no. 27238/95, 18 January 2001.

CR v United Kingdom, Application No 20190/92, 22nd November 1995.

Goodwin v. United Kingdom, Application no. 28957/95, 11 July 2002.

Kudła v. Poland, Application no. 30210/96, 26 October 2000.

M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

Niedzwiecki v. Germany, 58453/00, 15 February 2006.

Okpisz v. Germany, 59140/00, 25 October 2005.

Oršuš and Others v. Croatia, Application no. 15766/03, 16 March 2010.

Peers v. Greece, Application no. 28524/95, 19 April 2001.

Pretty v. United Kingdom, Application no. 2346/02, 29 April 2002.

Price v. the United Kingdom, Application no. 33394/96, 10 July 2001.

Shtukaturov v. Russia, Application no. 44009/05, 27 March 2008.

S.W. v. United Kingdom, Application no. 20166/92, 22 November 1995.

Tarakhel v. Switzerland, Application no. 29217/12, 4 November 2014.

Tyrer v. the United Kingdom, Application no. 5856. 72, 25 April 1978.

Valašinas v. Lithuania, Application no. 44558/98, 24 October 2001.

Van Ku¨ck v. Germany, Application no. 35968/97, 12 June 2003.

European Committee on Social Rights

Conference of European Churches (CEC) v. the Netherlands (decisions on the merits), Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 10 November 2014.

Defence for Children International (DCI) v. Belgium - decision on the merits, Complaint No. 69/2011, Council of Europe: European Committee of Social Rights, 23 October 2012.

Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009.

European Court of Justice / Court of Justice of the European Union

Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* (25 July 2018) Opinion of Advocate General Wathelet.

Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* [19 March 2019].

Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers* [12 November 2019].

Case C-411/10 N. *S. v Secretary of State for the Home Department et M. E. and Others* (December 21, 2011).

Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others* (27 February 2014)

Van Gend en Loos v. Nederlandse Administratie der Belastingen Case 26/62 [1963] ECR 1.

Flaminio Costa v. ENEL Case 6/64 [1964] ECR 585.

Hoekstra v. Bestuur der Bedrifsvereniging voor Detailhandel en Ambachten Case 75/63 [1964] ECR 177.

Case 29-69 *Erich Stauder v City of Ulm* Judgment of the Court of 12 November 1969

Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* Judgment of the Court of 17 December 1970.

Joined cases 36, 37, 38-59 and 40-59 *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*. Judgment of the Court of 15 July 1960.

Case no 1-58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, Judgment of the Court of 4 February 1959.

Reports, Proposals and Statements

European Union Documents

Commission of the European Communities, Report from the Commission on the Citizenship of the Union COM (93) 702 final, 1.

Conclusions of the Presidency (Copenhagen Summit Conclusions) reprinted in BULL. EUR. COMMUNITIES, 1.1-1.4 (June 1993); European Commission, Agenda 2000: For a Stronger and Wider Union, BULL. Of European Union, Supplement 5/97, p.131.

Conference of the Representatives of the Governments of Member States, *The European Union Today and Tomorrow Adapting the European Union for the Benefit of its Peoples and Preparing for the Future: A General Outline for a Draft Revision of the Treaties* (Brussels, December 5 1996) CONF 2500/96.

Council of the European Union, *Proposal for a Qualification Regulation*, 5402/1/17 REV 1 ASILE 2 CODEC 59, 21 February 2017, 76, fn. 128.

Economic and Social Council resolution No. 248 (IX) adopted 8 August 1949.

European Commission (2010) Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions of 20 April 2010—Delivering an area of freedom, security and justice for Europe's citizens—action plan implementing the Stockholm programme COM (2010) 171 final.

European Commission (2013) Press Release – Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards, Brussels [30 May 2013].

European Commission Brussels, 13.7.2016 COM(2016) 466 final 2016/0223 (COD) Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of

the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

European Commission, Agenda 2000: For a Stronger and Wider Union, COM (97) 2000 final at 131-132.

European Commission, Proposal for a [recast Qualification Directive] – Explanatory Memorandum, COM (2009) 551, 21 October 2009, 8.

European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final/2, 23.10.2009 ("Recast Proposal).

European Commission, *Proposal for a Directive of the European Parliament and of the laying down standards for the reception of applicants for international protection (recast)* Brussels, 13.7.2016 COM(2016) 465 final 2016/0222 (COD).

European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final/2, 23.10.2009.

European Commission, *Proposal for a Qualification Regulation*, COM(2016) 467, 13 July 2016; ECRE, *Comments on the Commission proposal for a Qualification Regulation*, November 2016, 7.

European Council, *Conclusions of the Presidency* (Copenhagen April 20, 1978)

European Economic and Social Council, *Opinion of the European Economic and Social Committee on the RRCD*, SOC/332 (16 July 2009) and Committee of the Regions, *Opinion of the Committee of the Regions on the RRCD*, CONST-IV-021 (5-7 October 2009).

European Parliament 2014-2019 Plenary sitting A8-0250/2018 4.7.2018 REPORT on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Judith Sargentini (Initiative – Rule 45 and 52 of the Rules of Procedure) online at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2018-0250&language=EN>.

European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] *O.J.* C-212E/348 (05 August 2010).

European Parliament Press Release, "Final Turnout Data for 2019 European Elections Announced" (October 29, 2019) online at <https://www.europarl.europa.eu/news/en/press-room/20191029IPR65301/final-turnout-data-for-2019-european-elections-announced>.

European Parliament, *Draft report on the proposal for a Qualification Regulation*, PE599.799, 21 February 2017, available at: http://bit.ly/2lCJhmH, Explanatory Statement, 61.

European Parliament's policy departments and the Economic Governance Support Unit, "Fact Sheets on the European Union – 2019, "The Maastricht and Amsterdam Treaties" online at <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf>.

General Declaration no 6 on Articles 13 to 19 of the Single European Act (concerning the internal market).

Guidelines for a Community Policy on Migration. Commission communication transmitted to the Council on March 1985. COM (85) 48 final, 7 March 1985. Bulletin of the European Communities. Supplement 9/85. Council resolution of 16 July 1985 on guidelines for a Community policy on migration. Commission Decision of July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries online at <http://aei.pitt.edu/1256/>.

Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission (July 16, 2019).

Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (recast), 2011/C 18/14.

von der Leyen, Ursula, "A Union That Strives for More: My Agenda for Europe" Political Guidelines for the Next European Commission 2019-2024 online at <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf>.

United Nations Documents

Ad Hoc Committee on Stateless and Related Problems, UN Doc. E/AC.32/SR.33 (1950), p. 1.

Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, 2003, p 85.

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

Conference of Plenipotentiaries, UN Doc. A/ CONF. 2/ 108/ Rev. 1 (1951).

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, 20 May 1997, E/1998/22.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18.

UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30, Discrimination against Non-citizens* (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

UN High Commissioner for Refugees (UNHCR), *A New Beginning: Refugee Integration in Europe*, September 2013.

UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997 written by Professor Atle Grahl-Madsen in 1963; re-published by the Department of International Protection in October 1997.

UN High Commissioner for Refugees (UNHCR), *Convention Relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, available at: A commentary by Nehemiah Robinson, Institute of Jewish Affairs, World Jewish Congress, 1955. Reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees.

UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17.

UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4.

UN High Commissioner for Refugees (UNHCR), *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, December 2013.

UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990.

UN Human Rights Committee (HRC), *General Comment 18, Non-discrimination* (Thirty-seventh session, 1989),

UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986 at para. 2.

UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982.

UN Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, Raquel Rolnik*, 4 February 2009, A/HRC/10/7.

UNHCR, (2002) "4th Meeting: Global Consultations on International Protection" EC/GC/02/6, 25 April 2002.

UNHCR, "Local Integration", Global Consultations on International Protection, 4th Meeting, UN doc. EC/GC/02/6, 25 Apr. 2002.

UNHCR, "Reception of asylum-seekers" Executive Committee Conclusion No. 82 (XLVIII) on 'Safeguarding Asylum', 1997.

UNHCR, "Islam and Refugees" *UN High Commissioner's Dialogue on Protection Challenges. Theme: Faith and Protection English* (12-13 December 2012)

UNHCR, "Note on International Protection" UN Doc. A/AC.96/815 (1993).

UNHCR, *Asylum in the European Union: The Study of the Implementation of the Qualification Directive*, November 2007.

UNHCR, Facts and Figures about Refugees online at <http://www.unhcr.org.uk/about-us/key-facts-and-figures.html>.

UN High Commissioner for Refugees (UNHCR), *Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced Persons: A Comparative Perspective*, December 2009.

UN Human Rights Committee

Communication, No. 426/ 1990, *Oulajin and Kaiss v. the Netherlands*, Views adopted on 23 October 1992, paragraph 7.5.

United Nations Statements

Statement of Brohi (Pakistan), ECOSOC, UN ECOSOCOR, 11th Sess., SR 399 (1950), paras. 29-30.

Statement of Davidson (Canada) ECOSOC, UN ECOSOCOR, 11th Sess., SR 406 (1950), paras 89-90.

Statement of Henkin (USA), Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.3 (1950), p.9 (para 37).

Statement of Mr. Anker of Norway, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Bell of the Friends' World Committee for Consultation, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Chance (Canada), U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Chance (Canada), U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. del Drago of Italy, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Habicht of the International Association of Penal Law, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/ SR.37, Aug 16, 1950, at 7.

Statement of Mr. Herment of Belgium, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. 20 (1951).

Statement of Mr. Hoare of the United Kingdom, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Hoare of the United Kingdom, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Makiedo of Yugoslavia, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Mostafa Bey of Egypt, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Petren of Sweden, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Rees of the International Association of Voluntary Agencies, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, U.N. Doc. A/CONF.2ISR. 19, at 4 (1951).

Statement of Mr. Robinson of Israel, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Rochefort (France), *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting*, 26 November 1951, A/CONF.2/SR.19.

Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. 20 (1951).

Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Rochefort of France, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirtieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Mr. Warren of the United States, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. Doc. A/CONF.2ISR. 19 (1951).

Statement of Mr. Warren of the United States, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-First Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Ms. Sender from the International Confederation of Free Trade Unions, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting, U.N. Doc. A/CONF.2ISR. (1951).

Statement of Rain (France), Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.15 (1950) [in:] Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford (2011) at p 1048.

Statement of Rochefort (France), ECOSOC, UN ECOSOCOR, 11th Sess., SR 406 (1950), para 55.

Statement of Soldatov (USSR), GA, UNGAOR, 5th Sess., PM 325 (1950), paras.72-73;

Statement of Drohojowski (Poland), GA, UNGAOR, 5th Sess., PM 325 (1950), paras. 111-113.

Bibliography

Abrams, Dominic and Michael A. Hogg, "Comments on the Motivational Status of Self-Esteem in Social Identity and intergroup Discrimination" (1988) 18 *European Journal of Social Psychology* 317-34.

Abrams, Dominic, "Focus of Attention in Minimal Intergroup Discrimination" (1985) 24 *British Journal of Social Psychology* 65-74.

Abrams, Dominic, Diane M. Houston, Julie Van de Vyver and Milica Vasiljevic, "Equality Hypocrisy, Inconsistency, and Prejudice: The Unequal Application of the Universal Human Right to Equality" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 28–46.

Abrams, Dominic, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) (Kindle edition).

Abrams, Dominic, Michael A. Hogg, Jose M. Marques, "A Social Psychological Framework for Understanding Social Inclusion and exclusion" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005) [Kindle edition].

Abrams, Kathryn and Hila Karen "Who's Afraid of Law and Emotions?" (2010) 94 *Minnesota Law Review* 1997-2074.

Adamson, Fiona B., "Engaging or Contesting the Liberal State? 'Muslim' as a Politicised Identity Category in Europe" (2011) 37(6) *Journal of Ethnic and Migration Studies* 899-915.

Adelson, Wendi, "Economic Migrants and Political Asylum Seekers in the United Kingdom: Crafting the Difference" (2004) 1 *The Michigan Journal of Public Affairs* 1–23.

Aldeeb Abu-Sahlieh, Sami A., "The Islamic Conception of Migration" (1996) 30(1) *The International Migration Review, Special Issue: Ethics, Migration, and Global Stewardship* 37-57.

Alkopher, Tal Dingott, "Socio-Psychological Reactions in the EU to Immigration: From Regaining Ontological Security to Desecuritisation" (2018) 27(3) *European Security* 314-335.

Allen, Mike, *The Sage Encyclopedia of Communication Research Methods* (Vols. 1-4) (Thousand Oaks, CA: SAGE Publications, 2017).

Allot, Philip, *Eutopia: New Philosophy and New Law for a Troubled World* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2016).

Allott, Philip, "The Opening of the Human Mind" (20070 1(1) *European Journal of Legal Studies*.

Allport, Gordon, *The Nature of Prejudice* (1954) [in:] Kopano Ratele and Norman Duncan, *Social Psychology: Identities and Relationships* (UCT Press, 2007).

Amnesty International EU Office, "Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of

Third Country National and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection", COM (2001) 510 final' (2 October 2002).

Anderson, Benedict, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso, 2006).

Anderson, Benedict, "The Origins of National Consciousness" [in:] John Hutchinson and Anthony D. Smith (eds.) *Nationalism: Critical Concepts in Political Sciences, Volume I* (London: Routledge, 2000).

Andreoni, James J., "Impure Altruism and Donations to Public Goods: A Theory of Warm Glow Giving" (1990) 100 *Economic Journal* 464-77.

Appiah, Kwame Anthony, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton, 2006).

Arendt, Hannah, "We Refugees" [in:] *The Jewish Writings* edited by Jerome Kohn and Ron H. Feldman (New York: Schocken Books, New York, 2007).

Arendt, Hannah, *The Origins of Totalitarianism*, 1968 [cited in:] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

Asad, Talal, "Muslims and European Identity: Can Europe Represent Islam?" [in:] Anthony Pagden (ed) *The Idea of Europe: From Antiquity to the European Union* (Cambridge: Cambridge University Press, 2002).

Bakewell, Oliver, "Conceptualizing Displacement and Migration: Processes, Conditions and Categories" [in:] Khalid Koser and Susan Martin (eds) *The Migration–Displacement Nexus: Patterns, Processes and Policies* (Oxford: Berghan Books, 2011).

Banakar, Reza and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford and Portland Oregon, 2005).

Bandes, Susan (ed), *The Passions of Law* (Critical America) (NYU Press, 2000).

Bandes, Susan A., "Group Conflict Resolution: Sources of Resistance to Reconciliations: Victims, "Closure," and the Sociology of Emotion" (2009) 72 *Law and Contemp. Probs*. 11-13.

Bandura, Albert, "Self-Efficacy Mechanism in Human Agency" (1982) 37(2) *American Psychologist* 122–147.

Bandura, Albert, "Self-Efficacy: Toward a Unifying Theory of Behavioral Change" (1977) 84 (2) *Psychological Review* 191–215.

Bandura, Albert, Bill Underwood, and Michael E. Fromson, Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanisation of Victims (1976) 9 *Journal of Research in Personality* 253–269.

Barreto, Jose Manuel, "Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty" (2006) 17 *Law and Critique* 73-106.

Bates, Ed, "History" [in:] Daniel Moeckli et al (eds) *International Human Rights Law* (Oxford University Press, 2010).

Bates, Ed, "The Birth of the European Convention on Human Rights—and the European Court of Human Rights" [in:] Jonas Christoffersen and Mikael Rask Madsen (eds) *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011).

Bates, Ed, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010).

Batson, Daniel C., *The Altruism Question: Toward a Social-Psychological Answer* (Lawrence Erbaum Associates, Inc. 1991).

Baumeister, Roy F. and Mark R. Leary, "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117 (3) *Psychological Bulletin* 497-529.

Bay, Christian, "Self-Respect as a Human Right - Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community" (1982) 4 (1) *Human Rights Quarterly* 53–75.

Bennett, Samuel, Jessika ter Wal, Artur Lipiński, Malgorzata Fabiszak and Michal Krzyżanowski, "The Representation of Third-Country Nationals in European News Discourse: Journalistic Perceptions and Practices" (2013) 7 (3) *Journalism Practice* 248–265.

BEU Citizen, *Social Rights of EU Migrants: A Comparative Perspective* (July 15, 2015).

Bloch, Alice, "The Importance of Convention Status: A Case Study of the UK" (2001) 6 (1) *Sociological Research Online* 15-24.

Bloch, Alice, Treasa Galvin, Barbara Harrell-Bond, "Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions" (2000) 38(2) *International Migration* 169–190.

Bourdieu, Pierre, *Language and Symbolic Power* (Cambridge, UK: Polity, 1991).

Branscombe, Nyla R., Michael T. Schmitt, and Richard D. Harvey, "Perceiving Pervasive Discrimination Among African-Americans: Implications for Group Identification and Well-Being" (1999) 77(1) *Journal of Personality and Social Psychology* 135–149.

Brown, Garrett W., "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right A Kantian Response to Jacques Derrida" (2010) 9(3) *European Journal of Political Theory* 308–327.

Brubaker, Rogers, *Nationalism Reframed: Nationhood and the Question in the New Europe (*Cambridge: Cambridge University Press, 1996).

Bryder, Tom, "Patterns for Future Research on Self-Esteem and Human Dignity in Mass Society" (1994) 15(3) *International Society for Political Psychology* 401–414.

Burr, Vivien, *An Introduction to Social Constructionism* (London & New York: Routledge, 1999).

Busch, Brigitta and Michał Krzyżanowski, "Inside/ Outside the European Union: Enlargement, Migration Policy and the Search for Europe's Identity" [in:] Warwick Armstrong and James Anderson (eds), *Geopolitics of European Union Enlargement: The Fortress Empire* (New York, NY: Routledge, 2007).

Buyse, Antoine, “The Role of Human Dignity in ECHR Case-Law” ECHR Blog (Friday, 21 October 2016) online at <http://echrblog.blogspot.com/2016/10/the-role-of-human-dignity-in-echr-case.html>.

Byrne, Rosemary, Gregor Noll, Jens Vedsted-Hansen, “Western European Asylum Policies for Export: the Transfer of Protection and Deflection Formulas to Central Europe and the Baltics” [in:] Rosemary Berne, Gregor Noll and Jens Vested-Hansen (eds) *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002).

Calhoun, Craig (ed), *Classical Sociological Theory* (Oxford Blackwell: 2002).

Cantat, Celine, Eda Sevinin, Eqa Maczynska, and Tegiye Birey (eds), *Challenging the Political Across Borders: Migrants’ and Solidarity Struggles* (Budapest: Central European University, CPS Books, 2019).

Carraud, Simon, “France’s Le Pen Hails EU ‘Way of Life’ Job as Victory on Path to Elyse” *Reuters* (Frejus France, September 15, 2019) online at <https://uk.reuters.com/article/uk-france-politics-farright/frances-le-pen-hails-eu-way-of-life-job-as-victory-on-path-to-elysee-idUKKBN1W00NC?il=0>

Castano, Emanuele, “European Identity: A Social-Psychological Perspective” [in:] Richard K. Herrmann, Thomas Risse-Kappen, Marilynn B. Brewer (eds), *Transnational Identities: Becoming European in the EU* (Lanham, MD: Rowmann & Littlefield Publishers, 2004).

Castano, Emanuele, “European Identity: A Social-Psychological Perspective” [in:] Richard K. Herrmann, Thomas Risse-Kappen, Marilynn B. Brewer (eds), *Transnational Identities: Becoming European in the EU* (Lanham, MD: Rowmann & Littlefield Publishers, 2004).

Castles, Stephen *et al*, *Integration: Mapping the Field*, Report of a Project carried out by the University of Oxford Centre for Migration and policy Research and Refugee Studies Centre contracted by the Home Office Immigration Research and Statistics Service (IRSS) (December 2002; Home Office Online Report 28/03).

Chimni, B. S., “The Meaning of Words and the Role of UNHCR in Voluntary Repatriation” (1993) 5(3) *International Journal of Refugee Law* 442–60.

Chimni, B.S., “The Geopolitics of Refugee Studies: A View from the South” (1998) 11(4) *Journal of Refugee Studies* 350–374.

Cholewinski, Richard, “Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations – Education and Employment”, Paper presented at ECRE conference on Social and Economic Rights of Refugees and Asylum Seekers” in Odessa, Ukraine November 18-19, 2004.

Chouliaraki, Lillie, “Between Pity and Irony – Paradigms of Refugee Representation in Humanitarian Discourse” [in:] Kerry Moore, Bernhard Gross, Terry Threadgold, *Migrations and the Media* (New York, NY: Peter Lang, 2012).

Cialdini, Robert B., Mark Schaller, Donald Houlihan, Kevin Arps, Jim Fultz, Arthur L. Beaman, “Empathy-Based Helping: Is it Selflessly or Selfishly Motivated?” (1987) 52 *Journal of Personality and Social Psychology* 749-568.

Clutton-Brock, Tim, "Breeding Together: Kin Selection and Mutualism in Cooperative Vertebrates" (2002) 296 *Science* 69 online at <https://science.sciencemag.org/content/296/5565/69.long>.

Cohrs, J. Christopher, Jürgen Maes, Barbara Moschner, and Sven Kielmann, "Determinants of Human Rights Attitudes and Behavior: A Comparison and Integration of Psychological Perspectives" (2007) 28 *Political Psychology* 441– 469.

Condor, Susan, "Towards a Social Psychology of Citizenship? Introduction to the Special Issue" (2011) 21 *Journal of Community & Applied Social Psychology* 193-201.

Corneille, Olivier, Vincent Y. Yzerbyt, Anouk Rogier, Geneviève Buidin, G, "Threat and the Group Attribution Error: When Threat Elicits Judgments of Extremity and Homogeneity" (2001) 27 *Personality and Social Psychology Bulletin* 437–446.

Correa-Velez, Ignacio, Sandra M. Gifford, Adrian G. Barnett, "Longing to Belong: Social Inclusion and Wellbeing Among Youth with Refugee Backgrounds in the First Three Years in Melbourne, Australia" (2010) 71(8) *Social Science and Medicine* 1399-1408.

Costa, Jean-Paul, "Human Dignity in the Jurisprudence of the European Court of Human Rights" [in:] Christopher McCrudden (ed.) *Understanding Human Dignity* (Oxford: British Academy by University of Oxford Press, 2013).

Costello, Cathryn, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2016).

Cover, Robert M., "Foreward: Nomos and Narrative" (1983) 97 *Harvard Law Review* 4.

Craig, Tom, Peter Mac Jajua, Nasir Warfa, Mental Health Care Needs of Refugees (2009) 8(9) *Psychiatry* 351-354.

Craven, Matthew, *The International Covenant on Economic, Social, and Cultural Rights: Perspective on its Development* (Oxford, Claredon Press, 1995).

Crocker, Jennifer and Lora E. Park, "Seeking Self-Esteem: Construction, Maintenance, and Protection of Self-Worth" [in:] Mark R. Leary and June Price Tangney (eds.), *Handbook of Self and Identity* (New York: Guilford Press, 2003).

Crocker, Jennifer and Noah Nuer, The Insatiable Quest for Self-Worth (2003) 14 (1) *Psychological Inquiry* 31–34.

d'Albi, Hippolyte, Ekrame Boubtane and Dramane Coulibaly, "Macroeconomic Evidence Suggests that Asylum Seekers Are Not a "Burden" for Western European Countries", (2018) 4 (6) Science Advances online at <https://advances.sciencemag.org/content/4/6/eaaq0883>;
d'Artis Kancs and Patrizio Lecca, *Long-term Social, Economic and Fiscal Effects of Immigration into the EU: The Role of the Integration Policy*, JRC Working Papers in Economics and Finance, 2017/4 (EU: Technical report by the Joint Research Centre (JRC), the European Commission's science and knowledge service, 2017).
Da Costa, Rosa, Report for UN High Commissioner for Refugees (UNHCR), *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, June 2006, POLAS/2006/02.

Dahl, Goran, *Radical Conservatism and the Future of Politics* (London: Sage, 1999).

Dahlvik, Julia, "The Human Individual vs. the Faceless Case" [in:] *Inside Asylum Bureacracy: Organizing Refugee Status Determination* (Springer, IMISCOE Research Series 2018).

Danchin, Peter, *Columbia University* online at <http://ccnmtl.columbia.edu/projects/mmt/udhr/article_1/drafting_history_2.html> .

Dauses, Manfred, "The Protection of Fundamental Rights in the Community Legal Order" (1985) 10 *EL Rev* 399.

de Búrca, Gráinne, "The Evolution of EU Human Rights Law" [in] P. Craig and G. de Búrca (eds), *The Evolution of EU Law, Second Edition* (Oxford University Press, 2011).

de Búrca, Gráinne, "The Road Not Taken: The European Union As a Global Human Rights Actor" (2011) 105 (4) *The American Journal of International Law* 649-693.

Delors, Jacques, (1985) *The Thrust of Commission Policy. Statement by Jacques Delors, President of the Commission, to the European Parliament and extracts from his reply to the ensuring debate. Strasbourg, 14 and 15 January 1985. Bulletin of the European Communities Supplement 1/85.* [EU Speech] online at <http://aei.pitt.edu/8525/>.

Dembour, Marie-Bénédicte, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).

Dennison, James and Andrew Geddes, "Brexit and the Perils of 'Europeanised' Migration" (2018) 25 (8) *Journal of European Public Policy* 1137-1153.

Deutsch, Morton, "Justice and Conflict" [in:] Morton Deutsch, Peter T. Coleman, and Eric C. Marcus (eds) *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco, CA: Jossey Bass, 2006).

Di Marco, Antonio, "The Subsidiary Protection: The Discriminatory and Limited Protection of the 'New Refugees'", (2005) 20 (1-2) *Mediterranean Journal of Human Rights* 201.

Dicke, Klaus, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights" [in:] David Kretzmer and Eckhart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002).

Diop, Petra Molnar, "The "Bogus" Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's C-31', (2014) 30 (1) *Refuge* 67–80.

Doise, Willem, *Human Rights as Social Representations* (London, UK: Routledge, 2002).

Donnellan, M. Brent, Kali H. Trzesniewski, Richard W Robins, Terrie E. Moffitt, Avshalom

Caspi, "Low Self-Esteem is Related to Aggression, Antisocial Behavior, and Delinquency (2005) 16 *Psychological Science* 328–335.

Donnelly, Jack, "Dignity: Particularistic and Universalistic Conceptions in the West" *Universal Human Rights in Theory and Practice*. 3rd edition (Ithaca: Cornell University Press, 2013).

Donnelly, Jack, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 (2) *The American Political Science Review* 303-316.

Donnelly, Jack, *International Human Rights* (Fourth edition Dilemmas in World Politics series, Westview Press, 2013).

Donnelly, Jack, *Universal Human Rights in Theory and Practice* (3rd edition) (Cornell University Press, 2012).

Douzinas, Costas, "Obliez Critique" (2005) 16 *Law and Critique* 47-69.

Dovidio, John F., Jane A. Piliavin, Samuel L. Gaertner, David A. Schroeder, Russell D. Clark III "The Arousal: Cost-Reward Model and the Process of Intervention: a Review of the Evidence" [in:] M. S. Clark (ed.) *Review of Personality and Social Psychology: Prosocial Behavior* (Vol. 12) (Newbury Park, CA: Sage, 1999).

Dovidio, John F., Jane Allyn Plain, David A. Schroeder, Louis A. Penner, "The Social Psychology of Prosocial Behaviour" (Psychology Press, 2006).

Dovidio, John F., Sameul L. Gaertner, Ana Validzic, Kimberly Matoka, Brenda Johnson, and Stacy Frazier, "Extending the Benefits of Re-categorization: Evaluations, Self-disclosure and Helping" (1997) 33 *Journal of Experimental Social Psychology* 401-420.

Dovidio, John F., Samuel L. Gaertner, Gordon Hodson, Melissa A. Houlette, and Kelly M. Johnson, "Social Inclusion and Exclusion: Recategorization and Perception of Intergroup Boundaries" [in:] Dominic Abrams, Michael A. Hogg, Jose M. Marques (eds) *The Social Psychology of Inclusion and Exclusion* (Psychology Press, New York, 2005).

Druckman, David, "Nationalism, Patriotism and Group Loyalty: A Social Psychological Perspective," (1994) 38 *Mershon International Studies Review* 44.

Dupré, Catherin, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart Publishing, 2015).

Edwards, Alice, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum, 2005 (17) (2) *International Journal of Refugee Law* 293–330.

Einarsen, Terje, "Drafting History of the 1951 Convention and the 1967 Protocol" [in:] Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011).

Eisenberg, Nancy and Richard A. Fabes, "Pro-Social Behavior and Empathy: a Multi-Method Perspective" [in:] M. S. Clark (ed.) *Review of Personality and Social Psychology: Prosocial Behavior* (Vol. 12) (Newbury Park, CA: Sage, 1999).

Esses, Victoria M., John F. Dovidio, Lynne M. Jackson, Tamara L. Armstrong, "The Immigration Dilemma: The Role of Perceived Group Competition, Ethnic Prejudice, and National Identity" (2001) 57 *Journal of Social Issues* 389–412.

Esses, Victoria M., Scott Veenvliet, Gordon Hodson, and Ljiljana Mihic, "Justice, Morality, and the Dehumanization of Refugees" (2008) 21 *Social Justice Research*: 4–25.

Esses, Victoria M., Stelian Medianu and Andrea S. Lawson, "Uncertainty, Threat, and the Role of the Media in Promoting the Dehumanization of Immigrants and Refugees" (2013) 69(3) *Journal of Social Issues* 518–536.

European Council of Refugees and Exiles, "Asylum statistics 2017: Shifting Patterns, Persisting Disparities" (19 January 2018) online at <https://www.ecre.org/asylum-statistics-2017-shifting-patterns-persisting-disparities/>.

European Council on Refugees and Exiles, "Withdrawal of reception conditions of asylum seekers: An appropriate effective or legal sanction?" (July 2018, AIDA Asylum Information Database).

European Council on Refugees and Exiles, *Comments from the European Council on Refugees and Exiles on the Commission Proposal to Recast the Qualification Directive*, 12 March 2010.

European Council on Refugees and Exiles, *Refugee Rights Subsiding? Europe's Two-tier Protection Regime and its Effect on the Rights of Beneficiaries*, 2016, online at: <https://www.refworld.org/docid/58e1fc8e4.html>.

European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection*, October 2008, ELENA is the European Legal Network on Asylum coordinate by the European Council on Refugees and Exiles (ECRE); Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (recast), 2011/C 18/14, point 4.7.

European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection*, October 2008.

European Observatory on Homelessness Asylum Seekers, Refugees and Homelessness, "Asylum Seekers, Refugees and Homelessness: The Humanitarian Crisis and the Homelessness Sector in Europe" *Comparative Studies on Homelessness* (Brussels – December 2016).

Evans, John H., *What is a Human? What the Answers Mean for Human Rights* (Oxford; New York, NY: Oxford University Press, 2016).

Fairclough, Norman, "*Critical Discourse Analysis, Organizational Discourse, and Organizational Change*" (2005) 26 *Organization Studies* 915-39.

Fairclough, Norman, *Discourse and Social Change* (Cambridge: Polity Press, 1996).

Fairclough, Norman, *Analyzing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

Falk, Richard A., "Forward" [in:] Roger Normad and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press, Bloomington Indianapolis, 2008 United Nations Intellectual History Project).

Falzon, Michael, "Protecting the European Way of Life: We Can't Let Others 'Take Away Our Language" *Malta Today* (September 24, 2019) online at <https://www.maltatoday.com.mt/comment/blogs/97613/protecting_the_european_way_of_life#.XYycYVUzaJA>.

Faure, Raphaëlle, Mikaela Gavas and Anna Knoll, *Challenges to a Comprehensive EU Migration and Asylum Policy* (London: European Center for Development Policy Management

Report, 2015) online at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10166.pdf>.

Fehr, Ernst and Urs Fischbacher, "Why Social Preferences Matter – The Non-Selfish Motives on Completion, Cooperation and Incentives" (2002) 112 (478) *Economic Journal* online at < https://onlinelibrary.wiley.com/doi/full/10.1111/1468-0297.00027>.

Feldman, D., "Human Dignity as a Legal Value, Part 1 (1999) *Public Law* 682.

Feller, Erika, "The Evolution of the International Refugee Protection Regime" (2001) 5 *Washington University Journal of Law and Policy* 129.

Findley, Sally E., "Compelled to Move: the Rise of Forced Migration in Subsaharan Africa" [in:] M.A.B. Siddique (ed), *International Migration into the 21st Century* (Chelhtnam: Edward Elgar, 2001).

Fineman, Martha Albertson, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1)(2) *Yale Journal of Law and Feminism* 1.

Fineman, Martha Albertson, ""Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*"* (2012) 20 *The Elder Law Journal* 101.

Fiske, Susan T., *Social Beings: A core Motives Approach to Social Psychology* (New York: Wiley, 2004).

Fligstein, Neil, Alina Polyakova and Wayne Sandholtz. "European Integration, Nationalism and European Identity" (20112) 50(1) *JCMS: Journal of Common Market Studies* 106-122.

Flockhart, Trine, "'Complex Socialization': A Framework for the Study of State Socialization" (2006) 12(1) *European Journal of International Relations* 89-118.

Foster, Michelle and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford : Oxford University Press, 2019).

Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*. (Cambridge Studies in International and Comparative Law, 2009), Kindle Edition.

Fowler, Roger, *Language in the News* (London: Routledge, 1991).

Fredman, Sandra, "Substantive Equality Revisited" (2016) 14 (3) *International Journal of Constitutional Law* 712–738.

Fredman, Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2001).

Fredman, Sandra, *Discrimination Law*, *Second edition* (Oxford: Oxford University Press, 2011).

Fredman, Sandra, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

Frevert, Ute , "Does Europe Need a Cultural Identity? Ten Critical Remarks" [in:] Krzysztof

Michalski, *What Holds Europe Together? (Conditions of European Solidarity)* (Budapest: CEU Press, 2006).

Fuchs, Thomas, "Empathy, Group Identity, and the Mechanisms of Exclusion: An Investigation into the Limits of Empathy" (2019) 38 *Topoi* 239-250.

Gabrielatos, Costas and Paul Baker, "Fleeing, Sneaking, Flooding. A Corpus Analysis of Discursive Constructions of Refugees and Asylum Seekers in the UK Press, 1996–2005" (2008) 36(1*) Journal of English Linguistics* 5–38.

Gardner, John, "The Logic of Excuses and the Rationality of Emotions" (2009) 43 *Journal of Value Inquiry* 328.

Geddes, Andrew, *The Politics of Migration and Immigration in Europe* (London: SAGE Publications Ltd, 2003).

Gellner, Ernest, *Nations and Nationalism* (Oxford: Blackwell Publishers, 1983).

Gemi, Eda, Iryna Ulasiuk, and Anna Triantafyllidou, "Migrants and Media Newsmaking Practices" (2013) 7(3) *Journalism Practice* 266–281.

Gestel, Rob van and Hans-Wolfgang Micklitz, "Why Methods Matter in European Legal Scholarship" (2014) 20 (3) *European Law Journal* 292-316.

Ghosh, Bimal, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhof Publishers, 1998).

Gilbert, Daniel T., Susan T. Fiske, Gardner Lindzey, *The Handbook of Social Psychology*, Volume Two, Fourth Edition (The McGraw-Hill Companies, Inc. Oxford University Press, New York and Oxford, 1998).

Gilbert, Liette, "The Discursive Production of a Mexican Refugee Crisis in Canadian Media and Policy" (2013) 39(5) *Journal of Ethnic and Migration Studies* 827–843.

Glendon, Mary Ann, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

Goldman, Robert Kogod and Scott M. Martin, "International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law" (1983) 5(3) *Human Rights Quarterly* 302.

Goldsmith, Jack L. and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

Goodman, Simon and Susan A. Speer, "Category Use in the Construction of Asylum Seekers" (2007) 4 (2) *Critical Discourse Studies* 165-185.

Goodman, Simon, Ala Sirriyah, Simon McMahon, "The Evolving (Re)Categorization of Refugees Throughout the 'Refugee/ Migration Crisis" (2017) 27(2) *Journal of Community & Applied Social Psychology* 97-178.

Goodwin- Gill, Guy, "The Rights of Refugees and Stateless Persons" [in:] K P Saksena (ed), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (Lancers Books, 1994).

Goodwin-Gill, Guy and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford University Press, 2007).

Goodwin-Gill, Guy, "Refugees and Responsibility in the Twenty-First Century: More Lessons learned from the South Pacific" (2003) 12 *Pacific Rim Law and Policy Journal* 23-48.

Gorp, Baldwin Van, "Where is the Frame? Victims and Intruders in the Belgian Press Coverage of the Asylum Issue" (2005) 20(4) *European Journal of Communication* 484–507.

Gotev, Georgi, "Schinas Puts on Good Performance but MEPs want 'European Way of Life' Title Ditched" Euractiv.com with Reuters (October 4, 2010) online at <https://www.euractiv.com/section/future-eu/news/schinas-puts-up-good-performance-but-meps-want-european-way-of-life-title-ditched/> .

Grahl-Madsen, Atle, *The Status of Refugees in International Law*, vol. II (A.W. Sijtohoff-Leyden, 1972).

Granger, Marie-Pierre, "Revisiting The Foundation of European Union Citizenship: Making it Relevant To All European Union Citizen" (BEU Citizen Policy Brief, December 2016).

Grant, David, Grant Michelson, Cliff Oswick, and Nick Wailes, "Guest Editorial: Discourse and Organizational Change" (2005) 18(1) *Journal of Organizational Change Management* 6-15.

Green, M. Christian and John Witte Jr, "Religion" [in:] Dina Sheldon (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015).

Greenberg, Moshe, "The Biblical Conception of Asylum" (1959) 78 (2) *Journal of Biblical Literature* 125-132.

Gregor, M. (ed), *The Metaphysics of Morals* (Cambridge, Cambridge University Press, 2009).

Greussing, Esther and Hajo G. Boomgaarden, "Shifting The Refugee Narrative? An Automated Frame Analysis of Europe's 2015 Refugee Crisis" (2017) 43 (11) *Journal of Ethnic and Migration Studies* 1749-1774.

Grossi, Renata, "Understanding law and Emotion" (2015) 7(1) *Emotion Review* 55-60.

Guild, Elspeth and Claude Cahn, "Court of Justice of the European Union: Sanctions for Bad Behaviour in Reception Conditions: Nothing can undermine the Dignified Standard of Living Requirement - *C-233/18 Haqbin 12 November 2019 CJEU* [in:] ILPA (Immigration Law Practitioners' Association) European Update – December 2019 at p 10. online at <https://www.ilpa.org.uk/pages/ilpa-quarterly-european-update-.html> (login required).

Guild, Elspeth, "Migration, Security and European Citizenship" [in:] Engin F. Isin and Peter Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge, 2014).

Guild, Elspeth, "The Europeanization of Europe's Asylum Policy" (2006) 18 (3-4) *International Journal of Refugee Law* 630–651 at p 633 online at <https://doi.org/10.1093/ijrl/eel018> referencing Art. 3(2)(c) and (d) Directive 2003/109.

Guild, Elspeth, *Legal Elements of European Identity: EU Citizenship and Migration Law* (London: Kluwer Law International, 2004).

Günther, Klaus, "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on the Political Culture" [in:] Philip Alston (ed), *The EU and Human Rights* (Oxford: Oxford University Press, 1999).

Haasen, Christian, Cüneyt Demiralay, and Jens Reimer, "Acculturation and mental distress among Russian and Iranian migrants in Germany" (2008) 23 *European Psychiatry* 10–13.

Haddad, Emma, "Who is (not) a Refugee?" *EUI Working Paper* SPS No. 2004/6.

Hafer, Carolyn L, "The Psychology of Deservingness and Acceptance of Human Rights" [in:]

Elisabeth Kals and Jürgen Maes (eds) *Justice and Conflicts* (Berlin, Heidelberg: Springer, 2011).

Hailbronner, Kay and Daniel Thym (eds.), *EU Immigration and Asylum Law: A Commentary*. 2nd edition (München: C.H. Beck; Oxford; Hart, 2016).

Haldane, JBS, "Population Genetics" (1955) 18 *New Biology* 34.

Hall, Stephen, "European Citizenship – Unfinished Business" [in:] Leslie Holmes and Philomena

Murray (eds), *Citizenship and identity in Europe* (Aldershot, Hants, England: Ashgate, 1999).

Hamilton, WD, "The Genetic Evolution of Social Behavior, Part 1" (1964) 7 *Journal of Theoretical Biology* 1.

Harrell-Bond, Barbara, "The Experience of Refugees as Recipients of Aid" [in:] Alastair Ager (ed), *Refugees: Perspectives on the Experience of Forced Migration* (London: Continuum, 1999).

Haslam, Nick and Anne Pedersen, "Attitudes Towards Asylum Seekers: The Psychology of Prejudice and Exclusion [in:] Dean Lusher and Nick Haslam (eds), *Yearning to Breathe Free: Seeking Asylum in Australia* (Sydney: Federation Press, 2007).

Haslam, Nick, "Dehumanization: An Integrative Review" (2006) 10(3) *Personality and Social Psychology Review* 252–264.

Hathaway, James C., "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31(1) *Harvard International Law Journal* 129.

Hathaway, James C., "Refugees and Asylum" [in:] Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (New York: Cambridge University Press, 2012).

Hathaway, James C., "The Evolution of Refugee Status in International Law: 1920– 1950" (1984) 33 (2) *The International and Comparative Law Quarterly* 348-380.

Hathaway, James C., *The Law of Refugee Status* (Butterworths, 1991).

Hathaway, James C., *The Rights of Refugees under International Law* (Cambridge University Press, 2005).

Hawes, Derek, "Refugees in Europe 1919–1959: A Forty Years' Crisis?" (2018) 26(1) *Journal of Contemporary European Studies* 137-139.

Hearn, Jonathan, *Rethinking Nationalism; A Critical Introduction* (New York: Palgrave Macmillan, 2006);

Heater, Derek, *A Brief History of Citizenship* (Edinburgh University Press, 2004).

Heater, Derek, *Citizenship: The Civic Ideal in World History, Politics and Education* (London: Longman Group, 1990).

Hebebrand, Johannes, Dimitris Anagnostopoulos, Stephan Eliez, Henk Linse, Milica Pejovic-Milovancevic, Henrikje Klasen, "A First Assessment of the Needs of Young Refugees Arriving in Europe: What Mental Health Professionals Need to Know" (2016) 25 *European Child and Adolescent Psychiatry* 1–6.

Herlihy, Jane, "What Do We Know So Far About Emotion and Refugee Law? (2013) 64(1) *The Northern Ireland Legal Quarterly* 47–62.

Hier, Sean P and Joshua L. Greenberg "Constructing a Discursive Crisis: Risk, Problematization and Illegal Chinese in Canada" (2002) 25(3) *Ethnic and Racial Studies* 490–513.

Hill, Thomas E., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca, NY: Cornell University Press, 1992).

Hobsbawm, Eric and Terence Ranger (eds), *The Invention of Tradition* (Cambridge: Canto, 1992).

Hochschild, A.R., *The Managed Heart: The Commercialization of Human Feeling* (Berkeley: University of California Press, 1983).

Hoffman, Martin L., "Empathy, Justice and the Law" [in:] Amy Coplan and Peter Goldie (eds), *Empathy: Philosophical and Psychological Perspectives* (Oxford Scholarship Online, 2011).

Hoffman, Martin, L., *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge: Cambridge University Press, 2000).

Hofstede, Geert H., *Cultures and Organizations: Software of the Mind* (London: McGraw-Hill, 1991).

Hogg, Michael A. and Sarah C. Hains, "Intergroup Relations and Group Solidarity: Effects of Group Identification and Social Beliefs on Depersonalized Attraction" (1996) 70 (2) *Journal of Personality and Social Psychology* 295–309.

Hogg, Michael and Dominic Abrams, "Towards a Single-process Uncertainty Reduction Model of Social Motivation in Groups" [in:] Michael A. Hogg and Dominic Abrams (eds.), *Group motivation: Social Psychological Perspectives* (Hertfordshire, UK: Harvester Wheatsheaf, 1993).

Hohmann, Jessie, *The Right to Housing: Laws, Concepts, Possibilities* (Hart, Oxford, 2013).

Hooft, Stan Van, *Cosmopolitanism: Philosophy for Global Ethics* (New York: Routledge, 2009).

Hopgood, Stephen, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).

Horsti, Karin, "Hope and Despair: Representation of Europe and Africa in News Coverage of 'Migration Crisis'" (2008) 3 *Communication Studies* 125–156.

Horsti, Karina, "Europeanisation of Public Debate: Swedish and Finnish News on African Migration to Spain" (2014) 15(4) *Javnost – The Public* 41–53.

Howard, John M. and Myron Rothbart, “Social Categorization for In-group and Out-group Behaviour” (1980) 38 *Journal of Personality and Social Psychology* 301-319.

Human Rights Watch, “At Least Let Them Work The Denial of Work Authorization and Assistance for Asylum Seekers in the United States” (2013) online at: <http://www.hrw.org/sites/default/files/reports/us1113_asylum_forUPload.pdf> .

Humphrey, J.P., *Human Rights and the United Nations: A great Adventure* (Dobbs Ferry, N.Y.: Transnational Publisher, 1984).

Hunt, Lynn, , *Inventing Human Rights: A History* (New York: W.W. Norton & Co., 2007).

Huntington, Samuel P., “The Clash of Civilizations?” (1993) 72(3) *Foreign Affairs* 22-49.

Huysmans, Jef, “The European Union and the securitization of migration” (2000) 38 (5) *JCMS: Journal of Common Market Studies* 751-777.

Huysmans, Jef, *The Politics of Insecurity* (Routledge, 2006).

Ibrahim, Maggie, “The Securitization of Migration: A Racial Discourse” (2005) 43(5) *International Migration* 163–187.

Iglesias, Teresa, “The Dignity of the Individual in the Irish Constitution: The Importance of the Preamble” (2000) 89(3) *Studies: An Irish Quarterly Review* 19–34.

Informationsverbund Asyl und Migration, “Differential Treatment of Specific Nationalities in the Procedure: Germany” online at <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/treatment-specific-nationalities>.

Insko, Chester A, John Schopler, Lowell Gaertner, Tim Wildschut, Robert Kozar, Brad Pinter, Eli J. Finkel, Donna M. Brazil, Matthew R. Montoya, “Interindividual-Intergroup Discontinuity Reduction Through the Anticipation of Future Interaction” (2001) 80 *Journal of Personality and Social Psychology* 95-111.

Isin, Engin F. and Patricia K. Wood, *Citizenship & Identity* (London: Sage Publications, 1999).

Isin, Engin F., (ed) *Recasting the Social in Citizenship* (Toronto: University of Toronto Press, 2008).

Jenkins, Richard, *Social Identity* (London: Routledge, 1996).

Jennings, Robert and Arthur Watts (eds), *Oppenheim’s International Law* (9th edn) (Harlow: Longman, 1992).

Jensen, Steven L. B., “Decolonization – Not Western Liberals – Established Human Rights on the Global Agenda” Open Global Rights” (September 29, 2016).

Joas, Hans, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown University Press: 2013).

John A. Dent, *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, prepared for the European Council on Refugees and Exiles (ECRE), November 1998.

Johnson, Nancy E., "Introduction" [in:] Nancy E.Johnson (ed), *Impassioned Jurisprudence: Law, Literature, and Emotion, 1760–1848* (Bucknell University Press, 2015).

Jolls, Christine, Cass R. Sunstein and Richard H. Thaler "A Behavioral Approach to Law and Economics" (1998) 50 *Stanford Law Review* 1571-1606.

Jones, Jonathan, "And Greece Created Europe: the Cultural Legacy of a Nation in Crisis" *The Guardian* (November 3, 2011) online at <https://www.theguardian.com/artanddesign/jonathanjonesblog/2011/nov/03/greece-europe-cultural-eurozone-crisis> .

Kahneman, Daniel, "Maps of Bounded Rationality: Psychology for Behavioral Economics" (2003) 93 *American Economic Review* 1449.

Kant, Emmanuel, *Perpetual Peace* (Cosimo Classics Philosophy, 2002).

Kapferer, Sibylle, "Article 14 (2) of the Universal Declaration of Human Rights and Exclusion form International Refugee Protection" (2008) 27 (3) *Refugee Survey Quarterly* 53-75.

Karolewski, Iraneusz Pawel, *Citizenship and Collective Identity in Europe* (London; New York: Routledge, 2010).

Kaufmann, Paulus, Hannes Kuch, Christian Neuhauser (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24 (Springer, 2011).

Kelman, Herbert C., "Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers" (1973) 29(4) *Journal of Social Issues* 25–61.

Kemper, Theodore D, *A Social Interactional Theory of Emotion* (New York: Wiley, 1978).

Kernis, Michael H., Toward a Conceptualization of Optimal Self-Esteem (2003) 14(1) *Psychological Inquiry* 1–26.

Kerstein, Samuel J., "Dignity and Preservation of Personhood" [in:] Kaufmann, Paulus, Hannes Kuch, Christian Neuhauser (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24 (Springer, 2011).

Kesby, Alison, *The Right to Have Rights* (Oxford University Press, 2012).

Kingwell, Mark, "Let's Ask Again: Is Law Like Literature?*"* (1994) 6 *Yale Journal of Law & the Humanities* 318.

Kirchheimer, Otto, "Asylum" (1959) 53 (4) *The American Political Science Review* 985-1016.

Kirkwood, Steve, Simon Goodman, Chris McVittie, Andy McKinlay, "Asylum-Seekers and the Right to Work" [in:] *The Language of Asylum* (Palgrave Macmillan: London, 2016).

Kleingeld, Pauline, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012).

Kligman, Gail, "On the Social Construction of 'Otherness': Identifying 'the Roma' in Post-socialist Communities" (2001) 7(2) *Review of Sociology* 61-78.

Klocker, Natascha and Kevin M Dunn, “Who’s Driving the Asylum Debate? Newspaper and Government Representations of Asylum Seekers” (2003) 109 (1) *Media International Australia* 71–92.

Kneebone, Susan, “Refugee as Objects of Surrogate Protection: Shifting Identities” [in:] Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds), *Refugee Protection and the Role of Law* (Routledge Research in Asylum, Migration and Refugee Law, 2016).

Kølvraa, Christoffer, “Psychoanalyzing Europe? Political Enjoyment and European Identity” (2018) 39(6) *Political Psychology* 1405-1418.

Kommers, Donald P., *The Constitutional Jurisprudence of the Federal Republic of Germany* 359 (2d ed. 1997).

Koslowski, Rey, “European Union Migration Regimes, Established and Emergent” [in:] Christian Joppke (ed), *Challenge to the Nation-State- Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1994).

Kostakopoulou, Dora, “Co-Creating European Union Citizenship: Institutional Process and Crescive Norms” *Institutional Constructivism in Social Sciences and Law: Frames of Mind, Patterns of Change* (Cambridge University Press, 2018).

Kostakopoulou, Dora, “European Union Citizenship Rights and Duties: Civil, Political and Social” [in:] Engin F. Isin and Peter Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge, 2014).

Kostakopoulou, Theodora, “Security Interests. Police and Judicial Cooperation” [in:] John Peterson and Michael Shackleton (eds.), *The Institutions of the European Union.* 2nd ed (Oxford: Oxford University Press, 2006).

Kovera, Margaret Bull and Eugene Borgida “Social Psychology and Law” [in:] Susan T. Fiske, Daniel T. Gilbert, and Garnder Lindzey (eds.), *Handbook of Social Psychology* 5th edition (John Wiley & Sons Inc, 2010).

Kronfeldner, Maria, “The Politics of Human Nature” Final draft [in:] Michel Tibayrenc and Francisco J. Ayala (eds.) *On Human Nature: Evolution, Diversity, Psychology, Ethics, Politics and Religion* (Amsterdam; Boston: Elsevier/AP, 2017).

Kruglanski, Are W. and Edward Tory Higgins (eds.), *Social Psychology: Handbook of Basic Principles* (The Guilford Press; 2nd edition, 2007).

Krzyżanowsk, Michał, “Brexit and the Imaginary of ‘Crisis’: a Discourse-Conceptual Analysis of European News Media” (2019)16 (4) *Critical Discourse Studies* 465-490.

Kuhlman, Tom, “The Economic Integration of Refugees in Developing Countries: A Research Model” (1991)4 (1) *Journal of Refugee Studies* 1-20.

Kühnhardt, Ludger, “The Fall of the Berlin Wall and European Integration” [in:] *20 Years After the Fall of the Berlin Wall* (Singapore: Konrad Adenauer Stiftung, 2009).

Kumsa, Martha Kuwee, ‘“No! I’m Not a Refugee!’ The Poetics of Be-longing Among Young Oromos in Toronto” (2006) 19 (2) *Journal of Refugee Studies* 230–55.

Kuteynikov, Alexander and Alexander Boyashov, "Dignity Before the European Court of Human Rights" [in:] Edward Sieh and Judy McGregor (eds) *Human Dignity: Establishing Worth and Seeking Solutions* (London: Palgrave Macmillan, 2017).

Kuypers, Jim A., *Rhetorical Criticism: Perspectives in Action* (Lexington Press, 2009).

Lambert, Hélène, "The Position of Aliens in the Relation to the European Convention on Human Rights" (Council of Europe Publishing, 2007).

Langbroek, Philip, Kees van den Bos, Marc Simon Thomas, Michael Milo, and Wibo van Rossum, "Methodology of Legal Research: Challenges and Opportunities" (2017) 13(3) *Utrecht Law Review* 1–8.

Lauren, Paul Gordon, "Proclaiming a Vision - The Universal Declaration of Human Rights", *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press; 3rd edition: 2013).

Lauren, Paul Gordon, "The Foundations of Justice and Human Rights in Early Legal Thought" [in:] Dina Sheldon (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015)

Lavenex, Sandra, "Asylum, Immigration, and Central-Eastern Europe: Challenges to EU Enlargement" (1998) 3 *European Foreign Affairs* 275-294.

Leibfried, Stephan and Paul Pierson, "Semisovereign Welfare States: Social Policy in a Multitiered Europe" [in:] Stephan Leibfried and Paul Pierson (eds) *European Social Policy – Between Fragmentation and Integration* (Washington, DC: Brookings, 1995) 43-77.

Leonard, Sarah, "The 'Securitization' of Asylum and Migration in the European Union: Beyond the Copenhagen School's Framework", Paper presented at the SGIR Sixth Pan-European International Relations Conference, 12-15 September 2007, Turin (Italy) Section 9: Security, Politics, Critique Panel 9-14: 'Securitization and the Other: Theorising Immigration and Asylum Policies'.

Levine, John M. and Norbert L. Kerr, "Inclusion and Exclusion: Implications for Group Processing" [in:] Arie W. Kruglanski and Edward Tory Higgins (eds.), *Social Psychology: Handbook of Basic Principles* (The Guilford Press; 2nd edition, 2007).

Levy, Carl, "European Asylum and Refugee Policy after the Treaty of Amsterdam: the Birth of a New Regime" [in:] Alice Bloch and Carl Levy (eds) *Refugees, Citizenship and Social Policy in Europe* (Palgrave Macmillan UK, 1999).

Lindert, Jutta, Ondine S. von Ehrenstein, Stefan Priebe, Andreas Mielck, and Elmar Brahler, "Depression and Anxiety in Labor Migrants and Refugees – A Systematic Review and Meta-Analysis" (2009) 69 *Social Science & Medicine* 246–257.

Lindner, Evelin, *Making Enemies: Humiliation and International Conflict* (Westport, CT: Praeger Security International, 2006).

Lister, Michael and Emily Pia, *Citizenship in Contemporary Europe* (Edinburgh: Edinburgh University Press, 2008).

Lockwood, David, “Social Integration and System Integration” [in:] George K. Zollschan and Walter Hirsch (eds.), *Explorations in Social Change* (London: Routledge and Kegan, 1964).

Long, Katy, “When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection”, (2013) 1(1) *Migration Studies* 4–26.

Lowry, Rosemary and Martin Peterson, “Cost-benefit Analysis and Non-utilitarian Ethics” (2011) 11(3) *Politics, Philosophy & Economics* 258–279.

Lynn, Nick and Susan Lea, “A Phantom Menace and the New Apartheid: The Social Construction of Asylum-Seekers in the United Kingdom” (2003) 14(4) *Discourse & Society* 425–452.

Maas, Willem, *Creating European Citizens (Europe Today series)* (Lanham: Rowman & Littlefield Publishers, 2007).

MacDonald, Geoff and Mark R. Leary, “Why Does Social Exclusion Hurt? The Relationship Between Social and Physical Pain” (2005) 131(2) *Psychological Bulletin* 202-223.

Madigan, Janet Holl, “The History of Human Rights in International Law”, *Truth, Politics and Universal Human Rights* (Palgrave Macmillan, 2007).

Madra, Yahya M. and Fikret Adaman, “Neoliberal Reason and Its Forms: De-politicisation through Economization” (2014) 46 (3) *Antipode* 691–716.

Manstead, Anthony S. R. and Miles Hewstone (eds), *The Blackwell Encyclopedia of Social Psychology* (Oxford: Blackwell, 1996).

Margalit, Avishai, *The Decent Society* (Cambridge, Mass: Harvard University Press, 1998).

Maroney, Terry A., “Law and Human Emotion: A Proposed Taxonomy of an Emerging Field” (2006) 30 *Law and Human Behaviour* 125-133.

Marshal, Thomas Humphrey, *Class, Citizenship, and Social Development/ Essays by T.M. Marshall* (Garden City, N.Y.: Doubleday, 1965).

Martinello, Marco, “European Citizenship, European Identity and Migrants: Towards the Post-National State?” [in:] Robert Miles and Dietrich Thränhardt (eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Pinter Publishers1995).

Martinielo, Marco, “The New Migratory Europe: Towards a Proactive Immigration Policy?” [in:] Craig A. Parsons and Timothy M. Smeeding, (eds.) *Immigration and the Transformation of Europe* (Cambridge: Cambridge University Press, 2006).

Maslow, Abraham H., *Motivation and Personality* (2d Ed. New York: Harper & Row, 1970).

Massey, Douglas S., *Categorically Unequal: The American Stratification System* (New York Russel Sage, 2007).

Mattson, David J. and Susan G. Clark, “Human Dignity in Concept and Practice” (2011) 44(4) *Policy Sciences* 303–319.

Maynard-Moody, Steven and Michael Musheno, “State Agent or Citizen Agent: Two Narratives of Discretion” (2000) 10(2) *Journal of Public Administration Research and Theory* 329–358.

Mazuccelli, Colette, *France and Germany at Maastricht: Politics and Negotiations to Create the European Union* (New York: Garland Publishing, 1997).

McAdam, Jane, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime" [in:] *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).

McConnell, Fiona, "Citizens and Refugees: Constructing and Negotiating Tibetan Identities in Exile" (2013) 103 (4) A*nnals of the Association of American Geographers* 967-983.

McCormick, John P., *Carl Schmitt's Critique of Liberalism. Against Politics as Technology* (Cambridge: Cambridge University Press, 1997).

McCrudden, Christopher, "Equality and Discrimination" [in:] David Feldman (ed) *English Public Law* (Oxford: Oxford University press, 2004).

McCrudden, Christopher, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 (4) *The European Journal of International Law* 655 – 724.

McCrudden, Christopher, "Human Rights Histories" (2015) 35 (1) *Oxford Journal of Legal Studies* 179-212.

McFarland, Sam, "Culture, Individual Differences, and Support for Human Rights: A General Review" (2015) 21 (1) *Peace and Conflict: Journal of Peace Psychology* 10 –27.

McLaren, Lauren M., "Anti-Immigrant Prejudice in Europe: Contact, Threat Perception, and Preferences for the Exclusion of Migrants" (2003) 81 *Social Forces* 909–936.

McNamara, Tim, "Theorizing Social Identity: What do We Mean by Social Identity? Competing Frameworks, Competing Discourses" (1997) 31 *TESOL Quarterly* 561-67.

MCornelis (Kees) J. Laban, *Dutch Study of Iraqi Asylum Seekers: Impact of a Long Asylum Procedure on Health and Health Related Dimensions among Iraqi Asylum Seekers in the Netherlands; An Epidemiological Study* (doctoral dissertation, 2010).

Medialab, Sissa, "The Pain of Social Exclusion: Physical Pain Brain Circuits Activated by 'Social Pain'" *ScienceDaily.* 27 February 2014. <www.sciencedaily.com/releases/2014/02/140227101125.htm>.

Meier, Christian, *A Culture of Freedom: Ancient Greece & The Origins of Europe* (Oxford: Oxford University Press, 2011).

Meijers, H., "Refugees in Western Europe ''Schengen'' Affects the Entire Refugee Law" (1990) 2(3) *International Journal of Refugee Law* 428-441.

Merkel, Angela 2015. *Statement by Federal Chancellor Angela Merkel to the European Parliament*. Strasbourgx: The Federal Government. [Google Scholar] cited in Marie Wolf & Marinus Ossewaarde, "The Political Vision of Europe During the 'Refugee Crisis': Missing Common Ground for Integration" (2008) 40(1) *Journal of European Integration* 33-50 online at <https://doi.org/10.1080/07036337.2017.1404054>.

Messing, Vera and Bence Ságvári, *Still Divided but More Open Mapping European Attitudes: Towards Migration Before and after the Migration Crisis* (Friedrich-Ebert-Stiftung, 2019).

Messing, Vera and Bence Ságvári, *Looking Behind the Culture of Fear: Cross-national Analysis of Attitudes Towards Migration" (European Social Survey)* (Friedrich-Ebert-Stiftung, 2018).

Michalski, Krzysztof, *What Holds Europe Together: Conditions of European Solidarity* (Budapest: CEU Press, 2006).

Midgal, Joel S., "Mental Maps and Virtual Checkpoints: Struggles to Construct and Maintain State and Social Boundaries" [in:] *Boundaries and belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004).

Miller, William Ian, *The Anatomy of Disgust* (Cambridge: Harvard University Press, 1997).

Minda, Gary, *Postmodern Legal Movements: Law and Jurisprudence at the Century's End* (NYU Press 1995).

Moghaddam, Finkel, *The Psychology of Rights and Duties: Empirical Contributions and Normative Commentaries* (American Psychological Association 2005).

Mole, Nuala and Catherine Meredith, *Asylum and the European Convention on Human Rights* (*Human rights files No. 9* (revised) (Council of Europe Publishing, 2010).

Moore, Jack, "Images of Syrian Child Washed Up on Turkish Beach 'Wake-Up Call" for EU Leaders" *Newsweek* (9/2/2015) <https://www.newsweek.com/syrian-child-turkey-beach-drowned-368045>.

Moravcsik, Andrew, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54 (2) *International Organization* 217–252.

Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial and Refugee Rights Under EU Law* (Oxford: Oxford University Press, 2017).

Morris, Caroline and Cian Murphy, "Legal Methodologies" [in:] *Getting PhD in Law* (Hart Publishing 2011).

Morrison, Kathleen Malley, Ross Caputin and Ellen Gutowski, Tristin Cambell *et al,* "Engaging Moral Agency for Human Rights: Outlooks from the Global South" (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 68–88.

Morsink, Johannes, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

Moyn, Samuel, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

Mügge, Liza and Marleen va der Haar, "Who is an Immigrant and Who Requires Integration? Categorizing in European Policies" [in:] B. Garcés-Mascareñas and R. Pennix (eds.), *Integration Processes and Policies in Europe* (IMISCOE Research Series. Springer, Cham, 2016).

Mullin, Barbara-Ann and Michael A. Hogg, "Motivations for Group Membership: The Role of Subjective Importance and Uncertainty Reduction" (1999) 21(2) *Basic and Applied Social Psychology* 91–102.

Mulvey, Gareth, "When Policy Creates Politics: The Problematization of Immigration and the Consequences for Refugee Integration in the UK" (2010) 23(4) *Journal of Refugee Studies* 437-462.

Murrow, Gail B. and Richard Murrow, "A Hypothetical Neurological Association Between Dehumanization and Human Rights Abuses" (2015) *Journal of Law and the Biosciences* 1-29.

Nadler, Janice and Pam A. Mueller "Social Psychology and the Law" [in:] Francesco Parisi (ed.) *The Oxford Handbook of Law and Economics*, Volume 1 (Oxford University Press; 1 edition, 2017).

Nagy, Boldizsar, "Hungarian Asylum Law and Policy in 2015-2-16: Securitization Instead of Loyal Cooperation" (2016) 17 (6) *German Law Journal* 1034.

Nancy Fraser, "Rethinking Recognition" (2000) 3 *New Left Review* 107.

Neal, Mary, "*Not Gods but Animals: Human Dignity and Vulnerable Subjecthood*" (2012) 33 *Liverpool Law Review* 177-2000.

Negowetti, Nicole E., "Judicial Decision-making, Empathy, and the Limits of Perception" (2014) 47(3) *Akron Law Review* 693.

Neumann, Iver B., *Uses of the Other: "The East" in European Identity Formation"* (Minneapolis, University of Minnesota Press, 1999).

Nickerson, Angela M. and Winnifred R. Louis, "Nationality Versus Humanity Personality, Identity and Norms in Relation to attitudes Toward Asylum Seekers" (2008) 38 (3) *Journal of Applied Social Psychology* 796-817.

Niemi-Kiesiläinen, Johanna, Päivi Honkatukia & Minna Ruuskanen, "Legal Texts as Discourses" [in:] Eva Maria Svensson, Åsa Gunnarsson and Margaret Davies M. (eds) *Exploiting the Limits of Law* (Ashgate 2007).

Noll, Gregor, Evangelia (Lilian) Tsourdi, Madeline Garlick, Philippe De Bruycker, Nuno Piçarra, and Aikaterini Drakopoulou, *Searching for Solidarity in EU Asylum and Border Policies*: A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference 26-27 February 2016 Université libre de Bruxelles online at <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>.

Novembre, Giovanni, Marco Zanon, Giorgia Silani, "Empathy for Social Exclusion Involves the Sensory-discriminative Component of Pain: A Within-subject fMRI Study" (2015) 10(1) *Social Cognitive and Affective Neuroscience* 153–164.

Nowak, Martin A. and Karl Sigmund, "Evolution of Indirect Reciprocity" (2005) 437 *Nature* 1271.

Nowak, Martin A., "Five Rules for the Evolution of Cooperation" (2006) 314 *Science* 1560.

Nussbaum, Martha C., *Hiding from Humanity: Disgust, Shame and the Law* (2006).

Nussbaum, Martha C., *Poetic Justice: The Literary Imagination and Public Life* (Alexander Rosenthal Lectures) (Beacon Press; 1st edition, 1997).

Nussbaum, Martha C., *Political Emotions: Why Love Matters for Justice* (Harvard University Press, 2013).

O'Leary, Siofra, "The Free Movement of Persons and Services" [in:] Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

Ogloff, James R. P., "Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) of the 20th Century" (2000) 24(4) *Law and Human Behaviour* 457.

Oldmeadow, Juliana et al., "Self-Categorization: Status, and Social Influence" (2003) 66 *Social Psychology Quarterly* 138-52.

Oliver, Sophie, "Dehumanization: Perceiving the Body as (In)Human" [in:] Kaufmann, Paulus, Hannes Kuch, Christian Neuhauser (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24 (Springer, 2011).

Ongur, Hakan Ovunc, *Minorities of Europeanization: The New Others of European Social Identity* (London: Lexington Books, 2015).

Opotow, Susan, "Drawing the Line: Social Categorizations, Moral Exclusion and the Scope of Justice" [in] (eds) Barbara Benedic Bunker and Jeffrey Z. Rubin, *Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutsch* (San Francisco, CA: Jossey Bass 1995).

Orbán, Viktor "Those Who are Overwhelmed Cannot Offer Shelter to Anyone" *Frankfurter Allgemeine Zeitung* (September 3 2015) online at <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/those-who-are-overwhelmed-cannot-offer-shelter-to-anyone>.

Orbán, Viktor, speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania) online at <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/>.

Otten, Sabine & Gordon B. Moskowitz, "Evidence for Implicit Evaluative In-Group Bias: Affect-based Spontaneous Trait Inference in Minimal Group Paradigm" (2000) 36 *Journal of Experimental Social Psychology* 77-89.

Park, Bernadette & Myron Rothbart, "Perception of Out-group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-group and Out-group Members" (1982) 42 *Journal of Personality and Social Psychology* 1051-1068.

Parkes, Roderick, "Borders: EU Institutions Fail to Reconcile their Agendas Despite Communautarisation" [in:] Florian Trauner and Ariadna Ripoll Servent (eds), *Policy Change in the Area of Freedom, Security and Justice* (Routledge, 2014).

Pastore, Ferruccio and Giulia Henry, "Explaining the Crisis of the European Migration and Asylum Regime" (2016) 51(1) *The International Spectator* 44-57.

Pati, Roza, "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective" (2005) 23 *Berkeley Journal of International Law* 223.

Peers, Steve, “Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law” [in:] Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff Publishers. Leiden. Boston, 2006).

Penel, Edwy, “This Shameful Europe” *Euronews* (16/09/2019) online at <https://www.euronews.com/2019/09/16/this-shameful-europe-view>.

Pennings, Frans, “EU Citizenship: Access to Social Benefits in Other EU Member States” (2012) 28(3) *The International Journal of Comparative Labour Law and Industrial Relation* 307–334.

Peroni, Lourdes and Alexandra Timmer, “Vulnerable Groups: The Promise of An Emerging Concept in European Human Rights Convention Law” (2013) 11(4) *International Journal of Constitutional Law* 1056–1085.

Perse, Elizabeth M., *Media Effects and Society* (London: Routledge, 2001).

Peters, Anne, “The European Ombudsman and the European Constitution” (2005) 42(3) *Common Market Law Review* 697-743.

Phillimore, Jenny and Lisa Goodson, “Problem or Opportunity? As Asylum Seekers, Refugees, Employment and Social Exclusion in Deprived Urban Areas” (2006) 43(10) *Urban Studies* 1715-1736.

Phinnemore, David, “The European Union: Establishment and Development” [in:] Michelle Cini and Nieves Perez-Solorzano Borragán (eds.) *European Union Politics*. 4th ed. (Oxford: Oxford University Press, 2013).

Piliavin, Jane Allyn and Hong-Wen Charng, “Altruism- A Review of Recent Theory and Research” (1990) 16 *Annual Review of Sociology* 27-65.

Pistoia, Emanuela, “Social Integration of Refugees and Asylum-Seekers Through the Exercise of Socio-Economic Rights in European Law” (2018) 3(2) *European Papers* 781-807.

Plato, *The Republic*, Book V, para 462.

Pollmann, Arnd, “Embodied Self-Respect and the Fragility of Human Dignity: A Human Rights Approach” [in:] Kaufmann, Paulus, Hannes Kuch, Christian Neuhauser (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24 (Springer, 2011).

Porsdam, Helle, “Human Rights and European Identity since World War II” [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

Posner, Eric A., *The Twilight of Human Rights Law* (New York, NY: Oxford University Press, 2014).

Natalie Nougayrède, “Refugees Aren’t the Problem. Europe’s Identity Crisis Is”, *The Guardian (31 Oct, 2016)* online at <https://www.theguardian.com/commentisfree/2016/oct/31/refugees-problem-europe-identity-crisis-migration>.

Postelnicescu, Claudia, “Europe’s New Identity: The Refugee Crisis and the Rise of Nationalism” (2016) 12(2) *Europe’s Journal of Psychology* 203-209.

Prentoulis, Nikos, “On The Technology of Collective Identity: Normative Reconstructions of the Concept of EU Citizenship” (2001) 7(2) *European Law Journal* 196-218.

Pyszczynski, Tom and Cathy Cox, “Can We Really Do Without Self-Esteem? Comment on Crocker and Park” (2004) 130(3) *Psychological Bulletin* 425–429.

Quinsaat, Sharon, “Competing News Frames and Hegemonic Discourses in the Construction of Contemporary Immigration and Immigrants in the United States” (2014) 17(4) *Mass Communication and Society* 573–596.

Rajaram, Prem Kumar and Carl Grundy-Warr (eds), *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (University of Minnesota Press, Minneapolis, 2007).

Ratjen, Sandra and Manav Satija, “Realizing Economic, Social and Cultural Rights for All” [in:] Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014).

Renner, Walter and Ingrid Salem, “Post-Traumatic Stress in Asylum Seekers and Refugees from Chechnya, Afghanistan, and West Africa: Gender Differences in Symptomatology and Coping. (2009) 55(2) *International Journal of Social Psychiatry* 99-108.

Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, Brussels, 3 Dec. 1991 (05.12) (OR.f) SN 4038/ 91 (WGI 930).

Report of the International Rescue Committee (IRC), *Are We Listening? Acting on Our Commitments to Women and Girls Affected By the Syrian* Conflict (September 2014) at p 5; Quotation also online at <http://feministing.com/2014/09/18/are-we-listening-to-syrian-women/>.

Research on the Commons, Common-Pool Resources, and Common Property, Digital Library of the Commons online at <http://dlc.dlib.indiana.edu/dlc/contentguidelines>.

Rich, Paul, “European Identity and the Myth of Islam: A Reassessment” (1999) 25 *Review of International Studies* 435–451.

Richard Plender and Nuala Mole, “Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments” [in:] Frances Nicholson and Patrick Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999).

Richmond, Anthony H., “Reactive Migration: Sociological Perspectives on Refugee Movements” (1993) 6 *Journal of Refugee Studies* 7.

Ricoeur, Paul, “Reflections on a New Ethos for Europe” [in:] Richard Kearny (ed) *The Hermeneutics of Action* (London: Sage, 1996).

Riek, Blake M., Eric W. Mania, Samuel L. Gaertner, “Intergroup Threat and Outgroup Attitudes: A Meta-Analytic Review” (2006) 10 *Personality and Social Psychology Review* 336–353.

Robert, Marrus Michael, *The Unwanted: European Refugees in the Twentieth Century* (Oxford: Oxford University Press, 1985).

Robila, Mihaela, "Refugees and Social Integration in Europe", United Nations Department of Economic and Social Affairs (UNDESA) Division for Social Policy and Development, United Nations Expert Group Meeting. New York. 15 – 16 May 2018.

Robinson, Chris A., "Biological Foundations of Human Rights" [in:] Dinah Shelton (ed.) *Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013).

Nehemiah Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, World Congress, 1953).

Rorty, Richard, "Human Rights, Rationality, and Sentimentality" [in:] Stephen Shute and Susan Hurley (eds.) *On Human Rights* (New York: Basic Books, 1993).

Rousseau, Cecile and Patricia Foxen, "Look Me in the Eye: Empathy and the Transmission of Trauma in the Refugee Determination Process" (2010) 47(1) *Transcultural Psychiatry* 70-92.

Sajjad, Tazreena, "What's in a Name? 'Refugees', 'Migrants' and the Politics of Labelling" (2018) 60 (2) *Race & Class* 40–62.

Sajó, András, "Emotions in Constitutional Design" (2010) 8(3) *International Journal of Constitutional Law* 354–384 (Oxford University Press and New York University School of Law) at p 381.

Sajó, András, *Constitutional Sentiments* (New Haven, Conn: Yale University Press, 2011).

Sales, Rosemary, "The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain" (2002) 22 (3) *Critical Social Policy* 456-478.

Salomon, Kim, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund University Press 1991).

Sander, David and Klaus R. Scherer (eds.), *The Oxford Companion to Emotions and the Affective Sciences* (Oxford: Oxford University Press, 2009).

Saul, Ben, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014).

Schachter, Oscar, "Human Dignity as a Normative Concept" (1983) 77(4) *The American Journal of International Law* 848-854.

Scheff, Thomas J., *Emotions, Social Bond and Human Reality: Part/Whole Analysis* (Cambridge University Press, 1997).

Schlegel, Stefan, "A 'Basket of Goods Approach' as an Alternative to Strict Legal Distinctions Between Migrants and Refugees" [in:] Rainer Bauböck, Christoph Reinprecht, Wiebke Sievers (eds.), *Flucht und Asyl – internationale und österreichische Perspektiven* (Vienna: Austrian Academy of Sciences Press) Pre-print of forthcoming publication.

Schmale, Wolfgang, "Before Self-Reflexivity: Imperialism and colonialism in the Early discourses of European Integration" [in:] Menno Spiering and Michael Wintle (eds.), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

Schrover, Marlou and Deirdre Moloney, "Conclusion: Gender, Migration and Cross-Categorical Research" [in:] Marlou Schrover and Deirdre M. Moloney (eds.), *Gender, Migration and Categorization: Making Distinctions Between Migrants in Western Countries, 1945–2010* (Amsterdam: IMISCOE Research. Amsterdam University Press, 2013).

Schulz-Forbes, Hagen, "Before Integration: Human Rights and Post-War Europe" [in:] Menno

Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

Schuster, Liza and Alice Bloch, "Asylum and Welfare: Contemporary Debates" (2002) 22 (3) *Critical Social Policy* 393–414.

Schuster, Liza, "Common Sense or Racism? The Treatment of Asylum-Seekers in Europe" (2003) 37 (3) *Patterns of Prejudice* 233-256.

Schuster, Liza, "Turning Refugees into 'Illegal Migrants': Afghan Asylum Seekers in Europe" (2011) 34(8) *Ethnic and Racial Studies* 1392-1407.

Scott, Rebecca J., "*Dignité* /Dignidade: Organizing Against Threats to Dignity in Societies after Slavery" [in:] C. McCrudden (ed), *Understanding Human Dignity* (Oxford: Oxford University Press, 2013).

Semynov, Moshe, Rebeca Raijman, Anat Yom Tov, and Peter Schmidt, "Population Size, Perceived Threat, and Exclusion: A Multiple-Indicators Analysis of Attitudes Toward Foreigners in Germany" (2004) 33 *Social Science Research* 681-701.

Sen, Amartya, *Inequality Re-examined* (Oxford: Carendon, 1995).

Sen, Amaryta, "Inequality, Unemployment and Contemporary Europe" (1997) 136 (2) *International Labour Review* 156-171.

Shacknove, Andrew, "Who is a Refugee?" (1985) 95 (2) *Ethics* 274.

Shamir, Michal and Tammy Sagiv-Schifter, "Conflict, Identity, and Tolerance: Israel in the Al-Aqsa Intifada" (2006) 27(4) *Political Psychology* 569–595.

Shao, Bo, Lorna Doucet, and David R. Caruso, "Universality Versus Cultural Specificity of Three Emotion Domains: Some Evidence Based on the Cascading Model of Emotional Intelligence" (2015) 46(2) *Journal of Cross-Cultural Psychology* 229–251.

Sheftalovich, Zoya, "Von der Leyen on 'European Way of Life" *Politico* (September 16, 2019) <https://www.politico.eu/article/von-der-leyen-on-european-way-of-life-we-cant-let-others-take-away-our-language/>.

Shiek, Dagmar, Lisa Waddington, and Mark Bell, Cases, *Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007).

Shultziner, Don and Itai Rabinovici, “Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach” (2012) 18 (1) *Psychology, Public Policy, and the Law* 105-143.

Shultziner, Doron and Guy E. Carmi, “Human Dignity in National Constitutions: Functions, Promises and Dangers” (2014) 62(2) *The American Journal of Comparative Law* 461-490.

Sigona, Nando, “The Contested Politics of Naming in Europe’s “Refugee Crisis” (2018) 41 (3) *Ethnic and Racial Studies* 456-460.

Silove, Derrick, Peter Ventegoverl and Susan Rees, “The Contemporary Refugee Crisis: an Overview of Mental Health Challenges” (2017) 16(2) *World Psychiatry: Official Journal of the World Psychiatric Association (WPA)* 130-139.

Silverman, David, *Interpreting Qualitative Data. Methods for Analyzing Talk, Text and Interaction* (London: Sage Publications, 1993).

Skran, Claudena M., “Historical Development of International Refugee Law” [in:] Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011).

Slingenberg, Lieneke, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Studies in International Law Book 51, 1st edition) (Hart Publishing, 2014).

Smith, Anthony D., “National Identity and the Idea of European Unity” (1992) 68 *International Affairs* 55-76.

Snape, Dawn and Liz Spencer, “The Foundations of Qualitative Research” [in:] Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (London: Sage Publications, 2003).

So¨hn, Janina, “How Legal Status Contributes to Differential Integration Opportunities” (2014) 2(3) *Migration Studies* 369-391.

Sober, Elliot and David Sloan Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behaviour* (Cambridge, MA: Harvard University Press,1998).

Solomon, Robert C., “The Universality of Emotions: Evolution and the Human Condition” *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008).

Solomon, Robert, “Lecture on Love” in *Passions: Philosophy and the Intelligence of Emotions, The Great Courses Lecture Series.*

Soulen, R. Kendall and Linda Woodhead (eds) *God and Human Dignity* (Grand Rapids, MI: Eerdmans, 2006).

Soysal, Yasemin, “Limits of Citizenship: Migrants and Postnational Membership in Europe” (Chicago: University of Chicago Press, 1994).

Spijkerboer, Thomas, *Gender and Refugee Studies* (Aldershot: Ashgate, 2000).

Stackert, Jeffrey, “Why Does Deuteronomy Legislate Cities of Refuge? Asylum in the Covenant Collection (Exodus 21:12-14) and Deuteronomy (19:1-13)” (2006) 125 (1) *Journal of Biblical Literature* 23-49

Staerklé, Christian, Alain Clémence, and Dario Spini, “A Social Psychology of Human Rights Rooted in Asymmetric Intergroup Relations” (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 133–141.

Statman, Daniel, “Humiliation, Dignity and Self-Respect” (2000)13(4) *Philosophical Psychology* 523–540.

Steimel, Sarah J, “Refugees as People: The Portrayal of Refugees in American Human-Interest Stories” (2010) 23(2) *Journal of Refugee Studies* 219–237.

Steiner, Henry and Philip Alston (eds) *International Human Rights in Context: Law, Politics, Morals. 2nd edn* (Oxford: Oxford University Press, 2000).

Stellmacher, Jost, Gert Sommer, and Elmar Brähler, “The Cognitive Representation of Human Rights: Knowledge, Importance, and Commitment” (2005)11(3) *Peace and Conflict: Journal of Peace Psychology* 267–292.

Stenberg, Gunnel, *Non-expulsion and Non-refoulement: The Prohibition Against the Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Iustu Forlag, 1989).

Stenmark, Håkon, Claudia Catani, Frank Neuner, Thomas Elbert, Are Holen, “Treating PTSD in Refugees and Asylum Seekers within the General Health Care System. A Randomized Controlled Multicenter Study” (2013) 51 *Behaviour Research and Therapy* 641-647.

Stephan, Walter G. and C. Lausanne Renfro, “The Role of Threats in Intergroup Relations” [in:] Diane E. Mackie and Eliot R. Smith (eds.) *From Prejudice to Intergroup Emotions* (New York: Psychology Press, 2002).

Stephan, Walter G. and C.W Stephan, “An Integrated Threat Theory of Prejudice” [in:] Stuart Oskamp (ed.), *Reducing Prejudice and Discrimination* (Mahwah, NJ: Lawrence Erlbaum Associates, 2000).

Stephan, Walter G., Oscar Ybarra and Kimberley Rios Morrison, “Intergroup Threat Theory” [in:] Todd D. Nelson (ed.), *Handbook of Prejudice, Stereotyping and Discrimination* (New York: Psychology Press Taylor & Francis Group, 2009).

Stevenson, Clifford, John Dixon, Nick Hopkins, Russell Luyt, “The Social Psychology of Citizenship, Participation and Social Exclusion: Introduction to the Special Thematic Section” (2015) 3(2) *Journal of Social and Political Psychology* 1-19.

Stevenson, Clifford, Nick Hopkins, Russell Luyt, and John Dixon, “The Social Psychology of Citizenship: Engagement with Citizenship Studies and Future Research” (2015) 3(2) *Journal of Social and Political Psychology* 192-210.

Stevis-Gridneff, Matina, “Protecting Our European Way of Life? Outrage Follows New E.U. Role” *New York Times* (Brussels, September 12, 2019).

Stoecker, Ralf, "Three Crucial Turns on the Road to an Adequate Understanding of Human Dignity" [in:] Paulus Kaufmann et al (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Library of Ethics and Applied Philosophy 24, Springer 2011).

Stone, Dan, "Refugees Then and Now: Memory, History and Politics in the Long Twentieth Century: An Introduction" (2018) 52(2-3) *Patterns of Prejudice* 101-106.

Sztucki, Jerzy, "Who is a Refugee? The Convention Definition: Universal or Obsolete?" [in:] Frances Nicholson and Patrick Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999).

Taijfel, Henri, "Cognitive Aspects of Prejudice" (1969) 25(4) *Journal of Social Issues* 79-97.

Tajfel, Henri and John C. Turner, "An Integrative Theory of Intergroup Conflict" [in:] William G. Austin and Stephen Worchel (eds.), *The Social Psychology of Intergroup Relations* (Monterey, CA: Brooks/Cole, 1979).

Tajfel, Henri, "Social Categorization, Social Identity and Social Comparison," [in:] Henri Tajfel (ed.) *Differentiation Between Social Groups: Studies in the Social Psychology of Intergroup Relations* (New York: Academic Press, 1978).

Tajfel, Henri, "Social Identity and Intergroup Behaviour" (1974) 13 (2) *Social Science Information* 65-93.

Tajfel, Henri, *Human Groups and Social Categories: Studies in Social Psychology* (Cambridge University Press, 1981).

Thomaz, Diana, "What's in a Category? The Politics of Not Being a Refugee" (2018) 27 (2) *Social & Legal Studies* 200–218.

Thorton, Liam, "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe" (draft paper for forthcoming book: The Socio-Economic Rights of Asylum Seekers in Economic Rights of Asylum Seekers in International and European Law), a version presented at The European Database of Asylum Law Conference (EDAL) January 2014.

Tiedens, Larissa Z., Colin Wayne Leach, *The Social Life of Emotions* (Cambridge; New York: Cambridge University Press, 2004).

Timsit, Annabelle, "Your Questions About the New EU Job for 'Protecting Our European Way of Life' Answered (October 3, 2019) online at <https://qz.com/1721178/the-eu-job-for-protecting-our-european-way-of-life-explained/>.

Tooze, Jennifer, "Social Security and Social Assistance" [in:] Tamara Harvey and Jeff Kennar, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Portland: Hart Publishing, 2003).

Torpey, John, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000).

Torres, Jacqueline M. and Maria-Elena D. Young, "A Life Course Perspective on Legal Status Stratification and Health" (2016) 2 *SSM-Population Health* 141–148.

Triandis, Harry Charalambos, *Individualism and Collectivism* (Boulder, CO: Westview, 1995).

Trivers, Robert L, “The Evolution of Reciprocal Altruism” (1971) 46 *The Quarterly Review of Biology* 35.

Tuitt, Patricial, *False Images: Law’s Construction of the Refugee* (London: Pluto Press, 1996).

Turner, John C., “Social Categorization and the Self-Concept” (1985) 2 *Advances in Group Processes* 77–121.

Turner, John C., Michael A. Hogg, Penelope J. Oakes, Stephen D. Reicher, Margaret S. Wetherell, *Rediscovering the Social Group: A Self-Categorization Theory* (London: Blackwell, 1987).

Turner, John C., *Rediscovering the Social Group: A Self-Categorization Theory* (London: Blackwell, 1987).

Turrini, Giulia, Marianna Purgato, Francesca Ballette, Michela Nosè, Giovanni Ostuzzi and Corrado Barbui, “Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies”; (2017) 11 *International Journal of Mental Health Systems* 51.

Twomey, Patrick (ed.) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999).

Twomey, Patrick, “The European Union: Three Pillars without a Human Rights Foundation” [in:] David O’Keefe and Patrick Twomey (eds), *Legal Issues of the Maastricht Treaty* (London: Wiley Chancery Law, 1994).

Twose, Gabriel and J. Christopher Cohrs, “Psychology and Human Rights: Introduction to the Special Issue” (2015) 21(1) *Peace and Conflict: Journal of Peace Psychology* 3–9.

Uçarer, Emek M., “The Area of Freedom, Security and Justice” [in:] Michelle Cini and Nieves Perez-Solorzano Borragán (eds.) *European Union Politics*. 4th ed. (Oxford: Oxford University Press, 2013).

UN News Centre, UN Warns of ‘Record High’ 60 Million Displaced Amid Expanding Global Conflicts (2015/06/20) online at <https://ourworld.unu.edu/en/un-warns-of-record-high-60-million-displaced-amid-expanding-global-conflicts>.

Vedsted-Hansen, Jens, “Common EU Standards on Asylum - Optional Harmonisation and Exclusive Procedures” (2005) 7 (4) *European Journal of Migration and Law* 369-376.

Vedsted-Hansen, Jens, “Common EU Standards on Asylum – Optional Harmonization and Exclusive Procedures? [in:] Elspeth Guild and Paul Minderhoud (eds) *The First Decade of EU Migration and Asylum Law* (Leiden: Martinus Nijhoff Publishers, 2011).

Velluti, Samantha, *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts* (Berlin, Heidelberg: Springer Berlin Heidelberg: Imprint: Springer, 2014).

Virdee, Satnam and Brendan McGeever, “Racism, Crisis, Brexit” (2018) 41(10) *Ethnic and Racial Studies* 1802-1819.

Vonk, Gisbert, (ed.) *Cross-border Welfare State: Immigration, Social Security and Integration* (Mortsel: Intersentia, 2012).

Voss, Amy, "Emotion and the Law: A Framework for Inquiry" (2006) *Faculty Publications, Department of Psychology.* Paper 181.

Waever, Ole, "Insecurity, Security, and Asecurity in the West European Non-War Community" [in:] Emanuel Alder and Michael Barnett (eds), *Security Communities* (Cambridge: Cambridge University Press, 1998).

Wæver, Ole, Barry Buzan, M. Kelstrup and P. Lemaitre (eds) *Identity, Migration and the New Security Agenda in Europe* (London: Pinter, 1993).

Waldron, Jeremy, *Dignity, Rank and Rights* (New York: Oxford University Press, 2012).

Warleigh, Alex, "Frozen: A Citizenship and European Unification" (1998) 1(1) *Critical Review of International Social and Political Philosophy* 113-151.

Waytz, Adam, "The Psychology of Social Status" *Scientific American* (December 8, 2009) online at <https://www.scientificamerican.com/article/the-psychology-of-social/>.

Weiss, Norman, "Integration, Aliens" [in:] Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

Weissbrodt, David and Michael Devine, "International Human Rights of Migrations" [in:] Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (New York: Cambridge University Press, 2012).

Weisstub, David, "Honor, Dignity and the Framing of Multiculturalist Values" [in:] David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2000).

White, Emily Kidd, "Till Human Voices Wake Us" (2014) 3 *J.L. Religion & St.* 201.

Wike, Richard, Bruce Stokes and Katie Simmons, "Europeans Fear a Wave of Refugees More will Mean More Terrorism, Fewer Jobs" *Pew Research Center* (11 July 2016) online at <https://www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> and "Negative Views of Minorities, Refugees Common in EU" online at

Wilder, David A., "Perceiving Persons as a Group: Categorization and Intergroup Relations" [in:] David L. Hamildon (ed.), *Cognitive Processes in Stereotyping and Intergroup Behaviour* (Hillsdale, NJ: Erbaum, 1981).

Williams, Andrew, *EU Human Rights Policies: A study in Irony* (Oxford University Press, 2004).

Wilson, Erin. K. and Luca Mavelli, "The Refugee Crisis and Religion: Beyond Conceptual and Physical Boundaries" [in:] Erin K. Wilson and Luca Mavelli (eds) *The Refugee Crisis and Religion: Secularism, Security and Hospitality in Question* (Lanham, MD: Rowman and Little, 2017).

Wimmer, Andreas and Yuval Feinstein, "The Rise of the Nation-State across the World, 1816 to 2001" (2010) 75(5) *American Sociological Review* 764–790.

Winkler, Inga T. and Clauda Mahler, "Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?" (2013) 13 (2) *Human Rights Law Review* 388-401.

Winter, Jay, "From War Talk to Rights Talk: Exile Politics, Human Rights and the Two World Wars" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

Wintle, Michael, "Editor's Introduction: Ideals, Identity and War: the Idea of Europe, 1939-70" [in:] Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Palgrave Macmillan, 2011).

Wood, Allen W., *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999).

Woods, Andrew K., "A Behavioral Approach to Human Rights" (2010) 51 (1) *Harvard International Law Journal* 51.

Worchel, Stephen, Hank Rothgerber, Eric Anthony Day, Darren Hart and John Butemeyer, "Social Identity and Individual Productivity with Groups" (1998) 37 *British Journal of Social Psychology* 389-413.

Zaat, Kirsten, "The Protection of Forced Migrants in Islamic Law" (2007) UNHCR New Issues in Refugee Research. Research Paper No. 146.

Zetter, Roger, "Protection in Crisis: Forced Migration in a Global Era" *Migration Policy Institute (MPI),* 2015.

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