



Protecting the Rights of Others

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Indeed: why? Thoughts on the reasons and motivations for protecting refugees

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1. Invocation

Reflection is the key to survival – and harmony. To introspect and investigate what we devote our lives to. To raise the same questions repeatedly, knowing that the answers may change as we proceed on our life-path. Jens (of course: Professor Jens Vedsted-Hansen) has devoted the first half (or a bit more ...) of his career to protecting refugees. It is an open question whether the remaining half (or a bit less, perhaps) will serve the same cause. But as his contemporary, I presume, that he also ponders upon the fundamental questions related to his (to our) professional identity, even without the apropos of a round anniversary.

So Jens, let us just converse, as we – happily – occasionally do! I propose a few arguments in favour of the protection of refugees and you'll take them apart with your renowned analytical skills. But you'll do it in a gentle and kind fashion, as always.

The starting point: the lack of freedom of movement, which is a recent phenomenon from an historical perspective.

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At present states tend to believe that migration and border controls are essential elements of their sovereignty.¹ Even the European Court of Human Rights has repeatedly confirmed that control of entry is a prerogative of the state.² Acknowledging in law that freedom of movement is or would be more beneficial than the restrictive regime has been limited to a few regions. Naturally, the EU is based on the giving up the 'sovereign right' to exclude the foreigner if that foreigner is a national of the EU, the EEA or Switzerland. Other regions (including Denmark – together with the other four Scandinavian countries) also exempt nationals of the region from limits on their migration. In fact a number of extra-European formations are also on the way to forming zones of freedom of movement.

Nevertheless, the prevailing rule is exclusion, which is only alleviated by the exception in the form of an entry visa or a treaty-based general waiver of the *ab ovo* exclusion, which states may still overrule even in the case of visa holders or persons who, in principle, are exempt from it.

Therefore, if asylum-seekers arrive, or try to arrive, the need arises to argue in favour of their admission and right to stay, even if they do not meet the strictures of the immigration rules. This paper is devoted to lines of argument which lead to the conclusion that refugees³ ought not to be

1. 'Even though the concept of state sovereignty is being constantly challenged and has been remarkably in decline during the second half of this century, it still prevails as such, in theory as well as in practice. Indeed, controlling the entry and residence of non-citizens in individual states remains among the core features of sovereignty.' Jens Vedsted-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states' exclusion?' in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities*, Cambridge, 1999, pp. 269-283, at p. 273.
2. For a recent re-statement see *Hirsi Jamaa and others v. Italy*, (Application no. 27765/09), Judgment of the Grand Chamber, 23 February 2012. '113. According to the Court's established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens ...'
3. In this paper I'll use the terminology of the 1951 Geneva Convention in the sense that I will assume that the persons seeking protection are indeed refugees, who have a well founded fear of being persecuted upon return to their country of origin. Asylum-seekers who pretend to be refugees, but in fact are not, are beyond the scope of this essay.

turned away, but should be admitted and protected in the sense of being entitled to a safe residence.⁴

2. The aim: to offer alternative argumentative ways that lead to the same conclusion

The aim here is not to prove that there is a decisive single argument which politically or morally justifies the call for the protection of refugees. My question is not similar to that posed by Christina Boswell or Matthew Gibney who seek to identify the obligations of a liberal state in a non-ideal world.⁵ Here the goal is to show that, if the choice between protection and exclusion arises, then the former is to be preferred according to several parallel lines of arguments. The corollary to this is that the refusal of protection is also a tenable position, but the one who adopts it will have to subscribe to a number of qualifications, namely welfare chauvinism, lack of historical memory and others, which few politicians or civilians will want to admit.

Naturally, if the pre First World War regime of free movement (with a few exceptions) were to be restored globally, one would not need specific arguments calling for the admission of refugees, even if situations of persecution would still occur. Before the First World War the persecuted of one region could simply move to another country or region and simple immigrants, as so many after the 1848 revolutions did when entering the new world and leaving the Hapsburg persecutors behind.

But the restoration of freedom of movement at the global level is at least a few decades away, so let us turn to the arguments which justify the exemption of refugees from immigration rules. The discursive position is that of an advocate of the refugees who addresses a more or less bounded community (its members, its politicians) whose aim is to prove that admission and protection is to be preferred by that society over exclusion.

4. The content of the protection in the sense of 'reception conditions' and 'integration' is also beyond the limits of this essay.
5. Christina Boswell, *The Ethics of Refugee Policy*, Ashgate, 2005; Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge University Press, 2004.

The following pages will introduce nine arguments and refer to a tenth. Six of them will treat identity as the central category. Three rely on the shared identity of the refugee and the protector, the other three on the difference between the asylum-giver and the refugee or between the protector and the persecutor. The identity focused lines of arguments are constructivists, they suggest that by relating to the refugee or his/her persecutor the protector creates/reinforces/interprets an identity which entails the duty to protect the refugee. The remaining three arguments are utility (reciprocity), rational choice and finally responsibility based. The tenth rationale to protect refugees is non-refoulement understood in a broad sense beyond its strictly legal application.

These arguments are not legal. They are rooted in substrata of the law, or in realms entirely beyond the law: they (should or may) serve as the foundation of a legal regime protecting refugees. The motivation to assemble these arguments derives from our bitter experience with a number of European (and other) countries, and the prevailing political and social discourse within them, all of which essentially suggest that states grudgingly protect refugees because they are legally obliged to do so. Absent such legal obligation they could (and perhaps would) select those whom they are willing to admit and those whom they choose to turn away.

3. Identity construction and refugee protection

'Identity', we argue, tends to mean too much (when understood in a strong sense), too little (when understood in a weak sense), or nothing at all (because of its sheer ambiguity) claim Brubaker and Cooper on the first page of their study that deals with interpretations of 'identity'.⁶ According to the authors, identity politics does not require a scientifically verifiable existence of identity. They designate the identity concept of the essentialist trend in the identity discourse as 'strong' and that of the constructivist approaches as 'soft'.⁷

6. Roger Brubaker and Frederick Cooper, 'Beyond Identity', *Theory and Society*, Vol. 29, No. 1, Feb. 2000, pp. 1-47.

7. *Op.cit.*, pp. 10-11.

Instead of declaring any of the prevalent identity concepts as valid, they break down identity into three clusters.⁸ These are: identification and categorization, self-understanding and social location, and thirdly: commonality, connectedness, groupness. In fact the third cluster of commonality, connectedness and groupness are particular forms of self-understanding. 'Commonality' refers to a common attribute; 'connectedness' entails relational ties amongst people. 'Groupness' – which may stem from the previous two – is 'the sense of belonging to a distinctive, bounded, solitary group'.⁹ This understanding of 'belonging to a distinctive, bounded group, involving both a felt solidarity or oneness with fellow group members and a felt difference from, or even antipathy to, specified outsiders'¹⁰ will lay the foundation of several arguments in favour of protecting the refugees, either based on the shared identity of the refugee and the asylum-giver, or based on the difference between the asylum-seeker (and his/her persecutor) and the protector, which assists the latter in constructing her/his/its identity.

In practical life 'identity' as self-understanding 'is a dispositional term that designates what might be called 'situated subjectivity': one's sense of who one is, of one's social location, and of how (given the first two) one is prepared to act. As a dispositional term, it belongs to the realm of what Pierre Bourdieu has called *sens pratique*, the practical sense – at once cognitive and emotional – that persons have of themselves and their social world.'¹¹

This is the semantic field in which I understand 'identity'. It may relate to an individual or the group to which he/she belongs (or which appears as the persecutor). The essential claim is simple: by extending or withholding protection to the refugee we construct (identify and understand) ourselves, our roles, our values. By constructing 'the refugee' at the same time we define ourselves, we (as individuals and as groups) identify those features which create and reflect at the same time our commonality, connectedness and groupness as a nation, as a religious community, as a

8. *Op.cit.*, pp. 14-21.

9. *Op.cit.*, p. 20.

10. *Op.cit.*, p. 19.

11. *Op.cit.*, p. 17.

clan, or whatever form of social grouping and – frequently define the outgroup (e.g. the totalitarian persecutor) as well.¹²

By identifying the refugee as one of us (or his/her persecutor as one who substantively differs from us) we recognise and confirm our group and the continuity and mutual belonging within that group. By performing what membership in that group requires, the membership itself is restated and reproduced.

3.1. Humankind as the common denominator: The universal liberal (cosmopolitan) argument

Assuming, for the sake of this essay that, at the moment general freedom of movement is not available, the universal egalitarian/liberal argument in favour of refugees may be constructed as follows. All human beings are equal by nature, have equal dignity and are entitled to an equal measure of freedom. No interest of a person may be preferred over the interest of another person unless it can be justified on the basis of agreed principles based on the equality of human beings. Human beings are members of the undivided community of mankind (the human race). Each member of that community has the same entitlements as any other member. Should differences emerge (and of course they did/do/shall) these differences need moral justification. That justification must be based on principles and expectations applicable to all.

The universal liberal argument may be developed in several ways.

From a Rawlsian, liberal, contractarian perspective, the primacy of fundamental rights and the difference principle will lead to the conclusion that refugees need to be protected. In the Rawlsian approach (if the starting position is extended beyond an imagined society to the whole of mankind)¹³ persecution entails so much suffering (or even loss of the person) that the other members of the community must not acquiesce. The

12. Naturally this insight is not without antecedents in the refugee law literature. See e.g. Thomas Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011, especially p. 12 or Emma Haddad, *The Refugee in International Society: Between Sovereigns*, Cambridge University Press, especially pp. 8-9.
13. Cărens in his seminal article does the same move. Joseph H. Cărens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics*, Vol. 47, pp. 251-273 at pp. 255-256.

command is that of moral nature: suffering must not be tolerated if acting against it does not expose the rescuer to an equal level of danger. Persecution is injustice inflicted on humankind which must be corrected. The obligation is unconditional. If there is any limitation on the duty to protect that must be narrowly tied to self-preservation or self-defence – as in most moral theories.¹⁴

The utilitarian approach – which does not prefer nationals over foreigners and so over refugees – would advocate the protection of refugees if the preferential treatment of refugees would, on balance, lead to more utility, even if the losses of those not preferred are taken into consideration. Whereas the sheer aggregation of utilities (where the content of utility is the preference of the equal individual) need not necessarily lead to protection (albeit it is likely that the utility gained by the persecuted will be larger than the loss the protector must cope with) a modified approach to utilitarianism, which calls for maximisation of the spread of utilities, would certainly result in the obligation to extend protection to refugees as it would definitely contribute to the more equal distribution of utilities.

Also, one may consider a refinement of the possible content of utility, eliminating from it e.g. the joy derived from racism and giving concrete, welfare-based content to it, when utility would be 'defined in terms of objectively definable goods, such as wealth, healthcare, accommodation, security, and so on'.¹⁵ Adopting that approach would be even more likely to lead to the conclusion that even self-interested utilitarians would be morally obliged to protect refugees as it would lead to an increase of the aggregate utility and/or contribute to its more equal distribution among morally equal persons.

Another strand of the utilitarian justification of refugee protection links utility not to happiness, well-being or to preference but to vulnerability. Robert Goodin has formulated the theory that the moral duty of

14. Boswell also ventures into interpreting Rawls' early conception of justice at the universal level which would lead the contractors to 'introduce an extensive set of refugee rights, with provisions far more generous than those currently in place', but then she turns to her own research question, motivation, and finds that after the lifting of the veil of ignorance probably actors would not keep their promises made behind the veil of ignorance. Christina Boswell, *The Ethics of Refugee Policy*, Ashgate, 2005, pp. 86-87.
15. *Ibid.*, p. 39.

everyone consists in decreasing the vulnerability of those whose vulnerability depends on our own actions.¹⁶ As long as our acts and choices may inflict harm on others we are obliged to refrain from those acts thereby decreasing the vulnerability of the other person.

A further way of developing arguments in favour of protecting refugees may be based on a global feeling of solidarity and sympathy. It is not hard to recognise Kantian ethics behind this position which entails that no one should be returned if that would endanger the life of the person wishing to enter.¹⁷ Commenting Kant, Seyla Benhabib notes that the Kantian text somewhat oscillates between the moral and the legal obligation

'The right of hospitality entails a claim to temporary residency which cannot be refused, if such refusal would involve the destruction – Kant's word here is *Untergang* – of the other. To refuse sojourn to victims of religious wars, to victims of piracy or ship-wreckage, when such refusal would lead to their demise, is untenable, Kant writes. What is unclear in Kant's discussion is whether such relations among peoples and nations involve acts of supererogation, going beyond the call of moral duty, or whether they entail a certain sort of moral claim concerning the recognition of 'the rights of humanity in the person of the other'.¹⁸

Finally, one last line of argument, which is the product of the 21st century, even if its roots go back to the last quarter of the past century. This takes as its starting point the notion of 'human security', which was defined by UNDP as follows: 'It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life.'¹⁹ In other words, human security entails what Roosevelt and, much later, the Commission on Human Security (in its 2003 Report) succinctly summa-

16. Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, University of Chicago Press, 1985, p. 118.
17. Thomas Gammeltoft-Hansen in his letter to the author kindly reminded him that Kant's discussion on the right of hospitality appears to be drawn from Grotius' *Mare Liberum*. See: Grotius, Hugo, *Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East-Indian Trade*, Oxford University Press (New York), 1916, pp. 7-8.
18. Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press, 2004, p. 28.
19. UNDP, *Human Development Report*, 22, 1994, p. 24.

rised as freedom from want and freedom from fear.²⁰ The human security approach is not legal, but political in nature. Its goal is to offer a legally non-binding, nevertheless potent doctrine. Alice Edwards (referring back to the 1994 UNDP report) identifies four characteristics of the human security approach: 1) Human security is a universal concern, relevant to people in all nations; 2) It is transnational in character and interdependent. Therefore threats to human security in one part of the world affect persons in other parts regardless of state borders; 3) Human security is easier to ensure through early prevention than later intervention; 4) It is people-centred.²¹ The human security proposition serves the realisation of human rights. However, it is a broader and more flexible approach than the strict universal human rights argument and has a global and trans-border character, diminishing the importance of sovereignty and borders. Thus, it enhances the strength of the demand of refugee protection.

3.2. Belonging to a group as the basis of protection. Expression and confirmation of the identity of the group (and its members) by extending protection to a member of the group against those who are perceived as 'the other'

3.2.1. Nation, tribe, clan

Most probably the strongest motivating force for the protection of refugees occurs when the refugee and the asylum-provider share membership in the same nation, ethnic group, tribe, clan or religion. Luckily, there is no need to review the nationalism debates here. It may suffice to pin down a few fundamental tenets.

The essence of a 'nation' is unsuitable for definition. The various nationalism-theories testify to this.²² They reveal that both the assumptions

20. *Human Security Now*, New York, 2003, p. IV.
21. Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders', 30 *Michigan Journal of International Law*, 2008-2009, p. 780.
22. The short review of the nationalism schools heavily relies on the PhD thesis of Miklós Bak: *A politikai identitás ontológiai alapjai (The ontological foundations of political identity)*, Babes-Bolyai University Kolozsvár (Cluj-Napoca), 2005, pp. 78-92. From the English speaking literature see: Anthony D. Smith, *Ethno-symbolism and Nationalism: A cultural approach*, Routledge, 2009.

of what constitutes a nation and the views about the historic and social function of these assumptions are widely divergent.

The essentialists believe that the nation (or its organic predecessor) has been in existence since the blurred beginnings of history and the nation has immutable or only slowly changing characteristics. Ethnicity, nation and culture fully overlap; the nation, in essence, is an extended family bound by blood, memory and history (hence the *ius sanguinis* principle of nationality). The logic of nationalism dictates that each nation should have a state of its own, rather than one shared with other nations.²³

Nations and nationalism are perceived totally differently by modernists and protagonists of the civic nation who claim that most (if not all) nations are relatively recent phenomena as earlier empires were inhabited by ethnic communities, not nations in the modern sense. Nation and the body politic coincide in this approach which frequently is labelled constructivist or instrumentalist (modernist). (E. Hobsbawm, B. Anderson, and E. Gellner) Scholarly as well as everyday thinking about the formation of nations and their essence may be widely divergent. Nevertheless, it is an undeniable fact of the 21st century that the idea of national/ethnic/clan identity constructed by the use of terms, symbols, myths, official and private narratives remained widespread and powerful.²⁴ Such ideas are still used to draw the line between the ingroup and the outgroup, thereby defining the ingroup (the nation, the national minority, the ethnic or indigenous group, the clan and so on).

23. This is not the place to go into the details. Suffice it to remark that the essentialist approaches may be subdivided into three branches, namely the *primordialists* (C. Geertz and P. van den Berghe) who assume a continuous and unchanging national existence, the *perennialists* (A. Hastings and W. Connor) who accept that nations change over historic timeframes and accept that the present concept of the nation is a product of modernity and the *ethnosymbolists* (J. Armstrong and A.D. Smith) who 'consider the cultural elements of symbol, myth, memory, value, ritual and tradition to be crucial to an analysis of ethnicity, nations and nationalisms'.

24. Thomas Franck in his seminal article on identity and nations observed in 1996: 'Late nineteenth and twentieth century romantic nationalism and its tribal definition of the nation are everywhere evident in the socio-political phenomena dominating the end of the second millennium.' Thomas M. Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice', *American Journal of International Law* 90, 1996, p. 374.

The argument for the protection of refugees belonging to the same national or ethnic or other similar group is based on this perceived and regenerated identity. In that context it is less material, whether the image of the nation is more on the essentialist or more on the modern, instrumentalist side. Both may serve as motivating forces for the protection of the refugee, seen as belonging to the group. Whenever political boundaries have cut across such an entity and persecution is threatening 'our brothers beyond the borders', the argument in favour of saving the victim of persecution, who is one from our midst, is fairly cogent among those who maintain any of the above-described visions of the nation, of the ethnic group, of the tribe. The obligation derives from loyalty to the group, from the responsibility felt for all those, who are seen as belonging to that group. Great numbers of recent flight – asylum scenarios may be explained by this argument, whether it is the movement of Hutus between Rwanda and Burundi, the flight of ethnic Hungarians from Romania to Hungary or the escape of North Koreans to South Korea, not to mention the fate of the Azeris and the Armenians who in different periods were forced to flee from Nagorno Karabakh to their respective kin states.

Only for the sake of clarity I mention that the return of nationals who have lived abroad does not fall under this category, nor the situation when, after an armed conflict, state succession in respect of certain territories takes place and the inhabitants are called upon to choose their residence (to opt). Members of these groups are not refugees even if their sudden and frequently involuntary return to the 'home state' may show exactly the same features as the life of a refugee.

3.2.2. Religious community

Historically and presently persecution is frequently based on the faith or religion of the refugee. Religion – one of the five grounds justifying protection in the 1951 Geneva Convention – is treated by UNHCR as a complex phenomenon with at least three different meanings. Essentially it may refer to belief (faith), to membership in a religious community defining the identity of the member, and a way of life.²⁵ Belief includes theistic, nontheistic and atheistic beliefs and may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of hu-

25. UNHCR Guidelines on religion-based claims, 2004, p. 3.

mankind. Membership of a community in the religious context may entail belonging to a group 'that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry'.²⁶ This religious group membership may be felt by the applicant or simply projected on him/her by the persecutor. Finally religion as a 'way of life' is a way of relating to the external world, including dietary customs, dress codes and observance of certain holidays.

The great (widespread) religions and the customs and teachings linked to them are rich in instructions related to escape and shelter. Some of them are addressed to every human being, especially to sheltering believers of other religions, others only to members of the given faith.

Relinquishing the pursuit of completeness let me only refer to a few tenets of Christian (and Jewish) as well as Islam traditions.

Plaut notes that the Old Testament calls up to respect and protect the foreigner in no less than thirty instances. Only obedience to God is demanded more frequently!²⁷ Exodus 22:21 'You shall not wrong a sojourner or oppress him, for you were sojourners in the land of Egypt.'²⁸ Deuteronomy prescribes among the miscellaneous laws that 'You shall not give up to his master a slave who has escaped from his master to you. He shall dwell with you, in your midst, in the place that he shall choose within one of your towns, wherever it suits him.'²⁹ Without quoting all the relevant verses and moving from the Old to the New Testament one is inclined to quote Matthew, 25: 35-40: 'For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me.' Then the righteous will answer him, saying, 'Lord, when did we see you hungry and feed you, or thirsty and give you drink? And when did we see you a stranger and welcome you, or naked and clothe you? And when did we see you sick or in prison and visit you?' And the King will answer them, 'Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me.'

26. *Ibid.*

27. Gunther W. Plaut, *Asylum A Moral Dilemma*, York Lane Press, Toronto, 1995, p. 17.

28. Translations from the Bible come from the English standard version.

(<http://www.biblegateway.com/passage/?search=Exodus%2022&version=ESV>).

29. Deuteronomy 23: 15-16.

After the 313 AD, edict of tolerance by the Roman Emperor Constantine, Christian churches became asylums, primarily, but not only for runaway slaves.³⁰ That was then enacted by Theodosius into Roman law in 392.³¹ The tradition of church asylum survived until the mid-sixteenth century³² and the Catholic Church has never abolished it formally.³³ In fact it experienced a revival during the 20th century in several parts of the world.³⁴

Islam also abounds in teachings on flight and asylum.³⁵ As it is well-known, the prophet Muhammad himself had to flee (just like the people of Israel in the Old Testament and Jesus's family in the New). In 622 he moved from Mecca to Yathrib (today: Medina). That flight we call *hijrah* today. By creating a brotherhood in faith (the *Ummah*) between the refugees and the local people he essentially has 'established a golden rule for the treatment of refugees. He decreed the principle of fraternization between the 'ansar' ('helpers', inhabitants of Medina defending the Prophet's cause) and the 'muhajirun' ('emigrants', refugees from Mecca). According to this pact, each 'ansar' should take care of one 'muhajir'. This care included food, clothing, shelter and any other form of help needed until the 'muhajir' could look after himself.'³⁶

In fact the idea of giving shelter goes back to earlier times. Arnaout calls it tribal humanism. 'To sum up, the granting of protection and asylum formed part of the 'moral ideal' of the desert Arabs. The feeling

30. Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits*, Cambridge University Press, 2009, p. 17.

31. *Ibid.*, p. 32.

32. *Ibid.*, p. 34. See also Prakash S. Sinha, *Asylum and International Law*, Martinus Nijhoff, 1971, pp. 10-13.

33. Plaut, *op.cit.*, p. 19.

34. One might think of the sanctuary movement in the US responding to the Central American crisis in the eighties or of the activity of German and French churches in respect of different targeted groups.

35. Possibly the most detailed and recent review of the relationship of Islam and asylum may be found in Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, UNHCR Riyadh, 2009/1430.

36. Sharifah Nazneen Agha, 'The Ethics of Asylum in Early Muslim Society', *Refugee Survey Quarterly*, Vol. 27, 2008, No. 2, p. 37 quoting (without page numbers) J. Krafess, 'The influence of the Muslim religion in humanitarian aid', *International Review of the Red Cross*, Vol. 87, 2005, pp. 327-342.

which drove them to conform to this ideal was that of honour (mu-rawah).³⁷

Islam (and Sharia law) envisages several forms of refugee protection. Amān is a personal protection and care which is due to the infidel who enters the territory of Islam in order to hear Allah's words (Quran, Chapter 9 verse 6).³⁸ This protection needs not come from an authority, it may be extended by a (private) person, but it is so strong that not even the ruling Caliph may revoke the refugee's right to stay, establish a family and trade for a year.³⁹ Although controversial, *dhimma* is seen as another form of protection provided by Islam, specifically to peoples of the book. (Originally Jews and Christians, now understood in a broader sense). *Dhimma* guarantees certain rights to those who live among Muslims, whether having moved on the land of Islam or being conquered by Islamic forces. Both Arnaout and Abou-El-Wafa stress that the prohibition of handing over the persecuted to the persecutor – even in case of a formal extradition request is absolute.⁴⁰

The three religious traditions presented are universalising: their command of granting asylum, extending protection encompasses non-believers as well as followers of other faiths. Nevertheless, it is obvious that all of them (and other religions not reviewed here) entail the expectation according to which persecuted brothers and sisters within the religion should be protected by members of the same faith if they are persecuted by a secularised or a religious power on account of their religion.

3.3. Historical identification and creation of identity. A loan from the bank of history and its repayment

A further argument in favour of the refugees built on identity formation is the following. By receiving and protecting presently arriving refugees the asylum-giver evokes past persecution against his/her group and proves to be grateful for the protection, members of his/her community received from others earlier in history. The current asylum is a repayment into the bank of history. Predecessors took the loan, by needing and ac-

37. Ghassan Maârout Arnaout, *Asylum in the Arab-Islamic Tradition*, UNHCR – International Institute of Humanitarian Law, Geneva, 1987, p. 15.

38. Abou-El-Wafa, *op.cit.*, pp. 81-82 and 235-236.

39. Arnaout, *op.cit.*, p. 20.

40. Arnaout, *op.cit.*, p. 21, Abou-El-Wafa, *op.cit.*, pp. 53-60.

cepting assistance from others: now their successors pay back what is (morally) due. Examples abound, let us limit it to one: that of Hungary. (But think of Germany, Spain, Italy, and Ireland, just to name a few others). Hungarians had to escape before the Second World War, during it and immediately after it, when Communists came to power. Then, again, the unsuccessful revolution of 1956 saw a large exodus of refugees. The following decades witnessed a further constant stream of people departing from Socialist Hungary and being recognised as politically persecuted. In total hundreds of thousands Hungarians relied earlier on the generosity, hospitality and empathy of Western Europeans, North Americans, and Australians. If during the last two decades Hungary provided shelter and assistance to Croats, Serbs, Romanians, Afghans, Somalis, and many other nationalities, it was only natural. We owed that to history.

In a more general sense one may state that whenever a society, which itself was a source of flight, later in history receives refugees, it expresses gratitude on behalf of its predecessors and at the same time re-lives the experience of them in the life of those who now seek protection at its doors.

This 're-payment' frequently does not benefit those who in the past protected members of the now performing community, that is why 'history' is included. It simply indicates that the duty to reciprocate is not linked to the benefactor. Much more is it owed to the memory of the predecessors. The present generation feels obliged because of the 'debt' incurred years, decades or even centuries ago. By volunteering to return it, the present society creates a bond with the past members (or those still living in exile). This appears to be an ethno-symbolist identity creation, however, not necessarily linked to any ethné.

Occasionally payment to the bank of history takes the shape of direct reciprocity: Hungarians fled to Yugoslavia in 1956 and gave asylum to those fleeing from what had been Yugoslavia in 1991-1995. Burundi and Rwanda, El Salvador and Nicaragua and other 'pairs' may also come to mind.

This historic identification with the predecessors who had to flee entails a further interesting aspect: as those past refugees frequently were persecuted by their fellow nationals or tribesmen (and women), the identification with those who fled (and not with those who forced them into exile) contributes to developing the group's self-image. Identifying with the better historic self is aspirational.

The first three theses on identity construction discussed above (humankind, group solidarity, bank of history) were based on the commonality between the persecuted and the protector. The victim was 'one of us'. The reason of protection was that by hurting the refugee the persecutor did harm to the community which the refugee is part of. By giving asylum the group draws the perimeter of its imagined community and at the same time heals the wound inflicted on the community.

The following three propositions motivating refugee protection are based on the difference between the refugee (or the persecutor) and the protecting actor. By relying on that – perceived – difference the society, group or individual providing asylum to the harassed constructs its own identity. Defining the other defines the self.

3.4. Construction of 'home', 'homeland', 'rootedness' by offering asylum to refugees

One who receives a guest in his/her home is the master of the home, the host. Allowing entry or keeping out is the privilege of the 'head of the household' since ancient times. It is a sovereign decision, it is the decision of the sovereign.⁴¹

Public discourse painfully reminds us of the truth of this proposition. As many times the state authorities or leading politicians claim the right to exclude the asylum-seeker, that many times they reinforce their privileged position in respect of the territory from which they exclude the one seeking entry. That privilege in the case of most of the states is based on use of force at an earlier stage of history. Few body politics may claim a title to territory based on presently acceptable moral principles, if we exclude historical conquest as a moral justification. Nevertheless communitarians are not hesitant to take the present composition of the population of a given territory as granted and entitled to decide on entry and exclusion of foreigners.⁴²

41. See the text accompanying footnotes 1 and 2 above.

42. Notoriously in the foundational book of communitarianism, Michael Walzer plainly states about the birth of those communities living within the state boundary 'I don't mean, How it *was* constituted? I am concerned here not with the historical origins of different groups, but with the decisions they make in the present about their present and future populations.' (Emphasis in the original – BN), Mi-

Why mention then, rootedness in the homeland's soil and the prerogative to exclude foreigners in support of the refugees? Because it may function the other way around, like tribal humanism of the Bedouins, like *amân* in Islam, like hospitality in the general sense.

One who decides on asylum and on sharing the resources of the territory is reinforcing its title to that territory and to those resources. Indigeneness is created by treating others as foreigners. If it is not competition (fight) over the territory and the resources but a gesture of sharing, then the one who decides has the title to the shared resources.

3.5. One who helps the poorer is rich

Rich and poor are contextualised when applied to refugee arrivals. By the nature of things, societies and individuals who can afford to share their possessions with the arriving poverty-stricken may perceive themselves as rich. And this self-image is independent from the GDP/head of the affected countries.⁴³ One who may share the home, the harvest, the national income with the asylum-seeker, that actor has a 'surplus', that person, that society is not struggling for mere survival.

The motivation to share with those who are in need has dual roots. On the one hand it is a moral command of a great number of religious, tribal or generally societal norm-systems, on the other hand, by the gesture of giving we construct ourselves (and our self-image). By assisting the asylum-seeker we may self-identify ourselves as rich – and that is a motivating force, for most people.

3.6. Democrats v. oppressors

In modern, post Second World War refugee affairs this juxtaposition is the most important. Scholarship extensively discusses how the protection of refugees has become the competition scene of the two political sys-

Michael Walzer, *Spheres of Justice: a Defense of Pluralism and Equality*, Basic Books, 1983, p. 31.

43. In the late 1980s Malawi offered asylum to around a million refugees from Mozambique at a time when Malawi's GDP was less than 200 USD per head and population less than 8 million. See e.g. *The State of the World's Refugees 2000*, Oxford University Press, 2001, pp. 112.

tems.⁴⁴ Democracies of the West defined themselves in juxtaposition to – as the terminology then went – the dictatorships of the East. Receiving refugees (and encouraging flight) was an important weapon in the Cold War. Residents of the East ‘voted with their feet’ when they denied the obligation to return to their home countries. That denial usually constituted a crime threatened with criminal sanctions, which in turn was – rightly – not interpreted by the democratic states as normal prosecution, but as persecution. Loescher aptly summarises: ‘The recognition of East European emigrants as refugees stigmatized their countries of origin as wilful violators of the human rights of their citizens ... Indeed, Western governments encouraged the flow from East to West in order to weaken their rivals ideologically and to gain political legitimacy in their Cold War struggle.’⁴⁵

The framing of refugee protection as fight between the democrats and the tyrants may have been honest in respect of the Communist East. However, by introducing the geographic reservation into Article 1 B (1) of the 1951 Geneva Convention⁴⁶ as well as by excluding the Palestinian refugees (even if at the request of the Arabic states) from its ambit, the West showed that its willingness to prove the superiority of the democratic regime was limited. Subsequent practice corroborated the accusation that friendly oppressive regimes were less used to prove the superiority of democracy. The US waived the application of immigration rules in respect of 232,711 refugees between 1952 and 1968, but only 925 of them came from non-Communist countries.⁴⁷

Exceptionally refugees flee from an otherwise democratic country to another democratic state and the latter – by recognising them as in need of protection – expresses a difference in the perception of the content of

44. James C. Hathaway, *The Law of Refugee Status*, Butterworth, 1991, pp. 6-10, Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, Oxford University Press, 1993, pp. 58-59.

45. Loescher, *op.cit.*, p. 59.

46. Among others France used the limitation till 1970, Portugal till 1976, Italy till 1990, and Hungary till 1998.

47. Price, *op.cit.*, p. 86.

the affected human right(s) and thereby interprets the rule of law and democracy obligations for itself.⁴⁸

4. Three arguments not closely related to identity construction: reciprocity, political calculation, historic responsibility

4.1. The functional argument of reciprocity

Personal experience normally comprises the life of three generations, 75 years. In Europe during the past three quarters of a century members of the following nationalities were forced to escape and seek asylum in vague chronological order: the Spanish, the French, Germans, Estonians, Latvians, Lithuanians, Italians, the Polish, Greeks, the Portuguese, Hungarians, Czechs and Slovaks, Romanians, Russians, Moldavians, Armenians, Azeris, Georgians, Croats, Bosnians, Serbs, and Albanians. No doubt this is not even a complete list.

At the beginning of 2011 there were at least 50 countries of origins from which more than ten thousand people were forced to live abroad.⁴⁹

All this should induce to seriously consider whether those who today may extend or withhold protection may themselves need it in the future. The first UN High Commissioner for Refugees, van Heuven Goedhart, delivering his lectures at The Hague Academy of International Law still as active high commissioner started his series by declaring that ‘it is unrealistic for anyone who looks at the refugee problem to say ‘it cannot hap-

48. The US recognized a German family as refugees in 2010 on the basis that they were denied the right in Germany to provide the kids solely with home education <http://www.spiegel.de/schulspiegel/wissen/0,1518,674309,00.html> (Accessed on 12 May 2013). The fate of the so-called Aznar protocol attached to the Treaty on the Functioning of the European Union (Protocol (no 24) on asylum for nationals of member states of the European Union) and the declaration by Belgium excluding the very restrictionist approach of the protocol is another testimony to the divergent approaches to democracy.

49. UNHCR Global Trends, 2010. Table 2. Refugees, asylum-seekers, internally displaced persons (IDPs), returnees (refugees and IDPs), stateless persons, and others of concern to UNHCR by origin, end-2010. Author’s calculation.

pen here'. No one has any absolute safeguard against becoming a refugee himself.⁵⁰

Reciprocity offers a strong argument in favour of protection.⁵¹ Reciprocity does not concentrate on instant mutual gains. Rather, it is like an insurance policy: the actor (individual, group) ensures that by providing asylum now he/she may expect the same from those whom he/she assists. Compared with the 'bank of history' argument (3.3. above) one may note three differences: First, the 'bank of history' is based on a moral duty. Second, that duty is identity related: it constructs identity by creating and perceiving the continuity with the predecessors. Third: the 'bank' mediates between different groups.

In contrast reciprocity has nothing to do with an interiorised moral duty, it is much more a rational calculation, as in the case of the insurance. We protect you now, but we expect – a rational transaction – the same from you next time, when we need protection. Reciprocity is not substantively related to identity beyond the point that the expectation to the returned service is harboured by the same entity. (Person, group), and thirdly, reciprocity assumes unchanging actors: the one who gives protection now expects to get protection exactly from those whom they now protect.

4.2. Political calculation

Political calculation and value driven action may appear indistinguishable, especially in the democracy v. oppression scenario. The difference between the two is in the dominant motivating factor. When democracies offer protection to refugees escaping persecution that may be read as a clash of values in which those democracies reinforce their (political) identity based on respect of the individual and his/her liberties. Protection is triggered by the need of the asylum-seeker and by the conviction of the protecting society that its self-perception requires that it provides asylum.

50. Gerrit Jan van Heuven Goedhart, 'The Problem of Refugees', *Hague Academy of International Law Recueil Des Cours, Collected Courses*, Vol. 82, 1953, p. 265.
51. Beyond the examples mentioned in the context of the bank of history one may refer – among others – to the fate of Sierra Leone és Liberia. Citizens of the one regularly fled to the other when their country was engulfed in civil war. (Sierra Leone: 1991-2002, Liberia: 1989-1996 and 1999-2003).

However, there may be another motivation behind extending protection to asylum-seekers. At the core of this second type of decision is the perceived national interest, or the felt international pressure, not the vulnerability of the asylum-seeker.

Before accession to the European Union (and earlier to the Council of Europe) Central and Eastern European countries, one after the other, undertook to protect refugees by acceding to the 1951 Geneva Convention. This, largely, was the result of sheer political calculation, rational choice. It was understood that access to these institutions would only be granted if the candidate states presented themselves as truly democratic, rule of law nations.⁵² One may see a support of the argument that the real aim was less the protection of refugees and more the 'admission to the club', in the fact that between 1994-2003 Estonia has recognised four, Latvia six and Lithuania twenty-two persons as Geneva Convention refugees.⁵³

This posturing nevertheless could result in the protection of many thousand persons (as in the case of Hungary, e.g.) and so can be seen as productive even if refugees are simply instruments for achieving other political goals.

Tougher considerations emerge when refugee protection is based on the political calculus relating to the conflict between countries. Honduras in 1979-1980 provided shelter to the contras escaping Nicaragua, including several thousands of soldiers of the former dictator, Somoza, and then enabled the US to give intensive assistance to these people in their fight against the Sandinist regime of Nicaragua.⁵⁴ The situation between Afghanistan and Pakistan also resembled (and may still resemble) a power game in which assistance to more than three million Afghan refugees also

52. The most articulate description of this process is still in R. Byrne, G. Noll, and J. Vedsted-Hansen, (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, Kluwer Law International, 2002. Hungary became party to the Geneva Convention in 1989, Romania in 1991, Slovenia and Croatia in 1992, Bulgaria, Russia and Slovakia in 1993, the three Baltic states in 1997, Serbia in 2001, (but Yugoslavia had been a party to the Convention since 1958) and Ukraine in 2002. (Accessed on 12 May 2013).
53. UNHCR, *Statistical Yearbook 2003*, Geneva, 2005, Table C7, p. 119.
54. See e.g. *The State of the World's Refugees 2000*, Oxford University Press, 2001, pp. 122 and 128.

included Pakistani support to the Mujahed fighting against the Communist leaders of Afghanistan.⁵⁵

A further argument under the heading of political rational choice relates to the situation in which the call for the protection of refugees is made in order to avoid conflict in the asylum country itself. Frequently the political elite acquiesces into admitting refugees in order to appease one of its minorities whose kin-people escape from another country (Macedonia, Albanian minority, refugees from Kosovo) or its political opponents. (Hungary, the party leadership grudgingly giving in to the oppositional voices calling for not returning refugees to brotherly Romania ruled by Ceaușescu.)⁵⁶

4.3. Historic responsibility as the basis of obligation to protect

As discussed earlier repayment of historic debt may serve as a tool of national (tribal, ethnic or even religious) identity formation.⁵⁷ Historic responsibility as the foundation of refugee protection is different, albeit it has a common feature with the 'bank of history' argument: both link present generations to predecessors, in both cases acts of them call for the protection of arriving refugees now.

However in the context of identity, the bank of history established the connection between the refugees of the past and their descendants thereby forming the collective identity of the whole affected group.

Historic responsibility may occur even if the asylum giver distances himself/herself from the acts of their predecessor.⁵⁸ The historic responsibility argument states that if a state/nation/political community has persecuted others, or a third party persecutes persons because of the acts of

55. *Ibid.*, pp. 120-121. Further examples are to be found in Aristide R. Zolberg, Astrid Suhre, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, Oxford University Press, 1989, pp. 275-278.

56. Boldizsár Nagy, *A magyar menekültjog és menekültügy a rendszerváltástól az Európai Unióba lépésig Erkölcsi, politikai-filozófiai és jogi vizsgálódások*, [The Hungarian refugee law and refugee system from the system change till accession to the EU. Moral, political-philosophical and legal investigations], Gondolat, 2012, pp. 112-116.

57. See 3.3 above.

58. The size of this essay does not permit a detour into the vital and practically frequently neglected question of how we should relate to the crimes of our predecessors, how THAT influences our present identity... Some states had their Historikerstreit, others are still waiting.

this state/nation/political community, than it is the task of the triggering entity to take in refugees fleeing in direct or indirect consequence of its deeds.

The past offers several examples. Germany obviously felt responsibility towards all the 'collaborators' who were chased away (whether ethnic German or not) due to their association with the Nazi power.⁵⁹ The generous Article 16 of the Grundgesetz⁶⁰ which lived an unconstrained life for almost half a century, until the introduction of the safe third country restriction in 1993 was a generous expression of acknowledgement of the historical responsibility of democratic Germany for crimes of the Third Reich.

A less remote historic precedent is that of the United States (and Australia), which felt obliged to resettle into their territory those who had to flee Vietnam, after North Vietnam first conquered and then in 1976 incorporated South Vietnam, exposing to persecution many sympathisers of the earlier regime, the ally of the US and Australia.⁶¹

In the above cases acts of the responsible states triggered the persecution. However if one assumes that responsibility could also be invoked if the reason of the forced migration is that external powers who had the capacity did not eradicate the root causes of persecution then the argument could have a much broader application.

If root causes as colonisation and its consequences, unequal global trade conditions, unscrupulous exploitation of developing nations, proxy wars and other menaces would have to be accounted for and establish the responsibility for protecting refugees forced to flee the (direct or indirect) consequences of all these, then a much wider circle of states (and other actors) could be found responsible.⁶²

A remarkable aspect of this broader approach to the foundation of responsibility is climate change. Could one argue that those, displaced by

59. This sentence does not state that the collective expulsion of ethnic Germans after the Second World War was justified or compatible with human rights standards.

60. 'Politisch Verfolgte genießen Asylrecht' [Politically persecuted enjoy asylum] Originally Grundgesetz, 16 § 2. bek., at present: 16a § (1).

61. David A. Martin, Alexander T. Aleinikoff, Hiroshi Motomura, and Maryellen Fullerton, *Forced Migration: Law and Policy (American Casebook)*, Thomson West, p. 673, Gibney, *op.cit.*, p. 52.

62. M. Gibney seems to be thinking in this direction. Gibney, *op.cit.*, pp. 53-54.

climate change may expect those states that have the lion's share in inducing climate change to take them up and provide with shelter? It may be too early to deliver a definitive answer especially as the core questions concerning the legal qualification of these persons are not settled,⁶³ but it may be postulated that if victims of climate change will be recognised as refugees then they may consider invoking the 'historic responsibility' argument when seeking safety.

5. Conclusion: ten arguments in favour of admission and the qualifications needed to exclude refugees

The above text proposed nine arguments⁶⁴ as the pre- or meta-legal foundation of the decision to admit refugees. There is a tenth: an extended understanding of non-refoulement. According to that the legally defined principle can – and should – also be seen as a norm of political morality or prudence. As the (legal) content of non-refoulement has been addressed very widely in the literature⁶⁵ I refrain here from entering the academic discourse.⁶⁶ Suffice it to re-state that the command of non-refoulement in its broad, human rights based meaning prescribes that return to inhuman or degrading treatment or punishment (and to death penalty or execution) is absolutely prohibited, independently of the cause of that harm.

Having listed ten parallel arguments each of which – in the relevant context – may justify admission, what remains is to note the possibility of refusing all of them and opt for the exclusion of asylum-seekers. Indeed it is an available intellectual and emotional position. But if one – whether a decision-maker or a simple member of the community – decides to take that outlook, at the same time he/she has to admit that he/she has no his-

63. For an overview see Jane McAdam, 'Environmental Migration', in Alexander Betts (ed.), *Global Migration Governance*, Oxford University Press, 2011, pp. 153-188.

64. Three on shared identity: 1) humankind, 2) group identity, 'national', 'religious' and potential others, 3) 'bank of history'; three on identity construction based on difference: 4) indigenous-foreigner, 5) rich-poor, 6) democratic-oppressive; three on other bases: 7) reciprocity, 8) political calculation, 9) historic responsibility.

65. For a remarkable contribution of recent nature see: Jens Vedsted-Hansen, 'European non-Refoulement revisited', *Scandinavian Studies in Law*, Vol. 55, 2010, pp. 269-283.

66. For my views see Nagy, op.cit., pp. 87-100.

toric memory, blindly believes in stability and is a realist in the international relations studies sense. The latter entails that the realist is willing to breach the law (and the moral obligations) if that in his/her assessment serves the national interest. Moreover, there is a fourth characterisation exclusionists have to put up with: economic chauvinism. Quite a heavy stigma in exchange of disregarding all the ten arguments which justify protection, and respond to the question: 'indeed, why should we care about them?'

6. Epilogue

I hear the pondering voice: but this is not a consistent scholarly paper expanding from a given starting point. It looks rather like an elaborate advocacy piece, not without some eclecticism.

Jens, you are right, it is. We academic lawyers, at halfway of our life-path (or earlier or later, but sometime) realise that working in the field, where advocacy is (also) vital forms a desirable complement, balancing the years spent at the research desk. You have realised that early on and prudently carried on both the academic and the practical activity in the first sixty years (or its adult segment). Let me wish that the dialogue which may follow this paper enhance both!