

THE "OTHERING" PROCESS: EXPLORING THE
INSTRUMENTALIZATION OF LAW IN MIGRATION POLICY

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ABSTRACT

Migration law and policy are clearly committed to the state (and its citizens) at the expense of the migrant. Receiving societies regard the migrant as a threat to the order and unity of national identity but the migrant is, in fact, also constitutive of that order and unity. This reveals a paradoxical relationship of the migrant to law. Questions of identity and alterity occupy a pivotal place in investigations related to the treatment of the migrant subject. Identity is a construct which is indeterminate and relational. This construct of the migrant brings to the fore the dependence of the migration system on the image of the migrant as repressed and marginalized. Within the international legal system, definitional discourses regarding forced/voluntary migration also have serious identity and policy related implications. The exclusion of migrants who does not fit within the narrow “boxes” of international migration law occurs precisely because international law cannot develop its ideal self-image without a caste of international *refusés*. Like the nation-state, international migration law achieves parts of its legitimacy through exclusion. International migration law also provide an escape mechanism which the state can access in order to advance its political goals. Both domestically and internationally, migrants are subjected by the legal discourse on migration to a form of violence which suppresses their humanity. Migrants are commandeered to help constitute the identity of international law and national societies. This de-ethicalizes the relationship with the migrant by negating the migrant’s autonomous nature. It therefore becomes necessary to introduce the ethics of alterity in law and to move the migrant back into the centre of the migration discourse. A significant way to do this is to be aware of the violence which is perpetrated upon the migrant and to work towards the elaboration of a less state-centred system open to constant reconsideration.

ABRÉGÉ

Le droit et les politiques migratoires servent de manière délibérée l'intérêt de l'État (et de ses citoyens) au dépend de celui des migrants. Les sociétés d'accueil considèrent que le migrant est une menace à l'ordre et à l'unité de l'identité nationale mais le migrant est en fait nécessaire pour la constitution d'une identité nationale ordonnée et unitaire. Ceci démontre la relation ambiguë entre le droit et le migrant. Les questions d'identité et d'altérité occupent une place centrale dans toute réflexion portant sur le traitement juridique du migrant. L'identité est un construit vague et relationnel et le système migratoire repose sur une image du migrant réprimé et marginalisé. Au sein du système juridique international, les discours portant sur la définition de la migration forcée/volontaire ont aussi des implications identitaires et politiques. En effet, l'exclusion du migrant qui ne correspond pas aux critères étroits du droit international des migrations est possible précisément parce que le droit international ne peut maintenir une image idéale sans une caste mondiale de refusés. Au même titre que l'État nation, le droit international des migrations construit donc, du moins partiellement, sa propre identité à travers des mécanismes d'exclusion. Le droit international des migrations constitue aussi une échappatoire utile pour faire avancer les visés politiques de l'État. Ainsi, à tous les niveaux, national et international, le migrant est assujéti à une forme de violence qui nie son humanité. Puisque le migrant existe aux yeux de l'État uniquement pour renforcer l'identité de celui-ci et du droit international, la relation entre le droit et le migrant s'en trouve vidée de son contenu éthique, notamment en refusant d'accorder au migrant toute autonomie. Il s'avère alors nécessaire d'introduire l'éthique de l'altérité dans le droit et de ramener le migrant au centre du discours migratoire. Une manière efficace de parvenir à ces objectifs est de ne pas oublier la violence qui s'exerce sur le migrant et de favoriser l'élaboration d'un système juridique moins centré sur l'État et plus ouvert au changement.

INTRODUCTION

International migration is an emotive issue because it raises complex questions about the identity and values of individuals, households and communities, as well as societies as a whole. International migration is a controversial matter because it highlights important questions about national identity, global equity, social justice and the universality of human rights. International migration policy is difficult to formulate and implement because it involves the movement of human beings, purposeful actors who are prepared to make sacrifices and to take risks in order to fulfill their aspirations. Its challenges are radically different from those that arise in managing the movement of inanimate objects such as capital, goods and information.¹

¹ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (Geneva: G.C.I.M., October 2005) at 10 (para 36).

“Partir ou mourir” (“Leaving or dying”) is a documentary that tells the story of three irregular migrants who risked their lives to enter Europe and Canada, survived the crossing, and were returned to their countries of origin.²

Khalid Aitour is a 28-year-old man who lives across the Strait of Gibraltar, in the Port of Larache (Morocco). He has held small jobs all his life and now earns about \$30 a week as a fisherman. Khalid wants to leave: “It’s not that we don’t love our country; but there’s nothing for us here. You can’t start a family. It’s so bad you have to get married on credit. Nobody wants to stay here.... Even people who are married want to leave. So, it’s no wonder that I want to...”³ Khalid has already made two failed attempts to migrate to Europe. He tells about his last “trip”:

We left from a place called Hajra Beïda, which means “white stone”. The boat was 7.5 metres long. We left at 7:30 in the evening. It’s very hard to describe the atmosphere of a clandestine crossing. Death hangs in the air. Human beings change. It’s another reality. The atmosphere is frightening. Everything was calm until we crossed the Strait. Then the weather became stormy. We spent three or four hours fighting against sea currents. It rained from midnight until dawn. Lots of things happened on the “patera”. We faced certain death. Some people called their families on their cell phones, others took out maps of Spain and asked their families to call the Spanish Civil Guard to rescue them. Some people started reading the Koran to ask for God’s help just as Spain loomed up before us. At daybreak, there was fog and rain and we couldn’t see anything until a mountaintop appeared. That’s when the Civil Guard helicopter arrived.⁴

² Raymonde Provencher, “Leaving or Dying (Partir ou Mourir)”, DVD (Montreal: Productions Macumba International inc., 2005).

³ Transcript, “Leaving or Dying”, online: eXtremis.tv <<http://www.extremis.tv/index2.html>> (accessed on 31 August 2007).

⁴ *Ibid.*

Khalid is believed to have tried to cross the Strait of Gibraltar yet again. No one has heard from him for months.

In Tapachula, Mexico, near the US border, Albergue Jesús Le Buen Pastor (“The Good Shepherd House”) annually receives approximately 5,000 “train amputees” - irregular migrants who have lost a limb (or more) while trying to enter the US aboard freight trains. Maria Magdalena Brisuela Carvajal is one of them. She comes from Chalatenango, El Salvador, has three children, and left the country on her own with the objective of “[buying her children] a house and giv[ing] them all [she] could”. “It’s impossible to buy a house in El Salvador because of the economic situation. So, I decided to leave El Salvador and go to the United States”. She explains her journey:

You can’t move about freely because Immigration agents might catch you. It’s really tough... We were approaching the first immigration checkpoint. There were many of us and we were planning to get off when we arrived. We were all going to jump off to avoid being arrested by the Immigration agents and sent back to our home countries. I closed my eyes as I was getting off. When I opened them again, I was already under the train. The train cars were passing above me. I remember the last car came almost up to my shoulder. It felt like something pushed me aside. Nobody got off – no one. No one. I was all alone.⁵

Maria Magdalena acquired her prostheses and returned to El Salvador where she now lives with her children.

In March 1998, Ramon Mercedes, from the Dominican Republic, stowed away on the “Clipper Fame”, a cargo ship bound for Port-Alfred, in the Saguenay. He took refuge in the machine room, but the suffocating

⁵ *Ibid.*

atmosphere soon caused him to look for another hiding place, which turned out to be extremely cold. Wearing only a windbreaker and sneakers, Ramon was ill equipped for the bitter cold of the cargo hold; discovered by crewmembers at the end of the voyage, he was immediately handed over to Canadian authorities. Both his feet were so badly frostbitten that they had to be amputated. Ten days after the amputation, the Canadian immigration authorities, acting with medical consent, sent Ramon back to the Dominican Republic aboard a private plane, handcuffed and with a police escort. He was left alone at the Santo Domingo airport. The Quebec Immigration Lawyers Association immediately requested a public inquiry, and Members of Parliament voiced their indignation in the House of Commons, but to no avail. At the time of the documentary, Ramon was still severely handicapped and in constant pain. In June 2007, thanks to a fund-raising campaign following the launch of the documentary, Ramon was finally able to obtain prostheses and regain some independence.

By giving voice to the motivation of people we will never encounter because they are unable to cross our national border, the documentary illustrates how the reality of those who frame migration policies is distinct and disconnected from that of the millions migrating around the globe. The forced/voluntary migration dichotomy, traditionally characterized in law and policy by the degree of choice involved in the decision to leave home, is strongly challenged here by the extraordinary determination of the individuals featured in the documentary to risk everything rather than stay in a country where they have neither hope nor future: although they are not “forced migrants” per se, migration is for them “a matter of life or death”, of “choosing between leaving and starving”.⁶ The strength of the documentary also lies in an important question asked of us indirectly: how

⁶ Father Ademar Barilli, Director of Immigrant House at TECÚN UMÁN (Mexican-Guatemalan border), *ibid.*

well do we, as North American or European citizens, really understand the complexity and deep interconnection of the factors influencing international migration? Some might be tempted to conclude that “we cannot welcome all the misery of the world”,⁷ implying by this, for instance, that the responsibility lies primarily with those who move, or that there are legitimate and illegitimate reasons for seeking protection in another country. However, the situation is more complicated than it first appears, since our governments have a strong interest in maintaining an anti-migration rhetoric while tolerating the presence of irregular migrants on their soil. What’s more, for years the strong tradition of distinguishing between “economic migrants” and “refugees” has been questioned by numerous studies which, with empirical evidence, reveal the complex interplay between economic and political factors. It is important, therefore, to show that the popular view, which suggests that our countries are only the “passive recipients” of migration, is inaccurate. But again, it seems of greater importance to understand what this language of migration, which is neither neutral nor innocent, is saying. Why is it that international migration, as old as humanity itself, today occupies a prominent place in the political agenda of the major immigration countries? Why is international law at its weakest in the migration field, and why do we not have a significant body of international human rights law in this area? What do the diverse responses to migration reveal about us and our identity? This thesis aims to provide an answer to these questions by articulating the reasons underlying the representation of the migrant as both an “[incomplete] universal rights-bearer and a universal threat”,⁸ and by offering new ways of thinking about the migration process. In this doctoral work, there is no formal definition of “migrant”; instead, I refer in general to people who live outside their country of origin for a period of

⁷ Quotation by Michel Rocard, Prime Minister of France from May 1988 to May 1991 (07 January 1990).

⁸ Ronen Shamir, "Without Borders? Notes on Globalization as a Mobility Regime" (2005) 23: 2 *Sociological Theory* at 215.

time (including those who may only stay for a few months): they are moving or have moved, whether permanently or temporarily, to a new place. The term “migrant” is loose enough to cover the various forms of migration and to resist any stereotypical representation of migration that traditionally operates along a dichotomy of “voluntary/forced”, “legal/illegal”, “permanent/temporary” and which relies upon a few strict definitions and labels. Indeed, as is shown in this thesis, migration has not yet evolved as a coherent field of study: the categories used to separate subsets of migrants increasingly overlap on the ground and allow for the stigmatization of those who do not satisfy all the legal requirements. By refusing to reduce the identity of the migrant to a dominant category, I do not, however, wish to imply that migration is problematic for all migrants.

The object of this thesis is to explore and analyze the tension at the heart of the relation between the migrant and political, social and legal institutions. The critical point here is the paradoxical relationship of the migrant to law, which partially explains her exclusion from the protection system and the role that the law plays, both in constructing and maintaining the figure of the migrant as an outsider. The paradox lies principally in the fact that the migrant produces and refines the concepts and processes which form a vital component of law, but cannot enjoy or use the law. She is, to borrow from Fitzpatrick and Tuitt, a “critical being”, a person who is both necessary to and alienated from the law, neither fully included nor absolutely excluded from the juridical order. This term, as the authors rightly suggest, is a more “accurate and nuanced” descriptor than either Hardt and Negris’ multitude or Agamben’s notions of bare life because it not only focuses on the migrant subject being “constituted in law in terms of its exclusion”, but also suggests that she is “constituent of it”.⁹ In doing so, this thesis is aided by social constructivist theories of law,

⁹ *Critical Beings: Law, Nation and the Global Subject*, ed. by Peter Fitzpatrick & Patricia Tuitt (Burlington: Ashgate, 2004) at xii. Quoting: Giorgio Agamben, *Homo Sacer* :

which perceive law first as a construct, in the sense that it is neither self-present, nor self-executing. This approach to law “as nothing natural” paves the way for improvement to the current legal order. Indeed, the law tells a story about what people are and should be, and it is only once we have exposed the “imagination as it constructs a world of legal meaning”¹⁰ that we are in a position to see how the legal order could be constructed differently:

The deconstruction of legal concepts, or of the social vision that informs them, is not nihilistic. Deconstruction is not a call for us to forget about moral certainty, but to remember aspects of human life that were pushed into the background by the necessities of the dominant legal conception which we call into question. Deconstruction is not a denial of the legitimacy of rules and principles; it is an affirmation of those human possibilities that have been overlooked or forgotten in the privileging of particular legal ideas.... By recalling elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society. We can choose to accept the challenge or not, but we will no longer cling blindly to our social vision.¹¹

Sovereign Power and Bare Life (Stanford, Calif.: Stanford University Press, 1998); Michael Hardt & Antonio Negri, *Empire* (Cambridge, Mass. ; London: Harvard University Press, 2000). Many critical scholars increasingly defend the idea that absolute exclusion from the juridical order is impossible. See, among others: S. Kyambi, "National Identity and Refugee Law" in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004), 19. See also: Lea S. Vandervelde, "The Moral Economy of the Purchase of Freedom: Ethical Lessons from the Slave Narratives" (1996) 17 *Cardozo L. Rev.* 1983 at 1985 (speaking of a new “historiography” on slavery and the law which views the slave as “a morally aware participant, rather than simply a passive victim in the drama” and which does not deny the dimension of her “personhood”). For more on this topic, see the section below: “The migrant: a figure made to bear the ambivalence of identity”.

¹⁰ Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 30. For further analysis on the cultural study of law, see page 15 below.

¹¹ J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 *Yale L.J.* 743 at 763. The word “deconstruction” is used here in a Derridean sense, with the objective of 1) showing how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule; and 2) displaying how doctrinal arguments are informed by and disguise ideological thinking. For further analysis, see: Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Oxford, UK; Cambridge, Mass., USA: Blackwell, 1992). See also page 24, below, for more on this topic.

Thus deconstruction, a methodology associated first and foremost with Derrida,¹² aims to reveal the exclusions entailed in categories of systems of thought. This involves pushing to their limit words, phrases and ideas in order to uncover the oppositions and repressed or expelled meanings which can be excavated. As is shown below in greater detail,¹³ law is a fruitful source of deconstruction because of its textuality: laws are written as statutes, cases and judgments are recorded, interpreted and reinterpreted, analyzed and evaluated. In this thesis, by uncovering the subjectivities necessary to law, which until now “have been marginalised in legal discourse in favour of more obviously powerful actors in the national and international arena”,¹⁴ I approach law mainly from a cultural perspective as well as from the perspective of the philosophical literature of “otherness”. The argument proceeds roughly as follows: first, the national identity which the figure of the migrant creates in the domestic sphere acts to ensure her continued exclusion (it will be shown that the operative role of law is central in seeking to preserve the assumed identity of the nation); second, the migrant subject within the purportedly universal international legal regime is constituted by excluding a vast majority of migrants who do not conform to contained and particular categories and who are, therefore, unable to fully engage in or enjoy the law; third, these domestic and international legal responses to cross-border movement, articulated primarily from the perspective of the host country, fail to address the complex, fragmented and blurred realities of migration. In order to understand and better respond to the relationship between the migrant subject and the law, it is necessary to re-centre the migration process around migrant voices, which are still largely omitted from this

¹² See page 19, below, for more on this topic.

¹³ See page 23 and following, below.

¹⁴ Patricia Tuitt, *Race, Law, Resistance* (London; Portland, Or.: GlassHouse, 2004) at xi.

configuration, but can help untangle the confusion occurring at various levels of the international and domestic legal spheres.

Approaching Migration through a Cultural Study of Law

Contemporary legal scholarship may be seen as consisting roughly of two groups, two sets of questions and concerns. On one hand there are the “instrumentalists”, who view law in pragmatic instrumental terms as a tool to be judged by its success or failure in achieving stated ends. In other words, they see law as being evaluated according to its usefulness in solving actual legal problems. On the other hand there are the “culturalists”, for whom the purpose of legal scholarship is to provide an account of the content of legal norms, the meaning of legal texts, and the place of law in culture.¹⁵ This thesis draws on insights of the cultural theory of law but this should not be interpreted to mean that it takes a clear-cut position on the intellectual rivalry between instrumentalist and culturalist approaches to legal analysis: although law is conceived here as a non-autonomous discipline, it seems possible to explore the place of law in culture – and to bring to light the practices and beliefs which underlie the law – with the objective of devising useful solutions to concrete legal problems. The two positions are reconcilable, and indeed few legal scholars would define themselves solely in either cultural or instrumental terms.¹⁶ In this thesis, approaching law from a cultural perspective is an appealing undertaking which opens the way to new and fascinating interdisciplinary research. As explained below, it is a way of demonstrating how, in the current migration system, the problematic figure of the migrant has its roots in the conventional view of identity as static and

¹⁵ For further details, see: Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities" (2005) 3 *Buff. L. Rev.* 973.

¹⁶ In the conclusion of this thesis, I intend to show how and why the ethics of alterity helps to shape the terms of the migration debate in a positive manner. As such, this ethics does not offer an alternative to the existing state-centred legal discourse but, with its fostering of difference and de-centredness, it offers solutions to make better use of this discourse. For further analysis, see page 37 and following, below.

homogeneous.¹⁷ It also shows how, in order to challenge treatment of the migrant in the political and legal arenas and to propose different ways of acting, it is necessary to deconstruct, as a whole, the logic underpinning the migrant's exclusion.¹⁸ More precisely, by showing tensions and contradictions within the dominant legal discourse on migration, both domestically and internationally, this thesis is interested in ultimately offering suggestions about how the migration system could be more "just".

The cultural theory of law incorporates the idea that laws governing the movement of persons are highly influenced by social, economic and/or political factors. Although the cultural theory of law draws upon earlier works in anthropology and cultural theory,¹⁸ the desire to reconnect "law" with a wider cultural context has only recently been articulated by legal scholars. An initial statement was made by Kahn in 1999:

There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life.... [T]he rule of law is neither a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and its individual members. It is both the product of a particular history and constitutive of a certain kind of historical evidence.... To study the rule of law outside of the practice of law is to elaborate this history and to expose the structure of these beliefs.¹⁹

The cultural study of law leads therefore to the recognition that there are "competing worlds of experience, competing ways of understanding an event [and that] every cultural form can be viewed and valued from a

¹⁷ See pages 17 to 27 for more on this topic.

¹⁸ A debt to Geertz's and Foucault's works is often acknowledged in the literature on law and culture: Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London,: Tavistock Publications, 1970); Clifford Geertz, *Local Knowledge : Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

¹⁹ Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, *supra* note 10 at 1 & 6.

variety of perspectives”.²⁰ Although we may disagree with Kahn’s ultimate objective, which is to achieve a radical separation of legal theory from practice,²¹ his central argument that “there is nothing natural about the legal order, that it is a constructed social world that could be constructed differently” (page 43) is a good starting point for the scholar wishing to distance themselves from the obsessive focus on law as a pragmatic tool. In his work, Kahn repeatedly makes an analogy to religious studies, where the aim is not the reform of religious beliefs, but the examination of religion’s significance in regards to human existence.

This focus on law as a way of life rather than as a set of rules is more explicitly stated by Rosen who underlines not only the need to see law as part of a specified culture but also the need to see it as inseparable from other elements of cultural life. He states:

Law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture. If one sees religion as about “ultimate values” rather than concrete designs for understanding and directing everyday life; if one sees economics as only about “the rational calculation of means to ends”, rather than the relations among people as they circulate things to which they attribute meaning; or if one sees law as exclusively concerned with the rules that regulate disputes, rather than a realm in which a society and its members envision themselves and their connections to one another – if, in short, one pulls life and its articulations apart without ever rejoining them through a unified view of the nature of

²⁰ Anna di Robilant, “The Aesthetics of Law” (2001) 1: 2 *Global Jurist Advances* 1 at 1. See also Chase, who draws upon the theoretical insights of Kahn to provide a deep analysis of the connection between culture and disputing processes: Oscar G. Chase, *Law, Culture, and Ritual : Disputing Systems in Cross-Cultural Context* (New York: New York University Press, 2005).

²¹ In making his call for a “new discipline of law”, Kahn explains that “tak[ing] up such a study requires turning legal scholarship away from the project of law reform”: Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, *supra* note 10 at 43. For criticism of this entrenched position, see above, page 10.

culture, then the reification of our momentary view of how the world is composed will triumph over our need to understand it from afar.²²

In sum, in a context where culture is treated as “the capacity for creating the categories of our experience”, law is just one of the windows on the social world.²³ Although law “possess[es] a distinctive history and terminology”, it does not exist in isolation: “To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture”.²⁴ This insistence on the importance of the problematization of law in relation to other areas of life, and thus to other disciplinary fields, makes a great deal of sense to the migration scholar. Indeed, although law presents itself as pure, self-present, self-executing and devoid of “significance” as to its content, law is in fact “neither a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and its individual members”.²⁵ This explains why it is essential to study international migration from a trans-disciplinary perspective: first, as will be shown here, the content of migration law and the law governing the movement of people between states is essentially dictated by concerns of the political arena; second, nuances are key to understanding migration issues and, in such a multidimensional field as migration, there are no simple solutions. And as demonstrated in the following section, this also explains why, in the field of migration, it is necessary to highlight the pivotal role of metaphors in hiding normative processes.

²² Lawrence Rosen, *Law as Culture: an Invitation* (Princeton: Princeton University Press, 2006) at xii.

²³ In the past, Durkheim made a similar claim for religion: Emile Durkheim, *The Elementary Forms of Religious Life*, ed. by Mark Sydney Cladis, trans. by Carol Cosman (Oxford New York: Oxford University Press, 2001).

²⁴ Rosen, *Law as Culture: an Invitation*, *supra* note 22, at 4.

²⁵ Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, *supra* note 10 at 6.

Migration and Metaphor: The Role of Metaphor in Hiding Normative Processes

This thesis is elaborated around the idea of the “conceptualization of migration” - within the national political and legal arenas of Western receiving societies (Part One), and within the international legal system (Part Two). This is done in order to distance my doctoral work from the authoritative discourse in which law situates itself within the field of migration.

“Conceptualization”, which is not synonymous with “description” or “definition”, means constructing something as an object of commonly understood knowledge. A concept is a mental representation which stands for something in the external world through the sharing of linguistic practices: meaning is neither fixed nor given; it is the result of our social and cultural conventions. Therefore, when we talk about the conceptualization of migration, we are talking about the way migration is produced as an object of knowledge by means of concepts that are easily knowable by people in a particular cultural, social, legal and institutional context. In other words, we represent migration “metaphorically” and, most importantly, without realizing we are doing so. This latest point is crucial because linguistic expression is anything but disinterested, and the metaphorical language we use to talk about migration carries with it certain implications for the way Western societies think about and, as a result, act towards migrants.²⁶

²⁶ David Turton, "Conceptualising Forced Migration" (October 2003) S.R.C Working Paper no 12, online: Refugee Studies Centre <<http://www.rsc.ox.ac.uk/PDFs/workingpaper12.pdf>> (accessed on 03 October 2006) at 2-3.

The role of metaphor may appear to be a subject more appropriate for a work on literature than on law, but “metaphor may well be the key mechanism through which all of the crucial connections among cultural domains take place”.²⁷ Lakoff and Johnson have examined the way metaphors structure our daily perceptions and understanding:

Metaphor is for most people a device of the poetic imagination ... a matter of extraordinary rather than ordinary language... [it] is typically viewed as ... a matter of words rather than thought or action. ... on the contrary ... metaphor is pervasive in everyday life, not just in language but also in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.

The concepts that govern our thought ... structure what we perceive, how we get around in the world, and how we relate to other people. Our conceptual system thus plays a central role in defining our everyday realities....

But our conceptual system is not something we are normally aware of. In most of the little things we do every day, we simply think and act more or less automatically along certain lines.²⁸

In other words, ordinary language is permeated by “metaphorical concepts” providing coherent structures for thinking and speaking about one domain (the target) in terms of another (the source). They are so ubiquitous that we are hardly aware of them qua metaphors and tend to

²⁷ Rosen, *Law as Culture: an Invitation*, *supra* note 22 at 9.

²⁸ George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003) at 3. This book led to a flourishing series of studies on the metaphorical structure of language and thought, including many applications to various specific domains. See *e.g.*: M. Johnson, *The Body in the Mind: The Bodily Basis of Reason and Imagination* (Chicago: The University of Chicago Press., 1987); George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (Chicago: University of Chicago Press, 1987); George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* (New York: Basic Books, 1999); George Lakoff & Mark Turner, *More Than Cool Reason: A Field Guide to Poetic Metaphor* (Chicago: University of Chicago Press, 1989); *Metonymy in Language and Thought*, ed. by Klaus-Uwe Panther & Günter Radden (Amsterdam; Philadelphia: J. Benjamins, 1999) .

use them as if they were literal.²⁹ The fact that we are unaware of the “metaphors we live by” is crucial: it explains clearly their power to determine the way we act in relation to the objective events and processes which they represent.³⁰ But, as Hannerz has put it, “when you take an intellectual ride on a metaphor, it is important that you know where to get off”.³¹ To which one might add that it is even more important to know that you are riding on a metaphor in the first place. Although it might be impossible to stop using metaphors to talk about something so complex as migration, it is necessary to recognize that we are speaking metaphorically and that the metaphorical language we use encourages us to think in a certain way about the people in question, and then to “get off” the metaphor before it is too late.

Apparently, the authors of legal texts abhor the use of metaphor and don’t make even the slightest effort to seduce their readers. Yet, as we try to look for the place of culture in law and the inescapable role of law as culture, we will necessarily have to consider the role of metaphor in hiding normative processes, by making them all the more difficult to challenge, and hence, all the more effective. As Rosen states: “Metaphors are the

²⁹ When one says, for example: “I don’t have time for you right now”, “That flat tire cost me an hour”, “I don’t have enough time to spare for that”, “You’re wasting my time”, “I’ve invested a lot of time in her” etc. – one represents time as money, something that can be bought and sold. This representation of time as a valuable commodity, as a limited resource that we use to accomplish our goals, is relatively new in the history of humanity and by no means exists in all cultures. It is the nature of modern industrialized societies to understand and experience time as something that can be spent, wasted, budgeted, invested wisely or poorly, saved, or squandered: Lakoff & Johnson, *ibid.* at 8. Thus, unlike logic, no metaphor or metonymy can claim universality or exclusiveness. However powerful, handy and habitual, a metaphorical or metonymic schema can be replaced by a new one, or by one we find in another culture or language: Marcelo Dascal, “Argument, War, and the Role of the Media in Conflict Management” in T. Parfitt & Yulia Ergorova, eds, *Jews, Muslims, and the Mass Media: Mediating the ‘Other’* (London: Routledge, 2004), 228.

³⁰ Turton, “Conceptualising Forced Migration”, *supra* note 26 at 4.

³¹ Ulf Hannerz, “Flows, Boundaries and Hybrids: Keywords in Transnational Anthropology” (2002) Working Paper WPTC-2K-02, ESRC Transnational Communities Programme at 6.

glue of social and cultural life. They knit together the different domains in which our concepts and our relationships exist with such force that they seem to be features of [a] natural world [in which] what is true in every domain of culture is, by definition, true in law as well".³² In such a context, the relationship between law and migration - despite its claim of neutrality - cannot be seen as rational: the law produces particular images of the migrant which influence our cultural thinking about migration. As will be shown here at length, these images are very reductive of the migrant's identity, justifying her arbitrary exclusion from certain rights and benefits. They also reflect a relationship between law and the migrant which is not properly articulated in terms of exclusion, but rather, is riddled with conflict.

This brings me, in the next section, to an analysis of the tension at the heart of the migration discourse, its close connection to the critical question of "otherness" and its dependence upon the portrayal of those migrants outside the narrow, entrenched and dominant identities as the ultimate "others". As shown in the following lines, the concept of identity occupies a pivotal place in any investigation related to migration. Positing identity as a construct³³ - and therefore nonessential, relative, indeterminate, and abstract - helps to further our understanding of the prominent place occupied by South-North migration on the political agenda of Western societies. It also offers an explanation for the limits of

³² Rosen, *Law as Culture: an Invitation*, *supra* note 22 at 132-33.

³³ There is a tension in current scholarly literature "between the notion that identity is essential, fundamental, unitary, and unchanging, and the notion that identities are constructed and reconstructed through historical action": Richard Handler, "Is 'Identity' a Useful Cross-Cultural Concept?" in John R. Gillis, ed, *Commemorations. The Politics of National Identity* (Princeton: Princeton University Press, 1994) at 29. This thesis, in line with works in cultural theory of the past twenty years that criticize reifying and essentialist models of culture, adopts the position that identity is not fixed and immutable and agrees that culture is "a deeply compromised idea [we] cannot do without". For more on this topic, see: James Clifford, *The Predicament of Culture : Twentieth-Century Ethnography, Literature, and Art* (Cambridge, Mass.: Harvard University Press, 1988) at 8. See also: E. J. Hobsbawm & T. O. Ranger, *The Invention of Tradition* (Cambridge; New York: Cambridge University Press, 1983); Roy Wagner, *The Invention of Culture* (Englewood Cliffs, N.J.: Prentice-Hall, 1975). See finally the next section, below.

the modern international legal regime as related to cross-border movement.

Seeing Migration at the Heart of the Nexus between Identity and Otherness

[I]n creating our own centers and our own locals, we tend to forget that our centers displace others into the peripheries of our making.³⁴

Conventional accounts of identity are essentialist, seeing identity as self-enclosed and simply present to itself. In these accounts, identity is perceived as generated by itself rather than interactively. In the case of nation-states, for instance, this conception of identity as “unique” means that the nation simply “is” and that it exists independently.³⁵ Yet attempts to comprehend national identity as generated from within conflict with the inability to state what it really “is”. As Fitzpatrick notes, “Nation cannot be encompassed in an ordinary correspondence to some thing(s) which would tell us what it positively ‘is’. On the contrary ... identity is formed in terms of what it is not”.³⁶ This inability to state positively what nation “is” reveals a problem for essentialist notions of identity. It also explains why the determination of the “other” is indistinguishable from the ideology of

³⁴ Elspeth Probyn, "Travels in the Postmodern: Making Sense of the Local" in L. Nicolson, ed, *Feminism/Postmodernism* (New York: Routledge, 1990), 176.

³⁵ For example, Bagehot's aphorism on nation proclaims: “[W]e know what it is when you do not ask us, but we cannot very quickly explain or define it”. What is highlighted here is the assumed self-presence of national identity which is held to exist and be immediately evident. Identity is perceived as being known to itself, from within itself, and known instinctively: Walter Bagehot, *Physics and Politics : or, Thoughts on the Application of the Principles of "Natural Selection" And "Inheritance" to Political Society* (London: [s.n.], 1872) at 20. Wodak writes: “Used as a completely static idea, the concept wrongly suggests that people belong to a solid, unchanging, intrinsic collective unit because of a specific history which they supposedly have in common, and that as a consequence they feel obliged to act and react as a group when they are threatened. Understood in this way, it is incapable of explaining why the social actors involved act in a certain way.... Given the assumption of homogeneity and constancy, the term in this sense cannot do sufficient justice to the complexity of the relationships a more comprehensive definition of identity must consider.”: Ruth Wodak, *The Discursive Construction of National Identity* (Edinburgh: Edinburgh University Press, 1999) at 11. See also note 33, *supra*, for more on this topic.

³⁶ Peter Fitzpatrick, *Nationalism, Racism, and the Rule of Law* (Aldershot; Brookfield, USA: Dartmouth, 1995) at 10.

identity. Thus, contrary to conventional accounts of identity which see it as static and achieved, my claim in this thesis is that every construction of identity involves two conflicting impulses: exclusion and inclusion. Simply put, “[T]here would be no enemies were there no friends, and there would be no friends if not for the yawning abyss of enmity outside”.³⁷ This approach, which draws on the philosophical literature of “otherness”, provides the basis in this work for exploration of the nexus between otherness, identity and migration.³⁸

The Derridean concept of “Différance” illustrates well the tension between the self and the other. Différance is a pun based upon the French word “différer”, which means both to differ and to defer. Derrida coined it in

³⁷ Zygmunt Bauman, *Modernity and Ambivalence* (Oxford: Polity Press, 1991) at 53.

³⁸ In fact, the nexus is between identity, modernity and otherness, many philosophers having shown that the idea of the subjective self, determined in relation to the “other”, is a construct of modern societies. What is generally accepted is that prior to the Renaissance, Western society defined the self according to its position within both a “secular and divine order” in which each member of society had their rightful place. However, with the rise of Renaissance humanism and the Enlightenment, the individual was conceived as sovereign and epistemologically central. This reconfiguration of the self, spurred by historical events such as the Protestant Reformation and the scientific revolution, ultimately led to systematic examination of the modern self: Stuart Hall, “The Question of Cultural Identity” in Stuart Hall et al., eds, *Modernity and Its Futures* (Cambridge: Polity Press in association with the Open University, 1992), 592 at 602-03. The philosophical construct of modernity owes a important debt to Kant who determined in a 1797 book that self-determination (in Kantian terms “the morally determined self”) is a concentration on the other: Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary J. Gregor (Cambridge ; New York: Cambridge University Press, 1996). For further details, see also the first chapter of: Elizabeth Rottenberg, *Inheriting the Future : Legacies of Kant, Freud, and Flaubert* (Stanford, Calif.: Stanford University Press, 2005). The influential contemporary philosophers of “otherness” are numerous. See for instance: Jurgen Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe” (1992) 12: 1 *Praxis International* 1 (explaining that modernity is “obsessed” with marginalization, determining identities and refining the subjectivity of the self); Hélène Cixous, “We Who Are Free, Are We Free?” in Barbara Johnson, ed, *Freedom and Interpretation: The Oxford Amnesty Lectures 1992*, trans. by Chris Miller (New York: Basic Books, 1993), 17 (showing that in the modernist tradition, identity is co-determinative with the idea of the self); Julia Kristeva, *Nations without Nationalism* (New York, NY: Columbia University Press, 1993) (emphasizing the increasingly frenetic search for origins and identities which characterizes the late modern world). The thesis, however, specifically elaborates upon the writings of Derrida and Foucault in order to demonstrate ultimately that the crisis of modernity is a crisis of identity.

1968 in light of his research into the Saussurian and structuralist theories of language. One way of explaining Différance, Derrida tells us, is to approach it through the theory of the linguistic sign. The notion of the arbitrariness of the sign, which Derrida borrows and develops from and against Saussure, leads to the realization that the sign achieves its value or meaning only through its difference from other signs and not from any intrinsic value attached to that sign. For instance, the only requirement for the letter “t” to be identified as a “t” is that it be distinguishable from the letters “l”, “d”, and so on. Thus, given the relational nature of meanings, each sign is constantly evolving from an agglomeration of others in relation to which it is in a continual state of differing and deferral.³⁹ From Différance we understand, therefore, that both of the terms in opposition rely for their coherence on the differentiation between them. This relation is one of mutual dependence and difference, or Différance.⁴⁰ Put differently, definition and naming depend on differentiation of a thing or a quality from its opposite. We only recognize things by being able to distinguish them from what they are not, and terms have meaning because of the relation with their opposites. The term “female”, for example, would have no meaning if we did not have a sense of “male”: “female” only has meaning if we know that beings are differently sexed.⁴¹ In a 1992 essay on Europe, Derrida took up the concept of Différance and applied it to the topic of European identity. He proposed a definition of culture that would change the whole question of where Europe headed:

³⁹ Jacques Derrida, “La Différance” in *Théorie d'ensemble* (Paris: Seuil, 1968), 49. See also Laclau and Mouffe, who refer to Greimas’ *carré sémiotique* (semiotic square) in which the meaning of “white” and “black” is ultimately “non-black” and “non-white”: Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy : Towards a Radical Democratic Politics* (London: Verso, 1985) at 129. Quoting: Algirdas Julien Greimas, *On Meaning : Selected Writings in Semiotic Theory* (Minneapolis: University of Minnesota Press, 1987). See finally: Richard Beardsworth, *Derrida & the Political* (London ; New York: Routledge, 1996) at 6-20.

⁴⁰ For further details, see also: Balkin, “Deconstructive Practice and Legal Theory”, *supra* note 11 at 752.

⁴¹ Barbara Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity* (London: SAGE, 2003) at 181.

What is proper to a culture is to not be identical to itself. ... Not to not have an identity, but not to be able to identify itself, to be able to say "me" or "we"; to be able to take the form of a subject only in the non-identity to itself or, if you prefer, only in the difference with itself [avec soi]. There is no culture or cultural identity without this difference with itself.⁴²

It can be understood from Derrida's reading of the logic of identity that any subject which takes a stand on identity does so in relation to a certain difference with that identity and that any identity is, therefore, always marked by its constitutive outside, its own difference to itself. In other words, identity, which is always derived in the process of an interaction and not a stasis, is an effect of difference and the setting of limits.⁴³ Based on this preliminary analysis of identity, the solution for the future of an exhausted Europe, Derrida tells us, seems fairly straightforward: since it is impossible to return to a single, pure identity, the only option is to cultivate differences to that identity and to move away from the traditional conception of Europe. Later, Derrida reaffirms the same argument in his *Spectres of Marx*, suggesting that the only thing that provides Europe with either a cultural or a geo-political identity is an appreciation of justice as an acceptance of fundamental difference.⁴⁴

⁴² Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (Bloomington: Indiana University Press, 1992) at 9.

⁴³ Drawing on Derrida, Laclau describes the relation between exclusion and identity as follows: "Antagonism and exclusion are constitutive of all identity. Without limits through which a (non-dialectical) negativity is constructed, we would have an indefinite dispersion of differences whose absence of systematic limits would make any differential identity impossible": Ernesto Laclau, *Emancipation(S)* (New York: Verso, 1996) at 52. Thus, "all identity is relational and all relations have a necessary character ... for the same reason that the social cannot be reduced to the interiority of a fixed system of differences, pure exteriority is also impossible": Laclau & Mouffe, *Hegemony and Socialist Strategy : Towards a Radical Democratic Politics*, supra note 39 at 106-11.

⁴⁴ Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (New York: Routledge, 1994) at 62-64.

Derrida's work reflects his critique of Western thought's emphasis on unambiguous and foundational concepts such as meaning, truth or identity. Yet in every society, the construction of identity involves the establishment of opposites and "others". It is important to make this point here since the Derridean approach should not necessarily be limited to Western identity. Thus, we must heed Said's warning against "any attempt to force cultures and peoples into separate and distinct breeds or essences".⁴⁵ In the afterword to the 1994 edition of *Orientalism*, the author, who showed how Orientalism helped define Europe's self-image, complains that hostile critics have misread the book as a polemic against Western civilization. He explains:

The task for the critical scholar is not to separate one struggle from another, but to connect them, despite the contrast between the overpowering materiality of the former and the apparent otherworldly refinements of the latter. My way of doing this has been to show that the development and maintenance of every culture require the existence of another, different and competing *alter ego*. The construction of identity – whether of Orient or Occident, France or Britain, while obviously a repository of distinct collective experiences, is finally a construction in my opinion – involves the construction of opposites and others whose actuality is always subject to the continuous interpretation and re-interpretation of their differences from "us". Each age and society recreates its "Others". Far from a static thing then, identity of self or of "other" is a much worked-over historical, social, intellectual and political process that takes place as a contest involving individuals and institutions in all societies. [author's emphasis]⁴⁶

It is no wonder, then, that the attitudes towards foreigners of the societies of the "Global North" are increasingly found in some major host societies of the "Global South" which speak about - and therefore act towards - undesirable migrants in almost exactly the same way as the

⁴⁵ Edward W. Said, *Orientalism* (New York: Vintage Books, 1994) at 347.

⁴⁶ *Ibid.* at 331-32.

former.⁴⁷ Thus, it is not simply by accident that in every society certain persons or groups are excluded: due to the categories of thought and language from which it is constructed, exclusion is an integral and unavoidable principle of identity. Although it is important to stress this point, research is limited here to societies of the “Global North”, which I refer to as “Western receiving societies”.

What particular challenges does the notion of Différance pose to the legal system? If Différance is to be found everywhere, then law, like “any system of thought that proceeds by marking out the fundamental, the essential, the normal, or the most important”, is contingent and provides a fertile field of discourse for deconstructive readings.⁴⁸ Derrida writes: “Law is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata ... or because its ultimate foundation is by definition unfounded”.⁴⁹ Thus, law “is not a tangible object of the real word” but “a concept or process” that is never innocent.⁵⁰ It is neither self-present nor self-executing and it must be seen as “an

⁴⁷ For more on this topic, see e.g.: Carlos Sandoval Garcia, *Threatening Others: Nicaraguans and the Formation of National Identities in Costa Rica* (Athens: Ohio University Press, 2004); Ratna Kapur, “The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion” (2007) 8: 2 *Theor. Inq. L.*; Nevzat Soguk, “Poetics of a World of Migrancy: Migratory Horizons, Passages, and Encounters of Alterity” (2000) 14: 3 *Global Society* 415 at 423.

⁴⁸ Balkin, “Deconstructive Practice and Legal Theory”, *supra* note 11 at 754. The idea that law is an unstable and contingent phenomenon is not completely new. More than 70 years ago, people known today as legal realists expounded the same views, but with less conceptual rigour: F. Cohen, “Transcendental Nonsense and the Functional Approach” (1935) *Columbia Law Review* 809; J. Frank, “Legal Thinking in Three Dimensions” (1949) 1 *Syracuse L. Rev.* 9; R. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Political Science Quarterly* 470.

⁴⁹ Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” in Drucilla Cornell, Michael Rosenfeld & David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), 3 at 14. Derrida adds elsewhere that the authority of law rests only on the credit given to law: “One believes in it; that is the only foundation [of law]. This act of faith is not an ontological or rational foundation”: Jacques Derrida & Gil Anidjar, eds, *Acts of Religion* (New York ; London: Routledge, 2002) at 240.

⁵⁰ Lawrence Meir Friedman, *Law and Society: An Introduction* (Englewood Cliffs, N.J.: Prentice-Hall, 1976) at 3.

abstraction, a set of rules, principles and ideas"⁵¹ which is ontologically aleatory. Seen from this perspective, the discourse of law is the product of our particular history and not of any transcendental domain, such as, for instance, universal justice, the nature of the international community, or the basic principles of reason. Therefore, probing the language of law through deconstruction reveals the politics of inclusion, exclusion, protection and repression contained in law, in addition to destabilizing the claims of these powerful discourses to authority.⁵² Several authors have already pointed out the linkage of the idea of rights to the repression of people who are excluded from rights. They have shown that the definitional necessity of the negative other means that there must always be a group who can be identified as the negative. "As one group gains rights, another, or a residue of the rights-gaining group, must remain without rights in order to maintain the understanding of what rights are".⁵³ In the case of slavery, for instance, the relationship of rights was not that of balancing rights held by both parties, but rather that of rights/no rights, thereby echoing the postmodernist theme of the necessity for each "thing" to be defined in contrast to its opposite. Enlightenment, with its ideal of freedom, accommodated slavery. It would be more surprising if it had not, writes Morrison, since "[t]he concept of freedom did not arise in a vacuum. Nothing highlighted freedom - if it did not in fact create it - like slavery"⁵⁴. Exclusion is thus an integral and unavoidable principle of the legal system because of the categories of thought and language from which it is

⁵¹ P. S. Atiyah, *Law and Modern Society* (Oxford: Oxford University Press, 1995) at 117.

⁵² Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 41 at 185.

⁵³ Hudson, *ibid.* at 182. See numerous examples in: Jack M. Balkin, "Deconstruction" in D. Patterson, ed, *A Companion to the Philosophy of Law and Legal Theory* (Malden, MA: Blackwell Publishing Limited, 1996); Margaret Davies, "Exclusion and the Identity of Law" (2005) 5 *Macquarie Law Journal* 5. For more on this topic, see the introduction to Part II

⁵⁴ Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* (New York: Vintage Books, 1993) at 38.

constructed. In this thesis I examine the necessity of the negative other in the field of migration. More specifically, I investigate how migration law sustains the exclusionary mechanisms of the migrant, a vital component in reinforcing the national identity of host states. I also explore international legal responses to human cross-border movement, which has been addressed in international law through the use of categorical distinctions. Central to this analysis is the role of ambivalence in the process of identity formation. Clearly, the relation between the migrant subject and the constitution of the societies, institutions, and structures from which she has been ousted (and the dominant role of law in maintaining the migrant as an “outsider”) is not one properly articulated in terms of exclusion but rather one ridden with conflict:

Though not excluded from the juridical order, the [outsider categories] are in conflict with it. The conflict is born of the fact that for the law to function as slave or servile force, the [protagonist] must exist simultaneously with the operation of the law. ... It is thus that [we can] speak of a reflexive relation between the law and [the migrant].⁵⁵

Therefore, before examining some of the more powerful mechanisms of exclusion which the law applies to the migrant subject - both domestically and internationally, it is essential to understand the central role of ambivalence in the process of identity formation. This is all the more important since, as demonstrated in the next section, this ambivalence is denied in conventional accounts of identity, which largely prevail in law and migration policies. To a great extent, this denial of the role of ambivalence displaces ambivalence onto the migrant who is then penalized for it.

⁵⁵ Tuitt, *Race, Law, Resistance*, *supra* note 14 at 5. To support her argument, Tuitt explains in her book that the existence of the slave was almost simultaneous with the emergence of law.

The Migrant: A Figure Made to Bear the Ambivalence of Identity

A Derridean focus on identity in terms of the processes between which identity is suspended - inclusion and exclusion - brings us to realize that these two conflicting impulses remain inextricably linked. More precisely, the very act of drawing the boundary between the inside and the outside continually reveals “that the ‘outside’ is known ‘inside’ and therefore cannot be totally ‘outside’ as proclaimed”.⁵⁶ Thus the relationship with the “other” is not an external relationship, but structures one’s identity from within. This reveals an instability within identity as its boundary cannot be finally and definitely determinative of identity, as any attempt at a separation finds itself undermined in the claim it makes as to the finality of that exclusion and separation. The very failure of the attempt to found identity through exclusion and separation is what gives identity its force, as its failure ensures the continuing necessity of the act of exclusion. In other words, it is the persistent presence of the outside within that allows the act of exclusion to be continually repeated. It is a “productive failure” which renders identity “always anxious as it is assertive”.⁵⁷ This recognition of the ambivalence of identity shifts the arena of conflict away from a confrontation between the self and the other who are imagined as separate identities, as in Huntington’s head-on “clash of civilization”, into a conflict over the distinction between self and other, making the separation of self from other simply impossible. “In this view, the conflict of identity is transformed from a conflict at the boundary to a conflict about the

⁵⁶ Kyambi, “National Identity”, *supra* note 9 at 20.

⁵⁷ Homi K. Bhabha, *The Location of Culture* (London; New York: Routledge, 1994) at 70. In discussing this ambivalence in the colonial sphere, where the ambivalence of identity creates a problem in distinguishing between self and other, Bhabha expresses it as “not Self and Other but the otherness of the Self inscribed in the perverse palimpsest of colonial identity”: Bhabha, *The Location of Culture*, at 44. Recognition of what Bhabha terms the “otherness of the self” makes the essentialist and straightforward separation of self from other impossible.

boundary”,⁵⁸ and the problem of identity becomes a problem of proximity to, rather than distance from, the other.

The idea that ambivalence is central to identity stands in marked contrast to conventional notions of identity in which the boundary between inside and outside remains static rather than in constant evolution. Purity of origin is central to such accounts, viewing identity as static and achieved, self-enclosed and distinct. In such a context, then, “all that is necessary to re-establish its purity is to retrace those originary lines and so mark its boundaries”.⁵⁹ The obsession with clear boundaries, viewed as self-evident and pre-existent, makes it simply impossible to acknowledge the continual tension between inside and outside. The denial of ambivalence in conventional accounts of identity naturalizes the boundary between inside and outside as something which simply exists, as opposed to a place of continual tension. This creates particular problems in the field of migration, which I will now proceed to discuss in greater detail.

Contemporary debates surrounding South-North migration in Western receiving societies reveal the ambivalence that pervades national identity and law. Law is an essential agent in the nation’s relationship to the other. Following Derrida’s position which states that every self carries within it an ineradicable trace of its external other, which is to say that the other is never really external and never really an other, Fitzpatrick has even described this relationship between law and nation as one of complementarity, where they “mutually compensate for their intrinsic inadequacies”. In his analysis, “the irresolution of nation’s identity is

⁵⁸ Kyambi, “National Identity”, *supra* note 9 at 21.

⁵⁹ *Ibid.* at 21.

'overcome' by law and the irresolution of law's identity is 'overcome' by nation"⁶⁰:

Law ... has to be particularly situated so as to be determined and determining. It has, that is, to be of a contained place, yet not contained by it. This impossible combination is accommodated by itself becoming constituent of the nation. The resulting irresolution 'in' nation is played out in terms of nation's being both particularly placed and universally uncontained. As with ... law, it is in being set against certain alterities that nation assumes an ostensible coherence and its irresolution is putatively – 'resolved', that is to say buried, dissimulated, repressed.⁶¹

Law, then, is continually formative of nation. "This assertion of nation through law", writes Fitzpatrick, "comes about not because nation achieves an ultimately assured identity but precisely because it does not - because, that is, it is always unresolved in between the universal and the particular and always 'becoming' other than what it is".⁶² Simply put, the commonality of nation and law is their need for boundaries: "The othering process facilitates a fixed idea of nation and does so relying on a fixed idea of the law. The two are necessarily intertwined".⁶³ As migration law is concerned with the limit of nation, the border itself and the mythology of national identity, it constitutes a site where complementarity is easily observed. The "overcoming" essential to Fitzpatrick's argument is illustrated in the incessant adjustment of migration law to meet national need and the use of national need as a device to justify migration statutes.⁶⁴

⁶⁰ Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 129.

⁶¹ *Ibid.* at 111. Quoting Derrida: Derrida, "Force of Law: The Mystical Foundation of Authority", *supra* note 49 at 23.

⁶² Fitzpatrick, *Modernism and the Grounds of Law*, *supra* note 60 at 111-12.

⁶³ Catherine Dauvergne, "Making People Illegal" in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004) at 94.

⁶⁴ *Ibid.*

The present state of international law as related to the movement of people, which reflects a view that there are proper and improper reasons to migrate, is also permeated by the ambivalence it seeks to suppress. In line with those scholars who regard international law as a complicated and non-linear project,⁶⁵ the reduction of the migrant identity to strict definitions and labels derives from a construction of identity and is, therefore, “always under threat from that which it excludes”.⁶⁶ More specifically, “insofar as all presence is always permeated with absence, and all entities ... require in their constitution a certain boundary of exclusion beyond which they locate their constitutive outsides and thus derive a sense of their identity, the view that international law could ever become all-inclusive appears to be analytically unsustainable”.⁶⁷ In other words, there must always be a certain incommensurable other against which the international juridical order can construct its *raison d'être* and develop its ideal self-image. Therefore, international law cannot exist without a global caste of international *refusés*: “[l]aw and exclusion walk hand in hand. Global law requires global exclusion”, and “to the extent to which there has to be created a domain of international legality, there must also be (simultaneously) created a corresponding class of [...] outlaws”.⁶⁸ If, for instance, one looks at refugee law, the definition of a “refugee” is quite clear: “A person becomes a refugee at the moment when he or she satisfies the definition, so that the determination of status is declaratory,

⁶⁵ See, in particular: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, UK; New York: Cambridge University Press, 2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, UK; New York: Cambridge University Press, 2001); Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law" (1996) 5: 4 *Social & Legal Studies* 321; David Kennedy, "When Renewal Repeats: Thinking against the Box" (2000) 32: 2 N.Y.U. J. Int'l. & Pol. 335; Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law?: Postmodern Anxieties" (2002) 15: 3 *Leiden J. Int'l L.* 553; Susan Marks, "The End of History? Reflections on Some International Legal Theses" (1997) 8 *E.J.I.L.* 449.

⁶⁶ Kyambi, "National Identity", *supra* note 9 at 25.

⁶⁷ Akbar Rasulov, "International Law and the Poststructuralist Challenge" (2006) 19 *Leiden Journal of International Law* 799 at 812.

⁶⁸ *Ibid.*

rather than constitutive”.⁶⁹ But in fact, the 1951 Refugee Convention definition attains clarity through the suppression of other refugee claims which fall outside this definition. This “reduction of refugee identities”,⁷⁰ limits the types of refugees that are legally recognizable as such, and makes it possible for those who do not satisfy all requirements of this category to be stigmatized as “fraudulent”, “illegal”, “suspect” or “less deserving”. This occurs precisely because questions concerning the definition’s construction are inadmissible, thus concealing and legitimizing the stigmatization and exclusion of those outside it. In sum, the purpose of the Convention is to define who is a refugee; it does not recognize that it also deprives others of their refugee claims by not including them in the Convention refugee definition. It does not recognize its own construction of the boundary and substitutes that construction with the simple location of the boundary.⁷¹

To summarize, national and international legal responses to human cross-border movement are rife with ambivalence, and lack a clear divide in the process of identity formation which they seek unsuccessfully to suppress. Like any social identity, national identity is an unstable construct in which the emphasis, to paraphrase Stuart Hall, is “on becoming rather than on being”.⁷² This ongoing process derives from a tension between the relation to and the separation from a discredited outside and involves two conflicting impulses (exclusion and inclusion) which are, in fact, inextricably linked. In addition, there is a theoretical tension at the heart of

⁶⁹ Guy. S. Goodwin-Gill, *The Refugee in International Law*, 2^a ed (Oxford: Clarendon Press, 1996) at 32.

⁷⁰ Patricia Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996) at 14. *Convention Relating to the Status of Refugees*, 14 December 1950, 189 U.N.T.S. 137 [1951 Refugee Convention].

⁷¹ Kyambi, "National Identity", *supra* note 9 at 27. See also: Giorgio Agamben, *Means without End : Notes on Politics* (Minneapolis: University of Minnesota Press, 2000); Costas Douzinas, *The End of Human Rights : Critical Legal Thought at the Turn of the Century* (Oxford: Hart Pub., 2000).

⁷² Stuart Hall, "Who Needs 'Identity'?" in Stuart Hall & Paul Du Gay, eds, *Questions of Cultural Identity* (London; Thousand Oaks, Calif.: Sage, 1996), 1 at 2.

the international legal regime governing the movement of persons between or within states. This tension derives from assumptions about law as an objective, external, neutral truth (the universalist premise of international human rights law) and the exclusionary potential of legal discourse. As such, the need to conform to particular, contained categories, which are “incommensurate with, and set within, the universalist appropriation of the place of the human in human rights”⁷³ is highly problematic for the migrant subject.

Avoiding ambivalence in identity has turned the discourse on migration into one against migrants, which allows for their stigmatization and exclusion. Thus ambivalence, which is impossible to suppress, is displaced onto the figure of the migrant. The migrant’s position, both inside and outside the boundaries, highlights this ambivalence in a way that is contrary to the requirement that identity be fixed and unambivalent:

Oppositions enable knowledge and action; undecidables paralyze them. Undecidables brutally expose the artifice, the fragility, the sham of the most vital of separations. They bring the outside into the inside, and poison the comfort of order with suspicion of chaos. This is exactly what the strangers do.⁷⁴

The migrant, with her assault on several crucial oppositions, is instrumental in the incessant effort of ordering. As shown in Part One of this thesis, she is the one who makes her way into our country “uninvited”. Because she “refuses to remain confined to the ‘far away’ land”, she “defies the easy expedient of spatial segregation”.⁷⁵ In addition to being a “transgressor”, she is a person without established connections who

⁷³ Peter Fitzpatrick, “Terminal Legality? Human Rights and Critical Being” in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004), 119 at 125.

⁷⁴ Bauman, *Modernity and Ambivalence*, *supra* note 37 at 56.

⁷⁵ *Ibid.* at 59.

cannot be easily located (and “fixed”) within the national order. She is therefore a person who is distant in spite of her proximity (even though she is close by):

[She] disturbs the resonance between physical and psychological distance: [She] is *physically close* while remaining *spiritually remote*. [She] brings into the inner circle of proximity the kind of difference and otherness that are tolerated and anticipated only at a distance – where they can be either dismissed as irrelevant or repelled as hostile. [She] represents an incongruous and hence resented ‘synthesis of nearness and remoteness’.⁷⁶ [authors’ emphasis]

As shown in Part Two of this thesis, this person makes her decision to migrate in response to a complex set of external constraints and predisposing events, thereby also questioning the plausibility of the traditional forced/ voluntary migration dichotomy and unmasking the artificiality of division between particular individualized categories of migrants.

It is impossible to completely bypass the space the migrant occupies. She cannot be made “non-existent” in the (inter)national migration system. Nor can we deny the complex reality of migration today. The migrant can, nonetheless, be made “untouchable”. Given that she has forcibly brought about an encounter by entering our space and crossing the borders of our community, we need to classify her in order to render her predictable, as well as to assess and manage the risk she may pose. This explains why, in Part One, we present the migrant in Western receiving societies as simultaneously “poor”, “mobile”, “culturally different”, and consequently, a potentially dangerous person, the “invader” who

⁷⁶ *Ibid.* at 60. Quoting: Georg Simmel, *On Individuality and Social Forms; Selected Writings* (Chicago: University of Chicago Press, 1971) at 145. For more on this topic, see also: Zygmunt Bauman, *Postmodernity and Its Discontents* (New York: New York University Press, 1997); Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000).

wants to “settle indefinitely in the prosperous economies to benefit from the welfare state” etc. It also explains legitimation of the use of a variety of governmental methods designed to categorize and track such “dangerous” persons: according to this argument, there needs to be a strong and efficient mobility regime to counteract this “uncontrolled wave of unwanted migration”. This also makes clear why, in Part Two, the solution at the international level is to disarm the migrant who, as a possible source of normative influence, does not clearly fit the assumptions of the international legal system. This is done either by constructing her as a permanent other, who stands outside existing legal divisions and categories, or by portraying her in narrow terms, within one legal category, thereby creating - as will be demonstrated - a dominant refugee or trafficked person identity. This allows for stigmatization of those who do not satisfy the category’s strict legal requirements, or in other words, make the migrant’s actual experience obscure and invisible to the law.

But analysis of how denial of ambivalence functions in outlawing the migrant as a person “afflicted with incurable sickness of multiple incongruity”⁷⁷ cannot take place without analysis of the adverse effects on the migrant of this outlawing of ambivalence. In Part One, I will illustrate the manner in which the migrant is penalized for having broken “our” laws, and this, despite the fact that host states are not mere “passive agents” in the migration process: not only do they respond to migration movements, they implicitly favour them. In Part Two, I will explore how the migrant’s experience is constantly marginalized by the existing authoritative discourse of international law in the field of migration, a discourse which is founded on an artificial distinction between forced and voluntary migration, as well as on strict definitions and labels. In doing so, I will continually highlight the central role of law in producing and legitimizing violence as a

⁷⁷ Bauman, *Modernity and Ambivalence*, *supra* note 37 at 61.

result of the ambivalence exhibited by the undesirable migrant. In law, this legitimization of violence,⁷⁸ which is presented as a natural consequence of the process of identity formation, is particularly powerful. The reasons for this are twofold. First, the force of law is precisely its “enforceability”. A rule that would not be enforceable would not be called a law.⁷⁹ Second, the violence involved in the everyday operations of law is all the more pernicious as law is often presented as the “antidote to violence”.⁸⁰ As such, the reality of law’s violence is suppressed in favour of a “mythology of law” (to use Fitzpatrick’s term), which is the “only alternative to general, barbaric violence when its own violence is a numbing commonplace of everyday life”.⁸¹ It is necessary to clarify this following point: by referring to law as violence, I do not mean in this thesis to undermine law itself: law has to define and categorize in order to facilitate and to justify aid and protection. Rather, the objective is to challenge the depiction of law as a neutral order: as explained previously, law is better conceived as a normative world in which legal rules and institutions interact with other cultural forces in the production of legal meaning. More precisely, the objective is to emphasize law’s dominant state-centred logic, its incompleteness and its neglect for certain others as it tries to assimilate and exclude them. This should not be seen as limiting the possibilities and prospects of law: law is the promise of a better law still to come and we can point to the possibility of a more decentred legal system, one which

⁷⁸ Derrida frequently uses the words “violence” and “force” in describing the necessity for discourse to define through repression and exclusion. The titles of the first two essays in his *Writing and Difference* are “Force and Signification” and “Violence and Metaphysics”: Jacques Derrida, *Writing and Difference*, trans. by Alan Bass (Chicago: University of Chicago Press, 1978).

⁷⁹ Derrida, “Force of Law: The Mystical Foundation of Authority”, *supra* note 49. See also: Hudson, *Justice in the Risk Society : Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 41 at 186.

⁸⁰ Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 41 at 188.

⁸¹ Austin Sarat & Thomas R. Kearns, “A Journey through Forgetting: Toward a Jurisprudence of Violence” in Austin Sarat & Thomas R. Kearns, eds, *The Fate of Law* (Ann Arbor: University of Michigan Press, 1991), 208 at 211. See also: Peter Fitzpatrick, *The Mythology of Modern Law* (London ; New York: Routledge, 1992).

better reflect the needs of a diverse and complex world.⁸² This puts a clear focus on what a deconstructivist approach to identity intends to do, namely to show how the relation to the migrant has been de-ethicalized in the hope of ultimately re-ethicalizing that relationship in order for the migrant to become a legal and “moral subject”.⁸³

⁸² See especially: Robert M. Cover, "Violence and the Word" (1986) 95: 8 Yale L.J. 1601; Robert M. Cover, "Nomos and Narrative" in Robert M. Cover, et al., eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1993). See also, above, the section “Approaching Migration through a Cultural Study of Law”. See finally the conclusion of this thesis for further analysis.

⁸³ Bauman, *Modernity and Ambivalence*, *supra* note 37 at 63.

“Giving Difference its Due”⁸⁴: Re-ethicalizing our Relationship with the Migrant

The dichotomous and simplistic responses to cross-border movements have several important implications for the migrant: her exclusion from the global mobility regime; the fragmentary nature of the international legal regime governing the cross-border movement of people; the fact that the reality of those who frame migration policies is disconnected from that of millions migrating around the globe (obscuring the actual lived experience of most migrants). All these responses, which reveal the dangers of dehumanizing peoples whose lives are shaped by the contours of migration law and policy, reflect a de-ethicalized (inter)national relationship to the migrant. Bauman explains:

It is a meeting which is not really a meeting, a meeting pretending not to be one, a *mismeeting* ... The art of mismeeting is first and foremost a set of techniques that serve to *de-ethicalize* the relationship with the Other. Its overall effect is a denial of the [migrant] as a moral object and a moral subject.⁸⁵ [author’s emphasis]

The most adverse consequence of this de-ethicalized relationship with the migrant, to be addressed in Parts One and Two of this thesis, is the negation of the migrant’s autonomous nature, of her “agency against all odds”,⁸⁶ of her free will which characterizes all human beings. As such, this person is seen as having “no real existence for us as a moral agent with claims upon us”. She is constituted “only to show us to ourselves, to

⁸⁴ This expression is taken from: Hudson, *Justice in the Risk Society : Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 41 (Chapter 6: “Giving Difference its Due: Discourse and Alterity”, page 178 and beyond).

⁸⁵ Bauman, *Modernity and Ambivalence*, *supra* note 37 at 63.

⁸⁶ Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft* (Minneapolis: University of Minnesota Press, 1999).

provide a negative image of what we must be, and the tenets of rights-respecting democratic governance do not apply to them”.⁸⁷

The critique offered in this thesis is not intended to foster pessimism. Migration is not a temporary phenomenon: it is part of the fabric of every society and cannot be constantly viewed as an ongoing crisis. This explains why it is necessary to be productive and to articulate a different cosmology within which to understand the relationship between the migrant and law, at both domestic and international levels. Having explored in Parts One and Two the complex challenges underlying the state-centric responses to migration, and shown how the denial of ambivalence in conventional accounts of identity penalizes the migrant and works to deny responsibility toward her, my conclusion will explore other possible approaches to think the migration process. In a context in which the migrant is “defined not by what she has done or does - the defining characteristic of human nature - but what she is, for her being rather than for her action”,⁸⁸ there is a pressing need to change the focus within the legal system from a state-centred approach (primarily from the perspective of the host country) to the “ethical choices and values of ... individuals captive of the system”.⁸⁹ Defending the introduction of the ethics of alterity into the migration debate is a good starting point, a way of reorganizing legal discourses, both international and domestic, relating to cross-border movement.

Lévinas’ ethics of alterity calls for the re-ethicalization of the relation to the migrant in the national and international legal spheres. Reminding

⁸⁷ Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 41 at 183-84.

⁸⁸ Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, *supra* note 71 at 144.

⁸⁹ *Ibid.* at 1985.

us that law always involves the other in the construction of the self, such ethics re-positions the othered migrant as a complex and central actor in the legal discourse. It introduces into the migration debate the “voice” of the migrant, placed in the foreground “not as a terrorist, nor as a victim, but as a complex subject who is affected by global processes and seeking safe passage across borders”.⁹⁰ By providing a place for the migrant to articulate her experience and assert her agency, such ethics can assist in addressing the real issues which emerge in the context of cross-border movement.

As Kapur rightly points out: “The strategies we formulate and the assumptions we challenge today are critical, not so much for the present, but for the fact that there will always be another [o]ther who will come along”.⁹¹ Under such circumstances, the idea that “the real challenge posed by the other is not whether or how to convert, tolerate, protect, or reject those who are not the same, but how to deal with difference, with those who resist categorization as same or other”,⁹² is key to shaping the terms of the migration debate in a positive manner. It is key in mitigating the belief that others cannot and ought not share our space. The point, then, is to open “spaces where recognition as well as contestation and conflict can take place”.⁹³ More importantly, it is to “keep them open”.⁹⁴ As will be shown, the ethics of alterity is aimed at such concerns.

⁹⁰ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London, Portland, Or.: Glass House Press, 2005) at 173.

⁹¹ *Ibid.* at 11.

⁹² Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca, N.Y.: Cornell University Press, 1993) at 194.

⁹³ Mustafa Dikeç, "Pera Peras Poros: Longings for Spaces of Hospitality" (2002) 19: 1-2 *Theory, Culture & Society* 227 at 244.

⁹⁴ *Ibid.*

PART ONE: THE EXCLUSION OF THE MIGRANT FROM WITHIN: A CRITICAL PROCESS IN THE REINFORCEMENT OF THE NATION-STATE

A spectre is haunting the “new world order”: the spectre of the immigrant. To live with this spectre is to live with desires and anxieties of the state and the nation ... The public debate about, and legislative responses to, this spectre remain preoccupied with characterizing the immigrant as an outsider and a threat, with immigration configured as a problem to be solved, a flaw to be corrected, a war to be fought and a flow to be stopped. This posture rests on some implicit assumptions of fixed identities, unproblematic nationhood, indivisible sovereignty, ethnic homogeneity and exclusive citizenship. These assumptions posit a picture of the inter/national system that consists of complete, differentiated, and closed living spaces, constituted by the pivotal principal of sovereign nation-states. The immigrant does not fit this picture well (...) As a non-citizen, she is to be marginalized in distribution of legal rights and political protections. As a cultural signifier, she is to be erased. As a violator of borders, she provides the rationale to ever strengthen the territorial divides.¹

¹ Tayyab Mahmud, "Migration, Identity, and the Colonial Encounter" (1997) 76: 3 Or. L. Rev. 633 at 633.

States purport to construct their migration regimes around some form of rationality: the rule of law both presupposes and requires it. They will defend their policies, and the implementation and outcomes of those policies, as non-arbitrary and coherent. Yet the organizing principle makes sense of a model specifically oriented to closure and the blocking of access, which is premised, not only on “old” national or local grounds, but also on a principle of “perceived dangerous personhoods”. Making sense of something should not be confused with “making it right”²: in this process where law becomes “one site on which to construct the subjectivity of the other as distinct and external to the liberal circumferences of rights and entitlements”,³ this regime is normatively defective.⁴ This is not because the migrant – especially the irregular migrant – is the one “forgotten” by the international community of nations, but precisely because, on the contrary, she is integrally tied into the practice of excluding and including that constitutes and maintains the faceted system of the nation-state. In this process, both marginal and yet so very central to the territorial norm, the protection of migrants’ universal human rights is seriously compromised. Thus, as shown below, the already familiar legal debates concerning the “adequate balance” between human rights and state sovereignty are not mere replications of the tension between the international and the national: we are witnessing the emergence of a

² This point is raised by Macklin: Audrey Macklin, "Sovereignty and Autonomy at the Border" ("The Complex Dynamics of International Migration", Interdisciplinary Seminar on the Conceptualization of the Migration Phenomenon, University of Montreal, 08 March 2006); to be published soon in: François Crépeau, Delphine Nakache & Idil Atak, eds, *La complexe dynamique des migrations internationales* (Montreal: PUM, forthcoming) .

³ Ratna Kapur, "The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion" (2007) 8: 2 *Theor. Inq. L.* at 542.

⁴ Macklin, *supra* note 2.

“mobility regime”,⁵ constructed precisely to maintain high levels of inequality by allocating a “license to move”. This “mobility regime” has to do with the degree to which agents of mobility are suspected of representing the threats of crime, undesired immigration and terrorism (independently or, increasingly, interchangeably). In this sense, the tensions here should “be understood between universal rights and universal fears, both operating at the global level, albeit materializing at concrete localities”.⁶ But before illustrating how the mobility regime constitutes a serious counterbalance to the human rights regime, it is necessary to start disentangling the links that have formed between sovereignty and migration controls: How do we, as individuals and states, come to “know” border control as the ultimate manifestation of sovereignty? In other words, in a context where the right to control the entry of people is the *sine qua non* of sovereignty in contemporary political, legal and popular discourse, it has become important to understand how profoundly this conception structures and constrains the way Western receiving societies “think” about migration. As shown below, in this new “state thought”, the figure of the migrant has become ontological, because, as stated by Sayad, “...at the deepest level of our mode of thought it is synonymous with the very existence of the immigrant and with the very fact of immigration”.⁷

The first part of this thesis, which is dedicated to an analysis of the prominent place occupied by South-North migration in the political agenda of Western societies and the powerful images governing our thinking

⁵ This expression is taken from Ronen Shamir, “Without Borders? Notes on Globalization as a Mobility Regime” (2005) 23: 2 *Sociological Theory*. See page 60 & following, below, for a definition of the mobility regime.

⁶ *Ibid.* at 214.

⁷ Abdelmalek Sayad, *The Suffering of the Immigrant* (Cambridge, UK; Malden, MA: Polity Press, 2004) at 282.

about this phenomenon, explores how the psychological architecture of the migration discourse sustains laws and policies which otherwise appear anomalous or even incoherent. More precisely, the objective is to demonstrate how the apparent symmetrical relation between state sovereignty and human rights enables a discourse that justifies certain systematically perverse and incoherent features of contemporary migration regimes. Particular attention is paid to the gradual erosion of the migrant's human agency imposed by host countries' laws and policies or by the media. Part One is organized as follows. Chapter One shows how the multitude of political exclusionary discourses and practices toward the migrant is the result of an elaborated construction of migration as a problem to be managed and of the migrant as the contemporary, threatening collective figure of the outsider: this exclusion of the "other", as the "one who does not belong", is inherent in the construction of the host society's collective identity and is – paradoxically – critical in the reinforcement of the nation-state. The conduit for this examination is constructivism, an approach that probes the connections between security problems, perceptions and discourse. Constructivists stress the role of social knowledge in the practice of world politics: they suggest that structural environments are largely a social construct (i.e. "the world is what you make of it") and that social constructs (such as identities) shape interests.⁸ But any well-rounded analysis of exclusion and belonging has to include a study of border controls. Borrowing from Foucault's theory on modern governance, with the theoretical account of the "mobility regime" in hand, Chapter Two deals with state measures aimed at preventing unwanted migration, from walls and fences to visa regime to bioprofiling.

⁸ See generally: Ronald L. Jepperson et al., "The Culture of National Security : Norms and Identity in World Politics" in Peter J. Katzenstein, ed, *Norms, Identity, and Culture in National Security* (New York: Columbia University Press, 1996); J. Checkel, "The Constructivist Turn in International Relations" (1998) 50: 2 *World Politics* 324; Alexander Wendt, "Collective Identity Formation and the International State" (1994) 88 *American Political Science Review* 384; Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics" (1992) 46 *International Organization* 391.

Part One ends with a reflection on the problematic, state-centred approach to migration, in order to illustrate that Western receiving societies are not simply “passive recipients” of migration, and that the number of deaths and injuries among people who try to reach the borders of these states has increased significantly since the enforcement of stricter border control. At each stage of this thesis, the exclusionary potential of migration law is investigated, to illustrate how the inherent flexibility and malleability of this legal structure is, in fact, closely tied to shifting political interests: “It has the appearance of law, but is changed so rapidly (either through amendment or policy shift) that its adherence to rule of law principles has been easily suspect”.⁹ In order to better understand what is meant by this assertion, it is necessary to explore the interaction between migration, globalization and state sovereignty. As shown below, each term is loaded with ideological import and the relation between the three elements is much more complicated than it first appears.

The rule of territorial sovereignty is a fundamental governing principle of international legal and political systems. The term refers to the state's power to exercise exclusive control over its physical domain, subject to limitations imposed by international law. It is usually understood to denote the state's "competence to prescribe and apply law to persons, things and events within its territorial domain to the exclusion of other states".¹⁰ In international law, the power of states to refuse entry, to expel

⁹ Catherine Dauvergne, "Security and Migration Law in the Less Brave New World" (2007) 16: 4 *Social & Legal Studies* 533 at 541. For further analysis, see the introduction and the conclusion of this thesis.

¹⁰ Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (New Haven: Yale University Press, 1989) at 117. The system of modern, sovereign nation-states was established by the Westphalian Peace Treaty in 1648. In the classical Westphalian regime of sovereignty, states are free and equal; they enjoy ultimate authority over all objects and subjects within a circumscribed territory; relations with other sovereigns are voluntary, contingent and limited in kind and scope to transitory military and economic alliances, as well as cultural and religious affinities; above all, states “regard cross-border processes as a “private matter” concerning only those immediately affected”: David Held, "Law of States, Law of Peoples: Three Models

foreigners and to confer nationality at their discretion has been treated as an integral part of territorial sovereign power since the late nineteenth century. The claimed right of exclusion is defended as an inherent power, necessary for the self-preservation of the state. As one analyst expressed it, "If a state is not free to decide who will enter its territory according to its own criteria and to regulate the conditions of such ingress, it is severely impeded in its function as the governing authority of the territory in question".¹¹ Under current international law, these powers are by no means treated as absolute. As such, the exercise of this competence has somehow been limited by the recognition of international human rights law

of Sovereignty" (2002) 8 Legal Theory 1 at 4. See generally: Lassa Oppenheim et al., *Oppenheim's International Law* (Harlow, Essex: Longman, 1992) at 661; David Martin, "The Authority and Responsibility of States" in T. Alexander Aleinikoff & Vincent Chetail, eds, *Migration and International Legal Norms* (Cambridge: Cambridge University Press, 2003), 31; Justin Conlon, "Sovereignty Vs. Human Rights or Sovereignty and Human Rights" (2004) 46: 1 *Race & Class* 75.

¹¹ Gerassimos Furlanos, *Sovereignty and the Ingress of Aliens: With Special Focus on Family Unity and Refugee Law* (Stockholm: Almqvist & Wiksell International, 1986) at 57. The modern rationale for exclusionary powers of the sovereign is derived from Vattel's work (*Le Droit des gens* (1758)) and his concept of self-preservation by which a state may take all necessary measures to maintain national security: Emmerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. by Joseph Chitty (Philadelphia: T. & J.W. Johnson, 1839) at 107 (book I, chapter XIX, sec 230). Nazfiger point outs, however, that Vattel's writings have been used selectively and that there are several sections of his treatise where he places strict conditions on the capacity of the state to exclude: James A. R. Nafziger, "The General Admission of Aliens under International Law" (1983) 77: 4 *A.J.I.L.* at 805. Quoting Vattel at 107-108 (book I chapter XIX, sec 230-231): "No nation can, without good reason, refuse even perpetual residence to a man driven from his country". In the common law tradition, migration control was originally an outgrowth of the royal prerogative. In accordance with the principle that immigration is a privilege and not a right, it was believed that foreigners had no right to oppose any decision affecting them made by competent authorities. This position has been asserted in the practice of the Anglo-American States. See: *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)); *Attorney General for Canada V Cain*, [1906] AC 542 at 546; *Johnstone V Pedlar* [1921], 2 AC 262 at 283. In addition, the recent jurisprudence refers to Vattel's work as part of the conventional logic. See e.g. : *R (European Roma Rights Centre) V Immigration Officer at Prague Airport* (2004), [2005] 2 A.C. 1 (HL), at 11; *Victorian Council for Civil Liberties v. M.I.E.A.*, [2001] FCA 1297 at 119. For more on this topic, see generally: Stephen H. Legomsky, *Immigration and the Judiciary : Law and Politics in Britain and America* (New York: Clarendon Press, 1987); Kathryn. Cronin, "A Culture of Control: An Overview of Immigration Policy Making" in J. Jupp & M. Kabala, eds, *The Politics of Australian Immigration* (Canberra: Australian Government Publishing Service, 1995), 83. See also: Dauvergne, "Security and Migration Law in the Less Brave New World" at 541, *supra* note 9.

as a source of interpretation.¹² So, by definition, and despite these and other limitations, in international law the ingress of the foreigner is a field “essentially falling within [the] domestic jurisdiction of States”.¹³ The aim of this thesis is not to dispute the long association of migration law with sovereign power. Migration law is the legal text that makes borders meaningful for people, determining who can enter and who will be excluded, and how entrants are to be categorized: given the constitutive role of migration law for states, the rule of territorial sovereignty will continue to operate as long as we live in a world of nation-states. Rather, it is to show that the existence, in theory, of a sovereign right to exclude should not hinder the reality: that, in the realm of migration law, the recent reinforcement by states of exclusionary practices is emblematic of how migrants as outsiders contribute to the discourse of national consciousness and are a crucial element in modern statecraft. The objective is consequently to bring attention to the myriad ways in which migration law serves as a conduit for those exclusionary practices, essentially because, as is shown in the following lines, the executive branch has always been given a wide scope for discretionary manoeuvring in migration matters. In France, for instance, irregular migration, which

¹² As the Permanent Court of International Justice said in 1923, wherever international implications are concerned, “jurisdiction which, in principle, belongs solely to the State is limited by rules of international law”: *Tunis - Morocco Nationality Decree Case*, Advisory Opinion of 7 February 1923, [1923] P.C.I.J., Ser. B, No. 4 at 24. From that perspective, the admission and expulsion of aliens – in principle a domestic issue – has to some extent been internationalized by a set of customary and conventional rules. What’s more, while still incomplete, the record of UN treaty bodies and other organizations in addressing human rights violations against non-citizens is developing in a positive manner on the international scene. This question is addressed in details in: François Crépeau & Delphine Nakache, “Controlling Irregular Migration in Canada” (2006) 12:1 *Choice*, online: Institute for Research on Public Policy <<http://www.irpp.org/choices/archive/vol12no1.pdf>>(accessed on 02 August 2006) at 6; Joan Fitzpatrick, “The Human Rights of Migrants” in T. Alexander Aleinikoff & Vincent Chetail, ed, *Migration and International Legal Norms* (Cambridge: Cambridge University Press, 2003); Audrey Macklin, “The Application of International Human Rights Law by Administrative Decision-Makers” in Stephen G. Coughlan & Dawn Russell, eds, *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Éditions Thémis, 2002).

¹³ Ian Brownlie, *Principles of Public International Law* (Oxford; New York: Oxford University Press, 2003) at 519.

constituted up to 80 per cent of all immigration until the early 1970s, was described as "spontaneous migration" and was tolerated as such; only later was it described as "illegal" and made the object of concerted border control. This simple example demonstrates that states have not always exercised the legal power to protect their borders against outsiders, and, perhaps more importantly, that either rhetorically or in fact, states have not always treated unauthorized cross-border movement of populations as a threat to state sovereignty.¹⁴ Thus, whereas in the literature on migration and human rights, it is common for even its critics to accept international boundary enforcement as a "legitimate state activity",¹⁵ "issues" surrounding migration have become so fundamental to the inner construction of the host society's collective identity – and so critical to the reinforcement of the nation-state – that the sovereign power of territorial states cannot remain "uncontested". To understand the complex phenomenon just described, it is necessary to clarify first, what is meant by the "State" and second, to examine the interrelationship of migration and the state within the theory of globalization.

Understanding the "State": Governmentality, or the "Art of Government"

The genealogy of the Western state has been analysed by scholars of sociology and international relations, who all similarly emphasize the state's capacity to impose itself as a frame of mind, to justify itself as the

¹⁴ Gilles Verbunt, "France" in Tomas Hammar, ed, *European Immigration Policy: A Comparative Study* (Cambridge: Cambridge University Press, 1985) at 136; cited in Linda S. Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention" (1991) 25: 4 *International Migration Review* 737 at 744.

¹⁵ Joseph Nevins, "Thinking out of Bounds: A Critical Analysis of Academic and Human Rights Writings on Migrant Deaths in the U.S.-Mexico Border Region" (2003) 2: 2 *Migraciones Internacionales* 5.

sole political order, once it has been accepted that, when combined in a single body, sovereignty, law and order are the prerequisites for peace and homogeneity.¹⁶

This thought informs the writings of Foucault and others on “governmentality”. Governmentality (“Gouvernementalité” in French) is a theoretical concept that aims to reveal the general mechanisms of society's governance. Because of its focus on the importance of the technological in realizing the objectives of government, it has been the basis for a series of studies pertaining to the analysis of security and migration control. Walters, for instance, in defining the European Union as a governable space, has made use of the governmentality approach in analyzing the standardization of airport signs and architecture, as well as the gathering of European statistics on cross-border crime, to demonstrate the ultimate effect they have on European thinking.¹⁷ Similarly, Bigo and Guild have shown how the development of a system of European visas has increasingly replaced the national passport as a signifier of trust and the basis for inclusion and exclusion.¹⁸ As shown below, the governmentality study also complements perfectly readings on

¹⁶ See, particularly in sociology: Pierre Bourdieu, *Raisons pratiques: sur la théorie de l'action pratique* (Paris: Seuil, 1994); A. Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge: Polity, 1984). See also in international-relations theory: Bertrand Badie, *La Fin des Territoires* (Paris: Seuil, 1996); R. Mansbach, *The State, Conceptual Chaos, and the Future of International Relations Theory* (Boulder: Lynne Rienner, 1989); J.G. Ruggie, *The Constitution of Society: Outline of the Theory of Structuration* (London: Routledge, 1998); Robert Ashley & R.B.J. Walker, "Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Relations" (1990) 34 *International Studies Quarterly* 367.

¹⁷ See e.g.: William Walters, "Mapping Schengenland: Denaturalizing the Border" (2002) 20: 5 *Environment and Planning D.: Society & Space* 561; William Walters, "The Frontiers of the European Union: A Geostrategic Perspective" (2004) 9: 3 *Geopolitics* 674; William Walters, "The Power of Inscription: Beyond Social Construction and Deconstruction in European Integration Studies" (2002) 31: 1 *Millennium*.

¹⁸ Elspeth Guild, "The Borders of the European Union. Visas and Carrier Sanctions" (2004) 7: 3 *Politik* 34; Elspeth Guild & Didier Bigo, "Le visa Schengen : expression d'une stratégie de « police » à distance" (2003) 49: 1 *Cultures & Conflits* 22. See also section 2.2., below, for more on this topic.

securitization as the outcome of routine practices by bureaucratic professionals, as well as increasing our understanding of the shaping and constitution of authority in the area of migration controls.

Foucault was the first to develop the concept of governmentality as a means of identifying the emergence in modern societies of a new exercising of power in connection with the discovery of a new reality – the economy, and a new object – the population. Governmentality marks the point at which political power concerns itself with the population’s wealth, health, welfare, and prosperity.¹⁹ Sovereign power involves the exercise of authority over the state’s subjects – imposing taxes, meting out punishment and taking life. The role of government, on the other hand, is to optimize the power of the population. Government does not replace these forms of power, but instead rearticulates them:

Hence taxation, law and punishment are directed not primarily towards augmenting the power and glory of the sovereign, but to promoting the ends of population. But conversely, the promotion of population will be used to advance the sovereign power of the state, where the latter is understood as inserted in a field of perpetual geopolitical conflict.²⁰

This is what Foucault calls the “reason of state”. Reason of state is “a technique conforming to certain rules” within which “the art of governing people is rational on the condition that it observes the nature of what is

¹⁹ Foucault locates what is specific and original in the liberal treatment of a population, through the discovery of economic man as a subject of interests, individual preferences, and choices, which are irreducible (i.e. they cannot be explained by any other, more fundamental, causal principle) and non-transferrable (i.e. no external agency can supplant or constrain the individual determination of preferences): Michel Foucault, "Governmentality" in Graham Burchell, Colin Gordon & Peter Miller, eds, (Chicago: University of Chicago Press, 1991). See also: Mitchell M. Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999), chapter 1.

²⁰ William Walters, "Deportation, Expulsion, and the International Police of Aliens" (2002) 6: 3 *Citizenship Studies* 265 at 278.

governed, that is the state itself".²¹ The ways in which a population is governed by the state are contingent upon that state's own preservation. The form assumed by a correct governmentality – and the rationale behind it – is linked to one major "idea" that Foucault develops from reason of state, which is that under the conditions where the state is continually concerned with its preservation, "the individual becomes pertinent for the state insofar as he can do something for the strength of the state".²²

Foucault describes the individual's political usefulness as follows:

The individual exists insofar as what he does is able to introduce even a minimal change in the strength of the state, either in a positive or in a negative direction. It is only insofar as an individual is able to introduce this change that the state has to do with him. And sometimes what he has to do for the state is to live, to work, to produce, to consume; and sometimes what he has to do is to die.²³

In other words, governmentality is the notion that "society" creates itself out of the tension between the centrifugal forces of economic egoisms and the centripetal forces of non-economic interests, whereby individuals espouse the well-being of the family, the clan, the nation. The question of interest perpetually outflanks the scope of self-imposed limitation that constitutes the subject of law. Quoting Foucault, Gordon suggests:

Liberalism's real moment of beginning is, for Foucault, the moment of formulation of 'this incompatibility between the non-totalizable multiplicity which characterizes subjects of interest and the totalizing unity of the juridical sovereign' ... What liberalism undertakes...is the construction of a complex domain of governmentality, within which economic and juridical sovereignty can alike be situated as relative moments, partial aspects of a more englobing element'. The key role,

²¹ Michel Foucault, "The Political Technology of Individuals" in Luther H. Martin, Huck Gutman & Patrick H. Hutton, eds, *Technologies of the Self: A Seminar with Michel Foucault* (Amherst: University of Massachusetts Press, 1988), 166 at 149.

²² *Ibid.* at 152.

²³ *Ibid.*

which comes to play in this effort of construction and invention, is, for Foucault, the characteristic trait of the liberal theory of civil society.²⁴

Thus, there is, on the one hand, a perpetual movement and flow, and on the other hand, the forces working to temper or halt this movement. The feat of government is to manage these tensions, to construct the complex domain of governmentality. This domain is never fixed, never fully stable, always in the process of being produced and reproduced.²⁵

In modern statecraft, the distinction between what is inside and what is outside has always been essential to managing these tensions and to positioning the domestic in opposition to the international:

The consolidation and legitimation of the Western state in its modern form relied on two parallel strategies. First, the drawing of firm boundary lines which delimited the area of the state's jurisdiction. Boundaries did not only define the jurisdictional authority of the State, but they also moulded human behaviour by separating subjects from aliens and by limiting movement. Secondly, the ties uniting the collectivity, to which metaphysical claims to "immortality" were assigned, were "territorialized". Communities became organic entities rooted in space, and territory became an object of political devotion.²⁶

The concept of "territoriality" helps to characterize the activity of those bureaucracies that "stake out and defend territories surrounding

²⁴ Colin Gordon, "Governmental Rationality: An Introduction" in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) at 21. Political liberalism is understood in this thesis as the practice of liberal democratic politics.

²⁵ Roxanne Lynn Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion* (London; New York: Routledge, 2003) at 8.

²⁶ D. Kostakopoulou, "Irregular Migration and Migration Theory: Making State Authorisation Less Relevant" in B. Bogusz, et al., eds, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden/ Boston: Martinus Nijhoff, 2004), 41 at 45.

their nests or ‘home bases’”.²⁷ This territoriality –defined as “a spatial strategy to affect, influence or control resources and people by controlling area” – is a form of enforcement that “uses area to classify and assign things, [and which] works by controlling access into and out of specified areas”²⁸:

[Territoriality] simplifies issues of control and provides easily understood symbolic markers on the ground, giving relationships of power a greater tangibility and appearance to circumvent the territorial strategies of states and other powerful actors.

It involves the active use of geographic space to classify social phenomena, to communicate social boundaries and to influence or control resources, things, information, symbols and people, by delimiting and asserting some form of control over territorial borders.²⁹

Territoriality, which is understood here as encompassing the territorial space delimited by the border but also the institutions governing and shaping the lives of those within the space, has fashioned the terms of migration debate. There is indeed a common belief, cultivated by nationalist narratives, that territory is a form of property that is owned by a particular national group, either because the latter has established a “first occupancy” claim, or because it regards this territory as a formative part of its national identity.³⁰ However, national identity is neither self-present at origin nor stable and delineated. In this process where the state forms/reinforces itself via a mechanism of suppression or marginalization

²⁷ Cited in Claudia Aradau, "Migration: The Spiral of (in)Security" (March 2001) *Rubikon*. See also: D. Sack, *Human Territoriality: Its Theory and History* (Cambridge: Cambridge University Press, 1986) at 19.

²⁸ *Ibid.* at 21-34.

²⁹ James Anderson & Liam O'dowd, "Borders, Border Regions and Territoriality: Contradictory Meanings, Changing Significance" (1999) 33: 7 *Regional Studies* 593 at 598.

³⁰ For a comprehensive analysis of territoriality and immigration policy, see: Linda Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants" (2007) 8: 2 *Theor. Inq. L.* 389.

of the “other”, national identity reveals itself in what it seeks to disavow, namely that the outside is known inside.³¹ In relation to migration, this means that the apparent internal unity and the relativization of differences between individuals and social groups within the territory are made possible by subordinating these differences to the overarching distinction between “ourselves as citizens” and “themselves as foreigners”. As such, the external frontier – real or imagined – serves as a “projection and protection of an internal collective personality”.³²

There are several concrete examples of migration problematization as practices of statecraft. The political economy of activities staged on and around the US-Mexico border, for instance, is one of constructing a field of activity where the “spectacle” of the border serves as a powerful reference for the projection of territorially bound citizenry and statehood.³³ Similarly, in the Italian popular imagination, the constitution and mapping of particular forms of otherness and marginalized subjectivity in the fields of

³¹ National identity is presumed to be clear and self-present at origin. Yet attempts to grasp national identity from within, rather than interactively, make it impossible to state what it actually “is”. Instead, identity is solely formed in terms of what it is not. See generally: Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1998); Peter Fitzpatrick, *Nationalism, Racism, and the Rule of Law* (Aldershot; Brookfield, USA: Dartmouth, 1995); Sarah Kyambi, “National Identity and Refugee Law” in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004), 19. See also Honig, who shows how historically, the foreignness of outsiders has been used to establish the self-identity of “insiders” and, more importantly, how foreigners are often used to “reinvigorate” democracy, as myths about foreign founders are central to the stories many nations tell about themselves: Bonnie Honig, *Democracy and the Foreigner* (Princeton, N.J.; Oxford: Princeton University Press, 2001) at 4. Finally, see the introduction and the conclusion, for more on this topic.

³² Etienne Balibar, “The Nation Form: History and Ideology” in É. Balibar & I. Wallerstein, eds, *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991), 86 at 94-95. See also: Etienne Balibar, *Politics and the Other Scene* (London: Verso, 2002); Étienne Balibar, “Europe as Borderland” (The Alexander von Humboldt Lecture in Human Geography, University of Nijmegen, 10 November 2004); Alison Kesby, “The Shifting and Multiple Border and International Law” (2007) 27: 1 Oxford J. Legal Stud. 101 at 110.

³³ Michael Kearney, “Borders and Boundaries of State and Self at the End of Empire” (March 1991) 4:1 *Journal of Historical Sociology* 52. See also *infra* notes 197 to 199 & note 285, with accompanying text.

work, criminality and health have had effect, and continue to have effect, on the construction of the definition of the “average” citizen, upon which the “continuing project” of the state is dependent.³⁴

In sum, “the state” is not a unitary actor but rather a body of governmental bureaucracies, institutions and human subjects engaging in discourses and practices which include a wide range of control techniques and apply to a wide variety of activities – from the control of one’s self to the “biopolitical” control of populations. These practices create meanings, values, hierarchies, inclusions and exclusions, and the state defines/reinforces itself precisely through the exclusion of “others”, “outsiders” who are marked in order for the state to carry out constant scrutiny and maintain control. These practices point to strategies of representation which work to create a crucial “normality effect” underlying the symbolic political and cultural frameworks of the citizen’s overall life-plan and activities that she considers important.³⁵ In this configuration of the state as the “home” where we naturally belong, and where, by definition, others do not, the non-Western migrant today is, as explained below, the collective figure of the “other”: one who is uninvited and who should return to her home, but whose constitution is, paradoxically, inherent in the definition of who we are, the kind of state that governs us and the manner in which we are governed. In a context where the state – though born of deterritorializing and decoding practices – remains highly territorial and encoded, how can we assess the interaction between migration, globalization and state sovereignty?

³⁴ Donald Carter, “The Art of the State: Difference and Other Abstractions” (1994) 7:1 *Journal of Historical Sociology*. See also pages 111, 142 & 142, below, for more on this topic.

³⁵ De Certeau calls this “the effect of awarding centrality to a specific category of signs, classifications and subjects” while marginalizing others”: Michel de Certeau, *The Writing of History* (New York: Columbia University Press, 1988) at 120-21; cited in Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft* (Minneapolis: University of Minnesota Press, 1999) at 31.

Reframing the Debate: Migration and Evolving Interrelated Conceptions of Globalization and Sovereignty

Globalization escapes definition, and there is still a broad debate among those writing about it as to whether it even “exists” in the sense of constituting something new in social or political ordering.³⁶ What is certain, however, is that globalization is associated with economies, societies and technologies which are increasingly open. The term as such encompasses an amalgam of processes driving “the growing number of chains of economic, social, cultural and political activity that are world-wide in scope” and “the intensification of levels of interaction and interconnectedness between states and societies”.³⁷ As such, globalization has given rise to a “compression of time and space”.³⁸

Within the theory of globalization, both migration and the state are the subjects of a particular – and interrelated – focus.³⁹

Migration, which has become a highly complex, unpredictable and increasingly transnational phenomenon, is presented either as a

³⁶ Catherine Dauvergne, "Making People Illegal" in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004) at 592.

³⁷ Ash Amin, "Placing Globalization" (1997) 14: 2 *Theory, Culture & Society* 123.

³⁸ This expression is taken from Richmond: Anthony H. Richmond, "Globalization: Implications for Immigrants and Refugees" (2002) 25: 5 *Ethnic and Racial Studies* 707 at 708.

³⁹ Dauvergne, "Making People Illegal", *supra* note 36. It should be noted that Dauvergne speaks instead of “nation”.

consequence or aggravating factor of the “downsides” of globalization.⁴⁰ Widespread migration (made possible by globalization and, to a lesser extent, the collapse of communist regimes⁴¹) is also said to have significantly fostered the interdependence between flows of investment, trade, intellectual property and the movements of people. Finally, a growing body of literature indicates that the era of globalization is simultaneously an era of increasing restrictions on movement, explaining that there is a hypermobility for a small stratum of “cosmocrats”, while the vast majority of the world’s population remains immobilized.⁴²

Globalization is also said to have made an impact on the role of the state in various ways. According to proponents of the “globalization thesis”, states have been weakened, in the sense that they are often unable to control fully the movement of goods, capital, people and culture, all elements of globalization.⁴³ This view of a globalization threatening the

⁴⁰ The “downsides” of globalization are defined as the trans-sovereign challenges to state sovereignty and security: Maryann Cusimano Love, *Beyond Sovereignty: Issues for a Global Agenda* (Belmont, CA: Thomson/Wadsworth, 2003). See also: P. N. Lyman, "Globalization and the Demands of Governance" (2000) 1 *Georgetown Journal of International Affairs* 89.

⁴¹ See, on this point specifically: Mark J. Miller, "International Migration in Post-Cold War International Relations" in B. Ghosh, ed, *Managing Migration. Time for a New International Regime?* (Oxford: Oxford University Press, 2000), 27 at 34.

⁴² Bauman writes that 98 per cent of the world’s population never moves to a new place, while even in the United Kingdom, 50 per cent of the population lives within five miles of their birthplace: Zigmund Bauman, *Society under Siege* (Cambridge: Polity Press, 2002), cited in: Shamir, "Without Borders? Notes on Globalization as a Mobility Regime", *supra* note 5 at 197. See also: John Adams, *The Social Implication of Hypermobility* (Paris: OECD, 1999).

⁴³ Some have argued that current processes of globalization, the rise of non-state political actors, and the proliferation of human rights norms suggest that sovereignty – as an absolute and indivisible condition – is in decline; and they have emphasized the simultaneous emergence of “global” or “cosmopolitan” citizenship, or at least the birth of a project to hasten their realization: Mark W. Zacher, "The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance" in James N. Rosenau & E. Czempiel, eds, *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park: Pennsylvania State University Press, 1995); Gideon Gottlieb, *Nation against State: A New Approach to Ethnic Conflicts and the*

core institutions of world order – sovereignty and the nation-state – is fairly widespread among migration scholars. Kennedy argued that great waves of migration will continue into the twenty-first century and that increased efforts by states to control their borders are unlikely to succeed.⁴⁴ Hamilton suggests that international migration directly poses new challenges to state sovereignty.⁴⁵ In a similar vein, others think that the value of national citizenship is being diminished in that migrants can now claim rights once reserved exclusively for citizens.⁴⁶ Of course, not everyone agrees that globalization leads to the increasing irrelevance of territorial borders or

Decline of Sovereignty (New York: Council on Foreign Relations Press, 1993); Gene M. Lyons & Michael Mastanduno, eds, *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: Johns Hopkins University Press, 1995); John Urry, "Global Flows and Global Citizenship" in E. F. Isin, ed, *Democracy, Citizenship and the Global City* (London: Routledge, 2000), 62.

Others have added that these processes of globalization are eroding the fundamental basis of international society – state sovereignty – and that its decline represents a revolutionary transformation in the Westphalian structure of the international system. Rosenau, for example, understands globalization as "a wholly new set of processes, a separate form of world politics" and argues that what distinguishes globalizing processes "is that they are not hindered or prevented by territorial or jurisdictional barriers": James Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (London: Cambridge University Press, 1997) at 44 & 80. See also: Kenichi Ohmae, *End of the Nation State* (London: Harper Collins, 1995); Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: HarperBusiness, 1999).

⁴⁴ Paul Kennedy, *Preparing for the Twenty-First Century* (New York: Random House, 1993) at 21.

⁴⁵ Kimberly Hamilton & Kate Holder, "International Migration and Foreign Policy: A Survey of the Literature" (1991) 26 *The Washington Quarterly*. The views of Huntington, Schlesinger Jr. and Weiner are also consistent in regarding immigration as a threat to state sovereignty. See: Jr. Arthur M. Schlesinger, *The Desuniting of America. Reflexions on a Multicultural Society* (New York-London: Morton & Company, 1992); Myron Weiner, *The Global Migration Crisis- Challenge to States and Human Rights* (New York: Harper Collins, 1995); Samuel P. Huntington, "The West: Unique, Not Universal" (1996) 75: 6 *Foreign Journal* 28.

⁴⁶ This position is emblematically associated with the work of Yasemin Soysal, particularly her book entitled: Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994). Soysal argues that the decline of the nation-state is a positive development, since a "postnational citizenship" is emerging and that universal personhood, not national citizenship, is the basis of membership in host polities. In opposition, Jacobson accepts the argument that we are witnessing a decline in citizenship but regards this decline as dangerous: a hollowing out of what is a fundamental status – citizenship – and a constraint on the sovereign powers of the state: David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996).

diminishes the power of the state. Some even assert that in the future, states will matter more rather than less.⁴⁷ And in between these two poles, every position is held.⁴⁸ For example, some scholars in the field of migration see the survival of the nation-state as a positive development, in the sense that states remain the best providers of stability and welfare for their populations. In other words, migration must be controlled and channelled to preserve the rights and welfare of the citizenry.⁴⁹ Other scholars dispute this positive evaluation of the state. They acknowledge constraints on states but highlight the continued power of states in relation to their own populations and would-be entrants, and the negative impact of exercising that power on minorities, migrants

⁴⁷ Linda Weiss, *The Myth of the Powerless State: Governing the Economy in a Global Era* (Cambridge: Polity Press, 1998). See also Panitch who argues that the state is one of the main authors of globalization: Leo Panitch, "Rethinking the Role of the State" in J.H. Mittelman, ed, *Globalization: Critical Reflections* (Boulder: Lynne Rienner, 1996), 83.

⁴⁸ According to Slaughter and Freedman, although global governance scholars are right when asserting that the problems of today's world are very complex and cannot be solved by states alone, they are wrong, however, when they eschew that states are obsolete: state power cannot be replaced. See: Anne-Marie Slaughter, "The Real New World Order" (1997) 76 *Foreign Affairs* 184. See also: Lawrence Freedman, "The Concept of Security" in Mary Hawkesworth & Maurice Kogan, eds, *Encyclopedia of Government and Politics* (London: Routledge, 2004), 753-58. For complementary details on the "in-between" position, see: Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67 *Mod. L. Rev.* 588 at 593.

⁴⁹ See: William Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992); Gary P. Freeman, "The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States" in Christian Joppke, ed, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford: Oxford University Press, 1998); William Rogers Brubaker, "Comments on 'Modes of Immigration Politics in Liberal Democratic States'" (1995) 29: 4 *International Migration Review* 903; Gary P Freeman, "Migration and the Political Economy of the Welfare State" (1986) 485 *Annals of the American Academy of Political and Social Science* 51; Gary P. Freeman, "Modes of Immigration Politics in Liberal Democratic States" (1995) 29 *International Migration Review* 881; Christian Joppke, "Multiculturalism and Immigration: A Comparison of the United States, Germany and Great Britain" (1996) 25: 4 *Theory and Society* 449; Christian Joppke, "How Immigration Is Changing Citizenship: A Comparative View" (1999) 22: 4 *Ethnic and Racial Studies* 629; Lydia Morris, "A Cluster of Contradictions: The Politics of Migration in the European Union" (1997) 31: 2 *Sociology* 241; Lydia Morris, "Globalization, Migration and the Nation-State: The Path to a Post-National Europe?" (1997) 48: 2 *British Journal of Sociology* 192.

and potential migrants. This position shares with Freeman and Joppke the argument that the nation-state plays a key role in shaping citizenship rights, though it also acknowledges the impossibility of maintaining complete control of borders.⁵⁰

As with most academic debate in international relations, neither of these conflicting views is necessarily wrong: some official government practices promote aspects of globalization while, at the same time, there are forces at work which are beyond the effective control of government. In other words, cross-border flows are not simply tolerated but at times also facilitated by states in order to advance their national interests. In this perspective, the loss-of-control theme may serve as a powerful narrative that obscures the ways in which government practices themselves create the very conditions that call for, and justify, increased state authority.⁵¹

It is therefore necessary to adopt a more nuanced perspective, recognizing the complex dynamics of state sovereignty, as well as its various dimensions. First, sovereignty has never been absolute and indivisible, though it is often presented in such terms. As such, it is a

⁵⁰ Castles, for example, does not question the trend towards globalization but also seeks to show that "nation-state citizenship" is still an important determinant of the everyday experiences of non-citizens: Stephen Castles, "Democracy and Multiculturalism in Western Europe" in Rainer Bauböck, ed, *From Aliens to Citizens: Redefining the Status of Immigrants in Europe* (Aldershot: Avebury, 1996), 3. See also: Stephen Castles & Alastair Davidson, *The Citizen Who Does Not Belong: Citizenship in a Global Age* (London: Macmillan, 2000); Frank Bovenkerk et al., "Racism, Migration and the State in Western Europe: A Case for Comparative Analysis" (1990) 5: 4 *International Sociology* 475; Frank Bovenkerk et al., "Comparative Studies of Migration and Exclusion on the Grounds of "Race" and Ethnic Background in Western Europe: A Critical Appraisal" (1991) 25: 2 *International Migration Review* 375.

⁵¹ See especially: Peter Andreas, *Border Games. Policing the U.S.-Mexico Divide* (Ithaca: Cornell University Press, 2000); Peter Andreas, "Redrawing the Line: Borders and Security in the Twenty-First Century" (2003) 28 *International Security* 78. See also: Doty, *Anti-Immigrantism in Western Democracies : Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 5; Rudolph, "Sovereignty and Territorial Borders in a Global Age" (2005) 7 *International Studies Review* 1 at 3.

mistake to posit the “end of sovereignty” or its serious attenuation, as those concerned by globalization have done, when, in fact, this erosion, never existed in the first place.⁵² Second, despite differences of opinion regarding the health of the state, there is a discernable trend in many globalization theories towards seeing “people more important to sovereignty than they were in the past”.⁵³ Shamir’s theoretical contribution to the debate is substantial: he argues that it is impossible to analyze the processes of globalization solely in terms of “a systemic malfunction or the unintended consequences of such processes” because such processes also involve their “own” principles of “closure, entrapment and containment”. Shamir does not theorize globalization in terms of “social openness” and “social fluidity” involving tensions between, for example, the North and the South, capitalism and democracy, mobility and immobilization and so on. Rather, following Simmel’s terminology, he explains: “...the social nearness that globalization allows for is also constitutive of simultaneous processes of social distance”.⁵⁴ The result is an emerging “mobility regime, oriented to closure and the blocking of access, premised not only on ‘old’ national or local grounds, but also on a principle of perceived universal dangerous personhoods”. In practice, writes Shamir, this means that national boundaries “are being rebuilt ... as a counterbalance to the universal human rights regime”.⁵⁵ Although the objective here is not to mount an argument in favour of open borders, nor

⁵² Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999). In the same vein, neither was there a “golden age” of border state control, implying that states effectively controlled borders: Lloyd Cox, “Border Lines: Globalization, De-Territorialization and the Reconfiguring of National Boundaries” (Mobile Boundaries/Rigid Worlds Conference, Macquarie University, 27-28 September 2004). See also the conclusion of Part I, below, for more on this topic.

⁵³ Dauvergne, “Sovereignty, Migration and the Rule of Law”, *supra* note 48 at 593. See also: Saskia Sassen, *Guests and Aliens* (New York: New Press, 1999). Sassen shows how the free movement of workers in Europe, once traditional during harvest time, was changed by the transformation of such visitors into political aliens.

⁵⁴ Shamir, “Without Borders? Notes on Globalization as a Mobility Regime”, *supra* note 5 at 199. See also *infra*, note 82, the reference to Simmel.

⁵⁵ *Ibid.* at 199.

a prescription for how to attain it, Caren's comparison between today's world order and the feudal states of the Middle Ages is very helpful in illustrating the moral implications of this mobility regime. He writes: "Citizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one's life chances. Like feudal birthright privilege, restrictive citizenship is hard to justify when one thinks about it closely".⁵⁶ In the feudal states of the Middle Ages the children of peasants couldn't aspire to a different vocation; bound to the soil and their father's trade, this was, according to the medieval worldview, their place in the universe. People remained at the social level to which they were born, with no form of social mobility to enable them to advance. As Carens points out, the same is true for those holding the passport of a particular country. For example, the mere fact of being born in an African state may limit their ability to move around the world in an effort to realize their potential. Thus, the mobility regime put in place by Western countries is determined by the mere coincidence of birthplace. Shamir's suggestion that the emerging mobility regime is constructed to maintain high levels of inequality perfectly reinforces the theoretical framework of this thesis, the "integrated risk-management system" being a central feature of his mobility regime. In fact, Shamir borrows from Foucault's theory on modern governance in order to show the multiple forms of containment underlying the consolidation of local and national boundaries through the identification of people perceived as "dangerous".⁵⁷

⁵⁶ Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49: 2 *The Review of Politics* 251 at 252. In taking a global liberal view, Carens questions why the right to move within a certain state should be accorded, while the right to move between states is severely restricted and largely depends on the place we were born by happenstance. These restrictions lead to increased economic and social inequalities and have a huge impact on people's opportunities in life. See *infra* notes 164 & 258.

⁵⁷ For further analysis of Foucault's theory on modern governance, see the section above: "Understanding the "State": Governmentality, or the "Art of Government". It should be noted that Shamir's theoretical contribution is in strong contrast with the view of some scholars, notably Soysal and Jacobson, that globalization is an emergent global human

To conclude the introduction to Part I of this thesis, which deals with the relationship between migration, globalization and state sovereignty, it is impossible to assess precisely the interaction among the three elements because the meanings of words such as “territory”, “sovereignty”, “country”, “citizen”, “foreigner” and “state” are constantly “negotiated, differentiated and hierarchized to affirm the state-centric imagination of the world”.⁵⁸ Consequently, the erosion of the sovereign state by globalization needs to be qualified: although the contemporary processes of globalization raise important challenges for the activities of statecraft, it is, in fact, more accurate to see globalization as affording “new” opportunities for rearticulating the sovereign state — new ways of being, becoming and “belonging”:

It is here, at the junctures of paradoxical happening where the modern territorial state is made, unmade, and remade, that the deterritorialized subject in global politics, that is the subject who is cut off from the land, the home, the nation, the bounded community – in other words the refugee – enters the scene. It is here that the refugee presence goes to the heart of the paradoxes and predicaments of statecraft, and here that the refugee’s voicelessness ... makes sense, offering a window into how the paradoxical dynamics of events and happenings in relation to the task of statecraft work or are made to work.⁵⁹

Although Soguk talks specifically about the “refugee”, it is shown in the following pages that those organized activities and established institutions which concern the migrant without the required certificates – especially the non-Western (irregular) migrant – help to affirm a specific version of the sovereign state, its *raison d’être*, and its technologies of governance, thus allowing the sovereign state to remain in the business of

rights regime whose process profoundly challenges the notion of state sovereignty and associated citizenship rights: see *supra* note 46 and accompanying text.

⁵⁸ Soguk, *States and Strangers: Refugees and Displacements of Statecraft*, *supra* note 35 at 35.

⁵⁹ *Ibid.* at 44.

governance. To summarize, the labelling of the migrant is the point of convergence for all state activity.

Chapter 1. The Political and Legal Framing of South-North Migration as a Problem

“There are friends and enemies. And there are strangers”.⁶⁰

While not a new phenomenon, migration is more on the public mind than ever before. For instance, the Eurobarometer survey published in January 2007 finds that on a list of secondary concerns expressed by European citizens, migration comes before terrorism and just after health care. The list of primary concerns is related to unemployment, crime and the economy, which, in public perception, are often connected to migration.⁶¹ Among individual Member States, migration ranks at the top of the list of issues citizens currently regard as most important. In the UK, for example, a July 2006 survey has “race relations and immigration” as the top issues, mentioned by 38% of respondents.⁶² Canoy and others write:

Public perception of migration is not uniform in the 25 Member States...but the overall conclusion is that public perception of migration tends to be *increasingly negative* throughout Europe. Migration is regarded by many citizens as a problem that politicians should seriously address. Interestingly, European citizens expect European leadership – and not only their national leadership - to tackle this issue ... Citizens also increasingly expect decision makers

⁶⁰ Zygmunt Bauman, *Modernity and Ambivalence* (Oxford: Polity Press, 1991).

⁶¹ The survey covers 30 countries or territories (25 Member States, two acceding countries (Bulgaria and Romania), two candidate countries (Croatia and Turkey) and the Turkish Cypriot Community. The survey finds that a first group of principal concerns of European citizens is related to unemployment (49%), crime (24%) and the economic situation (23%). A second group of concerns, with results between 18% and 10%, includes health care (18%), immigration (14%), inflation (13%), terrorism (10%) and pensions (10%): European Commission, "Eurobarometer 65: Public Opinion in the European Union- Fieldwork : March – May 2006", January 2007, online: Europa <http://ec.europa.eu/public_opinion/archives/eb/eb65/eb65_en.pdf>(accessed on 28 May 2007).

⁶² See: Ipsos MORI Political Monitor, 31 July 2006; online: Ipsos MORI <<http://www.ipsos-mori.com/polls/2006/mpm060724.shtml> > (accessed on 28 May 2007).

to consult them, and to explain policy settings to them.⁶³ [authors' emphasis]

Interestingly, the authors mention that the surveys confirming the existence of an increasingly anti-immigration attitude often assume a level of knowledge of migration (for example, clear understanding by the respondents of the differences between “migrants”, “asylum seekers” and “ethnic minorities”; or some assessment of the existing level of immigration in their country) that “does not really exist”: “Surveys are about public opinions, wishes and preferences rather than knowledge and understanding of a given issue. They may not properly reflect the complexity and deep interconnection of the factors influencing public attitudes towards migration”.⁶⁴

In the past, migration was generally seen by politicians as necessary for industrialization and as a vital part of nation-building. In the current context, it is necessary to understand the reasons why, and the means by which migration is now presented as something we feel “at the mercy of” and/or as a security problem. As is shown in the following lines, this framing of migration as a “problem” is built upon the simultaneous representation of the non-Western migrant as a “stranger” and a “pauper”; like the stranger and the pauper, the non-Western migrant is deemed to be a danger to the supposedly collective values of the receiving society (1.1). In recent decades, the non-Western migrant, having arrived in Western receiving societies in greater numbers – essentially because of widening economic, demographic and democratic disparities between

⁶³ Marcel Canoy et al., "Migration and Public Perception", *supra* note 61. Quoting: Report by the Bureau of European Policy Advisers (BEPA) to the European commission, 09 October 2006, online:Europa<http://ec.europa.eu/dgs/policy_advisers/publications/docs/bepa_migration_final_09_10_006_en.pdf>(accessed on 28 May 2007).

⁶⁴ *Ibid.* For complementary analysis, see also page 110 & following, below.

countries of the North and South – is also depicted as representing the potential threat of foreign invasion. But migrants have always been a small percentage of the receiving country's population, never approaching anything that could be considered an actual invasion (1.2). Despite this fact, most Western receiving states repeatedly invoke the permeability of their borders to movements of irregular migration and the need to exclude the undesirable migrant. This is because two powerful metaphors are simultaneously at play. The first is the historically specific and legally constructed "illegal migration" metaphor, which is, by definition, a by-product of the legislation established to control migration (1.3). The second is the depiction of international migration in the West as a security threat and the securitization of migration as a "logical" response to the "wave" of "illegal migration" (1.4).

1.1. The Basic Feature of the Non-Western Migrant: A “Stranger” and a “Pauper”

As explained previously, the multitude of exclusionary discourses and practices of Western governments has created concepts of the “other” which resulted in unambiguous and collective self-identities.⁶⁵ The non-Western migrant is one such contemporary concept of the “other”.

South-North migration is presented as a danger to the “homogeneity of the people” in the sense that the migrant’s position, both within and without the state, highlights its ambivalence in a way that is contrary to general opinion: that the national political order be fixed and unambivalent. The symbolic territory is thus a focus of difference: any representation of “we-n

ess” as “sacred” or “pure” implies the classification of what is perceived as “polluting” and, as a result, “threatening”. In this “sacred space”, where certain activities are carried out in the name of a supposed shared identity, the migrant is doomed to be the “other”, the source of menace, never one of “us”.⁶⁶ These representations of the migrant as “impure” or “polluting” are instances of a new kind of racism: “neo-racism”.

Barker, in a book entitled *The New Racism: Conservatives and the Ideology of the Tribe*, argued that the British Conservative Party focused on immigration by perceiving it as an agent of destruction of the British

⁶⁵ *Supra* notes 31 & 32. See also the general introduction and conclusion, for more on this topic.

⁶⁶ Aradau, "Migration: The Spiral of (in)Security", *supra* note 27. Terrén speaks of an "irony of solidarity" to describe the fact that the social structure cannot take place without a polarized classification of "we-ness" and "other-ness": Eduardo Terrén, "Rethinking Ties that Bind. Religion and the Rhetoric of Othering" (2004) 8 *Journal for the Study of Religion and Sociology* 13 at 16.

Nation and by theorizing that every national or ethnic community is neither superior nor inferior, but different. He spoke of “new racism” to describe a racism that does not draw upon the ideas of biological race prevalent in the nineteenth-century but rather on the insurmountability and unavoidability of cultural differences. The “new racism” or “neo-racism”, or “racism without race”, is based on two intertwined concepts: 1) the idea of shared value and difference and 2) the fear of the “other”:

Human nature is such that it is natural to form a bounded community, a nation aware of its differences from other nations. They are not better or worse. But feelings of antagonism will be aroused if outsiders are admitted. And there grows up a special form of connection between a nation and the place it lives.⁶⁷

The natural tendency to form social units based on similarity lies in biology. Biological or pseudo-biological groupings of people are used to explain “bounded social units” instead of social and historical processes. Thus, what Barker has termed “pseudo-biological culturalism” is used to explain how, instead of applying the rigor of social psychology, people understand and incorporate cultural diversity into their worldview.⁶⁸ New racism does not posit the superiority of certain groups of people in relation to others, but only the harmfulness of abolishing borders and the incompatibility of life styles and traditions.⁶⁹ More precisely, the defining feature of the new racism is the tenet holding that cultural pluralism will lead to inter-ethnic conflict which will dissolve the unity of the state. For decades, right-wing governments have used this logic to limit immigration. However, the rejection of others in an attempt to preserve the state is now

⁶⁷ Martin Barker, *The New Racism: Conservatives and the Ideology of the Tribe* (London: Junctions Books, 1981) at 21.

⁶⁸ Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse" 43: 5 *International Migration* 163 at 165.

⁶⁹ Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 19.

a measure also upheld by liberal governments. Divisions based on cultural difference are:

just as intractable and fundamental as the natural hierarchies they have partly replaced, but they have acquired extra moral credibility and additional political authority by being closer to respectable and realistic cultural nationalism and more remote from bio-logic of any kind. As a result, we are informed not only that the mutually exclusive cultures of indigenes and incomers cannot be compatible but also that mistaken attempts to mix or even dwell peaceably together can only bring destruction. From this perspective, exposure to otherness is always going to be risky.⁷⁰

As a result of concentrating on cultural difference and the preservation of the state, new racism “has modernized racism and made it respectable”.⁷¹

Samuel Huntington’s writings are one such illustration of this. He first drew a sharp line between Western culture and Western ideas of individualism, liberty, equality, rule of law, the separation of church and state, and non-Western ideas that are incompatible with the above and pose a potential for conflict.⁷² But Huntington didn’t clearly define these non-Western civilizations and seemed unsure whether Latin America was a distinct civilization or was part of the West. A few years ago, he answered this question in *Who Are We?*, claiming that the deluge of Latino immigration in America is so unlike any earlier wave in its hostility or

⁷⁰ Paul Gilroy, *After Empire: Melancholia or Convivial Culture?* (London: Routledge, 2004) at 157. See also Feagin’s study of neo-racism in American society: Joe R. Feagin, “Old Poison in New Bottles: The Deep Roots of Modern Nativism” in Juan F. Perea, ed, *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States* (New York: New York UP, 1997), 13.

⁷¹ M Duffield, “The Symphony of the Damned: Racial Discourse, Complex Political Emergencies and Humanitarian Aid” 2:3 173 at 175, cited in Ibrahim, “The Securitization of Migration: A Racial Discourse”, *supra* note 68.

⁷² Huntington, “The West: Unique, Not Universal”; Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Old Tappan: Touchstone Books, 1998), *supra* note 45. See also, above, the introduction to this thesis (“The Migrant: A Figure Made to Bear the Ambivalence of Identity”).

resistance to sharing the common American language, civic rites and virtues upon which republican self-governance depends, that it constitutes "a major potential threat to the cultural and possibly political integrity of the United States".⁷³

The racial aspects of the Australian border protection policy were also made relatively explicit during an interview conducted by the Australian Broadcasting Corporation in 2001, when Ruddock, then Minister for Immigration and Multicultural and Indigenous Affairs, explained:

There are some people who do not accept the umpire's decision, and believe that inappropriate behaviour will influence people like you and me, who have certain values, who have certain views about human rights, who do believe in the sanctity of life, and are concerned when people say, "If you don't give me what I want, I'm going to cut my wrists." ... I'm saying that there are some people who believe that they will influence decisions by behaving that way. The difficult question for me is, "How do I respond?" Because I think if I respond by saying, "All you've got to do is slit your wrist, "even if it's a safety razor" – which is what happens in most cases – "...you'll get what you want." ... You say it's desperation, um, I say that in many parts of the world, people believe that they get outcomes by behaving in that way. In part, it's cultural.⁷⁴

Here Ruddock uses linguistic strategies to reinforce the us/them divide by explicitly pointing out the "un-Australian quality" of migrants: these people in detention are cheats, alien to the Australian "fair go"

⁷³ Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity* (New York: Simon & Schuster, 2004). Michael Walzer offers another example of anxiety over the mixing of cultures: "Neighbourhoods can be open only if countries are at least potentially closed ... The distinctiveness of cultures and groups depends upon closure and, without it, it cannot be conceived as a feature of human life": Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 38. See also *supra* note 31 and accompanying text.

⁷⁴ Four Corners, "The inside Story: An inside View of What Is Going on in Detention Centres", *Australian Broadcasting Corporation* (13 August 2002), online: Australian Broadcasting Corporation <<http://www.abc.net.au/4corners/stories/s344246.htm>> (accessed on 06 June 2007).

culture. That Ruddock praises Australians for their “values”, “human rights”, and belief in “the sanctity of life” also clearly means that there are others who don’t adhere to these tenets, “who don’t have the same values, who have little conception of human rights, and, most sinister of all, don’t believe in the ‘sanctity of life’”.⁷⁵ Ruddock then outlines the deviancy of those people who come from strange parts of the world where cutting wrists is a “cultural practice”.

To summarize, the concept of neo-racism directs our attention to the construction of race within the context of the late twentieth century and its implication for national policies of inclusion and exclusion. In contrast to earlier forms of racism – legitimated by an ideology of inequality of human types – the mixing of cultures is seen here as a threat to national identity.⁷⁶ Neo-racism is not really new⁷⁷ and it would be equally erroneous to suggest that the old kind of racism has completely disappeared.⁷⁸ The important point is, however, that against the background of multiple

⁷⁵ Prem Kumar Rajaram & Carl Grundy-Warr, "The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand " (March 2004) 42: 1 *International Migration* 33 at 44.

⁷⁶ Etienne Balibar, "Is There a Neo-Racism?" in Etienne Balibar & Emmanuel Wallerstein, eds, *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991),17. Etienne Balibar suggests that neo-racism is the reversal of population movements, that is, movements from the poor “Third World” countries to the rich industrialized countries, in contrast to the movements in the opposite direction during the era of colonialism. See also: Etienne Balibar, "Difference, Otherness, Exclusion" (2005) 11: 1 *Parallax* 19. For more on this topic, see the section 1.2, below.

⁷⁷ To better understand neo-racism, Balibar suggests, for example, looking back at the Renaissance with its cultural stereotypes that did not necessarily depend upon a pseudo-biological discourse but were, nevertheless, extremely pernicious. In suggesting this, Balibar is thinking of contemporary anti-Semitism, as well as the rise of Islamophobia which, since his essay was written, and particularly following 9/11, has in fact become a global phenomenon. The language of Islamophobia invokes the Crusades, freezing the Islamic world in a medieval past, and depends upon the recirculation of a repertoire of very old images, a division between "us" and "them" which does not reflect but seeks to control a far more complex reality: Balibar, "Is There a Neo-Racism?", *ibid*.

⁷⁸ As Doty rightly points out, the “indicators” of race have historically been, and continue to be, multiple, extremely complex and related to one another in various ways: Doty, *Anti-Immigrantism in Western Democracies : Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 21.

transformations brought about by globalization, neo-racism occurs within the context of movement and “fixations” of identity that characterize a world “increasingly resistant to and, at the same time, preoccupied with borders”.⁷⁹ It is through neo-racism that we are able to understand the forms of exclusion that are particularly relevant to migration, the inherent insecurities and the accompanying desire for order and security. Neo-racism functions as “a supplement to the nationalism that arises from the blurring of boundaries and the problematizing of national identity that the deterritorialization of human bodies gives rise to”.⁸⁰ Consequently, the value of this term lies in its ability to capture (however imperfectly) the changing meaning of the very word “race” and complements such as colour and ethnicity.

Two figures of the “other” are linked to the conception of neo-racism: the stranger and the pauper. They are contemporary figures of the “non-Western migrant”.

⁷⁹ Balibar, “Is There a Neo-Racism?”, *supra* note 76.

⁸⁰ Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 25.

1.1.1. The Figure of the Stranger

There has long been a profound mistrust of people without established connections. In the past this led to an increase in formal criminalization of mobility itself, from the concept of “criminal vagabondage” in France, where mobility was a crime, through a series of “vagrancy panics” in Britain, to, in the United States, increasing legal hostility toward vagrants and anxiety over “crimes of mobility”.⁸¹ The borders that separate national, state-controlled spaces, and the conceptual demarcations that signal the opposition between the inside space and the outside beyond are disrupted today by the figure of the “stranger”.⁸²

As already mentioned above, Bauman speaks of “de-ethicalization” to describe the process whereby the “stranger” – an “undecidable” figure whose presence among friends (inside) and enemies (outside) – is presented as disruptive of the social organization founded on that binary.⁸³ Although the division between the inside and the outside has never been a fixed one, its fragile nature becomes more apparent at a time when

⁸¹ Shamir, “Without Borders? Notes on Globalization as a Mobility Regime”, *supra* note 5 at 201.

⁸² The very first scholar to describe the immigrant as a “stranger”, physically present but not a member of the community was sociologist Simmel. As Simmel puts it, “[t]he unity of nearness and remoteness involved in every human relation is organized in the phenomenon of the stranger...distance means that he, who is close by, is far, and strangeness means that he, who also is far, is actually near”: Georg Simmel, *The Sociology of Georg Simmel*, ed. by Kurt H. Wolff (trans.) (New York: Free Press, 1950) at 402. Simmel’s stranger is, therefore, a neighbour who is not like “us”: close to those she does not know or who are socially distant, and far from those to whom she feels most close. However, Simmel treats the sociological phenomenon of the stranger as “a very positive relation” (*ibid.*), since the stranger represents and embodies, in his view, a freedom of mobility unavailable to others, thus allowing for novel forms of what he calls “social participation”.

⁸³ Bauman, *Modernity and Ambivalence*, *supra* note 60. Bauman calls the strategy the state uses to deal with the migrant “Vergegnung” – a mismeeting or a way of meeting without meeting. Bauman writes about Vergegnung (at page 63): “The art of mismeeting is first and foremost a set of techniques that serve to de-ethicalize the relationship with the other. Its overall effects are the denial of the migrant as a moral object and a moral subject”. For more on this topic, see the general introduction to this thesis.

decoded and deterritorialized movement increases, becoming more widespread, i.e. when the scope and scale of migration is as important as it is today:

Today in the late twentieth century there are many strangers (...) dispersed throughout the world in the form of immigrants (...) calling into question established spatial images of domesticity versus anarchy and chaos, giving rise to intense desires for order and stability and an easily identifiable community (...) The conceptual demarcation between the inside and the outside becomes contaminated, the unity of the nation-state questioned (...) **Strangers, those constituted as other to the national self become more visible and are seen as more threatening. Practices of codification and territorialization proliferate.**⁸⁴ [our emphasis]

Thus, the emblematic figure of the migrant as a “stranger” is at the heart of multiple contemporary exclusionary practices that rest upon strong dichotomizations in terms of space (inside versus outside), membership in a specific community (citizen versus non-citizen) and agency (state versus individual). But these differences are, to a great extent, made apparent by economic disparity. In this context, otherness is constructed not only socially, but economically and materially as well.

1.1.2. The Figure of the Pauper

In his fictionalized memoir about immigrating to France, Ben Jelloun makes the point that “ethnic and cultural difference” do not themselves elicit racism, but rather their connection with poverty does. He writes, with characteristic irony:

⁸⁴ Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 26. Further analysis on territoriality and codification is found on page 51.

Poverty has never been well-received ... At most, difference is accepted under condition that the person be rich, under condition that he has the means to disguise it and pass unobserved. Be different, but be rich! Whoever has no other riches than their ethnic and cultural difference is consigned to humiliation and every form of racism.⁸⁵

The pauper is another social figure that has been deemed disruptive to the social order. The figure of the pauper in the nineteenth century offers a useful example of an excluded other created by the very social order from which it was excluded:

Pauperism is mobility: against the need for territorial sedentarization, for fixed concentrations of population, it personifies the residue of a more fluid, elusive sociality, impossible either to control or utilize: vagabondage, order's itinerant nightmare, becomes the archetype of disorder and the antisocial: 'the vagabond, the original type of all the forces of evil, is found wherever illegal or criminal activities go on: he is their born artisan.'⁸⁶ [author's italics]

During the eighteenth and early nineteenth centuries, with widespread fear of pauperism (extreme poverty), political economists were confronted by the sight of destitute people; an impossible occurrence according to the wisdom of the time, which proclaimed the universal benefits of free markets and the invisible hand. The responses of government at that time included the great strategies of "territorial sedentarization", in order to produce "fixed concentrations of population" and to form, out of the recalcitrant material of the "dangerous classes", something greater than economic man: a social citizen (through, for

⁸⁵ Tahar Ben Jelloun, *La plus haute des solitudes : misère affective et sexuelle d'émigrés Nord-Africains* (Paris: Editions du Seuil, 1977). Text translated by Calavita in: Kitty Calavita, "Law, Citizenship, and the Construction of (Some) Immigrant "Others"" (2005) 30 Law & Soc. Inquiry 401.

⁸⁶ "Poverty is not the external limit of the economy, but rather its internal limit": Giovanna Procacci, "Social Economy and the Government of Poverty" in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press 1991), 151 at 155.

example, anti-vagabondage laws, the poor law, and later, public housing).⁸⁷

The cities' restriction of relief for the poor in earlier centuries was a prelude to the national immigration policy of more recent times.⁸⁸ To provide a concrete example of this, I refer here to the US visa policy. Under Section 214(b) of the US *Immigration and Nationality Act*,⁸⁹ "every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer ... that he is entitled to a non-immigrant status". To convince the immigration officer, the migrant has to show proof of "strong ties" to the country of origin, which includes permanent employment, ownership of property, a bank account and so forth. This highlights the constant need, as in the past, to establish "settled connections".

To conclude, the modern state "requires racism" in order to constitute itself as sovereign.⁹⁰ Signs of racism are found, not in the racial animus born by some persons towards others who are not of their own race, but in the idea that the state must protect itself from those who do not share its values and "virtues". It is indeed "by virtue of her *inherent* difference –

⁸⁷ For example, the UK's Act of Settlement and Removal of 1662 established the principle of "parish serfdom", and was only relaxed in 1795. This act established parish responsibility for the poor, while seeking, simultaneously, to protect the "better" parishes from an influx of paupers: "Only with the good will of the local magistrate could a man stay in any other but his home parish; everywhere else he was liable to expulsion even though in good standing and employed": Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957) at 88.

⁸⁸ Leo Lucassen, "Eternal Vagrants? State Formation, Migration, and Travelling Groups in Western Europe, 1350–1914" in L. Lucassen & J. Lucassen, eds, *Migration, Migration History, History: Old Paradigms and New Perspectives* (Bern: Peter Lang, 1997) at 249.

⁸⁹ *United States Immigration and Nationality Act*, 8 U.S.C. §1182 (1952).

⁹⁰ Michel Foucault, "Society Must Be Defended" in Mauro Bertani, Alessandro Fontana & David Macey, eds, *Lectures at the Collège de France, 1975-76* (New York: Picador, 2003) at 255-57.

manifested ... through outward appearance including cultural practices and accent - to an imagined homogeneous citizenry, a difference understood as inferiority, that states makes the claim that utopia is threatened".⁹¹ In contemporary times, the figures of the stranger and the pauper come together in the figure of the non-Western migrant. For instance, the development of a negative stereotype of Canada's Muslims as "insular, poor, indifferent to Canadian society and more concerned with life in their country of origin" is one of the principal factors underlying the hostility towards Muslims in the country following the 9/11 terrorist attacks in the United States.⁹² Canada is an interesting example because of its claims to be an important, multicultural, Western nation and among those nations most respectful of immigrants and the rights of cultural minorities.⁹³ Thus, today's non-Western migrant is both stranger and pauper, simultaneously created by the social order and deemed a threat to it. As such, as shown below in the chapter on the securitization of migration, the familiar link between crime and migration is often mediated through indicators of poverty. Several metaphors, used frequently in policy

⁹¹ Sherene H. Razack, " 'Your Client Has a Profile:' Race and National Security in Canada after 9/11" (2007) 40 *Studies in Law, Politics, and Society* 3 at 9 (author's emphasis).

⁹² Denise Helly, "Are Muslims Discriminated against in Canada since September 2001?" (Fall 2004) 36: 37 *Journal of Canadian Ethnic Studies* 24 at 22-23. Other principal factors are: 1) negative images of Islam disseminated by Western media (conflicts concerning religious accommodation and the content of opinion polls - the association of Islam with terrorism, the view of Islam as an intolerant and violent religion that is a source of conflict and that oppresses women etc.); 2) the geographical proximity to the United States, Canada's primary political, military and economic ally. Helly adds that this stereotype results from the history of Muslims in Canada, which differs greatly from the histories of people of European origin and of other important immigrant minorities in Canada. In fact, the majority of the country's Muslims arrived relatively recently (during the 1990s), which explains both their quasi-absence from the political arena and their limited political influence: "Ethnic, national and religious fragmentation combined with the absence of federal programmes to support Muslim associations during the 1990s also explains the weak community structure and political mobilization" (*ibid.* at 23).

⁹³ The Preamble of the *Canadian Multiculturalism Act* (*Canadian Multiculturalism Act*, R.S.C 1985, c. 24 (4th Supp.)) states as follows: "The Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism".

circles and media discourse to discuss South-North migration, reinforce the host society's negative attitudes toward the migrant. One of the most powerful is the flood-metaphor, present even in scientific discourse, which insists on comparing immigrants to water: immigration is a flow ("flux migratoire"), a tide, a flood...

1.2. Deconstructing the Flood-Metaphor

When speaking of South-North migration, the most pervasive metaphors are what Lakoff and Johnson call “ontological metaphors”, because they have to do with entities, substances and containers: “We speak of flows, streams, waves and trickles of migrants. We speak of “asylum capacity”. We speak of dams and of sluice gates, we speak of being flooded, inundated and swamped”.⁹⁴ In July 2006, for instance, then French President Chirac warned that Africans “will flood the world” unless more is done to develop the continent’s economy. Libyan Leader Al Qadhafi also has employed the “invasion’ methaphor to portray African migration to North Africa and Europe in his dealings with the European Union.⁹⁵ Clearly, this metaphorical language of migration is not innocent: it suggests that migration is a force of nature, something that cannot be stopped.

In some countries, the “fear of invasion” is not new. For instance, in 1901 the first significant act of Australia’s new Federal Government was to

⁹⁴ George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003) at 25-32. See also: David Turton, “Conceptualising Forced Migration” (October 2003) S.R.C Working Paper no 12, online: Refugee Studies Centre <<http://www.rsc.ox.ac.uk/PDFs/workingpaper12.pdf>> (accessed on 03 October 2006) at 4. See finally the introduction to this thesis, above (“Migration and Metaphor: The Role of Metaphor in Hiding Normative Processes”).

⁹⁵ Hein de Haas, “The Myth of Invasion Irregular Migration from West Africa to the Maghreb and the European Union” (Oxford: International Migration Institute, IMI research report, October 2007). See also: Hein de Haas, “International Migration, Remittances and Development: Myths and Fact” (2005) 30 *Global Migration Perspectives*, online: GCIM <<http://www.gcim.org/attachements/GMP%20No%2030.pdf>>(accessed on 06 August 2008); Ralph Müller, “Creative Metaphors in Political Discourse. Theoretical Considerations on the Basis of Swiss Speeches” (September 2005) *metaphorik.de*, online: Metaphorik <<http://www.metaphorik.de/Journal/>> (accessed on 05 July 2006). See, lastly, Zolberg’s work on the evolution of alarmist popular social science commentary on migration, paralleled in a more moderate form in the academic literature: Aristide R. Zolberg, “Beyond the Crisis” in A.R. Zolberg & P.M. Benda, eds, *Global Migrants, Global Refugees: Problems and Solutions* (Berghahn Books New York, 2001).

pass the *Immigration Restriction Act*, better known as the “White Australia Policy”. This policy, explicitly designed to prevent Asian immigration so as to maintain a predominantly white national community, built a powerful image of Australia as surrounded by “peoples and races”. Devetak writes: “Australia existed in a swelling ‘sea of yellow’; it was constantly under threat of the ‘yellow peril’. These ‘invasion anxieties’ established Australia’s nation building project around the nexus of race, nation and security as other races were publicly maligned as ‘menaces and contagion’”.⁹⁶ Although Australia rid itself of the vestiges of this policy in the 1970s, it has recently reappeared under slightly different guises. Hanson’s maiden speech to Parliament in 1996 is an interesting example: “I believe we are in danger of being swamped by Asians (...) They have their own culture and religion, form ghettos and do not assimilate”.⁹⁷ In addition, late in 1999, there was an increase in the number of unauthorized boats arriving on Australian shores. It has been argued that in the three years subsequent, the way in which the Australian media dealt with the issue of irregular migrants of Middle Eastern background attempting to enter Australia, brought out “the same kinds of anxieties that attached to Chinese immigrants at the end of the nineteenth century. Like today’s boat people, they were described as ‘flooding’ into the territories in ‘waves’, threatening to ‘inundate’ us”.⁹⁸ This “fear of invasion” translates into an important public opposition to migration: in September 2001, in the

⁹⁶ Richard Devetak, "In Fear of Refugees: The Politics of Border Protection in Australia" (2004) 8 IJHR 101 at 104. See also: David Walker, *Anxious Nation : Australia and the Rise of Asia, 1850-1939* (St Lucia, Queensland: University of Queensland Press, 1999).

⁹⁷ Cited in: Devetak, "In Fear of Refugees", *ibid.* at 104.

⁹⁸ Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (Sydney: UNSW Press, 2001) at 41. See also: James Jupp, *From White Australia to Woomera : The Story of Australian Immigration* (New York: Cambridge University Press, 2002); Don McMaster, *Asylum Seekers: Australia's Response to Refugees* (Melbourne, Vic.: Melbourne University Press, 2001); Peter Mares, "Distance Makes the Heart Grow Fonder: Media Images of Refugees and Asylum Seekers " in Edward Newman & Joanne van Selms, eds, *Refugees and Forced Displacement : International Security, Human Vulnerability, and the State* (New York: United Nations University Press, 2003), 330.

aftermath of the Tampa incident⁹⁹, polls conducted by AC Nielson reported that 41 per cent of Australians believed immigration levels were too high.¹⁰⁰

In major Western countries, the strength of the flood-metaphor is drawn from two key interrelated concerns of the post WWII era: the strong increase in South-North migration and the fact that human mobility has taken place at a time when there is so much movement in the world, “so many flows across so much space that space itself is often defined by speed and movement”.¹⁰¹ In other words, Western receiving societies are acutely sensitive to types of migration flows, and not just their volume: the increasing visibility of global migration in host countries, which confronted many citizens with the unprecedented settlement of non-Western, culturally and physically distinct immigrants, might partly explain the popular perception that current migration is at “unprecedented levels” and the concomitant “flooding” images associated with it.¹⁰²

⁹⁹ The Norwegian freighter Tampa reached Australia's Christmas Island in August 2001, carrying more than 400 mainly Afghan asylum seekers it had rescued at sea. Then Prime Minister Howard refused to let the group enter Australia and embarked on a November election, campaigning strongly on this issue.

¹⁰⁰ Since 1996, opposition to immigration has softened in Australia: whereas by 2001 and 2002, between 35 to 41 per cent of Australians thought the current intake was too high, in the early 1990's, at least 70 per cent held that opinion. According to Betts, it is not because more Australians want population growth but rather due to the decline of a number of factors which previously fed opposition to immigration (a decline in the rate of unemployment, a decrease in family reunification, the growth of skilled migration, cuts in social welfare for migrants, upon arrival; the end of the promotion of a “structural multiculturalism”): Katherine Betts, "Immigration and Public Opinion: Understanding the Shift" (2002) 10: 4 *People and Place* 24.

¹⁰¹ Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 3.

¹⁰² Haas, "International Migration, Remittances and Development: Myths and Fact", *supra* note 95 at 3. See also: Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25. See lastly: Rudolph, "Sovereignty and Territorial Borders in a Global Age", *supra* note 51 at 9.

The increase in South-North migration is significant and, as such, presents new challenges to integration policies and institutions of Western receiving societies.¹⁰³ It is also true that managing migration has now become more difficult, particularly because of the unpredictability and periodically high intensity of human displacements – whether they are driven by political, environmental or social factors, or a combination thereof.¹⁰⁴ Assessing the exact role played by population movement within the current context is a difficult task, which goes far beyond the objective

¹⁰³ Estimates by major development groups of the number of international migrants indicate that, between developed and developing countries, the distribution in the number of international migrants worldwide changed considerably since the 60's: excluding the former USSR, from 1960 to 1970, developed countries gained 6 million international migrants (which accounted for virtually the total increase in the number of international migrants worldwide); from 1970 to 1980, 9 million (accounting for half of the increase in that number); from 1980 to 1990, nearly 15 million (55 per cent of that number) and from 1990 to 2005, over 33 million (around 92 per cent of that number). As a result of these trends, the concentration of international migrants in the richer countries has increased. Whereas in 1960, 38 per cent of all international migrants lived in developed countries other than the USSR and 58 per cent lived in developing countries, by 2000, 46 per cent of all international migrants lived in developed countries and just 37 per cent lived in developing countries. With the inclusion of the former USSR among the developed countries, the proportion of international migrants in the developed world rose to 42 per cent in 1960 and to 63 per cent in 2000. The latest statistics indicate that in 2005, 115 of the 191 million international migrants were to be found in the world's most prosperous countries (which represents around 60 per cent of all recorded migrants). See: U.N. Department of Economic and Social Affairs, *World Economic and Social Survey 2004: International Migration* (United Nations: New York, 2004), U.N. Doc. E/2004/75/Rev.1/Add.1 at 26; International Organization for Migration, *World Migration 2005: Costs and Benefits of International Migration* (Geneva: IOM, 2005) at 388; O.E.C.D., *Trends in International Migration: Annual Report 2004* (Paris: OECD Publishing, 2005); U.N., *International Migration and Development: Report of the Secretary-General*, UN GAOR, 60th sess., U.N. Doc. A/60/871 (2006) 1 at 28.

¹⁰⁴ In Europe, for example, following the collapse of the communist regimes, the 1989-1990 East-West movement of 1.3 million persons took most governments by surprise. This did not turn out to be a harbinger of larger movements originating from the eastern region: "Russians did not come" – as many in the West apprehended. Instead, however, the ethno-political conflicts in Bosnia and Kosovo generated a large number of internally and externally displaced persons: Bimal Ghosh, "Towards a New International Regime for Orderly Movements of People" in B. Ghosh, ed, *Managing Migration. Time for a New International Refugee Regime?* (Oxford: Oxford University Press, 2000), 6 at 9.

of this thesis.¹⁰⁵ However, in the following passage, I adopt a more balanced view of contemporary global migration; a view that does not neglect the “other side” of migration and that brings us to a proper understanding of this phenomenon. Contrary to the popular opinion, there is no “crisis” of migration: human mobility is, in fact, increasing in scope and complexity. This fear of an “invasion of migration” symbolizes some deep apprehensions in the policy circles of Western receiving societies: the progressive replacement of the emblematic picture of the late nineteenth international migrant – “a European crossing the ocean in search of a better life, exchanging an industrializing region intensive in labour for another industrializing region intensive in land”¹⁰⁶ – with “apocalyptic visions of a Western world beset by massive migration pressures from ‘barbarous’, ‘degenerating’ regions of the developing world, coupled with overwrought anxieties about growing ‘imbalances’ between the native population and other racial categories”.¹⁰⁷

Although it is commonplace to think that we live in an age of unprecedented migration,¹⁰⁸ there is reason for scepticism.

¹⁰⁵ In an extensively researched analysis which forms part of the systematic evaluation of globalization, Held and his co-authors examined human migration patterns throughout history on the basis of their extensity (the degree to which cultural, political, and economic activities “stretch” across new frontiers to encompass the “world”), intensity (changes in the magnitude and regularity of interconnectedness) and velocity (changes in the speed of global interactions and processes). Their conclusion is tentative, stating that if present trends continue, the contemporary pattern of migration “may supersede predecessors in terms of intensity as well as extensity”: David Held, *Global Transformations: Politics, Economics and Culture* (Stanford, Calif.: Stanford University Press, 1999) at 312.

¹⁰⁶ Douglas S. Massey et al., *Worlds in Motion* (Oxford: Clarendon Press, 1998) at 4.

¹⁰⁷ Ninna Nyberg-Sorensen et al., “The Migration-Development Nexus: Evidence and Policy Options; State-of-the-Art Overview” (2002) 40: 5 *International Migration* at 8. See also: Zolberg, “Beyond the Crisis”, *supra* note 95. Finally, see the analysis by Balibar on neo-racism in note 76, *supra*.

¹⁰⁸ This refers to the widely cited book by Castles and Miller, who label the current period the “Age of Migration”: Stephen Castles & Mark. J. Miller, *The Age of Migration* (Houndmills, Basingstoke, Hampshire and London: Macmillan Pres Ltd, 1993).

First, the view of the present era as “unique” must be balanced with the awareness that long-distance migration is as old as humankind:

Like many birds, but unlike most other animals, humans are a migratory species. Indeed, migration is as old as humanity itself. Of this fact there is no better proof than the spread of human beings to all corners of the earth from their initial ecological niche in sub-Saharan Africa (Davis 1974:53). A careful examination of virtually any historical era reveals a consistent propensity towards geographic mobility among men and women, who are driven to wander by diverse motives, but nearly always with some idea of material improvement.¹⁰⁹

Since earliest times, when the world population spread out from Africa, migration has taken place over long distances and, as shown below, in substantial numbers.

Second, the absolute number of people on the move is greater now than ever before. However a similar statement can be made about almost every category of human activity. It reflects not only an increase in the tendency to migrate but also an increase in the world population, as well as in the number of people engaged in virtually any activity.¹¹⁰ While the number of international migrants (defined as persons residing more than one year in a country other than the one in which they were born) has doubled in the past 25 years – from an estimated 75 million in 1965 to 120 million in 1990 to 191 million in 2005 –, the overall proportion of migrants in the world, which, one century ago, was estimated at 2.5/3 per cent, has remained more or less constant over the last four decades – from approximately 2.3 per cent in 1965 and 1990 to approximately 3 per cent

¹⁰⁹ Massey et al., *Worlds in Motion*, *supra* note 106 at 1. Quoting: Kingsley Davis, "The Migrations of Human Populations" *The Human Population* (San Francisco: W.H. Freeman, 1974), 53.

¹¹⁰ Kathleen Newland, "International Migration: At the Boiling Point" in K.M.Cahill, ed, *Traditions, Values and Humanitarian Action* (New York: The Center for international health and cooperation, 2003), 309.

in 2005.¹¹¹ Therefore, current levels of migration can be considered to be neither qualitatively, nor, as demonstrated below, quantitatively, exceptional.

Last but not least, the period between World War I and the beginning of the 1950s was a period of low migration. As a result, post WWII migration may appear to be comparatively high. However, such a volume of migration has historical precedents: there were periods of equal, if not more drastic, international migration over the turn of the last century. As such, it is estimated that during the industrial period (from the beginning of the nineteenth century to the outbreak of WWI), rapid economic growth in the Americas and Oceania attracted European workers in numbers that, relative to the population of receiving countries' population, have not since been surpassed. Available data indicate that, between 1820 and 1932, an estimated 52 million Europeans migrated to the principal receiving countries of the Americas and Oceania. Of these emigrants, 85 per cent went to just five destinations: Argentina, Australia, Canada, New Zealand and the United States of America.¹¹²

¹¹¹ See: Stephen Castles, "International Migration at the Beginning of the Twenty-First Century: Global Trends and Issues" (2000) 52: 165 *International Social Science Journal* 269; GCIM, *Migration in an Interconnected World: New Directions for Action* (Geneva: Global Commission on International Migration, October 2005) at 3; Haas, "International Migration, Remittances and Development: Myths and Fact", *supra* note 95 at 3.

¹¹² The history of modern international migration divides roughly into four periods: the mercantile period (from 1500 to 1800); the industrial period (from the beginning of the nineteenth century to the outbreak of WWI); the period of limited migration (from the 1920s to the end of the 1950s); post-industrial migration (from the 1960s to today). Emigration during the industrial period resulted from economic development in Europe and the spread of industrialization to former colonies in the New World: Lydia Potts, *The World Labour Market: A History of Migration* (London: Zed Books, 1990) at 71; Massey et al., *Worlds in Motion*, *supra* note 106 at 1-5. See also: U.N. Department of Economic and Social Affairs, *World Economic and Social Survey 2004: International Migration*, *supra* note 103 at 3-22.

The data on South-North migration must also be carefully interpreted. In the first place, international migration has increased not only in the Western receiving societies. Since the 1980s, it has spread into newly industrialized Asian countries as well as into several less-developed but capital-rich nations of the Gulf region. This is an important point because, in fact, current statistics on South-North migration include among the developed countries, several developing countries with high-income economies, which attract a huge concentration of migrant workers (such as Bahrain, Brunei Darussalam, Kuwait, Qatar, the Republic of Korea, Saudi Arabia, Singapore and the United Arab Emirates).¹¹³ Further, while there are currently no global estimates for the number of migrants originating from each country, latest estimates suggest that “South-to-South” migrants are still about as numerous as “South-to-North” migrants.¹¹⁴ And if it holds true that in recent decades, there has been an increase in the proportion of migrant workers from developing countries among the number of international migrants in high-income countries,¹¹⁵ since the 1980’s there has been a constant decline in the small proportion

¹¹³ It is thus more accurate to say that growth of migrant stock has primarily been concentrated in high-income countries, whether developed or developing: U.N., *International Migration and Development*, *supra* note 103 at 33 (para.124).

¹¹⁴ Estimates based on the 2000 census suggest that approximately 80 per cent of migrants in developing countries originate from other developing countries, whereas 54 per cent of migrants in developed countries originate from developing countries. When these proportions are combined with estimates of the global migrant stock, they suggest that there are approximately as many migrants from developing countries in other developing countries (60 million) as there are migrants from developing countries in the developed world (62 million): *Ibid.* at 33. Recent estimates also suggest that in certain regions South-South migration is more important. For instance, more sub-Saharan Africans live in North Africa than in Europe now. Because of the irregular or unregistered character of most migration, official North African data sources show unrealistically low estimates of West African migrant populations in the region. Libyan local authorities estimate the number of legal foreign workers at 600,000, while irregular immigrants are estimated to number between 750,000 and 1.2 million. Another source claims that Libya hosts 2 to 2.5 million migrants, representing 25 to 30 per cent of its total population. For more on this topic, see: Hein de Haas, "Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends" (Geneva: International Organization for Migration, 2008). See also *infra* note 119.

¹¹⁵ See: GCIM, *Migration in an Interconnected World: New Directions for Action*, *supra* note 111 at 13-14.

of asylum seekers and refugees from developing countries in those high-income nations.¹¹⁶

To summarize, neither the movement of human beings across geographic space, nor their movement across the territorially sovereign states of the Western industrialized world is a new phenomenon. Even since the development of the nation-state and the seventeenth century concept of legally linking populations to territorial units,¹¹⁷ people continued to migrate in large numbers. It is also inaccurate to suggest that more people are on the move now than ever before: the current volume of migration has historical precedents and the scope of international migration remains relatively limited. In addition, it should be noted that recent trends in migration replicate, to a certain extent, underlying trends of the 19th century: Europe was, at that time, substantially poorer than the New World and most migrants left seeking a better life, attracted by job opportunities and higher wages. Therefore, there are “more similarities between current and historical migration than most people think”.¹¹⁸

¹¹⁶ At of the end of 2007, roughly one third of all refugees were residing in countries in the Asia and Pacific region, with 80 per cent of them being Afghans. The Middle East and North Africa region was host to a quarter of all refugees, primarily from Iraq, while Africa hosted 20 per cent of the world's refugees. Europe and the Americas region had the smallest share of refugees, respectively 14 per cent and 9 per cent (with Colombians constituting the largest number): UNHCR, *2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva: UNHCR, 2008). See also: U.N.H.C.R., *2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR* (Geneva: UNHCR, 2006). This trend has been analysed by some scholars as a result of unwarranted anxiety about migration in Western countries. See, e.g.: Bhuppinder S. Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems" (1999) *New issues in Refugee Research*, Working Paper No2, UNHCR, online: [Journal of Humanitarian Assistance <http://www.jha.ac/unhcr.htm>](http://www.jha.ac/unhcr.htm) (accessed on 02 October 1999); Nyberg-Sorensen et al., "The Migration-Development Nexus: Evidence and Policy Options; State-of-the-Art Overview"; Andrew Shacknove, "From Asylum to Containment" (1993) 5: 4 *Int'l J. Refugee. L.* 516.

¹¹⁷ See *supra* note 44.

¹¹⁸ See Marcel Canoy et al., "Migration and Public Perception", *supra* note 63. For further details, see also: Timothy J. Hatton & Jeffrey G. Williamson, "International

Looking at migration from a historical perspective helps to demonstrate the distorted and erroneous nature of contemporary public perception of South-North migration. However, “receiving” (as well as “sending”) countries are faced with new migration-related challenges that cannot be ignored. The significance of changes during the post WWII era lies in the considerable increase in the diversity and complexity of human mobility. Firstly, migration has become a multifaceted and complex global issue, which now touches every country in the world: migrants are to be found all around the globe, some moving within their own region, others travelling from one part of the world to another. This is making it increasingly difficult to sustain the distinctions that have traditionally been made between countries of origin, transit and destination, and many states now fall into all three categories.¹¹⁹ Until now, relatively little attention has been paid to the responsibility of states to safeguard the rights of people moving across their territory, on their way to another country. In view of the increasingly long and complex routes taken by international migrants, there is an urgent need to focus additional attention on this issue.¹²⁰ Secondly, the widening of economic, demographic and democratic disparities between the countries of the North and the South has

Migration and World Development: A Historical Perspective" (September 1992), NBER Working Paper No. H0041.

¹¹⁹ The Middle East and North Africa, for example, remain major regions of emigration and, at the same time, receive a significant number of migrants, destined either for the region itself or in transit to Europe. On their way, migrants often settle temporarily in towns to work and save enough money for their onward journey. Substantial numbers of migrants end up settling in such towns and cities. On this subject, see essentially: C.A.R.I.M., *Mediterranean Migration - 2005 Report*, ed. by Philippe Fargues (Florence: Robert Schuman Center for Advanced Studies, 2006). See also: Haas, "The Myth of Invasion", *supra* note 95; Hein de Haas, "Morocco: From Emigration Country to Africa's Migration Passage to Europe " (October 2005), online: Migration Policy Institute <<http://www.migrationinformation.org/>>; Mehdi Lahlou, *Les migrations irrégulières entre le Maghreb et l'Union européenne: évolutions récentes* (San Dominico di Fiesole: European University Institute, Robert Schuman Centre for Advanced Studies, 2005). See also *supra* note 115.

¹²⁰ GCIM, *Migration in an Interconnected World: New Directions for Action*, *supra* note 111 at 59.

reinforced the traditional causes of migratory movements (i.e. disparities in income and employment, few opportunities for education and advancement, environmental degradation, political upheaval and armed conflict, poverty and human rights abuse), making these causes more interrelated and connected to each other than in the past.¹²¹ On this point, and contrary to the popular migration myth in Western countries that poverty and misery are the root causes of migration, it is not the poorest who migrate. In fact, migrants generally originate from households which, in relation to their communities, have middle incomes. This is mainly because international migration involves considerable costs and risks which poor households do not have sufficient means or ability to absorb.¹²² Thus, the popular idea that poverty has proved “mass

¹²¹ According to the United Nations Development Programme (UNDP), the proportion of the world's population living in poverty has decreased faster in the past 50 years than in the previous 500 years, while the gap in standards of living between richer and poorer parts of the globe is continuing to grow. In 1975, the per capita Gross Domestic Product (GDP) of high-income countries was 41 times greater than that of low-income countries and eight times greater than that of middle-income countries. Today, high-income countries have per capita GDPs that are 66 times those of low-income countries and 14 times those of middle-income countries. The potential for growth in the migration scale from poorer to richer countries is reinforced by demographic differentials. Many of the world's more prosperous states now have fertility rates that are below the replacement rate of 2.12 per woman, a situation which threatens their ability to sustain current levels of economic growth and to maintain their existing pension and social security systems. In contrast, fertility rates for the 2000 to 2005 period range from 2.5 in Latin America and the Caribbean to 3.8 in the Arab states and 5.4 in sub-Saharan Africa, which means that all of the world's population growth is taking place in developing countries. Finally, a good number of the states experiencing unemployment, low incomes and high rates of population growth are also countries where the democratic process is fragile, the rule of law is weak, and public administration is inefficient: *Ibid.* at 13.

¹²² Migration, especially long distance migration, requires planning and the ability to pay for transportation and maintenance during the journey and settling-in stage at the destination. Poor people often have debts and social obligations which tie them to a place. In communities of origin, the probability of migrating is lower for low-income households, increases as income rises and tends to decline for those with higher incomes. Even in situations of forced migration from areas stricken by famine, war or natural disaster, it is generally not the poorest who tend to migrate: Ronald Skeldon, *Migration and Development: A Global Perspective* (Essex: Longman, 1997); Ronald Skeldon, "Migration and Poverty" (2002) 17: 4 *Asia-Pacific Population Journal* 67. However, once migrants from a particular community establish a foothold abroad, the “migration network” reduces the costs and risks of migration. Understanding this explains the apparently conflicting results found in different studies on the impact of international migration on income inequality and poverty: U.N., *International Migration and Development*, *supra* note 103 at 53. For more on this topic, see *infra*, note 126. See also Part II, chapter 3, section 3.2.

migration” is fundamentally flawed, since it is based on “self-sustaining assumptions and impressions rather than on sound empirical evidence”.¹²³ Finally, today migration is characterized by several changing patterns. First, the old paradigm of permanent migrant settlement is progressively giving way to temporary migration, in part in response to the rising demand for labour in receiving countries.¹²⁴ Second, women are migrating in greater numbers and increasingly migrate alone, then becoming primary breadwinners for the families they leave behind. Representing 49.6 per cent of all migrants in 2005, female migrants have outnumbered male migrants in developed countries since 1990 (55.5 per cent), but today, in developing countries, they account for just 45.5 per cent of all migrants.¹²⁵ Third, migration has become a “transnational phenomenon”, leading to the increasing maintenance of strong links with countries of origin.¹²⁶ Transnationalism leads to forms of “multiple belonging”, fostered by increased mobility and communications, and contributing to the formation and maintenance of relations which transcend national boundaries and create a transnational space of cultural, economic and political

¹²³ See: Haas, "The Myth of Invasion", *supra* note 95 (pointing out that there is still a lack of empirical research on this issue).

¹²⁴ In the 1990s, the number of temporary workers admitted to high-income countries under skill-based programs rose substantially, doubling in the United Kingdom and almost quadrupling in the United States. Since the early 1990s, movements of unskilled seasonal workers have also increased in most high-income countries which have such programs: The World Bank, *Global Economic Prospects 2006 -Economic Implications of Remittances and Migration* ed. by The World Bank (Washington, D.C.: The World Bank, 2006) at 72; I.O.M., *Biometrics and International Migration* (Geneva: International Organization for Migration, 2005) at 14.

¹²⁵ Women and men circulate differently in the global economy; women predominantly enter into the service and welfare sectors, and apparently, appear in skilled migration streams only if admission policies are developed specifically for their preferred occupations: GCIM, *Migration in an Interconnected World: New Directions for Action*, *supra* note 111 at 14; U.N., *International Migration and Development*, *supra* note 103 at 33.

¹²⁶ The term “transnational” refers to communities (individuals or groups) settled in different national societies, sharing common interests and references – territorial, religious, linguistic – and using transnational networks to consolidate solidarity beyond national boundaries: Thomas Faist, "Transnational Social Spaces out of International Migration: Evolution, Significance and Future Prospects" (1998) 39: 2 *Archives Européennes de Sociologie* 213.

participation. Richmond describes this ability to move from one country to another and back again as “transilience”.¹²⁷ Interestingly, transnational migration suggests the increasing inadequacy of conventional normative approaches to the national border. Migration scholars have shown that many irregular migrants have constructed lives that traverse political, geographic, cultural and political borders altogether. They maintain “multiple relationships – familial, economic, social, organizational, religious and political – in both home and host societies... [They] take actions, make decisions, and develop subjectivities and identities embedded in networks of relationships that connect them simultaneously to two or more nation-states”.¹²⁸ These experiences clearly do not conform to conventional modes of state-centred thinking at all. They show that, although migrants do “live constantly subject to the legal authority of [a country]’s national border, they also reside in social worlds that simply are not confined by national territorial boundaries”.¹²⁹

¹²⁷ Anthony H. Richmond, "International Migration and Global Change" (International Conference on Migration, Centre for Advanced Studies, Faculty of Arts and Social Sciences, National University of Singapore, February 1991). The more concrete manifestations of “resilience” are high rates of migrants’ returns to home countries (available evidence suggests that return migration is more common than normally believed); family reunification and the maintenance of strong family networks (for example, Salvadorian, Dominican and Mexican migrants constituted respectively 50, 30 and 20 per cent of tourists to countries of origin); remittances sent from migrants to the country of origin; promotion of investment in the country of origin. See: Douglas S. Massey et al., "Theories of International Migration: A Review and Appraisal" (1993) 19: 3 *Population and Development Review* 431; U.N., *International Migration and Development*, supra note 103 at 68; The World Bank, *Global Economic Prospects 2006 - Economic Implications of Remittances and Migration*, supra note 124 at 64-87; Robert E. Lucas, *International Migration and Economic Development: Lessons from Low-Income Countries* (London: Edward Elgar Publishing, 2005).

¹²⁸ Linda Basch, *Nations Unbound: Transnational Projects, Postcolonial Predicaments, and Deterritorialized Nation-States*, ed. by L. Basch, N. Glick Schiller & C. Blanc-Szanton (Routledge: London, 1993) at 7; cited in: Linda S. Bosniak, "Opposing Prop.187: Undocumented Immigrants and the National Imagination" (1996) 28 Conn. L. Rev. 555 at 615. See notes 352 & 353, below, for more on this topic. See also Part II, chapter 3, section 3.2 & chapter 4, section 4.2, for further analysis.

¹²⁹ Bosniak, "Opposing Prop.187", *ibid.* at 615.

In conclusion, international global migration – which has existed for centuries – is not rising dramatically compared with past periods of influx. However human mobility is growing in scope and it is of an increasingly complex nature. Data on “expanding South-North migration” must be also be interpreted with great caution because they do not correctly represent the ever-important South-South migration. Despite this fact, apocalyptic scenarios of a massive influx of migrants, incited by the flood-metaphor, have spurred political leaders to advocate for the need to defend ourselves against the “waves of migration”, to keep South-North migration as far from us as possible. It is in this context that the case is frequently made for “upgrading” border control: in terms of “protecting” the “sovereignty” of the state from “illegal attempts” to enter. However, one cannot assume that border controls are a natural and eternal feature of political life, since, as shown in the next section, they have, in fact, developed concurrently with immigration restrictions. Thus, irregular migration is not a natural or fixed condition: the category of “illegal migration” is historically specific and legally constructed, being, by definition, a by-product of the positive laws made to control migration. This calls for the need of disassociating sovereignty and its master, the nation-state, from their claims of neutrality: not only does the nation-state control irregular migration, but creates it as well.¹³⁰

¹³⁰ Michael Samers, "An Emerging Geopolitics of 'Illegal' Immigration in the European Union " (2004) 6: 1 Eur. J. Migr. & L. 27 at 28-29. See also: Kostakopoulou, "Irregular Migration and Migration Theory", *supra* note 26 at 42. This idea was raised previously in the introduction to this chapter where, on page 60, it is stated that it is necessary to adopt a more nuanced perspective in recognition of the complex dynamics of state sovereignty and its various dimensions.

1.3. The “Illegal” Migrant as an “Impossible Subject”¹³¹: When a Juridical Status is in Fact a Political Identity

Journalists frequently refer to “illegal immigrants” as if it were a neutral term. But the illegal frame is highly structured. It frames the problem as one about the illegal act of crossing the border without papers. As a consequence, it fundamentally frames the problem as a legal one.¹³²

Nowadays the concept of “illegal migration” is so frequently used in public discourse, and has become so common, that it tends to be forgotten that this has not always been the case. It must, therefore, be treated as a relatively new feature. This requires some historical explanation.

Until the 1880s, the history of migration was, by and large, an unregulated process with few political interventions and no systematic form of management.¹³³ The first modern immigration restrictions were issued towards the end of the nineteenth century, most of them directed not against migration in general but rather, against specific groups: morally undesirable individuals (single mothers, unmarried couples, prostitutes, vagrants and criminals); socially undesirable individuals, suspected of becoming “liable to public charge” (the insane, for example); politically undesirable individuals (labour militants, communists and anarchists); and racially undesired individuals (Chinese, Poles and Jews). However, at that

¹³¹ “The illegal alien is ... an ‘impossible subject’, a person who cannot be and a problem that cannot be solved”: Mae M. Ngai, *Impossible Subjects : Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004) at 5.

¹³² George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (Chicago: University of Chicago Press, 1987).

¹³³ See: Tomas Hammar, "Laws and Policies Regulating Population Movements: A European Perspective" in Mary M. Kritz, Lin Lean Lim & Hania Zlotnik., eds, *International Migration Systems: A Global Approach* (Oxford: Clarendon Press, 1992), 245; William Walters, "Secure Borders, Safe Haven, Domopolitics" (2004) 8: 3 *Citizenship Studies* 237 at 250.

time, and up to the 1920s, the very term “illegal migrant” was still not in use. Even in the Netherlands, one of the first countries to issue immigration restrictions, migrants entering illegally were labelled “stowaways”, “paid off” or “deserted” but not “illegals”.¹³⁴ One common explanation for this is that there was no way to enforce these restrictions. The twentieth century is a different matter: it was only with the invention of passports, visas and deportation procedures after World War I – when governments were finally able to put immigration restrictions into practice – that the concept of “illegal alien” was created.¹³⁵ It is no coincidence that the regime of immigration restriction emerged with WWI. By simultaneously destroying the geopolitical stability of Europe and solidifying the nation-state system, the war also created millions of refugees, stateless persons, and during the post-war period, denationalized persons. Recalling Arendt, Agamben explains: “In the system of the nation-state, the so-called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state.”¹³⁶ Certainly the “illegal migrant” appears at the moment in history

¹³⁴ Franck Düvell, “The Irregular Migration Dilemma: Keeping Control, out of Control or Regaining Control?” in Franck Düvell, ed, *Illegal Immigration in Europe : Beyond Control?* (New York: Palgrave Macmillan, 2006), 3 at 22. See also Carter, *supra* note 34, and accompanying text.

¹³⁵ *Ibid.* at 23-24. Although it was certainly the case that passports and border controls appeared at an earlier point in time, it was not until the 1920s that the world was fully and firmly divided by borders, with the requirement of passports and visas to cross them. This story is well documented in: John Torpey, *The Invention of the Passport. Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000). See also: Ann Dummett & Andrew G. L. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld & Nicolson, 1990).

¹³⁶ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Calif.: Stanford University Press, 1998) at 126. Agamben points out the similarity between an illegal alien, an “enemy combatant” and Homo Sacer, a figure of Roman law deprived of any civil rights. Between 1915 and 1933, France, Belgium, Italy and Austria denationalized persons of “enemy origin” and others deemed unfit for citizenship by reasons of birth, culminating in the Nuremberg citizenship laws and the Nazi concentration camps. He explains: “One of the few rules to which the Nazis consistently adhered during the course of the ‘Final Solution’ was that Jews could be sent to the extermination camps only after they had been fully denationalized (stripped even of the residual citizenship left to them after the Nuremberg laws)”. See also: Hannah Arendt,

and in the juridical “no-man's-land” created when the war loosened the ties between birth and nation, human being and citizen.¹³⁷ Following World War II, immigration restrictions remained in place, varying in intensity depending on the country and region.¹³⁸ The term “illegal migrant” has even become more popular since the 1970s, with the criminalization of entry, stay and employment.¹³⁹

In short, the history of the term “illegal migration” correlates with the emergence of immigration restrictions. To give a concrete example, the origins of the “illegal alien” in US law and society date from the time when irregular migration became the central problem in US immigration policy, with the enactment of a legal regime of restriction that commenced in the 1920s. Before 1891 there were no provisions in US immigration laws to deport an immigrant who entered without permission (and hardly any requirement for admission existed). Thereafter, US Congress enacted statutes of limitations of one to five years for deportable offences. “This policy recognized an important reality about illegal immigrants”, writes Ngai: “They settle, raise families and acquire property - in other words, they become part of the nation's economic and social fabric”.¹⁴⁰ It was considered unconscionable to expel such people. After World War I, both

The Origins of Totalitarianism (San Diego, New York, London: Harcourt, 1968) at 267-302; Richard Bernstein, "Hannah Arendt on the Stateless" (2005) 11: 1 *Parallax*, 46. For further analysis, see section 2.1.2., below.

¹³⁷ Mae M. Ngai, "The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965 " (2003) 21: 1 L.H.R. 69.

¹³⁸ According to Walters, “many factors were involved, including fears about newly-identified ‘foreigners’ related to a racialized biopolitics of population; a desire to regulate immigration in the interests of governing unemployment; and the emergence of a notion of refugees as a ‘crisis’ and an international ‘problem’”: Walters, "Secure Borders, Safe Haven, Domopolitics", *supra* note 133 at 250.

¹³⁹ See for further details: Düvell, "Illegal Immigration in Europe", *supra* note 134 at 27.

¹⁴⁰ Mae M. Ngai, "We Need a Deportation Deadline - a Statute of Limitations on Unlawful Entry Would Humanely Address Illegal Immigration", *Washington Post* (14 June 2005), A 21.

quantitative (numerical ceilings) and qualitative (national origin and racial) restrictions on immigration were put into place by the *Johnson-Reed Immigration Act* of 1924. “In a fit of hyper-nationalist vengeance”, US Congress also eliminated the statute of limitations on unlawful entry.¹⁴¹ This policy switch re-mapped the nation, both by creating new categories of racial difference and by emphasizing in an unprecedented manner the nation's contiguous land borders and their patrol. This brought about the “illegal alien”: a new legal and political subject whose inclusion within the nation was “simultaneously a social reality and a legal impossibility – a subject barred from citizenship and without rights”.¹⁴²

Given the absence of provisions in international law concerning irregular migration as a whole,¹⁴³ the distinction between those within the law and those outside it is made by each state. The definitional task thus belongs to the national authorities. Although technically anyone present in a country without either nationality or proper authorization has transgressed migration laws, irregular migration as a concept covers a number of rather different issues. Three are immediately apparent: a foreigner arriving clandestinely in the territory of a state; a foreigner staying beyond her permitted period of entry and residence; a foreigner working when not permitted to do so or in a manner inconsistent with her

¹⁴¹ *Ibid.*

¹⁴² Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, *supra* note 131 at 4. See also: Ngai, "The Strange Career of the Illegal Alien", *supra* note 137.

¹⁴³ The only existing international definition is that of the “irregular migrant worker” as provided by Article 5 of the UN Migrant Workers Convention, which states that irregular migrant workers may have entered without authorization, be employed contrary to their visa stipulations, or have entered with permission but remained after their visas expired: *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990) (entered into force 1 July 2003). For more on this topic, see: Laurie Berg, "At the Border and between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law" (May 2007) 8: 1 *Melbourne Journal of International Law* 1.

immigration status. These categories are, however, implicitly rather than explicitly stated in law, for national laws of the states seem to avoid defining specifically who qualifies as an “illegal migrant”. Instead, definitions cover who is legal, leaving the “rest” as potentially “illegal”. The zone of legality is then carefully controlled in law: admission to it “is certified by various means, all involving the direct involvement of State authorities”.¹⁴⁴ What is less clear, however, is what being an “illegal” means in terms of the law: where people do not clearly fall within one of the national definitions of legal entry, residence and work, without the required certificates, they fall into this grey zone.¹⁴⁵

The label “illegal”, which draws from but does not conform to the law, obscures differences among individuals to whom it is applied. Indeed, as Dauvergne rightly points out, the “illegal” in our imagination, and against whom the current wave of law reform is specifically directed, is not a backpacking student who overstays her visa or a businessman who falls just outside the NAFTA categories:

[She is] instead racialized and destitute... [and] come[s] seeking the benefits of our great wealth and generosity, our right to bestow but not her right to claim. The discourse of illegal migration is filled with images of those who have and those who have not, of desperate transgressors, of the deserving and the undeserving, of “good” or “bad” illegal.¹⁴⁶

¹⁴⁴ Elspeth Guild, “Who Is an Irregular Migrant?” in Barbara Bogusz, et al., eds, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden; Boston: Martinus Nijhoff, 2004) at 4 & 15.

¹⁴⁵ An exception, Portugal has adopted a similar definition but one which, in some respects, is circular, leading in the end back to whether or not the state has taken certain steps or acted in respect of the individual: *Ibid.*

¹⁴⁶ Catherine Dauvergne, “The Immigration and Citizenship Law Dichotomy in Globalizing Times” (Citizenship Borders and Gender Conference, Yale University, Toronto, 8 and 9 May 2003). Interestingly, in Australia, during the Tampa crisis of 2001, the largest group of “illegals” were visitors who had overstayed their legally permitted time, and among them, the largest nationality group was British - “hardly those who people our imaginary sweatshops and brothels”: Dauvergne, “Making People Illegal”, *supra* note 36 at 93.

The desperation of the illegal others appears in contrast with our prosperity as a nation: We “have” and they “have not”. Entitlement to membership is ours to bestow.¹⁴⁷

As such, it is neither her legal distinction as a non-citizen nor the fact that she comes from outside that marks the “illegal migrant”. Instead, it is the image conjured by the term “illegal” that defines her special status: a “stranger”, a “pauper” and a “transgressor” whose presence – because of a lack of State authorization or consent - is illegitimate.¹⁴⁸ The label “illegal”, which is “empty of content”, circumscribes identity “solely in terms of a relationship with law: those who are illegal have broken (our) law. [I]legals are transgressors – and nothing else – by definition”.¹⁴⁹ To flatten someone’s identity to fit it into the category ‘illegal’ is to prejudge to the extreme their claim to recognition as a legal subject in the most way; it is to say, “You do not exist in the eyes of the law because the law thinks you have not shown enough respect for it”.¹⁵⁰ Put differently, the nomenclature of ‘illegal’ “names the other not only as an outsider to a particular nation, but as an outsider to any nation. As such, the other is outside the law itself, and, in a word, ‘illegal’”.¹⁵¹ Interestingly, while the phenomenon of human trafficking stands out as the starkest example of “illegal migration”, it is “illegal migration” with a difference – trafficking has “victims”. As

¹⁴⁷ Dauvergne, “Making People Illegal”, *supra* note 36 at 93. Ngai, for example, clearly demonstrates that in American society, concern has focused on illegal migrants from the United States–Mexico border, and therefore on illegal immigrants from Mexico and Central America, suggesting that race and illegal status remain closely related: Ngai, *Impossible Subjects : Illegal Aliens and the Making of Modern America*, *supra* note 131.

¹⁴⁸ The transgressor is the migrant who has broken “our laws”: C. Dauvergne, “Illegal Migration and Sovereignty” in C. Dauvergne, ed, *Jurisprudence for an Interconnected Globe* (Burlington: Ashgate, 2003), 187 at 201. See also above, section 1.1.

¹⁴⁹ Dauvergne, “Making People Illegal”, *supra* note 36 at 92-93.

¹⁵⁰ Akbar Rasulov, “International Law and the Poststructuralist Challenge” (2006) 19 *Leiden J. Int'l L.* 799 at 814.

¹⁵¹ Dauvergne, “Making People Illegal”, *supra* note 36 at 83-84.

“victims”, those who are trafficked fit differently into the imagination than many of those who are rendered “illegal” by the migration laws of Western receiving societies. This makes it more difficult for states to rhetorically cast the victims of trafficking as “transgressors”, thus altering the familiar “illegal migration’ discourse. These points fit squarely into the discussion in Chapter 4, below.

This imagery of the “non-Western illegal migrant” works against careful attempts to define her as the one who transgresses migration laws. More importantly, it provides moral ballast against arguments that, because of her presence, economic contribution, and general adherence to societal norms (including laws), she deserves legal recognition and rights of political participation.¹⁵² This point is essential because, notwithstanding public discourse stating precisely the contrary, the presence of the “illegal migrant” is tolerated in the world’s richest countries, especially as she fulfils pressing labour demands by running the informal sector of the economy.¹⁵³ A good example of this (i.e. the law’s institutionalization of illegality) is the current Spanish legislation, which states that irregular migrants may be detained for a maximum of forty days, during or after which expulsion orders may be issued on the basis of

¹⁵² See: Dauvergne, "Jurisprudence for an Interconnected Globe" at 599, *supra* note 148; George Lakoff & Sam Ferguson, "The Framing of Immigration" (2006), online: The Rockridge Institute <<http://www.rockridgeinstitute.org/research/rockridge/immigration>>(last modified: 25 May 2006). Bosniak, in an analysis of the themes of the Proposition 187 campaign in California, demonstrates that the “illegality” issue stands at the heart of the pro-187 message, the claim being that irregular migrants come to the USA in order to obtain social benefits. For example, in a pamphlet distributed to registered voters, an argument favouring the measure proclaimed, "Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion." Another argument was: "It's time to stop rewarding illegals for successfully breaking our laws": Bosniak, "Opposing Prop. 187", *supra* note 128 at 561. California Proposition 187 was a 1994 ballot initiative designed to deny illegal immigrants social services, health care, and public education. It was introduced by Assemblyman Dick Mountjoy (a Republican from Monrovia, California) as the “Save Our State” initiative. It passed with 59% of the vote, but was overturned by a federal court as unconstitutional.

¹⁵³ Further analysis of this remark is found in the concluding chapter of Part I.

“illegal entry” into Spanish territory. In the event that the individual’s identity and national origin can be confirmed within the maximum forty day detention period and that a readmission agreement exists with either her country of origin or departure, the migrant is returned (unless, in the interim, she has presented an asylum claim).¹⁵⁴ Nonetheless, the majority of migrants who receive expulsion orders cannot be returned, due to the fact that either they lack documentation from their country of origin, or their country of origin or transit has not signed a readmission agreement with Spain and will not accept them back. Having reached the maximum detention period and being without resolution for their return, the migrants are simply released.¹⁵⁵ Spanish legislation was deliberately designed to help fill gaps in the domestic labour market without openly embracing immigration:

This law declared that illegal immigrants were no longer to be considered deportable, thereby creating a whole population of workers who are deprived of the panoply of rights undergirding a liberal democratic society (and are thereby punished implicitly for their illegal status), but who may be permanent ‘members’ (or at least fixtures) of society. Illegal immigrants thus found themselves in a kind of legal limbo, an ambiguous status that captured perfectly the contradictions of their role in the political economy

... [T]he punishment that [irregular migrants] endure for their illegality is that they are denied full economic rights. And, it is this penalty and the economic marginalization it helps constitute that shore up the ‘flexibility’ immigrants provide the post-Fordist economy.¹⁵⁶

¹⁵⁴ Organic Law 8/2000 of 22 December, Reforming Organic Law 4/2000 of 11 January, Regarding the Rights and Freedoms of Foreign Nationals Living in Spain and their Social Integration (Art. 53, 57, 63 & 64); Royal Decree 864/2001 of 20 July, approving Regulations for the Application of Spanish Organic Law 4/2000, of 11 January, on the rights and liberties of foreigners in Spain and their social integration, reformed by Organic Law 8/2000 of 22 December.

¹⁵⁵ Alanna Ryan, "Learning from the Cayuqueros: What the African 'Boat People' Are Teaching Spain -and Europe- About Immigration Policy" (Border Regions in Transition Conference – BRIT IX; North American and European Border Regions in Comparative Perspective: Markets, States, Border Communities and Security, Victoria, BC/Bellingham, WA 12 – 15 January 2008).

¹⁵⁶ Kitty Calavita, "A 'Reserve Army of Delinquents'. The Criminalization and Economic Punishment of Immigrants in Spain" (2003) 5: 4 *Punishment and Society* 399

Thus, in this legal construction of the migrant as an “outlaw”, it is precisely her particular status as worker that brings about this marginalization. This Spanish legislation has been implemented, almost exclusively, with irregular migrants who have entered Spain by boat. Some irregular migrants observe that the system provides a means of getting to Europe, no matter what the subsequent conditions are. But many claim that the system “traps” them on the peninsula where, compounding the challenges of being the subject of an expulsion order, the lack of a passport eliminates nearly all possibilities of return travel to Africa.¹⁵⁷ Moreover, this situation has directly contributed to generating an environment of misinformation and false hopes, both in Spain and in the migrants’ countries of origin. As one Senegalese migrant has stated, when calling home it is rare for those who have left for Europe to give honest accounts, either of the journey or of their current living situations:

I had a good job in Senegal ... Everyone always called home talking about how easy it is to make money in Europe. My parents, my aunts and uncles, my cousins — everyone pooled their money to be able to pay for my trip in the cayuco so I could go and send money back to them. I even sold my car. Now I see that was all a lie, but of course, I do the same thing. I can’t call home and tell them that I have been living on the street, can’t find a job and that I am hated here because I am African. They would be so ashamed. So I tell them that I am doing very well and send home as much money as I can as ‘evidence’ — even if it means I don’t have enough money to eat more than once a day.¹⁵⁸

at 400. “While there is nothing legally incorrect about the issuance of expulsion orders against migrants who cannot be returned to their countries of origin, the policy has humanitarian consequences that raise serious concerns. Significantly, an expulsion order gives migrants no right to work and, upon its issuance, they may never regularize their status in Spain or in any other Schengen country. The authorities’ approach to expulsion ... simply sweeps large numbers of migrants into permanently illegal existence.”: Human Rights Watch, “Discretion without Bounds: The Arbitrary Application of Spanish Immigration Law” (July 2002) 14: 6 *Human Rights Watch*, online: Human Rights Watch <<http://www.hrw.org/reports/2002/spain2/>>(accessed on 10 May 2008) at 12.

¹⁵⁷ Ryan, “Learning from the Cayuqueros”, *supra* note 155.

¹⁵⁸ *Ibid.* at 7. The Spanish term “Cayuco” designates the small, rickety fishing boats employed by migrants attempting to reach Spanish shores from the African continent.

The migrants' tendency to misrepresent both the voyage and living conditions in Europe — together with the government's practice of explicitly condemning but implicitly tolerating irregular migration in Spain — has been exploited by some smugglers. A well known Senegalese travel agency offers several travel packages to Europe, including the "Delivery Pack" for expectant Senegalese women to give birth to their children in France and the "D-Day Cayuco Voyage" for Senegalese men. Alleging in its *Guide to Going to Europe* that "the massive disembarkments in the Canaries are a good solution for young Senegalese men who envision a brighter future", and instructing potential migrants not to carry any passport or identifying papers, the agency's website highlights Spain's legislative loophole for migrants who cannot be returned to their country of origin, suggesting that they will be well received and quickly ushered to the mainland, where residency will be easily acquired.¹⁵⁹ A number of NGOs have indicated that such channels of information have ultimately created confusion among migrants who frequently believe that the expulsion orders are, in fact, work permits. According to field interviews held with migrants detained in detention centres:

Not a single migrant with whom Human Rights Watch spoke demonstrated any understanding of the effect an expulsion order had on his or her legal status in Spain. Rather, they uniformly explained that the police were sending them a *carte blanche* to the mainland so they could work. Many of the undocumented migrants said they had applied for "work papers" and that they knew they would be getting them soon, because that is what the police had told them. Other migrants said they had applied for "expulsion", but explained that this meant they could go to the peninsula.¹⁶⁰

¹⁵⁹ *Ibid.* at 7.

¹⁶⁰ Human Rights Watch, "Discretion without Bounds: The Arbitrary Application of Spanish Immigration Law", *supra* note 156 at 13.

This lack of clarity in the legislation is detrimental to migrants as they discover the grave new challenges facing them in their day-to-day lives as irregular migrant workers. During his first days in mainland Spain, one migrant, provided with shelter in a hostel by a local NGO, recalled how he and his colleagues were “terrified” to leave the hostel during the day, in spite of encouragement from their social worker. They were constantly afraid that “every car that passed, every helicopter that flew overhead, was the police coming to get us. Even now, I live in constant anxiety; it seems as though I have a sign on my forehead that says ‘I’m a sin papeles [undocumented]’”.¹⁶¹

In conclusion, the concept of “illegal migration” is a legal construct of the twentieth century that has only recently gained prominence. It is a concept that is loaded with ideological import and highly politicized, since there is no illegal migration without migration policy, thus the definition of those who are deemed to be “illegal”, “sans papiers” or “undocumented” shifts with the nature of migration policy. On this point, Fassin helpfully reminds us (speaking about French immigration legislation):

Words do not only name, qualify or describe. They found actions and orient policies. By calling “clandestins” those foreigners who are on

¹⁶¹ Ryan, “Learning from the Cayuqueros”, *supra* note 155. Similar reports by other migrants who had been detained give certain credence to these fears as well. In June 2008, the European Parliament approved a draft directive, known as the “Return Directive”, whose purpose is to lay down rules and procedures which would apply throughout the EU regarding the return of irregular migrants. This EU directive, which may be enforced by 2010, will ask EU member states to choose between issuing residency permits to irregular migrants or returning them to their country of origin. Under this directive, countries will be permitted to jail irregular migrants for up to 18 months pending deportation. A five year ban on re-entry into the EU will apply, although member states will retain the right to waive, cancel or suspend the ban. Spain believes the newly-approved directive is “necessary” at a time when unemployment is on the rise in the country. Spanish Deputy Prime Minister de la Vega told the press that “[Spain was] going to hire less immigrants” as the total job opportunities continue to decline. See: Du Guodong, “Spain Says New EU Immigration Law “Necessary””, (03 July 2008), online: chinaview < www.chinaview.cn > (accessed on 10 July 2008). See also: European Parliament, “Parliament Adopts Directive on Return of Illegal Immigrants” (Press release: 18 June 2008), online: European Parliament < <http://www.europarl.europa.eu/> > (accessed on 26 July 2008).

French soil and in an irregular situation, we place them in a category that conjures up certain images – for example, that of the worker who has illegally entered the country – and justifies policies preventing or repressing such acts of transgression. These images and policies are in some way fashioned after our process of naming.¹⁶²

Consequently, the images produced by legal texts should not be underestimated. Today in our collective imagination, the “non-Western illegal migrant” is the prototype of marginality; she is the destitute “cultural other” who has no right to be here since she has crossed a territorial boundary without authorization. And it is against her that legislation aimed at fighting unwanted migration is directed, precisely because the very act of labelling her as “illegal” permits Western receiving societies to create their own national identity. The “unlawfulness” or “illegality” of this person is such that she is neither a legally recognized citizen, nor a legally recognized foreigner, making her in many ways an “impossible subject”.¹⁶³ Above all, labelling people as “illegal” reflects a pervasive and increasingly globally coherent view that there are proper and improper reasons to migrate. Whereas in the nineteenth century people migrated to other countries in search of a better life, today it is only citizens of Western receiving societies and highly skilled labourers from Southern countries who are given the authorization to move and are expected to take advantage of the opportunities in economic mobility offered by our world. The remainder are simply refused the right to move and are expected to live permanently in their global “über-ghettoes, the garbage-heap of a

¹⁶² Didier Fassin, “«Clandestins» ou «Exclus»? Quand Les Mots Font de la Politique” (1996) 34 *Politix* 77; translation by Mireille Rosello: Mireille Rosello, “Fortress Europe and Its Metaphors: Immigration and the Law” (1999) 3: 1 Working Paper Series in European Studies at 15.

¹⁶³ Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, *supra* note 131 at 4. See also: Marianne Constable, “Sovereignty and Governmentality in Modern American Immigration Law” (1993) 13: 249 *Studies in Law, Politics, and Society* 71.

superfluous humanity”.¹⁶⁴ This formulation of the theoretical problem concerning the productivity of the law, and the production of migrant “illegality” in particular, has to be situated within Foucault’s analysis of modern power as productive, and more specifically, within his discussion of “illegalities” and “the production of delinquency”.¹⁶⁵ In their efforts to explore Foucault’s insights into theorizing the relationship between law and migration, Behdad and Coutin have examined how migration law “produces its subjects” and emphasized the critical role that the “illegality” of the undocumented plays in disciplining and “othering” all non-citizens, thereby perpetuating monolithic, normative notions of national identity for citizens themselves. Coutin, notably, clearly insists that one must not presuppose the category of the “illegal”, which itself should be under critical scrutiny, and stresses the power of the law to create the individual’s narrow legal identity through its categories of differentiation. This leads to an interest in understanding migration law as comprising “more than legal codes, government policies, and bureaucratic apparatuses”. Indeed, as shown below in Chapter 2, “a myriad of practices produce knowledge that constitutes individuals as citizens, illegal aliens, legal residents, asylees, and so forth”.¹⁶⁶

As a result, in this thesis, bearing in mind the complexities, and given the discriminatory connotation of the word “illegal”, I prefer to refer to “irregular migrant” or “irregular migration” when describing people who

¹⁶⁴ *Law, Justice, and Power: Between Reason and Will*, ed. by Sinkwan Cheng (Stanford: Stanford University Press, 2004) at 1. For further analysis of the “mobility regime”, see page 60 & following, above. See also note 258, *infra*. For a reflection on the similarities between current and historical migration, see chapter 1.2., above.

¹⁶⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979) at 257-92.

¹⁶⁶ Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Boulder: Westview Press, 1993) at 88. See Also: Ali Behdad, “INS and Outs: Producing Delinquency at the Border” (1998) 23: 1 *Aztlan* 103; Susan Bibler Coutin, “Differences within Accounts of U.S. Immigration Law” (1996) 19: 1 *POLAR: Political and Legal Anthropology Review* 11.

have entered and/or remained in a given country via channels other than those which are officially regulated and sanctioned for entry and residence. This is done in an effort to avoid using dehumanizing language, to prevent further criminalization, and to emphasize that it is not the migrant as a human being who is “illegal”, but rather her mode of entry and stay or work. This is also done to avoid using a legal term that does not necessarily reflect the actual experiences of migrants and that is more dismissive of the human aspect of migration. For instance, smuggling can be “illegal”, but licit, or socially accepted, at the same time. Research has shown that migrants may see their autonomous migration as extralegal, but not necessarily as criminal. This is because to the migrant and her family irregular migration means much more than unauthorized border crossing: “It means a community strategy implemented, developed, and sustained with the support of institutions, including formal ones, at the migrants’ points of origin and ... points of destination. Precisely because core institutions (legal, religious, local governmental, etc.) support this migratory strategy, [irregular] migrants do not perceive its moral significance as deviant”.¹⁶⁷ Thus, we have to be careful with the use of a description which, instead of being an administrative description with well-defined effects “becomes a ‘label’ that results in many disadvantages and exposes the bearer to innumerable abuses”.¹⁶⁸

After having shown in this section that the images generated by the immigration legislation of Western countries have the effect of implicitly recommending and justifying certain actions, I turn in the next section to the securitization of migration, which is a “logical” response to the “wave”

¹⁶⁷ Nestor Rodriguez, “The Battle for the Border: Notes on Autonomous Migration, Transnational Communities and the State” (1996) 23: 3 *Social Justice* 21 at 23. See also: Ilse van Liempt, *Navigating Borders: inside Perspectives on the Process of Human Smuggling into the Netherlands* (Amsterdam: Amsterdam University Press, 2007) at 129.

¹⁶⁸ IACHR, *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion), 18 (ser A) (2003) [11] (Concurring Opinion of Judge Ramírez).

of “illegal migration”. But, as emphasized by the literature on governmentality, political programmes and projects only become governmental when technologies are available to implement them.¹⁶⁹ It is fruitful, therefore, to analyze the securitization of migration at the level of its discourses and practices in order to better understand the processes whereby migration becomes socially constructed and recognized as a security issue (and the manner in which threats from different sectors are brought together in the image of the undesirable migrant).

¹⁶⁹ Walters, "Deportation, Expulsion, and the International Police of Aliens", *supra* note 20 at 279.

1.4. The Migrant, an Object of Securitization

There is an international moral panic afoot about migration. Newspapers around the world report daily on illegal migrants arriving in boats, trucks, planes and trains [...] The worldwide fear of terror has overlapped and intertwined with the fear of illegal migration. The prosperous West is under siege, this popular refrain tells us; the hordes are ascending.¹⁷⁰

The topic of migration has always been deeply political, as it invariably raises important questions about the changing nature of boundaries, self/other relations, and ethical and political practice. The political potency of fears of migration is nothing new either: historians recall campaigns against Jewish immigrants in Britain in the 1880s, the US Nativist movement of the 1920s, which opposed entry of all those of neither British nor Western European descent, and the White Australia policy, designed to keep out Asians, supported by the labour movement and all political parties up to the 1970s.¹⁷¹ With the end of the Cold War, migration again became a key issue, with mounting fear of the tens of millions of East-West migrants, as well as countless more from the South. But the predicted migrations from the East never happened. Most migrants to the West were people returning to ancestral homelands: ethnic Germans to Germany, Albanians of Greek origin to Greece, and so on.¹⁷² In the two last decades, however, Western governments have reinforced the framing of questions on migration through the prism of security:

From the beginning of the eighties, politicians of the rich host countries analysed globalization, mobility of people and what they

¹⁷⁰ Dauvergne, "Sovereignty, Migration and the Rule of Law", *supra* note 48 at 588.

¹⁷¹ For more on the Australian topic, see section 1.2. above ("Deconstructing the Flood-Metaphor").

¹⁷² For further details, see: Stephen Castles, "Confronting the Realities of Forced Migration" (May 2004), online: Migration Policy Institute <<http://www.migrationinformation.org/>>.

call migration, not as an opportunity, but as a danger. They accept mobility of capital and mobility of rich people, of consumers in transit, of rich tourists, but they refuse the same “freedom” of movement to the poor people, to the vagabonds, to the people fleeing ecological, economic or political disasters. Markets and politicians construct (im)migration as a political and security problem.¹⁷³ [author’s emphasis]

Migration has thus been gradually “located in a security logic”.¹⁷⁴ And several scholars today concur, saying that the effects of 9/11 have been most tangible in the global movement of people, in that where tough migration policies – which often pre-dated the 9/11 attacks – were strengthened, even used by some countries as a pretext to limit their responsibilities toward non-citizens in need of international protection.¹⁷⁵ Academic literature has already largely illustrated how, in media coverage and political discourse on migration, migrants are cast as the objects of securitized fears and anxieties, possessing, as Nyers explains, “either an *unsavoury agency* (i.e. they are identity-frauds, queue jumpers, people who undermine consent in the polity) or a *dangerous agency* (i.e. they are criminals, terrorists, agents of insecurity)”.¹⁷⁶ For instance, in Italy in 1999, polls showed that migrants were increasingly seen as threats to the “inner stability” of the country. The Northern League of Italy, in control of several provincial governments, ran on the campaign slogan “One more vote for

¹⁷³ Didier Bigo, "Criminalisation of 'Migrants': The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion" in B. Bogusz, et al., eds, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), 61 at 63.

¹⁷⁴ Jeff Huysmans, *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, ed. by Miles, Robert & Thränhardt (London: Pinter, 1995) at 230.

¹⁷⁵ See e.g.: Antonio Tujan et al., "Development and the 'Global War on Terror' " (2004) 46: 1 *Race & Class* 53 at 66; Dauvergne, "Security and Migration Law in the Less Brave New World" at 541, *supra* note 9; Kent Roach, "The Post-9/11 Migration of Britain's Terrorism Act, 2000" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

¹⁷⁶ Peter Nyers, "Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement" (2003) 24: 6 *Third World Quarterly* 1069 at 1070 (author's emphasis).

the League, one less Albanian in Milan” to exploit negative attitudes towards migration.¹⁷⁷ In the UK, a 2002 survey asked respondents which three words on a list of 20 descriptions – some negative, some positive – they feel the media uses most when referring to asylum seekers and refugees. “Illegal immigrant” came first (mentioned by 64%), then “desperate” (35%), followed by “foreigners” (24%) and “bogus” (22%). Similarly, in Portugal, studies of media coverage of migration show that the Portuguese media have constructed images of migrants and ethnic minorities as “criminals”, “delinquents” and “undesirables”.¹⁷⁸

Alongside the more familiar link between migration and crime, there seems to emerge a complex link between migration and terrorism. Terrorism is the security problem par excellence: “[it] colours the interpretation of all inequalities and potential trouble spots in society in much the same way as the cold war made it possible to suspect trade union activists of being Soviet agents”.¹⁷⁹ The direct reference to terrorism in the context of migration has been made in several countries. For instance, the Italian minister of defence under the previous Berlusconi government, Antonio Martino, stated in November 2004 that “illegal immigration is infiltrated by Al Qaeda”, and that it is often managed “by

¹⁷⁷ Nevzat Soguk, "Poetics of a World of Migrancy: Migratory Horizons, Passages, and Encounters of Alterity" (2000) 14: 3 *Global Society* 415 at 422.

¹⁷⁸ Marcel Canoy et al., "Migration and Public Perception", *supra* note 63. For broader insight into the Western world, see generally: Peter Mares, "Distance Makes the Heart Grow Fonder: Media Images of Refugees and Asylum Seekers " in Edward Newman & Joanne van Selm, eds, *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (New York: United Nations University Press, 2003), 330. See also: Ayse Ceyhan, "La fin de l'en-dehors : les nouvelles constructions discursives de l'ennemi intérieur en Californie" (2001) 43 *Cultures et Conflits* 61; Devetak, "In Fear of Refugees", *supra* note 96; Ibrahim, "The Securitization of Migration: A Racial Discourse", *supra* note 68 ; Randa A. Kayyali, "The People Perceived as a Threat to Security: Arab Americans since September 11 " (01 July 2006), online: Migration Policy Institute <<http://www.migrationinformation.org>>. For complementary analysis, see also page 64 & following, above.

¹⁷⁹ Magnus Hörnqvist, "The Birth of Public Order Policy" (2004) 46: 1 *Race & Class* 30.

terrorists in order to bring persons, weapons and drugs to Italy and Europe".¹⁸⁰ In the United States, the migration-terrorism nexus has been made even clearer on a number of different occasions. In October 2001, then US Attorney General Ashcroft explicitly linked terrorist status with immigration status, bringing migrants under suspicion and increasing the threat posed to them:

Let the terrorists among us be warned. If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will work to make sure that you are put in jail and kept in custody as long as possible.¹⁸¹

Another illustration of this is a 2003 case involving a detained, irregular Haitian migrant: the US Department of Justice argued that although the individual in question had no links to terrorism, his release could prompt an "influx" of irregular Haitian refugees which, in turn, could jeopardize national security because it would have diverted immigration resources currently allocated to the fight against terrorism.¹⁸² In the US, it is also very common to hear statements claiming that the migration system plays a crucial role in the war against terrorism, and that the best way to prevent the entry of terrorists into the United States is to have a well-functioning migration system that deters, detects, and promptly removes those lacking a legitimate purpose for entering or staying on US soil. However, reporting on the successes of immigration schemes, such as SEVIS (a system for tracking foreign students) and US-VISIT (Visitor and Immigrant Status Indicator Technology, a project for tracking non-immigrant visitors) in the war on terrorism, one study revealed in 2004 that

¹⁸⁰ Paolo Cuttitta, "The Changes in the Fight against Illegal Immigration in the Euro-Mediterranean Area and in Euro-Mediterranean Relations" (Genoa: University of Genoa, 22 January 2007), online: Challenge <<http://www.libertysecurity.org/article1293.html>>.

¹⁸¹ Inna Nazarova, "Alienating 'Human' from 'Right': US and UK Non-Compliance with Asylum Obligations under International Human Rights Law" (2002) 25 *Fordham Int'l L.J.* 1335 at 1335.

¹⁸² *In re D-J*, 23 I & N Dec. 572 (A.G. 2003). See also: Stephen H. Legomsky, "The USA and the Caribbean Interdiction Program " (2006) 18: 3-4 *Int'l J. Refugee Law* 677.

achievements so far included the exposure of a smuggling ring and the discovery of 30 wanted criminals. A 2007 study by an organization for the gathering, research and distribution of data, associated with Syracuse University, also found this: among the more than 800 000 individuals against whom the Department of Homeland Security filed charges in the immigration courts from FY 2004 to FY 2006, only 12 involved a terrorism charge.¹⁸³ These two examples illustrate the growing conflation of perceived concerns regarding migration, terrorism and crime. They also demonstrate the limited effectiveness of migration measures in preventing terrorism.¹⁸⁴ Despite this fact, the US persists in its extensive use of migration law as anti-terrorism law, a trend that can be seen in many other Western countries, including Canada, the United Kingdom, Australia and New Zealand.¹⁸⁵ But before turning to an analysis of the particular reasons underlying this intertwining of criminal and migration law, it is first necessary to understand why the migrant has become an object of intense securitization and to illustrate the policies behind the criminalization of the immigration system. In doing so, the inherent subjectivity of the two concepts at stake – migration and security – must be acknowledged. Indeed, making a connection between migration movements and the security of states is particularly challenging, since the two concepts are dependent on who is defining the terms and who benefits by defining the terms in a given way. As such, the question of whether migrants really constitute security risks does not need to be addressed. In other words,

¹⁸³ For the 2004 study, see: Jessica M. Vaughan, "Preventing the Entry of Terrorists into the United State" (Testimony before the U.S. House of Representatives, Committee on International Relations, Subcommittee on International Terrorism, Nonproliferation and Human Rights, 13 February 2004). For the 2007 report, see: T.R.A.C. (Transactional Records Access Clearinghouse), "Immigration Enforcement: The Rhetoric, the Reality" (2007), online: T.R.A.C. <<http://trac.syr.edu/immigration/reports/178/>>(accessed on 12 June 2007).

¹⁸⁴ For more on this topic, see *infra* note 274 and accompanying text.

¹⁸⁵ For an analysis of the "criminalization of migration law", see page 142 & following, below.

the point is not whether the securitization of migration is right but what it is good for:

In the final analysis, the answer is not a central factor. Neither the assessment of the problem nor the response need be proportionate to a concrete threat. It is more a question of who succeeds in establishing their definition of the situation and less one of what the threat really consists of. The security risks may be real or fictitious; it doesn't matter which – what they actually are or what they were to begin with – since they are what they have been made into and it is in this capacity that they exercise their effect. The more diffuse the description of a threat, the more can be interpreted into it, thus defining it as a security risk. All that is required is that a phenomenon be linked to an existing security risk.¹⁸⁶

Starting from my previous reflections on governmentality, the first part of this section deals with discourses on migration. The second part focuses on the “security continuum”,¹⁸⁷ which brings together and gives coherence to a set of otherwise heterogeneous practices of security professionals. A third part analyzes the reasons behind the growing phenomenon of securitization of migration and argues that this process was concurrent with the end of the Cold War and the expansion of the capitalist market system.

¹⁸⁶ Hörnqvist, "The Birth of Public Order Policy", *supra* note 179 at 40. See also: Nazli Choucri, "Migration and Security: Some Key Linkages" (2002) 56: 1 *Journal of International Affairs* 97.

¹⁸⁷ Didier Bigo, "L'Europe de la sécurité intérieure: penser autrement la sécurité" in A.M. Le Gloannec, ed, *Entre Union et nations: l'État en Europe* (Paris: Presses de Sciences politiques, 1998).

1.4.1. The Securitization Framework: A Powerful “Discursive Practice”

The concept of “securitization” has been developed by the Copenhagen School as a theoretical framework in order to allow it to contribute to the so-called “widening-deepening” debate in security studies, which became particularly intense after the end of the Cold War.¹⁸⁸ The “widening” dimension concerns the extension of security to issues or sectors other than the military one, whereas the “deepening” dimension questions whether entities other than the State should be able to identify and characterize security threats.¹⁸⁹ The objective, then, was to widen and deepen the concept of “security”, without making it either too broad or meaningless, a fear regularly expressed by security scholars who have retained a traditional (i.e. military and state-centric) understanding of “security”. In doing so, the Copenhagen School didn’t share the traditional perspective of security studies which considers security the opposite of insecurity and holds that “the more security, the better”. Rather, by questioning whether it was a good idea to “frame as many problems as possible in terms of security”,¹⁹⁰ it has always insisted on the negative

¹⁸⁸ Since the end of the Cold War, the meaning of security has increasingly been articulated in broader, more comprehensive terms. The expansion of the security agenda is premised on the suggestion that threats have taken on different forms, arisen from different sources, and targeted different referent objects. Consequently, several authors have crafted a re-definition of the boundaries of security to include protection not only from traditional military threats, but also from a variety of economic, social, political, ethnic, epidemiological, and environmental challenges that they now see as equally, if not more, pressing. This transformation is mirrored in the scholarship that has emerged over the last decade and that deals with such alternative conceptions of security: the Copenhagen School. See: Bill Mcsweeney, *Security, Identity, and Interests: A Sociology of International Relations* (Cambridge: Cambridge University Press, 1999). See also: Michael Sheehan, *International Security: An Analytical Survey* (Boulder: Lynne Rienner, 2005). For further analysis, see the section 1.4.3, below.

¹⁸⁹ See: K.Krause & M.C. Williams, "Broadening the Agenda of Security Studies? Politics and Methods" (1996) 40 *Mershon International Studies Review* 229 at 230. See also: Barry Buzan et al., *Security: A New Framework for Analysis* (Boulder Co.and London: Lynne Rienner, 1998).

¹⁹⁰ Ole Wæver, "Securitization and Desecuritization" in R.D. Lipschutz, ed, *On Security* (New York: Columbia University Press, 1995), 46 at 64.

impact of securitization as, for example, the reinforcement of an exclusive logic of “us-them”.¹⁹¹ Because of both its capacity to analyze a broadened concept of security and its conception of securitization as a rather conservative and defensive concept, “securitization” currently represents the most promising concept to make use of in the study of migration as a security issue.

The main idea at the basis of the securitization framework, very much in line with our preceding reflection in this thesis on constructivism and the practice of statecraft, is that security is a “speech act”: there are no security issues in themselves, only issues constructed as such by certain actors, through official discourses. That is not to say that the actors invent problems. Rather, they choose from among all the troubles of a “risk society” what is and what is not a problem, i.e., a threat for security. They base their construction of the problem on “facts”.¹⁹²

In the securitization framework, three main elements are essential: a designated referent object, a “securitizing” actor and an audience. Regarding the referent object, security is conceptualized in five distinct but interrelated sectors, namely the military, political, economic, environmental, and societal sectors.¹⁹³ As far as the “securitizing actor” is

¹⁹¹ *Ibid.* at 64. See also: Sarah. Léonard, "Studying Migration as a Security Issue: Conceptual and Methodological Challenges" (SGIR Fifth Pan-European International Relations Conference, Netherlands Congress Centre, The Hague, 11 September 2004).

¹⁹² M.J. Edelman, *Pièces et règles du jeu politique* (Paris: Seuil, 1991) at 249.

¹⁹³ The definition and importance of each of those five sectors remain highly controversial and contested among scholars of the Copenhagen School. An intense debate has emerged concerning, in particular, the meaning and use of societal security within the Copenhagen School's framework. Because of the important problems associated with it, I prefer, in this thesis, to stay at a more general level of analysis. See: Léonard, "Studying Migration as a Security Issue", *supra* note 191 at 10. See also the polemic debate in: Bill Mcsweeney, "Identity and Security: Buzan and the Copenhagen School" (1996) 22 *Review of International Studies* 81; Barry Buzan & Ole Waever, "Slippery? Contradictory? Sociologically Untenable? The Copenhagen School Replies"

concerned, there are no finite criteria as to who can (or cannot) speak about security, but the security field is biased, as some actors occupy positions of power and are more likely to be accepted voices of security.¹⁹⁴ The third element (the role of the audience in the securitization framework), in spite of valuable criticisms directed at the concept of “audience” itself,¹⁹⁵ aids in understanding that securitization is inter-subjective and socially constructed. Therefore, a discourse presenting something as a vital threat to a referent object is not sufficient to constitute securitization. An issue is only securitized when the audience accepts it as such and the speech act thereby fulfills internal and external conditions. The internal conditions are linguistic and grammatical: the speech act must follow the grammar of security and construct a plot based on an existential threat, a point of no return, etc. As for the external conditions, they are contextual and social: the securitizing actor should, for example, be endowed with social capital and, in a broad sense, be in a position of authority or again, refer to certain “objects” generally considered threatening, such as tanks or polluted waters.¹⁹⁶

One example of discursive elements used as speech acts to define the security problem and justify a solution was when, in the mid-1990’s, US Patrol officials placed emphasis on the “disorder” and “chaos” caused by irregular migrants entering the US-Mexico borderlands. The discourse

(1997) 23 *Review of International Studies* 241; Bill Mcsweeney, "Durkheim and the Copenhagen School: A Response to Buzan and Waever" (1998): 24 *Review of International Studies* 137; Michael C. William, "Modernity, Identity and Security: A Comment on the Copenhagen Controversy" (1998) 24 *Review of International Studies* 435.

¹⁹⁴ Typical examples are political leaders, bureaucracies, governments, lobbyists, and pressure groups: Buzan et al., *Security: A New Framework for Analysis*, *supra* note 189 at 25.

¹⁹⁵ In the Copenhagen School's framework, the notion of “audience” remains largely under-articulated, as does that of the audience’s understanding of the discourse: Léonard, "Studying Migration as a Security Issue", *supra* note 191 at 16.

¹⁹⁶ Buzan et al., *Security: A New Framework for Analysis*, *supra* note 189 at 40.

created a dichotomy of “chaos” versus “order”: the border needed to be “controlled” by reconfiguring difference and separation, in effect securitizing the frontier:

I think people are very happy ... [we] are cleaning up of a lot of problems – that was a positive effect of having [Operation Hold the Line].

Chaos reigned on the border. Not today.¹⁹⁷

Bersin, then the US Attorney General’s Special Representative for border issues, articulated the problem of order in similar terms:

[O]ur duty and responsibility is to manage the border satisfactorily, to manage it away from the epic of lawlessness that has characterized that border for the 150 years that the American Southwest has been a part of the United States, as contrasted with the northern half of Mexico.¹⁹⁸

In the post 9/11 era, “fighting terrorism” along the border has become both a national-security objective and a justification to continue and expand 1990s-style border security policies which primarily targeted migrants and drugs. The securitization framework can once again help in making sense of how the threat of terrorism coming over the US-Mexico border was, in part, discursively constructed. There are indeed numerous examples of recent speech acts by elites which have served to help securitize the US–Mexico border as a conduit for terrorists:

Attorney General John Ashcroft: “The menace of terrorism knows no borders, political or geographic” (2002).

The Congressional Immigration Reform Caucus: “The time is right to call for troops on the border in order to protect our national security–interests” (2002).

¹⁹⁷ Jason Ackleson, “Constructing Security on the U.S.–Mexico Border” (2005) 24 *Political Geography* at 173.

¹⁹⁸ *Ibid.*

Representative Tom Tancredo (R-Colorado): "The defence of the nation begins with the defence of its borders" (2001).

Representative J.D. Hayworth (R-Arizona): "In these trying times, border security is synonymous with national security" (2004).

The US State Department: "We are faced with a more diffuse and insidious threat by our open borders" (2001).¹⁹⁹

Following this presentation of the securitization framework in the Copenhagen School's work, one can argue that its main strength is the focus, not on what security is in reality, but on what is presented and accurately recognized as a threat:

The securitization framework aims at understanding which actors can speak security successfully, how they are accepted as legitimate actors in that role, and what consequences those 'speech acts' have.²⁰⁰

However, on closer examination, several aspects of the securitization framework developed by the Copenhagen School appear to be problematic. One of them, of particular relevance in the field of migration, is the focus on discourse at the expense of practice.²⁰¹ It is here that governmentality theory, which underlines the importance of the technological in realizing objectives of government, clearly adds to our understanding of the logic of securitization.²⁰² Drawing upon governmentality literature, some authors have shown how the discourses

¹⁹⁹ *Ibid.* at 177.

²⁰⁰ Léonard, "Studying Migration as a Security Issue", *supra* note 191 at 12.

²⁰¹ For an overview of the challenges to use of the concept of "securitization", see: Léonard, *ibid.* See also Ayse Ceyhan & Anastassia Tsoukala, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies" (2002) Special issue *Alternatives* 21-39. For more specific criticisms of the concept of "securitization" in the migration field, see: Lene Hansen, "The Little Mermaid's Silent Security Dilemma and the Absence of Gender in the Copenhagen School" (2000) 29 *Journal of International Studies* 285; P. Roe, "Securitization and Minority Rights: Conditions of Desecuritization" (2004) 35 *Security Dialogue* 279.

²⁰² See the introductory section of Part I: "Understanding the "State": Governmentality or the 'Art of Government'".

of security are themselves embedded in and shaped by more technological ways of framing security, a point that will be developed in greater detail in the next chapter.²⁰³ As such, the focus upon governmental procedures and techniques complements the political, sociological, and largely Bourdieu-inspired analyses of securitization as the outcome of routinized practices by security professionals:

The securitization of immigration ... emerges from the correlation between some successful speech acts of political leaders, the mobilization they create for and against some groups of people, and the specific field of security professionals.... It comes also from a range of administrative practices such as population profiling, risk assessment, statistical calculation, category creation, proactive preparation and what may be termed a specific *habitus* of the "security professional" with its ethos of secrecy and concern for the management of fear or unease. [author's italics]²⁰⁴

To summarize, securitization processes are not confined to simple rhetoric (i.e., speech acts) but also imply extensive "mobilization" of resources to support discourse (i.e., specific practices of security professionals). Discourses consequently result from a larger framework created by the security professionals and activated for the purpose of political games. What are the main functions and specific practices of security professionals in this securitization framework? And who exactly are the "security professionals"?

²⁰³ See e.g.: Didier Bigo, *Polices En Réseaux : L'expérience Européenne* (Paris: Presses de la Fondation nationale des sciences politiques, 1996); Didier Bigo, "When Two Become One: Internal and External Securitizations in Europe" in Morten Kelstrup & Michael C. Williams, eds, *International Relations Theory and the Politics of European Integration* (London: Routledge, 2000); Anna Leander, "The Power to Construct International Security: On the Significance of Private Military Companies" (2005) 33: 3 *Millennium* 803; Jef Huysmans, *The Politics of Insecurity : Fear, Migration and Asylum in the EU* (London ; New York: Routledge, 2006); Jeff Huysmans, "Minding Exceptions. Politics of Insecurity and Liberal Democracy" (2005) 3: 3 *Contemporary Political Theory*, 321; Jeff Huysmans, "A Foucaultian View on Spill-Over: Freedom and Security in the EU" (2004) 7: 3 *Journal of International Relations and Development* 294. See Chapter 2, below, for more on this topic: "Governing Risk, Controlling Migration: the multiples forms of the 'mobility regime'".

²⁰⁴ Didier Bigo, "Security and Immigration: Toward a Critique of the Governmentality of Unease" (2002) 27 *Alternative* 63 at 65.

1.4.2. Securitizing Migration through Specific Practices of Security Professionals

Security professionals - experts from the military, intelligent services, police, journalists, economists, health-care specialists, academics etc. – are agents in a position of authority, the ones endowed with “symbolic capital” and with a particular form of knowledge: they know what we (i.e. the non-professionals) do not know. There is, in fact, a common belief that security professionals have specific modes of action of a technical nature that we are not supposed to know about: “[o]ne of the most significant characteristics of the field effect is the lack of precision required for threats identified by the professionals who know some “secrets” ... They do that as “professionals”.²⁰⁵ And the more the threats are ill-defined, considered to be invisible and diffuse, the more they catalyze various fears and generate misgivings and erroneous associations which justify the vigilance of a particular institution.²⁰⁶ This “shared knowledge” among security professionals creates a “community of mutual recognition” and governs a logic of implicit acceptance of claims made by other professionals, “not only with respect to the substance of these claims, but also to the forms and technologies of knowledge acquisition”.²⁰⁷ In other words, following Bourdieu’s interpretation of *habitus*, security professionals, even if always in competition, have all become “managers of unease” and have created considerable autonomy for their field: the management of fear.²⁰⁸ The

²⁰⁵ *Ibid.* at 74. See also: Huysmans, "A Foucaultian View on Spill-Over", *supra* note 203.

²⁰⁶ Bigo, "Security and Immigration" at 78, *supra* note 204 at 78.

²⁰⁷ *Ibid.* at 74-75

²⁰⁸ As Bourdieu has shown, it is when beliefs and norms are transformed because of inner struggles inside a field, and when creativity is important, that it is possible to understand the autonomization of a field as such: Pierre Bourdieu, *Raisons pratiques: sur la theorie de l' action pratique* (Paris: Seuil, 1994).

“security field”, where security professionals meet to structure a new and wider conception of security, is created by the focal point of the migrant, who is presented as a threat, both internally and externally.

Historically, this is exemplified by TREVI, a discussion forum founded in the mid-1970s for ministers and senior officials from internal affairs and justice departments then within the European Community, with police chiefs and intelligence officers also participating in its working groups. Eventually, TREVI became the model for the development of European police collaboration over future decades. Initially, collaboration focused almost exclusively on terrorism. Then, at the beginning of the 1980s, organized crime and political protest were included as important themes, to which were added, at the end of the decade, drugs and refugees. During the 1990s, links between various crimes, population movements and political protests were re-enforced.²⁰⁹

Another example of this is the new European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), which was set up at the end of 2004 to “improve integrated management at the Union's external borders”.²¹⁰ FRONTEX coordinates intelligence-driven operations based on “risk analyses” and “threat assessments”, two of the salient features of “Integrated Border Management”. The threat against which “integrated border management and surveillance” work is that of people

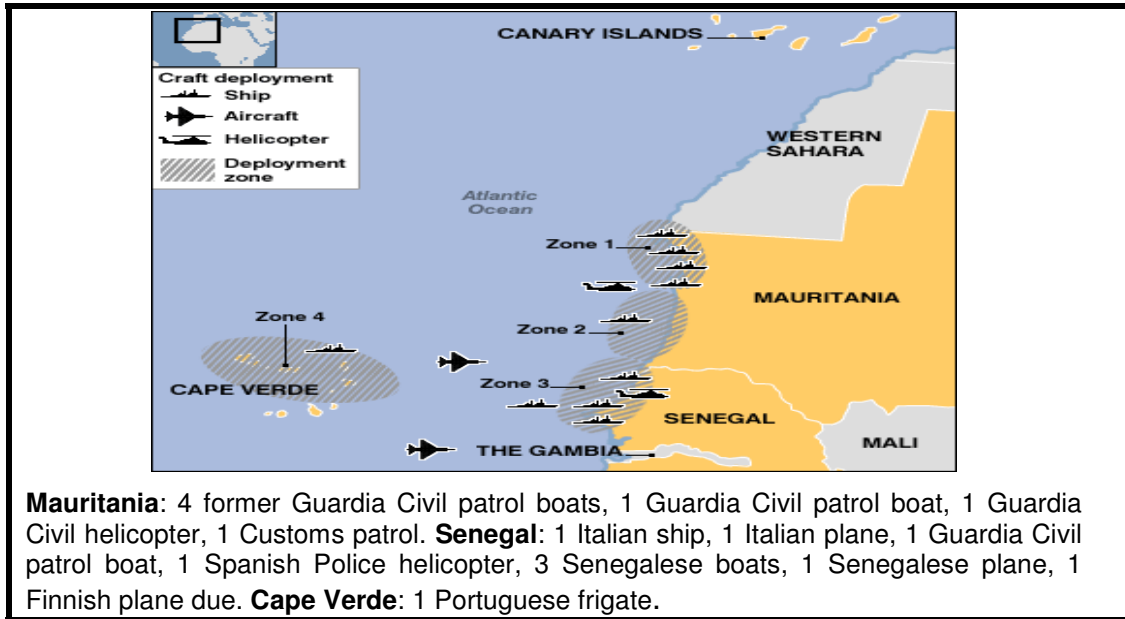
²⁰⁹ See: Hörnqvist, "The Birth of Public Order Policy ", *supra* note 179 at 40. In 1992, with the Treat of Maastricht, TREVI ceased to exist, and was integrated in the Third Pillar of the European Union. It was replaced by the European Union's criminal intelligence agency, Europol, which became fully operational in July 1999. Europol's specific mandate is to counter smuggling of and trafficking in migrants.

²¹⁰ EC, *Council Regulation No. 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, [2004] O.J. L. 349/1.

who are in the process of moving towards EU territory irrespective of the legal framework institutionalized by the Schengen borders regime. Risk analyses, which describe routes, modus operandi, patterns of irregular movement, conditions of the countries of transit, statistics of irregular displacement, etc., are secret and are therefore not declassified for the public. However, as shown below, FRONTEX publicizes some rough statistics on the number of irregular migrants intercepted while on their way to Europe, which helps reinforce its image of the “security professional” par excellence. The official justification currently given for such secrecy is that these analyses contain very sensitive information based on sources provided by the authorities of member states in the countries of origin and transit: if made public, the source of information could be discovered and put at risk. The Risk Analysis Unit (RAU) of FRONTEX is in charge of preparing risk analysis reports. RAU is composed of a combination of border guard officials and experts with a customs background, and has already delivered a series of Risk Analyses: on Ceuta and Melilla (November 2005), Mauritania (March 2006), Libya, which was part of the wider Tailored Risk Analysis Identifying Threats and Risks of Illegal Migration from the African Continent (May 2006), etc. RAU uses the revised “Common Integrated Risk Analysis Model” (CIRAM), originally requested at a 2002 meeting of the Seville European Council, in order “to combat primarily illegal immigration”.²¹¹ CIRAM, based on a six-field matrix, brings together aspects of crime intelligence (threat assessment) and risk assessment, the latter focusing on the weaknesses of border management systems at the external borders of the European Union. The outcomes of CIRAM are problem-oriented risk analyses, according to which a decision can be made on joint operational

²¹¹ Seville European Council Presidency Conclusions, 21 and 22 June 2002. See point 32: “... before June 2003: preparation of a common risk analysis model, in order to achieve common integrated risk assessment”.

measures.²¹² Operation Hera II, launched in August 2006 and the first effort of its kind for FRONTEX, operated off the shores of Mauritania, Senegal and Cape Verde, in an attempt to stop migration at source.²¹³ The map provided by the BBC at that time to explain the deployment of this joint patrol is particularly illustrative of the way Operation Hera II was conceived, clearly as a military action:²¹⁴



²¹² For a detailed analysis of FRONTEX's management of "risks" and "threats", see: Sergio Carrera, "The EU Border Management Strategy - Frontex and the Challenges of Irregular Immigration in the Canary Islands" (March 2007) CEPS Working Document No. 261, online: CEPS <<http://www.ceps.eu/index3.php>>(accessed on 13 June 2007) at 14-17.

²¹³ Hera II (August-December 2006) involved Italy, Portugal, Finland and Spain, with the latter in command. Senegal and Mauritania were also included in the operation at some stage. Cooperation with these third states rested on bilateral agreements with Spain. Hera II was replaced by Operation Hera III, which began in February 2007 along the West African coast. Spain, Italy, Luxembourg and France were financing these measures: See: European Commission, "EU Common Patrols to Control Maritime Borders Will Be Organised Shortly in the South Mediterranean Region" (2006), http://ec.europa.eu/justice_home/news/intro/news_intro_en.htm>(last modified: 04 August); Ruth Weinzierl & Urszula Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea* (Berlin: German Institute for Human Rights, 2007) at 21; Roderick Parkes, "Joint Patrols at the E.U.'S Southern Border -Security and Development in the Control of African Migration" (August 2006) SWP Comments 2006/C 21.

²¹⁴ Dominic Bailey, "Stemming the Immigration Wave ", *BBC News, Tenerife* (10 September 2006), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/5331896.stm>> (accessed on 30 September 2006).

The recent statistics gathered in the course of FRONTEX's latest joint operations (HERA 2008 and NAUTILUS 2008), which are published on the FRONTEX website, also illustrate well the point previously raised: that FRONTEX uses a statistical apparatus to praise itself as a successful "key player in the implementation of the concept of EU Integrated Border Management":²¹⁵

| Name of Activity | Total number of arrivals | | Illegal Migrants diverted back / deterred | Facilitators arrested | Interviews carried out by experts deployed by Frontex |
|----------------------|--------------------------|------|---|-----------------------|---|
| HERA 2008 | 4289 | | 3263 | 110 | 998 |
| NAUTILUS 2008 | MT | 1603 | 0 | 1 | 395 |
| | IT | 6491 | | | |

Source: HERA 2008 and NAUTILUS 2008 Statistics, May 2008.²¹⁶

²¹⁵ "More About Frontex- Origin and Tasks", online: Frontex <http://www.frontex.europa.eu/more_about_frontex/> (accessed on 08 August 2008).

²¹⁶ Operations currently in place are HERA 2008 and NAUTILUS 2008. The main objective of the Joint Operation HERA 2008 is to prevent irregular migration from West Africa countries heading to Canary Islands. The main objective of the Joint Operation NAUTILUS 2008 is to reinforce border control activities in Central Mediterranean and control irregular migration coming from North Africa countries heading to Malta and in Italy: "Hera 2008 and Nautilus 2008 Statistics" (05 May 2008), online: Frontex <http://www.frontex.europa.eu/newsroom/news_releases/art40.html> (accessed on 08 August 2008).

To summarize, “security is meaningless without an “other” to help specify the conditions of insecurity”.²¹⁷ This other is constructed and understood through discourses and practices. The securitization of migration depends, therefore, on the capacity of all security professionals – who not only respond to threats, but moreover determine what is and is not a threat – in order to combine threats from different sectors in the image of the migrant. Security agencies have successfully institutionalized a new domain in which otherwise distinct activities and concerns are linked in an apparently natural manner, interwoven within a “security continuum” in which we see a “transfer of illegitimacy”, operating at both the levels of signification and of institutional practice, such that asylum and migration become questions of “security” even more than questions of human rights or citizenship.²¹⁸ Securitization of migration is thus the result – and not the cause – of the development of technologies of control and surveillance of migration. The existence of such a field of “unease management” linking practices and knowledge is beyond the domain of national politicians. In fact, security professionals have succeeded in making security their object (rather than the object of national politicians) by investing time, statistical apparatus and other routines that give shape to political labels.²¹⁹ This does not mean that politicians of the Western states necessarily believe in the myth they themselves disseminate regarding migrants, but they do not have a framework, other than the one established by security professionals, in which to speak about the state, migration and security.

²¹⁷ Ronnie D. Lipschutz, *On Security* (New York: Columbia University Press, 1995) at 9.

²¹⁸ Bigo, "When Two Become One: Internal and External Securitisations in Europe", *supra* note 203.

²¹⁹ Bigo, "Security and Immigration", *supra* note 204 at 75. See also: Jeff Huysmans, "Discussing Sovereignty and Transnational Politics" in N. Walker, ed, *Sovereignty in Transition* (Oxford: Hart Publishing, 2004), 209-27; Huysmans, "Minding Exceptions. Politics of Insecurity and Liberal Democracy" ; Huysmans, "A Foucaultian View on Spill-Over", *supra* note 203.

Within such a complex set-up, the issue cannot be simply the manner in which the migrant becomes this symbolic figure of risk to both the social and cultural orders. It is also important to ask why migration has increasingly become a matter of security. In other words, why has migration undergone such intense securitization?

1.4.3. The End of the Cold War: A Factor of Intense Securitization of Migration

The transformation of the concept of security, which has encouraged the spreading fear of migration, occurred along with the end of the Cold War and expansion of the capitalist market system into a global market system.

Throughout the Cold War, security was focused on war and external threats to the state that might give rise to war. The state was portrayed as protecting itself from other hostile states, with this situation reinforced by the existence of two dominant “superpowers” that sought hegemony through nuclear deterrence of conflicts between state interests.²²⁰ Threats from other states were seen as being “directed toward individuals qua citizens, (that is toward their states) and ... through concerted action by the representatives of the citizenry – the state’s leaders”.²²¹ Thus, issues such as interstate and intrastate migration were

²²⁰ Arnold Wolfers, *Discord and Collaboration* (Baltimore: Johns Hopkins University Press, 1962).

²²¹ Keith Krause & Michael C. Williams, "From Strategy to Security: Foundations of Critical Studies" in Keith Krause & Michael C. Williams, eds, *Critical Security Studies: Concepts and Cases* (London: UCL Press, 1997) at 43.

approached in terms of *realpolitik*, (i.e. in realist terms, with the sole principle being the advancement of the national interest): presenting such concerns as: “Does this de-stabilize our country’s political order? Will our receiving refugees be seen as a hostile act by the other state’s government?”²²²

With the end of the Cold War and the increasingly globalized nature of economic, social, cultural, and environmental issues, the focus on the state has shifted, in security terms, more to the individual. Instead of viewing security as concerned with “individuals qua citizens”, the current view of security is concerned with “individuals qua persons”.²²³ This redefinition has led to the broadening of security issues which have necessarily been of relevance when addressing new problems such as global warming, soil depletion, the growing scarcity of water and food, AIDS epidemic or the increase in South-North migration. This broadening has encapsulated migration within a new security discourse. Whereas once international migration appeared to be marginal, it suddenly loomed large, essentially when those on the move were short of money and were culturally different.²²⁴ Deprived of its external enemy – the Cold War – the fragmented, bureaucratic state needed to find another “enemy” in order to fulfil its essential role as society’s protector:

²²² Ibrahim, "The Securitization of Migration: A Racial Discourse", *supra* note 68 at 168.

²²³ Krause & Williams, "From Strategy to Security: Foundations of Critical Studies", *supra* note 221 at 43.

²²⁴ Bigo, "Criminalisation of Migrants", *supra* note 173 at 62. See more generally: Myron Weiner, "Security, Stability, and International Migration" (1992/93) 17: 3 *International Security* 91; R. Lohrmann, "Migrants, Refugees and Insecurity. Current Threats to Peace?" (2000) 38: 4 *International Migration* 3; Miller, "International Migration in Post-Cold War International Relations", *supra* note 41. See also section 1.1. above, for more on this topic.

The enemy outside becomes the enemy within, disrupter of order and harmony. But this time the enemy is no longer easily identifiable; it has become the category of the immigrant.²²⁵

The development of the image of the non-Western migrant as the new “state-enemy” is facilitated by two main factors. First, the migrant is neither clearly identifiable nor associated with a particular state, and, therefore, “potentially omnipresent, transnational and [having] already infiltrate[d the state]”.²²⁶ Second, since multitudinous phenomena are linked to the physical mobility of persons, migration can be conveniently connected to a host of problems, those of danger and military threat, as well as social, economic, political and cultural issues. Thus, as previously examined, migration, as presented by security professionals at all levels, converges in a coherent discourse which depicts an oversimplified schema of the world.

Although it is easy to emphasize the role played by the mass media, or to illustrate the way it has been exploited by populist politicians, in concluding this section on the securitization of migration, the basic point to be made is that irregular migration is dealt with by the very same

²²⁵ Aradau, "Migration: The Spiral of (in)Security", *supra* note 27. See also: Tim Dunn & Jose Palafox, "Border Militarization and Beyond: The Widening War on Drugs" (2000) 8: 4 *Border Lines* 14. See lastly Bigo who, interestingly, speaks of a “degenerated Schmittian vision in which polity is the continuation of war by other means”: Bigo, "Criminalisation of Migrants", *supra* note 173 at 81.

²²⁶ Didier Bigo, "The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention" in Malcolm Anderson & Monica den Boer, eds, *Policing across National Boundaries* (London: Pinter, 1994), 166. According to Faist, the fact that the effects of immigration are extremely hard to establish empirically with a sufficient degree of certainty aids in understanding why, throughout the 90s, immigration became an integral part of the social rhetoric of right-wing politicians in the member states. (who blamed immigrants for taking jobs without having to give concrete evidence): Thomas Faist, "'Extension du Domaine de la Lutte': International Migration and Security before and after 11 September 2001" (2002) 36 *International Migration Review* 7. See also: Edelman, *Pièces et règles du jeu politique*, *supra* note 192.

agencies who deal with security, terrorism, drugs and organized crime. The framing of migration as a security issue is thus directly related to the security professionals' own immediate interests in this post-Cold War era: the search for a new role, competition for budgets and missions, etc.

In this first chapter I have examined the many ways in which Western receiving societies have shaped the terms of the migration debate. I also demonstrate that in the corpus of political speeches and legal discourses, when referring to South-North migration, the powerful metaphors used all converge at the framing of migration as a problem: the “non-Western” migrant is often presented today as a “poor”, a “stranger”, an “illegal” who has no right to be there because she was uninvited, and has frequently been identified as a danger to the supposedly collective values of the receiving society. Yet the “non-Western migrant” occupies such an important position in the tensions discussed above, precisely because her exclusion as “the one who does not belong” is inherent in the construction of the host society’s collective identity. Thus, paradoxically, the strong migration myths that in recent years have evolved in public perception and in policy circles are an indication of how much we now depend upon our representation of the migrant as the threatening collective figure of the outsider in order to construct our own identity and values as a society. But any well-rounded analysis on exclusion and belonging must also include a study on border control. As such, within the complex process of “exteriorizing aspects of the interior”,²²⁷ the sovereignty myth translates into “the need to monitor borders, to reassure the integrity of what is inside, the practice of territorial protection [and] the technologies of surveillance”.²²⁸ The fundamental elements of the “mobility regime” are thus outlined in the next chapter. The point of departure of this analysis is the so-called “mobility gap”, or “the differential ability to move in space – and even more so to have access to opportunities for movement”, which “has become a major stratifying force in the global social

²²⁷ Doty, *Anti-Immigrantism in Western Democracies: Statecraft, Desire and the Politics of Exclusion*, *supra* note 25 at 29.

²²⁸ Bigo, “Security and Immigration”, *supra* note 204 at 67.

hierarchy".²²⁹ A series of questions arises: How does the mobility regime develop and how is it maintained? What are the social technologies that facilitate it? What sorts of social imageries sustain it?

²²⁹ Shamir, "Without Borders? Notes on Globalization as a Mobility Regime", *supra* note 5 at 200. This mobility gap is not only an expression of the conditions of the possibilities of movement, such as socioeconomic factors, geographical locations, cultural imperatives, and political circumstances. The "differentiation of mobility chances" is, rather, the strategies "avidly and consistently pursued by the governments of more affluent areas in their dealings with the population of less affluent ones": Bauman, *Society under Siege*, *supra* note 42 at 83.

Chapter 2. Governing Risk, Controlling Migration: The Multiple Forms of the “Mobility Regime”²³⁰

Sometimes noisily and sometimes sneakily, borders have changed place. Whereas traditionally, and in conformity with their juridical definition and “cartographical” representation as incorporated in national memory, they should be at the edge of the territory, marking the point where it ends, it seems that borders and institutional practices corresponding to them have been transported into the middle of political space ... More and more, however, borders are creating problems in the heart of civic space where they generate conflicts, hopes and frustrations for all sorts of people, as well as inextricable administrative and ideological difficulties for states.²³¹

This chapter is concerned with the governance of mobilities in a Foucauldian sense (i.e. the different forms of surveillance and control over undesirable migrants). It draws upon the concept of the “mobility regime” in order to demonstrate that migratory controls are not only about regulating mobility: they are a very useful tool in stigmatizing suspect populations of migrants, marking them as potential unwanted migrants and thereby excluding them as dangerous “outsiders”.²³² The mobility regime is predicated on the classification of individuals and groups according to principles of perceived threats and risks. Thus the primary objective of a mobility regime is to create distinctions between various categories of persons. The strong principle of division that governs the mobility regime in the field of migration is one that separates privileged countries and regions from most other regions of the world, in effect turning the latter into “suspect countries”:

²³⁰ This expression is taken from: Shamir, “Without Borders? Notes on Globalization as a Mobility Regime”, *supra* note 5 at 199.

²³¹ Etienne Balibar, *We, the People of Europe?: Reflections on Transnational Citizenship* (Princeton, N.J.: Princeton University Press, 2004) at 109-10.

²³² Further discussion of the mobility regime is found on page 60 & following, above.

Such countries are perceived as social spaces that have the potential of exporting criminal elements, terrorists, and undocumented immigrants into the more privileged social spaces of the globe. Thus, while the traditional function of guarded borders was conceived in terms of the need to defend sovereignty (physically against organized violent invasion and symbolically as an affirmation of national identity), borders become increasingly conceptualized in terms of “the need to protect a perceived stable and secure social fabric from unwarranted infiltration by suspect populations.”²³³

Keeping in mind this theoretical account of the “mobility regime”, this chapter deals with the measures taken for the prevention of unwanted migration. As I cannot present, due to limited space, a complete inventory of all measures aimed at controlling the movement of people, and as new techniques are constantly emerging, the analysis focuses on measures that define the process whereby some migrants are seen to be “dangerous”, hence their movements need to be contained and curtailed. More precisely, it is an insight into what those who wish to migrate to the West are facing – through an illustration of varying forms of the mobility regime, from “elementary forms” (walls and fences) to more complex systems (involving, for example, the use of biometrics). But before describing those processes that seek to exercise governmentality over undesirable migrants, it is necessary, first, to clarify what is meant by “control” in the Foucauldian political sociology, second, to understand the changing topography of the border in the context of border control, and third, to assess the important implications of this mobility regime for the legal regime, notably by analyzing a trend that in the last 10 years has come to define modern migration law: the increase in linking migration and crime as a vehicle of social control.

The Meaning of “Control” in the Foucauldian Political Sociology

²³³ Shamir, “Without Borders? Notes on Globalization as a Mobility Regime”, *supra* note 5 at 205.

If the Foucauldian political sociology is helpful in understanding power in terms of its multiple tactics and functions, then Deleuze's idea of the "control society" deserves to be viewed as an important contribution to such a project.²³⁴ Deleuze argues that during the late twentieth century, a new kind of power, which he calls "control", has come to define the social and political life of states and citizens.²³⁵ He theorizes control by comparing its logic, topology, assumptions and mechanisms to those of the "disciplinary societies". The "control society" has, according to Deleuze, gradually replaced the "disciplinary society".

Foucault identifies the disciplinary societies as having begun in the eighteenth and nineteenth centuries, and having reached their peak at the outset of the twentieth century. He emphasizes that discipline is reducible neither to a particular institution nor apparatus but is instead "a type of power, a modality for its exercise comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a "physics" or an "anatomy" of power, a technology".²³⁶ While discipline would have different objectives and targets depending on its particular site of confinement, it is always oriented according to demographic and economic concerns. Discipline confronts the "floating population". As an "anti-nomadic technique", it 'fixes, arrests or regulates movements; it clears up confusion; it dissipates compact groupings of individuals wandering about the country in unpredictable ways; it establishes calculated

²³⁴ This point is made by Walters who expounds at length on the work of Deleuze in William Walters, "Border/Control " (2006) 9: 2 *European Journal of Social Theory* 187 at 189-93.

²³⁵ Gilles Deleuze, "Postscript on Control Societies" in Gilles Deleuze, ed, *Negotiations 1972–1990* (New York: Columbia University Press, 1995); Gilles Deleuze, "Postscript on the Societies of Control" (1992) 59 *October* 3-7.

²³⁶ Foucault, *Discipline and Punish: The Birth of the Prison*, *supra* note 165 at 215.

distributions”.²³⁷ Discipline initiates the organization of vast spaces of enclosure; it operates a regime of confinement, segmentation and utilization. The individual never ceases to move from one closed environment to another: first family; then to school (“you are no longer with your family”); then to the barracks (“you are no longer at school”); then to the factory; from time to time, the hospital; and possibly to the prison, the primary example of the enclosed environment. These spatio-temporal practices make it possible to “organize a human multiplicity, both by totalizing and individualizing it, so as to maximize and extract its productive energies and capacities”.²³⁸

Foucault is clear that however central it is to the organization of modern societies, discipline represents only a particular “technology” of power, and not power per se. With this in mind, Deleuze suggests that disciplinary societies are gradually turning into control societies. He develops his model of control as follows: “Enclosures are molds, distinct castings, but controls are a modulation, like a self-deforming cast that will continuously change from one moment to the other, or like a sieve whose mesh will transmute from point to point”.²³⁹ Thus, whereas discipline involves a power that is concentrated in sites of confinement, control involves a power that has become more fluid, less centred, aimed at managing the wider territory. There is another important difference between discipline and control: while disciplinary power is all-embracing, with a clear ambition to govern everybody (this includes the “marginal elements” of society who cannot be ignored and have to be “reformed and moralized”), control is “less bothered with [moralizing and] reforming [the individual] than with securing the home or the shopping mall against their

²³⁷ *Ibid.* at 218-19. For further analysis of Foucault’s theory on modern governance, see the section above: “Understanding the “State”: Governmentality, or the “Art of Government”.

²³⁸ Walters, “Border/Control”, *supra* note 234 at 190.

²³⁹ Deleuze, “Postscript on the Societies of Control”, *supra* note 235 at 6.

presence".²⁴⁰ To illustrate this idea, Deleuze makes a reference to the technology of the password. The password can materialize in such forms as the credit card, passport, reward card, identity card, electronic ankle tag; with biometrics, even the body itself can operate as a password. He writes: "In the societies of control ... what is important is ... a code ... the code is a *password*, while on the other hand disciplinary societies are regulated by *watchwords* (as much from the point of view of integration as from that of resistance)".²⁴¹ Linked in a dynamic relationship to the database and the risk profile, the password provides access and status: it creates privileged populations who enjoy the rewards of credit, mobility and information. But at the same time, it filters out and creates a risky, excluded group. In this regard, the title of a magazine article on the Authenticam (an iris recognition system) is most illustrative: "With biometrics you're the password".²⁴² The issue here is less the ability of biometrics to see who we are and more the stabilization and ordering of identity: your biometric double, already programmed into the machine, is what allows you to pass, or not.²⁴³

Deleuze's analysis of control is very helpful in understanding the emergence of "consumer societies", "information societies" or "risk societies". However, it is erroneous to suggest that control societies are in the process of replacing disciplinary societies. In the field of migration in particular, and as demonstrated in the following passage, disciplinary procedures still play a central role in facilitating imprisonments,

²⁴⁰ Walters, "Border/Control", *supra* note 234 at 192.

²⁴¹ Deleuze, "Postscript on the Societies of Control", *supra* note 235 at 6 (author's emphasis).

²⁴² Sam Costello, "Comdex: With Biometrics, You're the Password", 16 November 2000, online:CNN<<http://archives.cnn.com/2000/TECH/computing/11/16/comdex.biometrics.idg/index.html>>(accessed on 26 June 2007).

²⁴³ Bart Simon, "The Return of Panopticism: Supervision, Subjection and the New Surveillance" (2005) 3: 1 *Surveillance & Society* 1 at 15.

deportations, and a host of other types of containment. It would be more accurate, therefore, to recognize that new and growing techniques, such as bioprofiling, as well as other disciplinary means, complement the regulation of mobility.²⁴⁴

In examining borders in the contemporary context, we are not only confronted with divergent experiences of the border, but also with the shifting locations at which the border is experienced. A state's assertion of sovereignty is to be found not only at that state's physical border, but also outside of its own territory.

The Changing Topography of the Border

Interestingly, the word "frontier" ("frontière") originally referred either to the façade of a building or the front line of an army. Sometime in the sixteenth century it "came to mean the boundaries or borders of a particular space and has been associated with state borders ever since".²⁴⁵ This is the modern idea of the border: a continuous line demarcating the territory and sovereign authority of the state, enclosing its domain. But policing and control functions are no longer concentrated solely in the national domain: we are witnessing a "delocalization" of the

²⁴⁴ Foucault describes new modalities of power in late modernity. Normalization, as Foucault calls it, predicts an era of decreased reliance on physical punishment in general and on the life-taking powers of the law in particular. It uses disciplinary techniques which control life by subjecting individuals to an ever-expanding list of standards to which they are expected to conform: Michel Foucault, *The History of Sexuality* (New York: Pantheon Books, 1978); Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval" (1992) 17: 1 *Law and Social Inquiry* 1.

²⁴⁵ Mark Neocleous, *Imagining the State* (Maidenhead: Open University Press, 2003) at 99.

border, which has become evident in migration control from a distance (hereafter “remote control”).²⁴⁶

Remote control designates the aggregate of measures aimed at controlling the movement of people at a distance from the border, before “undesirable” prospective migrants reach the territory of a given state.²⁴⁷ Although remote control is not a recent invention,²⁴⁸ many of these measures were first codified in the 1990 Schengen Convention. The Schengen Convention paved the way for the removal of the “internal” borders of EU member-states: it compensated for the “security deficit” created by this move by inventing a new border – the external frontier – aimed at protecting the member-states’ combined territory. With the 1999 Amsterdam Treaty, security cooperation was no longer considered simply a compensatory measure for the abolishment of internal frontiers. It was also seen as a basic prerequisite for the exercise of freedom in a more general sense. As such, security consists of a range of governmental techniques and practices implemented in order to promote the EU as an area of freedom and free movement. Here, security and freedom are not, in fact, each other’s opposites but are defined in a complementary manner, each state becoming increasingly responsible for Schengenland’s

²⁴⁶ By “delocalization of the border, Bigo means a “disaggregation of border functions away from the border”: Bigo, “Security and Immigration”, *supra* note 204 at 77.

²⁴⁷ Virginie Guiraudon, “Before the EU Border: Remote Control of the “Huddled Masses” in K. Groenendijk, E. Guild & P. Minderhoud, eds, *In Search of Europe’s Borders* (The Hague: Kluwer, 2003) at 191.

²⁴⁸ For Instance, in 1924, in response to perceived uncontrolled migration from Europe and human chaos at major US ports, the US federal government put in place a system requiring “all foreign nationals coming from overseas to produce an entry visa prior to boarding a US-bound vessel”. Previously, the UK Aliens Act of 1905 had obliged ship captains to provide state officials with a list of foreign passengers: Antonio Cruz, *Shifting Responsibility. Carriers’ Liability in the Member States of the European Union and North America* (London: Trentham Books, 1995); Aristide R. Zolberg, “Matters of State: Theorizing Immigration Policy” in C. Hirschman, P. Kasinitz & J. DeWind, eds, *The Handbook of International Migration: The American Experience* (New York: Russell Sage, 1999).

security.²⁴⁹ For this reason Schengen, which might be considered a signal moment in the deterritorialization of the national border, has been described as an “experiment” and a “laboratory”.²⁵⁰ But the panoply of measures used increasingly by all Western states in order to prevent irregular migration suggests that Europe is not the only exception to this move of deterritorialization. Overseas deployment of airline liaison officers to help prevent improperly documented passengers travelling to Western countries, visa regimes, carrier sanctions, etc.: all these actions support the thesis of deterritorializing borders.²⁵¹

²⁴⁹ Rens van Munster, "Reconfiguring Authority: Neo-Liberal Governmentality, Security and Immigration Control in the EU" (Conference: "Critical Approaches to Security in Europe II", Tampere Peace Research Institute, University of Tampere, September-October 2006). See also: Balibar, *Politics and the Other Scene*, *supra* note 32 at 78; Walters, "Secure Borders, Safe Haven, Domopolitics", *supra* note 133 at 252; Huysmans, *The Politics of Insecurity : Fear, Migration and Asylum in the EU*, *supra* note 203 at 148. The rhetoric concerning the need to reconcile freedom and trade with heightened security is also found in American and Canadian initiatives (i.e. the smart border initiative) to monitor the goods and people entering North America: François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada" (2006) 12: 1 *Choice*, online: Institute for Research on Public Policy <<http://www.irpp.org/choices/archive/vol12no1.pdf>>(accessed on 02 August 2006).

²⁵⁰ Jorg Monar, "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs" (2003) 39: 4 *Journal of Common Market Studies* 747. See also: Cox, "Border Lines: Globalization, De-Territorialization and the Reconfiguring of National Boundaries".

²⁵¹ For an exhaustive study of the three core strategies of remote control at play in almost all Western receiving countries (visa regimes, carrier sanctions and pre-inspection regimes), see: Matthew J. Gibney, *The Ethics and Politics of Asylum : Liberal Democracy and the Response to Refugees* (Cambridge, UK ; New York: Cambridge University Press, 2004); Virginie Guiraudon, "Enlisting Third Parties in Border Control: A Comparative Study of Its Causes and Consequences" in Marina Caparini & Otwin Marenin, eds, *Borders and Security Governance. Managing Borders in a Globalised World* (Reihe: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2006); Eric Neumayer, "Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalised World" (Annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA, 22 March 2006); Matthew Gibney & Elizabeth Colson, "Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees" (2005) 22 *Global Migration Perspectives*, online: GCIM <<http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%2022.pdf>>; Crépeau & Nakache, "Controlling Irregular Migration in Canada", *supra* note 249.

There are several aspects to the deterritorialization of borders. On one level, it refers to the “heterogeneity” of borders: political, cultural and socio-economic borders no longer tend to coincide. Whereas previously the control of goods and people converged on the same borderline, there is now a disjuncture between the control of goods and people, with the former being subject to transnational regulation and the latter to intensified state control.²⁵² On another level, the multiplication of the border refers to the myth of the border as a unified, univocal concept experienced by everyone in the same manner. A state’s border is “multiple” in the sense that its function and effect on the lives of individuals varies from group to group. A good example of the “polysemic”²⁵³ nature of borders is the evidence presented in a 2004 case by the House of Lords in *R v Immigration Officer at Prague Airport*.²⁵⁴ This evidence shows the different ways in which Roma and non-Roma experienced the process of attempting to cross the border between the Czech Republic and the UK. For some, borders are being ‘thinned’ and their function as the threshold on which citizenship and nationality converge is dissolving. For others, on the contrary, the border is being intensified and the link between citizenship and nationality reinforced.²⁵⁵ Data from the European Roma Rights Centre indicate that a Roma passenger was 400 times more likely than an individual non-Roma to be refused pre-entry clearance by the UK. Roma were subjected to longer questioning by immigration officials than non-Roma and 80% of Roma, as compared to less than 1% of non-Roma, were subjected to a second interview.²⁵⁶ Here, the border is distinguishing

²⁵² Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, *supra* note 231 at 113. See also: Walters, “Border/Control”, *supra* note 234 at 195.

²⁵³ This expression is taken from: Balibar, *Politics and the Other Scene*, *supra* note 32 at 81. Balibar uses this term to highlight the fact that borders that do not have the same meaning for everyone.

²⁵⁴ *R (European Roma Rights Centre) V Immigration Officer at Prague Airport* (2004), [2005] 2 A.C. 1 (HL).

²⁵⁵ *Ibid.* para. 92.

²⁵⁶ *Ibid.* para. 92 & 93.

not only on national but on social lines, rejecting some individuals as a result of arbitrary application of the law:

Today's borders ... are, to some extent, designed to perform precisely this task: not merely to give individuals from different social classes different experiences of the law, the civil administration, the police and elementary rights, such as the freedom of circulation and freedom of enterprise, but actively to differentiate between individuals in terms of social class.²⁵⁷

Thus, very much in line with preceding reflection in this thesis on the mobility regime, we see that the border performs a discriminatory role. For a "rich person from a rich country", the border signifies a mere formality - the point at which their "surplus of rights" may be exercised -. For "a poor person from a poor country", the border is something altogether different, an "obstacle" with which she is continually confronted. "It is an extraordinarily vicious spatio-temporal zone, almost a home – a home in which to live a life which is a waiting-to-live, a non-life".²⁵⁸ Seen in this way, the border is no longer a "line". It is the place of construction and verification of identity, of "detention zones" and "filtering systems".

As the following shows, today the spread of remote control has not led to a diminished importance of the physical border. On the contrary, there are several places where one can now see the construction and reinforcement of actual barriers directly on the border.²⁵⁹ And for those who succeed in forcing their way into the territory of Western countries,

²⁵⁷ Balibar, *Politics and the Other Scene*, *supra* note 32 at 81.

²⁵⁸ *Ibid.* For the discussion of the mobility regime, see *supra* note 164 and page 60 & following, above. For the discussion of the "spectacle" at the border, see section 2.1.1, below.

²⁵⁹ See section 2.1, below.

complementary measures have been developed, such as readmission agreements with migrants' countries of origin and transit, the so-called safe third-country agreements, or provisions to deal with manifestly unfounded applications in a way which places an unduly heavy burden of proof upon the asylum-seeker. Other instruments implemented at the national level include the reduction of social benefits available to asylum-seekers, denial of access to reception facilities, increasingly resorting to detention, etc. These "deterrent policies" are all aimed at reducing privileges and entitlements available to undesirable foreigners already on the soil of the host country. They allow for such rash treatment of foreigners that other foreigners in a similar situation will think twice before attempting to travel to the territory.²⁶⁰ The fortification of the border on one hand, and the increasing use of internal deterrent measures on the other hand, allow us to imagine the state as a territorial space delineated by firm borders.

In short, control is a technology that materializes at different sites and levels and the modus operandi of border controls is double. First, the state is deterritorialized: "when governments search for ways to insulate their territories from unwanted population flows ... the solution ... comes from

²⁶⁰ See generally: Crépeau & Nakache, "Controlling Irregular Migration in Canada", *supra* note 249; Gibney & Colson, "Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees", *supra* note 251; M.J. Gibney & R. Hansen, "Asylum Policy in the West: Past Trends, Future Possibilities" (September 2003) Discussion Paper No.2003/68, online: United Nations University <<http://www.ciaonet.org/wps/gim03/>>(last modified: January 2004) at 9; María-Teresa Gil-Bazo, "The European Union's External Dimension of Asylum and Migration Policies from an International Refugee and Human Rights Law Perspective" (2006) 14 *Revue marocaine d'études internationales* 85; Bail for Immigration Detainees & Asylum Aid, "Justice Denied: Asylum and Immigration Legal Aid - a System in Crisis. Evidence from the Front Line Compiled by Bail for Immigrant Detainees and Asylum Aid", April 2005, online: Asylum Aid <<http://www.asylumaid.org.uk/Publications/Justicedenied.pdf>> (accessed on 13 August 2006); O.X.F.A.M., "Foreign Territory: The Internationalisation of EU Asylum Policy", May 2005, online: OXFAM <<http://www.oxfam.org/>>(accessed on 03 August 2006).

elsewhere”.²⁶¹ Through preventive measures, which are used to keep irregular migrants from setting foot on the territory, the border begins to spread (to the high seas, consular offices, foreign airports, etc.). Its control functions start to disperse into networks of information and surveillance: “Frontier functions are disintegrating in a spatial sense ... [and] the entire national territory is now being treated as an expanded frontier”.²⁶² Controls are shifting in other respects as well, implicating other states, intergovernmental organizations, private agents such as airlines, and mobile task forces.²⁶³ Second, the state is reterritorialized as a particular place, a territory with an inside and an outside. It should be noted that frequently, the state is simultaneously being deterritorialized and reterritorialized. As such, while analytically distinguishable, there is an obvious overlap in practice between preventive and deterrent measures because many policies that prevent entry also deter others from arriving. For example, remote control increases the chance of being refused entry in a particular country and can thus act to dissuade people from seeking asylum there.²⁶⁴

Another important feature of the mobility regime is strong reinforcement of the security-related policy apparatus of Western countries, which brings us to an analysis of the causes underlying the asymmetrical shift in the relationship between migration law and security concerns.

²⁶¹ Walters, "Border/Control", *supra* note 234 at 190.

²⁶² Michel Foucher, "The Geopolitics of European Frontiers" in Malcolm Anderson & Eberhard Bort, eds, *The Frontiers of Europe* (London: Pinter, 1998) at 238.

²⁶³ Walters, "Secure Borders, Safe Haven, Domopolitics", note 133 at 251. See also: Guiraudon, "Before the EU Border: Remote Control of the "Huddled Masses", *supra* note 247.

²⁶⁴ Gibney & Hansen, "Asylum Policy in the West: Past Trends, Future Possibilities", *supra* note 260.

Immigration Legislation in Security Policies: A Vehicle of Social Control

In the last 15 years, there has been abundant literature on the growing connection between two critical regulatory regimes -criminal law and migration law-, this trend being called the "criminalization of immigration law".²⁶⁵ This expression was first used in the US, between 1986 and 2001, to characterize the process whereby the immigration system gave credence to the "severity revolution" occurring within the criminal justice system.²⁶⁶ It is now more commonly used to designate the application of several attributes of criminal law to migration law. A central idea surrounding the criminalization of migration law is that this connection between the two legal regimes has been profoundly asymmetrical: while elements aligned with criminal enforcement have found their way into migration law, the procedural safeguards at the core of criminal adjudication have consciously been rejected in migration matters.²⁶⁷

In practice, the criminalization of migration law encompasses a growth in the scope of criminal grounds for the exclusion and deportation of non-citizens. This includes the classification of violations of migration law as criminal, when previously, they were a civil or administrative matter;

²⁶⁵ See, among others: Daniel Kanstroom, "Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law'" (2004) 29 N.C.J. Int'l L. & Com. Reg. 639; Teresa Miller, "Citizenship & Severity: Recent Immigration Reforms and the New Penology" (2003) 17 Geo. Immig. L.J. 611; Juliet Stumpf, "The Crimmigration Crisis: Crime and Sovereign Power" (2006) 56 Am. Univ. L. Rev. 367.

²⁶⁶ For more on this topic, see: Maria Isabel Medina, "The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud," (1997) 5 Geo. Mason L. Rev. 669; Helen Morris, "Zero Tolerance: The Increasing Criminalization of Immigration Law" (August 1997) 74 *Interpreter Releases* 1317.

²⁶⁷ See *infra* note 274.

detaining for an indefinite period and deporting those deemed likely to commit crimes that pose a threat to the national security of the state; making the smuggling of persons a criminal offence; making it a criminal offence for employers to hire irregular migrants, etc. Italy passed a controversial bill in July 2008 that would make irregular migration a crime punishable by up to four years in jail. According to media reports, the legislation will introduce a new criminal offence - "illegal immigration" - punishable by six months to four years in prison. The law also states that property rented to an irregular migrant can be confiscated. This is an example of this criminalization of migration law.²⁶⁸ Another current example of this criminalization of migration law is the increase in the number of criminal charges brought against irregular migrant workers employed in US companies. According to government records, US Immigration and Customs Enforcement agents have been conducting raids at a brisk pace, with 4,077 administrative arrests and 863 criminal arrests during worksite enforcement operations in 2007, roughly 45 times the number of criminal worksite arrests in 2001. One raid gained particular national media attention because of its scale, the severity of the charges

²⁶⁸ See: Renata Goldirova, "Italy to Jail Clandestine Migrants", (24 July 2008), online: Euobserver.com <<http://euobserver.com/22/26531>>(accessed on 30 July 2008). For the US context, see generally: Jennifer M. Chacón, "Unsecured Borders: Immigration Restrictions, Crime Control and National Sovereignty" (2007) 39: 5 Conn. L. Rev. 1827; Stephen Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms" (2007) 64: 2 Wash. & Lee L. Rev. 469; Teresa A. Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th" (2005) 25 Third World L.J. 81; Stumpf, "The Crimmigration Crisis: Crime and Sovereign Power", *supra* note 265. See also: David Cole, *Enemy Aliens* (New York: The New Press, 2003); Nora V. Demleitner, "Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators" (2004) 40 *Criminal Law Bulletin* 550; Miller, "Citizenship & Severity", *supra* note 265. For a more international perspective, see: Audrey Macklin, "Borderline Security" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); George Williams, "The Rule of Law and the Regulation of Terrorism in Australia and New Zealand" in Victor V. Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005); Victor V. Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) ; Clive Walker, "The Treatment of Foreign Terror Suspects " (2007) 70: 3 Mod. L. Rev. 427; Crépeau & Nakache, "Controlling Irregular Migration in Canada", *supra* note 249; Dauvergne, "Security and Migration Law in the Less Brave New World", *supra* note 9.

brought against those arrested, and the unusual nature of the legal proceedings. In May 2008, federal agents arrested 389 workers when they raided the Agriprocessors Inc. meat packaging plant in Postville, Iowa. Federal prosecutors, who called the raid "the largest criminal worksite enforcement ever in the United States", charged the Agriprocessors workers with aggravated identity theft, false use of Social Security numbers, illegal re-entry into the United States after being deported, and fraudulent use of alien registration cards. The unusually swift proceedings, in which 297 immigrants pleaded guilty and were sentenced in four days, were criticized by criminal defence lawyers for violations of due process. The American Immigration Lawyers Association also protested that the workers had been denied meetings with immigration lawyers and that their claims under migration law had been swept aside in unusual and speedy plea agreements. Many of the workers apparently pled guilty to lesser criminal offences to avoid prosecution for criminal charges that carry longer prison terms. In total, 270 of them were sentenced to five months or more in prison, and almost all agreed to immediate deportation after serving their prison sentences. This distinguished the Postville raid from most workplace actions, where unauthorized workers had -until now- generally been charged with administrative violations of migration law and not with federal criminal charges. While some people have questioned why no criminal charges have been brought against the Agriprocessors owner and management, labour advocates argue that this raid compromised an ongoing federal investigation into complaints of worker abuse and child-labour law violations at Agriprocessors because many potential witnesses are now facing deportation.²⁶⁹ Recently, US local

²⁶⁹ See: Julia Preston, "Employers Fight Tough Measures on Immigration", *The New York Times* (06 July 2008), online: [nytimes.com <http://www.nytimes.com/2008/07/06/us/06employer.html >](http://www.nytimes.com/2008/07/06/us/06employer.html)(accessed on 02 August 2008); Julia Preston, "270 Illegal Immigrants Sent to Prison in Federal Push", *The New York Times* (24 May 2008), online: [nytimes.com <http://www.nytimes.com/2008/05/24/us/24immig.html>](http://www.nytimes.com/2008/05/24/us/24immig.html)(accessed on 10 August 2008). See also: Muzaffar Chishti & Claire Bergeron, "Iowa Raid Raises Questions About

government institutions have also been involved more extensively and directly in the day-to-day "interior enforcement" of federal migration laws.²⁷⁰ This is a break in the traditional assumptions of US migration law, which has long been understood to constrain state and local involvement in the regulation of immigration status. These limitations on state and local authority have been explained as resting, at least in part, on the premise that non-citizens are more likely to face hostility, discrimination, or disadvantage at the hands of state or local institutions than at the hands of the federal government.²⁷¹ Since May 2008, for instance, everyone arrested in Phoenix is questioned by Phoenix Police about their immigration status. Police officers have the authority to contact Immigration and Customs Enforcement when, as a result of questioning, they have reason to believe a person is in the country irregularly. This policy departs from a longstanding policy that bars police officers from asking persons about their legal status in most cases. It also sets Phoenix apart from most other big cities with large immigrant populations, including New York and Los Angeles.²⁷² Immigrant community advocates and

Stepped-up Immigration Enforcement" (16 June 2008), online: Migration Policy Institute <<http://www.migrationinformation.org/>>(accessed on 02 August 2008).

²⁷⁰ In response to the failure of the US Congress to pass a comprehensive immigration law in summer 2007, state lawmakers are giving local authorities a wide berth. According to the National Conference of State Legislatures, in 2007, 1,562 bills related to irregular migration were introduced nationwide, while 240 bills were enacted in 46 states, triple the number passed in 2006.. A new law in Mississippi now makes it a felony for an irregular migrant to hold a job. Also, in Oklahoma, sheltering or transporting illegal immigrants is a felony. See: Damien Cave, "States Take New Tack on Illegal Immigration", *The New York Times* (09 June 2008), online: nytimes.com <<http://www.nytimes.com/2008/06/09/us/09panhandle.html?ref=us>>(accessed on 02 August 2008). See also text accompanying note 350, above, for more on this topic.

²⁷¹ Anil Kalhan, "Immigration Enforcement and Federalism after September 11 2001" in Ariane Chebel d'Appollonia & Simon Reich, eds, *Immigration, Integration, and Security: America and Europe in Comparative Perspective* (Pittsburgh: Univ. of Pittsburgh Press, 2008) at 4-6. See also *infra* note 273.

²⁷² In March 2008, the mayor of Phoenix implemented a new policy (Phoenix's Operations Order 1.4) ordering municipal police officers to investigate the immigration status of any individual arrested on a criminal charge and to notify Immigration and Customs Enforcement whenever an officer has a "reasonable basis" to believe that a detained or arrested individual is an irregular migrant. However, officers were not given the permission to make inquiries regarding the immigration status of people stopped for civil traffic violations, victims of crimes, or witnesses to crimes. Changes to this policy

community leaders have raised rights-based concerns with respect to the use of state and local police in migration enforcement. They argue that, given the complexity of migration law, state and local police whose primary responsibilities involve completely different objectives will likely find it difficult to properly ascertain the immigration status of individuals who they encounter. Untrained in the complexities of immigration regulations, they may resort all too quickly, consciously or unconsciously, to racial and national origin profiling rooted in stereotypes, in some cases in direct violation of state law. Lastly, even if the conduct of state and local officials were no worse than their federal counterparts, the negative consequences could be more significant, given the broader set of responsibilities of state and local governments within immigrant communities. In some instances, it has been reported that individual officers have used the threat of deportation as a means of intimidating non-US citizens. Generally, members of immigrant communities may be discouraged from cooperating with police and other local institutions (for example, if they are crime victims or witnesses) if they perceive those institutions to be in the business of federal immigration enforcement.²⁷³

The criminalization of migration law, or “cimmigration law”, has recently generated great interest from migration and criminal law scholars alike. Important recent scholarship has detailed, for instance, the increasing use, by Western states, of migration law as a means to detain

were made in May 2008, after Phoenix police officers and the Phoenix Law Enforcement Association objected to the first set of proposed changes, claiming it did not give Phoenix police officers sufficient latitude in questioning individuals about their immigration status. For more on this topic, see: Chishti & Bergeron, "Iowa Raid Raises Questions About Stepped-up Immigration Enforcement"; *supra* note 269. Muzaffar Chishti & Claire Bergeron, "Virtual Border Fence Given Mixed Assessment in First Test" (17 March 2008), online: Migration Policy Institute <<http://www.migrationinformation.org/>> (accessed on 31 July 2008).

²⁷³ Some research suggests that this concern may be well-founded. See: Kalhan, "Immigration Enforcement and Federalism after September 11 2001", *supra* note 271 at 14-16; Muzaffar A. Chishti, "The Role of States in U.S. Immigration Policy" (2002) 58 Ann. Surv. Am. L. 371 at 374.

and deport suspected international terrorists. It has been shown that migration law appeals to authorities because it allows procedural shortcuts and a degree of secrecy that are not tolerated under criminal law. It has also been demonstrated that security strategies which target people on the basis of religion, race, or lack of citizenship may not only discriminate, but are also of limited effectiveness as regards the stated goal of fighting terrorism, first, because they fail to target terrorist suspects who do not fit the profile, including citizens, and second, because the ultimate aim of migration law is removal, not punishment.²⁷⁴ Yet little has been written about why this criminalization of migration law has occurred, and what its theoretical underpinnings are.

An initial answer may lie in the core function that both migration and criminal law play in our society. At bottom, both criminal and migration law embody choices about who should be members of society: individuals whose characteristics or actions make them worthy or unworthy of inclusion in the community of citizens. Both systems act as gatekeepers of membership in the host society. Both serve the purpose of determining whether an individual should be included in or excluded from society. Membership theory is therefore at work in the convergence of criminal and migration law: limiting individual rights and privileges to the members of a

²⁷⁴ Post 9/11 laws in both the United States and the United Kingdom amended migration laws to facilitate the detention of suspected terrorists. However, in Australia, Canada and New Zealand, it was not necessary to include the reform of migration law in post 9/11 anti-terrorism law, mostly because the existing laws were already broad enough to catch potential security threats. For more on this topic, see: John Ip, "Comparative Perspectives on the Detention of Terrorist Suspects" (Spring 2007) 16 *Transnat'l L. & Contemp. Probs* 773; Kent Roach, "The Post-9/11 Migration of Britain's Terrorism Act, 2000" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006); Dauvergne, "Security and Migration Law in the Less Brave New World", *supra* note 9 ; Victor V. Ramraj, "Terrorism, Security and Rights: A New Dialogue" (2002) *Sing. J of Legal Studies* 1; Kent Roach, "Must We Trade Rights for Security? The Choice between Smart, Harsh or Proportionate Security Strategies in Canada and Britain " (2006) 27 *Cardozo L. Rev.* 2157; Roach, "Sources and Trends in Post 9/11 Anti-Terrorism Laws", *supra* note 175; Walker, "The Treatment of Foreign Terror Suspects", *supra* note 268.

social contract between the government and the people, it has the potential to include individuals in the social contract or exclude them from it.²⁷⁵ However, the outcomes of the two systems differ. In criminal law, a decision to exclude within society results in segregation through incarceration, while in migration law, exclusion from society results in separation through expulsion from the national territory. Moreover, migration and criminal law approach the acquisition and loss of membership from two different directions. Criminal law presumes that the defendant has full membership in society and places the burden on government to prove otherwise. This pro-membership perspective is reflected in the stronger constitutional protections possessed by criminal defendants. Adversely, migration law assumes non-membership, and non-citizens are presumed inadmissible unless they can prove the contrary.²⁷⁶ By unpacking the concept of legal citizenship and problematizing the

²⁷⁵ For more on the membership theory, see Stumpf and the text accompanying notes 35 to 37: Stumpf, "The Crimmigration Crisis: Crime and Sovereign Power", *supra* note 265 at 11.

²⁷⁶ *Ibid.* at 28-29. It should be noted, however, that levels of protection in migration law depend to a great extent upon the individual's status in the host country. According to law, the claims of temporary migrants are weaker than those of permanent residents, while undocumented migrants, regardless of the strength of their actual ties to the host country have more ephemeral constitutional claims. This point reflects the recent literature on citizenship, immigration, and community, calling for a destabilization of the strict citizen-member/immigrant-outsider dichotomy, which for a long period of time was dominated by Marshall's seminal scholarship in the field of law and citizenship. This new scholarship recognizes that not all migrants are "strangers" nor are all citizens true "members". For the proponents of Marshall's work, see: T. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950); Linda S. Bosniak, "Membership, Equality, & the Difference That Alienage Makes" (1994) 69 N.Y.U. L. Rev. 1047 at 1055; Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, *supra* note 76; Brubaker, *Citizenship and Nationhood in France and Germany*, *supra* note 49. The group of scholars which undermines the sharp distinction between migrants and citizens covers a wide theoretical spectrum, but in this thesis, I am interested specifically in the literature which emphasizes the fact that rich cosmopolitans (migrant or not) may move about unnoticed in the public spaces of the world's major cities, and have access to all the goods and services they desire, whereas in these same cities, the poor are confined to segregated neighbourhoods in which crime and police violence effectively "delegitimize [their] citizenship": Teresa Caldeira, *City of Walls: Crime, Segregation, and Citizenship in São Paulo* (Berkeley and Los Angeles: University of California Press, 2000) at 3. See also: Zygmunt Bauman, *Community: Seeking Safety in an Insecure World* (Cambridge, England: Polity Press, 2001); Calavita, "Law, Citizenship, and the Construction of (Some) Immigrant 'Others' ", *supra* note 85; Dauvergne, "Making People Illegal", *supra* note 36; Düvell, "Illegal Immigration in Europe", *supra* note 134 at 26.

notion of national community, this literature – despite at times pronounced internal differences – collectively undermines the sharp distinction between immigrants and citizens, and unsettles the very notion of community.²⁷⁷

Delineating the major roles played by criminal and migration law in defining membership in the community of host societies only partially addresses the question. What remains is to determine the impetus for the criminalization of migration law, and to suggest why it is occurring at this moment in time. The work of several scholars in a number of disciplines lends analytic clarity to the coercive social engineering which pervades the post-9/11 legal landscape. Although these scholars have focused on US society to describe the criminalization of migration law, their conclusions are far-reaching and help to explain this trend as seen in several other Western countries. A common feature of this scholarship, which draws largely upon Foucault's theoretical framework on the governance of mobilities, is that the hybrid system of crime and migration control (created by their convergence) functions to socially control non-citizens and their communities through managerial and actuarial processes, including detention, surveillance, and a host of related strategies operating below the constitutional radar.²⁷⁸ Kanstroom, for instance, has analyzed the significance of deportation in migration cases, outlining the manner in which post-9/11 immigration reforms in the US have deviated from traditional deportation justifications and now conform more closely to

²⁷⁷ Calavita, "Law, Citizenship, and the Construction of (Some) Immigrant 'Others' ", *supra* note 85 at 402.

²⁷⁸ See, among others: Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th", *supra* note 268 (highlighting the social control dimensions of criminalization of migration law); Miller, "Citizenship & Severity", *supra* note 265 (seeking to explain why criminal law and migration law are converging, and why at this time); Kanstroom, "Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law' ", *supra* note 265 (concluding that the convergence of the criminal justice system and the immigration control system produces the worst features of both models).

traditional justifications for criminal punishment. He argues persuasively that deportation – stripped of its formalistic, contract-based border control rationales, and examined functionally- is now a means of continually and perpetually controlling the behaviour of non-citizens. More precisely, he posits that when disconnected from the traditional rationalities of migration law, deportation is a vehicle of social control -specifically, the conception of deportation as a “civil” (in the US context), regulatory, contractual process by which non-citizens who violate a condition of entry are “returned” outside the territorial limits of the United States. He emphasizes that deportation is used to “cleanse” society of its least desirable members (the “criminal” and “illegal” non-citizens), noting that the United States is simultaneously admitting and expelling more non-citizens than ever before.²⁷⁹ This reference to deportation as society’s “cleansing tool” helps to explain the paradoxical attitude of most Western states toward non-citizen terror suspects: in removing them, surely these states do not stop terrorism as these suspects are allowed to relocate to a neighbouring country.²⁸⁰ As such, the remedy of removal ultimately displaces rather than stops terrorism. Yet removal is a visible action, which plays a central role in ensuring that citizens of the host country realize that something is being done to deal with the challenges of terrorism. In other words, through harsh migration measures toward non-citizen terror suspects, the

²⁷⁹ Daniel Kanstroom, "Deportation and Justice: A Constitutional Dialogue" (2000) 41 B.C.L. Review 771; Daniel Kanstroom, "Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases" (2000) 113 Harv. L. Rev. 1889; Daniel Kanstroom, "Crying Wolf or a Dying Canary?" (1999) 25 *Review of Law & Social Change* 435; Kanstroom, "Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law'", *supra* note 265. See also : Dan Kanstroom, *Deportation Nation : Outsiders in American History* (Cambridge, Mass.; London: Harvard University Press, 2007). Detention is another aspect of the hybrid crime/immigration system of social control studied by Kanstroom. For an analysis of social control in the "economic-punishment" nexus fuelling the immigration detention industry, see: Michael Welch, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex* (Philadelphia: Temple University Press, 2002); Michael Welch, "The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex" (2000) 27 Soc. Just. 73; Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th", *supra* note 268 . See section 2.1.2, below, for more on the topic of detention.

²⁸⁰ See *supra* note 274.

host country's government can show its citizens how effective it is in addressing the terrorist threat. This dichotomy – the stated/hidden goal – is very problematic. It might suggest, in the context of the fight against terrorism, for example, that “purging the country of unwanted convicts and impoverished, low-wage workers is more achievable and more demonstrably successful than capturing Osama bin Laden, discovering weapons of mass destruction in Iraq, or preventing future terrorist attacks”.²⁸¹ It also allows one to forget, in Lord Hoffman's powerful language, that “the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve”.²⁸²

Interestingly, since 2004 a series of high profile cases have tested provisions allowing for the indefinite detention of non-nationals in the United Kingdom, the United States, New Zealand and Canada. The coincidence evident in this group of cases is instructive: each case brings into question the reconciliation of security concerns with human rights standards. In each case, the migration–security pairing has been rearticulated through an assertion of the principles of the rule of law in an area where, previously, few of these principles had been asserted, while the question of the gradual importation of criminal procedural safeguards into migration law has, by and large, been set aside. This response is consistent with a shift in the relationship between migration law and security concerns which has resulted in security issues being “normalized” within migration law. Ironically, the argument presented narrowly here fits

²⁸¹ Miller, “Blurring the Boundaries between Immigration and Crime Control after September 11th”, *supra* note 268 at 114.

²⁸² *A (Fc) and Others (Fc) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004), [2005] 2 A.C. 68 (H.L.), [2004] UKHL 56 (paras 96 & 97). This point is addressed in details in the conclusion of this part.

with a broader thesis that migration law is gradually being transformed into a primary security setting.²⁸³

To conclude these preliminary remarks on the mobility regime and the significance of border control, the governance of mobilities in the field of migration must be seen as a variety of methods which make it possible for states to categorize and track people deemed to be “dangerous”, to contain movement both within and across borders, and to normalize recourse in the field of migration law to discretionary practices which act as vehicles of social control and simultaneously operate below the constitutional radar. In the following passage, attention is paid to several elementary forms of the mobility regime (border enforcement practices and detention). These are ancient practices, such as the construction of the Great Wall of China and quarantine in plague-stricken medieval Europe, but their increasing use in the contemporary migration regime has great significance for those engaging in reflection on state sovereignty, border control and human rights. These practices always rely on selection procedures which distinguish between those who may enter from those who cannot (2.1). A second part deals with screening mechanisms and the range of modern techniques of governance of mobility that are increasingly made available to states (2.2).

²⁸³ For more on this topic, see: Dauvergne, "Security and Migration Law in the Less Brave New World", *supra* note 9 at 540 (summarizing case law in each country). See also: Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms", *supra* note 268 (illustrating the asymmetric incorporation of the US criminal justice model into US migration law).

2.1. The Elementary Forms of the Mobility Regime

The mobility regime still relies heavily on physical barriers as a means of blocking mobility. These elementary practices are based on the rather conventional methods of building walls and fences (2.1.1). On the privileged side of border fences, the mobility regime also still relies on the old methods of using prisons, penitentiaries, detention camps, and a host of other types of quarantine to isolate social elements perceived to be dangerous. In this context, the rule of law does not apply (2.1.2).

2.1.1. Physical Barriers: Walls and Fences

The very act of creating the migrant's "illegality" requires a certain "spectacle" at the border.²⁸⁴ At the US-Mexican border, for instance, irregular migration has been rendered synonymous with the US nation-state's purported "loss of control" of its borders and has supplied the pretext for what has been, in fact, a continuous intensification of militarized control:

It is precisely 'the Border' that provides the exemplary theatre for staging the spectacle of 'the illegal alien' that the law produces. The elusiveness of the law, and its relative invisibility in producing 'illegality,' requires the spectacle of 'enforcement' at the US-Mexico border that renders a ... migrant 'illegality' visible and lends it the commonsensical air of a 'natural' fact.²⁸⁵

²⁸⁴ For more on the topic of "illegality", see section 1.3, above. See also *supra* notes 197 to 199, with accompanying text, for the discussion of the "spectacle" at the border.

²⁸⁵ Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life" (2002) 31 *Annual Review of Anthropology* 419 at 436. It should be remembered that of the 15 million irregular persons now living in the United States, about 40 per cent were not border crossers but rather persons who had valid visas to enter the country and then "overstayed" their permitted time: Sidney Weintraub, "The Fence as a Metaphor for How the United States Views Its Relations with Mexico " (October 2006) 82 *CSIS, Newsletter* CSIS, Newsletter, online: CSIS <http://www.csis.org/index.php?option=com_csis_topics&task=select&obj=Publications&id=18>(accessed on 10 August 2008) at 2.

In the aftermath of the 9/11 terrorist attacks, border policing has intensified. The goal is no longer simply to keep out the “classic”, unauthorized Mexican migrant who comes to the US in search of work (and putatively to “take advantage” of public services), but also the potential “terrorist” who seeks to commit acts of violence against Americans.²⁸⁶ Accordingly, concrete walls are being built along segments of the border, while a growing number of patrol agents relies on technologically advanced equipment which includes high-intensity lighting, high steel fencing, body-heat and motion-detecting sensors and video surveillance.²⁸⁷ The increasingly militarized spectacle of arrests at the border is, paradoxically, coupled with increased facilitation of irregular

²⁸⁶ Jonathan Xavier Inda, "Border Prophylaxis. Technology, Illegality, and the Government of Immigration" (2006) 18: 2 *Cultural Dynamics* 115 at 125 (explaining that, while the main enforcement target continues to be the US–Mexico border, there is now also more attention paid to official ports of entry and on the northern border).

²⁸⁷ Elements of the technology of border policing include plans of action, police personnel, material structures (metal fences and stadium-type lights), and surveillance devices (helicopters, ground sensors, TV cameras, and infrared night-vision scopes): *Ibid.* at 117. Since President Bush took office in 2001, funding for border security has increased by 66 per cent to more than \$7.6 billion and border patrol has grown from approximately 9,000 to approximately 12,000 agents: The White House, "Comprehensive Immigration Reform", online: The White House <<http://www.whitehouse.gov/infocus/immigration/>>(accessed on 12 August 2006). In summer 2006, under “Operation Jump Start”, 6,000 additional National Guard troops were sent to the southern border to help US Customs and Border Protection combat illegal immigration. Recently, in October 2006, the \$1.2 billion *Secure Fence Act* was passed. Its primary purpose is to build 700 additional miles of 15 foot high double-layered fencing along the US-Mexico border, to add to the existing 125 miles of fence along this border. For an overview of recent issues related to the US-Mexico Border, see: Peter Skerry, "Foreign Policy: How Not to Build a Fence: America's Conflicted Attitudes toward Immigration" (September 2006) *Foreign Policy* ; Mpi Staff, "The US-Mexico Border " (June 2006), online: Migration Policy Institute <<http://www.migrationinformation.org/>>; General Accounting Office, "Illegal Immigration: Border-Crossing Deaths Have Doubled since 1995; Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated" (Washington, D.C.: GAO (GAO-06-770), August 2006), online: G.A.O. <<http://www.gao.gov/new.items/d06770.pdf>>(accessed on 20 September 2006) Philip Martin, " Mexico-U.S. Migration and U.S. Immigration Policy " (Mexican Migration and Human Development, Stanford Center for International Development (SCID), 13-14 April 2007). For an in-depth analysis of this question, see also: Joseph Nevins, *Operation Gatekeeper : The Rise of The "Illegal Alien" And the Making of the U.S.-Mexico Boundary* (New York: Routledge, 2002); Belinda I. Reyes et al., *Holding the Line?: The Effect of the Recent Border Build-up on Unauthorized Immigration* (San Francisco, CA: Public Policy Institute of California, 2002); Deborah Meyers, "US Border Enforcement: From Horseback to High-Tech" (November 2005) 7 *Task Force Policy Brief*, online: Migration Policy Institute <<http://www.migrationpolicy.org/ITFIAF/Insight-7-Meyers.pdf>>(accessed on 03 August 2006).

labour migration, which reveals the host states' ambivalent position regarding irregular migration. Interestingly, the border crossing narratives of Mexican and Central American migrants often contain accounts of both tremendous hardship and easy passage. These same narratives are punctuated with accounts of life in the United States depicting hard labour and frequent exploitation.²⁸⁸

Similar walls have gone up in several other instances as well. In September and October 2005, at the borders of the Spanish enclaves of Ceuta and Melilla in Morocco, the Guardia Civil fired shots at Africans attempting to climb a six-metre high fence. Several people were killed in the process. In August 2006, the city council of Padua, in Italy, erected a steel barrier 84 metres long by 3 metres high to divide the "respectable" side of the city from the high crime neighbourhoods which are rife with illegal drugs associated with an "influx of Nigerian and Tunisian migrants". In the fall of 2006, Saudi Arabia announced that to secure the border with Iraq, it will build a 900-kilometre long, double-track barbed security fence, outfitted with remote sensors and thermal cameras. The major concern of Saudi officials is that an Iraqi civil war might send a high proportion of refugees south, unsettling the kingdom's Shia minority in the oil-producing east: "If and when Iraq fragments, there's going to be a lot of people heading south and that is when we have to be prepared," said Obaid, director of the Saudi National Security Assessment Project.²⁸⁹ A concrete fence also stretches between Israel and the Palestinian territories it

²⁸⁸ Genova, "Migrant "Illegality" and Deportability in Everyday Life"; *supra* note 285 at 437; Wayne A. Cornelius, David Fitzgerald & Scott Borger, eds, *Four Generations of Nortesños: New Research from the Cradle of Mexican Migration* (Boulder: Lynne Rienner Publishers, 2008) . For further analysis of this point, see the conclusion of this part.

²⁸⁹ Thierry Paquot, "Through the Gate and over the Wall", *Le Monde Diplomatique* (14 October 2006), 14-15; Harry de Quetteville, "Saudis Build 550-Mile Fence to Shut out Iraq ", *Telegraph* (30 September 2006), online: [Telegraph <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/10/01/wirq01.xml>](http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/10/01/wirq01.xml)(access ed on 30 June 2007).

occupies. At some points, it functions as a borderline; at others, it cuts right through villages and neighbourhoods, sometimes encircling whole communities, sometimes isolating one or two families from the rest of the community. Although Israel's security fence is not primarily aimed at preventing irregular migration, the Israeli fence is unique, in that it simultaneously tries to establish a border and to concentrate the "Palestinian suspect population in highly guarded enclaves that look like a mixture of medieval ghettos and gigantic gulags".²⁹⁰

In conclusion, one means of blocking and containing mobility is a basic one of reliance on physical barriers. These elementary practices are based on the rather conventional methods of erecting fences. But the mobility regime may also operate as a form of isolation, by preventing exit, as shown below in the practice of detention.

2.1.2. Detention

In this section, I use the concept of "quarantine" to refer to multiple forms of containment and imprisonment. In general, quarantine operates by identifying and distancing people perceived as dangerous and subjected to particular treatment protocols. Its objective is to protect host populations from these people. Quarantine is not a new process. In medieval times, cities already relied on two different measures in dealing with perceived threats such as leprosy and plague: exclusion and quarantine. In later times, urban authorities, pressured by the bourgeoisie, dealt with the politico-sanitary menace by perfecting the instrument of

²⁹⁰ Shamir, "Without Borders? Notes on Globalization as a Mobility Regime", *supra* note 5 at 205. Quoting: Loic Wacquant, "What Is a Ghetto? Constructing a Sociological Concept" in N. Smelser & P. Bates, eds, *International Encyclopedia of the Social and Behavioral Sciences* (London: Pergamon, 2004). Wacquant offers four criteria for articulating the sociological analytical concept of the ghetto. The ghetto is treated as an urban space subjected to the forces of stigma, constraint, spatial confinement, and institutional duplication.

quarantine. Yet what began as the politics of urban health later converged with other forms of containment to become an important element of modern governmentality.²⁹¹ The mobility regime still relies heavily on the old methods of using prisons, penitentiaries, and detention camps, to isolate the migrants deemed to be dangerous. Although deportation practices often go hand in hand with detention practices, this section focuses solely on detention. Detention offers important insight into contemporary forms of governmental power.²⁹² In order to know better how the study of detention practices might contribute to such a history, we need to return to Arendt and Agamben.

Arendt, who studied the pervasiveness of the camp in twentieth century Europe, reminds us that the horror of the camps, as the specific outcome of the Nazi's genocidal project of racial purity, should not obscure this fact: by World War II, in many European countries the camps had become "the routine solution for the domicile of the 'displaced persons'".²⁹³ When she notes that the internment camp had become "the only practical substitute for a nonexistent homeland" and the "only "country" the world had to offer the stateless" (p. 284), she explains that the camp is not

²⁹¹ Between 1348 and 1359, the Black Death killed approximately 30 per cent of the populations of Europe and Asia. One response to infectious disease was to require ships to remain in isolation for 40 days prior to entering a city's harbour. This practice came to be known as "quarantine" from the medieval French, *une quarantaine de jours*: Michel Foucault, "The Politics of Health in the Eighteenth Century" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (New York: Pantheon, 1980), 166. See also: Bryan S. Turner, "The Enclave Society: Towards a Sociology of Immobility" (May 2007) 10: 2 *European Journal Of Social Theory* 287 at 291-93.

²⁹² Foucault writes: "A whole history remains to be written of *spaces* — which would at the same time be a history of powers ... — from the great strategies of geo-politics to the little tactics of the habitat" (author's emphasis): Michel Foucault, "The Eye of Power" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (New York: Pantheon, 1980), 146-65 at 149. For an analysis of deportation and detention as complementary forms of governmentality, see: Walters, "Deportation, Expulsion, and the International Police of Aliens", *supra* note 20 at 284. For further analysis of deportation as a vehicle of social control, see *supra* note 279.

²⁹³ Arendt, *The Origins of Totalitarianism*, *supra* note 136 at 279. See also *supra* note 136 and accompanying text.

merely an expression of discrimination by a particular government, but rather a logical consequence and almost necessary correlate of a world fully divided into territorial nation-states. The geopolitical realm with its biopolitical assumptions is crystallized and finds confirmation, in the Camp. However, it is in Agamben that we are able to schematize the camp as a diagram of power.

Politics, for Agamben, is an ongoing process of clarification between inclusion and exclusion, between the “forms of life” the sovereign will protect and represent, and those it will not. This distinction between included and excluded “forms of life” enables the sovereign to maintain its sovereignty: those “forms of life” that threaten the sovereign’s jurisdiction over a particular territory exist completely outside the “norm”. Agamben’s writings on sovereign power are based on Schmitt’s definition of sovereignty. According to Schmitt, the essence of sovereignty lies in the declaration of the state of exception. The state of exception is constitutive of the juridical order in that no rule exists without an exception. The state of exception operates as a force of law exempt from the law, but in the name of law. It is law that suspends the law: “Order must be established for juridical order to make sense. A regular situation must be created, and sovereign is he who definitely decides if this situation is actually effective”.²⁹⁴ In other words, sovereignty operates via its capacity to define situations as “exceptional”, therefore requiring and justifying actions and procedures outside the normal juridical order so as to maintain and perpetuate the norm of the regular. Thus, sovereign power essentially operates via a ban: “The originary relation of law to life is not application but abandonment”.²⁹⁵ Although Agamben finds Schmitt’s definition of

²⁹⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1985) at 19.

²⁹⁵ Agamben, *Homo Sacer: Sovereign Power and Bare Life* at 29, *supra* note 136 at 29.

sovereignty useful, he identifies a third variation of order and localization, outside the rule of law and the state of exception: “to an order without localization (the state of exception, in which law is suspended); there now corresponds localization without order (the camp as the permanent space of exception)”.²⁹⁶ The birth of the Camp, according to Agamben, is an event that marks the political spaces of modernity: “Inasmuch as its inhabitants have been stripped of any political status and reduced completely to bare life, the Camp is also the most absolute biopolitical space that has ever been realized – a space in which power confronts nothing other than pure biological life without any mediation”.²⁹⁷ Originally, the camp was an exclusive and secret space surrounded by walls that divided social life within the political community from the bare life of the camps. The space of the state of exception has now transgressed the spatiotemporal boundaries of the camp, and the exception has become the rule: “Today it is not the city but rather the camp that is the fundamental biopolitical paradigm of the West”.²⁹⁸ Taking his cue from Foucault’s definition of biopolitics as a form of power that is concerned with the correction, administration and regulation of populations, Agamben maintains that the sovereign right to “take” life has become supplemented and permeated by a right to “make” life. Therefore, the camp holds the key to understanding the complex place of “bare life” inside/outside the polity. It is a place that produces “bare life” in the sense that decisions regarding people’s lives can be taken outside the normal framework of rule, but are, nevertheless, not completely illegal and without connection to that law. It is a zone of indistinction where we encounter sovereignty as *nomos* – “the

²⁹⁶ *Ibid.* at 175.

²⁹⁷ Giorgio Agamben, *Means without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000) at 40.

²⁹⁸ Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *supra* note 136 at 181.

point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence”.²⁹⁹

Several parallels have been drawn between Agamben’s notion of the camp as a zone of exception and the contemporary logic which informs the United States’ war on terrorism.³⁰⁰ Guantánamo Bay, in particular, has been described as the archetypical space of exception, first, because many of the detainees taken into American custody during the armed conflict in Afghanistan have not been granted the status of prisoner of war as required by the Geneva Conventions (on the subject of “unlawful combatants”, the United States has succeeded in detaining them outside the realm of international regulation); second, because in a parallel movement and as a result of the extra-territorial location of the Guantanamo base where many detainees are held, their fate lies outside the jurisdiction of the US national criminal justice system.³⁰¹ Of particular concern is the regime of indefinite detention: detainees are stripped of almost all legal rights while subject to the power exercised over them. It is

²⁹⁹ *Ibid.* at 32. See also: Rens Van Munster, "The War on Terrorism: When the Exception Becomes the Rule" (2004) 17 Int'l J. Sem. L. 141 at 145.

³⁰⁰ According to Van Munster, the “war” on terrorism, which takes place largely outside the framework of domestic or international law, seems to consolidate something akin to a permanent state of exception, in which distinctions such as inside/outside, peace/war, friend/enemy and rule/exception are blurred to the point of indistinction. In this process, the sovereign power reduces the life of (some) people to that of homo sacer: life that can be ended without recourse to punishment: Van Munster, "The War on Terrorism: When the Exception Becomes the Rule", *ibid.*

³⁰¹ Several important recent US Supreme Court decisions have rejected the idea of an unreviewable executive power to detain. However, the US government’s policy seems to be largely reactionary, making the minimum changes necessary as and when adverse court decisions are handed down, while still attempting to detain suspects indefinitely. See especially: Richard Raimond, "The Role of Indefinite Detention in Antiterrorism Legislation" (2006) 54: 2 Kan. L. Rev. 515; Charles D. Weisselberg, "The Detention and Treatment of Aliens Three Years after September 11: A New New World?" (2005) 38 U.C. Davis L. Rev. 815.

in indefinite detention that it is possible to detect the juridico-political structure of the state of exception.³⁰²

Another correlation with Agamben's notion of the camp as a zone of exception is immigration detention, and it is useful to recall here that before Guantanamo Bay became an interrogation center for terror suspects, HIV-infected Haitian refugees were detained there in an HIV camp in the early 1990s.³⁰³ There are several instances of immigration detention practices as "spaces of exception",³⁰⁴ but a powerful illustration of this is the Australian "Pacific Solution" immigration policy. This controversial measure, which was in place from September 2001 to February 2008, aimed at processing all unauthorized arrivals who came to Australia by boat, in offshore detention centres on Nauru and Manus Island in Papua New Guinea. The Pacific Solution was formulated after the Tampa incident.³⁰⁵ From that moment, the government regarded entry of irregular migrants into its territory as an affront to Australian sovereignty and, accordingly, performed various legal manoeuvres to protect this sovereignty. Such action was followed by a legal extension of zones of exemption, whereby offshore islands were "excised" and exempted from the operations of normal migration law. This was a masterful act of differentiation whereby, from the start, the law did not apply to the irregular migrant. The country had given itself the prerogative to unilaterally move

³⁰² Agamben writes: "They are neither prisoners nor accused, only 'detainees' ... subjected ... to a detention that is indefinite not only in time, but also in its very nature as removed from the law and judicial process": Giorgio Agamben, *State of Exception*, trans. by Kevin Attell (Chicago: University of Chicago Press, 2005) at 12.

³⁰³ The U.S. administration attempted to justify the harsh treatment meted out to these refugee claimants on the grounds that Guantanamo was a law-free zone: Michael Ratner & Ellen Ray, *Guantanamo : What the World Should Know* (Victoria: Chelsea Green Pub. Co., 2004) at xv; Nicola White, "The Tragic Plight of Hiv-Infected Haitian Refugees at Guantanamo Bay " (2007) 28: 2 *Liverpool Law Review* 249.

³⁰⁴ For more details, see: Bauman, *Society under Siege*, *supra* note 42; Nicholas Mirzoeff, *Watching Babylon : The War in Iraq and Global Visual Culture* (New York ; London: Routledge, 2005).

³⁰⁵ For more on this topic, see note 100 and accompanying text, above.

boatloads of people to “declared safe countries” (declared by the Australian Immigration Minister) which were offshore detention camps.³⁰⁶ The United Nations envoy, Chief Justice Bhagwati, urged Australia to take a more humane approach to the detention of asylum seekers, and criticized the detention of children. In response to Justice Bhagwati’s report, then Minister for Immigration and Multicultural and Indigenous Affairs Ruddock denied that the detention of children flouted Australia’s international legal obligations. He claimed that Justice Bhagwati had ignored fundamental rationales of government policy, notably that “people in immigration detention have either become unlawful or have arrived in Australia without lawful authority”. Ruddock did not address the substance of Justice Bhagwati’s criticisms. He rather pre-empted the discussion by outlining a new set of parameters to demonstrate that detention does not flout Australia’s legal obligations: “The detainee [was] put outside of the law, [she was] unlawful and thus normal legal obligations [could] not apply to detainees as they would apply to Australian citizens.³⁰⁷ It should be remembered that, in the past, Ruddock had argued that detainees are not refugees but “rejectees”:

I see a lot of comments from time to time, particularly from those who are perhaps not dealing with these issues all the time, that these are refugees or asylum seekers. They are nothing of the sort . . . to use a

³⁰⁶ In 2001, an act “excised” Christmas Island, Ashmore Reef, Cocos Island and other territories from Australia’s “migration zone”, so that, according to Australian law, the arrival of irregular migrants in these territories did not oblige the country to protect such individuals. While Australia’s obligations under international law, including the 1951 Refugee Convention, could not be changed by such a unilateral legal device, the protections associated with the country’s domestic asylum laws (for example, the right to appeal a negative decision) were no longer available to individuals in these territories: Susan Kneebone, “The Pacific Plan: The Provision of “Effective Protection?” (2006) 18: 3 & 4 *Int'l J. Refugee Law* 696. See also: Kazimierz Bem et al., *A Price Too High : The Cost of Australia's Approach to Asylum Seekers : A Review of the Australian Government's Policy of Offshore Processing* (Glebe, N.S.W. : A Just Australia, 2007).

³⁰⁷ Prem Kumar Rajaram & Carl Grundy-Warr, “The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand ” (2004) 42: 1 *International Migration* 33, *supra* note 75 at 45-46.

term that is perhaps apt; they are a rejectee. (*The Daily Telegraph*, 2002)³⁰⁸

Here Ruddock conforms to the idea that within the space of exception, the distinction between the “legal” and the “illegal” is eroded: one moves “in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer ma[k]e any sense”.³⁰⁹ In February 2008, new Immigration Minister Evans welcomed the end of the policy, which he depicted as “a cynical, costly and ultimately unsuccessful exercise”.³¹⁰

The detention camp is a significant space of exception, but over the past decade, a series of Australian laws has made the point that the entire Australian political space operates as a zone of exception for those asylum seekers:

The maintenance of a state of exception has become a stable and institutionalized part of Australian law. The withdrawal of rights and protections to asylum seekers is notable for the way in which it appears to consign asylum seekers to a “bare life”, a form of existence without the rights and protections due to politicized, normal, forms of life operating within nation-states. This distinguishing of a depoliticized entity appears to safeguard and add cohesion to the Australian polity; it is in this further refinement and shaping of life, giving priority to certain forms of existence while denigrating others, that the rationale and justification for the

³⁰⁸ *Ibid.* at 46.

³⁰⁹ Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *supra* note 136 at 170.

³¹⁰ “Flight from Nauru Ends Pacific Solution”, *Sydney Morning Herald* (08 February 2008). The regional head of the UN refugee agency UNHCR welcomed the move. “This is the end of a long and fairly painful chapter in Australian asylum policy and practice. We’re delighted that Nauru finally will have no more refugees on it from now on”: “Australia Ends ‘Pacific Solution’”, *BBC News* (08 February 2008), online: [BBC News <http://news.bbc.co.uk/2/hi/asia-pacific/7229764.stm>](http://news.bbc.co.uk/2/hi/asia-pacific/7229764.stm) (accessed on 18 February 2008).

effectiveness, necessity, or rightness of certain forms of politics and public morality are based.³¹¹

This brings us to an important argument: the camp cannot be reduced to a particular institutional place; we find ourselves “virtually in the presence” of the camp every time “exceptional measures” are taken to institute a space in which “bare life and the juridical rule enter into a threshold of indistinction”.³¹² An airport’s international zones, for instance, are based on the fiction that the foreigner has not yet been admitted to the territory, and would indeed still be in some kind of international no-man’s-land. Placed in areas accessible only to airport personnel, they are organized so as to “allow” officials to refuse asylum seekers the protection available to those officially on state territory (for example, the right to legal representation or access to a review process), with the aim being their swift removal from the country. Although international zones were rejected in principle by domestic and international courts, the absence of external supervision in these areas makes them difficult to control.³¹³ States make use of other legal fictions to avoid the obligations of territoriality. Under US migration law, for instance, people detained at the border by the immigration authorities are not considered to be “within the United States” and therefore not entitled to the rights that come with territorial presence. This distinction between physical and legal presence has been interpreted

³¹¹ Prem Kumar Rajaram & Grundy-Warr, “The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand”, *supra* note 75 at 47. In July 2008, the new Australian government has abandoned the country’s policy of detaining all asylum seekers arriving irregularly by boat. Children will no longer be held in detention, and adults who are detained will have their situation evaluated every three months. Amnesty International’s campaign coordinator praised the move but called for further steps to be taken, including the closure of the remote Christmas Island detention centre. See: “Australia Abandons Asylum Policy”, *BBC News* (29 July 2008), online: BBC News <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7530156.stm>>(accessed on 02 August 2008).

³¹² Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *supra* note 136 at 174.

³¹³ For further analysis, see: Crépeau & Nakache, “Controlling Irregular Migration in Canada”, *supra* note 249 at 15; Walters, “Deportation, Expulsion, and the International Police of Aliens”, *supra* note 20 at 286.

so as to allow the government to hold individuals in detention indefinitely, without falling afoul of the Constitution's requirements of due process.³¹⁴ Another example of this is the Supreme Court of Canada's ruling in *Dehghani*, which held that a secondary examination by an immigration officer at a port of entry does not constitute a "detention" within the meaning of s. 10(b) of the Canadian Charter, and thus the right to counsel is not invoked.³¹⁵

In sum, emphasis on the "camp" in immigration policies allows us to shed light on the harsh treatment of a significant number of people whose suspension of their most basic rights is legally justified by a sense of permanent emergency. Because they rely on the logic that "we" must be protected from "them", those who consider themselves to be "unmarked", or "legitimate", find suspensions of the rule of law to be easily defensible. State of exception measures that suspend the rule of law for certain groups and in certain spaces are justified through confirmation of the idea that a "threat" confronts the nation, a "threat" that requires defensive measures. However, if states of exception and the camps they authorize are understood simply as the political response to a crisis, we place them in "the paradoxical position of being juridical measures that cannot be understood in legal terms and the state of exception appears as the legal form of what cannot have legal form".³¹⁶ Instead, states of exception have

³¹⁴ Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants", *supra* note 30 at 402. Quoting: *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987) at 1373: The entry fiction "holds that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States". See also: *Shaughnessy v. United States Ex Rel Mezei*, 345 U.S. 206 (1953), which held that a returning lawful permanent resident being held on Ellis Island was not within the United States and therefore not entitled to invoke the Constitution on his behalf to challenge his indefinite detention. This case has never been overruled and is still invoked by the Court as governing law.

³¹⁵ *Dehghani v. Canada (Minister of Employment and Immigration)* [1993] 1 S.C.R. 1053.

³¹⁶ Agamben, *State of Exception*, *supra* note 302 at 1. See also: Razack, "'Your Client Has a Profile:': Race and National Security in Canada after 9/11", *supra* note 91 at 10-13.

to be understood as governmental practices which enable the state to identify who is a member of the political community and who is not. Camps, then, have to be seen, not simply as “contemporary excesses born of the West’s quest for security” but as “a more ominous, permanent arrangement of who is and is not a part of the human community”.³¹⁷

In conclusion, to prevent unwanted migration the mobility regime still relies heavily on physical fences/barriers along borders. But it also operates to confine undesired non-citizens in detention camps by blocking the exits. These practices of enclosure are, to paraphrase Derrida, an “assault on law in the name of law”.³¹⁸ They reveal, like any state of exception in Agambien terms, the deployment of power which illustrates the nexus between violence and law. As shown in the following, elementary forms of the mobility regime are increasingly complemented by more sophisticated forms of migration control. Of particular significance are selection procedures which distinguish that which may enter from that which cannot.

³¹⁷ Razack, " 'Your Client Has a Profile:' Race and National Security in Canada after 9/11", *supra* note 91 at 11.

³¹⁸ Jacques Derrida, *Rogues: Two Essays on Reason*, trans. by P.-A. Brault & M. Naas (California: Stanford University Press, 2005) at 33.

2.2. Screening and Licensing Mechanisms: Visa Regime and Bioprofiling

Precisely because it must facilitate global cross-border flows, the implementation of the mobility regime, depends upon the creation of screening mechanisms. Screening mechanisms can be roughly defined as mechanisms that make it possible to distinguish those who are licensed to move from those who are not. Again, like the elementary forms discussed above, there is nothing very new about the regulation of movement through the creation of screening mechanisms. In the 18th century, with the birth of the modern, bureaucratic sovereign state, governments increasingly sought to generate and archive knowledge regarding ordinary individuals, in order to regulate mobility, among other things. Passports were first introduced in 1792, in France, and soon after in many other European countries. They were combined with regulations designed to control vagrancy, crime, and foreign infiltration, “thus turning the 19th century into a hotbed for developing the paradigm of the modern mobility regime”.³¹⁹ However, new technologies are being developed and perfected in tandem with physical structures such as fences and prisons. A basic illustration of this is the increasing use of the visa regime and profiling techniques. Contrary to visa policy, whose primary objective is to grant mobility rights on an individual basis and only to people who “deserve it” (that is, those who are not considered an “immigration risk”), profiling predicts behaviour and regulates mobility of a whole stratum of people by grouping them in categories which correspondingly rate their access to movement.

³¹⁹ Shamir, “Without Borders? Notes on Globalization as a Mobility Regime”, *supra* note 5 at 209. See section 1.3 above, for further analysis of the migration regime in the nineteenth and twentieth centuries.

2.2.1. Visa Regime: An Individual Documentary Examination

The mobility regime is increasingly based on limiting travel opportunities for some categories of people, making it extremely difficult to obtain ordinary tourist visas, and often using basic tactics such as long waiting periods, costly application fees, and a variety of other bureaucratic hurdles. As such, visa requirements not only regulate mobility and access to space but also do the organizational job of “fixing” identities. These requirements make a person “legible” to the state, as they are the markers of the holder’s identity and of the limits, or limitlessness, of the holder’s spatial mobility.³²⁰ Borrowing from Foucault’s discussions on the reason of state and disciplinary society, visa requirements are one of the disciplinary techniques whereby the individual is known as the subject. Documentary examination is important in Foucault’s work, as it helps to establish, as regards such individuals, a “visibility through which one differentiates them and judges them”.³²¹ More precisely, Foucault argues:

The examination that places individuals in a field of surveillance also situates them in a network of writing; it engages them in a whole mass of documents that capture and fix them. The procedures of examination [are] accompanied at the same time by a system of intense registration and of documentary accumulation. A “power of writing” [is] constituted as an essential part in the mechanisms of discipline.³²²

Foucault notes that disciplinary power is “exercised through its invisibility”, while imposing a “compulsory visibility” on its targets”.³²³ As such, disciplinary power can be said to operate, at times, as a visual and visualizing regime in which “documentary accumulation” and “a network of writing” are put into practice to produce an acute surveillance to which

³²⁰ P Adey, "Secured and Sorted Mobilities: Examples from the Airport" (2004) 1:4 *Surveillance & Society* 500.

³²¹ Foucault, *Discipline and Punish: The Birth of the Prison*, *supra* note 165 at 184.

³²² *Ibid.* at 189.

³²³ *Ibid.* at 187.

individuals are subjected, and which also turns them into subjects. It is with this understanding of the operational dynamics of visual regimes in disciplinary society that the reflection on the function of identity documents must be developed. These documents, by way of a visual and visualizing regime, facilitate the state's ability to "fix" individuals and control their transnational movements³²⁴

In sum, in the field of migration, the visa regime allows for the regulation of movement, carefully sorting out those who are deemed necessary to enhance the quality of the labour market from those who are considered redundant or, worse, a burden. Thus, for instance, the continued mobility of highly skilled workers is considered a vital issue for many rich countries, whereas others are barred entry, unless, as unskilled labourers, they may be granted mobility rights for designated tasks.³²⁵ As such, "[t]ravelling for profit is encouraged; travelling for survival is condemned".³²⁶

³²⁴ Simone Browne, "Getting Carded: Border Control and the Politics of Canada's Permanent Resident Card" (2005) 9: 4 *Citizenship Studies* 423 at 431. See also Bigo and Guild, *supra* note 18, who have convincingly shown how the development of a European visa system increasingly replaces the national passport as a signifier of trust and the basis for inclusion and exclusion.

³²⁵ See: Ryszard Cholewinski, *The Legal Status of Migrants Admitted for Employment - a Comparative Study of Law and Practice in Selected European States* (Strasbourg: Council of Europe, 2005); Delphine Nakache & François Crépeau, "Le Contrôle des Migrations et L'intégration Économique : Entre Ouverture et Fermeture" in Vincent Chetail, ed, *Mondialisation, migration et droits de l'homme : le droit international en question / Globalization, Migration and Human Rights : International Law under Review* (Bruylant: Bruxelles, 2007), 189. See also *supra* note 56.

³²⁶ Bauman, *Society under Siege*, *supra* note 42 at 84.

2.2.2. Bioprofiling

Profiling is not a technology specifically designed to contain mobility. For a long time, insurance companies have used it as a risk-management strategy for evaluating the monetary threat to insurers posed by different categories of individuals (young drivers pay higher premiums than older drivers, reflecting statistics which demonstrate that the former are more vulnerable to traffic accidents, for instance). These practices migrated from the insurance market to the criminal justice system, in which the logic of risk management (the management of crime opportunities and risk distribution), replaced the management of individual offenders, and now drives and shapes sentencing policies. In recent years, however, profiling has emerged as a constitutive feature of the mobility regime.³²⁷ The use of biometric data in profiling – or bioprofiling – has, in particular, received a great deal of attention as a method for "filling the gaps" in traditional methods of migratory controls. This is not to say that biometric identifiers have not historically been important in the governing of mobility – handwritten signatures are a form of biometrics –. But new forms of biometric technology expand categorization of the body via processes of risk profiling, "such that they have themselves come to perform and represent a border that approves or denies access".³²⁸

Bioprofiling is based on the creation and inscription of a holistic personal profile into electronic databases, through the collection of demographic, ethnic, and socio-economic data or/and the collection of data that directly refers to the body (biometrics). Biometrics consists of physiological or behavioural characteristics used to recognize or verify the

³²⁷ Shamir, "Without Borders? Notes on Globalization as a Mobility Regime", *supra* note 5 at 197. Quoting Giorgio Agamben, "No to Bio-Political Tattooing", *Le Monde* (10 January 2004), 3.

³²⁸ Louise Amoore, "Biometric Borders: Governing Mobilities in the War on Terror" (2006) 25 *Political Geography* 336 at 342.

identity of a living person. Physiological characteristics include fingerprints, hand geometry, iris shape, face, voice, and ear shape, and body odour. Behavioural characteristics include hand-written signatures and the way a person walks.³²⁹ The International Civil Aviation Organization (ICAO), an organization which is at the forefront of setting standards for the use of biometrics in passports, has concluded that the face is the biometric most suited to the practicalities of issuing travel documents, with fingerprints and/or iris recognition available as complementary biometric technologies to be used by states. Following these guidelines, North America and the European Union have opted for inkless fingerprints and digital facial recognition through digitized photographs. Iris recognition technology has been identified for secondary use.³³⁰

Bioprofiling is a very sophisticated technology which, in recent years, has been used increasingly in the field of migration. For example, following post-September 11 regulations, most individuals entering the United States are face-scanned and fingerprinted prior to entry, under the provisions of the US VISIT program (United States Visitor and Immigrant Status Indicator Technology). The program is designed to expand both profiling capabilities and detection possibilities by enhancing spatial monitoring beyond the port of entry. It mandates information sharing among several federal agencies. The system can access numerous databases (at least 20 at the time of writing) containing information on the

³²⁹ For further details, see: Migration, *World Migration 2005: Costs and Benefits of International Migration*, *supra* note 103; Ioannis Maghiros et al., *Biometrics at the Frontiers: Assessing the Impact on Society. A Report to the European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs (Libe)* (Brussels: European Commission Joint Research Centre (DG JRC), Institute for Prospective Technological Studies, 2005).

³³⁰ I.C.A.O., "Biometrics Deployment of Machine Readable Travel Documents, ICAO Tag Mrtd/Ntwg Technical Report" (Montreal: ICAO, 21 May 2004), online: ICAO <<http://www.icao.int/mrtd/biometrics/intro.cfm>>(accessed on 12 August 2006). See also: Migration, *World Migration 2005: Costs and Benefits of International Migration*, *supra* note 103.

traveller's behaviour, financial situation, health, previous destinations, etc, in order to perform a risk calculus on the basis of predetermined risk factors.³³¹ Passengers are then categorized as either "green", "orange", "red", or trustworthy, questionable or dangerous. In the governing of mobility within the war on terror, the US-VISIT program indicates a change on two levels in the creation of the contemporary biometric border. First, as exemplified previously³³², a significant shift to scientific and managerial techniques in governing the mobility of "bodies": US-VISIT uses databases to profile and assign people codes according to degrees of "risk", checking "hits" against passenger manifests and visa applications. It does so by enacting a series of practices in which the subject is divided, "broken up into calculable risk factors", both within herself (such as "student", "Muslim", "woman"), and also, by necessity, in relation to others (as, for example, "alien", "immigrant" or "illegal").³³³ The risk-based identity of the person who attempts to cross an international border is in this way encoded and fixed far in advance of reaching the physical border. Second, an extension of biopower, "such that the body, in effect, becomes the carrier of the border as it is inscribed with multiple encoded boundaries of access".³³⁴ As such, with biometrics, there is faith in the body as a source of absolute identification. For instance, in 2004, at a conference of European technology companies, the FBI's Director of Criminal Justice

³³¹ Homeland Security, "US-Visit Program", online: DHS <http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm>(last modified: 10 October 2006)(accessed on 28 June 2007). Among the most significant databases are IDENT, a biometric database that stores and identifies the electronic fingerprints of all foreign visitors, immigrants and asylum seekers; ADIS, storing travellers' entry and exit data; APIS, containing passenger manifest information; SEVIS, containing data on all foreign and exchange students in the United States; IBIS, a watch list interfaced with Interpol and national crime data; CLAIMS3, containing information on foreign nationals who claim social benefits from the country; and a number of links to finance, banking, education, and health databases: Amoore, "Biometric Borders: Governing Mobilities in the War on Terror", *supra* note 328 at 339.

³³² See the section 2.2.1, above.

³³³ Amoore, "Biometric Borders: Governing Mobilities in the War on Terror", *supra* note 328 at 339.

³³⁴ *Ibid.* at 348.

asserted that “the war on terror has come to rely on biometric technology” in a world where “the only way to trace a terrorist is through biometrics”. Although the potential for error is still enormous, US-VISIT’s risk calculation and the identities it confers on a person – coupled with the idea of infallible identification of travellers based on their physical features – have acquired an aura of legitimacy and objectivity.³³⁵

The European Union has also decided to set up a database for the exchange of data between Member States, regarding short-stay visas and visa applications by third country citizens who wish to enter the EU’s Schengen area (population approximately 70 million). The Visa Information System (VIS), established in June 2004, is currently in the testing and build-out phases, with a deadline for operation set at the end of the year 2008. VIS will include biometrics (the applicant’s photograph and prints of all ten fingers) and written information such as the applicant’s name, address and occupation, date and place of application, and any decision by the Member State to issue, refuse, annul, revoke or extend the visa.³³⁶ In February 2008, the European Commission presented a new “Border Package” setting out its vision of how to foster the further management of the EU’s external border. One of the key elements of this package is a EU Communication aimed at establishing an EU entry/exit system registering the movement of specific categories of third country nationals at the external borders of the EU (regardless of whether they

³³⁵ *Ibid.* at 340-42. As shown below, US-VISIT has proved to be of a limited effectiveness in preventing terrorism: see *supra* note 183.

³³⁶ See: EC, *Council Decision 2004/512/EC of 8 June 2004 Establishing the Visa Information System (VIS)*, [2004] O.J.L. 213/ 5; European Commission, “Visa Information System (VIS): The JHA-Council Reaches a Political Agreement on the VIS Regulation and VIS Decision” (Press Release: IP/07/802, 12 June 2007), online: Europa <<http://europa.eu.int/rapid/>>(accessed on 18 June 2007); European Parliament, “EU Visa Information System to Help Prevent Visa Shopping” (Press Release, Committee on Civil Liberties, Justice and Home Affairs: Ref 20070514IPR06646, 14 May 2007), online: European Parliament<http://www.europarl.europa.eu/news/expert/tous_les_infopress/default/default_en.htm>(accessed on 26 June 2007).

require a visa to enter the EU or not). Furthermore, this Communication recommends the setting up of an Automated Border Control System enabling the automated verification of a traveller's identity (for citizens and non-EU citizens alike), based on biometric technology as well as on an Electronic Travel Authorization System which would oblige non-EU travellers to provide personal data for a pre-departure online check.³³⁷

There are important human rights implications inherent in the collection, processing and distribution of a person's unique physical identifiers, causing a certain degree of friction between the policymakers' security interests and the right to privacy of those subject to any of these measures. But from the migrant's perspective, the situation appears even worse, due to the potentially discriminatory and traumatizing aspects of biometric technology. Past experience shows, for example, that several pilot projects have targeted narrow, specific groups of migrants. The United Kingdom's visa registration project targeted visa applicants, as well as asylum seekers, from five East African countries. The American SEVIS (Student and Exchange Visitor Information) and NSEERS (National Security Entry-Exit System) programmes were aimed at, respectively, foreign students and Arab-Muslim travellers. Thus, because of the unavoidable consequence of their contact with borders, and fears of terrorism, certain nationals and ethnic groups are deliberately targeted by immigration controls. People fleeing their country for fear of persecution may find these procedures very traumatic, as well as discriminatory.³³⁸

³³⁷ EC, *Preparing the Next Steps in Border Management in the European Union*, 13 February 2008, COM (2008) 69 Final. For an analysis of this Communication and the legal questions it raises, see: Elspeth Guild et al., "The Commission's New Border Package. Does It Take Us One Step Closer to a 'Cyber-Fortress Europe'?" (March 2008) 154 CEPS Policy Brief.

³³⁸ Rebekah Alys Lowri Thomas, "Biometrics, International Migrants and Human Rights" (2005) 7 *European Journal of Migration and Law* 377. See also: Crépeau & Nakache, "Controlling Irregular Migration in Canada", *supra* note 249. For a closer analysis of legal issues with regard to the application of biometrics in Europe, see: Paul de Hert, "Biometrics: Legal Issues and Implications" (January 2005) *Background paper*

In conclusion, bioprofiling techniques are not simply a more accurate and efficient way to validate an individual's identity and to crosscheck it with relevant data on irregular migration, crime, or terrorism. They are also a very intrusive technology which "inscribes a designated category of suspicion on human bodies, facilitating a situation in which one's fingerprints testify to one's travel log and consumption patterns along with one's place of origin, ethnic background, or religious affiliation".³³⁹ The mobility gap is further reinforced by biometrics. Indeed:

[t]o the preferred customers of international airports, business travellers and other 'low-risk' groups, the identity created through biometric identification hardly manifests itself. The 'trusted travellers' only notice smooth and easy access to their countries of destination ... However, those who fail to qualify as legitimate 'low-risk' travellers ... may face unwanted consequences such as delayed border crossing, denied access to the country, or even deportation ... Hence, in the name of security, symbolic violence is practised in the form of internalized humiliations and legitimizations of inequality and hierarchy connected to biometric identification.³⁴⁰

for the Institute of Prospective Technological Studies, DG JRC – Sevilla, European Commission. See also supra note 183.

³³⁹ Shamir, "Without Borders? Notes on Globalization as a Mobility Regime", *supra* note 5 at 217.

³⁴⁰ Jouni Häkli, "Biometric Identities" (2007) 31: 2 *Progress in Human Geography* 139 at 140. For more on the mobility gap, see text accompanying note 229.

To conclude Chapter Two of this thesis, the mobility regime consists in a vast array of measures aimed at categorizing and tracking undesirable migrants. As such, it contains movement both within and across borders, and normalizes recourse in the field of migration law to include discretionary practices which are extremely violent towards the migrant. While these practices would not be tolerated in a context where the fundamental rights of the citizens are at stake, they reveal the deployment of power that illustrates the nexus between violence and law. This mobility regime, which clearly points to the profoundly arbitrary privilege of birth in a prosperous state, as well as to the dangers of dehumanizing peoples whose lives are shaped by the contours of migration law and policy, is an indication of how far the concept of securitization of migration has been stretched in Western receiving societies. Interestingly, in recent years modalities of surveillance and control over undesirable migrants have increased and been reinforced, essentially because, according to state officials, irregular migration is growing. However, as the following passage demonstrates, irregular migration has grown precisely because governments have tightened legal controls and strengthened border controls. This draws attention to, among others, the problematic aspect of the predominant domestic statist (or state-centric) approach to cross-border movements.

Conclusion

It has been shown in the first two chapters of this thesis that as “outsiders”, migrants do in fact clearly inhabit the state-system of Western states, in the sense that they are the government’s disciplinary objects par excellence. Migratory processes and practices, however intense and widespread, are thus necessarily “state-oriented and territorializing in policy and conduct”.³⁴¹

The problematic aspect of such a state-centric approach to migration is the commonly-held opinion that major destination countries are not implicated in the migratory process and that consequently the greater responsibility lies with those who move. Western receiving countries are not, however, the “passive recipients” of migration: despite the consensus among experts that tougher measures of migration control do not reach their proclaimed goal,³⁴² the difficulty of Western states in controlling their borders has to be qualified. As such, judging migration controls strictly in

³⁴¹ Soguk, "Poetics of a World of Migrancy: Migratory Horizons, Passages, and Encounters of Alterity", *supra* note 177 at 417.

³⁴² Several complex explanations, involving anthropological, sociological, economic and political aspects, have been proposed to explain this “migration dilemma”. See generally: James Frank Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Cambridge, Mass.: Harvard University Press, 1992); Myron Weiner, *The Global Migration Crisis- Challenge to States and Human Rights* (New York: Harper Collins, 1995); Jagdish Bhagwati, "Borders Beyond Control" (2003) 82: 1 *Foreign Affairs* 98; Lant Pritchett, "The Future of Migration: Irresistible Forces Meet Immovable Ideas" (Conference on "The Future of globalization: Explorations in light of the recent turbulence", Yale University, Center for the Study of Globalization, New Haven, 10 October 2003); Han. B. Entzinger, Marco Martinello & Catherine Wihtol de Wenden, eds, *Migration between States and Markets*, "Research in Migration and Ethnic Relations Series" (Aldershot, Hants, England; Burlington, VT: Ashgate, 2004); Bigo, "Criminalisation of Migrants", *supra* note 173; W.A. Cornelius & T. Tsuda, "Controlling Immigration: The Limits of Government Intervention" in W.A. Cornelius, et al., eds, *Controlling Immigration. A Global Perspective* (Stanford: Stanford University Press, 2004), 3; Wayne A. Cornelius & Marc R. Rosenblum, "Immigration and Politics" (2005) 8 *Annual Review of Political Science* 99; Düvell, "Illegal Immigration in Europe", *supra* note 134. See also Castles, who provides several examples of immigration policies that achieve almost the opposite of their original intentions: Stephen Castles, "Why Migration Policies Fail" (2004) 27: 2 *Ethnic and Racial Studies* 205 at 206-07.

terms of whether or not the initial proclaimed goal is attained, is giving in way to naïve empiricism, since border controls are more symbolic than a matter of actual results.

Several reasons support this statement. First, historically, full control has never been the norm. While the picture of an era of laissez-faire in migration policies is probably exaggerated, it remains that states have only gradually acquired the ability and the legitimacy to control the movements of individuals. From this perspective, states are now more able to control migration than before, and their apparent “loss of control” relies on the myth of a once-perfect sovereignty that never was. Simply put, there never was a “golden age” of state control.³⁴³ Second, officially declared policies are different from actual intentions. The existing gap between stated migration policy goals and their implementation in practice allows employers to meet the demand for low-cost and flexible labour, without having to fight over this issue in a highly politicized public arena.³⁴⁴ More generally, the perpetual reinforcement of border controls is a sign that government is serious about preventing irregular migration. It is also a message sent to employers that their labour supply will not be disrupted,

³⁴³ See section 1.1.3 and text accompanying note 52, above, for more on this topic.

³⁴⁴ This is the theory of the “gap hypothesis”, identified thirteen years ago by Hollifield et al., Wayne A. Cornelius, Philip L. Martin & James Frank Hollifield, eds, *Controlling Immigration : A Global Perspective* (Stanford, Calif.: Stanford University Press, 1994) . See also: Andreas Jahn & Thomas Straubhaar, "A Survey on the Economics of Illegal Migration" (1998) 3: 3 *South European Society & Politics* 16. For a more recent analysis, see, among others: Düvell, "Illegal Immigration in Europe", *supra* note 134 at 26; Bill Jordan, "Poles Apart: How Each EU Country Gets the Migrant Worker It Requires" in Franck Düvell, ed, *Illegal Immigration in Europe: Beyond Control?* (New York: Palgrave Macmillan, 2006), 197; Sally Dench et al., "Employers' Use of Migrant Labour. Main Report" (United Kingdom: Home Office RDS Online Report 04/06, 2006), online: Home Office <<http://www.homeoffice.gov.uk/rds/pdfs06/rdsolr0406.pdf>>(accessed on 28 September 2006); Bridget Anderson et al., "Fair Enough? Central and East European Migrants in Low Wage Employment in the UK" (University of Oxford: COMPAS, May 2006), <http://www.compas.ox.ac.uk/changingstatus/>>(accessed on 28 September 2006). It should be noted that the stated/hidden goal dichotomy has already been raised in the context of the fight against terrorism. See page 142, above, for more on this topic.

given that migrants who have entered the country illegally will remain in a very precarious position.³⁴⁵ This idea was already illustrated in the first chapter of this thesis, as regards the particular case of Spain,³⁴⁶ but another example of this is provided by the US migration policy. In the late 1980s, the Mexico-U.S. border crossing process was coined "a game of cat and mouse" where INS border enforcement arrested migrants and deported them back to Mexico, permitting them to enter again.³⁴⁷ To illustrate this phenomenon, de Genova makes an interesting distinction between "deportation" and "deportability". He writes: "The disciplinary operation of an apparatus for the everyday production of migrant "illegality" is never simply intended to achieve the putative goal of deportation. It is deportability, and not deportation per se, that has historically rendered undocumented migrant labour a distinctly disposable commodity".³⁴⁸ Thus, there has not been sufficient funding for the US government to "evacuate" the United States of irregular migrants by means of deportations. As a result, efforts at enforcement have disproportionately targeted the U.S.-

³⁴⁵ Over the past twenty-five years, European states have run at least twenty legalizations programs, providing four million people with residency papers. However, the cases of Spain and Italy, which account for about two thirds of the total number, demonstrate that those states have chosen to offer amnesty to those irregular migrants because they do not possess the bureaucratic infrastructure to maintain a more regular immigration policy. Paradoxically, this is evidence of "success": higher immigration occurred as a result of significant economic growth and a reversal of long-term historical trends in emigration. However, those who are legalized generally receive only temporary legal status and must demonstrate continued formal employment as well as navigate a maze of government bureaucracies in order to renew their permits. In addition, research reveals that migrants are often fired for pursuing legalization through their bosses. See: Willem Maas, "Explaining Amnesty: Why States Legalize Illegal Migrants" (Annual meeting of the American Political Science Association, Marriott Wardman Park, Washington, DC, September 2005); Kitty Calavita, *Immigrants at the Margins : Law, Race, and Exclusion in Southern Europe* (New York: Cambridge University Press, 2005) at 28-55; Jason Deparle, "Spain, Like U.S., Grapples with Immigration", *The New York Times* (10 June 2008), online: [nytimes.com <http://www.nytimes.com/>](http://www.nytimes.com/)(accessed on 12 June 2008).

³⁴⁶ See section 1.3, page 100 and following, above, for more on this topic.

³⁴⁷ Katharine M. Donato et al., "The Cat and Mouse Game at the Mexico-U.S. Border: Gendered Patterns and Recent Shifts" (2008) 42: 2 *International Migration Review* 330.

³⁴⁸ Genova, "Migrant "Illegality" and Deportability in Everyday Life", *supra* note 285 at 438.

Mexico border, while sustaining a zone of relatively high tolerance within the interior: “The true social role of ...enforcement ... is in maintaining the operation of the border as a ‘revolving door’, simultaneously implicated in importation as much as deportation, and sustaining the border’s viability as a filter for the unequal transfer of value”.³⁴⁹ In other words, migrant “illegality” is made visible through a palpable sense of deportability (i.e. the possibility of deportation, the possibility of being removed from the space of the nation-state):

What makes deportability so decisive in the legal production of migrant “illegality” ... is that some are deported in order that most may remain (un-deported) – as workers whose particular migrant status may thus be rendered “illegal” ... [This] spatialized condition of “illegality” reproduces the physical borders of nation-states in the everyday life of innumerable places throughout the interiors of the migrant-receiving states. [It also] provides an apparatus for sustaining their vulnerability and tractability as workers.³⁵⁰

³⁴⁹ *Ibid.* at 439. Quoting: Ngai, "The Strange Career of the Illegal Alien" , *supra* note 137.

³⁵⁰ Genova, "Migrant “Illegality” and Deportability in Everyday Life”, *supra* note 285 at 439. See also: Inda, "Border Prophylaxis. Technology, Illegality, and the Government of Immigration", *supra* note 286 at 133. Although traditionally immigration enforcement efforts in US have tended to prioritize enforcement activities at the border itself, rather than interior enforcement, interior enforcement has tremendously increased in the last two years. Media reports have speculated that the Bush administration has increased the number and severity of measures against persons in violation of immigration laws to motivate Congress to pass comprehensive immigration legislation. Since Congress failed to pass a comprehensive immigration bill in summer 2007, government officials have publicly stated that they have been left with no choice but to increase enforcement to convince the public that the government is serious about enforcing the law. In response to Congressional inaction on immigration law, several states and localities have also enacted laws and ordinances prohibiting, among other things, hiring or renting property to irregular migrants, denying business permits, contracts, and grants to those who assist undocumented immigrants, or making it a felony sheltering or transporting irregular migrants. It is too early to tell whether the federal government, as well as state and local institutions, will prevail in their border enforcement efforts. The truth remains, however, that the “cat-and-mouse game” persists at the border: drawing on a thousand recent interviews with irregular migrants from four Mexican states, about why and how they come in the US, the Center for Comparative Immigration Studies found that fewer than half are caught by the Border Patrol. Those who fail the first time try again and again, and their success rates for entering the country are consistently above 90 per cent: Wayne A. Cornelius, David Fitzgerald & Scott Borger, eds, *Four Generations of Norteños: New Research from the Cradle of Mexican Migration* (Boulder: Lynne Rienner Publishers, 2008); Katharine M. Donato, et al., "The Cat and Mouse Game at the Mexico-U.S. Border: Gendered Patterns and Recent Shifts" (2008) 42: 2 *International Migration*

In sum, Western receiving societies are highly ambivalent about irregular migration: while irregular migration is considered to be a general threat to the social body, it is simultaneously regarded as crucial to the functioning of the economy. We can infer from this statement that the apparent inability of states to control their borders and, more generally, to successfully manage migration, might actually be the greatest success of their policy, since the ultimate goal of such policy, which is to generate visibility but little outcome, is reached by developing a strong public anti-migration rhetoric. As such, these actions gain visibility among the population to which they are accountable, i.e. the citizens of the host society:

[Border control] is not only about deterrence; it is also about projecting an image of moral resolve and propping up the state's territorial legitimacy. Everyday border control activities ... are part of what gives the state an image of authority and power. Statecraft is about power politics and deploying material resources, but it is also about perceptual politics and deploying symbolic resources.³⁵¹

In this context, it appears to be particularly difficult to assess the migrant's degree of autonomy. On one hand, we cannot deny the personal and complex factors which motivate the migrant to leave home. For instance, authors who have done research on the reasons and processes involved in making the decision to migrate to the United States without proper documentation reveal that the danger is not great enough to deter such people to migrate. Before leaving home, migrants are often well aware of the dangers involved in crossing the border, and that the decision

Review 330. See also: Aaron Matteo Terrazas, "Comprehensive Immigration Reform Eludes Senate, Again" (16 July 2007), online: Migration Policy Institute <<http://www.migrationinformation.org/>>(accessed on 10 July 2008); Kalhan, "Immigration Enforcement and Federalism after September 11 2001" , supra note 271. Finally, see notes 270 to 272, supra, for more on this topic.

³⁵¹ Peter Andreas, "Redrawing the Line: Borders and Security in the Twenty-First Century" (2003) 28 *International Security* 78 at 110.

to undertake a crossing could well cost them their lives. But they believe that crossing the border is worth the expense and danger. Despite the difficulties, they believe that they have made the right decision. Scarpellino explains:

The reasoning they give for their decision is simple, and it does not conform to the rational analysis that border policy analysts apparently assume is behind that decision. Neither financial cost nor the danger was great enough to deter them, because the anticipated benefit was far greater. Economic gain plays a part in the decision, but a strong sense of responsibility for supporting themselves and their families, and their desire to live a life that is productive and honourable, is an even greater motive for their choice.³⁵²

As such, at the centre of their decision to migrate is a deeply felt sense of responsibility to “pursue the best future possible”³⁵³. On the other hand, the migrant should not be held overly responsible for situations largely not of her own making:

Many situations come up during a migration in which migrants have to choose between doing things the ‘right’, or legal, way, or doing them so that they might turn out the way they want. This brings to mind the conversation I had with a Colombian woman through the bars of the detention centre where she was being held ... after spending a year in prison. Her anguish did not derive so much from her having been in prison as from her own feelings of guilt because she had semi-knowingly broken the law, allowing a fake visa to be prepared for her in order to get into Japan. Her family had helped her with this, and her resultant conflicts over love and blame were tormenting her. While this woman had been a victim, she had also

³⁵² Martha Scarpellino, "'Corriendo': Hard Boundaries, Human Rights and the Undocumented Immigrant" (2007) 12 *Geopolitics* 330 at 344. For more analysis on this topic, see: Ken Ellingwood, *Hard Line: Life and Death on the U.S.-Mexico Border* (New York: Vintage Books, 2004); Jorge Ramos, *Morir En El Intento* (New York: Harper Collins, 2005); Wayne A. Cornelius, David Fitzgerald & Scott Borger, eds, *Four Generations of Norteños: New Research from the Cradle of Mexican Migration* (Boulder: Lynne Rienner Publishers, 2008).

³⁵³ Scarpellino, "'Corriendo': Hard Boundaries, Human Rights and the Undocumented Immigrant", *ibid.* at 346.

made choices and felt responsible, and I would not want to take this ethical capacity away from her.³⁵⁴

That said, even if hidden agendas appear to benefit all sides, the migration policies of host countries place irregular migrants in a very vulnerable position. The reality is that people who irregularly cross borders when there is a demand for their labour have few of the protections afforded to citizens.³⁵⁵ What's more, the ever-increasing number of deaths of migrants during the migration process, essentially as a consequence of stricter border controls which have propelled them to take more risks, to cross at new border areas and to rely to a greater extent on professional people-smugglers,³⁵⁶ is a worrying phenomenon that should be seriously considered. The number of deaths among migrants attempting to cross the southwest border of the U.S. has more than doubled since the implementation of "Operation Gatekeeper" in 1994. It is estimated that between October 1994 and September 2006, more than 4,000 migrants lost their lives in the border area while trying to cross into the United States (mostly due to hypothermia, dehydration, sunstroke and drowning). Documented deaths increased from 180 in 1993 and 1994 to an annual average of approximately 360 for the fiscal years 2000 through

³⁵⁴ Laura Ma Agustín, "Forget Victimization: Granting Agency to Migrants" (September 2003) 46: 3 *Development* 30 at 34.

³⁵⁵ Alison Crosby, "The Boundaries of Belonging: Reflections on Migration Policies into the 21st Century" (June 2006) Inter Pares Occasional Paper # 7, online: Inter Pares Canada <www.interpares.ca/> (accessed on 02 October 2006) at 5.

³⁵⁶ Figures and accurate data for illegal travel are, by their very nature, hard to find, and as such, incomplete and in part speculative. The UN Special Rapporteur on Migration has noted that some migrants "appear to vanish" in transit countries. They travel under assumed names, and are detained, tried and sentenced under names and nationalities other than their own. This makes it difficult for families to find them: Stefanie Grant, "International Migration and Human Rights" (September 2005) Paper prepared for the Global Commission on International Migration, online: GCIM <http://www.gcim.org/en/ir_experts.html>. Quoting: Commission on Human Rights, *Specific Groups and Individuals Migrant Workers - Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, Submitted Pursuant to Commission on Human Rights Resolution 2001/52*, Fifty-eighth session, UN Doc.E/CN.4/2002/94 (15 February 2002) at para. 33.

2005, the time during which border enforcement intensified significantly.³⁵⁷ Interestingly, a 2006 report from the US Government Accountability Office (GAO) reveals that this increase in deaths occurred even without a corresponding increase in the overall number of illegal entries.³⁵⁸ Similar trends can be observed in Europe where the number of migrants who died while trying to reach Europe (mostly when attempting to cross the Straits of Gibraltar) increased during the last decade: from 920 between 1993 and 1997 to over 3000 between 1997 and 2000, according to a 2002 statement of the UN Secretary General.³⁵⁹ Less conservative statistics indicate that at least 12,566 people have died since 1988 along the European frontiers. Among them 4,646 were missing in the sea. The main causes of death were traffic accidents, dehydration in the deserts, freezing to death in the icy mountains, and explosions in the mine-fields along the border between Turkey and Greece.³⁶⁰ Although these statistics must be interpreted with caution, one can reasonably conclude that the number of

³⁵⁷ Joseph Nevins, "Dying for a Cup of Coffee? Migrant Deaths in the US-Mexico Border Region in a Neoliberal Age" (2007) 12 *Geopolitics* .

³⁵⁸ General Accounting Office, "Illegal Immigration: Border-Crossing Deaths Have Doubled since 1995; Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated" (Washington, D.C.: GAO (GAO-06-770), August 2006), online: G.A.O. <<http://www.gao.gov/new.items/d06770.pdf>> (accessed on 20 September 2006).

³⁵⁹ United Nations Commission on Human Rights, *Written Statement Submitted by Human Rights Advocates International, a Non-Governmental Organizations in Special Consultative Status*, ECOSOC, Fifty-eighth session, Item 14 (a) of the provisional agenda, U.N. Doc. E/CN.4/2002/NGO/45 (24 January 2002) . See also: A.P.D.H.A. (Asociación Por Derechos Humanos de Andalucía), *El Estrecho: La Muerte de Perfil. Los Derechos Humanos Y la Inmigración Clandestina* (December 2003); cited in Amnesty International, "Spain: The Southern Border. The State Turns Its Back on the Human Rights of Refugees and Migrants" (London: International Secretariat, June 2005 (AI Index: EUR 41/008/2005)), online: Amnesty International EU office <http://www.amnesty-eu.org/static/documents/Spain_detention_report_English_final.pdf> (accessed on 02 July 2007).

³⁶⁰ See Fortress Europe, online: Fortress Europe <<http://fortresseurope.blogspot.com/2006/01/fortress-europe.html>>(accessed on 02 August 2008). See also: Chris Galea, "1,769 Migrants Dead While Crossing to Malta, Italy since 1988 ", *di-ve news* 08 August 2006), online: Di-ve.com <<http://www.di-ve.com/dive/portal/portal.html?id=243480>>(accessed on 28 September 2006); A. Pécoud & P. de Guchteneire, "Migration without Borders: An Investigation into the Free Movement of People" (2005) 4: 27 *Global Migration Perspective* 1.

people who died on their way to Europe has increased significantly since 1995, when controls were extended to external borders of Europe.³⁶¹

Interestingly, Galtung uses the term “structural violence” to designate those violent deaths which are not attributable to a known actor and against a specific victim.³⁶² When applied to irregular migrants in the context of the migration process, the advantage of this term is significant. It points to the fact that, while host states “may not, strictly speaking, be liable for the fatalities at the border”, they do at least “bear a certain amount of responsibility for them in so far as these [increasing] deaths are an effect of the strict policing of the border”.³⁶³ This term also suggests that border control policy, “based on erroneous assumptions about the perspectives and decisions of the immigrants themselves and about the interests of the state and its citizens”, has created an unjust institution that “puts human beings at risk and violates their human rights”.³⁶⁴ This brings us to an important issue: law as a central element in “structural violence” against irregular migrants.

There is violence involved in the everyday operations of law. One powerful illustration of the nexus between violence and the law is the tragic death of Jean Charles de Menezes, a 27 year old Brazilian national, living in London, who was shot seven times and killed at Stockwell Underground Station in July 2005. His death highlights some of the

³⁶¹ See for further details, s: Thomas Spijkerboer, "The Human Costs of Border Control" (2007) 9 *Eur. J. Migr. & L.* 127. See also: Liz Fekete, "Deaths at Europe's Borders" (2004) 45: 4 *Race and Class* 75.

³⁶² Johan Galtung, "Cultural Violence" (August 1990) 27: 3 *Journal of Peace Research* 292 at 292.

³⁶³ Inda, "Border Prophylaxis. Technology, Illegality, and the Government of Immigration", *supra* note 286 at 131.

³⁶⁴ Scarpellino, "'Corriendo': Hard Boundaries, Human Rights and the Undocumented Immigrant", *supra* note 352 at 346.

starkest political implications of the association of migration with crime, insecurity and “illegality”. In the aftermath of the Metropolitan Police’s admission that de Menezes had been mistaken for a failed suicide bomber, the debate immediately turned to questions of identity and immigration status. In fact, once it became clear that de Menezes was not a terrorist, there was a struggle to reposition his “otherness” as that of the “illegal migrant”. The discovery that his student visa may have expired two years previously led to questions surrounding his “legality”. Disputes emerged as to whether or not he was “wearing a bulky jacket” in hot weather or had “jumped the ticket barrier” - presumably seen as profiles of suspicious behavior that may have led the officer to shoot to kill.³⁶⁵ This precise example reveals the extreme deployment of power generated by the nexus between violence and the law. However, everyday migration policies, and the complex process of deterritorializing/territorializing and the decoding/encoding practices which accompany that process, have important implications for the law. More precisely, “principal perpetrators of the violence are the state actors who, under the rubric of the law, construct and enforce the territorial and politico-legal boundaries that unauthorized immigrants must overcome, often at great personal risk”.³⁶⁶

³⁶⁵ In November 2007, the Old Bailey jury upheld a charge against the London Metropolitan Police of breaching its duty to protect the public under health and safety legislation after prosecutors detailed a series of errors which led to the shooting death of de Menezes. The jury agreed with that assessment and reached a guilty verdict but attached “no personal culpability” to Deputy Assistant Commissioner Cressida Dick, the officer in charge of the operation (that day). A few days later, an Independent Police Complaints Commission report highlighted “failures in procedures and communication” and said that the London Metropolitan Police had to rethink policies concerning the deployment of firearms officers and the manner in which they stopped a suspect. The family of Mr. de Menezes welcomed the report but said they had not achieved justice as no individual had been held accountable for his death. For more on this topic, see: “Police Censured over Menezes Case”, *BBC News* (08 November 2007), BBC News, online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/7084829.stm>(accessed on 30 November 2007); Philippe Naughton, “Scotland Yard Guilty over De Menezes Death”, *Times online* (01 November 2007), online: Times Newspapers online <<http://www.timesonline.co.uk/tol/news/uk/crime/article2786380.ece>>(accessed on 30 November 2007); Amoore, “Biometric Borders: Governing Mobilities in the War on Terror”, *supra* note 328 at 348.

³⁶⁶ Nevins, “Thinking out of Bounds”, *supra* note 15 at 12.

As previously shown here, migration law is highly reflexive of national identity. The flexibility of migration law makes it an ideal border for the nation because of its capacity to maintain a fixed and law-like appearance, while also being infinitely malleable. As shown above, in immigration law evidence of this malleability is provided by use of the label “illegal”, a by-product of the positive laws created to control migration. This evidence can also be found in the multiple forms of the “mobility regime”, when routine operation of the law is suspended and this suspension of rights appears, not as violence but as the law itself, not because the threat is real but because it is widely believed to be so. This phenomenon illustrates the symbiotic relationship which exists between nation and law: while both nation and law rely for their functional logic on an excluding and othering movement, each provides the boundary condition for the other; law sets the limits of the nation while the nation sets the limits of law. This also draws attention to the fact that, despite an appearance of uniqueness, national identity and migration law are incomplete when not constructed against a negative othered migrant. This relation of dependency on the other means that the national identity of Western states cannot be sustained as self-enclosed: citizens’ and migrants’ identities are mutually constitutive of each other, and, thus, relational and shifting as are all identities. Following this logic, migration policies are in fact as much about “us” as about “them”:

We are defined by our treatment of non-citizens and the extent to which the protection of the rights of some comes at the expense of the rights of others... We need to assert the principles by which we want our homes, our nations, our societies to live. Our rights are intertwined with the rights of the others.³⁶⁷

³⁶⁷ Crosby, "The Boundaries of Belonging: Reflections on Migration Policies into the 21st Century", *supra* note 355 at 9-10.

Pressure is building, then, for migration laws to express the “us-them” pairing differently, to engage with the other without losing spaces of alterity on both sides. This is important because our notion of the “other” is part of ourselves, part of our own self-image; when we are talking about the other, or imagining the other, we are talking about ourselves and how we imagine ourselves. Therefore, in changing the world, it is unavoidable that we change ourselves, our self-image and the place of the “other” both in the world and in our self-image. The repositioning of the “us-them” linkage through a Lévinasian ethics of alterity which challenges the “spaces of indifference” between citizens and non-citizens is the focus of the conclusion of this thesis.

Having shown in Part One the central role played by national legislation in exclusionary migration policies, I now turn to analysis of the international legal treatment of the migrant subject. Human rights norms are very important to migrants, and the difficulties of meaningfully extending these norms to those without a clear migration status reveals, as exemplified below, a vital problem with being “merely human”. As Dutt notes, “understanding human rights as the right to be human underscores the fact that the paradigm is not a language game but a mechanism through which we understand that we cannot take *rights* seriously without taking human *suffering* seriously.”³⁶⁸

³⁶⁸ Malika Dutt, “Reclaiming a Human Rights Culture” in Ella Shohat, ed, *Talking Visions* (Cambridge: MIT Press, 2000), 225 at 231.

PART TWO: THE “OTHER SIDE OF UNIVERSALITY”¹: THE INTERNATIONAL LEGAL TREATMENT OF THE MIGRANT

As suggested in the previous part of this thesis, the apparent conflict between human rights and state sovereignty cannot be seen as a mere replication of the tension between the humanitarian principles deriving from international law and the power of states to control the entry of people on their soil as the *sine qua non* of sovereignty. We are, in fact, witnessing the emergence of a “mobility regime”² oriented to closure and to the blocking of access to those suspected of representing the threats of undesired migration. As such, this mobility regime is premised not only on “old” national or local grounds, but also on a principle of “perceived dangerous personhoods” that pervasively and profoundly structures the national migration policies of the Western receiving societies, since the exclusion of the migrant is constitutive of national identity. While the first part of this thesis is intended to demonstrate how, at the national level, the migrant is cast as a problem, even a threat to the security of nation-states, this next part focuses on the international legal treatment of the migrant subject. The objective is to move one step beyond the apparent human rights/state sovereignty dichotomy by deconstructing the authoritative discourse of international law in the field of migration and by showing that its claim to universality and equality (with its implicit assertion “that certain principles are true and valid for all peoples, in all societies, under all

¹ Denise Ferreira Da Silva, "Toward a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality" (2001) 7 *Social Identities* 421 at 422.

² This expression is taken from Ronen Shamir, "Without Borders? Notes on Globalization as a Mobility Regime" (2005) 23: 2 *Sociological Theory*.

conditions of economic, political, ethnic and cultural life”³) resides, in fact, in the ideal rather than the actual practice of law. The hypothesis is that the international legal construction of the migrant, which is fraught with contradictory interpretations and connotations, is in fact carefully construed to achieve certain identifiable policy objectives. This analysis is not new: starting in the 1980s, the literature in the field of refugee law underlined that “refugee law does not derive from a commitment to humanitarianism or human rights, and has been, particularly since 1950, intimately linked to the attainment by powerful states of their own national goals”.⁴ This literature was not intended to remove refugee law from the human rights/state sovereignty conflict but rather to highlight that the conflict derived essentially from international refugee law being an “inevitable by-product of historical and contemporary Western European ideologies concerning the appropriate use of law in the refugee sphere”.⁵ In this second part of the thesis, by extending this analysis of international refugee law to international migration law, I intend to illustrate the “theoretical tension between assumptions about law as an objective, external, neutral truth, and the exclusionary potential of legal discourse”.⁶

Exploring how legal discourse actually justifies the exclusion of some migrants from certain rights and benefits necessarily entails a reading of post-colonial theory and the Subaltern studies project. I borrow from the insights of this scholarship, not to defend the idea that the migrant is a

³ Max L. Stackhouse, *Creeds, Society, and Human Rights: A Study in Three Cultures* (Grand Rapids, Mich.: W.B. Eerdmans Pub. Co., 1984) at 1.

⁴ James C. Hathaway, "International Refugee Law: Humanitarian Standard or Protectionist Ploy?" in Alan E. Nash, ed., *Human Rights and the Protection of Refugees under International Law*, (Halifax, Nova Scotia: Institute for Research on Public Policy, 1988), 183 at 184.

⁵ Patricia Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996) at 7.

⁶ Ratna Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants" (Spring 2005) 18 *Harvard Human Rights Journal* 106 at 109.

post-colonial subject (i.e. that she is excluded today on terms reminiscent of colonialism), but rather to challenge the traditional assumptions about universality, neutrality and objectivity on which international legal concepts are based.⁷ Although public international law has in recent years been beset by issues questioning its legitimacy and viability,⁸ post-colonial theory and the Subaltern studies project, in exposing how the identity of the West has been constructed in opposition to an other, have illustrated that universality is always accompanied by what da Silva describes as “the other side of universality”.⁹ It has been shown, for instance, that during the Colonial Period, Europe developed ideas of political freedom while

⁷ The theoretical framework of this introductory chapter draws heavily from the work of Kapur, whose insights stem from post-colonial feminist legal theory: Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London, Portland, Or.: Glass House Press, 2005). In her book, Kapur explains how the law excluded the world’s others (women, colonial subjects, blacks, children etc.) on the assumption that they were inferior. Comparative studies provide insight into how the law constructs the dominant legal subject, not just in opposition to, but also as interdependent upon the “other”. For an elaboration of the post-colonial project and the law, see generally: Homi K. Bhabha, *The Location of Culture* (London ; New York: Routledge, 1994); Eve Darian-Smith & Peter Fitzpatrick, "Laws of the Postcolonial: An Insistent Introduction" in Eve Darian-Smith & Peter Fitzpatrick, eds, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999); Dianne Otto, "Postcolonialism, and Law?" (1998-1999) Guest Editor’s Introduction *Third World Legal Studies* vii-xviii. For an elaboration of the Subaltern studies project and law, see: Michael W. Apple & Kristen L. Buras, *The Subaltern Speak : Curriculum, Power, and Educational Struggles* (New York: Routledge, 2006); Vinayak Chaturvedi, ed., *Mapping Subaltern Studies and the Postcolonial* (London: Verso, 2000) ; David E. Ludden, *Reading Subaltern Studies: Critical History, Contested Meaning and the Globalization of South Asia* (London: Anthem, 2002); Dianne Otto, "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference" (1996) 5 Soc. & Legal Stud. 337. Some feminist theorists also delineate a model of woman as the objectified “other”, against whom man defines and asserts himself as the subjective self. However, this binary structure of analysis is not universally accepted by feminists. For an introductory survey of various conceptions of woman as the other, see: Charlotte Bunch, "Transforming Human Rights from a Feminist Perspective" in Peters and Wolper, eds, *Women’s Rights, Human Rights: International Feminist Perspectives* (London: Routledge, 1995), 11; Rosemarie Tong, *Feminist Thought : A Comprehensive Introduction* (Boulder, Colo.: Westview Press, 1989) at 195-234.

⁸ For more on this topic, see the general introduction to this thesis, above (the section entitled: “The Migrant: A Figure Made to Bear the Ambivalence of Identity”).

⁹ Silva, "Toward a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality”, *supra* note 1 at 422. Fitzpatrick and Darian-Smith state: “... The problem post-colonialism has with human rights is not that they are universal ideals or that they have a particular practical purchase, or even that they contain both these qualities. The problem lies in these two things being made to correspond to each other.” See: Darian-Smith & Fitzpatrick, "Laws of the Postcolonial: An Insistent Introduction", *supra* note 7 at 10.

simultaneously amassing empires where, for the majority of native inhabitants, such freedoms were either absent or severely attenuated. One way to legitimize the freedoms associated with liberalism with the exclusionary impact of colonialism was to encourage the idea that the “native was entitled to certain rights and benefits to the extent that he could reinvent himself as an Englishman and successfully perform the mime”.¹⁰ In other words, the colonial subject had to conform to European practices – presumably applicable to all – if she was to avoid sanctions and achieve full membership in society. The other way was through the “discourse of difference”, in which colonial subjugation was understood as the “natural subordination of lesser races to higher ones”. Thus, liberal discourses of rights, inclusion, and equality could be reconciled with the colonial policies of exclusion and discrimination by presuming absolute differences between different types of individuals.¹¹ The assumptions that underscore the “universal values” in our contemporary world meet with some of the same difficulties as they encounter difference and unfamiliarity:

The colonial subject was denied a host of civil and political rights on the grounds that he or she was backward and uncivilised. Women were denied the right to vote or participate in public life on the grounds that they were biologically inferior, incapable, and infantile. Blacks were regarded as subhuman, as property, incapable of claiming rights and privilege. Apartheid and slavery were both justified and sustained in and through law on the basis of this reasoning ... Sexual workers and homosexuals ... have been

¹⁰ Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants", *supra* note 6 at 112.

¹¹ Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999) at 46-54. Critical race scholars have revealed the dependency of modern law on the “construct” of the slave. Situating the slave within the earliest legal form of the law, they have made explicit the relation between the development of the law of contract, the rule of law and those repressed in various ways. See particularly: Cheryl L. Harris, "Whiteness as Property" in Kimberley Crenshaw et al., eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995), 276; Cheryl L. Harris, "Finding Sojourner's Truth: Race, Gender, and the Institution of Property" (1996) 18 *Cardozo L. Rev.* 309; Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991).

incarcerated or denied legal rights because of the public nature of their sexuality, as well as the threat they pose to cultural and familial norms. In the contemporary moment, a similar logic has been deployed in dealing with the new Others, the Muslim as well as the transnational migrant.¹²

In short, the law always produces exclusions that are perceived to be “real differences” and the limit of law is – like identity – built upon the foundation of those differences. Thus, if the national exclusion of the migrant as the “other”, the “one who does not belong”, must be seen as inherent in the construction and reinforcement of the host society’s collective identity, the international legal treatment of the migrant, which legitimizes the “exclusion” of certain types of migrants from the universalist project of international human rights law, also needs to be viewed as a response to the other based on Western states’ interests. Implicit is the idea, therefore, that other constructions of the migrant are illegitimate because they stand outside the formal scope of the law. However, as exemplified below, the “othered” migrant within the international legal system resists categorizations and brings back the exclusion at law’s foundation. This highlights the need for the international legal system to be conceived in a more inclusive manner.

In the following pages, I examine several assumptions underlying the international legal treatment of the migrant subject, with the objective of breaking down the differences on which they are based and of showing that these differences, which have become central in determining who to include and exclude when formulating state and legal responses to those crossing borders, fail to recognize the complex reality of migration. Chapter 3 is devoted to a critical examination of the forced/voluntary

¹² Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, *supra* note 7 at 3. See also: Tayyab Mahmud, "Migration, Identity, and the Colonial Encounter" (1997) 76: 3 Or. L. Rev. 633.

migration dichotomy. It demonstrates that the distinction between “migrants” and “refugees” began after World War II (hereafter WWII) to promote particular policy interests of the Western states, and that the justification for separating migrants from refugees on the basis of forced or voluntary movement appeared only retrospectively. This artificial distinction between “refugees” and “migrants” which “is intimately linked to the attainment by the most powerful states of their own national goals”,¹³ has, with time, become overly simplistic. Increasingly, migration is, in fact, due to a variety of interrelated causal factors, with elements of both compulsion and choice involved in the decision-making of all migrants. After exploring the forced/voluntary dichotomy, according to which international law operates in the field of migration, Chapter 4 turns to an analysis of two strict definitions and labels in the field of forced migration. It examines the constructs of “refugee” and “trafficked person” in international law and demonstrates, through an exploration of the international protection mechanisms that have been formulated to address their situations, that international law in the field of migration “operates to define who should be permitted to move between states and what qualitative form that movement should take”.¹⁴ Specifically, this is because its objective is more to serve the interests of host states in controlling their borders than to protect people in situations of vulnerability. A final chapter (Chapter 5) then reflects on the conclusions reached in Part Two and considers a more appropriate approach to forced migration, one that does not revolve around voluntary migration as opposed to forced migration, and that secures eligibility for protection beyond the scope of the 1951 Refugee Convention or the UN Trafficking Protocol. In mentioning the existence of valid objections to return as the decisive factor in determining forced migrant status, the influence of international human rights law in

¹³ Hathaway, “International Refugee Law: Humanitarian Standard or Protectionist Ploy?”, *supra* note 4 at 184.

¹⁴ Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 1.

regulating state behaviour is recognized, as well as the necessity to view human rights law, refugee law and humanitarian law as branches of an interconnected and holistic regime.

Chapter 3. The Forced/Voluntary Migration Dichotomy: A Political Instrument

The traditional international legal approach to migration has been the differential treatment for refugees as compared to migrants, which rests upon a forced/voluntary migration dichotomy. This distinction, traditionally characterized by the degree of choice involved in the decision to leave home, has been particularly evident at the political and rhetorical level of state policy and has been the basis for the rejection of entire classes of applicants on the premise that their claims are those of migrants rather than refugees.¹⁵ Well-known examples include, in the early 1980s, the US policy of interdiction of Haitian refugees and, in the late 1980s, the forcible repatriation of Vietnamese refugees by Hong Kong, both justified by the respective labelling of Haitians and Vietnamese as economic migrants and not political refugees.¹⁶ As shown above in Chapter One of this thesis, the forced/voluntary migration dichotomy has also been used extensively by the media in Western receiving societies as a justification for enacting tougher border control measures against the “bogus” refugees who “manipulate” domestic rules governing migration and who do not therefore deserve international protection. The degree to which this dichotomy is entrenched in state practice is indicated in a study of refugee decision-making in the Netherlands, which concluded that: “The opposition between ‘economic’ and ‘political’ refugees is so strong in the context of refugee law that anything related to the economic is assumed to be non-political”.¹⁷ Even UNCHR tends to accept the dichotomy, assuming in a recent examination of the refugee-migration connection that the

¹⁵ For an analysis of the definition of refugee set out in the 1951 Refugee Convention, see section 4.1, below.

¹⁶ See: Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007) at 2.

¹⁷ *Ibid.* at 3. Quoting: Thomas Spijkerboer, *Gender and Refugee Studies* (Aldershot: Ashgate, 2000) at 76.

issues of “serious human rights violations or armed conflict” should be treated separately from “economic marginalization and poverty”.¹⁸ However, in recent years, this simplistic distinction between refugees and migrants has increasingly been challenged by a number of emerging and complex situations, suggesting that the lines of demarcation are not as clear as might be asserted in the rhetoric of states. In Colombia, for instance, hundreds of people leave their homes every day, fleeing the war that has ravaged their country for almost four decades. Families are torn apart, their members often facing very different futures. Some will become part of the vast internally displaced population. One or two family members will cross the border and be recognized as refugees by UNHCR. One person might eventually make it to North America or the European Union: the same family, the same history of violence, but falling into different categories and facing different futures.¹⁹ That policy makers within and without the United Nations continue to use a classification system which permits migrants to be placed in “specific boxes” despite overlapping status and dynamic elements of migration, hinders rather than facilitates the ability of national, intergovernmental and non-governmental organizations to offer appropriate assistance and protection.²⁰ As a consequence, a significant proportion of Colombia’s population made vulnerable by war is ignored because it has been categorized as “migrant” and not as “refugee” or “displaced persons”. In the same spirit, Foster remarks:

¹⁸ UNHCR, *Global Consultations on International Protection, Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, UN Doc. EC/GC/01/11 (2001) at para. 5.

¹⁹ Alison Crosby, "The Boundaries of Belonging: Reflections on Migration Policies into the 21st Century" (June 2006) Inter Pares Occasional Paper # 7, online: Inter Pares Canada <www.interpares.ca/> (accessed on 02 October 2006) at 3. See also: Myriam Bérubé, "Colombia: In the Crossfire" (November 2005), online: Migration Policy Institute <<http://www.migrationinformation.org/>>(accessed on 10 July 2007).

²⁰ Susan F. Martin, "Forced Migration and the Evolving Humanitarian Regime" (2000) *New Issues in Refugee Research*, Working Paper no. 20, UNHCR, online: *Journal of Humanitarian Assistance* <<http://www.jha.ac/unhcr.htm>> (accessed on 02 October 2006).

Is a child born outside the parameters of China's one-child policy, and thus subject to deprivations of economic and social rights, such as education and health care, an 'economic migrant' or a refugee? ... Is a Roma man from the Czech Republic, who suffers extensive discrimination in education and employment, an "economic migrant" or a refugee? What about ... women who leave their country in order to earn a living when the major forces causing them to leave are 'their educational disadvantage, their inability to inherit land under customary law, and their exclusion from serious involvement in coffee production'? These are just some of the examples of the types of claims that can be and indeed are being made at present under the auspices of the Refugee Convention regime. They raise controversial and difficult questions about different elements of the Refugee Convention definition, but all implicitly challenge the neat distinction inherent in the orthodox view.²¹

Consequently, there is a need for critical analysis of the forced/voluntary migration dichotomy which pervades the refugee and migration literature. The first part of this chapter is devoted to historical analysis of the origins of the forced/voluntary migration dichotomy in the international arena. It demonstrates that, after WWII, the rationale for distinguishing between refugees and migrants was based on two political goals of the Western states, and that the reason for separating migrants from refugees on the basis of either forced or voluntary movement only appeared later. The first policy objective, and the one most emphasized in the existing literature, was the use of the refugee as a geopolitical tool (i.e. to condemn the policies of unfriendly states in the Cold War's East-West divide). But, beyond the East-West division, there were already two competing approaches within the Western camp, with regard to a solution for the European problem of so-called "surplus population": the US government favoured an institution with specifically designed functions based on intergovernmental negotiations, whereas the ILO-UN plan recommended international cooperation under the leadership of a single international organization. The current institutional setting stems from that

²¹ Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 4-5.

division, and that is why, in this portion of the thesis (3.1), I address the desire of the US to limit the involvement of international institutions in the aftermath of WWII. In the second part of this chapter, the forced/voluntary migration dichotomy is qualified. I present the argument that this bipolar view of migration has, over time, become excessively simplistic: migration is increasingly occurring because of several interrelated causal factors, and there are elements of both compulsion and choice in the decision-making of all migrants (3.2). In the final portion of this chapter, I use concrete examples to illustrate that forced migration has not yet evolved as a coherent field of study, and that in the field, the categories used to separate subsets of forced migrants overlap increasingly, essentially because of the commonalities of experience among forced migrants (3.3).

3.1. An Historical Perspective of the Separation of Refugee and Migrant Regimes

Previous research has already strongly emphasized the Cold War's East-West divide, which influenced key elements of the definition of the refugee, as well as the nature and mandate of UNHCR in the 1950s: at that time, the Western states had a relatively clear idea of who was a refugee and therefore eligible for entitlements of the 1951 Refugee Convention. This narrow legal identity of the refugee within the Convention served to ensure that, for a long time, refugees seeking asylum were, almost exclusively, Eastern Europeans fleeing restrictions on speech and association, freedoms that the Western world had sought to entrench as the most fundamental of human rights.²² However, beyond the East-West division, two competing approaches existed within the Western camp with regard to how the urgent needs of displaced persons in Europe should be addressed. As shown in the following passage, US insistence on an institution with specifically designed functions based on intergovernmental negotiations – rather than international co-operation under the leadership of a single international organization, as favoured by the UN and ILO – determined current institutional structures related to international migration and refugee regimes.

At the end of WWII, migration in Western Europe focused on a “surplus population” that consisted mainly of two groups: refugees and so-called “surplus workers”.²³ In the absence of any universal definition of the “refugee”, the distinction between the two groups was often blurred, with refugees being lumped together with other “surplus workers” and

²² See section 4.1, below, for more on this topic.

²³ Donald Reed Taft & Richard Robbins, *International Migrations; the Immigrant in the Modern World* (New York: Ronald Press Co., 1955) at 236.

transferred to other countries for resettlement as “labourers”.²⁴ In order to seek a solution to this “surplus population”, European governments had to choose between two radically different approaches: the UN-ILO option and the US option. These approaches were developed during the period between the two world wars, at a time when several barriers to international migration began to appear.²⁵ The ILO, an international organization created in 1919 and mandated to assist in the development of the international movement of people, recommended international cooperation under the leadership of a single international organization, whereas the US government favoured an institution which had specifically designed functions based on intergovernmental negotiations. The ILO saw the need for taking a more active role in multilaterally organized migration of both refugees and labour migrants. For the ILO, this was “a war to liquidate one of the causes of distress and instability in the world”.²⁶ In contrast, the US, along with Australia and Canada (which were major destinations for overseas migration at that time), demanded a more practical and straightforward plan based on national interests, emphasizing the functionally assigned division and designated mandates of each organization in the field.

²⁴ Already in place was the High Commissioner for Refugees, established in 1921 by the League of Nations and responsible for Russian and later for Greek, Turkish, Bulgarian and Armenian refugees. However a number of works have criticized international cooperation regarding refugees under the League of Nations as being incoherent and ineffective because it conferred protection to a specific group of people, and not through a particularized analysis of each claimant. Moreover, the League of Nations, an organization aiming at universal membership, risked offending actual or potential members by providing protection to refugees who had refused to conform and were therefore forced to leave their countries: Guy. S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed (Oxford: Clarendon Press, 1996) at 4; Rieko Karatani, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins " (2005) 17: 3 Int'l J. Refugee. L. 517-41 at 522.

²⁵ See Chapter One at section 1.3, above, for more on this topic.

²⁶ International Labour Office, “Minutes of the 117th Session of the Governing Body”, Geneva, 20–23 Nov.1951 (the Director-General).

In 1951, the ILO and US delegates came head to head in the debate to determine which approach would dominate the shape of international regimes in the field of migration. During the Naples Conference of October 1951, the ILO exposed at length its “Plan for the best form of international co-operation to further European migration”. The ILO plan was based on three principles: (1) international measures concerning migration should be co-ordinated by a single international organization, (2) international assistance would be needed to supplement national action, and (3) migration was a issue which concerned the entire field of manpower, as well as being part of the general peace programme and the fight for economic and social betterment of the world. ILO actions would vary depending on whether the migrants concerned were refugees or not: refugees would receive more varied and extensive international assistance than non-refugee migrants. As for the latter, ILO administration would perform only those actions not normally undertaken by national governments.²⁷ On the second day of the conference, the US delegation made clear that its government would not accept the proposals advanced by the ILO. In the end, no committee was set up for further discussion of the ILO plan: without US financial and political support, the ILO knew it had to abandon its plans for a multilaterally organized migration scheme.²⁸ Two weeks after the Naples conference, the US government passed the *Mutual Security Act* whereby ten million dollars were allocated to encourage emigration from Europe. The act clearly stipulated that “None of the funds made available pursuant to the proviso should be allocated to any international organization which [had] in its membership any Communist-dominated or Communist-controlled country”.²⁹ In Brussels, in

²⁷ ILO (Statement by the Director-General of the ILO Mr Morse), *U.N. Report on Methods of International Financing of European Emigration*, UN ESC, 513th Mtg., ILO doc. MIG 1009/2/411/1 (1951).

²⁸ Karatani, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins ", *supra* note 24 at 535.

²⁹ *Mutual Security Act of 1951*, Pub. L. 249 (Section 101(a) (1)).

December 1951, a conference was held for further discussion of US proposals for a new organization. On the first day of the conference, the US representative, introducing a “Plan to facilitate the movement of surplus populations from countries of Western Europe and Greece to countries affording resettlement opportunities overseas”, attributed the failure of the ILO’s programme at Naples to its “vast and generous nature”. He then explained that the object of the Brussels conference was the establishment of a body, of an intergovernmental rather than an international character, whose task would be confined to the solution of the European problem. The US plan detailed the characteristics of a new organization dedicated to the protection of migrants: 1) its exclusive focus on transport, 2) a one-year limitation of its activities, and 3) intergovernmental operations and services on a cost-reimbursable basis. The plan was well received by those attending the conference but some non-European delegates, such as Brazil, questioned this exclusive treatment of European migration problems, while others, such as the Netherlands and Switzerland, requested that the proposed organization be more actively involved in refugee issues. In response to these points, the US representative later suggested relevant amendments to the original plan. One issue that attracted attention was the criteria for membership, which excluded Communist countries, a point not mentioned in the ILO programme at Naples. The resolutions to establish the new organization, then designated the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), now called the International Organization for Migration (IOM), cleared this hurdle by stating that these intergovernmental arrangements were between “democratic governments”, and that membership would be open to “governments with a demonstrated interest in the principle of the free movement of persons”. The first session of PICMME took place right after the Brussels conference.

In short, from the perspective of the US government, the primary goal of the post-WWII period was to limit as much as possible, international influence over migration and refugee policies, by favouring an institution with specifically designed functions based on inter-governmental negotiations. However, the division of the world into communist and democratic camps during the drafting of the 1951 Refugee Convention presaged the dominance of politically aligned states with regard to the treatment of refugees. It was stated that there would be no participation of or collaboration with Eastern bloc countries in post-World War II efforts to address the needs of Europe's displaced persons, which also meant that those countries had to withdraw from the regime-building process. As such, the US succeeded in framing a refugee regime that served the world well during the Cold War period. A number of institutions were established as a result of the US approach to international regimes: following the wishes of the US government, the functions of the IRO (the International Refugee Organization, a temporary agency of the United Nations established in 1946 to arrange for the care and repatriation or resettlement of Europeans made homeless by World War II, which terminated its work in 1952) were divided up and assigned to several relevant organizations. Transportation was taken over by PICMME, while the legal protection of refugees went to UNHCR (established in 1951 with the adoption of the Refugee Convention). With the failure of its overall plan, the ILO, the oldest and most influential agency dealing with migration, was forced to focus on its traditional role (i.e. the protection of migrant workers). However, this was not particularly problematic as the assumption at the time was that an international response to the violation of economic and social rights was unnecessary.³⁰

³⁰ See: Karatani, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins", *supra* note 24 at 537-539; Michael J. Parrish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection" (2000) 22: 1 *Cardozo L. Rev.* 223 at 232.

To conclude this first section on the origins of the separation of migrant and refugee regimes, we can identify two major, interrelated causes of the different treatment of refugees versus migrants following WWII: 1) the Cold War's East-West divide, which influenced the definition of "refugees" and 2) the division between the US and the team of international institutions - the ILO and the UN - over how to deal with population problems, which determined the current institutional structures. After having demonstrated the artificial basis on which the distinction between "refugee" and "migrant" is established, in the next section I explain how the lines between voluntary and forced migration are not as clear as often asserted in the legal or political discourse on international migration.

3.2. The Fuzzy Boundaries between Forced and Voluntary Migration

During the era of empires many Europeans set out to work and settle in territories across the world. They set out to escape strong, centralized, authoritarian governments that suppressed basic civil and political rights. They set out as non-Conformists to secure somewhere else the right to religious freedom. They set out as impoverished squatters to escape famine and hunger. Were they genuine refugees or were they economic migrants?³¹

The straightforward separation, after WWII, between refugee and migrant regimes has generated a forced/voluntary migration dichotomy that is traditionally characterized by the degree of choice involved in the decision to leave home.³² As Zolberg, Suhrke and Aguayo have explained, the distinction is neatly encapsulated in this simplistic formula: “voluntary economic = migrants” and “involuntary political = refugees”.³³ The reliance on “voluntariness” may not, at first glance, seem surprising, since one would not expect that someone who has left her country in order to earn a higher salary as, say, a scientist in another country should need or deserve international protection. However, this intuitive distinction between voluntary and forced migration becomes less apparent once one moves beyond obvious examples and attempts to apply it to more complex

³¹ Satvinder S. Juss, "Free Movement and the World Order" (2004) 16: 3 Int'l J. Refugee. L. 289 at 305. See Chapter 1, section 1.2, above, for more on the history of migration.

³² Robinson attributes the coining of the term “forced migration” to Petersen, who conceptualized the phenomenon as follows: “If in primitive migrations the activating agent is ecological pressure, in forced migration it is the state or some functionally equivalent social institution. It is useful to divide this class into *impelled* migration, when the migrants retain some power to decide whether or not to leave, and *forced* migration, when they do not have this power”: William Petersen, "A General Typology of Migration" (1958) 23: 3 *American sociological review* 256 at 261; Vaughan Robinson, "Forced Migration" in Paul J. Boyle, Keith H. Halfacree & Vaughan Robinson, eds, *Exploring Contemporary Migration* (Harlow, Engl.: Addison Wesley Longman, 1998), 180.

³³ Aristide R. Zolberg et al., *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989) at 30. On this point, see also: Robin Cohen, "Introduction" in Robin Cohen, ed, *Theories of Migration* (Cheltenham: Edward Elgar Publishing, 1996), xi at xiv.

situations. Two main reasons explain why this bipolar view of migration has, with time, been deemed overly simplistic.

First, it seems to be increasingly difficult to separate economic from political causes of migration. As this thesis has shown previously, most people make their decision to migrate in response to a complex set of external constraints and predisposing events:

... In many developing countries which have few resources and weak government structures, economic hardship is generally exacerbated by political violence. Thus it has become increasingly difficult to make hard and fast distinctions between refugees (as defined by the 1951 *UN Convention* with its political bias) and economic migrants.³⁴

Three concrete examples help illustrate this point.

In the Mexican state of Chiapas, a “low-intensity” armed conflict was waged for over a decade between the Mexican army and the insurgent Zapatistas, with no peaceful resolution. There is continued heavy military presence, and local groups report ongoing human rights violations. Chiapas, rich in natural resources, increasingly attracts transnational corporations interested in exploiting its water, gas and minerals. Many people are forced to leave their homes to make way for hydroelectric dams and mining operations. For many others, there is no longer a local economy to provide a livelihood. Crosby writes:

Busloads of people leave Chiapas every week, bound northward. Are they economic migrants or refugees? Does the distinction matter? Their situation of vulnerability remains the same. The violence of

³⁴ Gil Loescher, *Refugee Movements and International Security* (London: Brassey's for the International Institute for Strategic Studies, 1992) at 7. See also: Bimal Ghosh, *Huddled Masses and Uncertain Shores : Insights into Irregular Migration* (The Hague ; Boston: Martinus Nijhoff Publishers, 1998) at 47. See Chapter 1, section 1.2, above, for more on this topic.

poverty and the violence of war are intricately interrelated in ways that these categories cannot begin to address, and therefore we lose the context and any possible solution.³⁵

Similarly, the arrival of Burmese migrant workers in Thailand is obviously economically driven, due to the “pull factor” of employment opportunity in areas of destination and the “push factor” of poverty in areas of origin. Yet, a survey of more than 300 migrants from Myanmar, conducted in 2003 by Thailand’s World Vision Foundation in collaboration with the Asian Research Center for Migration at Chulalongkorn University, showed that the reasons for displacement are both voluntary (such as poverty and economic opportunities in Thailand) and political (forced labour and abuse by Burmese soldiers).³⁶ Anecdotal information from local sources serves to illustrate these conditions and the perversity of a system where, despite traumatic experiences which caused their displacement, the current status of Burmese migrant workers is that of economic migrants in search of employment opportunities in Thailand:

“My name is Ann. I came from a family of 6 children. We lived in Burma. Our family had to pay a lot of tax to the soldiers. They came and took our rice and food every year. Sometimes, they stole our belongings. I decided to leave Burma and came to stay with my sister in Thailand. I now work as a waitress in a food shop. I am paid for some pocket money only but my boss allows me to go to school on weekends. I came to work in Thailand because I want to attend a school”.

Source: Interview with a Burmese girl at Daughters Education Program, Mae Sai, Thailand, cited in *Burma Issues*, 6(2) 2003.

³⁵ Crosby, "The Boundaries of Belonging: Reflections on Migration Policies into the 21st Century", *supra* note 19 at 4.

³⁶ World Vision Foundation of Thailand & Asian Research Centre for Migration, *Research Report on Migration and Deception of Migrant Workers in Thailand* (Bangkok: World Vision Foundation of Thailand, 2004) at 104-05. See also : "Migration for Survival: Understanding Migrant Workers from Burma" (30 April 2004) 4 *The Mon Forum*, online: [ibiblio.org <http://www.ibiblio.org/obl/docs3/MF2004-04.pdf>](http://www.ibiblio.org/obl/docs3/MF2004-04.pdf)(accessed on 02 October 2006); Therese M. Caouette & Mary E. Pack, *Pushing Past the Definitions: Migration from Burma to Thailand* (Washington D.C. : Refugees International & Open Society Institute, December 2002); Jerrold W. Huguette & Sureeporn Punpuing, *International Migration in Thailand* (Regional Office Bangkok, Thailand: International Organization for Migration, 2005).

In 2004-2005, Amnesty International also conducted interviews with 115 Burmese nationals in seven locations in Thailand who were either working or looking for work. Again, when asked about why they leaved Myanmar, Burmese migrants give a variety of reasons, including the inability to find a job, confiscation of their houses and land by the military, and fear that if they remained they would be subjected to human rights violations, including forced labour. A young man described why he was in Thailand: "I like Thailand better. If I could be a citizen I would. In Burma it is 24 hours fear, every night I dreamed Misery Number 1, Misery Number 2". A 37-year-old Mon woman had left her home because the Myanmar military destroyed all of her 1,000 mature rubber trees in order to construct a barracks. She is currently working in a coconut oil factory in Thailand. She says: "The military cut all my rubber plants. I felt so sad to see this. They said they would give compensation, but they didn't...I really want to tell you, to spread the news...Not only my land, many acres were confiscated, some people are worse off than I am". One farmer who had been required to perform forced labour for the Myanmar army before he leaves, and who is now earning money picking corn in Thailand, also explains that "[it]'s better here in Thailand", because "[y]ou don't have to work for other people for free".³⁷ This puts a clear focus on the blurred line, in the field, between "forced" and "voluntary" migration.

In Sri Lanka, for over two decades there has been intermittent civil war between the government and the Liberation Tigers of Tamil Eelam, who want to create an independent state in the Northeast section of the island. A cease-fire was signed in 2002, but in late 2005 hostilities were renewed. Since then, there has been escalating violence, and the

³⁷ Amnesty International, "Thailand: The Plight of Burmese Migrant Workers" (London: International Secretariat, June 2005 (ASA 39/001/2005)), online: Amnesty International <<http://www.amnesty.org/en/library/>> (accessed on 03 August 2008).

government announced in January 2008 it was withdrawing from the 2002 ceasefire agreement.³⁸ Sri Lankans involved in the war since the early 1980s have had several options regarding migration, depending mainly on the resources their households could raise. Displacement within the country is the most common form of movement, particularly as the option to flee to southern India is diminished. However, for those households that can raise the necessary resources, there have been principally two international migration strategies: labour migration, usually to the Middle East, and asylum-seeking, initially in India and subsequently in Europe or North America. Marriage to someone abroad, in Europe, North America or Australasia is a third option.³⁹

In short, as Van Hear writes:

The Sri Lankan example shows how complex forced migration has become in recent years. A single district may contain a mix of households with asylum seekers or labour migrants abroad, returning refugees or labour migrants, IDPs and others affected by war. A single household may contain several or all of these categories. The national and international organizations charged with providing protection and assistance to people in distress are thus often confronted by a complex picture of displacements.⁴⁰

³⁸ See: "Chronology-Sri Lanka's Civil War Goes on as Talks Fail", *Reuters* (30 October 2006), online: Reuters-Alertnet <<http://www.alertnet.org/thenews/newsdesk/COL285411.htm>>(accessed on 04 November 2006); "Timeline: Sri Lanka. A Chronology of Key Events", *BBC News* (31 October 2006). See also: "Country Profile: Sri Lanka", online: BBC News <http://news.bbc.co.uk/1/hi/world/south_asia/country_profiles/1168427.stm>(last modified: 17 July 2008).

³⁹ Nicolas Van Hear, "Locating Internally Displaced People in the Field of Forced Migration" (2000) 54: 3 *Norwegian Journal of Geography* 90; Nicolas Van Hear, " 'I Went as Far as My Money Would Take Me': Conflict, Forced Migration and Class" in F. Crepeau et al, eds, *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham MA: Lexington/Rowman and Littlefield, 2004), 125.

⁴⁰ Van Hear, "Locating Internally Displaced People in the Field of Forced Migration" , *ibid.* at 94 See also: Jennifer Hyndman & Malathi de Alwis, "Reconstituting the Subject-Feminist Politics of Humanitarian Assistance" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 83.

Second, this dichotomous view of migration has also been deemed overly simplistic because, despite strong external constraints at the (macro) structural level, there seem to, be at the individual (micro) level, elements of both compulsion and choice in the decisions made by most migrants. Human agency implies “an element of choice and ensures that some degree of uncertainty is always present, even when the choices in question are severely constrained by external considerations”.⁴¹ In other words, almost all migration involves compulsion as well as choice, so that forced migrants do make choices but within a narrower range of possibilities. It can be inferred from this that those fleeing traditional forms of political persecution could also be characterized, to some degree, as voluntary migrants. The voluntary aspect of certain kinds of traditional refugee claims is made more explicit by Zolberg, Suhrke and Aguayo. Responding to the suggestion that refugees can be differentiated from other migrants according to the premise that a refugee is “the victim of events for which, at least as an individual, he cannot be held responsible”, they point out that those who reject the alternative, provided by their government, of living within certain religious and political parameters, make a choice to do so: “It is precisely because dissent does entail the

⁴¹ Anthony H. Richmond, "Reactive Migration: Sociological Aspects of Refugee Movements" (1993) 6: 1 *Journal of Refugee Studies* 7 at 9. On one level, it might be said that the only “true forced migrants” are those subject to expulsion by their own governments or forcibly removed from a country by human trafficking (as in the slave trade) (Richmond, *ibid.* at 7). See also Keely: “The problem ... is that all migration includes elements of choice and pressure. Not all people in groups targeted for persecution leave a country. Not all economic migration is without some coercion on the migrant’s decision making. It is also clear that refugee flows are quickly followed by some returns. Why do some people return quickly, while others take longer or even struggle against ever returning?”(Charles B. Keely, "Demography and International Migration" in Caroline B. Brettell & James F. Hollifield, eds, *Migration Theory: Talking across Disciplines* (New York: Routledge, 2000) at 50). See generally: Tomas Hammar et al., "Why Do People Go or Stay?" in Tomas Hammar, et al., eds, *International Migration, Immobility and Development: Multidisciplinary Perspectives* (Oxford; New York: Berg, 1997), 1 at 17; David Turton, "Conceptualising Forced Migration" (October 2003) S.R.C Working Paper no 12, online: Refugee Studies Centre <<http://www.rsc.ox.ac.uk/PDFs/workingpaper12.pdf>>(accessed on 03 October 2006) at 9; Nicolas Van Hear, *New Diasporas: The Mass Exodus, Dispersal and Regrouping of Migrant Communities* (London: University College London Press, 1998) at 42.

exercise of personal choice that those who engage in it are admirable".⁴² Some authors have tried to deal with the fuzzy boundaries between "forced" and "voluntary" migration by presenting schemas for fitting different types of migration into a single framework.

Richmond, for whom a "distinction between voluntary and involuntary movements" is "untenable",⁴³ proposes replacing the forced-voluntary dichotomy with a multivariate model, which emphasizes reactive and proactive migration, the opposite ends of a continuum:

Under certain conditions, the decision to move may be made after due consideration of all relevant information, rationally calculated to maximize net advantage, including both material and symbolic rewards. At the other extreme, the decision to move may be made in a state of panic during a crisis that leaves few alternatives but escape from intolerable threats.⁴⁴

At the "reactive end" one finds the victims of the African slave trade while at the "proactive end" are tourists and retirees. Between the two extremes, one observes that a large proportion of people crossing state borders possess characteristics that correspond to economic, social and political pressures over which they have little control, and they exercise a limited degree of choice in selecting destinations and in timing their

⁴² Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 8. Quoting: Zolberg et al., *Escape from Violence : Conflict and the Refugee Crisis in the Developing World*, *supra* note 33 at 31. Modern examples of refugee claims include those who live an openly homosexual life or openly practice acts prohibited by their religion: Rodger P. G. Haines et al., "Claims to Refugee Status Based on Voluntary but Protected Actions" (2003) 15: 3 *Int'l J. Refugee. L.* 430

⁴³ Anthony H. Richmond, *Global Apartheid: Refugees, Racism and the New World Order* (Don Mills, Ont.: Oxford University Press Canada, 1994) at 58.

⁴⁴ Anthony H. Richmond, "Sociological Theories of International Migration: The Case of Refugees" (1988) 36: 2 *Journal of the International Sociological Association* 7 at 17. See also: Richmond, *Global Apartheid : Refugees, Racism and the New World Order*, *ibid.* at 55.

movements.⁴⁵ Richmond's typology of what he calls "reactive migration", which is comprised of 25 categories of migrants "whose degrees of freedom are severely constrained", is interesting because he tries to depict situations where the causes of migration are interrelated.⁴⁶ For instance, there has been ample illustration of situations where a government used starvation as a political tool, "...inducing famine by destroying crops or poisoning water in order to break the will of insurgency groups".⁴⁷ Or the example of civil conflicts, where the government or local warlords withhold food from populations under their control, in order to attract money from international donors, which will in turn be used to buy arms.⁴⁸

Van Hear's matrix is equally challenging, with one axis running from voluntary (as in "more choice, more options") to involuntary (as in "less choice, fewer options"). Along the other axis he has five kinds of movement - inward, outward, return, onward and staying put. At the involuntary end of his continuum are refugees, people displaced by natural

⁴⁵ Richmond, *Global Apartheid: Refugees, Racism and the New World Order*, *supra* note 43 at 61.

⁴⁶ For Richmond's typology of migration, see in particular: Richmond, "Reactive Migration: Sociological Aspects of Refugee Movements", *supra* note 41 at 19-21.

⁴⁷ Such tactics were used by Nigeria during the Biafra conflict and by Ethiopia during its conflict with Eritrea: Susanne Schmeidl, "Conflict and Forced Migration: A Quantitative Review, 1964-1995" in Aristide R. Zolberg & Peter M. Benda, eds, *Global Migrants, Global Refugees: Problems and Solutions* (New York: Berghahn Books, 2001) at 82, cited in: Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 10.

⁴⁸ This was the strategy used by warlords in the Liberian civil conflict of 1996-97. The Iraqi Government also reportedly withheld food and medical supplies from civilians in order to force the United Nations to end its embargo: Myron Weiner, "The Clash of Norms: Dilemmas in Refugee Policies" (1998) 11: 4 *Int'l J. Refugee. L.* 433 at 437-38, cited in: Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 10. A more recent example is the situation in North Korea, where, it has been suggested, the severe food shortage has been, at the very least, caused in part (and exacerbated) by the North Korean government: David Marcus, "Famine Crimes in International Law" (2003) 97 *A.J.I.L.* 245 at 259-62. For more on this topic, see also: Amartya Kumar Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981) (Sen was one of the first authors to suggest we view famine as an economic *and* political phenomenon).

disasters and development projects, the point being that such people have relatively few choices or options.⁴⁹

These two models are ingenious attempts to capture the reality of migration, but as “[t]his is where the ethical problem arises”.⁵⁰ In fact, in trying to divide categories of migrants according to a continuum of choice – free at one end and entirely closed at the other – these schemes are in danger of ignoring the most important quality of all migrants, and, in fact, of all human beings: their “agency against all odds”,⁵¹ their free will. From studying the behaviour of people in concentration camps, for example, we know that even under the most constrained circumstances, human beings struggle to maintain an area of individual decision-making – and that those who succeed in doing so, have the best chances of survival.⁵² Moreover, even at the most “involuntary” end of the continuum, people have more choice than this model allows us to believe. A recent field study of Somalis in the Dadaab refugee camps of Kenya revealed, for instance, that while flight seems to be an immediate and radical response to acute danger, it still involves some element of choice: the decisions of whether, when, where and how to move from Somalia were based not on the security situation alone, but also depended on both local and transnational factors. These included individual and communal migration histories, the availability of necessary resources or people who could provide those resources, whether important assets had to be left behind, and whether family or clan members could offer support at the new destination. Their choices about whether to move or not, when to go, and where, can’t be

⁴⁹ Van Hear, *New Diasporas: The Mass Exodus, Dispersal and Regrouping of Migrant Communities*, *supra* note 41.

⁵⁰ Turton, “Conceptualising Forced Migration”, *supra* note 41 at 9.

⁵¹ Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft* (Minneapolis: University of Minnesota Press, 1999).

⁵² Turton, “Conceptualising Forced Migration”, *supra* note 41 at 10.

represented by a continuum of this kind.⁵³ As such, although the common issue in “forced” displacement is often seen to be a sense of loss of control over one’s own fate, we must be wary of a vision of the migrant that leaves little room for the more subtle issues of desire, aspiration, frustration, anxiety or “a myriad of other states of the soul”: even in the most trying situations, migrants do not lose their ability to “think through their options”.⁵⁴ What’s more, migrants are not simply isolated individuals reacting to market stimuli and bureaucratic rules, but social beings who seek to achieve a better future for themselves, their families and their communities by actively shaping the migratory process, a point raised previously in this thesis.⁵⁵

In conclusion, given the artificial aspect of the distinction between voluntary and forced migration, these neat categories are indistinguishable in terms of the causes of displacement. But even within the broad field of forced migration, it has become extremely difficult to make clear distinctions between unrelated categories of these migrants on the ground, essentially because, as highlighted in the next part of this thesis, their migration experiences are more similar than different.

⁵³ Cindy Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (New York: Berghahn Books, 2006). Interestingly, in this book Horst describes the rich personal and social histories that refugees bring with them to the camps, and how Somalis are able to adapt their “nomadic” heritage in order to cope with camp life. As such, he reveals the inadequacy of considering all refugees to be “vulnerable victims”. For more on this topic, see part I, notes 347 to 351, for further analysis.

⁵⁴ Laura Ma Agustín, “Forget Victimization: Granting Agency to Migrants” (September 2003) 46: 3 *Development* 30 at 33.

⁵⁵ See section 1.2 and the conclusion of Part I, above.

3.3. Refugees and Other Forced Migrants: A Blurred Distinction on the Ground

Is it really sensible that we have different systems for dealing with people fleeing their homes depending on whether they happen to have crossed an international border?⁵⁶

A strong distinction on paper between refugees and internally displaced persons (hereafter IDPs) is of particularly importance in that it determines two different legal mechanisms which provide protection and assistance. However, this section illustrates that in some contexts it has become increasingly difficult to separate refugees from IDPs in the field. As Van Hear observes, "In real situations ... these categories are often inextricably mixed, and it seems logically, practically and morally absurd to single out one category of forced migrant for protection and assistance over others".⁵⁷ To illustrate situations where the refugee and the IDP exceed categorization, I will trace the empirical connections between refugees and "oustees" (an Indian term which describes people "ousted" from their habitat through government intervention). Next, I will deal with those persons who may be referred to as seeking "ecological sanctuary", namely "environmental refugees" (though I disagree with the use of this term). Their position is quite precarious: since they have crossed borders, they aren't IDPs, yet neither do they fall under the strict definition of the refugee found under the 1951 Refugee Convention. However, as will be shown, complex political or human factors are often the cause of environmental disasters.

⁵⁶ Speech by Hilary Benn- U.K. Secretary of State for International Development, "Reform of the International Humanitarian System, O.D.I." 15 December 2004, online: Department for International Development <<http://www.dfid.gov.uk/news/files/Speeches/bennaidssystemreform.asp>> (accessed on 07 November 2007).

⁵⁷ Nicolas Van Hear, "Editorial Introduction" (1998) 11: 4 *Journal of refugee studies* 341 at 348.

Before we get to the heart of this matter, it is necessary to trace the development of international legal and institutional frameworks for IDPs and to discuss the extent of their protection. Barely a decade ago, the phenomenon of internal displacement was rarely discussed and poorly understood. However, in recent years the empirical growth of this phenomenon, as well as the work of the Representative to the United Nations Secretary-General on Internally Displaced Persons, and growing discontent at the inability of the international community to address the issue systematically and with foresight, have all created a shift in global attention to the issue.⁵⁸ According to the 1998 UN *Guiding Principles on Internal Displacement* (hereafter “the UN Guiding Principles”), IDPs are:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.⁵⁹

This definition highlights two principle elements: 1) the coercive or otherwise involuntary character of movement and 2) the fact that such movement takes place within national borders. As regards the first element (i.e. the involuntary character of movement), the definition is broad enough to include some of the most common causes of involuntary movement, such as armed conflict, violence, human rights violations, and

⁵⁸ The number of internally displaced persons has increased from an estimated 1.2 million in 11 countries in 1982, to 24 million in 28 countries in 2002, to 26 millions in more than 52 countries in 2007. See: Arild Birkenes et al., *Internal Displacement - Global Overview of Trends and Developments in 2007* (Geneva: Internal Displacement Monitoring Centre; Norwegian Refugee Council, April 2008); Global IDP Survey & Norwegian Refugee Council, *Internally Displaced People: A Global Survey* (London: Earthscan, 2002).

⁵⁹ United Nations Commission on Human Rights, *Report of the Representative of the Secretary-General on Internally Displaced Persons: Guiding Principles on Internal Displacement*, UN doc. E/CN.4/1998/53/Add.2 (11 February 1998) (paragraph 2 of the introduction).

disasters. It should be remembered that in 1992, the United Nations Secretary-General had already suggested a working definition, which read as follows: "Persons or groups who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disaster, and who are within the territory of their own country".⁶⁰ But this definition was described as too narrow in several respects, in particular its temporal and numerical criteria. It was suggested that limiting the concept of the IDP to only those who had fled their homes "suddenly or unexpectedly" overlooked the fact that in a number of situations, the displacement of populations was not a spontaneous event but an organized state policy implemented over years or even decades. In the mid-1980s, for instance, the Ethiopian government forcibly relocated many political opponents, known as *Tigrayans*, under the guise of a national disaster. In Burma, thousands were forced to relocate, without compensation, to the outskirts of Yangon, the capital of Myanmar, to undertake massive construction projects. The criterion of being "forced to flee" was also criticized for excluding all those situations where populations did not flee but were obliged to leave their homes. Examples of this are the forced evictions of minorities during the war in Bosnia or, more recently, in 2005, in Zimbabwe, with home demolitions and the forced removal of more than a half million people.⁶¹ A third concern was the notion of people fleeing "in large numbers", though, in reality, many of

⁶⁰ United Nations Commission on Human Rights, *Analytical Report of the Secretary-General on Internally Displaced Persons*, UN Doc. E/CN.4/1992/23 (14 February 1992) at para.17 . The emergence of this international responsibility for the plight of IDPs can be traced to events in the former Yugoslavia which had the effect of transforming what was formerly an "internal matter" into an international one: Satvinder S. Juss, *International Migration and Global Justice* (Aldershot, England ; Burlington, VT: Ashgate, 2006) at 158.

⁶¹ Roberta Cohen, "Protecting the Internally Displaced" *World Refugee Survey 1996* (Washington DC: US Committee for Refugees, 1996) at 5&14; Erin Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern" (2005) 24: 3 *Refugee Survey Quarterly* 9, *supra* note 61 at 12; Promod Nair, "Towards a Regime for the Protection of Internally Displaced Persons" (2001) 10 *ISIL Year Book of International Humanitarian and Refugee Law*.

the displaced flee in small groups or individually. Accordingly, the new definition introduced in 1998 eliminates any requirement concerning time or a minimum number of persons affected, and includes people who have fled their homes due to natural or human-made disasters. This creates situations in which IDPs are "neglected or discriminated against by their governments on political or ethnic grounds or have their human rights violated in other ways".⁶² In recognizing that internal displacement was not necessarily limited to these causes alone, the definition also prefaces the list of causes with the qualifier "in particular" so as not to exclude the possibility of there being other situations which meet the key criteria of involuntary movement within one's country.⁶³ As regards the second element (i.e. the fact that such movement takes place within national borders), a clear distinction is made here between IDPs and refugees: unlike refugees, who have been deprived of protection by their state of origin, IDPs are subject to state sovereignty and must be protected by the human rights obligations of their country of nationality. The UN Guiding Principles, which "address the specific needs of internally displaced persons worldwide [and] identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration", thus remind national authorities and other relevant

⁶² Roberta Cohen, "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting" (2004) 10 *Global Governance* 459 at 466.

⁶³ In particular, this has been done in reply to the concern raised by many NGOs that those displaced by development projects were excluded from the definition: Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *ibid.* at 11. Despite the absence of specific mention of persons uprooted by development projects, those individuals are not excluded from the 1998 *Guiding Principles*. In fact, principle 6.2(c) states that all human beings have a right to be protected from "arbitrary displacement", including in cases such as "large scale development projects, which are not justified by compelling and overriding public interests". According to Pettersson, this ignores the main issue in forced resettlement, which is not simply that people should be protected from "arbitrary displacement" but that, however compelling the reasons of public interest for displacing them, governments are still obliged to protect the person's political, social and economic rights: Bjorn Pettersson, "Development-Induced Displacement: Internal Affair or International Human Rights Issue?" (2002) 12 *Forced Migration Review* 16.

actors of their responsibility to ensure that IDPs' rights are respected and fulfilled, in spite of the vulnerability generated by their displacement.⁶⁴ As shown below, this territorial distinction disregards the fact that, for both groups, the risk of being persecuted and the need for protection are often identical.

The UN Guiding Principles are the first international standards to focus on the problem of internal displacement and the rights of IDPs. They consist of a highly persuasive consolidation of the existing international regime related to this subject, "reflect[ing] and [being] consistent with international human rights law and international humanitarian law", as stated in paragraph 3 of the Introduction to the Principles, "as well as with international refugee law where it can be applied by analogy".⁶⁵ The legal status of the UN Guiding Principles is, however, not legally binding, primarily because they were formulated without state involvement:

It is important to stress that [there is no] legal definition of internally displaced persons. Becoming displaced within one's own country of origin or country of habitual residence does not confer special legal status in the same sense as, say, becoming a refugee does. This is because the rights and guarantees to which internally displaced persons are entitled stem from the fact that they are human beings and citizens or habitual residents of a particular state. Those rights and guarantees emanate from the peculiar vulnerability and special needs that flow from the fact of being displaced. By locating the description of 'internally displaced persons' in their introductory section rather than in their main body, the Guiding Principles seek to highlight the descriptive and non-legal nature of the term "internally displaced persons". Internally displaced persons need not and cannot be granted a special legal status comparable to refugee status. Rather, as human beings who are in a situation of vulnerability they are entitled to the enjoyment of all relevant

⁶⁴ UN Guiding Principles, *supra* note 59 (paragraph 1 of the introduction).

⁶⁵ Walter Kälin, "Recent Commentaries about the Nature and Application of the Guiding Principles in Internal Displacement" in The Brookings Institution, ed, *How Hard Is Soft Law? Guiding Principles on Internal Displacement and the Need for a Normative Framework* (Washington, DC: Brookings-CUNY Project on Internal Displacement, April 2002), 1.

guarantees of human rights and humanitarian law, including those that are of special importance to them.⁶⁶

Viewed from the perspective of states, the flexibility and pragmatism of the UN Guiding Principles are the strength of this instrument: states can tailor their domestic plans to accommodate the rights and humanitarian needs of IDPs, at their own pace and without becoming alienated from the process. As a result, experience shows that the UN Guiding Principles' connection to existing law is recognized and acknowledged by many governments and that the latter prefer to discuss their application without having to consider the issue of legal obligation.⁶⁷ If it is true that meaningful protection for the internally displaced requires political will on the part of the state, then from the IDP's perspective, the instrument is currently a weak point in the system, since it is incapable of ensuring compliance:

The production of IDPs and their inhuman living conditions within their own states is a reality, which urgently needs an international regulatory regime. This magnitude and urgency of the problem are not necessarily reflected in the UN Guiding Principles, which seem to have yielded particularly to the pressure of IDP-producing states. The instrument has thus set a soft normative standard for a hard fact of our international life. In the absence of its legal enforceability, the competence of IDPs to seek and receive protection and assistance

⁶⁶ Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (Washington, D.C.: American Society of International Law and Brookings Institution Project on Internal Displacement, 2000) at 2-3.

⁶⁷ Kälin, "Recent Commentaries about the Nature and Application of the Guiding Principles in Internal Displacement", *ibid.* According to Kälin, it is doubtful, at least for the time being, that turning the Guiding Principles into a binding UN Convention would be feasible or even desirable. See also: M. Rafiqul Islam, "The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable " (2006) 18: 2 Int'l J. Refugee. L. 354 at 365.

as a matter of right remains uncertain and contingent upon international politics and goodwill.⁶⁸

Imprecise legal concepts and institutional inadequacy also contribute to very limited protection for IDPs under international law. It is particularly difficult, for instance, to determine when the internal displacement ends. In the refugee's case, their status ends either upon return to their country of origin or when they find another long-term situation under the auspices of UNHCR. However, for the IDP, there is neither a cessation clause nor an international organization to make that decision. For example, in 1993, Tajikistan several IDPs and refugees returning to their villages either found their homes occupied by other people or became the victims of physical assault incited by ethnic animosity. Even in countries where conflicts have officially ended, on-going animosity among individuals or groups may jeopardize the process of return and hinder the end of displacement. In the absence of guidelines, plans are made on a case-by-case basis.⁶⁹ The decision to include persons uprooted by human and natural disasters or development projects also seems to have not yet been fully implemented. As such, global statistics on internal displacement generally include only those IDPs uprooted by conflict and human rights violations.⁷⁰ Last but not least, there is no UN agency specializing in dealing with internally displaced persons, and in some areas, handling of international assistance and protection of IDPs has been overlooked. Following the release of a 2004 study, which found that the UN's approach to internal displacement

⁶⁸ Islam, "The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable", *ibid.* at 365. Islam points out that if more states adopt the UN Guiding Principles, they will become increasingly self-enforcing and difficult to deny. It is at this stage, therefore, that the Guiding Principles can be seen "as a standard-setting yardstick against which a state's treatment of its IDPs could be measured, affording guidance and impetus to humanitarian advocacy and lobby groups" (page 365).

⁶⁹ Roberta Cohen, "The Role of Protection in Ending Displacement" (May 2003) 17: 21 *Forced Migration Review*.

⁷⁰ Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *supra* note 61 at 12.

was “largely ad hoc and driven more by personalities and the convictions of individuals on the ground than by an institutional system-wide agenda”,⁷¹ institutional reforms were recently developed to strengthen inter-agency capability in protecting and assisting the internally displaced. In July 2004, Inter-Agency Internal Displacement (IAID) was set up under the auspices of the UN Office for the Coordination of Humanitarian Affairs (OCHA) but to date, it has failed to develop a consistent inter-agency approach. Then in July 2005, the Inter-Agency Standing Committee (IASC) was established to promote operational accountability on the ground. In December 2005, the principals of the IASC agreed to create a cluster-based response mechanism to address existing shortcomings in international humanitarian response to IDP situations. Under this “cluster approach”, specific areas of responsibility are assigned to agencies. UNHCR, for instance, has the responsibility for emergency shelter, protection, camp coordination and management, with a focus on the needs of persons internally displaced by conflict.⁷² This interagency arrangement came into effect in January 2006 and will be applied in phases to all major humanitarian emergencies and contingency planning

⁷¹ Simon Bagshaw & Diane Paul, *Protect or Neglect: Toward a More Effective United Nations Approach to the Protection of Internally Displaced Persons* (Washington DC: Brookings-SAIS Project on Internal Displacement and OCHA’s Inter-Agency Internal Displacement Division, November 2004). The Global Commission on International Migration has recently indicated reasons for the “lack of inter-agency cooperation”, ranging from responsibilities “spread across different institutions” to the involvement by “organizations that were not traditionally involved” to the fact that UN organizations “straddle the somewhat indistinct line between ‘migration’ and ‘humanitarianism’”: GCIM, *Migration in an Interconnected World: New Directions for Action* (Geneva: Global Commission on International Migration, October 2005) at 74-76.

⁷² Other “cluster” leaders are: Nutrition (UN Children’s Fund), Water and Sanitation (UN Children’s Fund), Health (World Health Organization), Logistics (World Food Program), Telecoms (UN Office for the Coordination of Humanitarian Affairs/UN Children’s Fund/World Food Program), Early Recovery (UN Development Program), Education (UN Children’s Fund), Camp Coordination and Management for Natural Disasters (International Organization for Migration), Emergency Shelter for Natural Disasters (International Federation of Red Cross and Red Crescent Societies), and Protection for Natural Disasters (UNHCR, UN Children’s Fund and Office of the United Nations High Commissioner for Human Rights): Anne Willem Bijleveld, “Towards More Predictable Humanitarian Responses – Inter-Agency Cluster Approach to IDPs” (2006) 25: 4 *Refugee Survey Quarterly* 28 at 31.

exercises. These efforts require significant internal UN reform. A number of challenges have already been addressed in the initial months, but it will take time for these changes to become fully operational and effective.⁷³ Of particular concern is the fact that “the new division of labour for IDPs ... does not necessarily address the operational realities: funding, access, security, host government consent and interagency competition”.⁷⁴

In sum, Weiss is correct in arguing that “international discourse has changed”⁷⁵: normative principles have been accepted by a wide range of actors, and institutional frameworks have been designed to achieve a more comprehensive approach to the protection and assistance of internally displaced persons. However, “the real issue is not so much deficiencies in the law as inadequacies of enforcement procedures and a lack of political will on the part of the perpetrators of violations and the international community”.⁷⁶ Moreover, although these developments have successfully promoted the category of internally displaced persons as a specific group of persons, there is a need to re-examine the conceptual precepts behind such categorization. In the next section, I will, therefore, demonstrate that the continued adherence to a rigid classification between

⁷³ Humanitarian crises such as the Tsunami and South-Asian Earthquake have clearly illustrated that one cannot easily draw a line between different types of emergencies (see the note above), since there are situations in which natural disaster and conflict-generated IDPs are grouped together. Following these experiences in the area of camp coordination and management, the IOM and UNHCR have initiated a discussion on the practical modalities of cooperation in order to avoid any duplication and to ensure a unified cluster process at the global level: *Ibid.* at 33.

⁷⁴ Crisp, cited in: Thomas George Weiss & David A. Korn, *Internal Displacement : Conceptualization and Its Consequences* (London: Routledge, 2006) at 144 (email between Crisp and the authors, 21 September 2005).

⁷⁵ Thomas G. Weiss, "Whither International Efforts for Internally Displaced Persons?" (1999) 36: 3 *Journal of Peace Research* 363.

⁷⁶ Francis Deng, *Protecting the Dispossessed: A Challenge for the International Community* (Washington, D.C.: Brookings Institution Press, 1993) at 135.

IDPs and refugees makes increasingly less sense because “it overlooks a practical interconnectedness and unity between these two groups”.⁷⁷

3.3.1 Refugees, IDPs and “Oustees”: Tracing the Connections

The term “oustees” is borrowed from the Indian literature on involuntary population displacement, where it is commonly used to describe people “ousted” from their environment through government intervention, generally due to a change in land or water use required by development. Oustees are allocated a specific area within their own country in which to resettle and have been provided with at least a minimum of resources and services in order to re-establish their lives. This term may also apply to those who are resettled by government-sponsored programmes which use resettlement as a technique of rural development and/or political control, as, for example, in the recent past in South Africa, Tanzania and Ethiopia. According to several authors, the term oustee is preferable to “development-induced displaced people” or “resettlers” since these terms do not underline the unjust and coercive nature of uprooting.⁷⁸

One could argue that there are strong practical reasons for maintaining a clear distinction between refugees and IDPs on the one hand, and oustees on the other. After all, both refugees and IDPs are unable or unwilling to avail themselves of their government’s protection,

⁷⁷ Juss, *International Migration and Global Justice*, *supra* note 60 at 151.

⁷⁸ Véronique Lassailly- Jacob, “Reconstructing Livelihoods through Land Settlement Schemes: Comparative Reflections on Refugees and Oustees in Africa” in M. Cernea & C. McDowell, eds, *Isks and Reconstruction. Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000), 108; Lyla Mehta & Jaideep Gupte, “Whose Needs Are Right? Refugees, Oustees and the Challenges of Rights-Based Approaches in Forced Migration” (2003) Working Paper: WP-T4, Sussex, UK, DRC on Migration, Globalisation and Poverty at 7.

while oustees have deliberately been moved by their own government using the excuse of legislation or policy which allows private property to be expropriated for the sake of public good. Ousteers, therefore, expect to be compensated for the land and property they have lost, and the government which moved them is responsible for providing appropriate protection and assistance.⁷⁹ Nevertheless some authors emphasize the commonalities of experience among the uprooted, showing that it is worth focusing on the experiences of forced migrants and on the challenges they face in re-establishing themselves, rather than on the causes of their migration alone.⁸⁰

Colson focuses on the psychological stress caused by the experience of both refugees and ousteers, i.e., sadness at the loss of their homes and anger towards the agents and institutions that forced them to move. She also identifies common phases in the process of forced displacement: first, a stage of denial (“this cannot happen to us”) and, after the move has taken place, a phase during which people cling to old certainties and take no risks, even if this prevents them from taking advantage of new economic opportunities.⁸¹ In turn, Cernea identifies the similar social and economic problems that confront both refugees and ousteers. Focusing on the potentially impoverishing effects of forced

⁷⁹ Mickael Barutciski, "Addressing Legal Constraints and Improving Outcomes in Development-Induced Resettlement Projects" (2000); Desk Study, Department for International Development, ESCOR Funded Project R7305, Refugee Studies Centre, University of Oxford at 2.

⁸⁰ Elizabeth F. Colson, "Coping in Adversity" (Gwendolen Carter Lectures, Conference on Involuntary Migration and Resettlement in Africa, University of Florida, Gainesville, 21-23 March 1991).

⁸¹ *Ibid.*; Thayer Scudder & Elizabeth Colson, "From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated Peoples" in A. Hansen & A. Oliver-Smith, eds, *Involuntary Migration and Resettlement* (Boulder, Colorado: Westview Press, 1982) at 271, *supra* note 80. See also: David Turton, "Refugees and 'Other Forced Migrants'" (October 2003) S.R.C Working Paper no 13, online: Refugee Studies Centre Working Papers <www.rsc.ox.ac.uk/PDFs/workingpaper13.pdf>(accessed on 05 October 2006).

migration, he explains that empirical evidence has shown clearly that landlessness and loss of “social capital” apply at least as much to those forced by conflict to move, whether or not it’s across international borders, as they apply to those forced to move on account of development projects.⁸²

On an empirical level, then, it is clear that refugees and oustees face similar problems. But it is also possible to trace a connection between them at the conceptual level, by considering their relationship to the nation-state. In Chapter One, I show at length how the migrant, especially the “non-Western migrant”, is a contemporary figure of the “other”. Similarly, for the oustee, a person displaced “in the national interest” to make way for a development project, the state constructs a different conspicuous image of “the other”. Of course, the main objective of a project involving forced resettlement is to benefit a population larger than that of the displaced themselves, and it seems morally acceptable that “some people enjoy the gains of development, while others bear its pains”.⁸³ But empirical evidence suggests that in case after case, these “others” are a relatively impoverished and powerless group of citizens. They are on the economic and political margins of the nation-state into which they were incorporated during the process of nation building, and their forced displacement can be seen as a continuation of that same process.⁸⁴ In other words, forced resettlement is “a ‘price worth paying’ for

⁸² Other issues particularly relevant to the comparison of forced resettlers with refugees are: “joblessness”, “homelessness”, “marginalization”, “food insecurity”, “increased morbidity” and “loss of access to common property resources”: Michael Cernea, “Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement” in M. Cernea & C. McDowell, eds, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, D.C.: The World Bank, 2000) at 20-40.

⁸³ *Ibid.* at 12.

⁸⁴ Turton, “Refugees and ‘Other Forced Migrants’ ”, *supra* note 81 at 12. In many cases, displaced persons belong to an indigenous minority, and have been forced out of either their home territory or a part of it: Marcus Colchester, “Dams, Indigenous People and Vulnerable Ethnic Minorities” (2000) Thematic Review 1.2 prepared as an input to

the good of the nation, provided somebody else pays it, where ‘somebody else’ refers to fellow citizens whose relationship to the state is different from, and inferior to, our own”.⁸⁵ This highlights the idea that, even among citizens, some are more equal than others.⁸⁶

These empirical and conceptual connections between refugees and oustees give support to Cernea’s repeated calls to bridge the “research divide” between the study of refugees and the study of oustees. Explaining the benefits to be gained from greater exchange among researchers whose work focuses on the two categories of forced migrants, he writes:

This potential for gain is fourfold. *Empirically*, the two bodies of research could enrich each other by comparing their factual findings. *Theoretically*, they could broaden their conceptualisations by exploring links and similarities between their sets of variables. *Methodologically*, they could sharpen their inquiry by borrowing and exchanging research techniques. In addition, *politically*, they could influence the public arena more strongly by mutually reinforcing their policy advocacy and operational recommendations.⁸⁷ [author’s italics]

the World Commission on Dams, Cape Town, South Africa, online: The World Commission on Dams <<http://www.dams.org/kbase/thematic/tr12.htm>>(accessed on 10 October 2006).

⁸⁵ Turton, "Refugees and 'Other Forced Migrants'", *ibid.* at 12.

⁸⁶ This point was raised previously: see Part I, notes 276 & 277, above.

⁸⁷ Cernea, "Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement", *supra* note 82 at 17. See also: Michael Cernea, "Internal Refugee Flows and Development-Induced Population Displacement" (1990) 3: 4 *Journal of Refugee Studies* 320; Michael Cernea, "Bridging the Research Divide: Studying Refugees and Development Ousteas" in T. Allen, ed, *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa* (London/Trenton: James Currey/Africa World Press, 1996).

In conclusion, there are links to be made between the particular vulnerabilities experienced on the ground by internally displaced persons and refugees. This holds also true in those instances when IDPs have been forcibly displaced by their own government or when governments are unable or unwilling to offer them assistance due to ongoing civil conflict or for other reasons, and when invoking formal citizenship rights is ineffectual in obtaining protection. Moreover, as shown below in the section on the reduction of the identity of the refugee, there is “an inverse relationship between the rising numbers of internally displaced persons and the declining figure for refugees”. That the rise in numbers of internally displaced persons in some countries is directly correlated to the erosion of the right to seek asylum in another “safe” country is clearly illustrated by the example of Pakistan: in 2000, when the country closed its border to Afghan refugees, many people were identified as internally displaced instead of as refugees, simply due to a change in policy, rather than a change in their status as victims of human rights abuses.⁸⁸

It was in this context that, in the mid 1990s UNHCR, faced with an increasingly complex situation in the field, suggested establishing a general-purpose humanitarian agency to deal with diverse forms of displacement engendered by humanitarian crises.⁸⁹ The prospect of such change fuelled a vigorous debate on the role of UNHCR and other agencies in the refugee regime. One argument was that UNHCR, by intervening in conflicts outside its original mandate, such as situations of internal displacement, was diluting its traditional role as a provider of protection for refugees. Proponents of this argument campaigned strongly for retention of the 1951 Refugee Convention, pointing out that any

⁸⁸ UNHCR, *The State of the World's Refugees* (New York: Oxford University Press, 2006) at 154. For more on this topic, see section 4.1 below.

⁸⁹ UNHCR, *The State of the World's Refugees: In Search of Solutions* (New York: Oxford University Press, 1995) at 48.

confusion related to the status of refugees is detrimental to their protection.⁹⁰ Others, with a broader view of the refugee regime, argued that the resolution of forced displacement requires an explicitly comprehensive approach, encompassing potential refugees or people in refugee-like circumstances, such as IDPs and other victims of human rights abuse, as well as former refugees, such as returnees.⁹¹ This debate between, on the one hand, those who contest the linkages between IDPs and refugees, and, on the other hand, those who view internal displacement linked to refugee movement, reveals a number of complex issues. It still rages among scholars. Recently, for instance, Hathaway explained in greater detail why, despite strong empirical evidence that refugees and internally displaced persons are not as different as suggested, refugee protection and the rights of internally displaced persons should not be linked, simply on the basis of the common experience of displacement.⁹² The first argument is that intervention for internally displaced persons can threaten the specificity of refugee

⁹⁰ See: Barutciski, "Addressing Legal Constraints and Improving Outcomes in Development-Induced Resettlement Projects", *supra* note 79; Mickael Barutciski, "Tensions between the Refugee Concept and the IDP Debate" (December 1998) 3 *Forced Migration Review* 11; B.S. Chimni, "The Geo-Politics of Refugee Studies: A View from the South" (1998) 11: 4 *Journal of Refugee Studies* 350; James C. Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection" (1995) 8: 3 *Journal of Refugee Studies* 288; James Hathaway & R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Orientated Protection" (1997) 10 *Harvard Human Rights Journal* 152. For additional information, see note 174, *infra*.

⁹¹ See among others: Loescher, *Refugee Movements and International Security*, *supra* note 34; Roberta Cohen & Francis Mading Deng, *The Forsaken People : Case Studies of the Internally Displaced* (Washington, D.C.: Brookings Institution Press, 1998); Roberta Cohen & Francis Mading Deng, *Masses in Flight : The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution Press, 1998); Erin Mooney, "In-Country Protection: Out of Bounds for UNHCR?" in Frances Nicholson & Patrick M. Twomey, eds, *Refugee Rights and Realities : Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999); Manfred Woehlkke, "Environmental Refugees" (1992) 43: 3 *Aussenpolitik*, 287-88. For additional information, see note 174, *infra*.

⁹² James C. Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" (2007) 20: 3 *Journal of Refugee Studies* 349; James C. Hathaway, "Why Refugee Law Still Matters (Feature)" (2007) 8: 1 *Melbourne Journal of International Law* . See also: Roberta Cohen, "Response to Hathaway" (2007) 20: 3 *Journal of Refugee Studies* 330.

protection. In response to this, it should be remembered that the UN Guiding Principles do not establish that IDPs require the same form of protection as refugees. They clearly mention that as citizens still residing in their own country, IDPS are afforded all the rights of citizens, which are greater than those granted to refugees by the 1951 Refugee Convention. However, it may be possible to maintain the specificity of refugee protection while recognizing that such aid may be necessary for some internally displaced persons in contexts where their government is unable or unwilling to provide them with the protection afforded to other citizens. What's more, addressing the plight of IDPs and refugees by taking a holistic approach to the overall international protection of human rights will produce "tangible dividends for refugees". As explained by UNHCR: "Especially where the benefits of UNHCR's involvement with IDPs are clear to see, these contacts can have a positive effect on asylum and protection in the country concerned. In those cases where the citizens of this country may be refugees elsewhere, there are telling advantages to operating in the heart of what may even be their very areas of origin".⁹³ The second argument is that the specificity of refugee rights is due not simply to displacement but rather derives from "the quality of being a foreigner who has escaped persecution".⁹⁴ This perspective stresses that refugees are afforded protection, not because of their displacement, but because they have lost the protection of their own government by virtue of

⁹³ U.N.H.C.R., "The Protection of Internally Displaced Persons and the Role of UNHCR", 27 February 2007, online: UNHCR Refworld <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/>>(accessed on 27 October 2007). UNHCR mentions elsewhere that its involvement with internally displaced persons goes back to the early 1970s, when IDPs were included in programs for returning refugees in South Sudan (1972), Guinea-Bissau, Angola and Mozambique (1974), Vietnam and Laos (1975): "IDPs were living in the same area as the returning refugee populations, in circumstances where it was neither reasonable nor feasible to treat the two categories differently": Vanessa Mattar & Paul White, "Consistent and Predictable Responses to IDPs. A Review of Usher's Decision-Making Processes" (Geneva: Evaluation and Policy Analysis Unit, March 2005, online: UNHCR <<http://www.unhcr.org/home.html>> (accessed on 23 October 2007).

⁹⁴ Mickael Barutciski, "Tensions between the Refugee Concept and the IDP Debate" (December 1998) 3 *Forced Migration Review* 11 at 12. For more on the issue of alienage, see below, section 4.1.1 on alienage and individual persecution in refugee law, below.

having crossed an international border. However, this protection “ought not to be because a person is internally displaced per se but – by analogy with the underlying concern for refugees – because a person who is internally displaced lacks the protection of [her] government and, owing to fear of persecution, is unable to access that protection”.⁹⁵ Thus the needs of internally displaced persons are not similar to those of refugees simply because they are displaced, but because some internally displaced persons have specifically been marginalized or targeted by their government, and their displacement is a direct result of this. Hence, under certain circumstances, principles of protection for internally displaced persons could be developed analogously to principles of refugee protection, without eroding the specificity of the refugee regime, which remains a fundamental way for refugees to access human rights.⁹⁶ The last argument, and by far the most plausible, is that the process of displacement, in and of itself, may be an outcome or cause of greater vulnerabilities. By this, Hathaway means that the focus is not displacement, but rather those vulnerabilities that are an outcome of the process. He argues consequently that displacement is not “an important enough concern to justify a segmentation of the community of internal human rights victims”, favouring a view that simply characterizes IDPs as “unlucky citizens” alongside other victims of internal human rights violations.⁹⁷ However, as Kälin explains:

As persons who left their homes involuntarily, internally displaced persons ... confront specific problems and needs that are different from those who may remain at home. While in flight, they may be attacked or cross into mine fields in areas they do not know. Families might become separated, with members losing contact with one another. Once they arrive at their destinations, they need food,

⁹⁵ Bill Frelick, "Displacement without End: Internally Displaced Who Can't Go Home" (2003) 17 *Forced Migration Review* 10.

⁹⁶ This point will be addressed in Chap. 5 on the definition of the forced migrant, below.

⁹⁷ Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", *supra* note 92 at 363.

shelter, and access to health services. Often they are not welcomed by the host population and suffer discrimination.

Their children may encounter difficulties in getting a proper education. IDPs in many countries run higher risks than those remaining at home of having their children forcibly recruited, of becoming the victims of gender-based violence, or of remaining without jobs [or] other means of livelihood.⁹⁸

The abundant evidence that, as a result of movement, IDPs are more often deprived of basic human rights than are other members of the population is an indication that displacement puts such individuals at greater risk of experiencing some forms of harm. However, advocates of the “unlucky citizens” perspective are right to mention that “internally displaced populations may in some circumstances be the relatively fortunate sub-population of internal human rights victims since they can at least access relative safety within their own country”.⁹⁹ In the 2005 Israel-Lebanon war, for instance, the internally displaced in both Israel and Lebanon were those who were “relatively resourceful”, mainly those who had the financial resources or international networks to enable them to flee the conflict-affected areas. The particular dynamics of that conflict showed that “those in most need of immediate assistance can be the people who stay behind rather than those who are displaced”.¹⁰⁰ Thus, those who view strong linkages between IDPs and refugees have to be careful not to give an oversimplified view of the situation in order for the “internal refugees” argument to be both empirically and conceptually strengthened. More

⁹⁸ Walter Kalin, "Internal Displacement and the Protection of Property" (2006) 1 *Swiss Human Rights Yearbook* 175 at 176, cited in: Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" , *supra* note 92 at 360. See also: Roberta Cohen, "Exodus within Borders: The Global Crisis of Internal Displacement" (Speech at UNHCR Bulgaria, 2001); Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *supra* note 61.

⁹⁹ Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", *supra* note 92 at 361.

¹⁰⁰ Khalid Koser, "Displacement in the Current Middle East Crisis: Trends, Dynamics and Prospects", 15 August 2006, online: Brookings Institution <<http://www.brookings.edu/speeches/2006/0815middleeast.aspx>> (accessed on 03 November 2007).

particularly, it is important to attenuate the strong perspective on the vulnerability of internally displaced persons that has developed as part of the advocacy campaign, and to recognize that displacement can, in some contexts, be a successful livelihood strategy for subsistence. In other words, we cannot see displacement as “prima facie evidence of vulnerability”¹⁰¹: if “displacement, by its very nature, generally entails the deprivation of many rights”,¹⁰² internal displacement alone cannot be seen as a proxy for vulnerability. In sum, it is not the special category of IDPs in itself that should actually entrench their effective protection, but the fact that displaced persons suffer basic human rights abuses and lack assistance in this matter. This “focus on relative needs and access rather than on categorical classification and prioritization”, which is, writes Hathaway, “a more sensible way to proceed as a general matter”,¹⁰³ leads us to defend the view opposite to Hathaway’s, i.e. that there are specific situations where the needs of IDPs are similar to those of refugees. In addition, when the displacement of IDPs is a direct result of marginalization by their own government, principles of protection for such individuals should be developed analogously to principles of refugee protection. Hence, in terms of a rights-based approach, one way to adequately address the similar needs of internally displaced persons and refugees in these particular contexts is to make no distinction between the two groups of individuals. Not to do is to run the risk of placing oneself “in a conceptual cul de sac, trapped and emasculated by the

¹⁰¹ Weiss, “Whither International Efforts for Internally Displaced Persons?”, *supra* note 75 at 363. See also: Sarah Meyer, “Internal Refugees or Unlucky Citizens: A Conceptual and Practical Examination of Internal Displacement” (MIGS Workshop, Montreal Institute for Genocide and Human Rights Studies, Montreal, Canada, 30 March 2007).

¹⁰² Cohen & Deng, *Masses in Flight: the Global Crisis of Internal Displacement* at 78, *supra* note 91 at 78.

¹⁰³ Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?”, *supra* note 92 at 361.

categorization.”¹⁰⁴ As shown below in Chapter 5 on the definition of the forced migrant, what really matters is a legal framework which succeeds in addressing the needs of forced migrants through proper recognition of identical claims within the human rights framework. Consequently, the study of forced migration must draw attention to, and find solutions for, the full range of forced migrants, regardless of cause or agency mandate. To put it simply, there are no categories; there are simply people whose fundamental human rights have been violated.

3.3.2. The Precarious Position of Environmentally Displaced Persons who have Crossed a Border: Neither IDPs Nor Refugees

The debate concerning environmentally displaced persons emerged in the middle of the 1980s with the work of El-Hinnawi, who used the term “environmental refugees” to draw attention to this subject.¹⁰⁵ In a 1985 report for the United Nations Environment Program, El-Hinnawi defined “environmental refugees” as people “who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”.¹⁰⁶ While in the late 1980s “environmental refugees” had become the single largest class of displaced persons in the world (reaching approximately 10 million), more recent estimates suggest that the

¹⁰⁴ Jonathan Bascom, *Losing Place: Refugee Populations and Rural Transformations in East Africa* (New York: Berghahn Books, 1998) at 4.

¹⁰⁵ The term “environmental refugees” was first used by Brown in the 1970s, but El-Hinnawi and Jacobson have called for greater attention to the subject: Richard Black, “Environmental Refugees: Myth or Reality?” (2001) New Issues in refugee Research, Working Paper No 34, UNHCR at 1.

¹⁰⁶ Essam El-Hinnawi, *Environmental Refugees* (Nairobi: United Nations Environment Programme, 1985) at 4.

numbers may now be as high as 25 million and it is expected that the rising sea level and agricultural distribution caused by climate change may displace 150 million people, or 1.5 per cent of 10 billion people, the predicted global population for the 2050s. However, collecting accurate statistical data on "environmental refugees" is extremely difficult, since few of the figures have been verified empirically. As such, one should be wary of this data.¹⁰⁷ What's more, for the moment, most people become "environmental refugees" due to a combination of factors, but it has been suggested that the principal causes of environmental migration (often interrelated and connected to other factors of a non-environmental nature) fall into three categories:

- 1) *Human-induced environmental change*, including single catastrophic events such as the Chernobyl nuclear accident or the Bhopal chemical accident. It also includes longer-term processes such as desertification, often viewed as the result of long-term land degradation.¹⁰⁸
- 2) *Environmental catastrophes and/or natural disasters*. Throughout history, natural disasters have played a major role in causing migration, though this usually occurs on a temporary basis. Natural disasters disproportionately affect poorer parts of the world, in particular Africa, Asia and South America: developing countries in these parts of the world account for 96 per cent of all deaths due to natural disasters. These figures are significant because, it is estimated that by the year 2025, eighty per cent of the world's

¹⁰⁷ See generally.: Jodi L. Jacobson, *Environmental Refugees : A Yardstick of Habitability* (Washington, D.C., USA: Worldwatch Institute, 1988);Norman Myers, "Environmental Refugees in a Globally Warmed World" (December 1993) 43: 11 *Bioscience* 752;Norman Myers, "Environmentally-Induced Displacements: The State of the Art" (Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration, International Symposium, Geneva: IOM/UNHCR, 21-24 April 1996);Molly Conisbee & Andrew Simms, *Environmental Refugees : The Case for Recognition* (London: New Economics Foundation, 2003).

¹⁰⁸ *Ibid.* at 6. See also: Black, "Environmental Refugees: Myth or Reality?", *supra* note 105 at 12.

population will live in developing countries.¹⁰⁹ It has also been suggested that human beings play a part in natural disasters – population increase and distribution may contribute to a higher occurrence and greater impact of such disasters. Recently, Brown drew attention to the significant number of people forced to move due to aquifer depletion and wells running dry: so far only villages have been evacuated, but eventually whole cities might have to be relocated, such as Sana'a, the capital of Yemen, where, according to experts from the World Bank, the water table is falling by 6 metres a year; or the capital of Pakistan's Baluchistan province, Quetta – originally designed for 50 000 people, it now has 1 million inhabitants, and may not have enough water for the remainder of this decade.¹¹⁰

- 3) *Migration induced by military and political upheavals.* The conscious and systematic destruction of the environment is a central weapon of war and genocidal policy. Examples include US deforestation policy during the Vietnam war; the Salvadorian government's destruction of the ecosystem, in the early 1980s, with the aim to eradicate guerrilla bases in the forest; following the first Gulf War of 1991, the Iraqi government's systematic destruction of marshes in southern Iraq, which forced thousands of Marsh Arabs to flee to south-west Iran or become internally displaced persons.¹¹¹ The use of environmental destruction as war policy is now fully acknowledged internationally: the Rome Statute of the International

¹⁰⁹ Juss, *International Migration and Global Justice*, supra note 60 at 169.

¹¹⁰ Lester R. Brown, "New Flows of Environmental Refugees", 03 February 2004, online: <http://www.peopleandplanet.net/doc.php?id=2134> & the Planet (accessed on 04 November 2006); Robert T. Stranks, "Policy Commentary. Environmental Refugees?" (Ottawa: Department of Foreign Affairs, Canada, 1997).

¹¹¹ Juss, *International Migration and Global Justice*, supra note 60 at 170.

Criminal Court lists as a war crime any attack that causes “severe damage to the natural environment”.¹¹²

A number of people have questioned the value of the very notion of “environmental refugee”. While environmental factors do play a part in forced migration, they are always closely linked to a range of other political and economic factors, so that focusing on environmental factors in isolation does not help in understanding specific situations of population displacement.¹¹³ A closer examination of several cases – including Bangladesh, Sudan and North Korea, – clearly reveals the complex interaction between ecological factors, human-induced disasters, as well as governmental and international factors. Bangladesh, for instance, with its very dense population and its exposure to cyclones and flooding, appears to be the archetypal example of environmental displacement. Yet there are complex causes of impoverishment and flight, which include patterns of land ownership, ethnic divisions, economic development projects such as dams, and political conflicts. Within such turmoil, the action - or more often the inaction - of the Bangladeshi government has been a major factor in forced migration. Even the Indian government has contributed, since the Farakka dam, situated on the Ganges upstream from Bangladesh, has played its part in reducing water supply and endangering agricultural production in the Ganges delta.¹¹⁴

¹¹² *Rome Statute of the International Criminal Court*, U.N. Doc. 2187 U.N.T.S. 90 (entered into force 1. July 2002) (Article 8 (2) (B) (IV)).

¹¹³ See among others: Gaim Kibreab, "Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate" (1997) 21: 1 *Disasters* 20; Joann McGregor, "Refugees and the Environment" in R. Black & V. Robinson, eds, *Geography and Refugees: Patterns and Processes of Change* (London, New York: Belhaven Press, Co-published in the Americas with Halsted Press, 1993), 157; Richard Black, *Refugees, Environment and Development* (London: Longman, 1998).

¹¹⁴ Lee Shin-Wa, *Environment Matters: Conflicts, Refugees & International Relation* (Seoul and Tokyo: World Human Development Institute Press, 2001) at 73-83.

Aside from the fact that environmental change is not the sole cause of migration, the main causes of international and domestic political conflicts are sometimes directly linked to environment. For instance, environmental scarcity may, depending on the context, lead to scarcity conflicts between states, cause large population movements (which in turn lead to group-identity conflicts), or cause economic deprivation and disrupts social institutions, leading to “deprivation conflict”.¹¹⁵ Even in camps, where refugees are protected, there is large-scale environmental devastation. Damage to the environment begins in the refugee camps because:

Areas in the immediate vicinity of refugee camps are stripped of vegetation cover because wood is needed for cooking and shelter. This alters soil and water balances and leads to erosion, soil depletion and decreased productivity.¹¹⁶

Therefore, environmentally displaced persons cannot be regarded as forced migrants who fall into the category of the refugee protected by instruments of international refugee law. This is because, under the current definition of refugee, the concept of a “well-founded fear of persecution” is defined in political terms.¹¹⁷ This excludes those who have experienced economic and social persecution, or who have suffered from the effects of war, as well as the victims of natural disasters in those countries where the state offers no protection. Yet in several respects, the link with refugees is unmistakable.

¹¹⁵ Thomas F. Homer-Dixon, "Environmental Scarcity and Violent Conflict: Evidence from Cases" (1994) 19: 1 *International Security* 5 cited in: Juss, *International Migration and Global Justice*, *supra* note 60 at 177.

¹¹⁶ John Sorenson, "An Overview: Refugees and Development" in Howard Adelman & John Sorenson, eds, *African Refugees : Development Aid and Repatriation* (Boulder, North York: Westview Press ; York Lanes Press, 1994), 175 cited in: Juss, *International Migration and Global Justice*, *supra* note 60 at 177.

¹¹⁷ See section 4.1, below, for further analysis.

In conclusion, this section has illustrated the “research divide” between the study of the three categories of forced migrants most often discussed in the literature: refugees, internally displaced persons and so-called “environmental refugees”. It has been shown that the definitions and labels used to separate these subsets of forced migrants are rapidly becoming blurred on the ground, and because of the increasing interconnection of human displacements, fail to do justice to the inherent complexity of migration. Thus, we can agree with Hansen that “our work should not be determined by these traditional categories or by the limitations of current literatures” and that “there is an immense potential for theoretical advances in our understanding of human behaviour (in general and in crises) by comparative studies of already-existing case material in currently-separated literatures”.¹¹⁸

¹¹⁸ Art Hansen, "Future Directions in the Study of Forced Migration" (Keynote address presented at 5th International Research and Advisory Panel Conference on Forced Migration, Centre for Refugee Studies, Moi University, Eldoret, Kenya, 9–12 April 1996).

The conclusion, as demonstrated in Chapter Three, is that the state of the world today often “turns the question of the voluntary or involuntary nature of migration into a macabre exercise”.¹¹⁹ While the exploration in Section 3.1 of the historical roots of the forced/voluntary migration dichotomy reveals that, following WWII, the justification for separating migrants from refugees had to do more with policy than with an interest in protecting displaced populations, Sections 3.2 and 3.3 explore the extent to which the phenomenon of forced migration is fraught with contradictory interpretations and connotations. The difficulty in distinguishing between forced and voluntary migrants (given the close connection between migration and a range of human rights violations) and between the different subsets of forced migrants (given the commonalities of experience) is emphasized, with the aim of demonstrating how the various labels in the field of migration fail to accurately define the reality of people’s lives.

To deal with this situation, thoughtful voices among the scholars suggest that the integration of refugee studies into the family of migration studies has not gone far enough. Thus, because the various labels now in use fail to capture the reality of peoples’ lives, “the study of refugees should be linked theoretically and practically to the study of other types of migration generally, ranging from voluntary, internal, rural–urban migrants to international movements of tourism; corporate, diplomatic, and military transfers; educational and other forms of temporary migration and the like”.¹²⁰ To sustain this argument, they defend the idea that the labels were invented by host states to justify management responses which assign greater value to some migrants than to others, a point illustrated in this

¹¹⁹ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths LexisNexis, 2002) at 226.

¹²⁰ Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", *supra* note 92 at 351; correspondence with the author in May and June 2006.

section and in the section below, on the international legal construction of the refugee and trafficked person. They argue that, as scholars, we “have an ethical responsibility not to adopt categorical distinctions which, while perhaps administratively convenient, fail to reflect true substantive differences” and “[do not] do justice to the reality of peoples’ lives”.¹²¹ Others defend an opposite view, arguing that “being a refugee is appropriately recognized as distinct from being a forced migrant” and that “the much greater risk [of administrative manipulation] is that officials will fail to take account of the specificity of the duties that follow from refugee status if refugees come to be seen as no more than (forced) migrants”.¹²² They refer to the “refugee status”, with its “unique ethical and consequential legal entitlement to make claims on the international community”¹²³, meaning by this two things. First, that the refugee is a person “uniquely deserving protection in view not just of [her] movement to avoid the risk of serious harm, but because of the fundamental social disfranchisement that gives rise to the underlying risk”. Second, because “among the population of disfranchised persons who have moved to avoid risk to basic rights, the presence of refugees outside their own state brings them within the unconditional protective competence of the international community”.¹²⁴ However, as shown below in the section on the reduction of the identity of the refugee – which questions the refugee’s “exceptional deservingness” – the basis for refugeehood is not to be found in humanitarianism but rather in powerful states attaining their own national goals.¹²⁵ In such a context, it is necessary to challenge the neutrality of

¹²¹ *Ibid.*, at 351.

¹²² *Ibid.* at 352. See also *supra* note 90 & accompanying text.

¹²³ *Ibid.* at 352.

¹²⁴ *Ibid.* at 354.

¹²⁵ It should be noted that Hathaway clearly acknowledges international refugee law as reflecting the strategic interests of the most powerful states in the twentieth century: see *supra* note 13. See also section 4.1 for more on this topic. However, he strongly defends the specificity of the refugee regime, making a strong distinction between refugees and the other migrants. For further analysis, see page 232 & following, above.

refugee law and to question the basis on which the specificity of refugeehood rests. The same analysis will be applied to the trafficked person, with the aim of demonstrating that their status reflects a narrow conception of trafficking that is in the policy interests of Western receiving societies.

Chapter 4. The International Legal Construction of the Refugee and the Trafficked Person

International law in the field of migration has traditionally been concerned with particular individualized categories of migrants, refugees and trafficked persons being the two unique categories of forced migrants which have a clear, legally defined status in international law. Despite the fifty years separating the inception of the two main instruments related to refugees and trafficked persons, it is possible to formulate some shared conclusions challenging the myth of the law's neutrality: international refugee law and international anti-trafficking law and policy have sought to deny their own limitations by seeking to portray the phenomena of refugeehood and trafficking as reducible to a legal definition imbued with a fixed identity. This fixed identity, which fails to capture the reality of a vast majority of migrants, reflects dominant assumptions mainly based on Western receiving countries' political interests as to what refugees and trafficked persons should be, excluding from the traditional discourse many individuals who might otherwise have qualified as such. Thus, I will demonstrate below that to distinguish refugees and trafficked persons from other forced migrants is to implicitly suggest that refugees and trafficked persons are "more important or more deserving" and that the recognition of "the distinctiveness of their circumstances" is not as objective as stated.¹²⁶

The first section looks at the international legal construction of the refugee and analyses how alienage and persecution, the two essential

¹²⁶ "To distinguish refugees from other forced migrants is not to suggest that refugees are more important or more deserving, but simply to recognize the distinctiveness of their circumstances": James C. Hathaway, "Is Refugee Status Really Elitist? An Answer to the Ethical Challenge" in J.-Y. and Vanheule Carlier, D. , eds, *Europe and Refugees: A Challenge?* (The Hague: Kluwer, 1997), 79, cited in: Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" , *supra* note 92 at 358.

conditions of the internationally binding definition of refugee, have over time helped to contain refugee movements. There is also a focus on the position of refugee women in refugee law: women have long been excluded from traditional discourse concerning the refugee, but the advent of a human rights framework, which acts as a barometer regarding the question of whether harm amounts to persecution, has provided a basis for the incorporation of many types of harm specific to women. Although these jurisprudential developments are very positive, they reflect strong stereotypical attitudes to gender and ethno-national cultures, which considerably reduce the identity of refugee women (4.1). The second section examines the international legal construction of the trafficked person. Drawing on well-established literature in the field of gender and migration studies, it demonstrates how the representation of all migrating sex workers as “victims” prevents a deeper understanding of the complexities surrounding issues of consent and coercion. Another source of criticism is the UN Trafficking Protocol with its focus on crime and punishment: by incorporating anti-trafficking initiatives in the framework of the fight against transnational organized crime, the trafficking of persons becomes the target of border control, clearly associated with the phenomenon of irregular international migration (4.2).

4.1. The Reduction of the Refugee's Identity

The unique status of the refugee in international law comes under the terms of the 1951 Refugee Convention and the 1967 Refugee Protocol.¹²⁷ Legally, a refugee is a person outside her country, who is unable or unwilling to return because of a well-founded fear of persecution on account of race, religion, nationality, membership in a political social group, or political opinion (article 1 of the 1951 Refugee Convention). The key distinguishing element in these definitions is the stipulation that an international border must be crossed, i.e., the refugee claimant must be outside his or her country of origin. The refugee definition places additional emphasis on individually targeted persecution, although two regional instruments in Africa and the Americas, respectively, enlarged the concept of refugee to include not only individual persecution, but also armed conflict and massive violations of human rights.¹²⁸ In other words, two requirements are constitutive of the refugee identity: alienage and individual persecution as the basis of the refugee's civil and political

¹²⁷ *Convention Relating to the Status of Refugees*, 14 December 1950, 189 U.N.T.S. 137 (entered into force 22 April 1954) [1951 Refugee Convention] ; *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267 (entered into force 04 October 1967) [Refugee Protocol] . The 1967 Protocol broadened the refugee definition by removing the geographic and temporal limitation of the 1951 Refugee Convention. The Convention restricted this status to people who became refugees as a result of events which occurred in Europe prior to January 1951.

¹²⁸ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974) , article 1.2 [OAU Refugee Convention]; *Cartagena Declaration on Refugees*, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) (entered into force 22 November 1984) , para. III.3 [Cartagena Declaration]. However, unlike the refugee definition in the 1969 OAU Refugee Convention, a refugee under the 1984 Cartagena Declaration must show a link between herself and the real risk of harm (all applicants must demonstrate that "their lives, safety or freedom have been threatened" – para. 3). This demand is similar to that of the UN Refugee Convention, which requires people to show that they are at risk of individualized persecution. Interestingly, Turton writes: "No sooner had the concept of refugee been confined to this legal box, than it began trying to jump out of it": Turton, "Conceptualising Forced Migration", *supra* note 41 at 13. Even though there are several legal definitions of the refugee, only one is binding for the international community in its entirety, the 1951 Refugee Definition.

status. These requirements reflect the strategic conceptualization of the 1951 Refugee Convention at the time of its drafting. Now, however, the apparently neutral formulation of the refugee definition needs to be critically assessed, though any criticism of the 1951 Refugee Convention should not disregard the specific historical context in which it was adopted. Although the refugee rights regime is a product of the twentieth century, the origins of refugee rights are closely intertwined with the emergence of a general system of international human rights law. The 1951 Refugee Convention was only the second convention to be adopted by the United Nations, while the only contemporaneous formulation of international human rights law was the 1948 Universal Declaration of Human Rights, an unenforceable General Assembly Resolution.¹²⁹ At that time, the entire idea of interstate supervision of human rights was new and not fully accepted by states, whereas all international law predating the UN Charter in 1945 was notoriously a “law of nations” rather than a “law of peoples”.¹³⁰ It should also be remembered that international refugee protection did not originate with humanitarian concern for the victims. Indeed, early efforts by the international legal community to protect refugees stemmed from two exoduses in the years following the end of World War I (hereafter WWI): the Russian Revolution of 1917 (over one million people left Russia between 1917 and 1922), and the Turkish persecution of Armenians in the 1920s (when hundreds of thousands of people escaped from Turkey). These two groups of migrants could not seek the traditional remedy of diplomatic protection from their country of nationality: most had no valid identity or travel documents to prove their nationality to a cooperative

¹²⁹ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3d Sess., Supp. No 13, U.N. Doc A/810 (1948) 71. The Refugee Convention was preceded by the UN *Convention on the Prevention and Punishment of the Crime of Genocide: Convention on the Prevention and Punishment of the Crime of Genocide*, 09 December 1948, 78 U.N.T.S. 277, UNGA Res. 260A (III) (entered into force 12 January 1951) .

¹³⁰ Lillich writes: “In such a world, the presence of ‘objects’ called human beings was an annoying problem, a perceived threat, one might say, to the logic of the system”: Richard B. Lillich, *The Human Rights of Aliens* (Manchester: Manchester University Press, 1984) at 1.

state, and those who fled the Bolshevik Revolution were formally denationalized by the new Soviet government. It is in this specific context that states

... confronted by largely unstoppable flows of desperate people who did not fit the assumptions of the international legal system ... agreed that it was in their mutual self-interest to enfranchise refugees within the ranks of protected aliens. To have decided otherwise would have exposed them to the continuing social chaos of unauthorized and desperate foreigners in their midst.¹³¹

This section is divided in two. In the first part, I explore how alienage and individual persecution, two essential conditions of the internationally binding definition of refugee, have, over time, become useful concepts for host states, allowing them to contain the refugee phenomenon within the countries of origin and to a limited category of movements (4.1.1). The second part looks at the evolution of the definition of refugee in jurisprudential terms. Particular attention is paid to refugee women who were, until recently, notable for remaining invisible in national refugee determination processes. Despite increasing recognition of equitable refugee protection for women within national jurisdictions, the imperative driving refugee law as applied nationally has led to stereotyping in which some gendered behaviours are ascribed to other “barbaric” cultures. This shaping of the identity of the refugee woman as a “Cultural Other”, a “victim” of barbaric cultures, makes it possible to portray refugee women outside this narrow identity as “bogus”, thereby justifying a limited range of assistance for them (4.1.2).

¹³¹ See: James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge, UK ; New York: Cambridge University Press, 2005) at 85. See also: James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 1; Parrish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection", *supra* note 30 at 228.

4.1.1. “Alienage” and Individual Persecution in Refugee Law

The common reasons for distinguishing refugees from other migrants can be summarized as follows:

... a person is a refugee only if able to show that the underlying risk prompting flight accrues *because of* fundamental disfranchisement within the home state community... refugee status is a recognition [that] refugees are persons who are seriously at risk because of who they are or what they believe. Refugees are therefore doubly deserving: not only is the risk they have fled profoundly serious, but their exposure to such risk is based on characteristics which are either unchangeable (like race or nationality) or so fundamental that they should not have to be renounced in order to be safe (like religion or political opinion).

... Refugee status follows not simply from being doubly deserving, but is also a functional designation directly linked to the capacity of the international community to guarantee a remedy. The alienage requirement limits refugee status to doubly deserving persons who, by crossing an international border, are now within the unqualified protective competence of the international community. [author’s emphasis]¹³²

Being a refugee means, therefore, being a person who deserves protection AND who can be guaranteed the substitute or surrogate protection of the international community. To give a concrete example, if a person is at risk of persecution, she still needs to meet the “alienage requirement” of refugee law. In the following pages, I will show that the definition of the refugee as “alien” and the reduction of the refugee identity through the privileging of certain forms of human rights violations are the principal means operating to ensure a limited regime of protection for refugees. This thereby excludes a large proportion of migrants who do not fit within the narrow box of the “refugee” and means that the refugee

¹³² Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", *supra* note 92 at 352.

definition and the reduction of identity are in fact driven more by policy than by humanitarian considerations.

Alienage: A Reflection of the Limited Reach of International Law and a Malleable Concept

Alienage is a condition *sine qua non* of refugee status which exists in all definitions of the refugee, both regional and international. The concept of “alienage” denotes the physical separation of the refugee from her country of nationality or domicile by the crossing of an international border, which completes the process of the refugee’s disenfranchisement from her state of origin. In fact, the condition of alienage rests upon the basis that it is only when outside the territories of a state that a person can be said to have lost or entirely surrendered the protection of the state:

Attachment to the territories of a state secures some of the bond between an individual and the political community ... Each time the refugee claims that she is outside the state due to a ‘well-founded fear of persecution’ (Convention, Article 1.A (2)) we revisit once again the ‘materiality’ of nation. As each refugee arrives at the determination procedures of a state, we are reminded that she comes from another territorially determined ‘place’.¹³³

The strict insistence on this territorial criterion has prompted concern that there is a mismatch between the definition of “refugee” and the human suffering consequent to involuntary migration. It has been argued, for instance, that the exclusion of IDPs is profoundly unfair because alienage is a concept which “immobilises large sections of the population, particularly the young and vulnerable and those upon whom

¹³³ Patricia Tuitt, “Refugees, Nations, Laws and the Territorialization of Violence” in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004) at 42 See also: Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 119.

they depend”.¹³⁴ Thus, the legal concept of alienage would serve to “separate the strong from the weak” which is done precisely because vulnerable refugees (generally women, children and the disabled) constitute a greater “burden” on receiving states than the adult male refugee who tends to benefit from the “exilic bias of refugee law”.¹³⁵ If it is true that alienage does not recognize the existence of the numerous barriers which make it impossible for all to benefit from international protection, there is an historical rationale for the requirement that only persons outside their state of origin be eligible for Convention refugee status. First, the Convention was drafted with a specific purpose in the context of limited international resources: its intent was not to relieve the suffering of all involuntary migrants, but rather to deal only with the problem of legal protection and status. Its goal was to assist a sub-set of involuntary migrants composed of persons who were “outside their own countries [and] who lacked the protection of a government” and who consequently required short-term surrogate international rights until they acquired new or renewed national protection. Internal refugee displacements, while of humanitarian note, “were separate problems of a different character”, the alleviation of which would demand a more sustained commitment of resources than was available to the international community.¹³⁶ Second, there was a very practical concern that the inclusion of “internal refugees” in the international protection regime might prompt states to attempt to shift responsibility for the well-being of large parts of their own population to the world community. The obligations of states under the Convention would thereby be increased because fewer

¹³⁴ Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 12. Tuitt see IDPs as “internal refugees”. For further analysis, see page 232 & following, above.

¹³⁵ Howard Adelman, “Refuge or Asylum. A Philosophical. Perspective” (1988) 1: 1 *Int'l J. Refugee. L.* 7 at 9, cited in Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 13.

¹³⁶ Statement by Mrs. Roosevelt of the United States of America, 5 UNGAOR at p.473, 2 December 1949, quoted in Hathaway, *The Law of Refugee Status*, *supra* note 136 at 29.

states would be likely to participate in the Convention regime. Last but not least, there was some anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the state within which the refugee resided.¹³⁷ In sum, the best that could be achieved in 1951 within the context of the accepted rules of international law was probably the sheltering of such persons as were able to liberate themselves from the territorial jurisdiction of a persecutory state. The primary logic behind the lack of juridical status of “internal refugees” was a practical but not a conceptual one: it had to do with a concern not to undermine the protection available to refugees under the 1951 Refugee Convention, which makes alienage an essential element of the legal definition of a refugee.

To illustrate the idea that the three factors which dictated the exclusion of internal refugees were “a reflection of the limited reach of international law”¹³⁸ we need to return to the origins of refugee rights. This involves briefly highlighting the role of two earlier legal regimes from which the refugee rights regime draws, and giving a short explanation of the development of a specific international refugee protection regime.

The refugee rights regime draws on earlier precedents of the law of State Responsibility for injuries to aliens (International Aliens Law) and international efforts to protect national minorities (international protection of minorities).

¹³⁷ *Ibid.* at 29-33.

¹³⁸ *Ibid.* at 31.

In ancient times, the alien was commonly not considered subject of rights and obligations. As the Roman Empire expanded, aliens were gradually given protection under the *ius gentium*, a law made applicable to foreigners as well to citizens, as distinguished from the *ius civile* which was applied exclusively to Roman citizens. Further improvement in the treatment of aliens came with the spread of Christianity and the idea of the unity of mankind. However, in the feudal period, the idea of boundaries became very clearly defined and the situation of aliens deteriorated. With the formation of the modern national states, a different attitude toward aliens began to develop: newly emergent nation-states of Western Europe took a more active interest in fostering the well-being of their nationals abroad.¹³⁹ By the end of the Middle Ages two principal methods had emerged for the protection of aliens, both in the area of treaty law. The first was the system of licensed reprisals by injured aliens which took the form of letters of reprisal granted by an injured alien's sovereign: states would agree by treaty to restrict, or to altogether refrain from granting letters of reprisal. The second was the granting of privileges for the alien community *en masse*: groups of merchants negotiated for various privileges in the foreign states where they traded.¹⁴⁰ The first method helped to clarify the concept of diplomatic protection, which became a doctrine of general international law rather than a treaty matter. The second method, the practice of negotiating privileges from foreign governments, led to the parallel development of a bilateral treaty system for the protection of aliens. The rise of diplomatic protection began in a context where states in general – and the colonial powers in particular – were loath to see their citizens injured by foreigners. One may recall that this period was an age of mercantile theory and practice, based upon the

¹³⁹ See: Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (The Hague; London: Martinus Nijhoff, 2001) at 35-73. See also Part I, text accompanying note 10, for further analysis of the modern system of sovereign nation-states.

¹⁴⁰ B.Lillich, *The Human Rights of Aliens*, *supra* note 130 at 5-8.

principle that the economic growth of one country necessarily came about at the expense of other countries. Accordingly, states became more closely involved in the supervision and protection of their citizens abroad, since “a loss sustained by an individual was considered a loss to the nation as well”.¹⁴¹ “The more serious side of this frenzied activity”, Lillich writes, “manifested itself in the development of international legal doctrine to the point where it took express cognizance of the right of the State to protect its citizens abroad”.¹⁴² International law at that time was oriented not towards eliminating the use of force in the international community but rather towards the gradual elaboration of rules concerning just and unjust causes of war. Thus, if a state committed a wrong against an individual who was an alien, and if that wrong was not redressed, it was then transformed into a wrong against the alien’s state of nationality. Once two states were involved, traditional international law handled the issue via the usual mechanisms (diplomacy, arbitration, and eventually war). Another major development of pre-twentieth century law was the use of bilateral treaties for the protection of aliens, whereby states would negotiate with foreign powers for various privileges, usually relating to such matters as safe passage and basic civil rights for religious pilgrims or for commercial and trading rights. During the eighteenth century, the practice of concluding commercial treaties on a genuinely equal basis was instituted. These treaties, which came to be called “Friendship, Commerce, and Navigation Treaties”, provided certain rights and privileges to be granted to those nationals of the states parties who traded in each other’s territory.

¹⁴¹ *Ibid.* at 9.

¹⁴² *Ibid.* at 9. It was Vattel who set forth the theoretical underpinning of the doctrine in 1758, in his classic treatise on the *Law of Nations*: “[W]hoever uses a citizen ill”, writes Vattel, “indirectly offends the State, which is bound to protect this citizen”: Emerich De Vattel, *The Law of Nations*, ed. by J. Chitty (Philadelphia: Johnson and Company, 1883) at 161. Lillich notes, arguably (*ibid* at page 9): “With one *caveat*, this statement may be taken as the classic expression of the traditional right of diplomatic protection. The *caveat* is that Vattel overstated the matter when he said that the injured party’s state was *bound* to protect him. The doctrine as it actually developed was that the State was *entitled* to protect its citizens abroad if it so chose. However, it was under no duty, domestically or internationally, to do so”(author’s emphasis).

The network of “Friendship, Commerce, and Navigation Treaties”, which grew considerably during the course of the nineteenth century, included so many provisions relating to the welfare of alien merchants and traders that one scholar has characterized them as collectively embodying an international Bill of Rights.¹⁴³ With these treaties, the national states undertook the task of protecting the interests of their citizens abroad, which gave birth to the doctrine of State Responsibility. More precisely, these treaties usually guaranteed that each state party would protect the person and property of the other state’s nationals: they provided for the right of “free sojourn”; the right to engage in trade and industry – including the right of permanent settlement; protection from discriminatory taxes and similar imposts; free access to courts; freedom to worship and exemption from military service. But the protection of aliens was not limited to these rights alone: because the states most involved in foreign commerce and investment were particularly anxious to garner additional protection for their nationals working abroad, the number of rights accorded to citizens of a particular state varied according to the importance attached to the bilateral relationship. Another innovation in the area of treaty law, which originated in the eighteenth century and then became widespread during the nineteenth century, was the most-favoured-nation clause. This was a technical device, a mechanism for automatically conferring rights of various kinds on nationals of the signatory powers, thereby, in many cases, enabling states to dispense with negotiating and renegotiating each and every concession with each and every trading partner.¹⁴⁴

¹⁴³ Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan Co., 1947) at 200, cited in: B.Lillich, *The Human Rights of Aliens*, *supra* note 130 at 19. See also Tiburcio, page xvii, who speak of a “sort of customary international law”: Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, *supra* note 139 at 39.

¹⁴⁴ B.Lillich, *The Human Rights of Aliens*, *supra* note 130 at 20. See also: Hathaway, *The Rights of Refugees under International Law*, *supra* note 131 at 75-78. Quoting Herman Walker, “Modern Treaties of. Friendship Commerce and Navigation” (1958) 42 Minn. L. Rev. 805 at 810-12.

While International Aliens Law might at first glance appear to be an important source of rights for refugees, it is not really about the rights of aliens as such, but rather about the rights and duties of states. Lillich explains: “The fate of the individual alien is worse than secondary in this scheme: it is doctrinally non-existent, because the individual, in the eyes of traditional international law, like the alien of the Greek City-State regime, is a non-person”.¹⁴⁵ Thus, the objective of International Aliens Law is more to reconcile the conflicting claims of governments arising when persons under the protection of one state are physically present in the sovereign state of another than to restore the individual alien to a pre-injury position. And although aliens may benefit indirectly from the assertion of claims by their national state, they can “neither require action to be taken to vindicate their loss, nor even compel their state to share with them whatever damages are recovered in the event of a successful claim”.¹⁴⁶ Moreover, refugees are unlikely to derive protection from the general principles of Aliens Law because they lack a relationship with the state of nationality empowered to advance a claim to protection: since an alien is widely defined in Aliens Law as a non-national, the question of nationality is of foremost importance for the development of this legal system. Aliens Law was, however, the first legal system to deny the absolute rights of states to treat persons within their jurisdiction in whatever manner they deemed appropriate and to recognize the special vulnerabilities of persons outside their national state. This marked a critical conceptual breakthrough in international law, which laid the groundwork for subsequent development of the refugee rights regime.¹⁴⁷

¹⁴⁵ B.Lillich, *The Human Rights of Aliens*, *supra* note 130 at 12.

¹⁴⁶ Hathaway, *The Rights of Refugees under International Law*, *supra* note 131 at 78. With the doctrine of State Responsibility, only the state has legitimacy to present a claim. However, according to some human rights instruments, the person herself has now the possibility of presenting her case.

¹⁴⁷ *Ibid.* at 83. Two different standards of the responsibility of states competed for general acceptance in the 19th and 20th century. One of these standards is described by the doctrine as the “national treatment”, which provides that aliens should receive equal

The second legal system to influence the structure of the international refugee rights regime was minority rights. The first international regime of minority protection was put into place following WWI within the framework of the League of Nations. Like International Aliens Law, it was intended to advance the interests of states: its specific goal was to require defeated states to respect ethnic and religious minority rights in the hope of limiting the potential for future international conflict. There was, therefore, a direct link between defending minority rights and providing for the security and stability of the international community as a whole. To fail to do so, wrote President Wilson, would have adversely affected the stability and security of the European continent, the maintenance of which was clearly in the national interest of the Great Powers.¹⁴⁸ The League of Nations system is widely credited both for acknowledging the existence of minority rights and for legitimizing minority protection as an area of international concern. This system was not, however, a universal mechanism for the protection of human rights: the duty to respect these rights was imposed on governments of defeated states as a condition to the restoration of sovereign authority over their territories or on a smaller number of states that made general declarations

and only equal treatment with nationals. The second standard is described as that of a “minimum international standard”, which supports the idea that, no matter how a state may treat its nationals, there are certain minimum standards of human treatment that cannot be violated in relation to aliens. Since WWII, the subject has been linked to the doctrine of human rights, in which the “minimum international standard” approach has been adopted: Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, *supra* note 139 at xvii.

¹⁴⁸ To quote President Wilson: “We are trying to make a peaceful settlement, that is to say, to eliminate those elements of disturbance so far as possible which may interfere with the peace of the world, and we are trying to make an equitable distribution of territories according to the race, the ethnographical character of the people inhabiting these territories . . . We can not afford to guarantee territorial settlements which we do not believe to be right, and we can not agree to leave elements of disturbance unremoved, which we believe will disturb the peace of the world. Take the rights of minorities. Nothing I venture to say is more likely to disturb the peace of the world than the treatment which might, in certain cases, be meted out to minorities. And therefore, if the Great Powers are to guarantee the peace of the world in any sense, is it unjust that they should be satisfied that the proper and necessary guarantees have been given?”: Speech by United States President Wilson to the Peace Conference, 31 May 1919; cited in: Cyril Edwin Black & Ernst Christian Helmreich, *Twentieth Century Europe* (New York: Knopf, 1959) at 159).

to respect minority rights a condition of admission to the League of Nations. But from the very beginning, many of the signatories of the various minority treaties tried to sabotage these treaties, which "irked their national pride", and were seen as an "infringement of their sovereignty".¹⁴⁹ More importantly, when the signatories began to intentionally violate these treaties, neither the League as a collective, nor any other state or organization, attempted to uphold their provisions. "From then on the whole minority system went into a rapid decline. Instead of reason and consultation, force became the arbiter".¹⁵⁰ The international community also showed relatively little interest in the establishment of international systems for the protection of minority rights during the formative years of the United Nations and other international and regional organizations, post-World War II. The omission of any reference to minorities in the UN Charter and the Universal Declaration is often attributed, at least in part, to the opposition of some Eastern and Central European nations. True or not, these countries believed that various irredentist movements, which in the 1930s had been encouraged by Nazi Germany and its allies, had their source in the League of Nations' minorities system.¹⁵¹ Although minorities were still unable to participate in the process, states being the only parties authorized to enact and enforce international law, this system nonetheless marked a major advance over the conceptual framework of International Aliens Law:

Whereas the concern under aliens law had been simply to set standards for the treatment abroad of a state's own nationals, the Minorities Treaties provided for external scrutiny of the relationship between foreign citizens and their own government. Minorities were guaranteed an extensive array of basic civil and political entitlements, access to public employment, the right to distinct social, cultural and

¹⁴⁹ *Ibid.* at 159-61.

¹⁵⁰ *Ibid.*

¹⁵¹ See especially: Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights" (1997) 19: 4 Hum. Rts.Q. 703 at 720-21; Jelena Pejic, "Minority Rights in International Law" (1997) 19: 3 Hum. Rts.Q. 666.

educational institutions, language rights and an equitable share of public funding.¹⁵²

In conclusion, the emergence of the refugee rights regime needs to be seen in relation to the conceptual contributions made by each of these two earlier bodies of law: clearly, the 1951 Refugee Convention expanded on the achievements of the League of Nations system regarding the protection of national minorities, which in turn expanded on the achievements of International Aliens Law. If the concern of the international community moved from simply facilitating national protective efforts to placing the refugee within the effective scope of international protection, the rationale behind the addition of a territorial dimension to the refugee definition was consequently “not to divide involuntary migrants into those who are worthy of assistance and those who are not deserving, but was instead to define the scope of refugee law in a realistic and workable way”.¹⁵³

If we agree with Shacknove and Hathaway that alienage “is not a constitutive element of refugeehood” but rather “a practical condition precedent to placing [the refugee] within the effective scope of international protection”,¹⁵⁴ then the concept of alienage has become, over time, a “malleable concept” allowing “states, according to their desire, to retain control over the world refugee map by positive manipulation of the conditions which determine the ability of refugees to cross territorial borders”.¹⁵⁵ For instance, Chapter Two has already shown that host states

¹⁵² Hathaway, *The Rights of Refugees under International Law*, *supra* note 131 at 83.

¹⁵³ Hathaway, *The Law of Refugee Status*, *supra* note 136 at 32.

¹⁵⁴ *Ibid.* See also Barbara E. Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford [Oxfordshire] ; New York: Oxford University Press, 1986); Andrew Shacknove, “Who Is a Refugee?” (1985) 95 *Ethics* 274.

¹⁵⁵ Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 12.

have increased the use of visa restrictions, coupled with carrier sanctions.¹⁵⁶ While visas have purposes other than stopping the movement of asylum seekers, the link with asylum has become clear over time with, for example, the imposition of visa requirements for Tamils by the British government in 1986, for Algerians by France in the same year and, most recently, for Hungarians by Canada in 2002. In almost all cases, asylum seekers wishing to travel to the West have to apply for visas, while Western states tend to deny visas to those believed to be seeking asylum.¹⁵⁷ Pre-inspection regime is another core strategy in the control of migration at a distance.¹⁵⁸ Pre-inspection agreements enable countries to post immigration officers at airports, train stations or ports of foreign countries to screen out improperly documented migrants. By the end of the 1990s, the UK, the US, Canada, Sweden, France, Australia, Denmark, Germany and the Netherlands employed immigration staff in select foreign airports, consulates and embassies, to detect potential irregular migrants. In 2004, following several Council conclusions, the EU formally established a network of Immigration Liaison Officers to coordinate its immigration control activities and train airline staff at foreign airports to recognize fraudulent or incomplete documentation.¹⁵⁹ Even the United Kingdom, a non-Schengen member, has acknowledged the importance of liaison officers within the context of EU cooperation: "Our carriers' liability legislation places the onus on carriers to check that passengers are

¹⁵⁶ See chapter 2, section 2.2.1, above, for more on this topic.

¹⁵⁷ M.J. Gibney & R. Hansen, "Asylum Policy in the West: Past Trends, Future Possibilities" (September 2003) Discussion Paper No.2003/68, online: United Nations University <<http://www.ciaonet.org/wps/gim03/>> (last modified: January 2004). For further details, see also: Eric Neumayer, "Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalised World" (Annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA, 22 March 2006).

¹⁵⁸ See the introduction to chapter 2 ("The Changing Topography of the Border"), above, for further analysis of remote control in the regime of mobility.

¹⁵⁹ See: European Commission, "Readmission Agreement" (Press Release: MEMO/05/351, 05 October 2005), online: Europa <<http://europa.eu.int/rapid/>>(accessed on 08 August 2006).

properly documented for travel to the UK. ALOs [Airline Liaison Officers] work in partnership with airlines abroad, offering advice on the acceptability of documents presented for travel. The Government is committed to playing a full part in the EU's action to improve the co-ordination of European ALO activities and enhance their training programmes."¹⁶⁰ Canadian government officials are particularly careful to emphasize that immigration control officers do not have extraterritorial powers and act solely in an advisory capacity. Yet they do not appear to have any mandate to examine the intercepted person's motivation for migration or to address any need for international protection.¹⁶¹ All these strategies effectively deny primary access to determination procedures in Western receiving states and this, despite the fact that the burdens and responsibilities of offering protection to refugees are today unfairly apportioned: more than 90 per cent of refugees remain in the less-developed world, with 18 per cent concentrated in a few states: Jordan, Lebanon, Syria, Chad, Tanzania, Iran and Sierra Leone, which host more than one refugee for every 100 citizens. In contrast, Australia's refugee to citizen ratio is nearly 1:1,400; the European Union's is roughly 1:2,000; and Japan's approaches 1:50,000.¹⁶² They also reveal that what really

¹⁶⁰ Home Office, *Secure Borders, Safe Haven. Integration with Diversity in Modern Britain* (Norwich: Secretary of State for the Home Department, 2002) at 92-93 For further details, see also: François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada" (2006) 12: 1 *Choice*, online: Institute for Research on Public Policy <<http://www.irpp.org/choices/archive/vol12no1.pdf>>(accessed on 02 August 2006); Rens van Munster, "The EU and the Management of Immigration Risk in the Area of Freedom, Security and Justice" (2005) 12/2005, online: University of Southern Denmark, Political Science Publications <<http://www.sam.sdu.dk/politics/publikationer/05Rens12.pdf>>(accessed on 12 July 2006) at 9.

¹⁶¹ In Canada's intervention at UNHCR's 18th Standing Committee session in 2001, Canadian representative Gerry van Kessel said: "[Canada's] immigration control officers do not have extraterritorial power to enforce our Immigration Act. They act solely as advisers and liaison officers with airlines and local authorities. Canada has very strong views against the refoulement of refugees and our officers do not engage in refoulement or support such activities." Quoted in : Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21: 4 *Refuge* 624.

¹⁶² Hathaway, "Why Refugee Law Still Matters (Feature)", *supra* note 92. Hathaway writes: "Not only is the less-developed world hosting the overwhelming share of refugees, but it does so with a small fraction of the resources presently allocated to processing and

makes a person an IDP or a refugee in the eyes of international law has sometimes more to do with the strategies developed by migrants to overcome border control mechanisms than anything else. We can therefore conclude that the “extremely hostile and life-threatening conditions in escaping across international borders” compel many potential refugees, which “invariably includes the weak and vulnerable, such as the aged and children, particularly unaccompanied, who are generally less amenable to long distance travel” to remain in IDP camps within their own countries. Viewed from this perspective, the distinction between IDPs and refugees for the purpose of their material aid and protection seems artificial.¹⁶³

To conclude, in 1951, there was a comprehensible historical rationale for the requirement that only persons outside their state be eligible for Convention refugee status. Yet, with the passage of time, the concept of alienage has clearly become a mechanism which allows host states to contain refugees within their countries of origin. The alienage requirement has worked in such a way that refugee phenomena in Western receiving societies are portrayed, for the most part, as “having an endemic mobilizing force”. As Tuitt writes, “the refugee’s international legal identity creates within the notion of movement a sense of need, of urgency, of humanitarian right – the very essence of refugeehood even outside the imaginings of law – which her still suffering has not, within such definitions, been allowed to convey”.¹⁶⁴

assisting the tiny minority of refugees who reach richer states”. See section 1.2, above, for more on this topic.

¹⁶³ Islam, “The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable”, *supra* note 68 at 361-62. See also: Mark Vincent & Birgitte Refslund Sorenson, *Caught between Borders: Response Strategies of the Internally Displaced* (London: Pluto Press, 2001) at 2. For more on this topic, see section 3.3.1, above.

¹⁶⁴ Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 14.

While alienage is an essential condition of the internationally binding definition of refugee within Article 1 A(2) of the 1951 Refugee Convention, another important criterion is required to be recognized as a refugee: the reason for leaving one's country of origin has to be an individual well-founded fear of persecution resulting from one or more of the five causes listed in the definition (race, religion, nationality, membership of a particular social group, or political opinion). This requirement reflects the strategic use of the Refugee Convention as a political instrument in the East-West divide, a point already raised briefly in the previous section on the history of the separation of refugee and migrant regimes, and which is developed at length below.

The Fear of Civil or Political Status-based Persecution: A Reflection of the Convention's Pro-Western Political Values

"From the debates surrounding the drafting of the statute of the High Commissioner and the Convention itself", writes Hathaway, "it is apparent that states were busy trying to limit the scope of refugee protection in ways that suited their particularized national interests".¹⁶⁵ By reducing refugee identity through the privileging of certain forms of human rights violations, Western states were successful in giving priority in protection matters to persons whose flight was motivated by pro-Western political values.

¹⁶⁵ Hathaway, "International Refugee Law: Humanitarian Standard or Protectionist Ploy?", *supra* note 4 at 184.

Strong disagreement concerning the refugee definition arose in the international community with the emergence, in the 1930s, of an individualist approach to the definition. Analysis of the international refugee accords, which occurred between 1920 and 1950, reveals three distinct approaches to refugee definition. From 1920 to 1935, the League of Nations defined refugees according to group affiliation, specifically in relation to their country of origin. It was the general policy of the League of Nations to extend protection to those groups of persons whose nationality had been withdrawn. For instance, the definition of a Russian refugee, adopted in May 1926 by the Office of the High Commissioner for Refugees, included “any person of Russian origin who does not enjoy, or who no longer enjoys the protection of the government of the Soviet Union and who has not acquired another nationality”.¹⁶⁶ Refugee agreements adopted between 1935 and 1939 embodied a “social approach to refugee definition”¹⁶⁷: the categories of persons eligible for international assistance encompassed groups adversely affected by a particular social or political event, and not only those who had a defined status within the international legal system. The objective, then, was to continue assisting persons without national legal protection and in the interim to help the victims of events which resulted in a *de facto* loss of state protection (essentially those persons caught in the dislocation caused by Germany’s National Socialist Regime.). The refugee accords adopted between 1938 and 1950 were revolutionary in their rejection of group determination of refugee status: refugee determination was processed individually, and the refugee became “a person in search of an escape from perceived injustice or fundamental incompatibility with her home state [who distrusted] the authorities who ha[d] rendered continued residence in her country of origin either impossible or intolerable, and desire[d] the opportunity to build a

¹⁶⁶ François Crépeau & Delphine Nakache, "Refugees" in Shelton D L., ed, *Encyclopaedia of Genocide and Crimes against Humanity* (New York: Macmillan Reference, 2004).

¹⁶⁷ Hathaway, *The Law of Refugee Status*, *supra* note 136 at 4.

new life abroad”.¹⁶⁸ While refugee status was a means of facilitating international movement for those in search of personal freedom, there was strong disagreement in the international community on the subjective concept of a refugee. During UN debates in 1946, the socialist states claimed that it was inappropriate to include political dissidents among the ranks of refugees protected by international law. It was argued that political escapees who had suffered no personal prejudice ought not to be protected as refugees under the auspices of the international community, but should instead seek the assistance of states sympathetic to their political views. But the voting strength and influence of the Western alliance led to the development of an international refugee rights regime protecting persons who feared “persecution” based on their civil or political status.¹⁶⁹

The precise formulation of the persecution standard meant that refugee law could not be turned to the political advantage of the Soviet bloc:

The refugee definition was carefully phrased to include only persons who had been disenfranchised by their state on the basis of race, religion, nationality, membership of a particular social group or political opinion, matters in regard to which the East bloc practice has historically been problematic. Western vulnerability in the area of respect for human rights, in contrast, centres more on respect for civil and political rights ... By mandating protection for those whose (Western-inspired) civil and political rights are jeopardised, without at

¹⁶⁸ *Ibid.* at 5. Quoting Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A. W. Sijthoff, 1966) at 74.

¹⁶⁹ Hathaway, *The Law of Refugee Status*, *supra* note 136 at 5.

the same time protecting persons whose (socialist-inspired) socio-economic rights are at risk, the convention adopted an incomplete and politically partisan human rights rationale.¹⁷⁰

Before 1967, the ambit of protection was also limited to refugees in Europe, who became refugees as a result of events occurring before January 1951 (the year in which the Convention was ratified). This restriction, combined with the narrow legal identity of the refugee within the Convention, served to ensure that refugees seeking the protection of European states were, for a long time, almost exclusively Eastern Europeans fleeing restrictions on speech and association, the kind of human rights which the Western world had sought to entrench as most fundamental.

Even following the elimination of temporal and geographic limitations in 1967, only those persons whose migration is driven by a fear of persecution on the grounds of civil or political status come within the ambit of the Convention-based protection system. This means that most migrants from Southern countries remain *de facto* excluded, as their flight is more often prompted by natural disasters and/or broadly based political, social and economic turmoil than by "persecution". In the refugee

¹⁷⁰ *Ibid.* at 8. See also: Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 17. The refugees that concerned Western states were ones congruent (in large measure) with their foreign policy objectives (i.e., people who fled communist states in Eastern and Central Europe). These people not only could be relatively easily incorporated into Western countries hungry for large supplies of unskilled and semi-skilled labour, but their desire for asylum provided much needed ideological evidence of the superiority of Western liberal democracy during the Cold War. The motivations of escapees from the Eastern bloc were, consequently, rarely the subject of close examination: Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, UK ; New York: Cambridge University Press, 2004); Arthur C. Helton, "Forced Displacement, Humanitarian Intervention, and Sovereignty " (2000) 20: 1 *SAIS Review* 61; Gil Loescher, *Beyond Charity : International Cooperation and the Global Refugee Crisis* (New York: Oxford University Press, 1993). See also: Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime " (2002) 14: 2&3 *Int'l J. Refugee. L.* 238; Michael Marrus, *The Unwanted: European Refugees from the First World War through the Cold War* (Philadelphia: Temple University Press, 2002).

convention, emphasis on individually targeted persecution has also been seen as one way of controlling the movement of refugee claimants to Western host countries, because the number of persons suffering indiscriminate violence clearly exceeds the number of people suffering targeted persecution.¹⁷¹ Of particular concern are situations in which indiscriminate hardship amounts to persecution: migrant populations are seen as not “deserving of protection”, since they are not fleeing a single, obviously identifiable aggressor:

In the past, refugees have won greater international sympathy than economic migrants. Theirs has been the more identifiable grievance: at its source there is often an identifiable persecutor. Yet the order of economic difficulty that prevails in some parts of the world is akin to persecution. No consensus exists about the identity of the tormentor, and so those who try to put it behind them are more easily reviled than others fleeing the attentions of secret police or state militias.¹⁷²

Clearly, the Convention refugee concept has evolved since its inception, and in practice its use has been expanded through the evolution of the institutional competence of UNHCR and the establishment of regional refugee protection arrangements.¹⁷³ More importantly, the notion that the Refugee Convention is a relic of the Cold War has not prevented it from undergoing an evolution in jurisprudential terms, as decision-makers have increasingly accepted the connections between refugee law and human rights law, a development that has expanded the definition to accommodate types of claims previously thought to fall outside the

¹⁷¹ Tuitt, *False Images: Law's Construction of the Refugee*, *supra* note 5 at 15. See also: Arthur C. Helton & Eliana Jacobs, "What Is Forced Migration?" in Anne F. Bayefsky, ed, *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers : Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Leiden: Nijhoff, 2006), 4 at 7-10(detailing the basic limitations of the established refugee definition).

¹⁷² Jeremy Harding, *The Uninvited: Refugees at the Rich Man's Gate* (London: Profile, 2000) at 122. See also notes 47 & 48 and accompanying text, above.

¹⁷³ Member states of the Organization of African Unity as well as certain Latin American governments have acknowledged the limited utility of the narrowly-defined refugee definition, and have broadened it in various ways. For further details on the enhanced competence of UNHCR, see: Hathaway, *The Law of Refugee Status*, *supra* note 136 at 11-13.

Refugee Convention regime.¹⁷⁴ While the human rights approach to interpreting the Refugee Convention has increasingly been adopted in domestic jurisdictions, it is important to note, however, that it is not universally accepted. UNHCR, the international organization responsible for supervising the implementation of the 1951 Refugee Convention, has offered guidelines to define such provisions, but these terms are interpreted differently by national decision makers.¹⁷⁵ Further, as is shown in the next section, refugee determinations based on gender, and the acceptance of women as a particular social group, have increased in many jurisdictions but these accomplishments are far from problem-free.

¹⁷⁴ For more on this, and on the progressive abandonment of the “single out” requirement in the course of accommodating refugees fleeing situations in which identification as a member of an at-risk group has proven sufficient to qualify for refugee status, see in particular: Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 27-86 & 236-90. See also: Hathaway, *The Rights of Refugees under International Law*, *supra* note 131. Despite such vigorous activity by the courts in a number of western jurisdictions, several scholars in the late 1980s and early 1990s continued to regard the 1951 refugee definition as being too restrictive, and proposed a formal widening of the definition of the term “refugee”. In contrast, others argued strongly for the retention of the 1951 refugee convention definition (suggesting that within the existing framework of the Refugee Convention, it would be possible to establish a wider conception of those who require the protection of another state). For criticism of the 1951 refugee definition and proposals to formally extend the 1951 refugee status, see: Loescher, *Refugee Movements and International Security*, *supra* note 34; Woehlcke, “Environmental Refugees”, *supra* note 91; Loescher, *Refugee Movements and International Security*, *supra* note 33 at 31; Shacknove, “Who Is a Refugee?”, *supra* note 154; Zolberg et al., *Escape from Violence : Conflict and the Refugee Crisis in the Developing World*. For opposition to the widening of the 1951 refugee definition, see e.g.: Göran Melander, *The Two Refugee Definitions* (Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1987); Peter Nobel, *Protection of Refugees in Europe as Seen in 1987* (Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1987), *supra* note 136. For more on this topic, see also *infra* notes 90 & 91.

¹⁷⁵ The responsibilities associated with determining refugee status in the 1951 Refugee Convention and the 1967 Protocol are not addressed in specific terms in the treaties; ordinarily they are assumed by the authorities in asylum countries: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 1979, re-edited Jan. 1992) See also: Helton & Jacobs, “What Is Forced Migration?”, *supra* note 171 at 8.

4.1.2. Stereotypical Understandings of Gender in the Refugee Determination Process: Seeing Woman as a “Cultural Other”

During the last decade, the 1951 Refugee Convention has been remarkably responsive to the plight of refugee women. In this regard, the refugee woman’s identity has been broadened to include many types of harm specific to women, including domestic violence and female genital mutilation. But no sooner was the refugee definition expanded than it began to be interpreted restrictively in refugee jurisprudence, reflecting, notably, a tendency to stereotype some cultures as being more “barbaric” than others.

Women remained for long the “forgotten majority” on the international agenda.¹⁷⁶ Surveying the literature on refugee women in the 1980s, Moussa wrote, “Women refugees – Footnote or Text?”,¹⁷⁷ to highlight the fact that research was not only explanatory and descriptive, but most often, distinction between men and women, let alone gender relations were not made. Over the last twenty years, however, the place of women in refugee law and processes has received significant scholarly attention. Initial lobbying efforts in the non-governmental sector led to UNHCR creating a refugee women’s initiative in 1985. This initiative was followed by several Western nations implementing an array of programs aimed at drawing attention to the effect difference gender makes for

¹⁷⁶ “The forgotten majority” is a term used by Geneviève Camus-Jacques in one of the first publications on refugee women in a chapter titled “Refugee Women: The Forgotten Majority”: Genevieve Camus-Jacques, “Refugee Women: The Forgotten Majority” in Gil Loescher & Laila Monahan, eds, *Refugees and International Relations* (Oxford: Calendon Press, 1989), 141.

¹⁷⁷ Helene Moussa, *Storm and Sanctuary: The Journey of Ethiopian and Eritrean Women Refugees* (Dundas, Canada: Artemis Enterprises, 1993) at 16.

refugees, and at ensuring that locally, refugee law was applied in a non-discriminatory way.¹⁷⁸

The move to put women on the refugee law agenda was driven by two factors: 1) a concern about the masculinist bias of the refugee definition crafted in 1951, and 2) the significant number of women who are either refugees or “persons of concern” to UNHCR (i.e., internally displaced persons or stateless persons). It is often said that 80 per cent of refugees and persons of concern to UNHCR around the world are women and children, while only a small fraction of formally recognized refugees are women and children, with the disparity in state protection particularly pronounced in developed countries.¹⁷⁹ Feminist critiques of the refugee definition, which have called attention to the fact that the prototypical asylum-seeker is a male individual persecuted for his political beliefs or activities, have argued that typically, women have not been thought of as potential refugees both because their political activities are often not

¹⁷⁸ UNHCR, *Refugee Women and International Protection*, Executive Committee, 1985, Conclusion No. 39 (X.X.X.V.I.), U.N. Doc No. A/AC.96/673. Canada was at the forefront of these initiatives, introducing its guidelines on gender-related persecution in 1993: *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act*, Immigration and Refugee Board, Guideline 4, 1993 (revised 1996). For an historical overview, see: Maroussia Hajdukowski-Ahmed, "A Dialogical Approach to Identity" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 28 at 35-36.

¹⁷⁹ Nahla Valji et al., "Where Are the Women? Gender Discrimination in Refugee Policies and Practices" (2003) 55 *Agenda* 61. Some authors disagree with these data, arguing that 50 per cent (and not 80 per cent) of world's refugees are women and children. They all similarly emphasize, however, that men outnumber women as asylum seekers and as government-assisted refugees: Catherine Dauvergne et al., *Gendering Canada's Refugee Process* (Ottawa: Status of Women Canada, 2006) at 1. The tendency to construct “women and children” as a single entity in scholarly works is very problematic since the identities and needs of each group are vastly different. Hajdukowski-Ahmed writes: “Those representations commodify refugee women in their role as -failed-caregivers, depict them as helpless victims, thus allowing...Western humanitarian organizations to play the role of saviors...Such imagery also conceals the specificity of the situation of children who have become orphans or those separated from their families, such as boy soldiers, abducted girls, and children left behind while parents seek a better life.” See: Hajdukowski-Ahmed, "A Dialogical Approach to Identity", *supra* note 178 at 39. See also note 208, below, for more on this topic.

viewed as “real” politics, and because the focus on state persecution in refugee law has led to the neglect of the kinds of private-sphere persecutions which most often afflict women. Feminists have thus sought to mitigate the male-bias of the refugee definition by making visible women’s experiences of persecution in the private sphere.¹⁸⁰

While calls to have “gender” or “sex” added to the refugee definition’s list of specific grounds of persecution have been unsuccessful to date, two things have happened in refugee law to shift the definition away from this masculinist bias. The first is that now, state involvement is not usually required as part of the formal test for the risk of “being persecuted”: the state’s inability or unwillingness to protect an individual is sufficient.¹⁸¹ The second is that increasingly, gender is incorporated into the understanding of persecution. “Gender-related persecution” recognizes that there are some forms of persecution, such as sexual and domestic violence, which affect women differently from men. As such, beginning in the 1980s and 1990s, the European Parliament and Canada adopted policies recognizing women as a “social group” which may experience retaliation for its behaviour or beliefs. Subsequently, there have been several cases in which women who refused to wear a veil or submit to female genital mutilation have been successful in their claims for asylum.¹⁸²

¹⁸⁰ See generally: Kitty Calavita, “Gender, Migration, and Law: Crossing Borders and Bridging Disciplines” (2006) 40: 1 *International Migration Review* 104; Heaven Crawley et al., *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* (Geneva: UNHCR, Evaluation and Policy Analysis Unit, 2004); Heaven Crawley & Refugee Women’s Legal Group, *Refugees and Gender : Law and Process* (Bristol: Jordan, 2001) at 18-21; T. Spijkerboer, *Gender and Refugee Status* (Aldershot, Hants, England ; Burlington, Vt., USA: Ashgate, 2000); Valji et al., “Where Are the Women? Gender Discrimination in Refugee Policies and Practices”, *supra* note 179; Tuitt, *False Images: Law’s Construction of the Refugee*, *supra* note 5, at 24 & following.

¹⁸¹ As Dauvergne notes, this is not a uniform interpretation though, but it is an influential one in powerful Western refugee-receiving states: Dauvergne et al., *Gendering Canada’s Refugee Process*, *supra* note 179 at 1.

¹⁸² For further details, see: Calavita, “Gender, Migration, and Law: Crossing Borders and Bridging Disciplines”, *supra* note 182 at 125; Natalie Oswin, “Rights Spaces: An

Recognizing women as a particular social group was an important step in ensuring equitable refugee protection for them - since gender-related persecution often affects women simply because they are women. In other words, depicting women as victims and vulnerable because they are women gave a reason to recognize their special circumstances as women refugees. However, as the image of victim and vulnerability took over, re-victimization has often occurred, particularly when women were asked to "tell their stories" to strangers as a way of raising the awareness of listeners. Thus, these accomplishments are far from satisfying. It has been shown, for instance, that the human rights perspective, the driving force behind refugee law as applied nationally, has led to stereotyping in which some gendered behaviours (such as domestic violence or genital mutilation) are ascribed to other "barbaric" cultures.¹⁸³ Crawley, citing a widely publicized trial in France, which involved the parents of a young girl who had been subject to female genital cutting, explains: "The trial and the polemic around it threw into sharp relief just how complex and riddled with doublethink the issue of 'cultural difference' has become in these 'post-modern' times".¹⁸⁴ In fact, this tunnel vision often amounts essentially to "fighting sexism with racism".¹⁸⁵ Having documented the refugee claim hearings of numerous women, Razak explains: "Women's claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states. Hence the successful applicant must be cast as a cultural other". She also found that,

Exploration of Feminist Approaches to Refugee Law" (Autumn 2001) 3: 3 *International Feminist Journal of Politics* 347 at 350. For Canada, see: *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act*, . For an analysis of the Canadian guidelines, see particularly: Dauvergne et al., *Gendering Canada's Refugee Process*, *supra* note 179.

¹⁸³ For further details, see: Calavita, "Gender, Migration, and Law: Crossing Borders and Bridging Disciplines", *supra* note 182 at 111-12.

¹⁸⁴ Crawley & Refugee Women's Legal Group, *Refugees and Gender : Law and Process* at 161, cited in Calavita, "Gender, Migration, and Law: Crossing Borders and Bridging Disciplines" at 112, *supra* note 182 at 112.

¹⁸⁵ Sherene H. Razack, "Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender" (1995) 8 C.J.W.L. 45 at 72.

besides having to present themselves as “Third World supplicants” or “Exotic Other Females”, successful female refugee claimants had to be extremely “emotional” so that they would be perceived as passive victims.¹⁸⁶ As a consequence of this portrayal of women’s victimization within barbaric cultures, another binary is sustained: that of “refugee-acceptors” and “refugee-producers”. This binary enables simplistic analyses which place the blame for population displacement squarely on the “refugee-producing” states. To put it simply, since Western countries can describe themselves as “refugee-acceptors”, they constitute themselves as “distinctive and superior by reference to what they are *not*, namely, the kind of governments that do the kinds of things to people that propel them to claim refugee status”. Macklin adds: “To describe oneself as a refugee-acceptor is to say that one is also a ‘non-refugee-producer’”.¹⁸⁷ Consequently, the need to maintain this binary intact stems from the unwillingness to acknowledge the reality that every country discriminates against women: “If the United States, or Canada, or Australia are refugee-acceptors, it follows that whatever they do cannot

¹⁸⁶ *Ibid.* at 50. See also: Sherene H. Razack, “Policing the Borders of Nation: The Imperial Gaze of Gender Persecution Cases” *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Class Rooms* (Toronto: University of Toronto, 1998), 88 (showing that portraying stereotypes of Islamic and Hindu cultures as particularly oppressive has resulted in Indo-Caribbean women being more successful than Africo-Caribbean women in refugee claims based on domestic violence); Sarah Katherine van Walsum & T. Spijkerboer, *Women and Immigration Law : New Variations on Classical Feminist Themes* (Abingdon ; New York: Routledge-Cavendish, 2007) (showing how immigration law situates gender conflicts outside the national order, projecting them instead onto non-western countries, exotic cultures, clandestine labour and criminal organizations). See finally: Maroussia Hajdukowski-Ahmed et al., “Introduction” in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 1; Geraldine Sadoway, “The Gender Factor in Refugee Determination and the Effect of ‘Gender Guidelines’ ” in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 244.

¹⁸⁷ Audrey Macklin, “Refugee Women and the Imperative of Categories” (1995) 17: 2 Hum. Rts.Q. 213 at 264. Macklin explains that “the categories are not always mutually exclusive” in reality, as showed in the Ward case that features a refugee claimant from Ireland: *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

constitute persecution, because that would make them potential refugee-producers".¹⁸⁸

In sum, there are narratives which are tool boxes "marketed for consumption in the North and it is most tempting for women asylum seekers to create a narrative that fits the mould".¹⁸⁹ Experience shows that consistency is paramount in hearings; thus, recycling a stereotype that is familiar to authorities is more effective, because "it would be detrimental to their causes if their narratives were ambiguous, hesitant, complex and unprovable in the courts that make decisions on their status".¹⁹⁰ This response to the claims of the non-Western refugee woman, which turns her into an absolute "other", clearly indicates that Western receiving societies avoid "confronting" the refugee woman as she really is because this would raise the possibility that some women in our countries, too, might be recognized as refugee women. This illustrates well the idea, central to the analysis of this thesis, that the relation between the migrant and the legal system is not one properly articulated in terms of exclusion but rather one ridden with conflict. One thing is clear, however: theories of migration that "universalize the migratory experience and suppress its astonishing diversity...are insufficient to account for the multiplicity of 'women's experience'...and the variegated nature of the phenomenon".¹⁹¹

¹⁸⁸ Macklin, "Refugee Women and the Imperative of Categories", *supra* note 187 at 272.

¹⁸⁹ Razack, "Policing the Borders of Nation: The Imperial Gaze of Gender Persecution Cases", *supra* note 186 at 99.

¹⁹⁰ Carmela Murdocca in Conversation with Sherene H. Razack, "Pursuing National Responsibility in a Post - 9/11 World" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 252.

¹⁹¹ Calavita, "Gender, Migration, and Law: Crossing Borders and Bridging Disciplines", *supra* note 182 at 125.

In conclusion, the normative definition of a refugee is subject to controversy because “alienage” and “individual persecution”, the two necessary conditions for establishing refugee status, are highly contested concepts which are, in fact, driven more by policy than by humanitarian considerations. What’s more, the Convention definition of “refugee” gives rise to numerous ambiguities in determining whether an individual deserves international protection. While the Convention refugee concept has, over the years, undergone an important evolution in jurisprudential terms, several of the definition’s terms still result in inconsistent interpretation and application. For instance, although refugee determinations based on gender, and the acceptance of women as members of a particular social group, have increased in many jurisdictions, some women keep being excluded from refugee protection simply because they do not fit the stereotyped categories and because their testimonies contradict the powerful images traditionally associated with their conditions. Another narrow portrayal of migrant women is the category of the trafficked person. As shown in the next section, the trafficked person is narrowly constructed by policy and law as a “victim”, which is a result of the failure to see her otherwise (i.e., as object of responsibility and bearer of human rights).

4.2. The Anti-Trafficking Framework: A Normative and Political Fault Line

The enormous interest and concern for trafficking and human smuggling in governmental, inter-governmental and non-governmental organizations, in the media and popular opinion, is running ahead of theoretical understanding and factual evidence.¹⁹²

Since the mid-1990s, concern has been raised over the issue of “trafficking”. Following numerous meetings, conferences and reports worldwide, in 2000 an international definition of trafficking was finally adopted in a protocol to be appended to the *UN Convention against Transnational Organized Crime* (hereafter “Trafficking Protocol”). The Protocol defines trafficking as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁹³

¹⁹² John Salt, "Trafficking and Human Smuggling: A European Perspective" (2000) 38: 3 *International Migration* 31-56 at 32.

¹⁹³ *United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force 29 September 2003) (Article 3 (a)); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force 09 September 2003).

As we can infer from this definition, the protocol's critical ingredient for trafficking in persons is a conduct associated with moving people (cross-border transport of the trafficked person is not required, provided the offence is "transnational in nature" as defined at Article 4 of the Protocol), involving deception or coercion for the purpose of exploitation. The Trafficking Protocol cannot be read without a reference to the Smuggling Protocol, which is also attached to the *UN Convention against Transnational Organized Crime*.¹⁹⁴ The two protocols are based on a central dichotomy between coerced and consensual irregular migrants: whereas people who are trafficked are assumed not to have given their consent and are considered to be "victims" or "survivors", people who are smuggled are considered to have willingly engaged in a criminal enterprise. In practice, the distinction between trafficking and smuggling is difficult to make because "rarely are there 'pure' cases of one or the other".¹⁹⁵ Most importantly, as shown below, the distinction between trafficking and smuggling depends on a flawed conception of human agency, since the divide between coercion and consent is much more complex than first appears. Of particular concern is the discourse of victimization, which erases the possibility of women's agency.

The definition of the Trafficking Protocol marks an important development because it is more widely acceptable and inclusive than

¹⁹⁴ See the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (hereafter the "Smuggling Protocol"), which was adopted at the same time: *Protocol against the Smuggling of Migrants by Land, Sea and Air*, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force 28 January 2004) .

¹⁹⁵ Bhabha writes: "The vast variety of migration strategies and circumstances defies easy categorization. At the point of departure and at multiple stages of the journey, it may well be unclear which category of irregular migration is at issue — trafficking or smuggling. And the most accurate classification may change over time. The available evidence suggests that most transported undocumented migrants consent in some way to an initial proposition to travel, but that, en route or on arrival in the destination country, circumstances frequently change": Jacqueline Bhabha, "Trafficking, Smuggling, and Human Rights" (March 2005) Migration information source, online: Migration Policy Institute <<http://www.migrationinformation.org/>>(accessed on 02 September 2007).

previous definitions. A striking feature of the definition is that it includes trafficking for purposes other than prostitution, such as forced labour, forced marriage, and other slavery-like practices. This emphasis on the fact that exploitation may take forms other than prostitution constitutes a significant step beyond previous definitions. It also acknowledges that trafficking is a human rights problem rather than a law and order or public morality issue pertaining to prostitution.¹⁹⁶ However, the Trafficking Protocol does not represent an international consensus on the definition of trafficking. Some argue that the new definition is not fully coherent and continues to conflate trafficking with migration and trafficking with prostitution, a long-standing confusion reinforced today by recourse to false or incomplete statistics. For example, the emphasis now is on hypothetical large-scale crime organizations dedicated to enslaving migrants, particularly women, although research by the UN Crime Commission's found little proof of such activity.¹⁹⁷

¹⁹⁶ For further details, see: Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants", *supra* note 6 at 116; Kamala Kempadoo, "Introduction: From Moral Panic to Global Justice; Changing Perspectives on Trafficking" in Kamala Kempadoo, Jyoti Sanghera & Bandana Pattanaik, eds, *Trafficking and Prostitution Reconsidered : New Perspectives on Migration, Sex Work, and Human Rights* (Boulder, CO: Paradigm Publishers, 2005).

¹⁹⁷ In 2002, the United Nations Office on Drugs and Crime (UNODC) undertook a pilot survey of forty selected organized groups in sixteen countries and one region. Of the 40 organized crime groups in the survey, eight were found to have trafficking in persons activities; of those, two groups were almost exclusively involved in human trafficking, while for the remaining six, human trafficking was one of a number of diversified criminal activities undertaken by the group. The key finding of the data collection exercise was a striking diversity amongst the specific groups studied, evidencing the very different forms that transnational organized crime can take, with a variety of localities, activities and structures. See: Centre for International Crime Prevention, *Assessing Transnational Organized Crime: Results of a Pilot Survey of 40 Selected Transnational Organized Criminal Groups in 16 Countries* (Vienna: UN Centre for International Crime Prevention, 2003); UNODC, "Trafficking in Persons: Global Patterns" (Geneva: United Nations Office on Drugs and Crime, April 2006), online: UNODC <<http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf>>(accessed on 24 May 2007). Statistics regarding trafficking are unavailable primarily due to the imprecise nature of the term "trafficking," the lack of systematic research in this area, and the clandestine nature of the activity. For instance, projects enumerating "victims" of trafficking refer at times to those who have entered a country on their own and are now selling sex, at times to people who have agreed to denounce a 'trafficker' according to the local law, or to those who give money to a "boyfriend" or to all irregular migrants who sell sex. They may also count those victims in their countries of origin or destination or both

There are two main reasons why the Trafficking Protocol's conflation of the relationship between migration and prostitution is problematic. First, although men and boys are included in the Protocol, women are a central feature of the trafficking problem and they are "disproportionably represented among the poor, undocumented, debt-bonded and international migration workforce".¹⁹⁸ Beyond the story that the numbers can tell,¹⁹⁹ the gendering of the phenomenon "taps into the familiar cultural (Western) elision of women and victimization. It conjures images of helplessness that are bolstered by the prevalence of children in the trade, and which emasculate men that are also trafficked".²⁰⁰ This brings us to the second point. What is missing in the definition is the concept of agency among trafficked women. In order to better understand what is meant by this assertion, it is necessary to relocate the debate on trafficking and migration in its context: throughout the drafting of the Trafficking Protocol, government representatives and NGOs expressed particular concern regarding the introduction of non-coerced adult prostitution in the definition of the Trafficking Protocol. This was a crucial issue because the way in which prostitution had to be defined – as a criminal, human rights, economic, or public health problem – determined

and include transit countries or not, and so on. See: K. Kangaspunta, "Mapping the Inhuman Trade" (Expert Meeting on the World Crime and Justice, Trin: Italy, 26-28 June 2003); Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants" , *supra* note 6 at 114; Laura Agustín, "The Disappearing of a Migration Category: Migrants Who Sell Sex" (2006) 32: 1 *Journal of Ethnic and Migration Studies* 29 at 43.

¹⁹⁸ Kempadoo, "Introduction: From Moral Panic to Global Justice; Changing Perspectives on Trafficking", *supra* note 196 at 986.

¹⁹⁹ The United Nations Office on Drugs and Crime (UNODC) estimates that 77 per cent of trafficked persons are women and 60 per cent are children. See: UNODC, "Trafficking in Persons: Global Patterns", *supra* note 197.

²⁰⁰ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge; New York: Cambridge University Press, 2008) at 72. For a criticism of the problematic tendency to construct "women and children" as a single entity, see *supra* note 179.

how it would be controlled.²⁰¹ The current definition of trafficking was influenced considerably by the ongoing prostitution debate, still a strong point of controversy among feminists. Outshoorn summarizes the situation as follows:

Although theoretically as many as four positions can be distinguished in feminist debates on prostitution ... the major divide is between those feminists defining prostitution as sexual domination and the essence of women's oppression ... and those who maintain prostitution is work that women can opt for, the sex work position ... The first position calls for an abolition of prostitution by penalising those who profit from it, except the prostitute. The second aims at legalisation, usually entailing removal of prohibitive articles in criminal codes, as well as some kind of regulation in order to normalize sex trade and guarantee prostitute's rights.²⁰²

The agency of prostitutes is at the heart of this long-standing debate on prostitution: one camp argues that prostitutes lack agency to make choice because of the constraints of patriarchal oppression; the other camp argues that while society imposes constraints on women's sexuality, sex work is like any other type of work. They contend that some women freely choose prostitution as a way to earn a living and that prostitution should be protected like any type of work. This strong divide among feminists has influenced the way trafficking is viewed. In the sexual domination view, trafficking of migrant sex workers is seen as against their will: prostitution can never be a job in the conventional sense of the word and those disputing these ideas are actually enemies of migrant women themselves. During the 1999 Trafficking Protocol negotiations, defenders

²⁰¹ For analysis of the debate generated by the trafficking issue, see: Anne Gallagher, "Human Rights and the New Un Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" (2001) 23 Hum. Rts.Q. 975 at 982; Joyce Outshoorn, "Introduction: Prostitution, Women's Movements and Democratic Politics" in Joyce Outshoorn, ed, *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge: Cambridge University Press, 2004) at 11.

²⁰² Outshoorn, "Introduction: Prostitution, Women's Movements and Democratic Politics", *ibid.* at 9.

of this perspective formed a lobby group called the International Human Rights Network. Their platform regarded all prostitution (voluntary or forced) as a violation of human rights and believed that all migrating sex workers are victims of trafficking. For those adhering to the sex work position, women may be victims of trafficking, but not all migrating female sex workers are victims of forced prostitution. In this view, trafficking women for prostitution is perceived as undesirable only when a woman is trafficked and forced into prostitution against her will. Feminists advocating this position during the 1999 Trafficking Protocol negotiations formed the Human Rights Caucus. Their platform viewed some trafficked women as migrant labourers and requested improved protection of those people through international labour legislation.²⁰³

The definition's focus on "forced" prostitution in the Trafficking Protocol is a deep disappointment to proponents of the Human Rights Caucus: while "exploitation of prostitution" is intentionally left undefined in the Trafficking Protocol, any migration involving prostitution is considered to be "exploitation", and all forms of trafficking not involving sexual exploitation are downplayed.²⁰⁴ The main criticism stems from the fact that

²⁰³ For the two groups' diverging opinions on migration and prostitution, see: Liz Kelly & Linda Regan, "Beyond Victim or Survivor: Sexual Violence, Identity and Feminist Theory and Practice" in L. Adkin & V. Merchant, eds, *Sexualizing the Social* (London: Macmillan, 1996), 77; Liz Kelly & Linda Regan, "Trafficking in Women" (2000) 20 Network Newsletter, London: The British Council 4-5; Outshoorn, "Introduction: Prostitution, Women's Movements and Democratic Politics", *supra* note 201 at 9; Jane Scouler, "The 'Subject' of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory" (2004) 5 *Feminist Theory* 343; Barbara Sullivan, "Trafficking in Women" (2003) 5: 1 *International Feminist Journal of Politics* 67.

²⁰⁴ The Trafficking Protocol definition makes it clear that trafficking necessarily involves some "consent-nullifying" behaviour. Moreover, the proposal that "use in prostitution" should be included in the definition as a separate "end purpose" was replaced in the Trafficking Protocol by the phrase "exploitation of the prostitution of others" and was thus directed at the exploiters. See: Gallagher, "Human Rights and the New Un Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", *supra* note 201 at 285. The proponents of the Human Rights Caucus see this definition of trafficking as a direct reproduction of the violence-against-women framework regarding migrant women selling sex, which was highly influenced by radical feminist insights into prostitution and, has, since the 1980s, traditionally been used to reveal the routine nature

all migrating sex workers are treated as if they were the “innocent victims” of trafficking:

In the context of law and human rights, it is invariably the abject victim subject who seeks rights, primarily because she is the one who has had the worst happen to her. The victim subject has allowed women to speak out about abuses that have remained hidden or invisible in human rights discourse.²⁰⁵

This representation of all migrating sex workers as “victims” prevents a deeper understanding of the complexities surrounding issues of consent. Empirical research reveals, for instance, that several women do achieve the goal of earning a large amount of money in a short time, from which they pay off debts and then decide whether they will continue in the sex trade or not. Apparent dichotomies (trafficking versus migration and prostitution versus sex work) are thus seriously compromised when women are listened to carefully,²⁰⁶ and seeing women as “market actors”

of gendered acts of aggression. This framework is characterized by an understanding of prostitution as violence against women – “violence not only in the practice of prostitution but more fundamentally in the very idea of ‘buying sex’ which is considered so inextricably linked to a system of heterosexuality and male power that it represents ‘the absolute embodiment of patriarchal male privilege’”: Kari Kesler, "Is a Feminist Stance in Support of Prostitution Possible? An Exploration of Current Trends" (2002) 5: 2 *Sexualities* 219, cited in Scoular, "The ‘Subject’ of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory", *ibid.* at 344.

²⁰⁵ Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Post-Colonial Feminist Legal Politics" (Spring 2002) 15 *Harvard Human Rights Journal* 1 at 5. See also: Jo Doezema, "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy" in Kamala Kempadoo & Jo Doezema, eds, *Global Sex Workers : Rights, Resistance, and Redefinition* (New York: Routledge, 1998) at 43. See finally: John McLaren, "Recalculating the Wages of Sin: The Social and Legal Construction of Prostitution, 1850-1920" (2000) 23 *M.L.J.* 524; Audrey Macklin, "At the Border of Rights, Migration, Sex-Work and Trafficking" in N. Gordon, ed, *From the Margins of Globalization: Critical Perspective on Human Rights* (Hanham, Maryland: Lexington Books, 2004), 161.

²⁰⁶ Laura Agustín, "Migrants in the Mistress’s House: Other Voices in the ‘Trafficking Debate’ " (2005) 12: 1 *Social Politics* 96; Agustín, "The Disappearing of a Migration Category: Migrants Who Sell Sex", *supra* note 197 at 44. See also: Doreen Indra, "Not a ‘Room of One’s Own’: Engendering Forced Migration Theory and Practice" in Doreen Indra, ed, *Engendered Forced Migration: Theory and Practice* (Oxford: Berghahn Books 1999), 1. See finally: Sietske Altink, *Stolen Lives : Trading Women into Sex and Slavery* (London; New York: Scarlet Press ; Harrington Park Press, 1995) at 2: “The concept of

who understand the economic opportunities available to them in other parts of the world would challenge the oversimplistic and patronising assumption that women from the southern countries enter the sex trade because of conditions of poverty, which belies the question why all poor women do not opt for sex work.²⁰⁷ Equating trafficking with migration has also led to simplistic and unrealistic solutions: in order to prevent trafficking, there is a move to altogether prevent migration of those who are deemed vulnerable to migrating. Even when curbing migration is not a stated programmatic focus, an inadvertent impetus is to dissuade women, girls in particular, from moving, “in order to protect them from harm”. Anti-trafficking measures are frequently applicable to “women and girls”, thereby failing to accord the woman an adult identity or to confer rights resulting from that status, including the right to choose to move and have control over her life and body.²⁰⁸ Moreover, while the definition’s focus on “forced” prostitution encourages states to abolish all prostitution as the only remedy to trafficking, the real problem of trafficking remains unsolved:

Curbing migration does not stop trafficking; it merely drives the activity further underground, making it invisible. Borders cannot be made impermeable, and stricter immigration measures result in pushing the victims further into situations of violence and abuse. As a result, women who migrate are pushed into further dependence on an informal and illegal network of agents and rendered even more vulnerable to economic and physical abuse, exploitation, and harm.²⁰⁹

victim ignores the sense of responsibility which leads women to migrate in search of work ... Victims can also be very tough and will do anything to avenge the damage done to them and make a better life for themselves. Some victims don't go to the police but start trafficking for themselves, or side with the traffickers to avoid reprisals”.

²⁰⁷ Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, *supra* note 7 at 130. See also: Jannie Chuang, "Redirecting the Debate over Trafficking in Women: Directions, Paradigms and Context" (1998) 11 Harv. Hum. Rts. J. 65.

²⁰⁸ Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, *supra* note 7 at 145. See *supra* notes 179 & 200 for more on the topic of the “children-women” coupling.

²⁰⁹ Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants", *supra* note 6 at 112.

Thus, the UN anti-trafficking framework does not deal with the fact that women move (or are moved) with (or without) their consent for a variety of reasons that have to do with the huge demand in receiving countries for domestic helpers or sex industry workers. The Protocol's neglect of the issue of demand suggests that this instrument lacks a viable remedy for the deep-rooted causes of trafficking. While the recognition of the human rights of sex workers would entail the recognition of voluntary prostitution - and there clearly is a discomfort in taking a position which neither governments nor many feminists are prepared to accept - the abuse that sex workers experience at the hands of law enforcement authorities remain unaddressed.²¹⁰

To summarize, the objective here is not to dispute whether migrant women who sell sex are trafficked or not, or whether more women have a bad or good experience of migration. It is rather to warn against a reproduction of assumptions about women as "passive, incapable of decision-making, and in need of protection".²¹¹ Such representations of non-Western women as "perpetually underprivileged and marginalized equat[es] choice with wealth and coercion with poverty and no space remains to recognize and validate the choices that women make when

²¹⁰ Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants", *supra* note 6 at 116-17. See also: Doezema, "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy" at 45.

²¹¹ Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants", *supra* note 6 at 114. It should be noted that the normative conception of the sex trade within twenty-first century human rights and feminist campaigns is subject today to great controversy: according to organizations, such as the Coalition against Trafficking in Women, the sex trade in all its manifestations constitutes exploitation and violence against women. Other groups, including the Global Alliance Against Trafficking in Women, distinguish between voluntary and coerced sex work, expand the scope of trafficking to include domestic workers and mail order marriages, and link sex trafficking to larger issues of labour migration and lack of informal-sector labour regulation.: Jo Doezema, "Loose Women or Lost Women? The Re-Emergence of the Myth of 'White Slavery' in Contemporary Discourses of 'Trafficking in Women'" (Winter 2000) 18: 1 *Gender Issues* 23-50, online: Walnut <<http://www.walnet.org/csis/papers/doezema-loose.html>> (accessed on 08 November 2006).

confronted with limited economic opportunities".²¹² This brings us to an important argument: the diversity of projects and experiences granted to other migrants must be granted to these women as well, allowing them to be regarded, like everyone else, as active agents with an "agency against all odds".²¹³ As Agustin says, "Not to do so is to 'further stigmatize people using sex for instrumental ends and perpetuate a tendency to view commercial sex as the end of virtue and dignity'".²¹⁴ The idea that, if a woman continues to choose to remain in sex work, then she "deserves" what she gets, is "frighteningly reminiscent of the requirement in rape laws where the victim must prove her chaste history in order to retain her credibility".²¹⁵ Not to do so is also to refuse to see these women as having responsibility and as bearers of human rights. This in turn impoverishes debate by silencing one of the most authentic positions from which to hear. Finally, this perspective acts against a powerful metaphor that homogeneously and perpetually represents the non-Western migrant as a victimized subject. As already shown previously, it deconstructs stereotypes of the southern countries as "barbaric" in the treatment of their women.²¹⁶ By offering an image of the migrant woman crossing a border as a "resistant subject", the migrant's agency is not "free and unfettered" but "fractured by experiences of violence, poverty, racism, and marginalization".²¹⁷ In sum, since the victim subject collapse easily into

²¹² Ratna Kapur, "Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern" (2001) 78: 4 *Denver University Law Review* 855 at 869, cited in Scoular, "The 'Subject' of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory", *supra* note 203 at 351.

²¹³ Soguk, *States and Strangers: Refugees and Displacements of Statecraft*, *supra* note 51.

²¹⁴ Agustín, "The Disappearing of a Migration Category: Migrants Who Sell Sex" at 35, *supra* note 197 at 35.

²¹⁵ Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, *supra* note 7 at 118.

²¹⁶ See section 4.1.2, above.

²¹⁷ Kapur, "Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern" at 885. See also: Scoular, "The 'Subject' of Prostitution: Interpreting the

assumptions of women as weak, vulnerable and helpless, there needs to be a space in this construction of “trafficked women” for difference, for the articulation of a woman who provides a normative challenge to the different assumptions that underlie the legal discourse on human trafficking. It is all the more important that, as shown below, the current dominant view of trafficked women encourages states to resort to the criminal law to address women’s rights issues. This an arena of law in which nation-states enjoy powers of moral surveillance and regulation.

The Trafficking Protocol’s focus on crime and punishment is another source of criticism. The UN *Convention against Transnational Organized Crime* is a “parent” agreement that must be read along with the protocols and vice versa, which means that the Convention and the Trafficking Protocol must be interpreted together. The main purpose of the UN *Convention against Transnational Organized Crime* is to promote inter-state cooperation for effectively combating transnational organized crime (Article 37.2). Signatories of the Protocol are required to prevent and combat trafficking in persons, particularly women and children; to protect and assist victims of trafficking, with respect for their human rights; and to promote cooperation between states (Article 2). Although the protection of victims is a component of the Trafficking Protocol, crime and punishment are its main priorities. This is so because the Convention and its Protocols “are primarily criminal justice instruments and, apart from criminal proceedings against offenders, there are no formal judicial or administrative proceedings in which the status of victims of trafficking as such can be determined”.²¹⁸ In other words, the strong emphasis is on

Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory”, *supra* note 203 at 352. See *supra* note 207.

²¹⁸ UNODC, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (New York: U.N., 2004) at 286. The UN *Convention against Transnational Organized*

criminalization as the primary remedy for trafficking and on state discretion in protecting victims and their residency status.²¹⁹ The focus of the UN Protocol on criminalization, deportation and border control strategies results in a supply-side approach that pays scant attention to both the demand side of the problem and to factors of economic inequality between developing and developed nations.²²⁰ The fact that the UN High Commissioner has rushed to publish the 2002 UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, a

Crime is not a human rights instrument, although it is intended to preserve existing entitlements (see Article 14).

²¹⁹ Part II of the Protocol ("Protection of Victims of Trafficking in Persons") provides only general guidance regarding protection and does not require States Parties to provide any measures of redress, assistance, or service to individuals who have been trafficked, or to their families. Article 6, for instance, ("Assistance to and protection of victims of trafficking in persons") contains a set of "desirable" standards which states should "consider as appropriate", such as protection of privacy and identity (Article 6.1) and measures for "physical, psychological and social recovery of victims" (Article 6.3), but two mandatory provisions relate to the criminal justice framework (assistance to victims for participation in proceedings and measures for obtaining compensation). At Article 7, the Protocol "advises" States Party to "consider" adopting measures "in appropriate cases", permitting trafficked victims to remain temporarily or permanently in the territory of the receiving state, taking "humanitarian and compassionate factors" into account; and Article 8 counsels that repatriation "shall preferably be voluntary". However, the recent progress of some major destination countries in implementing Articles 6 to 8 of the Trafficking Protocol should be noted. In 2006 Australia, Germany, Italy, Norway, Sweden and the United States generally complied with their international obligations under the Trafficking Protocol related to the protection of victims of human trafficking: The Future Group, "Falling Short of the Mark: An International Study on the Treatment of Victims of Human Trafficking" (Calgary: The Future Group, 2006), online: The Future Group <<http://www.thefuturegroup.org>>(accessed on 10 October 2007). Although the study found that the United Kingdom and Canada had failed to meet these international standards, the two countries recently reviewed and improved their policy in this area. For the latest developments in Canadian policy, see: Jacqueline Oxman-Martinez et al., "Canadian Policy on Human Trafficking: A Four-Year Analysis" (October 2005) 43: 4 *International Migration* ; Citizenship and Immigration Canada, "Canada's New Government Strengthens Protection for Victims of Human Trafficking" (Press Release, Ottawa: Citizenship and Immigration Canada, 19 June 2007), online: CIC <<http://www.cic.gc.ca/english/department/media/releases/2007/2007-06-19.asp>>(accessed on 10 October 2007). For the latest in the UK's policy, see the "UK Action Plan on Tackling Human Trafficking", released in March 2007, which outlines a range of measures to help improve the identification and referral of victims: Home Office and Scottish Executive, "U.K. Action Plan on Tackling Human Trafficking", March 2007, online: UK Home Office <<http://www.homeoffice.gov.uk/documents/human-traffick-action-plan>>(accessed on 10 October 2007).

²²⁰ See: Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants" , *supra* note 6 at 116-17; Agustín, "The Disappearing of a Migration Category: Migrants Who Sell Sex", *supra* note 197 at 44.

complementary document reminding the international community of the need for a more integral approach to human trafficking, calls attention to the disregard for the human rights of trafficked persons and to the supply and demand aspects of trafficking. As such, the 2002 UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking* assert the primacy of human rights, and obligations to protect are stated in mandatory rather than advisory terms. In the criminal justice system as well, the right to protection is separate from cooperation. Principle 8, for example, holds that “States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings”.²²¹ Yet all countries -except Italy- require today trafficked persons to testify against their alleged traffickers in court in order to receive a temporary residence permit. This kind of remedy scarcely addresses the human rights dimension of trafficking at all because it “hinges the remedy - migration status- to participating in prosecution rather than the harm of being trafficked. In order to be an effective remedy, it must attach and relate to the harm, not to assisting the state in enforcing its migration law”.²²²

In conclusion, international law has constructed a response to trafficking that fails to draw clear conceptual distinctions between migration and trafficking. What is missing in the definition is a concept of agency among trafficked women; as a result, the current definition of

²²¹ Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E.S.C., U.N. Doc. E/2002/68/Add.1.

²²² See: Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, *supra* note 200 at 84-85. See also: Victor Malarek & Sarah V. Wayland, "Always 'Natasha'- the Transnational Sex Trafficking of Women" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 67 at 78.

trafficking reinforces the assumption that women are incapable of decision-making or consent, and are therefore in need of constant state protection. The logical consequence of such an assumption is the curtailment of a woman's right to movement or to earn a living in the manner she chooses, and as such, there is logically no room for interpreting the image of an empowered migrant woman who is acting in response to the way in which the global economy affects her and her family. The fact that a Western state's response to trafficking is addressed as an issue of immigration or criminality, and not as a human rights issue, conceals the reality that human trafficking and smuggling are, as previously shown in this thesis, in large part a response to global demand in these countries.²²³ Nor is there a realistic discussion about whether these women are better served by prosecution of their traffickers or by labour regulations. For instance, there was no serious discussion regarding the viability of addressing trafficking in an annex to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.²²⁴ There are many reasons why paying even minimal attention to the human rights implications of trafficking is impossible from a Western state's perspective. First, trafficking is fostered by key elements of the "comfortable status quo; chief among these is the entrenched gulf between rich and poor people and nations, and the sovereignty of borders that ensures this".²²⁵ In other words, it is in the interest of Western states to maintain the mobility gap

²²³ See part I, chapter 1, section 1.3 & the conclusion of Part I, for more on the link between irregular migration and labour demand. Addressing demand as a root cause of trafficking is clearly identified as an important strategy aimed at preventing trafficking in the 2002 UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking*: Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E.S.C., U.N. Doc. E/2002/68/Add.1.

²²⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990) (entered into force 1 July 2003) [ICMW]

²²⁵ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, *supra* note 200 at 89.

between poorer and richer countries with the simplistic assumption that women from the southern countries enter the sex trade because of conditions of poverty.²²⁶ Second, in the current scenario it is also in the interest of Western states to transform “right holders” into silenced victims, not powerful claimants: this creates clarity about who is to be excluded from the legal system and who cannot be. As such, “drawing a line between trafficking and smuggling is about assigning guilt. People who are smuggled are culpable; ‘they’ have broken our laws. People who have been trafficked never had a choice”.²²⁷ Trafficked women are absolved from culpability by removing their agency. This helps explain the reluctance to conceptualize trafficking as something to which women can consent. “If it is her choice, how can she be absolved of the migration law transgression that follows?”²²⁸ Third, in receiving countries where prostitution is illegal, trafficking victims are indirectly stigmatized for their “immorality”. Not surprisingly, then, enforcement of anti-trafficking laws is often absent or low. And when the laws are enacted, their impact often falls on women rather than the traffickers, replicating enforcement patterns against prostitution generally.²²⁹ This failure of the Trafficking Protocol to pay even minimal attention to the human rights ramifications of trafficking reveals therefore that international mechanisms established to address the situation of trafficking serve more the interests of Western states in controlling their borders than to protect trafficked women.

²²⁶ For a discussion of the mobility regime and the mobility gap, see Part I, chapter 2, above.

²²⁷ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, *supra* note 200 at 91.

²²⁸ *Ibid.* at 91.

²²⁹ Nora Demleitner, "The Law at Crossroads: The Construction of Migrant Women Trafficked into Prostitution" in David Kyle & Rey Koslowski, eds, *Global Human Smuggling in Comparative Perspective* (Baltimore: Johns Hopkins University Press, 2001).

Increased familiarity with migration and the understanding that people who migrate are normal people with the normal range of complex relationships should help diminish this overemphasis on the criminalized aspects of trafficking as well as shift the rights and needs of migrants from a subordinate to a more central position within the international legal framework. Obviously this is not an easy task for law: law specializes in drawing clear lines, and such distinction facilitates a legal response which is limited by the capacity of law. However, to not do this is to deprive the imagination of solutions which go further, to obscure the space in which a new law might arise:

Confronted by a lack of knowledge and a global scale, we must listen to sublocal secrets, told in whispers. We must go to ground. If law can be a tool here, it must be grounded in the talk that is silenced by victimization. We need the thousands of words that the pictures embrace.²³⁰

²³⁰ Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*, *supra* note 200 at 92.

The conclusion, as demonstrated in Chapter Four, is that refugee and anti-trafficking law and policy function at the very margins of most migrants' lives. Primarily they are designed, not to offer a solution to the refugee or trafficking problem, but to control the movement of migrants to destination countries. As such, being pragmatically focused, the two regimes constantly turn away from the needs of migrants towards the sovereign interest of states. Moreover, the identities of the refugee and the trafficked person are so narrowly portrayed that they promote a particular idea of what a refugee or a trafficked person is, thereby justifying a limited range of assistance and protection for those who remain outside these two dominant identities but who clearly need international protection. In this process, where "the subject's agency is subordinated to the definitional power of others", we are "forced to confront categorization as a political choice": who we identify as a refugee or trafficked person, how and why we assign her to that category, and who we exclude from the category, as such, "reveals as much about how we define ourselves as it does about those whom we define".²³¹ To examine this situation, a fifth and final chapter will consider an approach to forced migration based not on the causes of flight and on strict categories, but on the needs and rights of displaced persons. This is accomplished through an analysis of legal principles which are decisive in a preliminary definition of a "forced migrant", notably the existence of valid objections to return in the context of increasing recognition of the principle of non-refoulement as a significant remedy which is based on international human rights law.

²³¹ Macklin, "Refugee Women and the Imperative of Categories", *supra* note 182 at 276.

Chapter 5. The Definition of “Forced Migrant”: A Proposal

We turn to human rights doctrine for assistance in filling out the grey areas. In doing so, we may wonder why it is permissible to distinguish in favour of Convention refugees, when other violations of rights seem no less serious. Why do some types of harm carry more “value” than others?²³²

Chapters Three and Four have established that the phenomenon of forced migration is fraught with controversial and contradictory interpretations and connotations. Chapter Three has shown that the basis of the historical distinction between “refugees” and “migrants” is artificial. This analysis suggests that, although the debate in migration discourse revolves around voluntary migration as opposed to forced migration, the boundaries between the two are blurred on the ground, first, because it has become increasingly difficult to separate economic from political causes of migration, and second, because there are elements of both compulsion and choice in the decision-making of most migrants. The difficulty in making clear distinctions between three distinct categories of forced migrants on the ground, essentially due to the commonalities of experience among forced migrants, has also been addressed in this chapter. This highlights the deficiencies of a formulation of forced migration that is based on the causes of flight, or “imputed motives”²³³ of those who flee. Such a formulation encompasses simplistic dichotomies (voluntary economic = migrants, while involuntary political = refugees) which do not do justice to the inherent complexity of the migration phenomenon on the ground. Moreover, characterizing the forced/voluntary

²³² Guy S. Goodwin-Gill, “Editorial: Asylum 2001 — a Convention and a Purpose” (2001) 13: 1 Int’l J. Refugee. L. 1 at 8.

²³³ Colson, “Coping in Adversity”. See also: Richmond, “Sociological Theories of International Migration: The Case of Refugees” ; Vaughan Robinson, “Forced Migration” in Paul J. Boyle, Keith H. Halfacree & Vaughan Robinson, eds, *Exploring Contemporary Migration* (Harlow, Engl.: Addison Wesley Longman, 1998), 180.

migration dichotomy according to the degree of choice involved in the decision to leave home implies that forced migrants “have little or no scope for independent rational decision-making, that they are simply passive victims of circumstances, carried along in flows, streams and waves, like identical modules in a liquid”.²³⁴ This issue has been raised in Chapter Four which addresses the structural weaknesses of the status of the refugee and the trafficked person, illustrating how the legal basis for protection of the refugee and the trafficked person has more to do with policy interests than with humanitarian concerns.

Based on the above, one way to resolve the definitional problem of forced migration is to refrain from referring to forced migration in opposition to voluntary migration, and to develop a definition of the “forced migrant” that is neither based on the causes of flight nor characterized by the degree of choice involved in the decision to leave home.

Before I get to the heart of this matter, it is important to say a few words on the term “forced migration”. “Forced migration” is probably the best term available to acknowledge the element of human agency in the great majority of the processes and events we wish to focus on. For example, it would be meaningless to describe migration as “involuntary”, since an act is “involuntary” when it is done without thinking, without deliberation, “as when I let out a cry of pain after dropping something on my foot”. To migrate, when applied to human beings, implies at least some degree of agency and of independent will; it implies that a person is able to make choices and take action even under social and economic constraints that impede or shape these choices. Moreover, to migrate is something a person does, not something that is done to her: people can be moved and displaced, but not be “migrated”. For the same reason, the

²³⁴ Turton, “Conceptualising Forced Migration”, *supra* note 41 at 10.

term “compulsory migration” is no less awkward: in the rare situations where there really is no reasonable alternative, as, for example, for the victims of slave trade or for those forced to move because their homes are about to be inundated by releasing a dam, it would be more appropriate, on linguistic and logical grounds, to speak of compulsory or forced displacement rather than of compulsory, forced or involuntary migration. In using the concept of “forced migration” and by proposing a definition of the “forced migrant”, we should, however, be aware, “of the conceptual difficulties [the term “forced migration”] raises and not assume that it refers to a clearly discriminable class of events”. We should consequently regard it as a “useful shorthand” that allows us to “bring together a whole range of overlapping ideas and events which don’t have any single characteristic in common but which are connected to each other, like the members of a family”.²³⁵

Before turning to an analysis of the proposed definition of the “forced migrant”, I also want to clarify this point: the definition proposed in the following passage is not a “normative definition” per se. It does not provide detailed guidelines for determining whether and when a person does (or does not) fit into the category of the “forced migrant”, nor does it address the legal status of this “forced migrant”. This should not be interpreted to mean that I undermine the necessity of such a formal definition: definitions are essential to facilitate and to justify aid and protection, and none of the discussions in the field -among politicians, policy workers and academics- can proceed without an idea of who we are talking about.²³⁶ Yet this thesis has been primarily focused on a critical analysis of the legal discourse on migration, and the definition provided below should be seen consequently,

²³⁵ *Ibid.*, at 11. The philosopher Antony Flew has written about an act for which an agent can be held morally responsible (‘voluntary’) and an act for which he or she cannot be held responsible (‘involuntary’): Antony Flew, *An Introduction to Western Philosophy: Ideas and Argument from Plato to Sartre* (London: Thames and Hudson, 1971).

²³⁶ Goodwin-Gill, *The Refugee in International Law*, *supra* note 24 at 2.

first and foremost, as reaction to this discourse and an attempt to reorganize it. Certainly, then, this definition is not useful for purposes of policy implementation but it is a good starting point to move away from the compartmentalizing approach that has prevailed until today, now that the major sources of the problem have been identified. As such, this definition points to the fact that legal protection can and must be made available to a broader category of persons within the existing human rights framework; that is it possible to better take into account the experiences of diverse populations as they occur and become known. The reasoning behind this assumption is that “Failing to take into account the interconnections between different types of forced migrants undermines the quest for effective solutions”.²³⁷ In this regard, and with the objective of addressing the plight of forced migrants’ needs and rights through an holistic approach to the overall international protection of human rights, the increasing recognition of non-refoulement obligations on states is an important guide in identifying the persons “who deserve priority with respect to international protection and assistance, while taking into account the manifold and complex causes of forced displacement”.²³⁸

One decisive factor in the definition of the person as a “forced migrant” should be the existence of valid objections to return. This proposal is not new, since as early as the mid-1980’s, Goodwin-Gill argued that once persons are placed in imminent danger because their own governments deny them protection in the face of harmful events, the principle of “non-refoulement” kicks in, and this, whether they are known Convention refugees or not:

²³⁷ Patricia Weiss Fagen, "Challenge of Finding Solutions for a Growing Population of Forced Migrants" in Susan F. Martin, et al., eds, *The Uprooted: Improving Humanitarian Responses to Forced Migration* (Lanham, MD: Lexington Books, 2005), "Program in Migration and Refugee Studies".

²³⁸ Helton & Jacobs, "What Is Forced Migration?", *supra* note 171 at 4.

... the essential moral obligation to assist refugees and to provide them with refuge or safe heaven has, over time and in certain contexts, developed into a legal obligation (albeit a relatively low commitment). The principle of non-refoulement must now be understood as applying beyond the narrow confines of Articles 1 and 33 of the 1951 Refugee Convention.²³⁹

At the time of this proposal, some refugee scholars were strongly opposed to Goodwin-Gill's suggestion. Hailbronner, for instance, describes this viewpoint as "wishful legal thinking", declaring that "[t]here is no evidence at all for a generalized recognition of an individual right of humanitarian refugees not to be returned or repatriated", an argument also advanced by Hathaway who suggests that Goodwin-Gill's assertion of a right to protection against "refoulement" overstates the scope of customary law in regard to non-convention refugees.²⁴⁰ But the situation today is quite different from that which prevailed some 20 years ago. Within the developing canvas of human rights law, which has profoundly altered the interpretation of refugee law itself,²⁴¹ there is now significant academic support for the view that non-refoulement is a norm of customary international law, a corollary of the absolute prohibition of torture.²⁴²

²³⁹ Guy S. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986) 26 Va. J. Int'l L. 897 at 898. The underlying argument by Goodwin-Gill is that "the existence of danger caused by civil disorder, domestic conflicts, or human rights violations generates a valid presumption of humanitarian need" and that "this has important consequences ... for the entitlement to protection of individuals or specific groups" (page 905).

²⁴⁰ Kay Hailbronner, "Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?" (1986) 26 Va. J. Int'l L. 857 at 887; Hathaway, *The Law of Refugee Status*, *supra* note 136 at 25-26.

²⁴¹ For more on this topic, see *infra* note 174 and section 4.1.2, above.

²⁴² See e.g.: Phil C.W. Chan, "The Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law?" (2006) 10: 3 Int'l J.H.R. 231; Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in Erika Feller, Volker Türk & Frances Nicholson, ed, *Refugee Protection in International Law - UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 78; William A. Schabas, "Non-Refoulement" *Final Report, Expert Workshop on Human Rights and Counter-Terrorism* (Office for Democratic Initiatives and Human Rights: Doc. ODIHR.GAL/14/07, February 2007), 20. However, in the post-September 11th climate, there has, been

The principle of non-refoulement is well established in both refugee and human rights law. In the context of refugee protection, non-refoulement forbids states from expelling or returning “refugees” to countries where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion (art. 33(1)) of the 1951 Refugee Convention).²⁴³ Human rights law has extended the international protection obligations of states beyond the 1951 Refugee Convention by widening the scope of non-refoulement to prevent states from removing not only convention refugees but other individuals at risk of serious harm: these persons fall outside the scope of the 1951 Refugee Convention because they risk ill-treatment which is very serious but does not amount to persecution, or which is persecutory but is not connected to one of the five Convention grounds (i.e., race, religion, nationality, membership in a political social group, or political opinion).²⁴⁴ The principle of non-refoulement may also be contained in general humanitarian principles, such as providing assistance to persons fleeing from generalized violence,²⁴⁵ and in international

resistance by some states to the view of non-refoulement as a norm of customary international law, manifested by such developments as the Suresh judgment of the Supreme Court of Canada; the objections of the United States at the time of presentation of its periodic report of the Human Rights Committee; efforts by some European States to overturn the conclusions in *Chahal*; and Tony Blair’s threat to denounce the European Convention on Human Rights so as to re-ratify with a reservation to the *Chahal* precedent: *Chahal v. United Kingdom* (1996), V Eur. Ct. H.R. 1831 fl 74, 23 Eur. H.R. Rep. 413 (1996); *Suresh v. Canada* [2002] 1 S.C.R. 3

²⁴³ Under the international law governing the protection of refugees and asylum seekers, there are several other formulations of this principle: see, for instance, the Organization of African Unity, the OAU Refugee Convention (Art. II(3)) or the Cartagena Declaration (Section III, para.5), *infra* note 127 & 128.

²⁴⁴ For an analysis of the current scope and content of the principle of non-refoulement, see: Schabas, “Non-Refoulement”, *supra* note 242. See also: Crépeau & Nakache, “Controlling Irregular Migration in Canada” at 7; Hélène Lambert, “Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue” (1999) 48 International and Comparative Law Quarterly 515 at 522 & 34.

²⁴⁵ Providing assistance to persons fleeing from generalized violence is a humanitarian principle; temporary protection in mass influx situations is premised on this: D Perluss & Jf Hartman, “Temporary Refuge: Emergence of a Customary Norm” (1986) 26 Va. J. Int’l L. 551; Goodwin-Gill, “Non-Refoulement and the New Asylum Seekers”, *supra* note 239; Kay Hailbronner, “Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?” (1986) 26 Va. J. Int’l L. 857.

criminal law.²⁴⁶ Thus, although the right of entry to a state other than one's state of nationality cannot, as such, be protected by general international law or by basic human rights treaties, the person's interest in admission is protected indirectly by the principle of non-refoulement.²⁴⁷ Over time, the principle of non-refoulement has been expanded through its express and implied incorporation in human rights treaties, such that, at the very least, international law now prohibits the removal of any individual to torture or cruel, inhuman or degrading treatment. Case law, for instance, reflects that in certain circumstances non-refoulement might be necessary in order to avoid a breach of other fundamental rights such as the right to life, the right to a fair trial and the right not to be refused admission to one's own country.²⁴⁸ Furthermore, although the nature of international legal obligations results from the domain of civil and political rights, in the European system at least, the relevant adjudicatory bodies increasingly recognize that under exceptional circumstances states may be in breach of their treaty obligations if they expel a person to a situation in which their economic and social rights will be infringed.²⁴⁹ Finally, the widespread

²⁴⁶ See: *Rome Statute of the International Criminal Court*, U.N. Doc. 2187 U.N.T.S. 90 (entered into force 1. July 2002), Articles 7 & 8.

²⁴⁷ Guy S. Goodwin-Gill, "Forced Migration and International Law" in T. Alexander Aleinikoff & Vincent Chetail, ed, *Migration and International Legal Norms* (Cambridge: Cambridge University Press, 2003), 123 at 130-31. It should be noted, however, that non-refoulement generally precludes expulsion at the border: Goodwin-Gill, *The Refugee in International Law*, *supra* note 24 at 124. This principle was recently affirmed by the House of Lords: *R (European Roma Rights Centre) V Immigration Officer at Prague Airport* (2004), [2005] 2 A.C. 1 (HL), at para. 26.

²⁴⁸ See: Hugo Storey et al., "Symposium Outline Paper: Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?" ("Disadvantages of the Present Situation", Joint ILPA/IARLJ Symposium, 06 December 1999); Jane Mcadam, *Complementary Protection in International Refugee Law* (Oxford ; New York: Oxford University Press, 2007) at 9.

²⁴⁹ The European Court of Human Rights has held, for instance, that Article 3 may prohibit the return of a person with HIV/AIDS to a country in which she would not receive any treatment or family support: *D. v. United Kingdom* (Unreported, Case No 146/1996/767/964, 21 April 1997). In addition, Art. 8 of the European Convention (respect for private and family life) may be invoked when the treatment which the applicant fears does not reach the severity of treatment described in Art. 3. For example, it has been held that treatment might breach Art. 8 in its private life aspect "where there are sufficiently adverse effects on physical and moral integrity" (*Bensaid*, at para. 46) such

practice of major Western states to extend humanitarian leave to remain to some migrants has also influenced the perception “to such a degree that there is now general acceptance that victims of serious non-persecutory violence have a legitimate need for refuge if they are unable to find safety in their state of origin”.²⁵⁰ One concrete manifestation of the principle of non-refoulement operating as a check on the state’s ability to remove individuals is complementary protection.

As a technical term, “complementary protection” denotes protection granted by states to individuals on the basis of a legal obligation other than the principal refugee treaty. It describes the engagement of states’ legal protection obligations which are complementary to those assumed under the 1951 Refugee Convention, whether derived from a treaty or from customary international law. Complementary protection stems from legal obligations to prevent a return to serious harm, rather than from compassionate reasons or practical obstacles to removal. Even though these latter instances of “protection” may be humanitarian in nature, they are not based on international protection obligations *per se* and therefore do not fall within the legal domain of “complementary protection”.

that reliance may be placed on Art. 8 to “resist an expulsion decision based on the consequences for [the applicant’s] mental health of removal to the receiving country” (*Razgar*, at para. 175): *Bensaid v United Kingdom*, (2001) 33 EHRR 205; *R (on the Application of Razgar) v. Secretary of State for the Home Department* [2004] All Er (D) 169 . Although the circumstances in which such a claim will be successful are very narrow, we can agree with Foster that this “nonetheless holds promise for persons outside the scope of the Refugee Convention who are in need of protection”: Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, *supra* note 16 at 250-255 (see also Chapter 4 of Foster’s book: “Rethinking the conceptual approaches to socio-economic claims”). See also: Katharina Röhl, “Fleeing Violence and Poverty: Non-Refoulement Obligations under the European Convention of Human Rights” (January 2005) New Issues in refugee Research - UNHCR Working Paper No 111, online: UNHCR <<http://www.unhcr.org/research/RESEARCH/41f8ef4f2.pdf>>(accessed on 04 October 2007).

²⁵⁰ Joan Fitzpatrick, *Human Rights and Forced Displacement: Converging Standards*, ed. by Anne F. Bayefsky & Joan Fitzpatrick (The Hague: Martinus Nijhoff Publishers, 2000) at 7-8; cited in Mcadam, *Complementary Protection in International Refugee Law* , *supra* note 248 at 9-10.

Complementary protection is distinct from “temporary protection”, which describes the (typically European) response of according emergency protection to a sudden *mass influx* of migrants, the size of which would overwhelm standard refugee determination procedures. As such, it should last only for as long as it remains impossible to proceed to refugee determination and to accord protection on an individual basis. In contrast, complementary protection is not an emergency device: it is a response by states to individual migrants who cannot be removed by virtue of the extended principle of non-refoulement under international law.²⁵¹ Despite the longstanding practice by Western states of protecting extra-Convention refugees,²⁵² the term “complementary protection” doesn’t appear in any international treaties and has no singular

²⁵¹ For more on this topic, see: Mcadam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 2-3. The European Directive establishing the temporary protection system in situations of mass influx confirms the general obligation of any state to allow entry or, at least, temporary protection provided that the principle of non-refoulement is applicable in cases of large-scale displacement. It is stated in Article 3(1) that “temporary protection shall not prejudice recognition of refugee status under the Geneva Convention”: EC, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, [2001] O.J. .L 212/12. For an analysis of the concept of “mass influx” and of the concept of “displaced persons” in this Directive, see: Nuria Arenas, “The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System ” (2006) 7: 4 Eur. J. Migr. & L. 435. For a general discussion on the inapplicability of the 1951 Refugee Convention to situations of mass refugee flow, see: Joan Fitzpatrick, “Temporary Protection of Refugees: Elements of a Formalized Regime” (2000) 94: 2 A.J.I.L. 279.; Hathaway & Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Orientated Protection”, *supra* note 90; Joan Fitzpatrick, “Revitalizing the 1951 Refugee Convention” (1996) 9 Harv. Hum. Rts. J. 229.

²⁵² For pre-1951 examples of complementary protection, and a demonstration of how the content of the status afforded to extended categories of refugees was historically the same as that granted to legally recognized refugees, see: Mcadam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 19-52. For post-1951 examples, see: Fitzpatrick, “Temporary Protection of Refugees: Elements of a Formalized Regime” , *ibid.* at 282-287. For a survey of state practice, see: Ruma Mandal, “Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)” (June 2005) UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 . For an overview of asylum and complementary protection practices in the United Kingdom, Canada and the US, see also: Jane Mcadam, “Complementary Protection and Beyond: How States Deal with Human Rights Protection” (August 2005) New issue in Refugee Research, UNHCR Working Paper No. 118, online: UNHCR <<http://www.unhcr.org/research/RESEARCH/42fb1f045.pdf>>(accessed on 14 September 2007).

connotation in state practice. For instance, a UNHCR Executive Committee Conclusion adopted in October 2005 refers specifically to “complementary protection”, but neither defines it nor does it explicitly address the question of the beneficiaries’ status.²⁵³ As a result, there are important discrepancies between different states’ interpretations of who should benefit from such extended protection, and, more crucial, the status to which they should be entitled.²⁵⁴ The reasons underlying the lack of an international complementary protection regime have already been addressed elsewhere.²⁵⁵ And discussions regarding the kind of legal status that should be afforded to beneficiaries of complementary protection, which have been complex and contentious, are well beyond the scope of this thesis.²⁵⁶ Suffice is to say that international law does accommodate complementary protection within its existing framework. What’s more, as indicated previously, the increase in practice of major

²⁵³ U.N.H.C.R., *Conclusion on Protection Safeguards in Interception Measures*, Executive Committee, 54th Sess., Doc No. 97 (LIV) - 2003.

²⁵⁴ This lack of clarity concerning the legal status of beneficiaries of complementary protection is problematic because protection cannot be understood without taking into consideration two interrelated elements: the threshold qualification and the rights attached to it. In other words, the determination of an individual’s international protection must not focus only on the scope of the threshold qualification (underscored by the principle of non-refoulement) but also on the ensuing rights. See Goodwin-Gill, *The Refugee in International Law*, *supra* note 24 at 202 for more on this topic. See also: McAdam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 10-12 & 20-21.

²⁵⁵ For more on this topic, see: Jane McAdam, “The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection” (July 2006) New issue in Refugee Research, UNHCR Research Paper No. 125, online: UNHCR <<http://www.unhcr.org/research/RESEARCH/44b7b7162.pdf>>(accessed on 14 September 2007) at 15.

²⁵⁶ McAdam does not defend the codification of states’ complementary protection obligations by a new international instrument but rather proposes that the 1951 Refugee Convention apply to all those whom the principle of non-refoulement protects: “This does not have to be viewed as an attempt to broaden the scope of Article 1A(2), but rather as recognition that the widening of non-refoulement under customary international law and treaty requires a concomitant consideration of the status which beneficiaries acquire”: *ibid.* at 4. See also: McAdam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 197-251. For a position against a broadened definition of the 1951 Refugee Convention, see: Fitzpatrick, *Human Rights and Forced Displacement: Converging Standards*, *supra* note 250 at 8; Helton & Jacobs, “What Is Forced Migration?” , *supra* note 171 at 10.

Western states to formally extend their protection to non-convention refugees, as, for example, in the case of the EU Qualification Directive,²⁵⁷ indicates that there is some interest from states in this matter.²⁵⁸ With this in mind, I will determine in the following passage who could benefit from complementary protection within the context of the development of human rights-based non-refoulement.

In defining the beneficiaries of the complementary protection regime, Fitzpatrick's insights into the elements of a formalized regime are particularly helpful, as, following a comparative analysis of representative models of temporary protection, she suggests some criteria.²⁵⁹ We could

²⁵⁷ EC, *Council Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise*, [2004] O.J. L304/12 . It is the first binding supranational instrument on complementary protection concluded by the European Union. It should be noted that the EU uses the term "subsidiary protection" instead of "temporary protection": Jane Mcadam, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime" (2005) 17: 3 *Int'l J. Refugee. L.* 461 at 463.

²⁵⁸ This interest may not be well-intentioned: the Qualification Directive specifies the rights to which beneficiaries are entitled, which is a considerable step forward for some EU states which, previously, simply 'tolerated' the presence of non-removable persons but did not grant them a formal legal status. The Qualification Directive does not, however, recognize the need for protection as a trigger – one which would entitle a person to the same protection as Convention refugees. These distinctions between the rights granted to Convention refugees and those granted to beneficiaries of subsidiary protection, which were part of the political compromise reached in drafting the Directive, may lead to states favouring subsidiary protection by "defining out" categories of persons who legitimately fall within Article 1A (2), so as to avoid the more stringent obligations required for the 1951 Refugee Convention refugees. For instance, the relatively generous complementary protection of the Nordic states is counterbalanced by very low recognition rates of Convention refugees. In Denmark, the ratio was in 2003 approximately one-third Convention refugees to two-thirds de facto refugees: Kim U. Kjær, "The Abolition of the Danish De Facto Concept" (2003) 15: 2 *Int'l J. Refugee. L.* 254 at 258. For more on this topic, see also: Mcadam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 53-110; J. Hathaway, "What's in a Label ?" (2003) 5: 1 *European Journal of Migration and Law* 1.

²⁵⁹ Fitzpatrick distinguishes among four elements in exploring the potential content of a formalized complementary protection regime: 1) the *why* (the objectives and motivations of the dominant participants in the discourse on formalization of complementary protection); 2) the *who* (definition of the beneficiaries - the eligibility criteria for protected persons); 3) the *where* (the emphasis on regional or international solutions); 4) the *what* (the duration and standards of treatment for beneficiaries). See: Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime", *supra* note 251 at 282. Fitzpatrick's work is largely inspired by two documents that were

therefore define the intended beneficiary of complementary protection as a person whose safe return under dignified and humane conditions is impossible in view of the situation prevailing in a particular country. The prevalence of certain human rights should be especially germane to assessing return in safety and with dignity, including the right to life; the prohibition on torture and other serious deprivations of the right to physical integrity; freedom of religion and expression; the right to a nationality; non-discrimination, especially in the enjoyment of basic economic rights; freedom from arbitrary detention and the right to a fair trial; freedom of movement and the right to return to one's home. "These rights are the most relevant", writes Fitzpatrick, "because their violation often contributes to flight. Further, hostility to returnees may trigger new abuses of these fundamental guarantees, and systematic disregard for these rights prevents temporary protection beneficiaries from returning in safety and with dignity".²⁶⁰ Fitzpatrick includes among the beneficiaries "persons fleeing severe natural disasters that deprive them of access to physical safety within the state of origin", although she recognizes this to be the most polemical option because it strays the most from the parameters of refugee law.²⁶¹

drafted during the same period: 1) a 1998 proposal submitted by the Commission of the European Communities to harmonize complementary protection norms within the European Union, which was ultimately stalled; and 2) and a May 1997 progress report of UNHCR informal consultations on complementary protection. These documents are interesting because they allow for expansion of the categories of protected persons: EC, *Amended Proposal for a Joint Action Concerning Temporary Protection of Displaced Persons*, [1998] C.O.M.(1998) 372 Final - 97/0081(Cns), O.J. C. 268/13 ; U.N.H.C.R., *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, Executive Committee, Doc. EC/47/SC/CRP.27 - 1997

²⁶⁰ Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime", *supra* note 251 at 302.

²⁶¹ *Ibid.* at 294. UNHCR noted recently (at para. 22): "Although there is basically no State practice to accord victims of natural disaster protection under [the complementary protection] mechanisms, it is worth noting, however, that UNHCR's call for suspension of return to the areas affected by the December 2004 tsunami, though not based on a legal obligation, was well respected": UNHCR, *Providing International Protection Including through Complementary Forms of Protection*, Executive Committee, 55th session, U.N. Doc. EC/55/SC/CRP.16 - 2 June 2005 (2004/2005) .

Although in international case law protection against refoulement is confined to the situation of migrants who are threatened with a return across borders, prohibiting the return of internally displaced persons to situations of danger can also contribute significantly to their physical protection and sense of security. It is with this perspective that Principle 15 (d) of the UN *Guiding Principles on Internal Displacement*, which states the right of internally displaced persons “to be protected against forcible return to or resettlement in any place where their life, safety, liberty or health would be at risk”, meets an important need “by applying, by analogy, the authority of existing refugee- and alien-related human rights law to the field of internal displacement”.²⁶² Kälin explains:

In refugee law and human rights law, states bear responsibility for violations of the non-refoulement principle and for forcibly returning aliens to situations of danger. In one case, the European Court of Human Rights derived the prohibition of return from Article 3 ECHR and Article 7 CCPR, and referred to the “liability incurred by the extraditing State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” When this reasoning is applied to the context of internal displacement, it is clear that states bear an affirmative duty to ensure that internally displaced persons are not compelled to return to or be resettled in places where their lives or liberty are at risk.²⁶³

²⁶² Kälin, *supra* note 66 at 32, commenting the UN Guiding Principles on Internal Displacement, *supra* note 59. See also Deng’s *Introductory Note to the Guiding Principles* in which he explains that, while not legally binding, the *Guiding Principles* consolidate the “previously too diffused and unfocussed” principles of international humanitarian law, international human rights law, and refugee law by analogy, from a large number of international instruments into an easily comprehensible single document: Francis Deng, *Introductory Note to the Guiding Principles*, Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum UN doc. E/CN.4/1998/53/Add.2, 11 February 1998. See section 3.3.1, below, for more on the topic of IDPs.

²⁶³ Walter Kälin, "The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool" (2005) 24: 3 *Refugee Survey Quarterly* 27 at 29, referring to *Soering v. United Kingdom* (1989), 161 Eur. Ct. H.R. (Ser. A) 300, 11 E.H.R.R. 439.

Principle 15 thus demonstrates that the kind of rights granted to migrants in specific situations do make sense for displaced persons who are still in their country of origin: the state's responsibility for not forcibly returning people to situations of danger is premised either on the need for international protection (non-refoulement protects migrants who are in foreign countries and who cannot rely on the protection of their own government)²⁶⁴ or on human rights obligations of the country of nationality towards their own internally displaced persons.²⁶⁵ In other words, protection against forcible return to situations of danger applies to those who have left their homes or usual place of habitat but remain within their own country and to those who cross the territorial borders of their country and are in a foreign country. That this principle applies to both migrants and IDPs is one important step in recognizing that despite their "chosen" safe territorial relocation, the need for protection is identical for both groups. However, there remains the problem of having meaningful protection for internal displacement, which involves "a genuine

²⁶⁴ The need for international protection is predicated on the breakdown of national protection – a lack of the basic guarantees which states normally extend to their citizens. When the term "international protection" was first coined by the French delegation during the drafting of the UNHCR Statute in the 1950s, its purpose was to distinguish between international protection extended by UNHCR and national protection extended by states. For further details, see: Mcadam, *Complementary Protection in International Refugee Law*, *supra* note 248 at 20.

²⁶⁵ According to the principles of national sovereignty and non-intervention, states are clearly responsible for their own internally displaced persons. See, e.g.: *Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations*, UN Doc A/RES/46/182, G.A. 78th plenary meeting, 19 December 1991; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)*, [1986] ICJ Rep 14 at para. 292. For doctrinal work see also: Goodwin-Gill, *The Refugee in International Law*, *supra* note 24 at 264; B. S. Chimni, *International Refugee Law : A Reader* (New Delhi; Thousand Oaks, Calif.: Sage Publications, 2000) at 392. This positive obligation of states to protect human rights includes a duty to protect individuals from abuses by private actors (be they private individuals or armed groups), a well-established principle of international human rights law that is also called the doctrine of due diligence. Due diligence requires reasonable measures of prevention which a well-administered government might be expected to exercise under similar circumstances: Katja Luopajarvi, "Is There an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?" (2003) 15: 4 Int'l J. Refugee. L. 678 at 692. This principle has been reaffirmed in international jurisprudence. See notably: *Velasquez Rodriguez Case*, (1988), Inter-Am. Ct. H. R. (Ser. C.) No. 4 at 35, *Annual Report of the Inter-American Court of Human Rights: 1988*, OEA/Ser.L/V/III.19/ Doc. 13 (1988) 35. at para172.

commitment for humanitarian assistance on the part of the international community and political will on the part of the state concerned”.²⁶⁶ It is not within the scope of this thesis to address whether and when the international community can provide either surrogate or complementary assistance for internally displaced persons without the consent of the concerned government, but suffice it to say that today there are different interrelated approaches to international humanitarian assistance of IDPs.²⁶⁷ In conclusion, although not already stated in any authoritative document, the articulation of the prohibition of return, as regards internally displaced persons, to dangerous areas within their own country, is in line with the spirit of existing international law and reflects its underlying principles.

In line with the above, following this logic and taking into account the complexities of forced migration and the intimate connections between its diverse forms, I propose the following preliminary definition:

The term “forced migrant” applies to a person who has left his or her habitual place of residence and whose safe return under dignified and humane conditions is impossible in view of the situation prevailing in his or her habitual place of residence.

²⁶⁶ Islam, "The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable", *supra* note 68 at 361.

²⁶⁷ There has been increasing recognition that sovereignty implies responsibility for one's citizens and that if a government fails to fulfill this commitment, it sacrifices the right to prevent international intervention. See e.g.: Cohen & Deng, *Masses in Flight : The Global Crisis of Internal Displacement*, *supra* note 91 at 276; Chaloka Beyani, "State Responsibility for the Prevention and Resolution of Forced Population Displacements" (Summer 1995) 130 Int'l J. Refugee. L. 140 (OAU/UNHCR Special Issue); Islam, "The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable", *supra* note 68 at 366 & 385; Beyani, "State Responsibility for the Prevention and Resolution of Forced Population Displacements", *supra* note 265.

Analysis of proposed definition

The proposed definition of “forced migrant” draws upon the definition of the beneficiary of a complementary protection suggested above (i.e., a person whose safe return under dignified and humane conditions is impossible in view of the situation prevailing in a particular country).²⁶⁸ Yet in order to ensure coverage of internally displaced persons, the expressions “his or her country of residence” and “in that country” were replaced by “his or her place of residence”.

As indicated previously, the proposed definition is obviously incomplete. First, according to the definition, the principal element triggering protection is a valid objection to return, but there is no explanation of what should be considered valid objections to return. In other words, there is no mention of the conditions under which an individual obtains the benefit of non-removal.²⁶⁹ Second, the formulation proposed in this definition does not regulate the status which the migrant would receive as a result of the enactment of the non-refoulement principle. In other words, it does not deal with the formal legal status that should be granted to non-removable persons. Again, I do not mean here to undermine the value of these two elements: it is of crucial importance to explain the conditions under which a safe and dignified return is presupposed, and drawing on Fitzpatrick’s writings, the least we can say is that the prevalence of certain human rights should be especially germane

²⁶⁸ See page 304, above, for more on this topic.

²⁶⁹ A good starting point is to look at the conditions enunciated in a June 2007 report of the Brookings-Bern Project on Internal Displacement, whose objective is to develop a framework for determining when an individual should no longer be considered an internally displaced person in need of protection and assistance: Brookings-Bern Project on Internal Displacement, “When Displacement Ends: A Framework for Durable Solutions” (Washington, D.C.: The Brookings-Bern Project on Internal Displacement, June 2007).

to assessing return in safety and with dignity.²⁷⁰ It is also equally important to determine the kind of formal legal status that should be granted to the forced migrant: a state may have an obligation not to deport, but questions remain regarding the degree to which it is responsible for taking measures to allow the individual to exist and subsist.²⁷¹ Detailed discussion regarding risks which, for the forced migrant, should be considered as valid objections to return, or the kind of status that should be granted to persons who have a need complementary protection is not the focus of this thesis. However, in reviewing one element key to establishing a minimum protection which states should accord persons in need of protection (i.e. the non removal of all individuals at risk of serious harm), it is possible to demonstrate that legal protection should be made available to a broader category of persons, not taking into account the causes of displacement (i.e. the reasons why people leave their country of origin), but from a consideration of valid objections to return (i.e. the reasons why people cannot go back to their country of origin).

This is not to suggest that the 1951 Refugee Convention should be abandoned. The Convention has 147 state parties and remains the key universally applicable instrument in international law for the protection of refugees.²⁷² Even though the Convention reiterates many of the rights mentioned in the universal treaties, its retention as a specialist refugee instrument is not redundant: refugee law has its own legitimacy, and “guarantees crucial for refugees would be abolished within the framework

²⁷⁰ See *supra* note 260.

²⁷¹ See *supra* note 254.

²⁷² As of October 2007, 147 states are party to either the 1951 Refugee Convention or the 1967 Protocol: UNHCR, "States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol" October 2007), online: UNHCR <<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>>(accessed on 08 October 2007).

of a regime based solely on human rights law”.²⁷³ Moreover, the 1951 Refugee Convention deals not only with the definition of the refugee, but sets out a range of rights which apply to refugee status. Given this situation, it is important to maintain the 1951 Refugee Convention as it is: an instrument which serves as the cornerstone of the international refugee protection regime. This regime, in spite of obvious deficiencies, provides principles, institutions, and mechanisms which make it possible to resolve problems of concern to the community of nations. Accordingly, instead of broadening the scope of Article 1A(2) (considering that the international treaty definition of the “refugee” has, over the last fifty years, become imbued with specific legal connotations), the term “refugee” should remain a subcategory of the term “forced migrant”. This term, with its specific corresponding remedies, provides an important complement to international human rights law regarding the provision of non-refoulement. This does not have to be viewed as the “sacrifice” of “the specificity of refugeehood”,²⁷⁴ but rather as acknowledgement that the 1951 Refugee Convention, acting as a type of *lex specialis*, complements, as much as it is informed by, the application of the *lex generalis* of international human rights law.

²⁷³ Walter Kälin, "The Legal Condition of Refugees in Switzerland" (1994) 7: 1 *Journal of Refugee Studies* 82 at 94. See also: E. Khiddu-Makubuya, "The Legal Condition of Refugees in Uganda" (1994) 7: 4 *Journal of Refugee Studies* 402 at 410 (arguing that it is important to consider the specific needs and interests of refugees, drawing on human rights norms). See finally: James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 *Journal of Refugee Studies* 113.

²⁷⁴ Hathaway writes: "I believe passionately that scholars must not sacrifice the specificity of refugeehood on the altar of a misguided effort to pursue equality with other migrants": Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" , *supra* note 92 at 365.

Conclusion

Forced migration and refugee studies emerged as a field of academic enquiry in the early 1980s. The approach was pragmatic: the concern with “relevancy” led to the adoption of “policy-related categories” in defining subject matter and setting a research agenda.²⁷⁵ But forced migration has still not evolved as a coherent field of study. In 1998, summarizing discussions held at a meeting entitled “The Growth of Forced Migration: New Directions in Research, Policy and Practice”, Van Hear concluded: “Nearly two decades on, it is debatable if the[se] objectives ... have yet been accomplished, even though the number of people active in the field has proliferated. In fact, if anything, the ‘field’ has become more and more diffuse as time has gone on”.²⁷⁶ At the heart of the matter lies a lack of consensus on the actual scope of forced migration studies, first, because the definitions and labels used to separate subsets of migrants are not mutually exclusive and because increasingly, they overlap on the ground; second, because international protection mechanisms established to address the specific situations of refugeehood and trafficking serve the interests of host states in controlling their borders more than they protect migrants in situations of vulnerability. In other words, there is no protection for the migrant internationally without the articulation and codification of their rights from the position of emplaced host states’ citizens.

²⁷⁵ Refugees and other forced migrants have been studied for many years. However, it was not until the 1980s Refugees and other forced migrants have been studied for many years. However, it was not until the 1980s that researchers began to advocate for a more systematic approach to this question. Many point to a special issue of the *International Migration Review*, published in 1981, as laying the foundations for a new field of study: Barry N. Stein & Silvano M. Tomasi, “Foreword” (1981) 15: 1/2 *International migration review* 5. See also: Turton, “Refugees and ‘Other Forced Migrants’”, *supra* note 78 at 2.

²⁷⁶ Van Hear, “Editorial Introduction”, *supra* note 57 at 341-42.

In a context where the limits of the characterization of population movements by migration typologies are so clearly illustrated, and having shown that the way we define “refugees” or “trafficked persons” is highly contested, it is necessary to start offering a definition of “forced migrant” which does not conceive of forced migration in opposition to voluntary migration and does not view displacement from the perspective of its causes and/or its purpose, but from a consideration of valid objections to return. By addressing those principles which should guide the minimum protection of forced migrants – notably, in making reference to the non-refoulement principle in the context of wider developments in international treaty interpretation – it is possible to embrace the different situations encompassing displacement by establishing fundamental connections between the different protection regimes. This approach, based on the conceptualization of international law as a body of interrelated norms which must be interpreted in relation to one another, emphasizes the existence of beneficiaries of international protection, be they Convention refugees, trafficked persons or others. It avoids putting people who migrate into categories, since such categorization assumes, and in fact creates, a singularity of experience and opportunity which obscures people’s actual lived experience. The formulation proposed in this definition also allows us to see forced migration from the viewpoint of personal rights and thus to respond in a more sophisticated manner to claims by those persons who have complex motivations for flight. A commitment to the centrality of the migrant herself is particularly important in a context where, as shown at length in the previous pages, her identity has been legally constructed and sustained in narrow, inflexible terms. This is a result of the failure to see her as a person with agency, “who has dreams and aspirations, and contributions to make to home, old and new”,²⁷⁷ and as an object of responsibility and a bearer of human rights,

²⁷⁷ Crosby, “The Boundaries of Belonging: Reflections on Migration Policies into the 21st Century”, *supra* note 19 at 10.

and consequently reflects dominant images concerning the kind of protection she deserves. The emphasis must be put therefore, first and foremost, on the migrant as a “normal” person with the normal range of complex relationships: she is the one who can best assist in untangling the confluences and confusions which occur actually in the migration debate.

Having illustrated in Part One the way in which the “othered” migrant marks the genesis of the national identity of the state, and having shown in Part Two how she puts to the test the claims of universalisation of human rights on the international scene, I now turn in this conclusion to an analysis of the conditions which would enable migrants themselves to act as autonomous beings.

CONCLUSION

Parts One and Two have deconstructed law's claims to objectivity and neutrality in the field of migration, showing how systems of thought and their legal enactments, which are always relational and involve their subjects in relation of dependence on others, are based on the image of the migrant as the prototype of marginality. It has been observed that essentialist conceptions of identity serve to legitimate the exclusion of the migrant within the nation-state (Part One) and within the international legal system (Part Two). Within the nation-state, where the migrant is seen as a threat to the order and unity of national identity, undermining the nation's self-presence, the exclusion of this person from our legal and political arena is presented as a logical and natural fact of migration policies. The operative role of the law in seeking to preserve the assumed identity of nation has been a dominant theme in this discussion. Similarly, within the international legal system, discursive logic dictates that for human rights to have meaning for certain identified categories of migrants, to be cognitively as well as politically recognized, there must be groups of migrants without rights or with fewer rights. A constant concern has been to trace the "logic" which permits these courses of action against the migrant, a logic infused with the presumption that identity is pre-existent, self-present and self-executing, thereby disallowing any ambivalence¹ and displacing it onto the figure of the migrant. As such, the migrant is

¹ In the introduction to this thesis, there is a discussion on ambivalence in identity in general, and in law in particular: a reminder that, in philosophical terms, ambivalence can be summarized as follows: "I am who I am only in relation to the Other, and this sense of difference prevents me from claiming that my existence is whole or complete, although I can ever be totally at one with the world around me". See: Alex Kostogriz & Brenton Doecke, "Encounters with 'Strangers': Towards Dialogical Ethics in English Language Education" (2007) 4: 1 *Critical Inquiry in Language Studies* Critical Inquiry in Language Studies 1 at 7.

outlawed because all her actions which reveal this ambivalence are assessed by a law which disallows ambivalence and registers whether these actions are illegitimate or even simply suspect. Consequently, the courses of action which actually reveal the migrant's ambivalent position within the (inter)national legal system exist due to the non-recognition of ambivalence. Yet the migrant stands equivocally both inside and outside the parameters of the (inter)national legal system, being both included and excluded. This position derives from the system's continuous suspension between these two poles as it continually constructs itself while attempting to delineate the boundary which separates it from the "outside". Thus, as shown in Part One, the migrant is the sign that national identity cannot find peace in a secluded and protected existence. This is the reason why the migrant is seen as such a threat: "Her arrival reminds us that we too, in our safe houses, are never at home ... and that our complacent enjoyment of rights is predicated on the exclusion of others".² Following Derrida's terminology, then, the migrant is the political pre-condition of the nation-state as is the other the pre-condition of identity. In making her way into our country "uninvited", she brings back the exclusion and repression at law's foundation, and "demands of us to accept the difficulty we have to live with the other in us".³ As illustrated in Part Two, international law in the field of migration cannot construct its *raison d'être* and develop its ideal self-image without a global caste of international *refusés*. This is because definitional discourses regarding forced/voluntary migration as well as refugees and trafficked persons have serious identity-related implications. It has been shown, for instance, that the portrayal in Western receiving societies of non-Western refugee women with a "barbaric" cultural background sustains a binary of "refugee-acceptors" and "refugee-

² Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Pub., 2000).

³ *Ibid.* at 357.

producers” which places the blame for population displacement squarely on the “refugee-producing” states. The need to maintain this binary intact stems from the unwillingness to acknowledge the reality that every country discriminates against women. Turning the non-Western refugee woman as an absolute “other” is, consequently, one way to avoid “confronting” the refugee woman as she really is because this would raise the possibility that some women in our countries, too, may be recognized as refugee women. Several reasons also support the statement that addressing trafficking as an issue of human rights, and not as a migration or criminality issue, is impossible from a Western state’s perspective. First, it is in the interest of Western states to maintain the mobility gap between poorer and richer countries with the simplistic assumption that women from the southern countries enter the sex trade because of conditions of poverty. Second, in those receiving countries where prostitution is illegal, this conceals the reality that human trafficking and smuggling are in large part a response to global demand in these countries. Third, it is in the interest of Western states to transform “right holders” into silenced victims because this creates clarity about who is to be excluded from the national legal system (i.e. the smuggled person) and who cannot be (i.e. the trafficked person). This helps explain the reluctance to conceptualize trafficking as something to which women can consent: implicit is the idea that if it is her choice to migrate, then she should not be absolved of the migration law transgression that follows. This illustrates well the idea, central to the analysis of this thesis, that the relation between the migrant and the legal system is not one properly articulated in terms of exclusion but rather one ridden with conflict.

For reasons mentioned above, recognition of the function of ambivalence in identity clearly points to the failure of any attempt to found identity without exclusion (i.e. the incompleteness of identity without an act of exclusion). In addition, this recognition has proved to be essential in

order to prevent naturalization of the exclusion of migrants which is falsely legitimated as a “simple existent reality”⁴. In other words, it is not simply accidental that some migrants have been excluded from the legal system: exclusion is an integral and unavoidable principle of the legal system because of the categories of thought and language from which this legal system is constructed. As something “done”, exclusion should be viewed as a violent act of segregation of peoples. Campbell explains: “[T]he greatest acts of violence in history have been made possible by the apparent naturalness of their practices, by the appearance that those carrying them out are doing no more than following commands necessitated by the order of things, and how that order has often been understood in terms of the survival of a (supposedly pre-given) state, a people, or a culture”.⁵ Consequently, I have shed light on violence that is done to the migrant. In Part One, I have used the term “structural violence” to illustrate the manner in which the migrant is penalized for having broken “our” laws, and this despite the fact that host states are not merely “passive agents” in the migration process: not only do they respond to migration movements, more specifically, they implicitly favour them. This highlights, again, ambiguous treatment of the migrant, based at times on a lack of knowledge or lack of a desire to know her, on irrational fears of “invasion”, or on the pressing need for migrant workers to fill labour shortages caused by aging populations. In Part Two, I have described how the migrant’s experience has been marginalized and repressed by the existing authoritative discourse of international migration law, a discourse which is founded on an artificial distinction between “refugees” and “migrants” as well as on strict definitions and labels which play into the hands of the governments which invented them. This violent act of

⁴ Sarah Kyambi, “National Identity and Refugee Law” in P. Fitzpatrick & P. Tuitt, eds, *Critical Beings: Law, Nation and the Global Subject* (Burlington: Ashgate, 2004), 19 at 33.

⁵ David Campbell, “The Deterritorialization of Responsibility: Levinas, Derrida, and Ethics after the End of Philosophy” (1994) 19 *Alternatives* 455 at 469-70.

exclusion of the migrant cannot be seen as fact of life that is unproblematic. Thus, as something “done”, exclusion is also something for which one is responsible. This brings about a strong focus on the state as the dominant category of human thought in the field of migration, as the starting point and the frame of reference for any thinking on this subject.

As this thesis reveals, law and policy in the field of migration are clearly committed to the state (and its citizens) at the expense of the migrant. This state-centric model necessarily does violence to the migrant in that the state forms the medium of truth, through which reality is filtered and on which the idea of the state is constructed. The dehumanizing language of law in the field of migration has been highlighted. This language obscures and makes invisible the actual lived experience of the migrants, responding to them “not as individual human beings, people like us, embedded in contingent social and historical circumstances, but as anonymous and dehumanized masses ... as people who are members neither of our civil nor our moral community”.⁶ As a consequence, arguments concerning migration tend to be highly polarized: migrants are sometimes depicted as burdens, undesirable, and even “bogus refugees” cynically “abusing” asylum procedures; while at other times they are idealized as helpless victims and people whose behaviour is determined solely by the need to escape immediate danger. Trafficked women in particular face this duality. The idea that these persons might be able to make choices regarding their final destination does not sit easily between these two simplified worldviews and, as such, the reasons why they choose to go to particular destination countries are little understood.⁷ Yet

⁶ David Turton, "Conceptualising Forced Migration" (October 2003) S.R.C Working Paper no 12, online: Refugee Studies Centre <<http://www.rsc.ox.ac.uk/PDFs/workingpaper12.pdf>>(accessed on 03 October 2006) at 10.

⁷ It was suggested a few years ago that there was a need for further work focused on decision-making in the field of forced migration: how migrants reach the decision to leave; what information is available to them; when they make the decision; how their journey is financed, the degree to which it is planned with a specific destination in mind;

migrants resist simplistic assumptions about the migration process. Their migration in fact involves a multitude of factors which they take into account when they make their decision to leave home. The strategies and perspectives of migrants themselves clearly do not conform to the conventional mode of state-centred thinking.

In line with the above is the suggestion that migrants be moved into the centre of the migration discourse. It is impossible to completely do away with the state as a category of thought: the constant tension between the state and the migrant makes it necessary to preserve both.⁸ However, it is crucial to challenge the exclusive state-based notion of the legal migration system and to introduce the voice of the migrant into the migration debate. One way to do this is to use strategies of “counter-violence”⁹ through which the ethics of alterity in law can be pursued. The ethics of alterity is a strong safeguard against repression of the other. By prioritizing the migrant, who is the focus of an act, such ethics acknowledges that “there is no way to avoid the production of others”¹⁰

the extent to which they had prior contact with that country etc. For further analysis, see: Stephen Castles, "Toward a Sociology of Forced Migration and Social Transformation" (2003) 37 *Sociology* 13; Jeff Crisp, "Policy Challenges of the New Diasporas: Migrant Networks and Their Impact on Asylum Flows and Regimes" (1999) UNHCR Working Paper No. 5, online: Transnational Communities Programme <<http://www.transcomm.ox.ac.uk/working%20papers/riia3.pdf>>(accessed on 02 October 2006) at 5. Some recent field studies fill in the gap in the literature. See e.g.: Darren Middleton, "Why Asylum Seekers Seek Refuge in Particular Destination Countries: An Exploration of Key Determinants" (May 2005) 34 *Global Migration Perspective*; Cindy Horst, *Transnational Nomads : How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (New York: Berghahn Books, 2006).

⁸ State institutions matter, and although law is more than the rules and prescriptions enacted by state institutions, a naturalistic approach to legal orders is, according to Webber, an “illusion”: Jeremy Webber, "Legal Pluralism and Human Agency" (2005) 44: 1 *Osgoode Hall L. J.* 167. See also: Ido Shahar, "State, Society and the Relations between Them: Implications for the Study of Legal Pluralism" (2008) 9: 2 *Theoretical Inquiries in Law* 417; Margaret Davies, "The Ethos of Pluralism" (2005) 27: 1 *Sydney L. Rev.* Finally, see *infra* note 13 and accompanying text .

⁹ Patricia Tuitt, *Race, Law, Resistance* (London; Portland, Or.: GlassHouse, 2004) at 97.

¹⁰ Mustafa Dikeç, "Pera Peras Poros: Longings for Spaces of Hospitality" (2002) 19: 1-2 *Theory, Culture & Society* 227 at 243-44.

because, far from being polar opposites, the *I* and *we* are two sides of the same coin, two expressions of the totalizing essentialism of the same”.¹¹ But it also states that this “difference is not merely unavoidable, but good, precious and in need of protection and cultivation”.¹² Such ethics, therefore, fosters difference and de-centredness. This is where this project connects with that of legal pluralism.¹³ The ethics of alterity also constitutes a radical departure from the “othering” distance created by the prevailing state-centred model in the migration field. This distance absolves the host state and its citizens from accountability within the migration process, and specifically exonerates their involvement in the perpetuation of violence against migrants. Through a deconstruction of the “othering” distance, which conceals the responsibility of Western societies for what happens “elsewhere” among “other” strange or “barbaric” populations, the task becomes the displacement of the responsibility that currently lies with those who move to those who make the decision to exclude those who move. Implicit is the idea that the Western receiving societies need to resist the seduction of seeing ourselves as “generous” and “good”.

¹¹ Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Montreal: McGill-Queen's University Press, 2006) at 26 (original emphasis).

¹² Zygmunt Bauman, *Postmodernity and Its Discontents* (New York: New York University Press, 1997) at 31.

¹³ Legal pluralism stands in contradiction to the notion that the law is a single, monolithic, unified set of rules flowing from the State authority. However, legal pluralists do not agree on a robust definition of legal pluralism. There are also several different ways of classifying the literature on legal pluralism, for instance, according to method (empirical or theoretical), discipline (anthropology, sociology or law) or subject matter (law in former colonies, law in the West or the positive legal system itself). See: Davies, "The Ethos of Pluralism", *supra* note 8; John Griffiths, "What Is Legal Pluralism" (1986) 24: 2 J. Legal Pluralism 2; Martha-Marie Kleinhaus & Roderick A. Macdonald, "What Is Critical Legal Pluralism" (1997) 12: 2 C.J.L.S. 25.

Translating the ethics of alterity into law is well beyond the scope of this thesis.¹⁴ Of greater importance here is the ethical inspiration underlying the law.

The ethics of alterity, as formulated by Lévinas and later developed by Derrida, stands as a reminder for those individuals who are forgotten, threatened or mistreated by a totality, which might be law. The purpose of this approach is to make sure that a totality does not become too assured of its “justice” - an assurance which, in the worst-case scenarios, descends into totalitarianism. In relation to this, it should be remembered that Lévinas, in whose work the ethics of alterity appears to be a major theme, was a survivor of the Holocaust. His specific aim was to explain that the suffering of others matters to us because, to paraphrase him, with each person who is killed, the whole of humanity dies. However - and this is where the force of Lévinas’ thinking lies as to how we might better understand existing law – he is not arguing that we ought to think more about ethics, or that we ought to care more about others. He wishes us to see that we cannot adequately explain our own experience and existence without reconfiguring our understanding of the relationship of the self to others.¹⁵ In line with the above, the primary objective of the ethics of alterity is not to undermine law. Rather, it is to emphasize law’s

¹⁴ Only a few legal scholars have recently attempted to do so. See, among others: Drucilla Cornell, *The Philosophy of the Limit* (New York; London: Routledge, 1992); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001); Diamantides Marino, "In the Company of Priests: Meaninglessness, Suffering and Compassion in the Thoughts of Nietzsche and Levinas" (2003) 24 *Cardozo L. Rev.* 1275; Marinos Diamantides, "The Subject May Have Disappeared but Its Sufferings Remain" (2000) 11: 2 *Law and Critique*; Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, *supra* note 2; Manderson, "Emmanuel Levinas and the Philosophy of Negligence", *supra* note 15.

¹⁵ Bauman offers an account of the Holocaust using similar terms. He focuses on the issue of ethical distance which leads inexorably to neutrality. He sees the Holocaust as illustrative of the triumph of obligations and reasons created by administrative procedures over any prior sense of duty: Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca, N.Y.: Cornell University Press, 2000). See also: Desmond Manderson, "Emmanuel Levinas and the Philosophy of Negligence" (2006) 14: 1 *Tort L. Rev.* at 4; R. Clifton Spargo, *Vigilant Memory : Emmanuel Levinas, the Holocaust, and the Unjust Death* (Baltimore: Johns Hopkins University Press, 2006).

incompleteness, its neglect for certain others as it tries to assimilate and exclude them, and the ways in which it can sometimes be inhospitable.¹⁶ In this sense, Lévinasian ethics does not offer a clear-cut normative guide for resolving dilemmas: it does not, for instance, put the emphasis on group recognition through a rights-based discourse; it does not explain how the parties to a dialogue should structure their interaction, nor does it explain how competing claims should be resolved. However, “[i]n opposition to traditional understandings of rules and law”, Lévinasian ethics “insists on the necessity of our response to others, and the unique circumstances of each such response”.¹⁷ As shown below, it is this focus on individuality and recognition within Lévinasian ethics that makes it possible to work towards the elaboration of a less state-centred legal regime in the field of migration. But before going to the heart of the matter, it is necessary to first explain the thought of Levinas.

The ethics of alterity starts with the other and challenges the various ways in which the other has been reduced to the same. This is very different from the “I” of the Cartesian *cognito* or the Kantian transcendental subject which starts with the self and turns the other into the self.¹⁸ For Levinas, the other comes first because the presence of the other is the pre-condition of the self: without the other there is no

¹⁶ “The most immediate and effective restraint on law is for law to recognize and reflect upon its own violence – to be presented with the horror of its own force – for law’s instinct for self-preservation would balk at removing itself entirely from the claims of justice ... Give the law pause and, in that hesitation, in the minute space between the law’s violence and the violence of the other – a space in which the law sees the terror of its own force – lies the space for justice”: Tuitt, *Race, Law, Resistance*, *supra* note 9 at 99-114.

¹⁷ Manderson, “Emmanuel Levinas and the Philosophy of Negligence”, *supra* note 15 at 2.

¹⁸ See generally: Martin Heidegger, *Being and Time*, trans. by John Macquarrie & Edward Robinson (New York, : Harper, 1962); Simon Critchley, *The Ethics of Deconstruction : Derrida and Levinas* (Oxford, UK ; Cambridge, Mass., USA: Blackwell, 1992).

interaction, no obligation to identify ourselves or to position ourselves. In the Lévinasian ethics of alterity, this foundational priority of the other is transposed into an ethical priority.¹⁹ Lévinas' understanding of responsibility for the other involves engaging in dialogue (i.e. to listen and to be open to the other) and being immersed in the discursive space where the self becomes responsive and answerable when face to face with the other.²⁰ This dialogue is a “relation without relation” between the self and the other. It is a relation because an encounter takes place, but it is without relation because that encounter does not establish parity or understanding – the other remains absolutely other.²¹ There is an appeal

¹⁹ In his masterpiece *Totality and Infinity*, Lévinas defines ethics as follows: “A calling into question of the Same... is brought about by the Other. We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into question of my spontaneity, as ethics”. In an interview, he elaborates that ethics is: “... a comportment in which the other, who is strange and indifferent to you, who belongs neither to the order of your interest nor to your affections, at the same time matters to you. His alterity [otherness] concerns you”. In another interview, taken from the same book, Lévinas further sharpens his definition of ethics: “Ethics is no longer a simple moralism of rules which decrees what is virtuous. It is the original awakening of an I responsible for the other; the accession of my person to the uniqueness of the I called and elected to responsibility for the other”. See: Emmanuel Lévinas, *Totality and Infinity: An Essay on Exteriority*, trans. by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969) at 33; Emmanuel Lévinas & Jill Robbins, *Is It Righteous to Be?: Interviews with Emmanuel Lévinas* (Stanford: Stanford University Press, 2001) at 48 & 218.

²⁰ Lévinas' approach is, broadly speaking, phenomenological and metaphorical. He asks us to think about experiences we have had which belie assumptions of “totality” – of the self as complete, as the origin of all knowledge and the justification for all morality. He then treats these aspects as instances which point towards a new way of thinking about what it means to be a human subject who is not self-absorbed, but where our sense of responsibility to the other comes before our self-interest. We are asked to deduce the existence of this “infinity” from the impression it has made on us. This other way of thinking becomes necessary in order to explain the life experiences upon which Lévinas comments. See: Lévinas, *Totality and Infinity: An Essay on Exteriority*, at 28.

²¹ The sign of the other is her unique face. The face eludes every category, no amount of detail about what she looks like can ever capture what it is to be that person: “In its uniqueness, the face gets hold of me with an ethical grip ‘myself beholden to, obligated to, in debt to, the other person, prior to any contracts or agreements about who owes what to whom’ “: Levinas, quoted in: Jacques Derrida, *Writing and Difference*, trans. by Alan Bass (Chicago: University of Chicago Press, 1978) at 100. See also: Lévinas, *Totality and Infinity: An Essay on Exteriority*, *supra* note 19 at 64 & 75; Emmanuel Lévinas, *Time and the Other and Additional Essays* (Pittsburgh, PA: Duquesne University Press, 1987) at 83. For that reason, we must act towards the other without arriving at a shared understanding, without any expectation of the effect of the action, without any expectation that this other would treat me similarly. In other words, there is no guarantee

made by the other to the self. The appeal of the other is direct, concrete and personal. It is addressed to the self and the self is the only one who can respond.²² Self's response to the other produces meaning from beyond self's experience and resources and reveals to the self that what had seemed so uniquely her is, in fact, shared with the other.²³ This brings us to an important argument: the other is incomparably unique but, at the same time, the total uniqueness of the other "creates my own identity, as the addressee, respondent and hostage to the demand. If my identity is intersubjective, it is not as the outcome of a struggle for recognition... I am unique because I am the only one asked by the singular other to offer my response and responsibility here and now to [her] demand".²⁴

Lévinas' ethics of alterity provides therefore a strong critical perspective on essentialist accounts of identity. Starting from difference, alterity is not apprehended here through the traditional us/them dichotomy, which is a subjective and elaborate understanding of the other, but rather through a process of interlocution between distinct and competing voices, a space where each protagonist retains her own open, multifaceted and moving identity. As shown in the following lines, the ethics of alterity is instrumental in the creation of policies and practices that are fair and appropriate to millions of migrants around the world.

that alterity will elicit an ethical rather than repressive response. Understanding and reciprocity may be desirable, they may develop, but they cannot be present from, or exist at the outset.

²² "It is addressed to me and I am the only one who can answer it.... To be free is to do what no one else can do in my place": Costas Douzinas & Ronnie Warrington, "The Face of Justice: A Jurisprudence of Alterity " (1994) 3: 3 *Social & Legal Studies* 405 at 415. See also: Emmanuel Lévinas, *Otherwise Than Being, or, Beyond Essence* (Pittsburgh, Pa.: Duquesne University Press, 1998) at 128.

²³ See especially: Lévinas, *Totality and Infinity: An Essay on Exteriority*, *supra* note 19 at 50; Emmanuel Lévinas, *Entre Nous: On Thinking-of-the-Other* (New York: Columbia University Press, 1998) at 65 & 189.

²⁴ Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, *supra* note 2 at 350.

In his most recent works,²⁵ Derrida provides a concrete reading of Lévinas as an ethics of hospitality. The ethics of hospitality does not offer a juridical solution to injustices engendered by the mobility regime. It helps nonetheless identify instances in which the law is insensitive to the needs of the migrant and points towards an obligation to do justice to outsiders.

Derrida suggests that we have a duty of hospitality towards the visitor.²⁶ He explains the concept of the visitor by drawing a distinction between the “visitor” – the one who calls upon us when we are not expecting her arrival – and the “guest” – the one who is invited and who comes to stay. Echoing Simmel’s point that the arrival of the “stranger” is “uninvited”, he describes “visitation” as “impl[y]ing] the arrival of someone who is not expected, who can show up at any time”. It is visitation, not

²⁵ Jacques Derrida, *Adieu to Emmanuel Levinas*, trans. by Pascale-Anne Brault and Michael Naas (Stanford, Calif.: Stanford University Press, 1999); Jacques Derrida, "Hostipitalité" in F. Keskin & Ö. Sözer, eds, *Pera Peras Poros: Atelier Interdisciplinaire Avec et Autour de Jacques Derrida* (Istanbul: YKY, 1999); Jacques Derrida, "Hostipitality" (2000) 5: 3 *Ange-laki* 3; Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond*, trans. by Rachel Bowlby (Stanford Stanford University Press, 2000); Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge: London, 2004); Jacques Derrida, "What Is Owed to the Stranger?" (September 2002) 60 *Arena Magazine* 5.

²⁶ Derrida returns to Kant’s theory of cosmopolitanism - not to Kantian moral philosophy, which has been a main source of inspiration for traditional liberal theories of justice, but to Kantian political philosophy to suggest that we have a duty of hospitality towards the visitor. Derrida, however, is critical of Kant’s writings on hospitality, pointing to the fact that Kant is concerned with hospitality as law and thereby with the conditions and limitations of hospitality, since hospitality as law subjects the stranger/foreigner to the law of the host’s home: Derrida, *Adieu to Emmanuel Levinas*, *supra* note 25 at 14-15 & 87. See the discussion on unconditional/conditional hospitality below. The basic idea in Kant’s essay *On Perpetual Peace* is that all persons are in possession of the earth’s surface, and since the earth is a globe, they cannot disperse over an infinite area, but must necessarily tolerate one another’s company. This communal possession of the earth means, says Kant, “that all men are entitled to present themselves in the society of others”. There is a right and duty of hospitality, and “Hospitality means the right of a stranger not to be treated with hostility when he arrives on someone else’s territory”: Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in Hans Siegbert Reiss, ed, *Kant's Political Writings*, trans. by H.B. Nisbet(Cambridge: Cambridge University Press, 1970 [1795])(page 105 and what follows).

invitation, which tests our hospitality: “[i]f I am unconditionally hospitable I should welcome the visitation, not the invited guest, but the visitor”.²⁷

Conditional hospitality is distinct from unconditional hospitality but the two exist in a relation of subordination, or justification, with one enabling the other.²⁸ This requires additional explanation.

The only hospitality ever encountered in Western receiving societies is conditional. Conditional hospitality concerns itself with rights, duties, and obligations.²⁹ It refers to “the ‘conditions’ which transform the gift into a contract, the opening into a policed pact; whence the rights and the duties, the borders, passports and doors, whence the immigration laws, since immigration must, it is said, be ‘controlled’”.³⁰ Derrida, clearly concerned about conditional hospitality, believes that when the conditions are defined

²⁷ Jacques Derrida, "Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida" in Richard Kearney & Mark Dooley, ed, *Questioning Ethics: Contemporary Debates in Philosophy* (London; New York: Routledge, 1999), 70. Quoting: Georg Simmel, *The Sociology of Georg Simmel*, ed. by Kurt H. Wolff (trans.) (New York: Free Press, 1950) at 402. See Part I, note 82 and accompanying text, *supra*, for more on Simmel.

²⁸ Hent de Vries, *Religion and Violence: Philosophical Perspectives from Kant to Derrida* (Baltimore: Johns Hopkins University Press, 2002) at 304. According to Derrida, the relationship between unconditional and conditional hospitality is a necessary asymmetrical antinomy. For: "even while keeping itself above the laws of hospitality, the unconditional law of hospitality needs the laws, it requires them. This demand is constitutive. It wouldn't be effectively unconditional, the law, if it didn't have to become effective, concrete, determined, if that were not its being as having-to-be. It would risk being abstract, utopian, illusory, and so turning over into its opposite. In order to be what it is, the law thus needs the laws, which, however, deny it, or at any rate threaten it, sometimes corrupt or pervert it. And it must always be able to do this": Derrida, *Of Hospitality*, *supra* note 25 at 79.

²⁹ Hospitality has a lineage going back to Greco-Roman times, through the Judeo-Christian tradition, as well as to the political philosophies of Kant and Hegel. The legal tradition we have inherited stretches back to ancient Greece, when hospitality was understood in relation to the law. In Athens, the foreigner ("xenos") held some rights. Moreover, he was identified according to a pact ("xenia"). Derrida writes, "Basically, there is no xenos, there is no foreigner before or outside the xenia." The foreigner, who was placed under the law, was essential to the law because he provided a figure to which citizens could compare themselves: Derrida, *Of Hospitality*, *supra* note 25 at 29 & 77.

³⁰ Jacques Derrida, "The Principle of Hospitality" (2005) 11: 34 *Parallax* 6 at 6.

by the state, and the foreigner is stripped of any “right to the internal hearth”,³¹ such control over the conditions of hospitality inevitably leads to violence and eventually threatens the very essence of hospitality.³² It is this concern with conditional hospitality that leads him to express his views on unconditional hospitality.

Drawing on Lévinas’ ethics of alterity as a welcoming of the other, as an unconditional invitation, infinitely open to all, Derrida views unconditional hospitality as offered to an unlimited number of others whose welcome is not to be contingent upon either identity or any questions put to them.³³ Unconditional hospitality is impossible, writes Derrida, because the host, the one who offers hospitality, would never leave her doors open to all who might come, to take or do anything, without condition or limit.³⁴ However this impossibility is not meaningless because it contains in itself an aspiration to unconditionality. To better understand the relation between conditional and unconditional hospitality, it is helpful to quickly review how Derrida conceptualizes the relation between law and justice, as it has a parallel structure.³⁵

For Derrida, within the drive for justice lies an *aporia* because on the one hand, it must respect universality, while on the other, it must respect absolute singularity. The *aporia* resides in the principle of universality which cannot speak directly to the particular case. In other

³¹ Derrida, *Of Hospitality*, *supra* note 25 at 69.

³² *Ibid.* at 71.

³³ Jacques Derrida, "A Discussion with Jacques Derrida" (2001) 5: 1 *Theory and Event* 49 at 9. See also: Derrida, *Of Hospitality*, *supra* note 25 at 25. See lastly: Paula Keating, "The Conditioning of the Unconditioned: Derrida and Kant" (2004) 3: 1 *Borderlands* at para.27

³⁴ Jacques Derrida et al., *Jacques Derrida, Deconstruction Engaged: The Sydney Seminars*, ed. by Paul Patton & Terry Smith (Sydney: Power Publications, 2001) at 201.

³⁵ Derrida, "Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida", *supra* note 27 at 71.

words, it is not possible to be just for everyone and in every single case. This is what Derrida means by saying that "justice is impossible".³⁶ Yet justice is the principle in whose name law is deconstructed.³⁷ Justice, which "imports an unlimited responsiveness to the singularity of the other",³⁸ "exists as a horizon to be looked towards, a criterion of justice against which existing laws can be measured and held into account".³⁹ Although justice can never be fully achieved, it is an aspiration that is supremely important and worth striving for: it is there, in the space between actual law in action and law as it aspires to justice, that one mediates between the universal and the particular. Thus, law and justice are not, and never will be, identical: to tend to justice, one has to deconstruct and improve the law. Despite the absolute radical heterogeneity between the two, the relation between them is not one of opposition: law is not opposed to justice, nor is justice opposed to law. The relation between law and justice will remain "endlessly open and irreducible".⁴⁰

Like justice, unconditional hospitality is impossible. As an unconditional "yes" to the other, unconditional hospitality is infinite. It cannot be regulated by a particular political or juridical practice of the nation-state. In other words, it is impossible to make a rule stating that a

³⁶ Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" in Drucilla Cornell, Michael Rosenfeld & David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), 3 at 16.

³⁷ *Ibid.* at 20. Deconstruction is not, as Derrida recalls, "some obscure textual operation imitated in a mandarin-style prose", but is rather "a concrete intervention in contexts that is governed by an undeconstructable concern for justice": Derrida, *On Cosmopolitanism and Forgiveness*, *supra* note 25 at viii.

³⁸ Fitzpatrick, *Modernism and the Grounds of Law*, *supra* note 14 at 72.

³⁹ Barbara Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity* (London: Sage, 2003) at 192.

⁴⁰ Meyda Yegenoglu, "Liberal Multiculturalism and the Ethics of Hospitality in the Age of Globalization" (2003) 13: 2 *Postmodern Culture* at para.35. This idea that law is the promise of a better migration system to come is also explored by Cover: Robert M. Cover, et al., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1993).

country should open its border unconditionally to all, hence turning it into official policy to be implemented: unconditional hospitality cannot be treated as a rule or an injunction that can organize the nature of the relation between citizens and non-citizens. Although unconditional hospitality is impossible, “[t]he very desire for unconditional hospitality is what regulates the improvement of the laws of hospitality”.⁴¹ This desire comes from the fact that responsibility for the other is, to follow Lévinas, part of our own meaning of being: I owe hospitality to the other for without the other, I do not exist.⁴² Derrida describes this as the “double law of hospitality: to calculate the risks, yes, but without closing the door on the incalculable, that is, on the future and the foreigner”.⁴³

It is not necessary to know what hospitality really is because hospitality exists within lived experience.⁴⁴ As an “experience beyond objective knowing, directed [to the] stranger of whom nothing is known”, it “is never completed” because there is a “constant process of engagement, negotiation and perhaps contestation”.⁴⁵ However, “it is always in the name of pure and hyperbolic hospitality that it is necessary, in order to render it as effective as possible, to invent the best arrangements [dispositions], the least bad conditions, the most just legislation”.⁴⁶

⁴¹ *Ibid.* at para.39.

⁴² Jacques Derrida, “Autoimmunity: Real and Symbolic Suicide” in G. Borradori, eds, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida*. (Chicago: University of Chicago Press, 2003) at 118.

⁴³ Derrida, “The Principle of Hospitality”, *supra* note 30 at 6.

⁴⁴ “We do not know what hospitality is. Not yet. Not yet, but will we ever know?”: Derrida, “Hostipitality”, *supra* note 25 at 6. We must be “unprepared, or prepared to be unprepared, for the unexpected arrival of any other. Is this possible? I don’t know”: Derrida, “Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida”, *supra* note 27.

⁴⁵ Dikeç, “Pera Peras Poros: Longings for Spaces of Hospitality”, *supra* note 10 at 229-237. See also: Derrida, *Writing and Difference*, *supra* note 21 at 155-56.

⁴⁶ Derrida, “The Principle of Hospitality”, *supra* note 30 at 6.

In line with the above, hospitality could be developed as a “sensitivity” in social relationships and interactions, as well as in institutional practices. Dicek explains:

... Hospitality means, on the side of the guest, that the host has a space of [her] own, and although a passage is granted, that should not translate into an extirpation of boundaries.... On the side of the host, it is a call to keep spaces open. Keeping spaces open does not simply refer to opening the doors to a stranger. It goes beyond that, as hospitality would suggest going beyond, and refers to the act of engaging with the stranger.... Hospitality as engagement: not simply a duality of the guest and the host; the guest is as hospitable as the host in that [she] is in engagement with the host while the host recognizes the specificities of the guest.... Hospitality implies, therefore, the cultivation of an ethics and politics of engagement.⁴⁷

Thus, the concept of hospitality implies the recognition that guests and hosts play shifting roles in their engagements.

Applying the Derridean concept of hospitality to the broader context of migration movements means that for a country to claim a reputation of being hospitable and open to the demands of in-coming others, it must be able to welcome the visitor whose arrival has caught the country by surprise. The function of hospitality is not, however, to prevent this country from exercising migration controls: limits and conditions on migration are set precisely because of the impossibility of an absolute hospitality, of a limitless opening of national borders in which all property would be available to those who enter, and all doors would be open.⁴⁸ Rather, it is to understand which motivations inhabit the conditional hospitality of a nation-state (the presuppositions of conditional hospitality and the concepts it is based upon), to question the restricted nature of hospitality, and to suggest ways of improving the conditions of this hospitality. As

⁴⁷ Dikeç, "Pera Peras Poros: Longings for Spaces of Hospitality", *supra* note 10 at 236-237.

⁴⁸ Kevin O'gorman, "Jacques Derrida's Philosophy of Hospitality" (2006) 8:4 *The Hospitality Review* 50 at 53.

such, when the government of a nation-state inevitably fails in its attempt to be open to the visitor, this impossibility resides in its attempt, and places it in a different kind of relationship with the other in question. For instance, Derrida, examining French debates on immigration during the 1990s, was particularly interested in the interconnection between overt institutional generosity and its implicit failure: for example, “when those hosts who are apparently, and present themselves as being, the most generous, constitute themselves as the most limited”.⁴⁹ Thus, “[i]t is not for speculative or ethical reasons” that Derrida is “interested in unconditional hospitality, but in order to understand and to transform what is going on today in our world”.⁵⁰

In sum, the Derridean ethics of hospitality is aimed at encouraging engagement with the other without losing spaces for alterity on both sides. This is a space where the host and the migrant constantly have to invent and reinvent identity so that they can transcend borders which are erected to contain them. Hospitality is a relationship in which people can never be self-enclosed. Derrida’s response to the presence of the stranger is interesting because it counters the tendency to strengthen the borders of the nation-state, real or imagined, while staying with the idea that the encounter with the migrant is unavoidable. Although he offers no clear articulation of the normative criterion which should prevail in the interrogation and reconstruction of law, his concept of hospitality as ethics and politics helps understand how we can approach law drawing on a Lévinasian ethics of alterity. This concept clearly points to the perils of closure through othering the stranger and aims to prevent such closure. It is also key to understanding the relevance, “for a legality that has universalistic pretensions and bases its empire upon the ... thematization

⁴⁹ Derrida et al., *Jacques Derrida, Deconstruction Engaged: The Sydney Seminars*, *supra* note 34 at 116.

⁵⁰ Derrida, "Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida", *supra* note 27.

of people and [the generalization of] circumstances”, of a discourse that “emphasizes the uniqueness of the face”.⁵¹ As such, very much in line with Derrida’s preceding argument that hospitality contains in itself an aspiration to unconditional hospitality, the ethics of alterity cannot be seen as offering a clear-cut answer to the question of what constitutes a “perfect” legal migration system, for such ethics is necessarily particular in scope and application. This does not mean, however, that elements of progress within the actual system should not be pursued. A good starting point is this is to be aware of the violence which this system perpetrates upon the migrant: this has been done in this thesis, so suffice is to say that in a context in which the migrant has no real existence as a moral agent who can make claims on the legal system, it is essential to always discipline the law in relation to its “inescapable violence”.⁵² Given the dependency on the other within every legal system,⁵³ it is also necessary to posit as a “positivist myth” the view of law as a firm, fixed and unique identity: law is necessarily constructed in plural forms by plural subjects; it can “only [be] realized through the actions of human beings who exist simultaneously in several discourses and who are, therefore, themselves plural”.⁵⁴ Thus, instead of the unity of law, the suggestion made in the following passage is to offer a picture of the “intrinsic heterogeneity”, or “inherent pluralism”, of (inter)national migration law. But what exactly does this mean?

⁵¹ Douzinas & Warrington, "The Face of Justice: A Jurisprudence of Alterity", *supra* note 22 at 416.

⁵² Douzinas & Warrington, "The Face of Justice: A Jurisprudence of Alterity", *supra* note 22 at 423.

⁵³ The major lesson of deconstructionist theory is that paradoxically law always involves the other in the construction of the self. See the general introduction to this thesis for further analysis.

⁵⁴ Desmond Manderson, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" (1996) 20 *Melbourne University Law Review* 1048 at 1064.

As rights are always relational and involve their subjects in a relation of dependence on others, those rights must be construed so as to apply to another who stands before us. Simply put, and drawing upon the ethics of alterity literature, there must be a reversal of priority of the self into a priority of the other. Douzinas explains:

If my right has meaning only in relation to another, whose action or entitlement are presupposed in the recognition or exercise of my right, the right of the other always and already precedes mine. The (right of the) other comes first; before my right and before my identity as organised by rights, comes my obligation, my radical turn towards the claim to respect the dignity of the other.⁵⁵

This means several significant things.

First, in opposition to liberal conceptions of law where the other is turned into the same (i.e. the other is understood as long as she conforms to my idea of what I am or should be), the “non-essential essence of law is the recognition that the ‘other’ who approaches me is ... always a unique, singular person who has place and time, gender and history, needs and desires”.⁵⁶ Thus, contrary to liberal theory which accepts that the

⁵⁵ Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, *supra* note 2 at 347-48.

⁵⁶ *Ibid.* at 348. Within liberal conceptions of law, any conventional legal discourse rests on a very specific and limited idea of humanity which one should expect to find in all persons and use as a guide in the formation of every legal system. However, by presenting and promoting a norm within which some persons are expected to find themselves, this discourse necessarily disregards those othered persons against which it is constructed: see the general introduction to this thesis for more on this topic. An additional concern, which is a consequence of “this necessity of the negative [o]ther”, is “that liberalism finds no need to concern itself with justice towards the negative [o]ther. Liberalism is concerned with those who meet the criteria [and] finds no problem in dealing with the negative [o]ther through total denial of rights”: Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 39 at 183. In other words, as there is no question of limiting measures to protect those accepted as conforming to the defining characteristic of the rational liberal subject, there is no concern regarding the pain inflicted by law on those people who are necessary constructions. In fact, the more marginalized the “peripheral legal subject”, the more resistant the legal system will be to cede her any ground: Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London, Portland, Or.: Glass House Press, 2005) at 132.

presence of inequality is necessary in order to conceive of equality, in a Lévinasian ethics of alterity there is a “deep” equality between legal subjects. “Deep equality” means two interrelated things. First, all legal subjects have equal claims: “There is no-one whose difference is ‘beyond the pale’, so intolerably [o]ther that she should not be treated as she requires”.⁵⁷ Concretely, this means that there can be no question of the denial of rights because the migrant is construed as, for instance, risky, dangerous or falling outside the legal box she has been confined to. Second, all legal subjects should be treated simultaneously as equal (i.e., as entitled to the symmetrical treatment of norms) and as totally unique persons who command the response of ethical asymmetry. This “truly universal” aspect of the legal discourse is clearly unattainable: “the law is necessarily committed to the form of universality and abstract equality”⁵⁸, notably because the uniqueness of the other gives way to the need of accommodating the many. However, the law must “also respect the request of the contingent, incarnate and concrete other; it must pass through the ethics of alterity in order to respond to its own embeddedness in ethics”.⁵⁹ The fundamental moral responsibility remains the ground or horizon of every legal system and is translated in politics and law, “from an infinite responsibility for my neighbour into a finite obligation to save many others whom I have never faced”.⁶⁰ This means, in the context of migration, that the dominant legal and political discourse on migration has to accept some limits and restrictions to its political action. It also has to be reconceptualized as an attempt to perform a service for the migrant in full respect of her alterity. There can only ever be attempts at this, for our responsibility to the other is infinite. The point, then, is to “try in an

⁵⁷ Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 39 at 196.

⁵⁸ Douzinas & Warrington, “The Face of Justice: A Jurisprudence of Alterity”, *supra* note 22 at 424.

⁵⁹ *Ibid.* at 424.

⁶⁰ Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, *supra* note 2 at 354.

authentic way to act in service of alterity as well as to acknowledge the reality that we are unable to do so in an absolute or perfect manner”.⁶¹

In the context of migration, “acting in service of alterity” entails recognition of the migrant’s agency. As highlighted in this thesis, the most adverse consequence of a de-ethicalized relationship with the migrant is the negation of the migrant’s autonomous nature which characterizes all human beings: special circumstances force people to leave their country. As normal individuals confronting abnormal situations, they have to redefine themselves in relation to those circumstances as well as to the entire national and international apparatus which constructs them as “non-citizens”, “strangers”, “paupers”, “illegitimate” or even as victims or “enemies”. While migrants find themselves “unequally located in structures of interpretation, representation, decision-making, policy-generation and program delivery”, even in the most disempowering circumstances, they always retain some specific forms of agency. They generate resisting discourses, work to reclaim their identity and take initiative in their everyday lives: “Every new location or situation challenges their state of self, which is constantly renegotiated as they rebuild their lives, and, in this process, is opened up to new possibilities”.⁶² Lévinasian ethics of alterity is particularly effective in identifying and validating the existence and transformative power of human agency to the extent that, even in the most disempowering situation, a dialogical perspective between the migrant and the citizen can reveal spaces of resistance and moments of agency which restore the migrants’ uniqueness.

⁶¹ Sebastien Jodoin, "International Law and Alterity: The State and the Other" (2008) 21 *Leiden Journal of International Law* 1 at 23.

⁶² Maroussia Hajdukowski-Ahmed, "A Dialogical Approach to Identity" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born a Refugee Woman- Contesting Identities, Rethinking Practice* (New York: Berghahn Books, 2008), 28 at 42.

This clearly echoes the concept of human dignity. For many reasons, human dignity is a contested concept.⁶³ However, one conception of human dignity is particularly helpful in furthering our understanding of what is meant in this particular context by migrant's uniqueness, as mentioned above. Human dignity can be seen as the basis for human rights in general, in the sense of providing a key argument as to why humans should have rights. This conception of human dignity is interesting because it provides that, even if human rights are context specific, the cause for their enactment is clearly attributed to human dignity⁶⁴. As such, in this case dignity is seen as a "supreme value" from which human rights derive, a proposition that has important implications. First of all, human dignity is inherent, in the sense that it is ever-present in a human being (i.e., it does not require effort or merit, but stems from human existence). Since human dignity is not conferred by authority, it cannot be lost.⁶⁵ The inherent characteristic of human dignity, the primary basis of which is the

⁶³ It is understood that there is no "true" meaning of human dignity, since dignity is a socially constructed concept in accordance with particular cultural and historical contexts. This is why the term "human dignity" and its variants are not exactly defined in international or national legal documents. There are also several significantly different uses of dignity, either as a principle with specific content, a right, an obligation, or as a justification. The only objective analysis of dignity may be of its etymological root. In *Oxford English Reference Dictionary*, the word dignity is rooted in the Latin "Dignitas" ("the state of being worthy of honour or respect"): Judy Pearsall & Bill Trumble, *The Oxford English Reference Dictionary* (Oxford, England; New York: Oxford University Press, 1996) at 398. See generally: Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76: 2 *American Political Science Review* 303; Christopher Mccrudden, "Human Dignity" (April 2006) University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2006; Doron Shultziner, "Human Dignity - Functions and Meanings" (2003) 3: 3 *Global Jurist Topics* 3.

⁶⁴ This is an "intrinsic" (or qua-personhood) conception of human dignity. See: Brad Stetson, *Human Dignity and Contemporary Liberalism* (Westport, Conn. ; London: Praeger, 1998) at 14. See also: Dierk Ullrich, "Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany" (2003) 3: 1 *Global Jurist Frontiers* 1 at 4-5. See finally: Shultziner, "Human Dignity - Functions and Meanings", *ibid.* at 22; Mccrudden, "Human Dignity", *ibid.* at 22.

⁶⁵ Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 A.J.I.L. 853. See also: Alwin Diemer et al., *Philosophical Foundations of Human Rights* (Paris: Unesco, 1986); Jerzy Zajadlo, "Human Dignity and Human Rights" in R. Hanski & M. Suksi, eds, *An Introduction to the International Protection of Human Rights: A Textbook* (Åbo: Åbo Akademi University, 1999); Shultziner, "Human Dignity - Functions and Meanings", *supra* note 63.

uniqueness of being human, calls for the inalienability of human rights. Secondly, human dignity is universal, in that every person is equally endowed with dignity no matter what her actions. This “universal human potential”⁶⁶ is based on the idea that all humans are equally worthy of respect: there are no human beings who are more human than other human beings. Thirdly, human dignity is objective so as to be independent of social, cultural, ideological, temporal or geographical conditions. In other words, human beings are endowed with dignity irrespective of the specific context of their existence. Put simply, human dignity is the “right to have rights”, or in other words, the “right to be recognized as a person”. Human dignity is the *goal* to which the rule of human rights law aspires: as justice ought to be the purpose of all law, so human dignity is the signpost by which human rights ought to be oriented. Of course, we may not know “where it will take us, but the fundamental value of human dignity will always remind us where we are coming from”.⁶⁷ Human dignity should be seen, therefore, as an “indispensable compass” for our journey to promote and protect the rights of the migrants. Linked with this central idea is the recognition that rights have “the ability to create new worlds, by continuously pushing and expanding the boundaries of society, identity and law”.⁶⁸

Second, this also means that if this reversal of priority of the self into priority of the other means that the ethical relationship is no longer based on qualities of the self, it does not thereby become the case that the

⁶⁶ Christoph Eberhard, *Common Humanities and Human Community - Towards Dianthropological Praxis of Human Rights* (Master's Thesis In Legal Theory: University Of London, 1996-1997).

⁶⁷ Ullrich, "Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany ", *supra* note 64 at 21.

⁶⁸ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Pub., 2000) at 343.

ethical relationship derives from the other's qualities. In other words, contrary to a liberal ethics based on the precept that I should treat others in the way I would wish to be treated because of characteristics we have in common, in Lévinasian ethics, responsibility to otherness does not depend on reciprocity. As such, reciprocity is the foundation of the moral relationship, not something that derives from it. It is an appeal to the self by the other, whereby the self bears witness to distress which lies beyond one's comprehension. Concretely, I must act towards the other without reaching a shared understanding, without confidence in the effect of the action, without confidence that this other would treat me similarly. In other words, the fact that migrants' actions, beliefs or attitudes are sometimes beyond my comprehension does not mean that I do not have the responsibility to defend their rights.

Third and finally, implicit is the idea that there is no single overarching discourse legitimating law and politics, but rather a multiplicity of discourses. This means, first, that all persons' claims should be formulated in their own language, and second, that new rules and practices should be challenged so as to reveal not only who they exclude, but what is lost if there is an accommodation to the prevailing discourse in the making and granting of such claims. If the only terms granted discursive legitimacy are the terms of the dominant discourse, then the other's claims will be dismissed as illegitimate. In sum, the "voice" of the migrant must be introduced into the migration debate. By providing a place for the migrant to articulate her experience and assert her agency, a place in which the migrant can speak her own language (otherwise she will be silenced), this voice has to be placed in the foreground "as a complex subject who is affected by global processes and seeking safe passage across borders".⁶⁹ What's more, as raised previously, the migrant is the

⁶⁹ Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, supra note 53 at 173.

one who can best assist in untangling the conflations and confusions which occur actually in the migration debate. Thus, the proliferation of “small narratives” within the prevailing state-centred migration legal system must be vigorously encouraged.⁷⁰

In conclusion, Lévinas’ idea of responsibility to the other - a responsibility which demands neither a relationship of reciprocity nor that the other make herself comprehensible to us - is the necessary ethical basis for a world in which encounters with “strangers” are unavoidable. Unlike liberal ethics which is based on the recognition of similarity between self and others, this ethics originates from difference. It is based on the impossibility and undesirability of eradicating difference (since the “stranger” is within us), but also on the desire to “give difference its due”.⁷¹ It points to the fact that making the stranger conform to our values, express herself in our terms, making her useful for our own aims, is an attempt to dominate rather to behave ethically: otherness must stake its claims in its own way and must not be reduced to those dominant categories already accommodated by the legal/political community. In other words, it is necessary to re-centre the complexity of migrants, with their human subjectivity, at the heart of the legal discourse. It is only under this condition that we can achieve a non-violent relationship with the stranger and with ourselves, given that our notion of the “other” is part of

⁷⁰ Barry Smart, *Facing Modernity: Ambivalence, Reflexivity and Morality* (London: Sage, 1999) at 140.

⁷¹ This expression is taken from: Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 39 at 178. In the words of Dummett, there is a distinction to be made between what a person “deserves” and what is her “due”. As he explains, “there are some things which are everybody’s due” (page 25). The basic conditions which enable someone to live a fully human life are the due of every human being, simply by virtue of being human: “It seems to me”, writes Juss, “that these are all ‘dignity rights’ inherent in a meaningful human existence predicated on the moral equality of all human beings”. See: Michael A. E. Dummett, *On Immigration and Refugees* (London ; New York: Routledge, 2001) at 26. See also page 338, above, the discussion on human dignity.

ourselves, part of our own self-image: when we are talking about the other, or imagining the other, we are talking about ourselves and how we imagine ourselves. Therefore, in changing the world, it is unavoidable that we change ourselves, our self-image and the place of the "other" both in the world and in our self-image. Hudson writes:

[It] is precisely the demand ... that no version of liberalism can meet ... however [some authors] may push liberalism to its limits. Even if they want to preserve a privileged place in political discourse for previously marginal groups, such groups have to be ... recognised as being capable of participation in the rule-governed discourse of liberal politics. Even if ... they insist that groups and individuals are to speak for themselves, putting forward their own versions of their suffering, their needs and their demands, they still have to be able to articulate their claims in ways that can be understood, that seem reasonable, and that can be acknowledged as legitimate. Even if ... they advocate giving cultural membership the status of a right, so that cultural assimilation is no longer the condition of access to rights, the culture has to be recognisable and recognised as culture.⁷²

This is a remarkably useful perspective, in that it begins to illustrate the manner in which the whole legal discourse may and ought to be recast in ways which could, ultimately, speak to the conditions of displacement. Significantly, this perspective focuses on the very significant point that the conditions of human dignity are not manifestly obvious but, rather, are constituted or revealed in modes of inter-personal relations on ongoing bases. The conditions under which one can speak of human rights are negotiated within the discourse itself and depend very much on the kind of relationships one person has with another. It therefore remains our challenge to enable them to be the most meaningful for the most powerless. This perspective also underscores the fact that human rights do not "belong" only to citizens of the states which explicitly recognize them: they are also implicit in the migrant's daily struggle, in her strategy to combat, and claims against the existing legal discourse. In this sense, human rights have a certain independence from the context of their

⁷² Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity*, *supra* note 39 at 194.

appearance. Identifying the migrant's strategies and claims as acts of resistance validates her agency without invalidating the harms to which she may have been subjected. It forces an unpacking of the regulatory norms which underlie the migrant's human rights claims and practices. This provides the transformative cosmology towards which we seek to move.

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