UNWELCOME REFUGEES:

A Multidisciplinary and Comparative Study on National Security and Refugee Protection

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ABSTRACT

Prevalent claims ("too many," "too dangerous," "too expensive," "too different") portraying refugees and asylum seekers as security, economic and cultural identity threats are driving the disarticulation of *human rights and international refugee law protections* at domestic and regional levels. This notwithstanding that, of the 34 million refugees and asylum seekers in the world today, nearly 14 million are children. This dissertation explores whether the suggested ineluctable choice between protecting host-countries' national security interests (*security claim*) or protecting refugees (*moral claim*) is truly justified or, if not, can be redressed. And it analyzes whether legal reasoning alone can unravel critical distortions, contradictions and disconnections on security, reality, diversity and morality. Drawing on a different rationalisation process developed through a comparative legal analysis, a multidisciplinary approach on reality and diversity (history, anthropology, neuropsychology, physics, law) and an interdisciplinary analysis on security, law and morality (legal theory, constitutional morality, quantum theory), the thesis argues that these claims neither oppose nor complement to each other but are instead—despite perceptional and legal gaps—very much aligned through a multidimensional purpose: *security*. The thesis concludes: protecting one above the other, protects none.

Four findings support this assertion. *First*, the evolution of international refugee protection going from the *Postwar* (victims of persecution entitled to human rights and refugee protections), *Modern* (suspects subject to prosecution and detention) and *Final Refugee Paradigms* (criminalized migrants subject to exclusion, rejection, abandonment) leads to its gradual disarticulation. *Second*, the reception and treatment of refugees and asylum seekers (State practices, polices, regulations, agreements) across the world indicate that *international refugee law* is falling into desuetude. *Third*, critical disconnections of reality (*perceptional gap*) and morality (*legal gap*) show conflicts of diversity, not security. *Fourth,* elaborating on evolving and emerging yet neglected risks as well as on moral and legal choices, a theoretical proposition (*constitutional entanglement and morality*) shows that it is not only possible but inherently necessary to redress the effects of the thereby mis-constructed security claim promoting the protection of national security above the protection of migrants. Instead, the thesis finds: Protecting refugees, protects national security.

RÉSUMÉ

Les revendications courantes («trop nombreuses», «trop dangereuses», «trop coûteuses», «trop différentes») qui présentent les réfugiés et les demandeurs d'asile comme des menaces pour la sécurité, l'économie et l'identité culturelle entraînent la désarticulation des protections des droits de l'homme et du droit international des réfugiés aux niveaux national et régional. Pourtant, sur les 34 millions de réfugiés et de demandeurs d'asile dans le monde aujourd'hui, près de 14 millions sont des enfants. Cette thèse examine si le choix inéluctable suggéré entre la protection des intérêts de sécurité nationale des pays d'accueil (revendication de sécurité) ou la protection des réfugiés (revendication morale) est réellement justifié ou, dans le cas contraire, peut être corrigé. Et elle analyse si le raisonnement juridique peut à lui seul démêler les distorsions, les contradictions et les déconnexions critiques sur la sécurité, la réalité, la diversité et la moralité. S'appuyant sur un processus de rationalisation différent élaboré à partir d'une analyse juridique comparative, d'une approche multidisciplinaire concernant la réalité et la diversité (histoire, anthropologie, neuropsychologie, physique, droit), d'une analyse interdisciplinaire de la sécurité, du droit et de la morale (théorie juridique, morale constitutionnelle, théorie quantique), la thèse soutient que ces revendications ne s'opposent ni ne se complètent les unes les autres, mais qu'elles sont au contraire —malgré les lacunes perceptives et juridiques—très alignées grâce à un objectif multidimensionnel: *la sécurité*. La thèse conclut: protéger l'une en tant que complément ou au-dessus de l'autre, ne protège aucune.

Quatre constatations viennent étayer cette affirmation. Premièrement, l'évolution de la protection internationale des réfugiés depuis l'après-guerre (les victimes de persécution protégées par les droits de l'homme et le droit d'asile), les paradigmes modernes (les suspects poursuivis et détenus) et les paradigmes des réfugiés finaux (les migrants criminalisés, exclus, rejetés et abandonnés) conduisent à sa désarticulation progressive. Deuxièmement, l'accueil et le traitement des réfugiés et des demandeurs d'asile (pratiques des États, politiques, réglementations, accords) dans le monde indiquent que le droit international d'asile est en train de tomber en désuétude. Troisièmement, les déconnexions critiques de la réalité (écart de perception) et de la morale (écart juridique) montrent des conflits de diversité et non de sécurité. Quatrièmement, en élaborant sur les risques évolutifs et émergents mais négligés ainsi que sur les choix moraux et juridiques, une proposition théorique

(enchevêtrement constitutionnel et moral) montre qu'il est non seulement possible mais intrinsèquement nécessaire de remédier aux effets de la revendication de sécurité ainsi mal interprétée en promouvant la protection des intérêts de sécurité nationale plutôt que la protection des migrants. Au lieu de cela, la thèse constate: protéger les réfugiés, c'est protéger la sécurité nationale.

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INTRODUCTION

This thesis is a multidisciplinary, interdisciplinary and comparative study on sociopolitical distortions (misperceptions, recharacterizations) and conceptualizations (migrants as security, economic, and cultural identity threats) informing the legal understanding (interpretations, regulations, practices) on the relationship between national security and refugee protection and, in the process, the reception and treatment of refugees and asylum seekers in the 21st century.

The *scope of the study* should not be mistaken, however. The thesis focuses mainly on international refugee law and national security law and, to a lesser degree, on international human rights law, immigration law, and constitutional law. Yet the reader should not expect to find a dissertation that examines the law and its seemingly evolving intricacies using nothing but legal methods, principles and premises. Law alone (including legal reasoning), I argue, cannot fully evaluate—much less resolve—the complexity of the proposed subject matter. If it could, it would have done it many years ago. As it turns out, notwithstanding hundreds of court decisions, statutes, and public policies developed to deal with refugee crises all over the world, there are more forced migrants every year. In fact, the planet already reached the highest number of forcibly displaced people in history counting nowadays 79.5 million, of which 34 million are seeking protection abroad.[1]

This study is not circumscribed to a particular legal system, culture, community, country or region. It tackles a global problem in the midst of a perfect storm: the expansion of populist governments across developed countries and the nationalization of international law (via domestic interpretation) as millions of migrants face a world in which reality, diversity, security and morality appear increasingly distant one from another. This thesis does not address the resolution of the refugee crisis—at least not with respect to a specific refugee crisis. Instead, the thesis' goal is to tackle the first and most critical obstacle to resolve any refugee crisis: namely, attain a multidimensional understanding of the relationship between refugee and national security protection.

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[1] UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2019* (Geneva: UNHCR, June 2020) at 2, online (pdf): *UNHCR* <https://www.unhcr.org/5ee200e37.pdf>.

Nor does this thesis aim to study the relationship between the novel coronavirus "COVID-19" and refugee populations around the world. At present (August 2020), there are simply too many uncertainties—including, for instance, when and whether vaccination will end the pandemic—for this thesis to make and validate any assertion in this regard. Nevertheless, the thesis has included both in its historical context (medical exclusion grounds, Chapter 1) and in the analysis on the realization of the *Final Refugee Paradigm's* most degenerative effect (abandonment, Chapter 4) some critical reflections on legal and public-policy reactions concerning arriving and currently hosted refugee populations.

Social and Legal Challenges

International Refugee Law derives from an apparently paradoxical equation, in that it prevents the uncivilized actor (State or non-state) from persecuting, abandoning or killing its own people (citizens), while it persuades the more civilized actor to come forward and protect those often different, foreign, and unknown to its kind. Tolerance, compassion, civility, diversity, humanity. From its inception, this seemingly specialized area of law unveils a historic moral choice with legal effects; a choice hundreds of countries once made (via treaty or international customary law) in the aftermath of the most consequential tragedies of the 20th century in order to reject dissimilar drivers of persecution (race, religion, nationality, political opinion, membership in a particular social group) fostering the most violent and uncivilized versions of the world.

This version of humanity, however, is vanishing. Uncivilized and civilized actions are no longer clearly discernable as arguably competing and gradually mischaracterized interests have shifted legal and political narratives from human rights to national security protection. Both reports and images on the reception and treatment of refugees and asylum seekers around the world speak volumes. Children in cages, toddlers taken away from their parents' arms (including children with disabilities), asylum seekers' property being confiscated, migrants being systematically detained in and deported from the 'free world' as thousands of refugees are dying during their journey for safety and millions of asylum seekers are being exposed to migrant smugglers, human traffickers,

labour exploitation, drug cartels, overcrowded facilities, high temperatures, sleep deprivation, starvation, sexual abuse, psychological trauma, torture, and dire humanitarian conditions.[2]

In theory, the policies, regulations and practices leading to these actions are justified by States' duties and powers to protect their territory and population from national security threats. In this context, the conceptualization of refugees and asylum seekers as national security threats ensues from three defining events. First, the *recharacterization of the security threat* ("foreign threat") portraying migrants as terrorists following the legal and public-policy effects (140 countries issuing national security regulations connecting terrorism and immigration)[3] of major terrorist attacks (beginning with 9/11) as well as the exponential increase in the number of terrorist attacks affecting more countries around the world (particularly between 2014 and 2017).[4] This, further, as migrants were seeking protection in the midst of major refugee crises across the planet (Syria, Afghanistan, Yemen, Eritrea, South Sudan, Myanmar, Venezuela, El Salvador, Honduras, Guatemala). Second, the *exacerbation and subsequent reconceptualization of the security threat* ("too many," "too dangerous," "too expensive," "too different") describing migrants as security, economic, and cultural identity threats following the expansion of radical populist governments[5]—especially in developed countries—and their increasingly pervasive *fear and hate narratives*.[6] Third, *sociopolitical distortions* on migrants and security showing patterns of distrust, dehumanization and criminalisation of refugees and asylum seekers and, as a result, a gradual disarticulation of basic human rights (human dignity, liberty) and international refugee protections (non-refoulement, non-discrimination, access to courts, non-penalization for undocumented presence) at domestic and regional levels.

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[2] J Mauricio Gaona, "Is the U.S. Committing Crimes Against Humanity on its Southern Border?" *NY Daily News* (5 July 2019) (analyzing human rights violations of migrant children in the US), online: <https://www.nydailynews.com/opinion/ny-oped-crimes-against-humanity-southern-border-20190705-ttwha2f43nefbdyx7ozmabadii-story.html>.

[3] See Human Rights Watch, "In the Name of Security: Counterterrorism Laws Worldwide Since September 11" (Washington, DC: Human Rights Watch, June 2012), online: *HRW* <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>.

[4] See Institute for Economics and Peace, "Global Terrorism Index 2018: Measuring the Impact of Terrorism" (Sydney: IEP, 2018) at 2.

[5] See Appendix, Chapter 3, Table 3 (Populist Leaders and Parties, 2014-2018).

[6] See e.g. Brookings Institute, "Anti-Muslim Populism in Hungary: From the Margins to the Mainstream" by Péter Krekó, Bulcsú Hunyadi & Patrik Szicherle (Washington, DC: Brookings Institute, July 2019), online: *BROOKINGS* <https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream/>.

In theory, moreover, national security powers emerge from State sovereignty and self-determination principles to ensure the preservation of States' most strategic interests, which institutional attribution is acknowledged by international refugee law as an exception to deny protection. In practice, however, the exception becomes the rule and the protection of refugees, the exception. The often portrayed as ineluctable choice suggests that host countries must decide between protecting refugees (*moral claim*) or protecting their national security interests (*security claim*). The legal and public-policy response to the constructed choice is clear: national security "trumps." This thesis argues that by using forms of *systematic* (e.g., summary deportations, asylum bans) and *diplomatic rejection* (e.g., outsourced migration, U-turn and safe-third-country-*like* agreements), host countries are not only evading their international legal obligations but further changing the moral fabric and legal purpose of *international refugee law* and its embedded *human rights protections*. This gradual disarticulation occurs through what I describe as "*Refugee Paradigms*." Accordingly, I propose that this disarticulation becomes a corrosive progression that goes from the *Postwar* (victims of persecution entitled to human rights and refugee protections) to the *Modern* (suspects subject to prosecution and detention) and the *Final Refugee Paradigms* (criminalized migrants subject to rejection, exclusion and abandonment).

If proved, such proposition leads to untenable inconsistencies between laws, values, principles, and actions; law being, in itself, the most endemic one because when law no longer mirrors the purpose of its creation (protecting migrants from unlawful forms of persecution and conflict) but the effects of its moral decadence (deterring migrants through various forms of persecution, prosecution, exclusion), the law thereby constructed becomes a tool of oppression and human suffering. Hence, if national security becomes (in practice) the sole legal reference to ascertain whether a migrant may seek refugee or asylum protection, the application of *international refugee law* would then depend almost entirely on every country's interpretation, values and understanding on the need to protect foreign citizens in its territory. And once human rights lose their most disputed yet effective deterrence mechanism (indivisibility), those without constitutional rights—or, for that matter, holding any diluted version thereof—would be at the mercy (as they often are) of such powers.

My general theoretical premise—from which various lines of inquiry emerge—is this: aside from conjunctural interests and evolving tensions (political, racial, religious, economic, cultural), governments around the world (through action, inaction, or reaction) have unsuccessfully tried to respond (regulate, control, redress) to a refugee crisis they either do not truly understand or cannot visualize given the tools of rationalisation they use and the challenges they face.

They do not understand it because both emerging (*unidimensional*, e.g., idealizing uniform societies, "getting our countries back") and traditional narratives (*bidimensional*, e.g., framing competing interests, "them-us" approach) depicting what most governments see as their choice and perspective (national security, immigration system, constitutional law) miss other dimensions (*multidimensional security*), connections (moral, legal, social, cultural), relations (laws, values, principles, actions), and critical disconnections (reality, security, diversity, morality).

Using a simile, when trying to repair a vehicle's engine, no matter how many times one looks from the same point at the same place using the same light and tools, one might never truly find the problem—particularly when this one is located deep inside the engine or can only be viewed through its rotation or multiple yet often neglected connections. Hence, only when one tackles the problem (temporary stage of rationalisation) through all its connections (variable dimensions), functional references (values, principles), the thought to be root causes (failures, inconsistencies)—along with our thought to be understanding of the problem—suddenly become prime references to find and understand the actual problem. Elaborating on this simile, moreover, legal reasoning provides us with a uniquely crafted set of tools (enabling us to do things that with other tools we could not). Our tools here are, if you will, in a red box (legal reasoning). In it, we find a flashlight, a powerful wrench, pliers, and a complete set of screwdrivers. We use the wrench (deposition) to untie the bolts (pleadings, defences) and upon removing the engine cover, look at the most critical pieces (facts) we think will pinpoint to the problem (issue). Yet before we diagnose the problem (rule), we must analyze it. We then use pliers (direct and cross-examination) to ascertain the functionality (credibility, character, truthfulness, authenticity) of the engine's extracted parts (witnesses, documents) containing the pieces (facts). We can either place back the pieces that appear to be unrelated to the problem (irrelevant) or eliminate those that no longer work or could further damage the system (undue prejudice). We refrain ourselves from replacing those

pieces with just any piece found outside the system (hearsay), unless upon proper inspection such seemingly unreliable piece may work (hearsay exception).

We can further use a flat (analogy) or a star screwdriver (custom) to install pieces that have worked in similar circumstances and engines before. And we use the flashlight (principle) to make sure that our repairs are consistent with the constitution and functioning of the engine. Still, there are times our red box no longer works. For example, we cannot rely solely on our red box to rotate, fully inspect, or remove the entire engine from the vehicle. Nor can we use it to reach or illuminate all its connections at once. We may need, in fact, more sophisticated tools of analysis such as, for instance, a computer scan (quantum theory). This is particularly true with complex or larger engines requiring us to check all connections, relations, and references from all and each perspective at once. Sometimes, the very tools we use worsen or are part of the problem. This thesis, however, never leaves behind the red box. It benefits from additional lights and set of tools to see all pieces and the entire engine at once, so that we can understand the problem through its multidimensional complexion.

Lines of Inquiry and Narratives

The current legal and public-policy narrative on refugee protection gradually neglected by or subjected to national security interests does not emerge—at least not directly—from a theoretical or purely academic proposition. As it turns out, it follows public policy interpretations describing national security interests as the legal reference guiding immigration systems across the world. Accordingly, the transcending narrative claims that refugees constitute a threefold security threat (security, economic, and cultural identity threats) for actual or potential host countries. The usual course of action—based on rhetoric followed by State actions, practices, policies, decisions, regulations—is to either block migrants altogether from even reaching these countries (e.g., summary deportations, asylum bans, U-turn and safe-third-country-*like* agreements), set migration controls in developing and poor countries (e.g., extraterritorial borders and outsourced migration agreements),[7] or relocate refugees and asylum seekers outside developed countries (safe zones,

[7] See e.g. Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017) at 23; Delphine Nakache & Jessica Losier, "The European

camps, shelters) in developing and poor host countries in exchange of a handling fee (political, economic), and with the assistance of international organizations and NGOs.

Current literature aims to contextualize the ongoing legal and public-policy trend through either legal discussions concerning two competing interests or public policy reflections envisioning two complementing legal interests.[8] Although such theoretical interpretation is sound, it fails nonetheless to break beyond the bidimensional possibility of conflict between the two viewed as separated yet correlated interests—particularly when the correlation is promoted within States' foreign powers, overlooking critical dimensions (constitutional values). This notwithstanding scholarly references describing domestic and foreign policies as part of national security.[9]

It must be noted, however, that this thesis contains 1,000 research references (bibliographic and supplemental material), for which their individual account at this juncture would be hardly efficient. Instead, a more productive enterprise is their summary review through the six lines of inquiry that led me to their reference and exploration in the first place.

The *first line of inquiry* (*national security conceptions*) of this thesis concerns the construction of the previously referred as "ineluctable choice." In this context, the seminal work of Arnold Wolfers[10] on national security (influencing its normative content) is critical to uncover a distinguishable feature that remains to this day: the process of elaboration as legal system through national security interests (identification) and threats (assessment). Going one step forward, another seminal work written by Walter Lippman rejects the conceptualization of national security as supreme value (interest). Although Lippman's narrative forces us to recast national security within a system of values (meaning, it can be limited by other values), it ends up using morality on the other side of the spectrum (States' moral duty to preserve the nation and its values), which

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Union Immigration Agreement with Libya: Out of Sight, Out of Mind?" (July 2017) 35 E-Intern'l Relations, online: <https://www.e-ir.info/2017/07/25/>. See also AFP, "Germany, Netherlands Back Niger Border Force to Counter Migration" *The Local* (1 November 2018), online: <https://www.thelocal.de/20181101/>.

[8] See William W Burke-White, "Human Rights and National Security: The Strategic Correlation" (2004) 17:249 Harv HRJ 249-280 at 258 (proposing correlations on national security and human rights through foreign policy).

[9] See e.g. Shoon Murray & Jordan Tama, "U.S., Foreign Policymaking and National Security" in Derek S Reveon, Nikolas K Gvosdev & John A Cloud, eds, *The Oxford Handbook of U.S. National Security* (Oxford: Oxford University Press, 2018) at 57-74.

[10] See Arnold Wolfers, ""National Security" As an Ambiguous Symbol" (1952) 67:4 Pol Sc Quart 483.

leads to an apparent dichotomy vis-à-vis the moral duty to protect the life of those fleeing unlawful forms of persecution or conflict.[11] What is more, neither Wolfman nor Lippman consider, in particular, whether human rights (human dignity, liberty, equality) or refugee principles (non-refoulement, non-discrimination) could be used as references limiting national security.

Using five identified benchmarks influencing the rather evolving notion of national security (the emergence of nation-states, the transition from imperialism to internationalism, the Cold War, terrorism, technology), this dissertation refers to works on international relations theory (Carr's and Clinton's works on imperialism, Magnusson's reflections on first national security goals, and Schmidt's studies on internationalism and realism, i.e., statism, survival, and self-help theories).[12] The dissertation also analyzes historic accounts on the mindset repercussions on national security of an ideologically divided world (Hayness, Scott, Klehr, Kissinger)[13] and the subsequent ramifications on global migration (Bilgic, Welch Larson)[14] —this analysis encompasses data and reports on terrorism and technology as security threats. This review, in particular, serves at two purposes: understanding the formation and conceptualization of national security, on the one hand,

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[11] Lippman's argues that the moral duty on State security justifies governments' national security choices through "adequate means." See Walter Lippman, *U.S. Foreign Policy* (Boston: Little, Brown & Company, 1943) at 51.

[12] A literature review of the disputed origin of *international relations theory* (realism, liberalism, constructivism) and the advent of the first industrial revolution provides a unique perspective on the development of military capabilities directing national security on States first, not people. See E H Carr, *The Twenty Years' Crisis: 1919-1939* (New York: Palgrave, 2001) at Chapter 1; David Clinton, "Francis Lieber, Imperialism, and Internationalism" in David Long & Brian C Schmidt, eds, *Imperialism and Internationalism in the Discipline of International Relations* (Albany, New York: NYSU, 2005) 22 at 24; Tim Dunne & Brian C Schmidt, "Realism" in John Baylis, Steve Smith, Patricia Owens, eds, *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2014) 99 at 101; Lars Magnusson, *Nation, State and the Industrial Revolution: The Visible Hand* (New York: Routledge, 2009) at 5.

[13] See Michael Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Owl Books, 2001) at 9-13; Len Scott, "Intelligence and the Risk of Nuclear War: Able Archer-83 Revisited" in Michael Herman & Gwilym Hughes, eds, *Intelligence in the Cold War: What Difference did it Make?* (New York: Routledge, 2013) at 6; John E Hayness & Harvey Klehr, *Early Cold War Spies: The Espionage Trials that Shaped American Politics* (New York: Cambridge University Press, 2006) at 15. See also Henry Kissinger, *World Order* (New York: Penguin Press, 2014) at 30 (reflecting on concepts of national interest through the Westphalia system).

[14] This includes the so-called *"security dilemma"* promoting the idea that the actions taken by one State to secure its own protection causes other States' reaction decreasing thereby the acting State's security. See Ali Bilgic, *Rethinking Security in the Age of Migration* (New York: Routledge, 2013) at Part II. Moreover, mistrust does not merely encompass States but also foreign nationals carrying their secrets. See Deborah Welch Larson, *Anatomy of Mistrust: U.S.-Soviet Relations During the Cold War* (Ithaca: Cornell University Press 1997) at Chapter 1.

and evaluating national security assessments on migrants (as "the greatest national security threat" despite more endemic threats, e.g., cyberattacks, nuclearization, automation),[15] on the other.

Exploring narratives that could justify giving up fundamental values (human dignity) and protections (non-refoulement), along with narratives promoting the security of some (migrants) in exchange for security of others (host country's population) further force us to recalibrate the constructed security threat from a historical (when not, anthropological)[16] perspective in order to elucidate the constitutional purpose of the often presented as competing interests (national security *versus* refugee protection). Here, exploring both multidisciplinary (anthropology, history, philosophy) and interdisciplinary sources (legal history from a comparative and sociological perspective) has proven to be quite effective. For instance, opposing views on the relationship between citizens and immigrants arising out of war, conquest, or territorial acquisitions show dissimilar perceptions/conceptualizations on security and migration both in Greece (social distrust, cultural threat) and Rome (social trust, security enhancement, cultural extension).[17] Yet dissimilar bibliographic accounts on security and migration (following the fall of the Western Roman Empire, 476 C.E.) show that legal concessions on migrants (e.g., citizenship) lead to different considerations on power relationships—especially when migrants are described as "too many" or "too different" from the dominant group (ruling majority).[18] This very historic assertion has become an endless source for scholarly research on group dynamics,[19] which findings correlate

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[15] See US President Donald J Trump, Proclamation: *Declaring a National Emergency Concerning the Southern Border of the United States* (15 February 2019), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>.

[16] Anthropological evidence shows clear trends on in-group's motivations and security concerns vis-à-vis foreigners or "out-groups." See Peter Jordan, "The Ethnohistory and Anthropology of 'Modern' Hunter-Gathers" in Vicki Cummings, Peter Jordan & Marek Zvelebil, eds, *The Oxford Handbook of the Archeology and Anthropology of Hunter-Gathers* (Oxford: Oxford University Press, 2014) at 903-917 (distinguishing research trends on regional hunter-gather groups); Thomas Mayor, "Hunter-Gatherers: The Original Libertarians" (2012) 16:4 The Independent Rev 486 (describing Hunter-Gatherer societies).

[17] See Ralph W Mathisen, "Perigrini, Barbari, and Cives Romani: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire" (2006) 111:4 The Am Hist'l Rev 1015; Laurialan Reitzammer, "For Ancient Greeks, Immigrants Were a Boon and Threat to Homeland Security" *Straits Times* (16 April 2017), online: <https://www.straitstimes.com/opinion/for-ancient-greeks-immigrants-were-a-boon-and-threat-to-homeland-security>.

[18] See Guy Halsall, *Barbarian Migrations and the Roman West 376-568* (New York; Cambridge: Cambridge University Press, 2008) at 163-411. See also Allen Leeper, "Germans, Avars and Slavs" (1933) 12:34 Slavonic & East Eur Rev 117-132.

[19] See e.g. Donelson R Forsyth, *Group Dynamics*, 5th ed (Belmont, California: Wadsworth, 2010) at 52 (elaborating on humans' security need to be part of a group and accept the influence and authority of its chosen leaders).

not only with respect to contemporary[20] and modern conceptualizations[21] on security but also in relation to domestic restrictions on refugee protection based on nationality (e.g., asylum bans)[22] or the number of migrants (e.g., annual refugee intake-caps).[23] A multidisciplinary review of references describing the evolution of the concept of security—including the events that eventually shape it—from the Middle Ages[24] to modern times[25] serves at explaining how national security came to be the archetypical legal restriction on immigration and, incidentally, refugee protection at domestic level. Bibliographic accounts, however, remind us that security concerns are not only associated with violence (terrorism) but can come as well from public health fears (pandemic)[26]

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[20] See LeRoy Parker, "Anarchism and the Assassination of McKinley" (1901) 11:2 Yale L J 80-94 (reflecting on security following the assassination of US President William McKinley Jr by a US citizen of polish descent).

[21] See David A Baldwin, "The Concept of Security" (1997) 23 Rev of Intern'l Studies 5 at 7-26 (describing the evolution of the concept of national security in current literature). See also George Sørensen, "Individual Security and National Security: The State Remains the Principal Problem" (1996) 27:4 Security Dialogue 371 at 372-386 (analyzing postmodernist and post-structuralist theoretical approaches from a State's security perspective).

[22] See e.g. US President Donald J Trump, Proclamation: *Addressing Mass Migration through the Southern Border* ("Procedures for Protection Claims"), 83 FR 55934 (9 November 2018) [codified 8 CFR § 208, 13(c)(3)].

[23] For instance, the US has reduced its annual refugee intake-cap from 232,000 in 1980 to 30,000 migrants in 2019. Moreover, the US Government has limited the refugee ceiling for 2020 to 18,000 people. See Jens Manuel Krogstand, "Key Facts About Refugees to the U.S." *PEW News* (7 October 2019) (describing US ceiling limits on refugees from 1980 to 2019), online: <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>.

[24] Walter Goffart, *Barbarian Tides: The Migration Age and the Later Roman Empire* (Philadelphia: University of Pennsylvania Press, 2006); Hugh Kennedy, *Mongols, Huns and Vikings* (Hamilton, Ontario: Cassell, 2012); Florin Curta, *Southeastern Europe in the Middle Ages, 500-1250* (New York: Cambridge University Press, 2014).

[25] Bibliographic references indicate security tensions with respect to the migrants' ideology and race in the year 1900 as in the years 2001 or 2020. See e.g. US President Theodore Roosevelt, *First Annual Message to Congress–National Archives* (3 December 1901) (calling Congress to exercise its discretion on persons whose principles appear hostile to government), online: *MILLER CENTER* <https://millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message>; *US ex rel Turner v Williams*, 194 US 279 (1904) at 291 (quoting Justice Shiras' opinion in *Wong Wing v United States*, 163 US 228 (1896), while authorizing the US Congress to exercise its constitutional discretion to rend migrants "undesirable as citizens" based on their race or habits). See also David Theo Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (Oxford: Wiley-Blackwell, 2009) at Chapters 7, 8 (describing migration as "racial Europeanization" and "racial latinamericanization," respectively); Glenn Deer, "The New Yellow Peril: The Rhetorical Construction of Asian Canadian Identity and Cultural Anxiety in Richmond" in Cheryl Teelucksingh, ed, *Claiming Space Rationalisation in Canadian Cities* (Waterloo, Ontario: Wilfrid Laurier Press, 2006) at 34 (reflecting on the *status quo* of White-Canadian man and Chinese immigrants in Vancouver).

[26] Exclusion and rejection of migrants on medical grounds did not begin with the current pandemic. See e.g. US President Donald J Trump, Proclamation: *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus* (31 January 2020), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>; Donald R Hopkins, "Public Health Then and Now: Smallpox" (1988) 78:2 Am J of Pub Health 1589 at 1590 (describing the devastating effects of smallpox during the 18th century in Quebec, Sweden, France, Germany, Russia, China, and Japan, including the death of thousands of soldiers along with Emperors, Kings and various members of royal houses around the world).

and cultural anxieties (heritage, language, identity)[27] affecting the reception and treatment of migrants in today's world[28] as it did 200 years ago.[29]

Considering legal (Cao & Dehoorne, 2011; Kang et al, 2012)[30] and social science studies (Deer, 2006; Josey et al, 2009; Henry & Tator, 2010; Jablonsky, 2012)[31] showing open (e.g., school segregation) and subtle forms of discrimination (e.g., constituency power reduction) across different areas of modern human interaction (criminal justice, employment, education, health care, the media), there is little room to perpetuate the seminal idea (Wolfers, Lippman) on the moral justification of security to restrict migrants and minority rights when the final institutional assertion becomes a simple relation of power between the dominant and the minority group. This creates untenable positions (moral, legal) promoting diversity (affirmative action) while developing an entire legal apparatus to deter certain undesirable migrants from even lodging asylum claims.[32]

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[27] See e.g. Susanna Mancini & Bruno de White, "Language Rights as Cultural Rights: A European Perspective" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden, Massachusetts: Martinus Nijhoff, 2008) at 250; Canada Bill C-91, *An Act Respecting Indigenous Languages, House of Commons of Canada*, 42nd Parl, 1st Sess, (first reading 5 February 2019).

[28] See e.g. UN, "COVID-19: Agencies Temporarily Suspend Refugee Resettlement Travel" *UN News* (17 March 2020), online: <https://news.un.org/en/story/2020/03/1059602>.

[29] See Howard Merkel, "The Foreignness Germens: The Persistent Association of Immigrants and Disease in American Society" (2002) 80:4 The Milbank Quart 757-788 (describing associations on race and public health during the arrival of millions of immigrants in the 19th and 20th centuries).

[30] See Huhua Cao & Olivier Dehoorne, "Changing Territorial Strategies: Chinese Immigrants in Canada" in Huhua Cao and Vivian Poy, eds, *The China Challenge: Sino-Canadian Relations* (Ottawa: University of Ottawa Press, 2011) at 222-240 (describing Canada's immigration restrictions on Chinese migrants during the 20th century); Jerry Kang et al, "Implicit Bias in the Courtroom" (2012) 59:5 UCLA L Rev 1124 at 1130-1186 (following behavioural realism trajectories on criminal justice, employment discrimination cases, and implicit bias).

[31] Glenn Deer, "The New Yellow Peril: The Rhetorical Construction of Asian Canadian Identity and Cultural Anxiety in Richmond" in Cheryl Teelucksingh, ed, *Claiming Space Rationalisation in Canadian Cities* (Waterloo, Ontario: Wilfrid Laurier Press, 2006) at 34 (reflecting on the *status quo* of White-Canadian man and the experience of Chinese immigrants in Vancouver); Christopher Josey et al, "The Portrayal of Race Online: A Content Analysis of the Portrayal of Racial Stereotypes in a New Media Environment" in Rebecca A Lind, ed, *Race/Gender/Media: Considering Diversity across Audiences, Content, and Producers* (Boston: Pearson Education, 2009) 135 at 138-142 (indicating minorities' under-representation in online news outlets and in relation to headlines, stories, and images portrayed by those outlets); Frances Henry & Carol Tator, *The Colour of Democracy: Racism in Canadian Society* (Toronto: Thomas Nelson, 2010) at 60 (analyzing the interplay of racism vis-à-vis Chinese Canadians); Nina G Jablonsky, *Living Color: The Biological and Social Meaning of Skin Color* (Berkeley: University of California Press, 2012) at 132 (elaborating on the establishment of races).

[32] Asylum seekers are nowadays forced to leave their intended host country after lodging a protection claim. See e.g. US Department of Homeland Security (DHS) & Department of Justice (DOJ), *Implementing Bilateral and Multilateral Asylum Cooperation Agreements Under the Immigration and Nationality Act*, DHS-US Citizenship and Immigration Services Docket No USCIS-2019-0021, DOJ-Executive Office for Immigration Review Docket No 19-0021, AG Order No 4581-2019 (14 November 2019) at 6, 8, 10, online (pdf): *FEDERAL REGISTER* <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-25137.pdf?1574084724>.

In studying the ontological nature of the principles (*sovereignty, self-determination*)[33] from which national security powers emerge (first as institutional, then as constitutional attribution), this dissertation aims to establish inherent and evolving disquisitions limiting national security powers from a legal, philosophical and theoretical perspective. To that end, the thesis walks through seemingly inconspicuous connections between the Aristotelian principle of authority (authority leads to order),[34] Rousseau's social construction of security (association provides security),[35] Weber's State Dominance Theory (geographical and legal control over population and territory as axiological features for security),[36] Pufendorf's seminal distinctions (absolute v. supreme sovereignty) and constitutional restrictions (over natural law),[37] along with their modern visualization through evolutionary psychology's increasingly contested assertions on group dynamics—including Darwin's Theory of Evolution.[38]

Although one may certainly appreciate the historic context and challenges existing at the time Jean Bodin wrote his theoretical proposition on *absolute sovereignty* ("the sovereign Prince accountable only to God"),[39] I strongly reject its post-modernist reception ("unchecked constitutional powers"). In fact, the multidisciplinary accounts on security become conventional references to modulate Bodin's theoretical elaboration, along with the Hobbesian institutional transaction (individual liberties and natural rights ceded to the sovereign authority in exchange for security)[40] often recruited by national security advocates (e.g., government officials) to promote the idea that once in the territory of the host country, the migrant's faith, status, rights and freedom is ceded to the unchecked authority of the host country's government by virtue of the unlimited powers justified

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[33] Neil MacFarlane & Natalie Sabanadze, "Sovereignty and Self-determination: Where Are We?" (2013) 68:4 Intern'l J 1 at 3-19.
[34] See Aristotle, *Politics* (Oxford: Oxford University Press, 1995) Book III, Chapter 6 at 1278.
[35] Jean-Jacques Rousseau, *Du Contrat Social: Ou, Principles du Droit Politique* (Amsterdam, The Netherlands: Mark-Michel Ray, 1762) Livre I at Chapitre 2 (describing protection as a need in human interaction, starting with families).
[36] See Andreas Anter, *Max Weber's Theory of the Modern State: Origins, Structure, and Significance* (London: Palgrave MacMillan, 2014) at Chapter 1.
[37] See David Boucher, "Resurrecting Pufendorf and Capturing the Westphalian Moment" (2001) 27:4 Rev of Intern'l Studies 557 at 568.
[38] See Ian Gough et al, "Darwinian Evolutionary Theory and the Social Sciences" (2008) 3:1 Twenty-First Century Society 65 at 73 (differentiating between evolutionary ecology and evolutionary psychology based on Darwin's influence). See also David Gelernter, "Giving Up Darwin" (2019) 19:2 Clairmont Rev of Books 104-108 (exposing Darwin's theoretical gaps considering geological and biological evidence).
[39] See Jean Bodin, *Six Books of the Commonwealth* (Oxford: Alden Press, 1955) Book I, Chapter VIII at 24.
[40] Thomas Hobbes of Malmesburry, *Leviathan: Or the Matter, Form, and Power of a Common-Wealth Ecclesiastical and Civil–1951* (London: Andrew Crooke, 1651) at 104.

by State Sovereignty, Self-determination—and to a lesser degree—Non-interference principles. In a sense, a sort of "what-happens-in-Vegas-stays-in-Vegas-*like* approach." The underlying challenge arising out of this literature review raised unavoidable questions: Considering national security's preeminent place, could the interplay between human security, refugee security and the security of the population be a referent on national security determinations? Is the idea of protecting human life (all human life) foreign to national security? Should it be?

These questions, in turn, lead me to reflect on the corollary narrative arising out of the relationship between human and national security both at domestic and international level (Alons, Reveron, Mahoney-Norris, Sciubba.)[41] Namely, given dissimilar systems of values attached to national security and the evolving yet (legally) restricted dynamics between demographics and immigration, refugees are not treated as part of the population.

The *second line of inquiry* (*national-security threats' formation*) refers to the increasingly intertwined connection between national security, immigration, and refugee protection. This connection results from, in part, the progressive expansion of national security powers (law and policy)[42] as national security interests become more complex (e.g., cybersecurity)[43] and, in part, the critical events[44] affecting perceptions/conceptualizations on security (extremism, terrorism.)[45] The resulting 21st-century mainstream narrative portrays migrants as suspects likely to commit terrorist attacks in host countries[46]—this notwithstanding doctrinal attempts to reconcile security

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[41] See Gerry C Alons, "Predicting a State's Foreign Policy: State Preferences between Domestic and International Constrains" (2007) 3 Foreign Pol'y Analysis 212; Derek S Reveron & Kathleen A Mahoney-Norris, *Human and National Security: Understanding Transitional Challenges*, 2nd ed (London: Routledge, 2018) 1 at 9-16; Jennifer Dabbs Sciubba, *The Future Faces of War: Population and National Security* (Santa Barbara, California: PRAEGER, 2011) at 3. See also Sharon L Claude, "National Security Strategies: Security from What, for Whom, and by What Means" (2009) 6:1 JHSEM 22 at 8 (elaborating on strategies affecting the extent of national security).

[42] See Aziz Rana, "Who Decides Security?" (2012) 44:5 Connecticut L Rev 1417 at 1422 (exploring the "persistent expansion" of the executive branch's national security powers and the evolving balance between liberty and security).

[43] See e.g. New Zealand Ministry of Foreign Affairs (MFAT), *Understanding China's Cybersecurity Law* (Wellington: MFAT, 2017).

[44] See e.g. US 9/11 Commission, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report)*, Final Report Y32/T27/2 (Washington, DC: 9/11 Commission, July 2004), online (pdf): *US GOVERNMENT* <https://www.9-11commission.gov/report/911Report.pdf>.

[45] See e.g. Public Safety Canada, *2018 Public Report on the Terrorist Threat to Canada* (Ottawa: Public Safety Canada, April 2019) at 6, online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cnd-2018-en.pdf>.

[46] See generally Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).

concerns and human rights protections at domestic level.[47] To assess factual and ideological contentions on the described security threat, the thesis reviews critical data on terrorist attacks across the world as well as on the expansion of populist governments and far-right extremism in host countries, along with their impact on refugee and national security protection.

This doctrinal[48] and data-oriented review,[49] in short, leads to defining assertions on the security threat, including unfounded assumptions, social misperceptions, and legal mis-conceptualizations. Accordingly, such constructed legal and public policy narrative suggests that, in the name of national security powers, governments can alter the balance between liberty and security,[50] which, in turn, presupposes the existence of governments' exclusive constitutional attributions as political and executive authorities. This corollary narrative—in my view—approaches *constitutional absolutism*, however. That is, not only do governments have plenary powers over migrants (these having diluted or no constitutional rights at all), but they further benefit from implied constitutional deference (doctrinal elaborations, e.g., *"Political Questions Doctrine"* in the United States, or *"Fact Collateral Doctrine"* in United Kingdom)[51] precluding the judiciary from even reviewing the way governments exercise such powers.

My theoretical concern here is the following. Even if we break through the circular discussions on the universality of human rights (human rights cannot apply everywhere even if they should apply everywhere) deriving from legal and cultural apprehensions ('expected' universal practice in an

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[47] See James C Simeon, "Terrorism in Canada: Combatting Terrorism through the Defense of Human Rights" in Satvinder S Juss, ed, *Beyond Human Rights and the War on Terror* (New York: Routledge, 2019) at 144.

[48] See Sudha Setty, "Assessing Unconventional Applications of the "Terrorism" Label" in Satvinder S Juss, ed, *Beyond Human Rights and the War on Terror* (London: Routledge, 2019) at 6-18 (analyzing cases in the context of India and US national security Acts).

[49] See e.g. Jayson S Lamchek, *Human Rights-Compliant Counterterrorism: Myth-making and Reality in the Philippines and Indonesia* (Cambridge: Cambridge University Press, 2019) at 210-213 (describing detentions of Muslim citizens in the Philippines and Indonesia as well as diplomatic tensions between the United States, Malaysia, and Singapore); Anthony H Cordesman, "Trends in European Terrorism: 1970-2016" (18 August 2017) at 35-55 (analyzing terrorist attacks in Western Europe), online: *CSIS* <https://www.csis.org/analysis/trends-european-terrorism-1970-2016>.

[50] Human Rights Watch, "In the Name of Security: Counterterrorism Laws Worldwide Since September 11" (Washington, DC: Human Rights Watch, June 2012), online: *HRW* <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>.

[51] See *Oetjen v Central Leather Co*, 246 US 297 (1918) (establishing the *Political Questions Doctrine*); *Baker v Carr*, 369 US 186 (1962) (developing more broadly the *Political Questions Doctrine* as jurisdictional limitation on nonjusticiable issues); *Trump v Hawaii*, 585 US _ (2018) (extending the *Political Questions Doctrine* to immigration powers); see also *Anisminic Ltd v Foreign Compensation Commission* [1969], 2 AC 147, 2 WLR 163.

increasingly diverse, multicultural and intercultural world), we will end up facing a greater predicament: specifically, if human rights do not apply in all countries or cultures, why should they apply in those in which migrants seek protection?

Using de Sousa Santos' simple yet effective theoretical proposition (human rights as "aspirational standards," i.e., reference-values, not legal principles) helps set aside cultural ("not our values") and sociopolitical concerns ("Western imposition").[52] Still, squandering human rights' universality in exchange for cultural and political flexibility (universal acceptance) deters human rights' effectiveness. For example, if we assume human rights apply (or should apply) when constitutional rights do not (meaning, domestic reception is not required), how do we reconcile lack of constitutional, human rights, and refugee protections in some countries vis-à-vis aspirational standards that other countries simply do not accept or follow? This should include, as current literature suggests (François Crépeau, Delphine Nakache),[53] countries like Canada that have internalized human rights protections within its legal and constitutional systems yet has used dissimilar deterrence mechanisms on asylum protections. For instance, the Canada-U.S. Safe Third Country Agreement, which is also viewed (Efrat Arbel)[54] as measure that ends up fostering narratives of "criminality" and "illegality" of refugees. If we deprive human rights of their universality to accommodate cultural differentials, we will need to integrate those differentials into our proposed equation, which, I argue, requires a different device (*redefined constitutional morality*).

The *third line of inquiry* (*international refugee law formation*) of this thesis relates to the inception and gradual conceptualization of international refugee protection (principles and exceptions). The underlying narrative indicates that national security "trumps" refugee protection because it is, in

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[52] See Boaventura de Sousa Santos, "Human Rights: A Fragile Hegemony" in François Crépeau & Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge: Cambridge Scholars Publishing, 2014) at 17.

[53] See François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRPP Choices 16

[54] See Efrat Arbel, "Between Protection and Punishment" The Irregular Arrival Regime in Canadian Refugee Law" in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solidarity Confinement* (London: Palgrave MacMillan, 2015) at 197 (analyzing the Canadian Designated Foreign National regime, along with the Canada-US Safe Third Country Agreement as one of the most palpable 'administrative' measures leading to a *de facto* punishment of refugees).

fact, one of its internationally recognized legal exceptions. The corollary misconception here is that refugee protections are subject to domestic regulations and policies contradicting the very essence of the non-discrimination and the non-refoulement principles. To better understand this dynamic, I explore the historic and the legal context in which *international refugee law* (principles) are formed, along with case law analyzing its exceptions. The literature review in this line of inquiry encompasses historical documents on the *Armenian Genocide* and the *Civil War in Russia* (showing "unregulated" massive movements of migrants to Europe),[55] along with legislative and public policy reactions when arriving migrants are either too many or from "undesirable" places; leading to racial[56] and security concerns.[57] Both Larking's human rights critique on refugee protection and Carlin's account on the treatment of refugees during *War World II* provide insightful reflections on the events preceding and following the first attempts to protect refugees.[58]

The *fourth line of inquiry* (*national security distortions and conceptualizations*) is directed at ascertaining the factual, philosophical, and legal conceptualization of refugees and asylum seekers as security, economic, and cultural identity threats following the underlying sequence of the numerical-security narrative ("too many," "too dangerous," "too different," "too expensive"). I explore this threefold security threat through its different relations. To begin with, I revisit major terrorist attacks taking place around the world since 9/11 against the backdrop of national security legislation and public policy decisions driving the relationship between terrorism, immigration and

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[55] See e.g. League of Nations, *Conference on the Question of the Russian Refugees*, Resolutions adopted by the Conference on 24 August 1921, OJ 2nd year, No 8 (Geneva, Switzerland: October 1921) at 899-902; See Eugene M Kulischer, "Displaced Persons in the Modern World" (1949) 262 The Annals of the Am Acad'y of Pol & Soc Sc 166 at 167 (portraying migration waves from Russia and the Ottoman Empires).

[56] For example, the US Congress passed *the Emergency Quota Act of 1921* and *the Immigration Act of 1924* creating a national system of quotas based on its population at the time (census data of 1910 and 1890), while facilitating the arrival of migrants from North-western Europe and restricting those coming from Asia. See *United States Emergency Immigration Act of 1921*, *An Act to Limit Immigration of Aliens into the United States*, 67th Congress, Pub L 52-5, 42 Stat 5 (signed into law on 19 May 1921); *United States Immigration Act 1924*, 68th Congress, Pub L 68-139, 43 Stat 153 (signed into law on 24 May 1924).

[57] For instance, the UK Parliament passed the *Aliens Restriction Act of 1914* ordering the registration and authorizing the espionage of suspicious aliens from enemy States (Germany, Hungary, Austria) entering or living in the UK. See United Kingdom, *Aliens Restriction Act 1914*, *An Act to enable His Majesty in time of war or imminent national danger or great emergency by Order in Council to impose Restrictions on Aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect*, 5 August 1914, Acts of Parliament, Chapter 12.

[58] See Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Burlington: Ashgate, 2014) at 18; James L Carlin, "Significant Refugee Crises Since War World II and the Response of the International Community" (1982) 3:1 Michigan JIL 3 (describing reactions toward refugees in World War II).

(sooner than later) refugee protection.[59] My literature review here includes critical, empirical, and interdisciplinary analyses (surveys, studies, reports)[60] used to uncover paradoxical relationships: religiously motivated international terrorism (jihadist attacks) *versus* racially-ideologically motivated domestic terrorism (far-right and antigovernment attacks). This extends to studies (Hutchinson 2017; Trip et al, 2019)[61] on emerging yet often neglected threats (domestic terrorism, enhanced discrimination, selective diversity). Next, using statistics, fiscal and public-policy literature,[62] the thesis analyzes the purported evidence supporting the narrative of refugees and asylum seekers as economic threat to host countries (economic impact, labour-market effects).[63] It then tackles factual contentions on cultural identity threats by looking at different concerns (religion, language, assimilation)[64] and cases (local communities) in various cultures, sociopolitical contexts, and countries (Canada, Colombia, Ecuador, England, Turkey, Uganda, Bangladesh). Moreover, using consolidated data from reliable sources across the world, the thesis produces quantitative and qualitative data on terrorism and far-right extremism as well as on reception/distribution of refugees and asylum seekers (both in wealthiest countries and in countries hosting the largest migrant populations) to illustrate misperceptions on security and cultural identity threats.[65]

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[59] See e.g. Congressional Research Service, *The Trump Administration's National Strategy for Counterterrorism: Overview and Comparison to the Prior Administration*, report by John W Rollins, CRS IN11027 (Washington, DC: CRS, January 2019) at 2, online (pdf): *FAS* <https://fas.org/sgp/crs/terror/IN11027.pdf>.

[60] See Nour Kteily et al, "The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization" (2018) 109:5 J of Pers & Soc Psych 901 at 905-931 (introducing a theoretical-empirical model on blatant dehumanization).

[61] Jade Hutchinson, "Violent Extremism and Far-Right Radicalism in Australia: A Psychological Perspective" (2017) 9:11 Counter Terrorist Trends and Analyses 16 at 17 (describing Muslim communities' experiences); Simona Trip et al, "Psychological Mechanism Involved in Radicalization and Extremism: A Rational Emotive Behavioral Conceptualization" (2019) 10:437 Front Psych 1-8.

[62] See e.g. Centre for Global Development, "The Economic and Fiscal Effects of Granting Refugees Formal Labor Market Access" by Michael Clemens et al (Washington, DC: CGD, October 2018) at 7-8 (describing refugees' economic contributions to communities that integrate them), online (pdf): *CGD* <https://www.cgdev.org/sites/default/files/economic-and-fiscal-effects-granting-refugees-formal-labor-market-access-brief.pdf>.

[63] See e.g. Statistics Canada, *Labour Market Outcomes Among Refugees to Canada*, by Garnett Picot et al (11 March 2019) at 6, online: *GOVERNMENT OF CANADA* <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019007-eng.pdf?st=zwZVb7-0>.

[64] See e.g. Michael Lipka, "5 Facts About Religion in Canada" (1 July 2019), online: *PEW* <https://www.pewresearch.org/fact-tank/2019/07/01/5-facts-about-religion-in-canada/>.

[65] See Appendix, Chapter 1, Figure 1 (International Migration Population in Top Host Countries), Table 2 (Jihadist Terrorism-related Attacks in Australia, Europe and North America), Table 3 (Refugee and Asylum-seekers Populations Distribution), Table 4 (Far-Right Related Attacks in the United States and Canada); Appendix, Chapter 3, Table 9 (Terrorist Attacks on US Soil Since 9/11).

The *fifth line of inquiry* (*refugee reception, treatment and protection*) focuses on the reception and treatment of refugees through traditional (*relocation and resettlement*) and emerging models (*putative reception*) against the backdrop of regional and domestic legislation through different refugee crises. Several narratives fostering State action against the right to seek asylum motivate this inquiry. *First*, the idea that asylum seekers have diluted or no constitutional rights[66]—this one, arguably, considering their unauthorized entry or presence in their intended host country.[67] *Second*, the subsequent premise that, since there is no constitutional right to asylum (but a mere expectation), asylum seekers need not be in their intended host country as long as there is a bilaterally or unilaterally designated safe third country.[68] *Third*, governments' *systematic rejection* of migrants indicating that summary deportations and temporary expulsions are within the purview of national security powers that both constitutional and international norms recognize.[69]

There is a gap in current literature, however. Either current literature does not aim to study systems of reception from a global perspective, but rather in relation to a specific refugee crisis[70] (notwithstanding previous attempts to contextualize and compare refugee reception in a global context.)[71] Or their scholarly interest (reach) tackles the particular challenges[72] that a given refugee population confronts without extrapolating patterns of evolution. This, in turn, forced me to look

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[66] See *Jean v Nelson*, 714 F2d 96 (11th Cir 1983) at 858-882 (holding that, "plaintiffs have no constitutional rights with respect to their applications for admission, asylum or parole). This precedent was only moderated through the US Supreme Court's subsequent decisions to include minimal due-process protection. See *Zadvydas v Davis*, 533 US 678 (2001); *Clark v Martinez*, 543 US 371 (2005) (upholding Zadvydas precedent).

[67] For example, the US recently issued the so-called "Interim Final Rule" which operates as a "Third Country Transit Bar" establishing an eligibility-to-remain-in-the-US ban for Central American migrants–including unaccompanied children passing through Mexico or another US designated safe-third country ("Asylum Cooperation Agreements"). See US Department of Justice (DOJ) & Department of Homeland Security (DHS), *Eligibility and Procedural Modifications Rule*, 84 FR 33829, 33820 (16 July 2019).

[68] In 2019, the US Government implemented the so-called "Remain in Mexico policy" (Migrant Protection Protocols MPP) enabling US authorities to return to Mexico asylum seekers arrested while entering the US southern border until their claim is decided. See US Department of Homeland Security (DHS), *Memorandum: Policy Guidance for the Implementation of the Migrant Protocols*, Memorandum No 20528 (25 January 2019), online (pdf): *DHS* <https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf>.

[69] See e.g. Amnesty International, "Sent to a War Zone: Turkey's Illegal Deportations of Syrian Refugees" (Washington, DC: Amnesty International, October 2019) at 5 (reporting summary deportation cases), online: *AMNESTY* <https://www.amnesty.org/download/Documents/EUR4411022019ENGLISH.pdf>.

[70] UN-Women, "Crisis Update: Nearly One Million Rohingya Refugees Are in Bangladesh" (21 June 2018), online: *UN WOMEN* <http://www.unwomen.org/en/news/stories/2018/8/feature-rohingya-humanitarian-update.>

[71] See e.g. Michel Agier, *Un Monde de Camps* (Paris: La Découverte, 2014).

[72] See e.g. Observer Research Foundation, "The Rohingya Crisis: A Health Situation Analysis of Refugee Camps in Bangladesh" by Sreeparna Banerjee (New Delhi: ORF, July 2019) at 4, online (pdf): *ORF* <https://www.orfonline.org/wp-content/uploads/2019/07/ORF_SpecialReport_91%20_Rohingya.pdf>.

at other sources of information; indeed, this thesis fills this gap by relying on research reports produced by those in the field (international organizations, NGOs),[73] government agencies,[74] and Media outlets (local and international) covering refugee crises all over the world.[75] It is worth noting that most refugee crises have evolved into ongoing humanitarian crises, for which researchers find it particularly challenging nowadays to keep track of international refugee law and human rights violations, practices, and risks migrants encounter in their journey for safety.

The *sixth and final line of inquiry* (*ineluctable choice's evolution, justification, connections and disconnections*) splits between *factual* (reality) and *legal connections*/*disconnections* (morality, diversity, humanity) arising out of the evolution of international refugee protection affected by an increasingly contradicting national security. On the one hand, the very assertion of an *objective truth* concerning migrants' intentions, motivations, and identities is being questioned by public-policy decision makers in host countries.[76] *Dehumanizing language*[77] as well as *fear and hate narratives* are being used to portray refugees and asylum seekers as threats to the well-being and security of host-countries' populations and interests. This trajectory raises, at minimum, two fundamental questions: Are these assertions factually supported? If not, how do the resulting distortions of reality affect the relationship and, in the process, the evolution of refugee and national security protection?

It is my preliminary contention that such distortions are not merely pervasive but inherently endemic because the inflicted perception (misperceptions) and resulting conceptualizations on migrants (regulations, policies, practices) end up affecting the most basic premises of their

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[73] See e.g. UN Development Program, *Impacts of the Rohingya Refugee Influx on Host Communities* (New York: UNDP, November 2018); Human Rights Watch, "Deported to Danger: United States Deportation Polices Expose Salvadorans to Death and Abuse" (Washington, DC: Human Rights Watch, February 2020).

[74] See e.g. Government of Canada (IRCC Evaluation Division), *Evaluation of the Settlement Program* (Ottawa: IRRC, November 2017).

[75] See e.g. Saba Aziz, "'We're Broken': Rohingya on Hunger Strike in Saudi Detention" *Al Jazeera* (17 April 2019), online: <https://www.aljazeera.com/news/2019/04/broken-rohingya-detainees-hunger-strike-saudi-190417124752481.html>.

[76] See e.g. Bill Hutchinson et al, "Trump Admits He Has 'No Proof' of 'Middle Easters' in Caravan, 'But There Could Very Well Be'" *ABC* (23 Oct. 2018), online: <https://abcnews.go.com/US/trump-admits-proof-middle-easterners-caravan/story?id=58686056>.

[77] See e.g. Jornal Opção, "Entrevista de Jair Bolsonaro" *JO* (October 2018) (quoting Brazilian President Jair Bolsonaro's comments on refugees arriving to Brazil described as, "la escória do Mundo" or "the scum of the world"), online (audio): <https://sound cloud.com/jornal-op-o-1/entrevista-bolsonaro> [accessed 9 April 2019, 5:10 AM-ET].

reception and treatment (rights, freedoms). That is, migrants initially protected by host countries due to persecution based on race, religion, nationality, political opinion, and membership in a particularly targeted group, yet eventually criminalized and prosecuted (detention, expulsion, deportation) due to their race, religion, nationality, economic condition, number, and membership in a particularly targeted group (refugees and asylum seekers).

Then, further questions emerge: How did we get here? What reasons (values, principles, events) led States across the world to protect in their territory foreign citizens persecuted by their own governments or fellow citizens? We know it was not the law because there was no refugee law when the first refugee populations emerged across Europe. Incidentally, how can we reconcile grounds of protection (race, religion, nationality, political opinion, membership in a particular group) becoming the very benchmarks fostering nowadays the security threat?

The first trajectory arising out of this *final line of inquiry* refers to the nature of reality (subjective, objective, universal, relative, multidimensional) in its relationship with the contended inescapable choice between protecting host countries or protecting refugees. Here, the extent, frequency and effects of current sociopolitical distortions of reality preceding the need and very formation/rationalisation of law pose an unparalleled challenge in legal reasoning. Whether in litigation or through the introspection of its making and interpretation, we let the facts (in any controversy or social problem) speak by themselves, while using dissimilar procedural or methodological devices that question their existence, consistency, relevance, or indicative value. We do this to "extract" the facts that reveal the issue at hand. We elaborate on those facts and analyze them through legal reasoning's tools of assertion leading to our resolution (rule, piece of legislation, action). It is therefore critical—notwithstanding legal reasoning's exclusive reality tests (relevance, undue prejudice, authenticity) and differential standards (formality, legality, constitutionality)—to make sure that our conceptualization of reality matches our perception about it. It follows that a comparative and multidisciplinary retrospection into these assertions and distortions of reality could lead to a multidimensional understanding of the constructed sociopolitical discourse and its legal and public-policy implementation through increasingly inhumane systems of reception and treatment of migrants in the 21st century.

To that effect, this dissertation uses the tools and lights provided by disciplines that specialize in the study of reality (from its perception to its eventual conceptualization) from a myriad of apparently dissimilar yet eventually intertwined perspectives: anthropology, psychology, neuropsychology, sociology, philosophy, classic physics and, at its most advanced detailed exploration yet, quantum mechanics. Here, in particular, I analyze Professor Vedral's theoretical proposition placing information (not perception) as the triggering event of reasoning, which, in my view, leads to circular and incomplete assertions of reality; unless, otherwise, we assume we are born knowing.[78] I then contrast my findings against the narratives and their subsequent actions (regulations, practices, policies, agreements, rulings) affecting the reception and treatment of refugees and asylum seekers.

I construct and deconstruct theoretical relations and empirical evidence across the proposed multidisciplinary fields. Media accounts, again, provide a very useful trace of the facts reported as contested or uncontested reality.[79] Without it, I firmly believe, the proposed scholarly exploration would be futile and distinctively abstract. The voice of migrants is a fact; the narrative and responses of those who decide their fate is another. I use the works of Gibson (*Bottom Up Theory*)[80] and Gregory (*Top Down Processing Theory*)[81] to illustrate how perception informs (precedes) our cognitive construction of reality including its natural (bias) and unnatural distortions (populism) —and, as a result, misperceptions (e.g., thousands of Central American migrant children pictured as "national security threat" to the U.S.). *Ergo* the cruelty, indifference, prolonged detention, inhumanity. I aim to ascertain whether reality justifies what law cannot. Here, I relate the Aristotelian view of perception with psychology's theories of perception (*constructivist, ecology*), along with philosophical reflections on conceptualism and perceptual-Self (knowledge).

Knowledge, in my view, is the construction of relations (known and seemingly unknown). Everything else is perception, until is not. Then it evolves into conceptualization. Elaborating on

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[78] Although Professor Vedral's perception-information rationalisation in different contexts is pertinent, I maintain that perception (precedent), not information (subsequent), is the triggering event of reasoning. See Valko Vedral, *Decoding Reality: The Universe as Quantum Information* (Oxford: Oxford University Press, 2010) at 10.
[79] See e.g. Sarah Bosely, "Myths About Migrants Spreading Disease 'Inform Hostile Policies'" *The Guardian* (5 December 2018), online: <https://www.theguardian.com/society/2018/dec/05/>.
[80] See James Gibson, *The Senses Considered as Perceptual Systems* (Boston: Houghton Mifflin, 1966).
[81] See Richard Gregory, *The Intelligent Eye* (London: Weidenfeld & Nicolson, 1970).

Plato's epistemological exploration of knowledge[82] and conceptualization of reality,[83] I further contrast immigration policies and narratives on migrants against scientific findings in neuropsychology. I utilize Freud's both *constitutional psychoanalytical systems* (unconscious, preconscious, and conscious mind)[84] and *brain personality constitution* (ego, superego, Id)[85] to ascertain the role of perception (and misperception) in conscious assertions of reality.

This multidisciplinary review takes me through some of the most quintessential elements affecting the perception and mis-conceptualization of migrants, along with the threats they arguably represent (bias, distrust, dehumanization). As such, the narratives arising out of governments proposing the criminalisation of migrants (intent) are certainly revealing. Both influential and groundbreaking studies in neuropsychology (Wheeler and Fiske, 2005; Jost, 2011; Golkar et al, 2014; Kteily et al, 2018)[86] and social sciences (Hart et al, 2000; Phelps et al, 2000; Nummenmaa & Calder, 2009; Hari & Kujala, 2009)[87] on racial attitudes toward minorities, social learning, stereotyping, dehumanization, and dissimilar correlation on neural activity provide insightful evidence on our perception/conceptualization of others. This is particularly important when

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[82] Plato, *Theaetetus* (Indianapolis: Hackett, 1997) at 164a-b (suggesting that knowledge neither precedes nor defines perception).
[83] *Ibid* at 164d-e (refuting *Protagoras' assertion of knowledge* by distinguishing between identity of knowledge and perception).
[84] See Sigmund Freud, *"*An Outline of Psycho-Analysis" (1940) 21 Intern'l J of Psycho-Analysis 42 at 43.
[85] See Sigmund Freud, *Das Ich und das Es* (Vienna: Internationaler Psycho-analytscher Verlag, April 1923).
[86] See Mary E Wheeler & Susan T Fiske, "Controlling Racial Prejudice: Social-Cognitive Goals Affecting Amygdala and Stereotype Activation" (2005) 16:1 Psychol Sci 56-63 (developing experimental observations on racial stereotyping and brain-activity responses in the amygdala using functional magnetic resonance imaging); John T Jost, "The Role of Stereotyping in System-Justification and the Production of False Consciousness" (2011) 33:1 British J of Soc Psych 1 at 4-27 (depicting core and consequential relationships between stereotyping, group's interests, and social bias to protect individuals or group's advantageous positions); See Armita Golkar et al, "Social Learning of Fear and Safety Is Determined by the Demonstrator's Racial Group" (2014) 11 Biol'y Lett 2 (analyzing transmission of social perception-information through experimental cases with different racial ingroups and outgroups); see also Kteily et al, *supra* note 60 at 905.
[87] See Allen J Hart et al, "Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli" (2000) 11:11 Neuro-Report 2351 at 2352-2355 (describing fMRI neurological response in the amygdala regarding racial outgroup v ingroup faces); Elizabeth A Phelps et al, "Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation" (2000) 12:5 J of Cogn Neurosc 729 at 730-738 (analyzing fMRI neural activity related to White and Black groups describing how cultural assertions on social groups may evolve). See also Lauri Nummenmaa & Andrew J Calder, "Neural Mechanisms of Social Attention" (2009) 13:3 Trends Congn Sci 135 at 137-143 (formulating both quantitative social-attention analysis of human neuroimaging based on perception gaze and socio-cognitive inferences); Ritta Hari & Miiamaaria V Kujala, "Brain Basis of Human Social Interaction: from Concepts to Brain Imaging" (2009) 89:2 Phys Rev 453 at 455-479 (proposing an interdisciplinary analytical model of neuroimaging information that suggests an innate connection between perception-action or "inner-world" and the development of external influences driven by social stimuli).

analyzed in the context of *legal bias* and the social misconstruction of reality through its consequences (e.g., collective assessments on migrants' criminal intent).

I study the conceptualization (if any) of reality itself. Here, I navigate through classic (Newton's Laws of Motion and Einstein's Theories of Relativity) and evolving assertions of reality (Quantum Theory). In an attempt to achieve a different model of rationalisation that can be applied to uncover our limited dimensions of reality affecting the choice and resulting relationships between refugee and national security protection, I elaborate critical/logical reflections on circular (discrimination, racism, anti-Semitism)[88] and regressive progressions of humanity (xenophobia). Using theoretical propositions (and most useful mistakes) of Newton[89] and Einstein,[90] I study the idea of an objective ("universal") truth in light of the perception/conceptualization of refugees and asylum seekers as dissimilar security threats. I aim to describe how we measure subjectivity, objectivity, relativity and still miss part of reality. Physics, anthropology,[91] and philosophy support this exercise. Once I extract Einstein's theoretical proposition of reality and its correlation to Kant's inherent formulation of reality,[92] I proceed to break the remaining gaps from classic physics (Newton, Einstein, Podolsky, Rosen)[93] to quantum physics' reflections on the nature and measurement of reality (Niels Bohr, Louis de Broglie, Erwin Schrödinger, Max Born, Warmer Heisenberg),[94] while considering their application on refugee and national security protection.

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[88] See Erin Kearns, Allison Betus & Anthony Lemieux, "Why Do Some Terrorist Attacks Receive More Media Attention Than Others?" (2019) Justice Quart 1 at 6-11; Caroline M Corbin, "Terrorists Are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda" (2017) 86:2 Fordham L Rev 458-485.

[89] See generally Isaac Newton, *Newton's Principia: The Mathematical Principles of Natural Philosophy* (New York: Daniel Adee, 1846).

[90] See Paul W Hodge, *Theory of Relativity* (New York: The McMillan Company, 1958).

[91] This refers to scientific interpretations describing variable conceptualizations on human evolution as evidence. See Timothy D Weaver, "Did a Discrete Event 200,000–100,000 Years Ago Produce Modern Human Beings?" (2012) 63:1 J of Hum Evol 121 at 122-126; Israel Hershkovitz et al, "The Earliest Modern Human Outside Africa" (2018) 356:6374 Sc 456 at 457-459. See also Illya Bobrovskiy et al, "Ancient Steroids Establish the Ediacaran Fossil Dickinsonia as one of the Earliest Animals" (2018) 361:6408 Sc 1246 at 1247-1249 (reflecting on perceptual implications of new evidence on human evolution).

[92] Immanuel Kant, "Critique of Pure Reason" in Paul Guyer & Allen W Wood, eds, *Kant* (Cambridge: Cambridge University Press, 1998) at 155-56.

[93] See Albert Einstein, Boris Podolsky & Nathan Rosen, "Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?" (1935) 47:10 Phys Rev 777 at 778-780 (expressing theoretical reservations on quantum-mechanics' measurement of reality without requiring time-space locations).

[94] Niels Bohr, "On the Constitution of Atoms and Molecules, Part I" (1913) 26:151 Phil Mag 1 at 4-24; Louis de Broglie, "A Tentative Theory of Light Quanta" (1924) 47:6 Phil Mag 446 at 447-458; Erwin Schrödinger, "An Undulatory Theory of the Mechanics of Atoms and Molecules" (1926) 28:6 Phys Rev 1049 at 1054-1070; Max Born, "Zur Quantenmechanik" (1926) 34:1 Zeitschrift für Physik 858 at 859-888.

Moreover, using data-oriented analysis[95] and social science studies (Stoller & Freeman, 2017; Woods, 2014),[96] the thesis analyzes the relationship between the expansion of populist governments, their public discourse, and the gradual implementation of national security policies (including immigration) directed at deterring forced migration toward the West (wealthiest countries). Reports[97] and scholarly work produced in the last years on the drivers of extremism and the recharacterization of forced migration (as threat) are particularly useful (Stiglitz, Kunts, MPI).[98] The literature review here encompasses as well speeches, declarations and other primary sources showing unfiltered contentions between protecting migrants or protecting security, economy and culture.[99] Then, using the backdrop of reception and treatment of refugees in Uganda (largest system in Africa) and Bangladesh (largest system in Asia), I use the works of Benjamin Cardozo (judge's primary function),[100] Cass Sunstein (legal reasoning's structuring),[101] André Lalande (legal logic)[102] and Lloyd L. Weinreb (analogical construction)[103] to help uncover dimensional limitations on legal reasoning (unidimensional, bidimensional, tridimensional), while analyzing the way reality is framed in the legal world (sociopolitical and legal facts).

This literature review leads me to revisit (now from a legal perspective) critical considerations on legal effectiveness, congruence and consistency arising out of the evolving tension between security and rights (freedoms, protections). The increasingly influential proposition of Professors

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[95] See Appendix, Chapter 3, Table 10 (Populist Leaders and Parties, 2014-2018).
[96] See Ryan M Stoller & Jonathan B Freeman, "A Neural Mechanism of Social Categorization" (2017) 37:23 J of Neurosc 5711 at 5715-21(indicating that humans do readily sort one another into multiple social categories); Dwayne Woods, "The Many Faces of Populism: Diverse But Not Disparate" in Dwayne Woods & Barbara Wejnert, eds, *The Main Faces of Populism: Current Perspectives* (Bingley, England: Emerald Group Publishing, 2014).
[97] See e.g. Migration Policy Institute (MPI), "The Growth of the Radical Rights in Nordic Countries: Observations from the Past 20 Years" by Anders Wildfeldt (Washington, DC: MPI, 2018).
[98] See Joseph E Stiglitz, "Wealth and Income Inequality in the Twenty-First Century" (June 2017), online (pdf): *COLUMBIA* <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Wealth%20and%20Income%20Inequality%20in%20the%20Twenty-First%20Century.pdf>.
[99] See e.g. UN Special Rapporteurs, "Legal Changes and Climate of Hatred Threaten Migrants' Rights in Italy, Say UN Experts" *OHCHR* (21 November 2018), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=E> [Joint declaration]; FN, «Discours de Marine Le Pen aux Estivales de Fréju» *Le Front National* (18 September 2016), online: <http://www.frontnational.com/videos/discours-de-marine-le-pen-aux-estivales-de-frejus/>.
[100] Benjamin N Cardozo, *The Nature of the Judicial Process* (Mineola, New York: Dover, 2005) at 10.
[101] Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).
[102] André Lalande, *La Raison et Les Normes: Essai sur le Principe et Sur la Logique des Jugements de Valeur* (Paris: Hachette, 1948) at 10.
[103] Llyod L Weinreb, *Legal Reasoning: The Use of Analogy in Legal Argument* (New York: Cambridge University Press, 2016) at Chapter 2.

Criddle and Fox-Decent connecting conflicting interests (sovereignty, security, freedom)[104] illuminates the discussion and confirms the need for legal consistency between legal systems conceptualized in different dimensions (domestic and international) through autonomous yet increasingly distant relations of values and principles. Aware of the limitations that legal reasoning's possible dimensions encompass, the thesis calls to reevaluate our understanding on legal reality from a multidimensional perspective, in which all interests are at the table of reasoning. All dimensions considered, reality is not defined by what we see, are told we see, or think we see, but by our understanding about it. Yet the limited and filtered understanding of legal reality does not necessarily equate to the identification of sociopolitical distortions affecting the formation of legal reality (legal and sociopolitical facts). This, in sum, takes me to the study of reality at its most pure stage: subatomic level. I refer here applicable groundbreaking experiments (Clauser & Freeman, 1972; John Bell, 1982)[105] validating principles of quantum theory.

The second trajectory of the final line of inquiry (*legal connections*/*disconnections*) concerns the content and effect of morality in international refugee law and in its relationship to national security—this further includes the effect of removing morality (justifications, restrictions) from the domestic protection of refugees and asylum seekers ("moral detachment"). To ascertain the relationship (precedent, concomitant, subsequent) between law and morality, I explore critical notions on "humanity" and "civility," viewed both from a legal and moral perspective. Here, in particular, the works of Coupland, Dean, and Orwin provide useful benchmarks of reflection — including the challenges to achieve a legal concept on humanity.[106] These notions are explored in the context of refugee protection in general and the risks 21st-century refugees and asylum seekers

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[104] See Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016) at 29.

[105] John Francis Clauser & Samuel J Freeman, "Experimental Test of Local Hidden-variable Theories" (1972) 28:938 Phys Rev Lett 938 at 939-41; John Bell, *Speakable and Unspeakable in Quantum Mechanics* (New York: Cambridge University Press, 1987).

[106] There are undeniable connections between humanity and morality. *Actual morality*, as defined by Dean (using Kant's theoretical attribution of humanity to moral beings capable of accepting moral principles and, as such, provide reasons to their actions) is an end in itself because it restricts self-interest to moral justifications. See Richard Dean, *The Value of Humanity in Kant's Moral Theory* (London: Oxford Scholarship Publishing, 2006) (reflecting on Kant's rational morality as referent to frame humanity) at 6; Robin Coupland, "Humanity: What Is and How Does It Influence International Law?" (2001) 83:844 IRRC 969 at 971 (analyzing humanity in the context of people's security and well-being). See also Clifford Orwin, "Civility" in Peter Berkowitz, ed, *Endangered Virtues Essays* (Stanford, California: Stanford University, 2011), online (pdf): *HOOVER* <http://media.hoover.org/sites/default /files/documents/Endangered _Virtues_Orwin_Civility.pdf.>.

confront in particular. To this end, the thesis uses theoretical accounts of Nanda,[107] Kaufman, Weber, Garland, Correa-Velez, Spaai, Upham, Tarlen et al, Miller, Borneman, Ghassem-Fachandi, and Bellinger to reflect on the meaning and lack of refugee protection (as national security becomes the preeminent choice), including axiological trends on criminalisation and exclusion of refugees and asylum seekers.

The most revealing accounts on the risks that refugees and asylum seekers face in today's world come from migrants themselves. This dissertation gives voice to their experiences in different crises (Myanmar, Venezuela, Central America, Africa) and related accounts (audios, transcripts).[108] The selection of these testimonies aim to illustrate gradually common risks 21st-century refugees in different parts of the world encounter in their journey for safety. These accounts, moreover, are contrasted with research findings produced by international organizations, NGOs and think tanks in various regions.[109]

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[107] See Ved P Nanda, "History and Foundations for Refugee Security, Health, and Well-being under International Law" in James D White & Anthony J Marsella, eds, *Fear of Persecution* (Lanham, Maryland: Rowman & Littlefield, 2007) at 151 (providing a retrospective analysis on the extent of international refugee protection); Emma Kaufman, "Segregation by Citizenship" (2019) 132:5 Harv L Rev 1380 at 1383 (elaborating on constitutional lines of deference and the Equal-protection law claim); Leanne Weber, *Policing Non-Citizens* (London: Routledge, 2013) at 3 (analyzing the nexus between immigration and criminalisation); D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) (articulating trends on criminalisation, including the "crimmigration crisis"); see also Ignacio Correa-Velez, Ramon Spaaj & Susan Upham, "'We Are Here to Claim Better Services than Any Other:' Social Exclusion among Men from Refugee Backgrounds in Urban and Regional Australia" (2012) 26:2 IJRS 163 at 166-186 (proposing a different approach on resettlement of refugees based on social exclusion study); Kırkayak Kültür, "The DOM The "Other" Asylum Seekers from Syria: Discrimination, Isolation and Social Exclusion" by Kermal Viral Tarlen et al (2019) at 29 (describing living conditions and exclusion of Syrian refugees in Turkey, Lebanon, and Jordan), online (pdf): *STGM* <http://panel.stgm.org.tr/vera/app/var/files/t/h/the-dom-the-other-asylum-seekers-from-syria-report.pdf>; Sarah Deardorff Miller, "Xenophobia toward Refugees and Other Forced Migrants" World Refugee Council Research Paper No 5 (September 2018) at 4 (describing policies on racial preservation and nationalism in Hungary and Australia as well as xenophobic attacks against Somali refugees in Nairobi and Syrian asylum seekers in Budapest), online: *CIGI* <https://www.cigionline.org/ publications/xenophobia-toward-refugees-and-other-forced-migrants>; John Borneman & Parvis Ghassem-Fachandi, "The Concept of *Stimmung*: From Indifference to Xenophobia in Germany's Refugee Crisis" (2017) 7:3 HAU J of Ethnographic Theory 105 at 107, 123 (explaining the concept of "*Stimmung*" as phenomenological form of *collective perception* toward refugees in Germany); Lee C Bellinger, *The Tolerant Society* (New York: Oxford University Press) at Chapter 4 (reflecting on social aspirations of tolerance or, "the quest of the tolerant mind").

[108] See e.g. Médecins Sans Frontières (MSF), "Refugees Trapped in Libya: Nowhere to Go But the Sea" by Natasha Lewer (15 January 2020) (showing the testimony of a refugee who escaped the bombing of a detention centre), online (audio): *MSF* <https://www.msf.org/mediterranean-escape-route-migrants-and-refugees-trapped-libya>.

[109] See e.g. Office of the United Nations High Commissioner for Human Rights (OHCHR) & UN Support Mission in Libya, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (Geneva: OHCHR, December 2018) at 27-28, online (pdf): *OHCHR* <https://www.ohchr.org/Documents/Countries/LY/Libya MigrationReport.pdf> .

Another critical notion that uncovers the relationship between law and morality is "human dignity." I explore the meaning, implications, and "stage" of human dignity against the backdrop of refugee, humanitarian and human-rights law violations migrants experience around the world. I review scholarly references (e.g., Borraccetti, 2017; Ataiants et al, 2018),[110] media reports,[111] and public policy measures as well as international and constitutional provisions.

The study of the relationship between law and morality through these sources (informing international refuge law but often neglected through national security law) takes me both to axiological determinations between moral and legal risks affecting refugee protection and to moral and legal choices host countries nowadays confront. This includes a legal critique on the *moral justification* to choose one way or the other. I refer to Donald Dworkin's core disquisition on *political morality* ("moral justification ensues from rational morality")[112] to analyze society's evolving consensual choices, apparently justified at certain point in history ("slavery"), yet openly rejected in present times through regressive and remaining forms of expression ("racial discrimination").

The influence of Dworkin's work on morality as ground for rationalisation and justification (as applied in the context of refugee protection) is acknowledged in this thesis. Although the distinction between *pure interpretivism* (normative content of law determined by institutional practices) and *hybrid interpretivism* (normative content of law established both through institutional practices and through moral principles) appears sound and justified, I agree with Dworkin's rejection of Joseph Raz's theoretical conceptualization of law (through laws and

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[110] See Marco Borraccetti, "Trafficking in Human Beings and Human Security: A Comprehensive Approach" in Stefan Salomon et al, eds, *Blurring Boundaries: Human Security and Forced Migration* (Boston: Brill Nijhoff, 2017) at 187; Janna Ataiants et al, "Unaccompanied Children at the United States Border, A Human Rights Crisis that Can Be Addressed with Policy Change" (2018) 20:4 J of Immigrant & Minority Health 1000 (analyzing human rights and health implications concerning the treatment unaccompanied children encounter in the US southern border).

[111] These are especially important when researchers cannot access certain places and report ongoing human rights violations. For example, media reports on human trafficking show criminal organizations in Mexico targeting migrants crossing rural areas near Puebla, Tlaxcala, Oaxaca, and Mexico City. See Municipios, "Atrapan a Jefe de Banda de Trata de Personas en Puebla y Tlaxcala" *Municipios* (27 March 2020), online: <https://municipiospuebla.mx/nota/2019-02-13/izucar-de-matamoros/atrapan-jefe-de-banda-de-trata-de-personas-en-puebla-y-tlaxcala>.

[112] See Ronald Dworkin, "Liberty and Moralism" in David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein, eds, *Law and Morality: Readings in Legal Philosophy*, 3rd ed (Toronto: University of Toronto Press, 2007) at 401.

principles).[113] Elaborating on the idea of *purposeful availment* (U.S. civil procedure, i.e., "based on the contacts and nature of her relationships with the forum State, the defendant avails herself to the jurisdiction of such State") and, at the same time, borrowing legal institutions and duties from family law (*filial support*), tax law (*paying income taxes*) and criminal law (*incest*), I reflect on H. L. Hart's—in my view—mistaken assertions.[114] Using the *notice requirement* stipulation in contracts law and property law, I test evolving *moral justifications* notwithstanding dissimilar cultures and legal systems.

These reflections lead to a quintessential assertion on international refugee protection; that is, refugee law is preceded and defined by its moral acquisition (content). I further consider the legal consequences of individual (vote) and collective moral choices (representatives' decisions). I revisit Dworkin's proposition on *moral justification* through his theoretical elaboration on *political morality*[115] in order to ascertain a necessary distinction between moral and legal duty affecting today's understanding (application and interpretation) of *international refugee law* at domestic and regional levels. This dissertation advances a different model of rationalisation (*multidimensional approach*) uncovering absent areas of legal reasoning,[116] while connecting legal theory (legal world), quantum theory[117] (natural world), and constitutional theory[118] (constitutional morality with the moral world).[119]

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[113] See Joseph Raz, "Dworkin: A New Link in the Chain" (1986) 74(3) Cal L Rev 1103. See also Donald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 78 (rejecting Raz's conceptualization of law through rules and principles).

[114] Although I agree with Hart's initial claim on law and morality as separate entities (dissimilar prongs of analysis), I disagree with his proposition suggesting an absolute lack of "necessary connections" between the two–especially in refugee law. See H L A Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 268.

[115] See Ronald Dworkin's premise on "moral reading" of constitutional clauses includes, for instance, abstract moral principles ("political decency and justice") to restrain State action, while ensuring "equal concern" (moral, political) vis-à-vis those subjected to the State's authority. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996) at 389.

[116] See generally Edgar Bodenheimer, "A Neglected Theory of Legal Reasoning" (1969) 21:4 J Legal Education 373.

[117] There have been previous attempts to connect quantum theory and legal theory. See e.g. R George Wright, "Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics" (1991) 18:3 Florida St Univ'y L Rev 855 (exploring connections between quantum theory and legal theory from the perspective of feminist theory, critical legal studies, law and economics movement).

[118] See generally Richard H Fallon Jr, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100:6 Harv L Rev 1189.

[119] See William D Guthrie, "Constitutional Morality" (1912) 196:681 The North Am Rev 154 at 172.

A Novel and Consistent Narrative

This thesis proposes a different narrative (*multidimensional security*) on the development of the relationship and the resulting "ineluctable choice" between national security and refugee protection. More so, it challenges it; from its construction to its seemingly only available options (protecting refugees or protecting host-countries' security interests). To begin with, I argue that the legal protection of refugees is determined by the progression of three identifiable paradigms (*Postwar, Modern and Final Refugee Paradigms*), along with a conflicting recharacterization of refugees (victims, suspects, criminals). I maintain that, notwithstanding being supported both by domestic (constitutional) and by international law (principles of sovereignty and self-determination, along with international refugee protections), national security and immigration powers are not meant to be absolute (unrestricted), at least not in democratic societies. On the contrary, State action is often limited by constitutional (separation of powers), evolving (State sovereignty restrictions) and procedural (fundamental rights) arrangements that promote legal consistency between State authority and security.

The conceptualization of security is, quite simply, structural reference (legal, moral, social, cultural). The way host countries treat migrants reflects their conceptualization of what they see as security interests (values) and threats (facts). I hold, moreover, that despite modern proclivities toward racial, religious, political, and even economic discrimination against refugees and asylum seekers, *international refugee law* imposes a rather moral/legal obligation on the host country to make sure the migrant is not only allowed to lodge a protection claim and remain in the country until such claim is decided but is also treated with human dignity. Hence, closing borders, depriving migrants of their most basic human rights (including their dignity, freedom and option to be equally different), humanitarian (food, water, medical attention, shelter) and refugee protections (non-refoulement, non-discrimination, non-penalization, access to courts) is not a justifiable way to end international refugee protection.

The conceptualization of security (reality) is not the product of a spontaneous event, however. I contend that we evolve in our understanding of reality by measuring the references we perceive to inform reality. Nonetheless, it is difficult to reconcile the narrative used to promote aggressive

public policies and regulations deterring the reception of refugees and asylum seekers based on national security concerns (terrorism, crime, economic costs and cultural identity threats) when reality indicates *diversity conflicts* instead (xenophobia, antisemitism, racism, nationalism).

If that is the case, I argue, a *perceptional gap* ensues. Once the perception upon which we conceptualize our understanding of the world (legal and natural worlds) is not the reality there is, the law that follows (made, applied, interpreted) is not the law that should be. Such an inflection of reality would break the otherwise reasonable justification arising out of our references (principles, values), perception, and legal conceptualization of the world. Such misconstrued version of security, moreover, would not only distort the sociopolitical reading of reality but also eventually its legal conceptualization (law as social-institutional response) resulting in a *redirected reality*—one in which, refugees are perceived and treated as dangerous, expensive, and unadaptable humans beings regardless of whether such contentions are or not true. I describe this distortion as "*the fabrication of law*;" that is, *remaking the facts to make the law*.

I argue that both the reality the law is missing (e.g., human suffering and emerging national security risks) and the connections the law is losing (e.g., reality, diversity, morality) could lead, in addition, to a *legal gap* between what international human rights law and refugee law aim to accomplish (the protection of human life) and what modern constructions on immigration law and national security law aim to avoid (the reception of undesirable migrants). After all, *international refugee law* embodies a *historic moral choice with legal effects*. That is, the choice hundreds of countries at some point in history made to institutionalize the protection of those foreign to their culture and legal duties, which, in turn, was preceded by a moral sense of "doing the right thing." This, essentially, acknowledges those countries' shared values: protecting the life, liberty, equality and dignity of those being persecuted due to their race, nationality, religion, political opinion or membership in a particular social group. Once these arguments and perspectives are considered, the thesis proposes a novel yet interconnected and more consistent form of rationalisation to uncover the gaps, risks, connections, disconnections, relations and references the law alone either misses or contributes to create.

Considering the disciplines involved, the geographical reach of the proposed examination, and the subject matter (human rights, refugee protection, national security), the thesis approach is novel and unprecedented. Legal and public-policy responses, however well-intended and sound they may appear, are not working. Accordingly, this thesis relates (for the first time) quantum physics, neuropsychology, anthropology, history, social sciences and legal theory to break through the dimensional limitations of legal reasoning (factual perception, assertion, and conceptualization of reality) in the context of human rights and refugee protection. The breadth of the research project is unique as well. Although there have been studies covering refugee crises across the world, this thesis takes upon the (at times) overwhelming yet necessary challenge of comparing major refugee crises, public policy responses, legal developments and judicial interpretations, while investigating sociopolitical reactions and distortions based on historic, scientific, empirical, and legal evidence.

The purpose of the thesis is then help changing course. It is to challenge conventional wisdom and knowledge on human rights, refugee protection, and national security through the acquisition of different references and structures of rationalisation that only a global and multidimensional perspective can provide. I firmly believe that modern society must defeat the circular progression of humanity by breaking its most regressive and endemic tendencies. This includes, among others, the institutions that foster such unintelligent, inefficient, inhumane and amoral version of the world (e.g., protecting migrants in the 20th century, yet criminalizing them in the 21st century). As it tackles the announced lines of inquiry, the thesis further develops original theoretical propositions through different its sections, including: a critical retrospection on refugee protection (*Postwar, Modern and Final Refugee Paradigms*); a multidimensional rationalisation model on security; a novel categorization on the risks refugees encounter in the 21st century (*causal, transitional, status-related and exclusion risks*); a legal and theoretical assertion on a new model of reception of migrants (*putative reception*); and the first quantum legal model of rationalisation/illustration on national security and refugee protection.

Historic References, Legal and Scientific Terms

This thesis covers the evolution of international refugee protection in relation to national security from its institutional inception to today, with special (but not exclusive) focus on the refugee crises

of the 21st century—this, in particular, considering that these refugee crises are ongoing processes leading to one of the major global challenges of our time. Still, given that the historical context of migration and the emergence of refugee and natural security protection are part of the structural development of the thesis, I defer their analysis to the beginning of Chapter 1.

Though the thesis brings about various concepts from other fields of knowledge, it always does it with the utmost respect for the reader, by making sure all concepts (including those apparently complex) are explained in succinct, simple, and illustrative fashion before applying them, so that anyone, with or without scientific background, can easily understand these concepts. Nevertheless, considering the number of scientific terms used in this thesis across sections and fields, I have chosen to define them (when applicable) in each section.

That said, there are some terms that given their frequent use are worth elucidating here. To begin with, some legal terms are used interchangeably to facilitate the legal discourse, which nonetheless deserves a word of caution. The thesis refers constantly to the term "migrants" to signify people leaving their home countries in order to seek protection abroad (not just better opportunities, e.g., economic or social migrants). Notice that I stress their *intent* (not the cause for leaving) as the most distinguishable element. Two reasons propel me to do that. On the one hand, the term "*forced migrants"* (often used in the context of internally displaced persons IDPs and, once the migrant crosses an international border, to refer to refugees and asylum seekers) leaves out what I describe as *"shadow migrants."* That is, migrants who, although might have been unwilling to leave their home countries, were ultimately forced to do it in light of their survival options they faced had they decided to stay instead. Think, for instance, about the situation of millions of Venezuelans getting food from garbage cans to survive. Consider, further, the thousands of Venezuelans crossing the Colombian border every day to buy food or to work for a few days before returning to their home country. Notwithstanding attributable legal references describing a globally recognized conflict in Venezuela, these migrants might not necessarily fit one of the protected categories under international refugee law (race, religion, political opinion, nationality, membership in a social group) because their *causal risk* is not directly associated—despite the generalized State of conflict—with persecution on any of these grounds.

Likewise, the term "*migrants"* must be distinguished from the term *"irregular migrants"* which current literature defines as, "any migrant who is in—or tries to enter—a destination country without proper authorization."[120] Yet what distinguishes these migrants from those seeking protection is not the triggering event forcing them to leave, but their intent "not to return." More so, I argue that even if the *international refugee law* definition on refugees leads to formal declaration of refugee status ("protected person"),[121] their intent, not the host country declaration, shall define them as refugees and asylum seekers—particularly in light of the regulations, practices, and policies being implemented worldwide either criminalizing migrants' intent, deterring their ability to lodge a claim, or forcing them to leave the destination country upon filing a claim and until a decision on their case is made.

It is within human rights fabric and refugee principles (non-refoulement, non-penalization, access to courts) to protect the lives, human dignity and liberty of those not merely recognized as refugees but attempting to become one. Consequently, when this dissertation uses the term *"migrants*,*"* it refers to people who, having no intent to return, flee their home country to seek legal protection abroad. In this context, the term migrant conveys both refugees and asylum seekers. Nevertheless, when the dissertation uses the term *"refugee"* or *"asylum seekers"* specifically, it does it to distinguish between the two based on the way migrants seek protection abroad. Refugees, like asylum seekers, have fled from their home country, have no intent to return, and aim to obtain legal protection abroad. Yet refugees, unlike asylum seekers, obtain such legal protection through a different legal path; that is, a refugee visa granted while the migrant waits in a third country or territory from where the claim is made (resettlement). Asylum seekers lodge their protection claim at the port of entry or short after they have entered their intended host country (direct reception).[122]

Another frequently used term is *"paradigm."* There are, however, different types of paradigms and the list keeps growing (e.g., technological, research, cultural, social, economic). A *paradigm*

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[120] See François Crépeau & Delphine Nakache, *supra* note 53 at 5.
[121] Though requirements lead to a declaration, they revolt around the migrant's intent. See UN General Assembly, *1951 Refugee Convention*, 28 July 1951, 189 UNTS 137, art 1A(2) (entered into force 22 April 1954).
[122] See generally James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge; New York: Cambridge University Press, 2014).

is defined as "an example of something" or a "pattern indicating something."[123] Scientifically speaking, however, the notion of paradigm is expanded. The most pertinent and influential of all is the Kuhn's paradigm. Physicist and philosopher Thomas S. Kuhn proposed the study of science as a paradigm—and, incidentally, progress, as the shift of paradigm. Kuhn frames scientific progress (*paradigmatic shift*) through four stages of science: *pre-paradigmatic* (subjective appreciations/elaborations of science), *normal science* (objective and shared appreciations/developments in science), *crisis* (unsurmountable anomalies casting doubt on objective assumptions of science), and *scientific revolution* (shifting assumptions and scientific developments).[124] In science, in short, the characteristics that define a *paradigm* (theories, concepts, methods) function as expected solutions for accepted problems progressively internalized through what Kuhn's often referred as "normal science."[125] This means, the things scientists must take for granted to enable progress, until they cannot longer be held as shared assumptions ("revolutionary science").[126] For the purpose of this dissertation, I define the term "*paradigm"* as a set of distinguishable and enduring characteristics (circular or linear patterns) affirmed by a perceptible illustration and plausible proposition that can be conceptualized as such; until, in light of the evidence, the perception changes or the proposition becomes implausible.

Another recurrent term in this dissertation is *"criminalisation,"* which I use to describe the legal and public-policy trend (affected by sociopolitical distortions) of shifting the perception/misperception of migrants from suspects to criminals in order to justify the criminalisation of their intent and, as a result, status. My critique states that this trend (arising out of the *Final Refugee Paradigm*) aims not only to deny but inherently to end refugee protection, at least, as we know it (direct reception). However, the term is being increasingly used (and defined) by legal experts and international organizations, which often underscore the trend of national security law and policy connected to States' immigration powers and penal jurisdiction. This, in turn, is attributed to legal and public policy narratives on "illegal immigration"[127] and "illegal

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[123] *Oxford Advanced Learner's Dictionary*, 10th ed, *sub verbo* "Paradigm."
[124] See generally Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).
[125] *Ibid* at 35.
[126] *Ibid* at 92.
[127] See Leanne Weber, *Policing Non-Citizens* (London: Routledge, 2013) at 3; D Garland, *supra* note 107 (underscoring the use of the expression, "crimmigration crisis").

entry"[128] leading to the gradual criminalisation of asylum seekers, along with those that help them.[129] Some scholars (Hudson, Nakache, Atak) have described the criminalisation of migrants and asylum as forms of social and legal exclusion.[130]

I define "human dignity" as the leading value of public international law, in that its ultimate goal (principles, regulations, institutions, agreements) is to ensure the moral and physical integrity of all human beings across the planet (minimum standard of respect),[131] irrespectively of their race, nationality, religious beliefs, political ideas, culture, or place where they live in. The Kantian corollary premise of dignity ("worth") reaches its most palpable contribution when we envision the dignity of every human being as intrinsic condition not given or taken by anyone or anything —much less the law (any law).[132] Human dignity, I hold, will be the defining moral/legal reference to preserve human life beyond the ambitions (technological development), differences (political), inequalities (socioeconomic), and indifference (forced migration) of our time.

The terms *"perception"* and *"conceptualization"* are frequently used throughout this dissertation. A detailed explanation on both is provided in Chapter 3. It suffices to say that *perception* is

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[128] See generally César Cuauhtémoc García Hernández, *Crimmigration Law* (Chicago: ABA, 2015).

[129] Office of the UN High Commissioner for Human Rights (OHCHR), *Statement of the United Nations Special Rapporteur on the Human Rights of Migrants* (Felipe González Morales) (Budapest: OHCHR, 17 July 2019) (denouncing the criminalisation of humanitarian assistance to asylum seekers), online: *OHCHR* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>.

[130] See Graham Hudson, Delphine Nakache & Idil Atak, "The Criminalisation of Migration and Asylum: A Comparative Analysis of Policy Consequences and Human Rights Impact" (2018) 4:4 Intern'l J of Migration and Border Studies 285 (describing a trend of criminalisation constructed through increasingly complex public policy developments and human rights dynamics).

[131] Human dignity is an ongoing concept because its elaboration hinges on the underlying version of humanity in which it aims to be applied. As such, there are philosophical, social, political and cultural ramifications ensuing from the very attempt to define the concept in one or another direction. As a concept, in fact, human dignity could give rise to a doctoral thesis on its own. In this one, however, I define human dignity by looking at its foundational (international conventions and declarations) and functional role (guiding principle to promote or restrict State action). See e.g. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Preamble (entered into force 23 March 1976); UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Res 217 A (III), art 23 (1948). See also Marcus Düwell, "Human Dignity: Concept, Discussions, Philosophical Perspectives" in Marcus Düwell et al, eds, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014) at 23-50.

[132] Although I agree with Kant's initial proposition attaching the dignity of every human being to its own existence ("intrinsic value"), I do not agree with his leading assertion placing human life above any other life or interest (the value of human beings "is above all price"). Nor do I agree with his corollary premise justifying the dignity of human beings by virtue of our rational capabilities (*rational agents*). This, in my view, negates the dignity of life altogether (existence, e.g. animals). See James Rachels, *The Elements of Moral Philosophy*, 4th ed (New York: McGraw-Hill, 2003) at 130 (elaborating on Kant's notion of human dignity).

generally defined as a preliminary cognitive function consisting in the recognition of the world through our stimuli (senses).[133] *Perception* informs human understanding of reality and, in the process, our physical impression and metaphysical construction about it. *Conceptualization* is broadly defined[134] as the construction of an idea that ensues from the information we assimilate. In this dissertation, the sequence of events preceding *conceptualization* start with *perception*, which I define as the "triggering event of human reasoning (including legal reasoning)." *Perception of reality* is followed by *assimilation* (information) and subsequent *conceptualization* (meaning) that defines our understanding of the world and interaction with others.

Methodological Considerations

The thesis question is this: Considering international refugee protection and its relation to the often depicted as ineluctable choice between protecting host-countries' national security interests (*security claim*) or protecting refugees (*moral claim*), how can we justify or, if not, redress evolving patterns of discrimination, criminalisation, exclusion and rejection? Incidentally, is legal reasoning equipped to unravel critical distortions (misperceptions), contradictions (law, values, principles, practices) and disconnections (security, reality, diversity, morality) arising out of the relationship between national security and refugee protection? The premise suggests that this question cannot be answered within the exclusive purview of law. Hence, this thesis uses a multidisciplinary, interdisciplinary, and comparative approach developed in a global and legal context: namely, the legal protection of refugees in the 21st century.

The *multidisciplinary component* of this thesis encompasses references on *anthropology* (studies on Hunter-Gatherer populations, evolutionary records, and cultural references on group dynamics),

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[133] Accordingly, perception is the most vital cognitive function there is. It precedes (informs) human understanding and enables reasoning based on experience and prediction. The latter is akin to human interaction (emotional intelligence), while the former is necessary for human development. See Markus Raab, "What Is Performance Psychology?" in Markus Raab et al, eds, *Performance Psychology: Perception, Action, Cognition, and Emotion* (Oxford: Elsevier, 2016) at 4-8.

[134] See generally Scott T Meier, *Bridging Case Conceptualization, Assessment, and Intervention* (Los Angeles: SAGE, 2003) at 17 (providing a literature review on sources of information for conceptualization). See also Anna Johansson & Stella Vinthagen, *Conceptualizing 'Everyday Resistance': A Transdisciplinary Approach* (New York: Routledge, 2020) at Chapter 9 (providing case-study analysis on how conceptualization works in the case of stateless persons currently in Israeli-occupied Palestinian territories and the Palestinian camps in Lebanon).

history (previously validated cross-reference descriptions on immigrant populations), *social sciences* (theoretical references on international relations theory, political science, and social science studies), *neuropsychology* (theoretical references on psychology, psychoanalysis, and biology as well as experimental/empirical evidence on brain activity and behavioral reaction studies on minorities), *physics* (theoretical analysis on Special and General Relativity, along with theoretical/experimental deductions on quantum theory principles), and *legal philosophy* (theoretical references on legal theory and philosophy), as well as occasional references on mathematics, art history, and astronomy. The multidisciplinary references produced by researchers and scholars in these fields are used to illuminate legal and public policy rationale between protecting refugees and protecting host countries' interests from the perspective of an increasingly contested reality.

These references (developed through their own methods of rationalisation) are needed because the very nature of the purported legal choice is framed, formed, and informed by sociopolitical assertions (and distortions) of reality that dispute the very existence of the facts upon which the law evolves. It follows that facts being consequential in legal reasoning and public policy making means those facts need to be ascertained, not through political discourse casting doubt on its objective existence, but through scientific filters that study reality, perception, conceptualization, and human interaction. A different challenge—however remote it might appear at first—is to understand that reality. That is, we might cherry-pick the facts we think are legal (relevant, pertinent, admissible) while leaving out sociopolitical facts that do not "make it" to the legal world,[135] but there may be other facts that could be also legal but we nonetheless miss (e.g., human suffering). Multidisciplinary references and methods of analysis help us uncover facts and connections and, in the process, develop the proposed and much-needed multidimensional perception-conceptualization of reality (including legal reality) as we correct its natural (bias) and unnatural (political) distortions (misperceptions).[136]

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[135] See Cass R Sunstein, *supra* note 101 at 14 (describing legal and sociopolitical facts).

[136] Following Klein's pivotal proposition: "reality is a nexus of interrelated phenomena that are not reducible to a single dimension." See J T Klein, *Interdisciplinary and the Prospect of Complexity: The Tests of Theory* (2001) 19 Issues on Integrative Studies 43 at 48-57.

The *interdisciplinary component* of this thesis is narrowed to two specific questions and sections. The first query (Chapter 3, section II-C) is this: Given the apparent dichotomy between refugee and national security protection (*competing interests*), is our perception-conceptualization of security accurate? To answer this punctual question, I use interdisciplinary analysis (quantum theory and legal reasoning) through a progression of parallel structures directed at illustrating critical/logical distinctions through different dimensions of reality (unidimensional, bidimensional, tridimensional, and multidimensional layers of perception). These parallel structures, in turn, are used to illustrate the contours of the problem through its most common claims: specifically, parallel structure on unidimensional perception (*"them" threat approach*), structure on bidimensional perception (*"them" or "us" ineluctable-choice approach*), and structure on multidimensional perception (*"them" is "us" approach*). To that end, using a hypothetical perceptional conflict (route accident case), I develop a multidimensional model of perception-conceptualization of reality, which I read, analyze, and compare both in quantum physics and in legal reasoning (*integrated stage*).[137] This exercise (rationale) is preceded by theoretical-practical explanations (definition and illustrations) on quantum theory principles (*superposition*, *entanglement*), which can be easily followed by anyone with or without background in quantum physics. Afterwards, I elaborate on my theoretical proposition (*multidimensional security*) and its application to the announced legal problem ("ineluctable legal choice"). But here is what this *interdisciplinary analysis* is not. This is not a quantitative model of analysis (data). It does not rely on empirical or experimental work. And it is not designed as (or meant to be) an interdisciplinary research project, but an interdisciplinary analysis that combines theoretical references (principles) in a cross-reference model of analysis involving both natural and legal worlds. Its purpose is therefore merely illustrative.[138]

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[137] Despite interdisciplinary research challenges concerning the difficulty to measure the degree of involvement in which two or more disciplines interrelate, the accepted reference on interdisciplinary work (applications, illustrations, research projects) is that the disciplines (models) must be at some point integrated in a convergent, embedded or sequential form. See J W Creswell & Clark Piano, *Designing and Conducting Mixed Methods Research*, 2nd ed (Los Angeles: SAGE, 2011) at 69-70. See also Hilde Tobi & Jarl K Kampen, "Research Design: The Methodology for Interdisciplinary Research Framework" (2018) 52 Qual Quant 1209 at 1215.

[138] The purpose is simple: providing a more efficient understanding on perceptional limitations. As Repko describes it, interdisciplinary work is about "identifying and blending knowledge from relevant disciplines to produce an interdisciplinary understanding of a particular problem." In this case, the disciplines are quantum physics and law, and the problem, the understanding of reality affecting legal and public policy conceptualizations on migrants and security. See A F Repko, *Interdisciplinary Research: Process and Theory*, 2nd ed (Los Angeles: SAGE, 2011) at 23.

The second query (Chapter 4, section II-B) uses the same theoretical references with an added element (constitutional doctrine). Elaborating on the same premises, the inquiry is this: How an interdisciplinary approach could help redress the current trend of disarticulation of human rights and refugee protections? The *interdisciplinary analysis* here blends quantum theory, legal theory, and constitutional law (constitutional morality doctrine).

The *comparative analysis* of this thesis involves constitutional and immigration law (international, regional/domestic refugee and asylum law). Further, my legal analysis uses sources and references in public international law, international human rights law, humanitarian law, and refugee law (conventions, treaties, UN documents). Other sources encompass regional (OAS, EU, IACHR, multilateral declarations, bilateral immigration agreements) and domestic materials (regulations, public policy documents, documented/reported State practices). Occasionally, this dissertation uses punctual and comparative references in other areas of law (evidence law, contracts law, property law, criminal law, tax law, family law, constitutional law) to further illustrate some of its claims on legal reasoning. The sources and materials used in this thesis include 945 bibliographic references and 55 illustrations (figures, tables, images, videos). Of these, some figures and tables are developed by the author of this thesis based on reliable sources of information (institutional and official reports) to provide what I consider to be necessary consolidated data (qualitative, quantitative) concerning both international and domestic terrorism as well as refugee reception in major host countries. The metrics of production both on cited and on consolidated data are referred directly in each figure and table. Images and video sources are equally reported. The reach of the comparative and global analysis encompasses 77 landmark decisions (issued by domestic and regional courts), 100 legislative references (statutes, acts, regulations), 168 reports, and dozens of primary sources (testimonies, hearings, interviews, declarations, speeches, lectures) documenting governments' practices and public policy measures around the world.[139]

[139] The geographical scope of this dissertation includes Canada, the United States, United Kingdom, France, Germany, Italy, Portugal, Spain, the Netherlands, Sweden, Denmark, Poland, Hungary, Czech Republic, Greece, Turkey, Iran, Jordan, Lebanon, Israel, Bahrain, Saudi Arabia, United Arab Emirates, Libya, Zimbabwe, Kenya, Uganda, South Africa, India, China, Bangladesh, Singapore, Thailand, Russia, South Korea, Japan, Australia, New Zealand, Nauru, Argentina, Brazil, Peru, Ecuador, Colombia, Curacao, and Mexico as well as refugee crises in Syria, Afghanistan, Myanmar, Sudan, South Sudan, Somalia, Eritrea, Yemen, Venezuela, El Salvador, Honduras, and Guatemala.

Although the study aims to favour *objectivity* over *subjectivity* through objective sources of information (e.g., data) supporting its core contentions and findings, it does nonetheless use subjective sources of information too (e.g., migrants' accounts) to break through the assumptions and claims driving the relationship between national security, human rights, and refugee protection. After all, human rights are about people and their circumstances. And while one may land perspective in the scholarly premises of its intellectual development, it is in the field where such perspective changes. Given the often neglected yet critical events affecting refugees (conflict, persecution, indifference, rejection, exclusion, discrimination, abandonment), the most objective assessments (e.g., credible fear of persecution) on refugee protection lie, in fact, in our ability to understand its subjective nature: human suffering. Both in international human rights law and in refugee law, human suffering is a moral-legal fact.

Outline of the Chapters

This dissertation is developed in four chapters. *Chapter one* tells the story of how migrants became refugees and the security of States, a national interest. The chapter begins with modern impressions and claims describing refugees and asylums seekers as security, economic and cultural identity threats. It traces its sources, origins, and preliminary dimensions. As it recounts the evolution of national security and refugee protection, the chapter moves from an apparently disentangled progression to gradually paradoxical points of inflection showing how (when neither refugees nor national security were conceivable notions) migrants were viewed, received and treated through ancient and modern history. The chapter brings the facts, the reasons, and the laws that set apart migrants from State interests. Then, upon reflecting on the philosophical, theoretical and legal reasons that sustain yet increasingly oppose such interests, the chapter explores the history of their conflicting relationship: needs, plagues, wars, trust, distrust, ignorance, knowledge, power, progress. Legislation and jurisprudence become the chapter's lenses to explain the development of the refugee paradigms (*postwar, modern, final*) and the threats (*apparent, emergent*) that redefine the eventual connection between forced migration, immigration, and security. Then, the chapter breaks data, facts, and claims upholding the constructed *security threat* by confronting them against the measurable references of our time (proportionality, probability, certainty). It tells, shortly, some claims pass; most, however, fail.

Once relations, reasons, and references are set, *Chapter two* covers traditional models of reception of refugees and asylum seekers while uncovering new ones. It shows the way refugees and asylum seekers are treated across the world in the 21st century. It analyzes the way host countries use the principles and the exceptions of refugee protection. Progress, not evolution, much less humanity. It studies legal and public policy trends (regulations, practices, agreements) that aim to deter human nature (fleeing persecution, conflict, indifference), while neglecting the most appalling forms of human suffering of the most vulnerable population in the most vulnerable time (starvation, violence, torture, psychological trauma, arbitrary detentions, summary deportations, refoulement, expulsion, discrimination, socioeconomic exclusion, moral abandonment).

Chapter three analyzes the particularities of such progression. It studies the *security threat* from its most basic inception: reality. First, it recognizes the circular (Nazis in 1930, Neo-Nazis in 2018), the regressive modern progressions (fostering racism in the 19th century, fighting it in the 20th century, justifying it in the 21st century). It acknowledges the role and critical stage of technology as well as actors and distractors of the *security threat*. Moving from the facts as we observe, assimilate and measure them to the facts as we tell, frame and understand them, the chapter uncovers a *perceptional gap*. Accordingly, the patterns of perception-conceptualization of migrants (distrust, dehumanization, criminalisation) and the threat their reception represents shifts the narrative from conflicts of security to conflicts of diversity, reality, morality and humanity that the law can barely explain.

Chapter four aims to explain them, however. It begins by proposing a novel categorization of risks refugees and migrants encounter in the 21st century. It continues with a critical exploration of the reasons seemingly justified by known and less-known connections (law, morality, security). It finds a defining *legal gap* in the way increasingly more governments treat migrants, which not even progress can justify. The chapter then turns to the alternative option: redressing such actions. It develops theoretical and interdisciplinary propositions to that end. It shows, in sum, how our moral and legal choices are inherently or eventually entangled.

Chapter 1
The Security Threat

INTRODUCTION

"Invaders,"[1] "criminals,"[2] "terrorists,"[3] "animals,"[4] "rapists,"[5] "disease carriers,"[6] "job stealers,"[7] "bunch of migrants,"[8] "the scum of the world,"[9] "bad hombres,"[10] "illegal infiltrators,"[11] "religious,"[12] "cultural"[13] and "security threats"[14] are some of the expressions government officials

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[1] Philip Bump, "What Is and Isn't Happening with the Migrant Caravan in Southern Mexico" *Washington Post* (29 October 2018) (citing US President Donald Trump's twitters and declarations), online: <https://www.washingtonpost.com/politics/2018/10/29/what-is-isnt-happening-with-migrant-caravan-southern-mexico/?noredirect=on&utm_term=.88d35481586c>.

[2] *Ibid.*

[3] *Ibid.*

[4] Michael Gerson, "The Cycle of Dehumanization in Hungary–and Here" *The Courier* (22 May 2016) (quoting political leader in Hungary), online: <https://wcfcourier.com/news/opinion/columnists/the-cycle-of-dehumanization-in-hungary-and-here/article_b7ccda4b-a4dd-50b3-9ecb-16a460ee8ae3.html>; David A Graham, "Trump Says Democrats Want Immigrants to 'Infest' the U.S." *The Atlantic* (19 June 2018) (quoting US President Donald Trump), online: <https://www.theatlantic.com/politics/archive/2018/06/trump-immigrants-infest/563159/>.

[5] See Southern Poverty Law Center, "No End Sight: Why Migrants Give Up on Their U.S. Immigration Cases" (Montgomery, Alabama: SPLC, 2018) at 14 (describing dehumanizing rhetoric on migrants in the United States), online (pdf): *SPLC* <https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf>.

[6] Long before COVID-19, there has been a sociopolitical trend depicting migrants as health risk. Stereotypes describing refugees as disease carriers capable of endangering public health constitute a greater risk for refugees and host-countries' communities. See Ibrahim Abubukar et al, "The UCL-Lancet Commission on Migration and Health: The Health of a World on the Move" (2018) 392:10164 The Lancet Commissions J 2606 at 2614.

[7] See Alberta Giorgi & Tommaso Vitale, "Migrants in the Public Discourse: Between Media, Policy and Public Opinion" in Stefania Marino et al, eds, *Trade Unions and Migrant Workers: New Contexts and Challenges in Europe* (Cheltenham, United Kingdom: Edward Elgar, 2017) at 66-89 (exploring various labels on "economic refugees").

[8] Rowena Mason & Frances Perraudin, "Cameron's 'Bunch of Migrants' Jibe Is Callous and Dehumanizing, Say MPs" *The Guardian* (27 January 2016) (quoting British PM David Cameron), online: <https://www.theguardian.com/politics/2016/jan/27/david-cameron-bunch-of-migrants-jibe-pmqs-callous-dehumanising>.

[9] Jornal Opção, "Entrevista de Jair Bolsonaro" *JO* (October 2018) (quoting Brazilian President Jair Bolsonaro's comments on refugees arriving to Brazil described as, "la escória do Mundo" or "the scum of the world"), online (audio): <https://soundcloud.com/jornal-op-o-1/entrevista-bolsonaro> [accessed 9 April 2019, 5:10 AM-ET].

[10] Amien Kacou, "Trump's Flailing Ratchet: From "Bad Hombres" to "Zero Tolerance" Harv L & Pol Rev (July 2018), online: <https://harvardlpr.com/2018/07/02/trumps-flailing-ratchet-from-bad-hombres-to-zero-tolerance/>.

[11] Harried Sherwood, "Israel PM: Illegal African Immigrants Threaten Identity of Jewish State" *The Guardian* (20 May 2012) (quoting Israel PM Benjamin Netanyahu's comments on African migrants), online: <https://www.theguardian.com/world/2012/may/20/israel-netanyahu-african-immigrants-jewish>.

[12] See e.g. IPSOS, "Attitudes toward National Identity, Immigration and Refugees in Italy" by Tim Dixon et al (April 2018) at 5-6 (portraying critical disconnections on Italian Catholics and Muslim refugees vis-à-vis Italian identity), online (pdf): *SCI* <https://www.thesocialchangeinitiative.org/wp-content/uploads/2019/04/0535-More-In-Common-Greece-Report_FINAL-2_web_lr.pdf>; see also Sigal Samuel, "'There's a Perception that Canada Is Being Invaded'" *The Atlantic* (26 May 2018) (analyzing Canadian far-right groups affecting public and government perception on refugee reception), online: <https://www.theatlantic.com/international/archive/2018/05/theres-a-perception-that-canada-is-being-invaded/561032/>.

[13] *Ibid.*

[14] *Ibid.*

in some of the world's wealthiest host countries have used to encapsulate their perception migrants and, in the process, justify hostile legal and public policy conceptualizations regarding the reception and treatment of refugees and asylum seekers in the 21st century. This notwithstanding that, of the 34 million refugees and asylum seekers in the world,[15] almost 14 million are children.[16] Still, an increasingly ubiquitous approach suggests variable concerns ("too many," "too dangerous," "too expensive," "too different") internalized as national security threats (differentials on security, economic costs, cultural identity).

The main inquiry of this chapter is this: Do these assertions of reality constitute truthful representations of the national security risks host countries face by opening their doors to refugees? More particularly, how do the emergence and evolution of national security law and international refugee law affect the reception and treatment of refugees? What elements define or even restrict the protection of refugees vis-à-vis the protection of host countries' security?

Moving from what in due course of history may be considered to be legitimate and justifiable national security interests to gradually malleable, doubtful, and less defensible national security threats, the current *security claim* favouring the protection of host countries' citizens over the *moral-legal claim* (promoting the protection of refugees) lies in the security risks that the reception of such migrants allegedly poses.

This chapter explores dissimilar references informing the *security claim* by analyzing the evolving relationship between immigration, refugee protection, and national security throughout its most identifiable patterns (*postwar, modern and final paradigms*), while exploring its liminal contentions (*apparent and emerging threats*). This assessment propels an integral analysis on

[15] The UN High Commissioner for Refugees indicated the number of refugees and asylum seekers worldwide reached 30.2 million in 2019. This figure, however, does not include the totality of refugees produced by the Venezuelan crisis. See UN High Commissioner for Refugees (UNHCR), *Refugee Data Finder* (December 2019), online: <https://www.unhcr.org/refugee-statistics/>; Regional Inter-Agency Coordination Platform (UN General-Secretary, UNHCR, IOM), *Coordination Platform for Refugees and Migrants from Venezuela R4V: DATA* (counting 5,180,615 Venezuelan refugees on 5 August 2020), online (database): *UNHCR* <https://data2.unhcr.org/en/situations/platform> [accessed 30 August 2020, 11:26 PM-ET].

[16] UNICEF, "Child Displacement" (April 2020), online (data): <https://data.unicef.org/topic/child-migration-and-displacement/displacement/>; Amnesty International, "The World's Refugees in Numbers" (2019), online: <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/global-refugee-crisis-statistics-and-facts/>.

dissimilar arguments supporting the *security claim*, which are often acknowledged yet ultimately neglected through a regressive conceptualization of national security law promoting the protection of host-countries' interests above any other interest—including the wellbeing, lives and human rights of refugees. I maintain that unless we aim to remove human rights from a more intelligent, humane and realistic conceptualization of security, the core element of the *security claim* cannot hinge on the promotion of an ineluctable choice between protecting the lives of host countries' citizens and the lives of foreign citizens—particularly when the latter claim that protection upon fleeing discrimination, persecution, or conflict. Such premise, in my view, will invariably alter human rights' defining moral and legal value: *human dignity*.

I argue that the legal protection of refugees is determined by the regressive progression of three paradigms, along with the eventual recharacterization of refugees shifting those paradigms. Accordingly, the inception of refugee protection reaches its highest peak upon the development of the **Postwar Refugee Paradigm** of the 20th century (*highest ebb*) whereby refugees are viewed and treated as victims of persecution or conflict in their home countries due to their race, religion, national origin, political opinion, or membership in a particular social group. This paradigm is characterized by the emergence of international refugee protection and is defined by historic events taking in the 20th century (Armenian Genocide, Russian Civil War, World War I and II, along with the development of international refugee law, national security law, and the international legal order). The **Postwar Refugee Paradigm**, however, shifts toward a regressive form of protection, distrust, and dehumanization. Under the **Modern Refugee Paradigm** (*middle ebb*), refugees go from being viewed and treated as victims of persecution in their home country to being viewed and treated as suspects subject to various forms of prosecution in host countries (detention, expulsion, putative reception) due to their race, religion, national origin, political opinion, or membership in a particular migrant group (refugees). This paradigm is characterized by changes in national-security and domestic-refugee law and is defined by events occurring between the second half of the 20th century and the first quarter of the 21st century (the Cold War, 9/11, and the emergence of refugee crises all over the world). The **Final Refugee Paradigm** constitutes the most regressive form of legal protection yet (*lowest ebb*). Under the *Final Refugee Paradigm*, refugees go from being viewed as suspects to being perceived and treated as undesirable, dangerous, criminals, and unwelcome migrants due to their race, religion, national origin, economic condition,

incremental number, and differential risks (security, economic, cultural, public health risks). The *Final Refugee Paradigm* is characterized by domestic and regional actions promoting the gradual disarticulation of international refugee law and is defined by the proliferation of refugee crises in recent years. Under this paradigm, the reception of migrants is gradually implemented outside developed countries and outsourced to poor and developing countries—including those in state of war or conflict (e.g., El Salvador, Honduras, Guatemala, Mexico, Syria, Libya, Yemen, Colombia). I refer to this trend as, "the outsourcing of humanity."

A brief word on refugee paradigms before I begin. While these paradigms serve at describing identifiable global trends on refugee protection (since its inception), I do nonetheless acknowledge in my theoretical approach some nuances concerning the development of each paradigm in every country. For example, although the *Postwar Refugee Paradigm* reached its highest development in the 20th century (international conventions), which very assertion—as this thesis will show—is being challenged before domestic courts across the world, there are some countries whose legal systems and practices still abide to their prior international commitments (e.g., Jordan, Uganda, Brazil). Further, even though 9/11 became a triggering event accelerating the assertion of the *Modern Refugee Paradigm* (entwining immigration, terrorism and national security), its impact varies in every country. Moreover, though the *Final Refugee Paradigm* fosters the legal disarticulation of refugee protection at domestic and regional levels, the pandemic caused by the novel coronavirus COVID-19 seems to be adding serious concerns (fears) to the already convoluted trend of dehumanization of refugees, which results in the paradigm's corollary assertions of rejection, exclusion, and abandonment.

This chapter decodes the shift of paradigms by revealing the various layers of the often portrayed as inexorable choice of protecting host countries from increasingly volatile national-security threats[17] and growing refugee populations.

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[17] US President Donald Trump, for instance, characterized both Canadian steel industry and Central American refugees as threats to US national security. This notwithstanding economic, social and historic relationships between the US and Canada as well as the humanitarian crisis forced migrants (including children) nowadays face across the US-Mexican border. Still, the US Government announced measures against Canada and Mexico on national security grounds (tariffs on Canadian aluminum and threats of tariffs on Mexican products). See Global Affairs Canada, *Steel and Aluminum* (Ottawa: Government of Canada, 23 August 2019), online (alert): *GOVERNMENT OF CANADA* <https://www.international.gc.ca/trade-commerce/controls-controles/steel_alum-acier_alum.aspx?lang=eng>; Mia Rabson,

It is therefore the contention of this chapter that there is an invariable cause-effect relationship between national security and refugee protection, which precludes considering one without the other. Hence, any solution promoting the trendy proposition of "our country first," "our country back," or "our country only," irrespectively of refugees' suffering, security and dignity ends up endorsing a rather degenerative and circular narratives that will not only prevent host countries from recognizing emerging security threats (domestic terrorism, self-radicalization), but also eventually from tackling more substantial yet interrelated issues (diversity, discrimination, exclusion) affecting the very fabric the *security claim* allegedly protects (national interest).

By advancing an objective exploration on the evolutionary premises of national security (interests and threats), this chapter aims also to unveil the central and incidental contentions often upholding—when not, distorting—the *security claim*. I expose here the regressive development on host-countries' security both with respect to national security interests (State security) and in relation to national security threats (apparent and emerging). This premise encompasses a critical disquisition on what I describe as ***legal asymmetry***: namely, the discriminatory and unrestrained use of domestic law (constitutional law, immigration law, national security law) to deter the application and effectiveness of international law (international human rights law, humanitarian law, international refugee law).

I proceed as follows. Section I titled, "Antecedents: From Nation-States Security to National Security," explores historic developments on national security with respect to immigration and refugee protection, both from a sociopolitical and legal perspective. Here, I decode dissimilar progressions through history concerning the reception and treatment of migrants and refugees, while identifying evolving concerns affecting critical determinations on host-countries' security. Section II titled, "Development: From National Security to Nationalism," documents and recounts

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"Trudeau Says U.S. Steel Tariffs on National Security Grounds Are Insulting" *The Canadian Press* (3 June 2018), online: *CTV NEWS* <https://www.ctvnews.ca/canada/trudeau-says-u-s-steel-tariffs-on-national-security-grounds-are-insulting-1.3957195>; Lauren Gambino & David Agren, "Trump Announces Tariffs on Mexico until 'Immigration Remedied'" *The Guardian* (31 May 2019), online: <https://www.theguardian.com/us-news/2019/may/30/trump-mexico-tariffs-migration?utm_campaig>. See also Loren Voss, "Choosing Words With Purpose: Framing Immigration and Refugee Issues as National Security Threats to Avoid Issues of Social Policy" (11 May 2018) Yale JIA 39 at 43-46; Amnesty International, "USA: 'You Don't Have Any Rights Here', Illegal Pushbacks, Arbitrary Detention and Ill-Treatment of Asylum-Seekers in the United States" (Washington, DC: Amnesty International, 2018) at 4, online (pdf): *AMNESTY* <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

the historical relationship between national security, immigration, and refugee protection. This section analyzes the construction and shift of paradigms showing distrust, suspicion, and recharacterization of immigrants and refugees. Section III titled, "Threats: Immigrants and Refugees as Security Threats," analyzes (based on data, proportionality and differential tests) claims portraying immigrants in general and refugees in particular as a threefold national security threat (security, economic, and cultural identity threats). This section further elaborates on the critical distinction between apparent and emergent threats—including those some host countries neglect or produce (e.g., domestic terrorism, selective diversity).

I. ANTECEDENTS: FROM NATION-STATES SECURITY TO NATIONAL SECURITY

Host countries' security is mainly developed through national security law and policies, including immigration policy. In a broader sense, national security interests are defined as legal, foreign and public policy protections[18] concerning a nation's strategic interests[19] required to preserve the integrity, safety, well-being and development of its population,[20] territory,[21] critical infrastructure[22] (e.g., food supply, stock market, electricity grids, communications, cyber

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[18] Both domestic and foreign policies are part of national security strategies. See e.g. Shoon Murray & Jordan Tama, "U.S., Foreign Policymaking and National Security" in Derek S Reveon, Nikolas K Gvosdev & John A Cloud, eds, *The Oxford Handbook of U.S. National Security* (Oxford: Oxford University Press, 2018) at 57-74.

[19] Although national security law serves at regulating decision-making processes on national security (strategic interests, security threats, State action), the means to attain such goals vary from one country to another depending on the values that inform–or, otherwise, justify–national security. See Gerry C Alons, "Predicting a State's Foreign Policy: State Preferences between Domestic and International Constrains" (2007) 3 For Pol'y Anal 212 at 215-232.

[20] Population is an integral element of national security. Protecting the normal functioning of a country's institutional systems is akin to the protection of the people living in such country. The human factor–as opposed to the merely institutional one–raises a more challenging relationship: security and population. Here, the definition of what does nowadays constitute the population of a country encompasses critical disquisitions on demographics and immigration. Still, from a national security perspective at most, refugees are not part of the population. See Derek S Reveron & Kathleen A Mahoney-Norris, *Human and National Security: Understanding Transitional Challenges*, 2nd ed (London: Routledge, 2018) at 9-16; Jennifer Dabbs Sciubba, *The Future Faces of War: Population and National Security* (Santa Barbara, California: PRAEGER, 2011) at 3.

[21] While traditional notions on national security incorporate physical protection against international aggressions and terrorism, a more recent approach incorporates incidental and emerging threats affecting the sustainability of the territory in a broader context. That is, increasingly present risks threatening not only the physical security of the territory but also the functional security of its society. For example, the Australian Homeland Security Research Centre classifies uncontrolled mass migration as national security threat with dissimilar dimensions. See Sharon L Claude, "National Security Strategies: Security from What, for Whom, and by What Means" (2009) 6:1 JHSEM 8 at 22.

[22] At present, most countries have identified critical infrastructure protections within their national security strategies. Canada, for instance, identifies food supply, electricity grids, health, transportation, and communication (national security plan. Public Safety Canada, *National Strategy for Critical Infrastructure* (Ottawa: Public Safety Canada, 2009), online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/srtg-crtcl-nfrstrctr/sr

structure), and institutional systems[23] (e.g., democracy, economy, environment, immigration, healthcare) deemed essential to the country's acquired and gradually identifiable national values as they have been internalized during a certain period of time. National security is therefore an inherently legal[24] and intrinsically constitutional, yet politically constructed concept. In countries where an entire apparatus of national security law has been built, core determinations on national security are made by the executive and legislative branches of government, for which the role of courts (judicial review) often remains circumscribed to procedural matters (outside the political branches of government), not to the meaning or extent of the concept.[25]

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tg-crtcl-nfrstrctr-eng.pdf>; Public Safety Canada, *National Cross Sector Forum: 2018-2020 Action Plan for Critical Infrastructure* (Ottawa: Public Safety Canada, 2018), online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pln-crtcl-nfrstrctr-2018-20/pln-crtcl-nfrstrctr-2018-20-en.pdf>. The US identifies up to 16 critical infrastructure sectors on national security going from chemical production, manufacturing and nuclear reactors to information technology and water supply. US President Barack Obama, Presidential Directive: *Critical Infrastructure Security and Resilience*, Directive No 21 (12 February 2013), online: *THE WHITE HOUSE* <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>. France, further, has divided critical security infrastructure in four groups: basic human needs, sovereign activities, economic systems, and technology. See France Le Secrétariat Général de la Défense et de la Sécurité Nationale, *The Critical Infrastructure Protection in France*, 8 December 2008, Instruction Générale Interministérielle No 6600, L 1332/1-7, L 2151/1-5, R 1332/1-42 (Directive 2008/114/EC), online (pdf): *GOVERNMENT OF FRANCE* <http://www.sgdsn.gouv.fr/uploads/2017/03/plaquette-saiv-anglais.pdf>. Still, countries like Germany and China have adopted a more specialized approach on national security infrastructure (e.g. cyber-security plans). See Germany Bundesministeriums (BMI), *Cyber-Sicherheitsstrategie für Deutschland* (Berlin: BMI, 2016), online: *GOVERNMENT OF GERMANY* <https://www.bmi.bund.de/DE/themen/it-und-digitalpolitik/it-und-cybersicherheit/cyber-sicherheitsstrategie/cyber-sicherheitsstrategie-node.html>; New Zealand Ministry of Foreign Affairs (MFAT), *Understanding China's Cybersecurity Law* (Wellington: MFAT, 2017), online (pdf): *GOVERNMENT OF NEW ZEALAND* <https://www.mfat.govt.nz/assets/China/Understanding-Chinas-cybersecurity-law.pdf>.

[23] Critical institutional systems are determined by the public impact of progressive actions, for which the list of systems that are viewed as critical for national security evolves. For example, the protection of the financial system correlates to cyber security protection. See e.g. MIT Center for International Studies, "Keeping America Safe: Toward More Secure Networks for Critical Sectors" by Joel Brenner (Cambridge, Massachusetts: MIT-CIS, 2017), online (pdf): *MIT* <https://internetpolicy.mit.edu/reports/Report-IPRI-CIS-CriticalInfrastructure-2017-Brenner.pdf>.

[24] The normative conceptualization of national security has a threefold effect. First, it enables foreign-policy makers and actors to set forth a guidance based on critical determinations, while engaging in international diplomacy (relations, negotiations). Second, it sets legal limits on domestic authorities vis-à-vis the treatment of foreign citizens in their territory. Third, it forces public officials to consider both existing and emerging national security interests. Therein, in his seminal Article on national security, Arnold Wolfers underscores the demand for national-security policy being primarily normative. See Arnold Wolfers, ""National Security" as an Ambiguous Symbol" (1952) 67:4 Pol Sc Quart 481 at 483-84.

[25] This is particularly evident in America where the US Supreme Court developed the so-called "*Political Questions Doctrine*" to ascertain the extent of judicial review with respect to the executive branch's political decisions (immigration, foreign affairs). See Jose Mauricio Gaona, "Refugees Don't Visit the US for Disneyland" (1 July 2017), online (blog): *THE HILL PUNDITS* <https://thehill.com/blogs/pundits-blog/immigration/340272-refugees-dont-visit-the-us-for-disneyland>; see also *Baker v Carr*, 369 US 186 (1962) (developing the *Political Questions Doctrine*); *Trump v Hawaii*, 585 US _ (2018) (affirming the US President's exclusionary powers on immigration and foreign policy, while upholding Presidential Proclamation No 9645 of 2017 or, "third travel ban").

The modern notion of national security finds its roots in five major events. First, ***the emergence of nation-states*** replacing classical propositions on what a State ought to be (Thucydides, Machiavelli, Hobbes, and Rousseau laying down the "code of conduct" for statesmen and States in international politics)[26] with a more realistic elaboration on what a nation-state really is—this one considering the core differentials of realism as described in *international relations theory*: statism, survival, and self-help. To begin with, *Statism* suggests that the concept of national security does not emerge from an ontological defined notion but rather from an evolving political and institutional concession States made to the international community of States (through the international legal order) while forfaiting the monopole of violence to resolve their disputes.[27] More than values, national-security assertions convey the institutional/political need to protect the territory of newly constituted nation-states. Next, the *Survival Theory* states that due to the lack of a central predominant authority among States, their international relations are defined by the struggle for power among self-interested nation-states.[28] *Sovereignty* here embodies States' authority to use violence against invaders as the monopole of violence is left to and exercised by the threaten State. Then, the *Self-help Theory* claims that the protection of any State cannot hinge on other States' actions but on what each nation-state does to secure its own protection.[29]

Second, ***the transition from imperialism to internationalism***. This transition, essentially, stems from imperialism in the 19th century to the gradual articulation of the international legal order in the 20th century. This period depicts States' newly developed military capabilities enabling them to inflict greater damage (therefore, risks) not merely to their enemies but to the instituted international intergovernmental order (e.g., UN, World Bank, IMF) and community of States. Despite evolving discussions on the origins of international relations theory,[30] the first industrial

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[26] Drawing on the notion of "reason of State" (*raison d'état*) and strong coalition of States in the West (North Atlantic Treaty Organization NATO) and the East (The Warsaw Pact), a trend emerges from national to common security; the latter, further, circumscribed by a precedent concession of power: "sovereignty." See Tim Dunne & Brian C Schmidt, "Realism" in John Baylis, Steve Smith, Patricia Owens, eds, *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2014) 99 at 100.
[27] *Ibid* at 101.
[28] *Ibid*.
[29] *Ibid.*
[30] Moving from traditional approaches situating the beginnings of the study of international relations after World War I (realism, liberalism, constructivism) to more recent accounts tracing the origins of international relations theory in the late 19th century (from imperialism to internationalization), different depictions on international relations among States acknowledge modern approaches (explanatory, constitutive). See E H Carr, *The Twenty Years' Crisis: 1919-*

revolution is viewed as the axiological event propelling the unstoppable militarization of States relations, foreign power, and security interests,[31] which led to a transition of international conflicts going from territorial and external disputes to struggle for economic resources gradually attached to the emergent notion of national security and economic interests.[32]

Third, ***the Cold War***. Although the importance of external threats in the Postwar Era is amplified by acquired nuclear capabilities and technological developments of major, identifiable and ideologically opposed international actors,[33] the emergence of domestic threats to national security lies in the dynamics of a war that relied on counterintelligence.[34] The *Cold War* developed the so-called *"security dilemma"* (spiral model); that is, a political science notion whereby actions taken by one State to secure its own protection causes other States' reaction decreasing thereby the acting State's security based on its prior decisions concerning its security.[35] Since the *Cold War*, national security targets the protection of strategic interests and people holding information in relation to those interests.[36] Slowly, national security law shifted its focus toward foreign citizens whose nationality and political opinions were viewed as security threats.

1939 (New York: Palgrave, 2001) at Chapter 1; David Clinton, "Francis Lieber, Imperialism, and Internationalism" in David Long & Brian C Schmidt, eds, *Imperialism and Internationalism in the Discipline of International Relations* (Albany, New York: NYSU, 2005) 22 at 24.

[31] Lars Magnusson, *Nation, State and the Industrial Revolution: The Visible Hand* (New York: Routledge, 2009) at 5.

[32] See Michael Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Owl Books, 2001) at 9-13.

[33] See e.g. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161.

[34] Len Scott, "Intelligence and the Risk of Nuclear War: Able Archer-83 Revisited" in Michael Herman and Gwilym Hughes, eds, *Intelligence in the Cold War: What Difference did it Make?* (New York: Routledge, 2013) at 6; John E Hayness & Harvey Klehr, *Early Cold War Spies: The Espionage Trials that Shaped American Politics* (New York: Cambridge University Press, 2006) at 15.

[35] See Ali Bilgic, *Rethinking Security in the Age of Migration* (New York: Routledge, 2013) at Part II.

[36] US Department of Justice (Office of Legislative Affairs), *Congressional Record on Classified Information and Material* (Washington, DC: DOJ, 23 July 2009) 155:14 at 19015 (supporting the amendment of the *National Defense Authorization Act 2010* while stating that, "avoiding the unauthorized disclosure of classified information is key to ensuring the protection of our national security"). See also House of Commons, *Protecting Canadians and Their Rights: A New Road Map for Canada's National Security*, 42nd Parl, 1st Sess, (Ottawa: House of Commons, May 2017) at 26 (describing threshold for sharing and disclosing classified information), online (pdf): *OUR COMMONS* <https://www.ourcommons.ca/Content/Committee/421/SECU/Reports/RP8874869/securp09/securp09-e.pdf>; Australia Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (Queensland: Government of Australia, June 2003) at 196 (regulating the administrative and confidential handling of classified, sensitive, and national security information), online: *GOVERNMENT OF AUSTRALIA* <https://www.alrc.gov.au/publication/keeping-secrets-the-protection-of-classifie ed-and-security-sensitive-information-alrc-report-98/>.

The fourth major event defining national security law and policy affecting critical determinations on immigration and refugee protection is ***terrorism***. Although terrorist attacks did not start in the 21st century, the increasingly dangerous amalgam of low-sophistication means and global replication of modern terrorism using trained, non-trained, self-radicalized individuals,[37] foreign and born citizens makes terrorism one of the greatest national-security concerns host countries often raise vis-à-vis State, Non-state actors, and refugees. As such, neither should the *security threat* of terrorism be taken slightly nor be automatically associated to extremism, populism, or nationalism—this even though such threat happens to be frequently exploded by the latter. The regularity, methods and number of terrorist attacks in the world has led to a split on national security determinations based on security interests and threats. *Terrorism* is, undoubtedly, a defining influence on national security conceptions and its relation to immigration and refugee protection—gradually perceived as a vulnerability and eventually conceived as foreign threat.

The last yet most inconspicuous and pervasive event affecting current and future national-security conceptualizations, policies and regulations is, in my view, ***technology***. All three, the second-quantum (quantum computing), the third-digital and the fourth-industrial revolutions are bringing unprecedented global-scale challenges on national security's most prototypical assessments concerning both known and emergent risks; the latter, nevertheless, yet to be fully understood. That is, increasingly intertwined yet distorted associations on national security threats, along with severe deficiencies in the chosen political model of national-security assessment systems missing actual and far-more perilous threats. Consider, for instance, common mischaracterizations on refugees depicted as drivers of unemployment allegedly affecting host countries notwithstanding

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[37] See Public Safety Canada, *2018 Public Report on the Terrorist Threat to Canada: Building a Safe and Resilient Canada* (Ottawa: Public Safety Canada, April 2019) at 15, online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cnd-2018-en.pdf>; US Direction of National Intelligence, *2019 National Intelligence Strategy of the United States of America* (Washington, DC: DIN, 2019) at 4-5, online (pdf): *DNI* <https://www.dni.gov/files/ODNI/documents/National_Intelligence_Strategy_2019.pdf>; Government of China (State Council Information Office), *The Fight Against Terrorism and Extremism and Human Rights Protection on Xinjiang* (Beijing: State Council, 18 March 2019), online: *XINHUA* <http://news.cn/english/2019-03/18/c_137904166.htm>; see also EUROPOL, *2018 European Union Terrorism and Trend Report* (2018) at 5-7, online: *EUROPOL* <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018>; UN Secretary-General, *Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy*, General Assembly A/72/840, Item 118 (20 April 2018) at 3, online: *UN* <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/72/840>.

the lower number of resettled refugees[38] vis-à-vis the millions of jobs being 'substituted' through automation across retail, transportation, medical, legal, the media, hospitality, customer service and manufacturing industries in these countries.[39] Consider, further, U.S. current national security assessment (identification, selection, prioritization) on foreign threats. As it turns out, U.S. President Donald Trump has directed its entire administration—including the military—to secure the U.S.-Mexican border to repeal and control forced migration (asylum seekers) as the most significant national security threat the U.S. allegedly confronts.[40] This notwithstanding reports warning about greater foreign security threats, such as the nuclearization of the Korean Peninsula,[41] Russia's continuous cyberattacks on U.S. infrastructure, cities and electoral system,[42]

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[38] The US Department of Labor indicated that the national unemployment rate for the month of October 2019 was 3.6%, that is, the lowest in the last decade. Still, executive order on the admissibility cap for refugees for the fiscal year 2019-2020 states that only 18,000 refugees will be admitted, which represents the lowest admission cap in 40 years. See US Department of Labor & Bureau of Labor Statistics, *Databases, Tables & Calculations by Subject* (2019), online (data): *US GOVERNMENT* <https://data.bls.gov/timeseries/lns14000000> [accessed 23 November 2019, 5:20 PM-ET]; US President Donald J Trump, Memorandum: *Presidential Determination on Refugee Admissions for Fiscal Year 2019-2020* (1 November 2019), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2020/>; Dara Lind, "Trump Slashed Refugee Levels This Year. For 2019, He's Slashing Them Even Further" *VOX News* (18 September 2018), online: <https://www.vox.com/2018/9/17/17871874/refugee-news-record-history-asylum>.

[39] Considering the negative relation on *job-loss v job-creation* resulting from automation processes taking place across the planet, research indicates a rather unequivocal and gradually exponential loss of jobs (calculated in millions) due to Artificial General Intelligence (AGI) developments on machine and deep learning (evolving and acquired capabilities), remote manufacturing integration, and transformation of the robotic industry—this, I argue, before quantum-computing integrated algorithms are fully developed. J Mauricio Gaona, Address ("Human Rights and Artificial Intelligence: From AI-News and e-policy forums to Human Rights Protections," paper presented at MIT10 International Conference, Massachusetts Institute of Technology MIT (Cambridge, 17 May 2019) [unpublished]; Erin Winick, "Every Study We Could Find on What Automation Will Do to Jobs, in One Chart" *MIT Technology Review* (25 January 2018), online: <https://www.technologyreview.com/s/610005/every-study-we-could-find-on-what-automation-will-do-to-jobs-in-one-chart/>; Brookings Institute, "Automation and Artificial Intelligence: How Machines Are Affecting People and Places" by Mark Muro et al (Washington, DC: Brookings Institute, January 2019) at 68, online: *BROOKINGS* <https://www.brookings.edu/research/automation-and-artificial-intelligence-how-machinesnes-affect-people-and-places/>.

[40] US President Donald J Trump, Proclamation: *Declaring a National Emergency Concerning the Southern Border of the United States* (15 February 2019), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>.

[41] Roberts Burns, "US Intel Heads List North Korea, Not Border, as Threat to US" *US News* (29 January 2019), online: <https://www.usnews.com/news/politics/articles/2019-01-29/spy-agencies-doubt-north-korea-will-give-up-nuclear-weapons>.

[42] US Department of Homeland Security (DHS), *Alert: Russian Government Cyber Activity Targeting Energy and Other Critical Infrastructure Sectors*, Alert No TA18-074A (Washington, DC: DHS-CISA, 12 March 2018), online: *US GOVERNMENT* <https://www.us-cert.gov/ncas/alerts/TA18-074A>; US Direction of National Intelligence, *Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community* (Washington, DC: Senate Select Committee on Intelligence, January 2019) at 7, online (pdf): *DNI* <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf>. See also Nicole Perlroth & Scott Shane, "In Baltimore and Beyond, a Stolen N.S.A. Tool Wreaks Havoc" *The New York Times* (25 May 2019), online: <https://www.nytimes.com/2019/05/25/us/nsa-hacking-tool-baltimore.html>.

or the massive investment on oceanographic intelligence (distant-ocean operations), artificial intelligence, and quantum technology (encryption, computing, sensing) developed by the Chinese Government through the Ministry of National Resources,[43] along with the Artificial Intelligence Research Centre (AIRC) and the Unnamed Systems Research Centre (ASRC)—this one, incidentally, directed to improve Artificial General Intelligence (AGI) capabilities to carry nuclear weapons using underwater drones.[44]

National security assessments in "x" or "y" country can be identified at a given time, but such identification cannot be viewed as that country's national-security policy at any time. Hence, being affected by its evolving political nature despite its legal acquiescence, national security determinations are ultimately variable. This, essentially, highlights national security's greatest risk: *parameters of determination*. Every time a country ascertains its national security interests or identifies new national security threats, a test of values (moral and legal)[45] attached to the political process establishing those interests and prioritizing those threats takes place. Here, I argue, *law and morality* become ever-present references that circumscribe governments' national security determinations. Yet morality in this context is *rational morality*, which goes beyond the philosophical, rather traditional, and eventually circular disquisitions on morals, law, and transcendent morality.[46]

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[43] Ryan D Martinson & Peter A Dutton, "China's Distant-Ocean Survey Activities: Implications for U.S. National Security" (2018) at 15, online: *US WAR COLLEGE* <https://dnnlgwick.blob.core.windows.net/portals/0/NWCDepartments/China%20Maritime%20Studies%20Institute/China%20Maritime%20Report%20%233_NOV%202018.pdf?sr=b&si=DNNFileManagerPolicy&sig=%2Fuy2RAjBuIGTqqfUw%2BJ%2BcPviM2cPLVTsqcXimocOjsw%3D>.

[44] See US Department of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China* (Washington, DC: Secretary of Defense, 2018) at 46 (describing China's strategic developments on offshore waters defense), online (pdf): *US DEPARTMENT OF DEFENSE* <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF>; Centre for a New American Security, "Understanding China's AI Strategy: Clues to Chinese Strategic Thinking on Artificial Intelligence and National Security" by Gregory C Allen (Washington, DC: CNAS, 2010), online: *CNAS* <https://www.cnas.org/publications/reports/understanding-chinas-ai-strategy>; The Jamestown Foundation, "Chinese Advances in Quantum Sensing" by Elsa Kania & Stephen Armitage (Washington, DC: The Jamestown Foundation, 2017), online: *REAL CLEAR* <https://www.realcleardefense.com/articles/2017/08/24/chinese_advances_in_quantum_sensing_112138.html>. See also Stephen Chen, "China Military Develops Robotic Submarines to Launch a New Era of Sea Power" *South China Morning Post* (22 July 2018), online: <https://www.scmp.com/news/china/society/article/2156361/china-developing-unmanned-ai-submarines-launch-new-era-sea-power>.

[45] Moral-legal values become references not because the law says they are but because they inherently convey what the law should say. Such values are not separated moral judgments (considered at a given time), but embedded legal principles. For instance, compassion (refugee law), liberty (constitutional law), or human dignity (human rights law).

[46] The premise of *rational morality* here is directed at evincing social values that have transcended from moral order to legal systems as part of law's evolving role (as social institution). Hence, *rational morality*—at least, the one I refer

The test national security decisions confront is a test with dissimilar references (cultural, moral, social, legal) and gradually entwined justification (the government's actions reflect the country's values). Thus, actions adopted by a government on national security grounds must be both legally (constitutionally) and rationally (legitimately) justified to the extent that the government's actions are recognizable within progressively integrated values (legal, social, moral)[47] a given society sees as essential to its origin, identity and preservation. This is akin to any political authority deemed to represent those upon which the former applies.

National security determinations solely circumscribed to a legal reference and, as such, fully detached from any moral apprehension seems rather extreme—especially since governments' national-security determinations often affect different kinds of relationships (legal, political, personal, economic, social) and people (born and foreign citizens). For example, one cannot help to wonder how the leader of the ruling party in Poland (Law and Justice Party) Jarosław Kaczyński's assessment on refugees as disease carriers ("[carrying] … all sorts of parasites and protozoa")[48] and as cultural security threats ("[admission of Muslims] … would have to completely

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here–does not derive from ontological disquisitions on the moral justification of law (Kelsen), but rather from a *rational justification* on State action. My reflection further embraces Dworkin's proposition on *rational morality* to be "inherent in law irrespective of the particular legal system"; this is, in my view, a default reference to law's moral acquisition (superseding moral values with legal force, e.g. liberty, equality, dignity, privacy). I therefore reject the theoretical assimilation between rational and universal morality—particularly in relation to national security—in that, what it might appear morally defensible (reasonable) in a country might nonetheless be viewed as inherently reprehensible in other. *Universal morality* may neglect differentials of moral reality concerning, for instance, individual values, aspirations, potential (Nietzsche), liberty (Mills), or even autonomy (Rawls). Instead, I envision *rational morality* as a guiding principle inuring any nation with a far more powerful and enduring attribute: consistency between laws, values, principles, and State action. For a more detailed account on rational morality and its distinctions, see Tony Honore, "The Necessary Connection between Law and Morality" in David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein, eds, *Law and Morality: Readings in Legal Philosophy*, 2nd ed (Toronto: University of Toronto Press, 2001) at 146-53; Hans Kelsen, *Pure Theory of Law*, 2nd ed (Los Angeles: California University Press, 1967) at 65 (describing moral norms as social norms and law as the realization of moral and social values arising out of distinguishable moral and legal orders); Nietzsche, *La Généalogie de la Morale* (Paris: Gallimard, 1969) at 8, 153 (portraying universal demands on morality as a "danger, poison, narcotic," which preclude a man from developing his creativity and reaching his highest potential); John Stuart Mill, *On Liberty* (Boston: Ticknor & Fields, 1863) at 162 (distinguishing between individual freedom and universal experience).

[47] Law provides institutional authority to State action; *rational morality*, however, does further embody reasonable considerations on government decisions (e.g. declaring or not war, rejecting or not refugees). In his elaboration on the concept of national security, Wolfers does not only state critical distinctions between subjective and objective elements of national security, but also acknowledges (with a detailed account through history) unavoidable moral dilemmas affecting the axiological acquisition of national security as a concept. See Arnold Wolfers, *supra* note 24 at 498 (depicting values that reflect both political decisions and moral choices).

[48] See Jan Cienski, "Why Poland Doesn't Want Refugees" *Politico* (21 May 2017), online: <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/>.

change our culture and radically lower the level of safety in our country")[49] as well as Polish MEP leader Janusz Korwin-Mikke's characterization of Syrian migrants as "human garbage" (Video 1), or even PM Mateusz Morawiecki's position of not accepting "migrants from Africa or the Middle East"[50] (supported by more than 50% of polish society)[51] play with respect to Poland's membership to the EU[52]—this one presupposing Poland's acceptance of European laws and values (Article 1 *of the Treaty of Accession* and Article 2 *of the EU Treaty*).[53]

National security attributions do not constitute an absolute power, however. National security determinations emerge from a defined set of rules and constitutional principles lifting up the security and preservation of a country as the highest responsibility of any government toward those who elected it, not an outright privilege of those who represent it. Inherently, at most, having dissimilar references to guide a government's actions (national security actions) is commensurate with such axiological responsibility.[54] Otherwise, the personal views and values of the ruling leader would become the 'unchecked' source of national security (authority).

Notwithstanding legal exceptions recognized by international law (e.g., Article 9 *of the 1951 Refugee Convention*)[55] and by domestic law (state-of-emergency powers), executive powers on national security grounds find limits both under international law (e.g., Article 4 *of the International Covenant on Civil and Political Rights*, "*Public Emergencies Non-Derogations*")[56] and domestic law (mandated renewal or legislative branch approval).

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[49] *Ibid.*
[50] Euronews, "Poland Refuses Middle Eastern Migrants" *Euronews* (2 February 2018) (quoting Polish PM Morawiecki), online: <https://www.euronews.com/2018/01/02/poland-refuses-mid-east-migrants>.
[51] See Heinrich Böll Foundation, "'Poland for the Polish'? Taking a Closer Look at the Polish Rejection of Refugees" by Annika Morath (Berlin: BOELL, 2017), online: *BOELL* <https://eu.boell.org/en/2017/06/14/poland-polish-taking-closer-look-polish-rejection-refugees>.
[52] Even if one assumes that national security determinations embody a subset of local or national values gradually internalized through political (government) and social (law) institutions, there is at minimum (hopefully), a backdrop of well-established rational assertions ensuing from such determinations.
[53] EU *Treaty of Accession*, 23 September 2003, OJ L 236 EU, art 1; Treaty on the European Union ("EU Treaty") *Treaty of Maastricht*, 7 February 1992, art 2 (amended by the Treaties of Amsterdam 1997, Nice 2001, Lisbon 2009).
[54] See e.g. Canada, *National Defence Act*, RSC, 1985, c N-5, ss 1, 4 [last amended on 1 August 2019].
[55] UN General Assembly, *1951 Refugee Convention*, 28 July 1951, 189 UNTS 137, art 9 (entered into force on 22 April 1954).
[56] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 4 (entered into force on 23 March 1976) ["ICCPR"].

In fact, most countries have developed within their constitution (e.g., Argentina, Colombia, France, India, Ireland, Switzerland) or through statutorily legislation (e.g., Canada, Germany, United Kingdom, United States, Australia, New Zealand, South Africa) mechanisms allowing the executive branch to act immediately when facing circumstances that endanger the wellbeing, safety and preservation of the territory or its population (natural disasters, foreign invasion, rebellion, terrorism, public health). These provisions often require for the government to periodically renew the declaration of emergency powers or obtain the legislative branch's prior, concomitant or subsequent approval.[57]

National security interests and threats are not alike. The former refer to military and non-military interests considered strategic for the development and preservation of a nation-states'

[57] For example, on the advice of the Privy Council, the British sovereign (the Queen) may proclaim *emergency powers* on national security grounds related to human welfare, terrorism, environment, or foreign invasion—which regulations are temporary (30 days under Parliament extension). See *United Kingdom Civil Contingencies Act 2004*, 2004, c 36, ss 19, 22, 23 (assented to 18 November 2004) (regulating national-security emergencies' scope, geographical and temporary limitations in United Kingdom). In Germany, *Emergency Acts* enacted in 1968 allow the government to limit certain constitutional rights (privacy, profession, public and military service) in cases of defence, internal emergency, or disaster provided the federal government informs the German Parliament (*Bundestag*). *Germany Emergency Act 1968,* ss 1, 3, 11 ("Notstandsgesetze") [amending Germany's Basic Law, arts 10, 12a, 19, 20, 53a, 59, 63, 73 related to constitutional rights during state of emergency). In the US, *emergency powers* to protect the security of the nation were invoked by Presidents Abraham Lincoln during the civil war (suspending the writ of *Habeas Corpus* and withdrawing funds from the Treasury without congressional appropriation), Harry Truman during the Korea War, Lyndon B Johnson during the Vietnam War, George W Bush during the Iraq War and, more recently, by President Donald J Trump on migrants and refugees entering the US through the southern border. Constitutional challenges against such declarations have led to legal limits, including renewal and Congressional approval. See *United States Insurrection Act 1807*, 9th Congress, Pub L 9-39, 2 Stat 443 (signed into law on 3 March 1807) [codified 10 USC §§ 251-255] (regulating presidential powers to deploy the military in case of insurrection or rebellion); *United States National Emergencies Act 1976*, 94th Congress, Pub L 94-412, 90 Stat 1255 (signed into law on 14 September 1976) [codified 50 USC §§ 1601-1651] (establishing congressional competence on emergency powers); *United States International Emergency Economic Powers Act 1977*, 95th Congress, Pub L 95-223, 91 Stat 1626 (signed into law on 28 December 1977) [codified 50 USC Ch 35, § 1701] (authorizing emergency powers on national security grounds concerning commerce regulation and foreign threats to the United States). In Canada, however, *emergency powers* are circumscribed by law to their immediacy, urgent and temporary nature vis-à-vis security threats that endanger the lives, health or safety of Canadians provided these threats cannot be repealed through the use of ordinary powers otherwise attributed by law to federal and provincial governments. See *Canada Emergencies Act*, *An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof*, RSC 1985 (assented to 21 July 1988) c 22, c 29, s 3 (4th Supp) (establishing the scope and procedure to declare a National Emergency in Canada). See also *US Senate Emergency Powers Statutes*, report by the US Senate Special Committee on the Termination of the National Emergency, 93rd Congress, 1st Sess, Report No 93-549, (Washington, DC: US Senate, November 1973); Louis Fisher, "Presidential Power in National Security: A Guide to the President-Elect" (June 2009) at 3, online (pdf): *LIBRARY OF CONGRESS* <https://www.loc.gov/law/help/usconlaw/pdf/presidential-power-national-security.pdf>; Elizabeth Goithen, "Thee Alarming Scope of the President's Emergency Powers" *The Atlantic* (January 2019), online: <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

constitutional references (rule of law, population, territory) and institutional systems (e.g., economy, healthcare, food supply, communications), while the latter embody public policy determinations on events and actors threating the realization of such interests.

The eventual determination of national security threats further encompasses the assessment of the identifiable threats against the backdrop of transactional (individual rights) and non-transactional values (government's authority).[58] The progression of security through its different approaches is an essential driver of *the* ***Modern and Final Refugee Paradigms*** because it creates critical contradictions between host countries' security and refugee protection that ultimately affect not only the legal and moral entity of domestic law—especially when applied on foreign citizens—but also the corollary premises of a thought to be civilized, intelligent, and diverse society. As such, the ontological conception of national security is preceded by anthropological, historical, sociological, and political influences ensuing from the need to procure the coexistence and preservation of humans as individuals, social group, local communities, cities and States.

Security is defined as the quality or state of being secure. This includes individual and collective needs of feeling secure from anxiety, fear, danger, or physical threats.[59] Yet some scholars have attempted to reintroduce the very notion of security—and, for that matter, national security—as value.[60] This presupposes the existence of a significant number of people sharing the "security value" during certain time to the extent that does not only characterize people's behaviour during such time but also become part of their identity beyond that time, which, in itself, raises no few cross-cultural analytical challenges. In due course, *postmodernists* advanced a transition from individual security (individual interests) to State security (State interests) by directing their

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[58] Transactional and non-transactional values vary in every country. As such, privacy, equality, human dignity, or liberty may or may not be considered transactional values. This acknowledges doctrinal nuances whose theoretical contentions hinge on the historical progression of national security as a concept. For example, in his work on national security, Walter Lippman sees non-transactional values as limit on national security, even in the face of war. National security is not in itself a value placed at the "apex of pyramid of values" because this position is "subscribed to a nationalistic ethics," which Wolfers sees as a rather extreme position leading to decisions that go beyond security. Hence, the choice governments face encompasses a moral duty to preserve the nation and its values, which can be nonetheless sacrificed to attain security if justification and adequate means exist. See Walter Lippman, *U.S. Foreign Policy* (Boston: Little, Brown & Company, 1943) at 51; see also Wolfers, *supra* note 24 at 500.
[59] *Oxford Advanced Learner's Dictionary*, 10th ed, *sub verbo* "Security."
[60] See David A Baldwin, "The Concept of Security" (1997) 23 Rev of Intern'l Studies 5 at 7-26 (depicting the evolution of the concept of national security in modern current literature).

analysis almost exclusively to State powers and authority, while diluting basic concerns on humanity and individualism (human dignity, liberty, equality).[61] In this context, the importance of individual security is soon replaced by the preeminence of State security. Henceforth, the very ascension of nation-states is influenced through the development of sociological (social relations), theoretical (realism) and political (State sovereignty) approaches placing State security as critical interest for the preservation of institutional forms of organization leading to the idea that protecting State, protects society.

A. Immigration, Security, and State Protection

Anthropological studies (Hunter-Gatherer studies and ethnographic evidence) on prehistoric and modern settlements have found a common trend on the perception-conceptualization of security to procure the in-group's coexistence and protection (food and physical security) vis-à-vis the actions of neighboring, outsiders, or competing groups.[62] The ascension of early civilizations (Egypt and Sumer) shows a growing correlation between intergroup violence, conflict, and surplus production.[63] The gradual institutionalization of those groups embodies a critical necessity to turn the originally viewed as competing and eventually treated as incompatible interests into mutual benefits by promoting the protection of the greater group, along with the territory in which such group interacts, lives and develops. In the advent of nation-states, such constitutional arrangement presupposes an eventual exchange of freedom for security, not merely for productivity.[64] This finding indicates that the need to protect the population and territory of a State cannot and should

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[61] See George Sørensen, "Individual Security and National Security: The State Remains the Principal Problem" (1996) 27:4 Security Dialogue 371 at 374-86 (analyzing postmodernist and post-structuralist theoretical approaches from the perspective of State security).

[62] While the development of cultural anthropology (concerning the study of human societies and cultures) and ethnographic research (relating to the study of hunting and gathering populations, including remaining Tribal groups in Africa, Aborigines in Australia, and Artic peoples living in North America) is relatively recent, evidence shows the need for food and physical security as the root-causes of first forms of social integration. Archeological evidence (depicting mobility patterns) suggests limited interaction among groups due to in-group's security concerns regarding interaction with out-groups (diseases, acculturation, cultural annihilation, social conflict). See Peter Jordan, "The Ethnohistory and Anthropology of 'Modern' Hunter-Gathers" in Vicki Cummings, Peter Jordan & Marek Zvelebil, eds, *The Oxford Handbook of the Archeology and Anthropology of Hunter-Gathers* (Oxford: Oxford University Press, 2014) at 903-17 (distinguishing research trends on regional and past Hunter-Gather groups); Thomas Mayor, "Hunter-Gatherers: The Original Libertarians" (2012) 16:4 The Independent Rev 486 (describing Hunter-Gatherer societies).

[63] Ernesto Dal Bó et al, "The Paradox of Civilization: Pre-Institutional Sources of Security and Prosperity" (2019) at 1, online: *HAAS-BERKELEY FACULTY REPOSITORY* <http://faculty.haas.berkeley.edu/dalbo/Paradoxofcivilization.pdf>.

[64] *Ibid* at 3.

not be automatically associated to a particular ideology or form of protection, but rather—as archeological and anthropological evidence suggest—to human nature and social interaction.

Though the notion of security related to groups, communities, and States identify both people and their territory as prevalent elements, such relationship has changed through time. In fact, evidence shows an inherently adaptive precondition of mistrust toward out-groups and foreigners entering the territory of the in-group. In Ancient Greece, for instance, Athenians had a dissimilar and sometimes conflicting vision of immigrants coming to their city (*polis*). On the one hand, immigration was viewed as a vital part of the Athenians' system of life,[65] indicating customary reliance on foreign migrants to perform tasks that Athenians did not, which led to the establishment of *Metoikos* (foreign residents sponsored by Athenians citizens to whom the former did serve).[66] On the other hand, immigrants were depicted negatively as *Barbarians* due to their inability to articulate ancient Greek and the sequential sound of their own language portrayed by Athenians as "*Bar-Bar-Bar*." Such perception increased with a secular mistrust toward foreigners whom Athenians viewed as security threat ("capable of stealing State secrets").[67]

While the concept of *barbarian foreigners* persisted during and beyond the Roman Empire,[68] Romans, unlike ancient Greeks, had a different perception on immigrants and a distinct articulation on collective security that ensues from the relationship between people and their territory. In their prime realization of a more advanced civilization, the actual construction of the Roman Empire relied on differential yet acquisitional interactions of people and their territory, in which the annexation of new territories—and, in the process, people—through war and conquest increased the security of the Roman Empire. This, in turn, contributed to enlarge the external boundaries of the territory and the internal dimensions (legal, cultural, economic, political) of the Emperor's authority vis-à-vis newly controlled populations.

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[65] Laurialan Reitzammer, "For Ancient Greeks, Immigrants Were a Boon and Threat to Homeland Security" *Straits Times* (16 April 2017), online: <https://www.straitstimes.com/opinion/for-ancient-greeks-immigrants-were-a-boon-and-threat-to-homeland-security>.
[66] *Ibid.*
[67] *Ibid.*
[68] See Ralph W Mathisen, "Perigrini, Barbari, and Cives Romani: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire" (2006) 111:4 The Am Hist'l Rev 1015 ["Mathisen"].

Using a method of accession/distribution of confiscated land (*Ager Publics*) previously owned by defeated enemies of the Roman Empire, both enemies and Romans were given parcels of land (and new public-common land) as token for their loyalty or new allegiance to the Roman Empire.[69] These 'forced migrants' were considered an acquisition rather than a threat to the security of the Roman Empire; a finding that correlates with descriptions made by Greek philosopher Epictetus (50–135 C.E.) and Roman Emperor Marcus Aurelius (161–180 C.E.) on *universal citizenship*.[70] Thus, immigrants were viewed based not on their geographical origin, but on what their actions and thoughts indicate. Moreover, *provincial immigrants* (living in the Roman Empire following the annexation of their former territory), were gradually recognized by Roman law (*ius civile*) as provincial non-citizens or *peregrini*.[71] Afterwards, both Emperor Augustus (27 B.C.E.–14 C.E.) and Emperor Carcalla (198–217 C.E.) provided the *peregrine* with paths to *Roman citizenship*. The former by serving in the city council of their provinces or in the Roman army, while the later did it by officially extending citizenship to the remaining *peregrine* through the Antonine Constitution (212 C.E.)[72] Hence, more than a foreign threat to the security of the Roman Empire, immigrants were, in fact, a critical component of its strength, security, vitality, and power.

The fall of the Western Roman Empire (476 C.E.) is preceded by treaties the Empire made with Germanic tribes arriving to Europe from different regions and through various waves (Franks, Goths, Vandals, Anglo-Saxons, Lombard, Suebi, Frisii, Jutes, Burgundians, Alemanni, Scirii).[73] Legal concessions on the new occupied territories became the political mechanism Romans employed to maintain control over their territory while assuring the aid of the new occupants to repel future foreign invasions.[74] Eventually, tribal wars with groups arriving to Europe during the decline of the Western Roman Empire (Huns, Avars, Slavic, Bulgars)[75] pushed the remaining Germanic tribes further to the West. This migration movement, along with the arrival of peoples

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[69] Saskia T Roselaar, "Colonization in the Roman Republic" Oxford Bibliographies Collection (January 2017), online: <https://www.oxfordbibliographies.com/view/document/obo-9780195389661/obo-9780195389661-0238.xml>.
[70] Stentiae Antiquae, ""Citizens of the World" from Diogenes to Marcus Aurelius" *SA* (4 June 2016), online: <https://sententiaeantiquae.com/2016/06/04/citizens-of-the-world-from-diogenes-to-marcus-aurelius/>.
[71] Mathisen, *supra* note 68 at 1013-14.
[72] *Ibid.*
[73] Guy Halsall, *Barbarian Migrations and the Roman West 376-568* (New York; Cambridge: Cambridge University Press, 2008) at 163-411.
[74] *Ibid* at 415-455.
[75] *Ibid* at 300; Allen Leeper, "Germans, Avars and Slavs" (1933) 12:34 Slavonic & East Eur Rev 117 at 119-132.

coming from Asia, North and East of Europe (Vikings, Norman, Varangian, Hungarian, Moorish, Turkic, and even Mongol)[76] after the so-called "Migration Period" (375 B.C.E.–700 C.E.)[77] changed the territory and the demographics across Europe and North Africa.

With the ascension and development of Germanic Kingdoms in *the Middle Ages* (Suebi, Visigoths, Ostrogoths, Lombard and Asturias, along with the Byzantine, Holy-Roman and Carolingian Empires),[78] the legal and political control over territory and population became an essential feature to secure the protection of the State. In this context, one must acknowledge immigration is neither an accidental nor incidental element of modern national security but rather a historic component of the critical elements that security and preservation of States embody—such elements further leading, in part, to the modern relationship between national security and immigration.

The protection of public health has been paramount in the development of legal restrictions on migration across the planet. Fear of epidemics brought by foreigners precedes domestic ("public health protection") and international law exceptions ("public order") on refugee protection.

The first known public health threat leading to the closure of a city to avoid the propagation of a plague is found in Ancient Greece. Seemingly a literary account, the Plague of Thebes described in the Greek tragedy written by Sophocles (*Oedipus Rex*, 429 B.C.)[79] leads to the Plague of Athens (430-429 B.C.), which occurrence and pathogen have been scientifically established.[80]

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[76] See generally Florin Curta, *Southeastern Europe in the Middle Ages, 500-1250* (New York: Cambridge University Press, 2014). See also Hugh Kennedy, *Mongols, Huns and Vikings* (Hamilton, Ontario: Cassell, 2012).
[77] *Ibid* at 163. The Migration Period ("Völkerwanderung") is defined as the period of Barbaric invasions portraying increasingly greater groups of migrants (mostly but not exclusively, the Germani, Hunnic and Slavic) into the territory of the Roman Empire from the year 375 BCE (approximately) to the year 700 CE (with some scholars limiting it to the year 538 CE), irrespective of their accession (war, migration, invasion). See also Walter Goffart, *Barbarian Tides: The Migration Age and the Later Roman Empire* (Philadelphia: University of Pennsylvania Press, 2006).
[78] Goffart, *ibid*.
[79] Though not the main event in Sophocles' tragic plot on *Oedipus Rex* (430-420 BC), the plague in Thebes is described through various scenes of the play. See Sophocles, *The Three Theban Plays: Antigone, Oedipus The King, Oedipus at Colonus* (London: Penguin Classics, 2000).
[80] A clinical examination of Sophocles' account on the Plague of Thebes unveils not only a fictional but to a historic fact. Medical researchers correlate Sophocles' description of the Plague of Thebes with the Plague of Athens (430-429 BC) by indicating that this epidemic was possibly caused by *Brucella abortus*. See Antonio A Kousoulis et al, "The Plague of Thebes, A Historical Epidemic in Sophocles' Oedipus Rex" (January 2012) 18:1 EIDJ 153, DOI: <https://dx.doi.org/10.3201/eid1801.ad1801>.

In the 14th century, the Republic of Venice ("La Serenissima") established a *quarantine system* on immigrants arriving by sea known as "*un' attesa per quarata giorni"* ("40-days waiting period") in the Island of Santa Maria di Nazareth (Lazaretto).[81] Following the demographic shift caused by "the Great Plague"—which affected more than a quarter million people in Eurasia and Europe[82] in the Middle Ages—the *quarantine system* was regarded as a vital mechanism to protect the health of the population in Venice against the epidemics coming from abroad.[83] This system was replicated through similar laws across the world (France 1521, Boston 1647, Rome 1656, New York 1663, Russia 1664, Frankfurt 1666, England 1712, San Francisco 1900, Australia 1908, Canada 2005, and nationwide in the United States in 1893 and in 2001, respectively).[84]

In the 17th century, regional and local regulations known as *"Plague Laws"* prohibited the entry of foreigners and the movement of local residents (with few exceptions) in order to protect the public health of the inhabitants living in town.[85] By the 18th century, States had imposed security restrictions on plague, smallpox, and inoculation in England,[86] France, and Germany.[87]

In the United States, one of the first historic references on national security protection appears under the administration of President John Adams with the enactment of *the Sedition Act* and *the*

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[81] Jane Stevens Crawshaw, "The Renaissance Invention of Quarantine" in Linda Clark and Carole Rawcliffe, eds, *The Fifteenth Century XII: Society in Age of Plague* (Woodbridge, United Kingdom: The Boydell Press, 2013) at 164.
[82] John Frith, "The History of the Plague: Part 1" (2012) 20:2 JMVH 1 (describing pandemics in the Middle Ages).
[83] Crawshaw, *supra* note 81 at 164-66.
[84] Peter Tyson, "A Short History of Quarantine" *Nova* (12 October 2014), online: <https://www.pbs.org/wgbh/nova/article/short-history-of-quarantine/> [timeline]; *Australia Quarantine Act of 1908, An Act to prevent the introduction and spread of communicable diseases,* FR 3, c 44 (1908) [amended on 28 March 2013]; House of Commons, Bill C-12, 38th Parl, 1st Sess, (assented to 13 May 2005); US Department of Health and Human Services (Division of Global Migration and Quarantine, Center for Disease Control and Prevention), *Quarantine and Isolation: US Quarantine Stations*, (2019), online: *CDC* <https://www.cdc.gov/quarantine/quarantine-stations-us.html>.
[85] The idea of foreigners carrying deathly diseases has been documented through history. In his account to a local politician, Henry Muddiman, a journalist of the London Gazette, describes more than 8,252 burials and hundreds of parishes infected by plague across the city. See Henry Muddiman, "The Plague" *The London Gazette* (1665), online (letter): *UK NATIONAL ARCHIVES* <http://www.nationalarchives.gov.uk/education/resources/great-pla gue/source-1/>.
[86] Arnold Zuckerman, "Plague and Contagionism in the Eighteenth-century England: The Role of Richard Mead" (2004) 78:2 Bull of the Hist of Med 273 at 275-308.
[87] Donald R Hopkins, "Public Health Then and Now: Smallpox" (1988) 78:2 Am J of Pub Health 1589 at 1590 (describing devastating effects of smallpox during the 18th century in Quebec, Sweden, France, Germany, Russia, China, and Japan, including the death of Emperors, Kings, various members of royal houses around the world, and thousands of soldiers). Fear of immigrants brining diseases to the US was also reported. See e.g. A J Viseltear, "The Pneumonic Plague Epidemic of 1924 in Los Angeles" (1974) 47:1 Yale J Biol'y of Med 40 at 41-45.

Alien Friends Act of 1798.[88] This legislation was viewed as the Federalists' attempt (President Adam's political party) to offset the political aspirations of the Democratic-Republican candidate Thomas Jefferson, by making more difficult for immigrants to become naturalized citizens and, eventually, vote for a Democratic-Republican candidate.[89] The Acts conferred the President the authority to arrest and deport aliens considered dangerous to national security ("immigrants from hostile nations and foreigners making false statements against the federal government").[90] Even though the *U.S. Alien and Sedition Acts* did expire in 1980 and in 1981 respectively, their national security component has transcended through legislation (*The Alien Enemies Act*) to our days (50 U.S.C. Ch 3, § 21).[91]

In the 19th century, State security measures were implemented in the U.S. to protect the population from foreign diseases. To that end, the *U.S. Immigration Commission of 1911*[92] ordered the physical inspection of migrants arriving to America from Europe and Asia. Various studies (Kraut 1994; Markel 1997 and 2002)[93] have shown a direct correlation between racial discrimination of immigrants and medical exclusion laws leading to major security concerns in the U.S.—particularly between the years 1880 and 1924 when more than 25 million immigrants from around the world were admitted into the country.[94]

Notwithstanding the political will and legislative efforts of promoted by the Canadian Prime Minister John A. Macdonald to open the country to immigrants in the West (1880), the massive

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[88] *US Alien Act of 1798*, 5th Congress, 6 July 1798, Acts and Resolutions, GR 11.
[89] Immigrants were mostly aligned with the Democratic Republican Party. *The US Alien Act* increased the residence requirement for immigrants to apply for citizenship from 5 to 14 years. Critics saw the *Act* as voting suppression mechanism. See Constitutional Rights Foundation, "The Alien and Sedition Acts: Defining American Freedom" (2003), online: *CRF* <https://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html>.
[90] *Ibid.* The Acts further established systematic controls on immigrants' public declarations criticizing the federal government–including immigrants from France considered then by Federalists a hostile nation ("the Quasi-War"). The government's censorship on immigrants was viewed as violation of the First Amendment.
[91] 50 USC Ch 3, § 21 (*Restraint, Regulation, and Removal*).
[92] US Immigration Commission on Steerage Legislation 1819–1908. *United States Immigration Commission 1907–1910*, 61st Congress, 3rd Sess, Senate Doc 758, (Washington, DC: US Printing Office, 1911) at 336-485.
[93] See Alan M Kraut, *Silent Travelers: Germs, Genes and the Immigrant Menace* (New York: Basic Books, 1994); Howard Markel, *Quarantine! East European Jewish Immigrants and the New York City Epidemics of 1892* (Baltimore: Johns Hopkins University Press, 1997); Howard Merkel, "The Foreignness Germens: The Persistent Association of Immigrants and Disease in American Society" (2002) 80:4 The Milbank Quart 757 at 760-788 (describing associations on race and public health during the arrival of millions of immigrants in the 19th and 20th centuries).
[94] US Immigration Bureau, *Annual Reports of the U.S. Immigration: 1890-1924* (Washington, DC: US Printing Office, 1925).

migration of Chinese citizens in British Columbia led to public protests describing Chinese immigrants as being, "immoral, prone to disease, and incapable of assimilation."[95] Both cultural and health concerns—deriving, in part, from the number of Chinese nationals arriving at British Columbia—led to the establishment of *the Royal Commission of 1885* and its legal amendments (1887, 1892, 1900, 1903) imposing fees on Chinese citizens entering Canada.[96]

In the 20th century, the 1918 influenza pandemic known as *"the Spanish flu"* (H1N1 virus) infected one third of the world's population (500 million at the time) and killed more than 50 million people,[97] counting 67 thousand deaths in the U.S.[98] and 55 thousand in Canada.[99] While discussions as to the geographical origin of the virus remain,[100] its propagation has been associated to global migration.[101] Protecting public health is therefore a legitimate national security interest.

In the 21st century, the world is facing a new pandemic with the novel coronavirus known as "COVID-19."[102] As of September 30, 2020, the virus has infected more than 30 million people worldwide and killed more than 1 million.[103] Despite the debate on whether the closure of borders is or not an effective measure to reduce the risk of contamination, most countries have enforced either regional or national lockdowns on their own populations. In fact, as the UN Agency for Refugees temporarily suspended all its resettlement programs,[104] nearly all countries placed immigration restrictions—including the suspension of refugee and asylum protection claims.[105]

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[95] Lindsay Van Dyk, "Canadian Immigration Acts and Legislation" (2019), online: *PIER21* <https://pier21.ca/research/immigration-history/canadian-immigration-acts-and-legislation>.
[96] *Ibid.* The Commission established an entry fee for Chinese immigrants of $10. Reforms increased it up to $50.
[97] US Health and Human Services (Center for Disease Control CDC), *1918 Pandemic* (March 2020), online: *US GOVERNMENT* <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> ["CDC"].
[98] *Ibid.*
[99] Government of Canada (Parks), *The Spanish Flu in Canada (1918-1920)* (25 March 2020), online: *GOVERNMENT OF CANADA* <https://www.pc.gc.ca/en/culture/clmhc-hsmbc/res/doc/information-backgrounder/espagnole-spanish>.
[100] CDC, *supra* note 97.
[101] *Ibid.*
[102] See Harvard Medical School, "As Coronavirus Spreads, Many Questions and Some Answers" (27 March 2020), online: *HEALTH HARVARD* <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>.
[103] Johns Hopkins University, "COVID 19: Dashboard by the Center for Systems Science and Engineering (CSSE)" (2020), online: *JOHNS HOPKINS* <https://coronavirus.jhu.edu/map.html> [accessed 30 September 2020, 4:40 PM-ET].
[104] See UN, "COVID-19: Agencies Temporarily Suspend Refugee Resettlement Travel" *UN News* (17 March 2020), online: <https://news.un.org/en/story/2020/03/1059602>.
[105] See e.g. Government of Canada, *How the Coronavirus Disease (COVID-19) Is Affecting Immigration, Refugees, Citizenship and Passport Services* (March 2020), online: *GOVERNMENT OF CANADA* <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19.html>; US President Donald J Trump, Proclamation: *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel*

There are two caveats on COVID-19 and refugees, however. *First*, while it was reported that the virus originated in China (Wuhan region) and spread through global migration,[106] neither the virus nor the restrictive measures imposed appertain exclusively to refugees. *Second*, notwithstanding most governments measures aim to protect their populations, indifference toward the wellbeing of refugees and asylum seekers (either on the move or located in camps or in detention centres)[107] could rapidly become the most fatal assertion of the *Final Refugee Paradigm:* "protect everyone but refugees." I maintain that considering the dire humanitarian conditions these migrants face, the lack of access to medical attention, and the most recurrent option to reduce the propagation of the virus ("social distancing"), holding asylum seekers in detention as the virus spreads is unconscionable as this not only jeopardize the lives of migrants but the entire planet[108]— particularly considering reports on asylum seekers dying of COVID-19 while under government custody,[109] and when even prisoners are being released.[110]

Coronavirus (31 January 2020), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>; US Citizenship and Immigration Services (USCIS), *Alert: USCIS Response to Coronavirus 2019 (COVID-19)* (18 March 2020), online: *USCIS* <https://www.uscis.gov/about-us/uscis-response-coronavirus-2019-covid-19>; Muzaffar Chishti & Sarah Pierce, "Crisis within a Crisis: Immigration in the United States in a Time of COVID-19" *Migration Policy* (26 March 2020), online: <https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19>; Stefania D' Ignoti, "How Coronavirus Hits Migrants and Asylum Seekers in Italy" *The New Humanitarian* (16 March 2020), online: <https://www.thenewhumanitarian.org/news/2020/03/16/italy-coronavirus-migrants-asylum-seekers>; María Martín, "Se Desploman las Solicitudes de Asilo y las Entradas Irregulars" *El País* (27 March 2020), online: <https://elpais.com/espana/2020-03-26/se-desploman-las-solicitudes-de-asilo-y-las-entradas-irregulares.html>; Ronan Tésorière, «Coronavirus: en Pleine Épidémie, les Demandeurs d'Asile dans l'Oubli» *Le Parisien* (24 March 2020), online: <http://www.leparisien.fr/societe/coronavirus-en-pleine-epidemie-les-demandeurs-d-asile-da ns-l-oubli-24-03-2020-828 6654.php>.

[106] World Health Organization (WHO), *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, Visit 16-24, February 2020 (March 2020) at 4-5 (tracing the outbreak's origin), online (pdf): *WHO* <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf >.

[107] See Michelle Bachelet & Filippo Grand, "The Coronavirus Outbreak Is a Test of Our Systems, Values and Humanity" *UNHCR News* (12 March 2020), online: <https://www.unhcr.org/en-us/news/latest/2020/3/5e69eea54/coronavirus-outbreak-test-systems-values-humanity.html>.

[108] Mark Leon Goldberg, "The Coronavirus Poses a Big Threat to Refugees and People in Humanitarian Crisis" *UN Dispatch* (2 March 2020), online: *JOHNS HOPKINS UNIVERSITY* <http://hopkinshumanitarianhealth.org/news-events/chh-in-the-news/the-coronavirus-poses-a-big-threat-to-refugees-and/>.

[109] American Bar Association (ABA), "Impact of COVID-19 over the Immigration System" *ABA News* (2 October 2020), online: <https://www.americanbar.org/groups/publicinterest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/> (reporting 9 deaths under ICE custody due to COVID-19).

[110] Due to the imminent spread of the virus in overcrowded secluded areas, the Colombian Government issued a State-of-emergency declaration ordering the release (based on crimes committed, convict's age and health condition) of more than 10 thousand inmates from prison. There are also reports on the Government of Iran releasing 54 thousand prisoners. See El País "Cerca de 10,000 Presos Saldrían a Prisión Domiciliaria Ante Emergencia Carcelaria" *El País* (23 March 2020), online: <https://www.elpais.com.co/colombia/ cerca-de-10-000-presos-saldrian-a-prision-domiciliaria-ante-emergencia-carcelaria.html>; BBC "Coronavirus: Iran Temporarily Frees 54,000 Prisoners to Combat Spread" *BBC News* (3 March 2020), online: <https://www.bbc.com/ news/world-middle-east-51723398>.

I maintain that although international refugee law recognizes the protection of public order as an exception (Articles 9 and 32.1 of the *Refugee Convention*),[111] no law can truly justify the abandonment of the most vulnerable population on the planet in the most vulnerable time.

B. Sovereignty, Self-Determination, and State Interests

I argue that national security is an axiological yet relatively novel (20th century)[112] component of nation-state development that derives from individual (*liberty cause*), political (*necessary cause*), institutional (*legal cause*), and social authority (*preservation cause*) enabling States to secure the protection of their population and territory with respect to initially foreign and gradually internal threats (e.g., foreign invasion, war, rebellion, crime, extremism, international and domestic terrorism). Still, human interaction[113] relates to the ever-present need of survival and preservation experienced across different cultures with regards to life-threatening circumstances[114] by individuals, groups, cities and States. As such, the emergence and 'theoretical viability' of nation-states is entrenched in the development of *State sovereignty* as a principle in domestic (constitutional sovereignty) and international law (sovereign equality).[115]

In the 16th century, Jean Bodin introduced *the notion of sovereignty* as *"la puissance absolue et perpétuelle d'une République"* (the absolute and perpetual power of the commonwealth).[116] In his theoretical approach on sovereignty (absolute sovereignty), Bodin envisions the King's authority as one of unlimited powers only restricted by God and natural law ("the sovereign Prince is

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[111] Refugee Convention, *supra* note 55, arts 9, 32(1).
[112] Wolfers, *supra* note 24 at 481. National security emerges in the 20th century as legal and public-policy concept.
[113] See Joseph E McGrath, *Groups: Interaction and Performance* (Bergen, New Jersey: Prentice-Hall, 1984) at 19 (proving that choosing a solution or negotiating a conflict is motivated by groups' association and interaction).
[114] See Donelson R Forsyth, *Group Dynamics*, 5th ed (Belmont, California: Wadsworth, 2010) at 52 (articulating the phycological need for humans to be part of a group and accept the influence and authority of its chosen leaders as a more effective way to prevent and coordinate group action toward danger, peril or conflict).
[115] This one, however, must be distinguished from "equal sovereignty," that is, a doctrinal elaboration promoting equal sovereign rights among States at domestic level (federalism). Yet both "equal sovereignty" and "sovereign equality" describe dissimilar entities having similar legal capacity for self-determination. See e.g. *Shelby County v Holder*, 570 US 529 (2013) (declaring equal sovereignty among States) [of particular interest, Justice Ginsburg's dissenting opinion]. See also Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International–Organization" (1944) 53:2 Yale L J 207 at 209-220.
[116] Bodin uses the term "*res publica*" (*République* or "Commonwealth") to exemplify the critical concession-abdication that individuals make toward the sovereign authority in order to achieve public good. See Jean Bodin, *Six Books of the Commonwealth* (Oxford: Alden Press, 1955) Book I, Chapter VIII at 24.

accountable only to God").[117] For Bodin, State security encompasses the authority to impose the law over the State population (subjects) and the authority to declare war or make peace with other States.[118] The acceptance of nation-states' authority hinges on its imposition and compliance. Such approach requires basic propositions solving unavoidable intricacies on human interaction (contradiction, disagreement, conflict). Then, *arguendo*, a nation-state can only survive when its authority (legal and political) can be imposed over those the State purportedly controls. This very acknowledgement conveys the existence of a hierarchy (structural authority) within the system thereby created (State). Here, nation-states' authority is at the peak of all conceivable authorities, for which individual and even some collective disagreements with the sovereign are to be resolved against the backdrop such hierarchy presupposes (i.e., sovereign's decision trumps).

The notion of nation-states security is attached to the ultimate assertion of *State sovereignty*, which enables States to rule over those subjected to its authority. Hence, albeit initially considered a domestic principle promoting the authority of the sovereign deemed free from outside interferences, the notion of sovereignty evolves from a constitutional condition securing State preservation (*national sovereignty*) to a pivotal principle of international law (*sovereign equality*). Further, the initial proposition of sovereignty (*political sovereignty*) suggests that States have the authority to rule (*self-determination powers*) over their population and within their territory, while the resulting principle commands States to respect each other's authority, which includes refugees and asylum seekers living in their territory. Thus, Bodin's corollary premise (sovereignty means States have the right to control their territory and population) becomes a critical influence on the development of modern nation-states—this one, in particular, is reflected in the development of the Peace of Westphalia (*territorial sovereignty*)[119] and its legal acquisitions on public international law: *Self-determination*, *Sovereign Equality*, and *principle of Non-interference*.[120]

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[117] *Ibid* at Chapter VIII.
[118] *Ibid* Chapter X at 44.
[119] See *Treaty of Westphalia*, Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, 24 October 1648, online: *ISN* <https://e4anet.files.wordpress.com/2014/09/treaty-of-westphalia.pdf>. See also Henry Kissinger, *World Order* (New York: Penguin Press, 2014) at 30 (reflecting on concepts of national interest through the Westphalia system).
[120] "Westphalia" (national sovereignty concept) presupposes the State authority to determine the rules governing its territory and population. See generally Neil MacFarlane & Natalie Sabanadze, "Sovereignty and Self-determination: Where are We?" (2013) 68:4 Intern'l J 1 at 3-19; Quincy Wright, "The Equality of States" (1970) 3:1 Cornell ILJ 1 at 3-7.

Such principles have been quintessential for the development of national security law both domestically (constitutional powers) and internationally (mutual recognition). Individual security transcends to collective security; the latter, gradually, to city-states' and nation-states' security, for which security does not emerge as ideological but as sociopolitical and legal rationalisation on collective wellbeing, human interaction, and development.

The Hobbesian institutional transaction (through an implied covenant of unity reflected in law) whereby individual liberties and natural rights are ceded to the sovereign authority in exchange for security and preservation of the State does still, in my view, influence current national-security transactions (e.g., surveillance programs, borders' security). In effect, prior to advancing the sovereign authority as inevitable political response vis-à-vis individual limitations of human beings (external knowledge of the world and conflicting individual interests), Hobbes' influential account on security moves from the right to self-defence to the necessary subjection of people's natural rights to the authority of the sovereign ("the multitude so united in one person is called a Commonwealth; in Latin, *Civitas*").[121] The latter, further, is considered to be in a more suitable position to assess the complexities of external (war, good, evil) and internal (envy, fear, justice) worlds in order to make decisions that assessment conveys.[122]

More than a constitutional concept subscribed to a specific legal entity, security is a behavioural instinct encoded in human nature.[123] Humans need security to coexist, set boundaries to interact, and limits to separate admissible from inadmissible actions (social limits established by the institutional agreement of law). As in the tacit "covenant" of Hobbes,[124] people abdicate to the sovereign their natural right to use violence and protect themselves by accepting instead a social

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[121] Thomas Hobbes of Malmesburry, *Leviathan: Or the Matter, Form, and Power of a Common-Wealth Ecclesiastical and Civil–1951* (London: Andrew Crooke, 1651) at 106 ["Hobbes"].
[122] For Hobbes, both absolute natural rights and human condition lead men to live in a permanent state of conflict or war that cannot be abandoned by simply joining other men organized in groups (to protect themselves from other men or groups), unless all (individuals and groups) subject themselves to a greater authority: the sovereign. *Ibid* at 104, 105 (describing six scenarios where humans appear as inherently conflicting rather than merely social beings and, incidentally, unable to behave as other more peaceful and social species).
[123] Weber describes the State as a system ruled and modified by law, which guides the collective actions of the executive (governing authority) vis-à-vis the people and the territory it dominates. For Weber, this system of administration and law is preceded by critical relations of territoriality (control), monopole of violence (use of force), and legitimacy (obedience). See Andreas Anter, *Max Weber's Theory of the Modern State: Origins, Structure, and Significance* (London: Palgrave MacMillan, 2014) at Chapter 1 ["Anter"].
[124] Hobbes, *supra* note 121 at 88.

(law) and political (authority) institution implied in the agreement between citizens and their sovereign and in exchange for the realization of their common-wealth (*civitas*).[125] Such boundaries emerge as interests deemed preeminent to a social group's survival and coexistence (either under their evolving forms of city-states or resulting forms of nation-states).

From Aristotle's ruling principle on authority (authority leads to order)[126] and Rousseau's primary depiction of the first societies or *"des premières sociétés"* (association leads to security)[127] to Max Weber's Theory of State Dominance (State's geographical and legal control over the members of the association)[128] and evolutionary psychology's gradual assertions on social groups dynamics (biological perspective),[129] the sovereign's authority is recognized as a necessary social—and progressively institutional—concession to attain a common good: Order, security, and the ultimate preservation of an entity made of citizens, territory and institutions developed under the authority of the sovereign. Such authority encompasses the power of the sovereign to make determinations directed at protecting the established entity or nation-state. This means that the authority embedded on nation-states' determinations concerning the entry, rejection, or presence of refugees and asylum seekers in their territory ensues from the most basic formulations of sovereignty as theory and legal principle.

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[125] *Ibid* at 146.

[126] Community exists when attains order, which is attainable throughout its most efficient cause or element: authority. See Aristotle, *Politics* (Oxford: Oxford University Press, 1995) Book III, Chapter 6 at 1278.

[127] Jean-Jacques Rousseau, *Du Contrat Social: Ou, Principles du Droit Politique* (Amsterdam, The Netherlands: Mark-Michel Ray, 1762) Livre I at Chapitre 2 (describing protection as a need for human interaction, starting with families).

[128] Anter, *supra* note 123. Elaborating on modern nation-states, Max Weber acknowledges the agreed-upon subjection of individuals to a larger entity characterized by a defined geographical area (territory), legitimate and legal authority

[129] Following Darwin's most consequential behavioural contention (adaptation), evolutionary psychology explores the mental structures and psychological traits that explain the natural progression from individual to social evolution (group interaction). While Darwin's causality attributions on genetical variation presupposing a "common three" have been increasingly contested both by anthropological evidence (fossils) and through novel theoretical assertions (intelligent design), the resulting attribute of the Natural Selection Theory (adaptation) has been used to ascertain causality relations toward human association. For example, security has been found to be a core element in social interaction (*Maslow's Hierarchy of Needs*) propelling an intrinsic need for human association. See Abraham Maslow, "A Theory of Human Motivation" (1943) 50:4 Psych Rev 370 at 373-396 (formulating observational propositions that motivate human behaviour based on subsequent stages described by the author as "self-actualization, esteem, belongingness, safety, and phycological needs"). For a detailed account on Darwin's Theory of Evolution and its influence on modern evolutionary psychology, see Ian Gough et al, "Darwinian Evolutionary Theory and the Social Sciences" (2008) 3:1 Twenty-First Century Society 65 at 73 (differentiating between evolutionary ecology and evolutionary psychology based on Darwin's influence). See also David Gelernter, "Giving Up Darwin" (2019) 19:2 Clairmont Rev of Books 104 at 105-108 (exposing Darwin's theoretical gaps in light of geological and biological evidence).

The authority of the sovereign is not absolute, however; at least, not in democratic systems. Unlike the Hobbesian proposition of *absolute sovereignty* (not bound by anything, not even by God),[130] and notwithstanding Bodin's limitations on *State sovereignty* (the King bound but for God and natural law), the notion of *national sovereignty* progressively transcends to "*popular sovereignty*" thanks to the doctrinal influences of Pufendorf's natural law restrictions ("constitutional arrangements"),[131] Rousseau's Social-contract assertions (the very assertion of the social contract means that sovereignty resides on the people),[132] and the advent of the First French Republic (*"Le people souverain est l'universalité des citoyens français")*[133] subjecting State sovereignty to the will of the people (*"l'expression de la volunté générale"*) from which the law (as social institution) eventually emerges. I maintain that the evolving notion of State sovereignty acknowledges a fundamental balance between the need to protect the State (*territorial sovereignty*) and the need to protect the people from whom State authority emerges (*popular sovereignty*). It follows that, based on the principle of Sovereignty, nation-states have the constitutionally and internationally recognized power to control the population that live or intend to live in their territories as necessary extension of State security. In this regard, the U.S. Supreme Court held that:

> "Every nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."
>
> —U.S. Supreme Court, *Nishimura Ekiu v. U.S.* (1892), citing Emer de Vattel (1758).[134]

The corollary question here is this: Does this interpretation mean such controls are absolute? And what does limit State sovereignty vis-à-vis its immigration powers: The security or the moral claim?

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[130] Thomas Hobbes, "On the Citizen" [*De Cive*] in Richard Tuck & Michael Silverthorne, eds, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1998) at Chapter IV (describing natural law as divine law).

[131] For Pufendorf, absolute and superior sovereignty are not alike. In his view, sovereignty is supreme with respect to the King's indivisible and exclusive faculty to decide commonwealth matters at the highest level of the State; yet limited in relation to natural law assertions (private contracts) and procedural safeguards (constitutional contracts). Hence, such faculty is exercised within the purview of a politically organized society. See David Boucher, "Resurrecting Pufendorf and Capturing the Westphalian Moment" (2001) 27:4 Rev of Intern'l Studies 557 at 568.

[132] Rousseau, *supra* note 127, Livre I at Chapitre 7.

[133] République Française, Constitution du 24 Juin 1973, art 7 (*De la Souveraineté du Peuple*).

[134] *Nishimura Ekiu v United States*, 142 US 651, 659 (1892); see also Emer de Vattel, *Le Droit des Gens* (Indianapolis: Liberty Fund, 2008) at 94.

To begin with, current literature acknowledges justifications[135] for States to control their borders through immigration law—namely, cultural (continuity, traditions),[136] national identity (language, symbols),[137] right of self-determination (political and economic decisions),[138] freedom of association, property rights, and natural resources protection.

Yet the preservation of a unique type of race ("uniform societies"), religion over other religions, or physical and behavioural traits (ethnicity) are not considered national security interests—particularly in the context of the *"acquis"* of modern civilization, in which tolerance, diversity and pluri-ethnic societies are not merely promoted but legally protected both domestically (e.g., affirmative action in the U.S. within the legal frame of the *Civil Rights Act of 1964* or respect toward indigenous languages in Canada following *Bill C-91*)[139] and internationally (e.g., *UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005*).

Still, under U.S. federal law, immigration powers to exclude, deny entry, detain, and deport aliens are unlimited, especially when exercised under national security law. In *Jean v. Nelson*—a long-litigation case involving more than 1,700 Hattians refugees held in isolated areas of Texas and New York during the 80s (some for more than one year) under the authority of the Immigration

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[135] Sarah Song, "Why Does the State Have the Right to Control Immigration?" in Jack Knight, ed, *Immigration, Emigration, and Migration* (New York: New York University Press, 2017) at 14.

[136] Here, nevertheless, continuity is viewed in relation to the rights every nation holds to preserve its historic and social traditions as part of its patrimony, not as an extended legal deference toward the continuity of a race irrespectively of any other deemed to be different. See David Miller, "Immigration: The Case for Limits" in Andrew I Cohen and Christopher Health Wellman, eds, *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005) at 200.

[137] While language is nowadays considered a fundamental right under the realm of social, economic and cultural rights, the need to "preserve" the language (not merely the right to speak) is part of national identity. As such, countries may favour within their immigration laws the fact that immigrants do speak their language (e.g. Canada, France). This is because their choice, in my view, does not presuppose the exclusion of all other languages but the promotional inclusion and values of the host country's language. Symbols too (flag, anthem) are sequential expressions of national proud and identity—which enable immigration authorities to require allegiance from non-citizens willing to immigrate to the host country. They all emerge as justifiable legal limits to control immigration. See Susanna Mancini & Bruno de White, "Language Rights as Cultural Rights: A European Perspective" in Francesco Francioni & Martin Scheinin, eds, *Cultural Human Rights* (Leiden, Massachusetts: Martinus Nijhoff, 2008) at 250.

[138] UN General Assembly Res 1514 (XV) of 14 December 1960 (No 2) (indicating that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development").

[139] *United States Civil Rights Act 1964*, 2 July 1964, 88th Congress, Pub L 88-352, 78 Stat 241 (signed into law on 2 July 1964) [codified 42 USC § 2000e; 34 CFR § 100(3)(b)(6)(i)]; Canada Bill C-91, *An Act Respecting Indigenous Languages, House of Commons of Canada*, 42nd Parl, 1st Sess, (first reading 5 February 2019).

National Service (INS) and following a collective hearing in which no lawyer was present[140]—the U.S. Supreme Court did not even consider constitutional Equal-Protection claims against the federal government's decision. Instead, the Court held that the contended racial discrimination was neutral on its face as neither the plaintiff nor the members of the class did prove "discriminatory intent." This notwithstanding critical evidence on record matching each one of the requirements normally set forth by the Court to grant constitutional deference; that is, (i) disparate impact, (ii) unusual or irregular proceeding vis-à-vis normally employed practices, and (iii) circumstantial and direct evidence on discriminatory purpose.[141] The Court, in short, avoided discussing both Due-Process (5th Amendment) and Equal-Protection-Clause claims (5th and 14th Amendments on aliens as suspected targeted class), affirming the lower court's ruling instead:[142]

> "…excludable aliens such as the Hattian plaintiffs **have no constitutional rights with respect to their applications for admission, asylum, or parole.**"
>
> —United States 11th Circuit Court of Appeals, at 984 (6 August 1983).[143]

The U.S. Supreme Court has held, moreover, that when the government raises national security concerns to deny hearing, admission, or parole to aliens, no constitutional challenge ensues because "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" (U.S. S. Ct. in *Knauff*).[144] Further, in *Shaughnessy v. United States ex rel. Mezei*,[145] the U.S. Supreme Court upheld the constitutional power of federal government to imprison inadmissible aliens whenever national security concerns precede such determination. Nonetheless, Justice Jackson's dissenting constitutes, in my view, a seminal constitutional discernment on executive and immigration powers purpose encapsulated in a simple proposition: one thing should be the power to detain aliens posing a risk to national security; another one, quite different, detaining aliens irrespectively of the inadmissibility ground.

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[140] For a complete description on the factual and procedural history of this case, see Irwin P Stotzky, *Send Them Back* (Durham, North Carolina: Carolina Academic Press, 2018) at Chapter 5.
[141] The controlling criteria to prove discriminatory intent on Equal-Protection Clause claims in the United States is set forth in the case, *Village of Arlington Heights v Metropolitan Housing Development Corp*, 429 US 1071 (1977).
[142] See *Jean v Nelson*, 714 F2d 96 (11th Cir 1983) at 858-82. As to the consequences of this ruling vis-à-vis future asylum cases, Justice Marshall's dissenting opinion is particularly revealing.
[143] *Ibid* at 984 [Emphasis added].
[144] *United States ex rel Knauff v Shaughnessy*, 338 US 537 (1950) ["Knauff"].
[145] *Shaughnessy v United States ex rel Mezei*, 345 US 206 (1953).

This constitutional interpretation led the U.S. Supreme Court, in two separate decisions (*Zadvydas v. Davis* and *Clark v. Martinez*),[146] to grant diluted constitutional deference over aliens (limited protection) with respect to unconstitutional prolonged detention whenever this one does not relate strictly to national security.

Similarly, in the landmark decisions, *Kleindienst v. Mandel* (denying entry to an alien based on his political opinion), *Fiallo v. Bell* (establishing plenary immigration powers of Congress to exclude or grant special deference to any alien),[147] and *Kerry v. Din* (holding that the denial of visa applications without reasons or notice does not raise constitutional rights violation),[148] the U.S. Supreme Court decided not to address constitutional challenges underlying immigration authorities' decisions to exclude aliens entering the United States. Instead, the Court used each opportunity to uphold *the Political Questions Doctrine* (as it applies to immigration law), while asserting the *Plenary Powers Doctrine* on immigration and refugee protection. In fact, when human rights issues (as opposed to merely constitutional ones) have been raised before the U.S. Supreme Court (e.g., *Boumediene v. Bush*),[149] the Court has held that a *Writ of Habeas Corpus* against the U.S. Government's decision to detain enemy combatants overseas does not affect—much less preclude—the government's immigration and national-security authority. In *Boumediene*, moreover, the Court held that the *Writ of Habeas Corpus* concerns individual liberty determinations (as opposed to national security assertions) which are nonetheless related to "an indispensable mechanism in the *Separation of Powers Doctrine*."[150] In addition and in spite of lower court's constitutional challenges on First Amendment (Establishment Clause) and statutory challenges to the *Immigration and Nationality Act (INA)*, the U.S. Supreme Court recently upheld President Trump's Proclamation 9645 banning millions of refugees and migrants (mostly from Muslim countries) by considering that the immigration and national security powers of Congress, along with the incidences of the *Political Questions Doctrine*, allow the President of the United States to restrict the entry of such nationals, while it precludes U.S. courts from judicially

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[146] See *Zadvydas v Davis*, 533 US 678 (2001); *Clark v Martinez*, 543 US 371 (2005).
[147] *Fiallo v Bell*, 430 US 787 (1977).
[148] *Kerry v Din*, 576 US _ (2015).
[149] *Boumediene v Bush*, 553 US 723 (2008).
[150] *Boumediene*, *ibid* at 5.

reviewing political assessments informing such decisions.[151] Thus, U.S. national security "trumps" refugee protection—and, being part of the immigration system, asylum law—as neither constitutional nor human rights appear to be 'transcending' limits vis-à-vis the government's national security powers over aliens (refugees).

Natural progression from local communities to political societies hinges on the gradual assimilation of interests by which the security of the State is justified by the security of the people benefiting from and live in such State. This very assimilation transcends from nation-state security to national security powers vested in the government. This means that national security determinations are limited by law. As such, State regulations on immigration and national security become modern archetypical expressions of *State sovereignty*. In this context, I argue that just as with sovereignty, State controls on immigration and national security are not absolute (unrestricted). In fact, State action on immigration and national security is limited by constitutional (separation of powers), evolving (State sovereignty restrictions), and procedural (fundamental rights) arrangements that promote legal consistency between State authority and security.

Some scholarly explanations underscore the decision-making factor of national security vested in the executive branch,[152] along with the moral and legal dimensions of such powers discussed in more detail in chapter 4 ("being an exclusive attribution of the executive branch, how much does popular support or rejection really matter?")[153] Considering the increasingly 'volatile' use of national security law and policies to advance governments' political interests (e.g., trade, immigration, electoral exclusion), the emerging issue on decision-making processes modeling immigration and refugee law lies in the limits of national security powers with respect to the executive branch. This line of inquiry reveals—due to the misuse and abuse of national security law (language)—an inexorable *test of reality*. That is, the original concession people made to the

[151] See *Trump v Hawaii,* 585 US _ (2018) ["Hawaii"].
[152] Aziz Rana, "Who Decides Security?" (2012) 44:5 Connecticut L Rev 1417 at 1422 (exploring the "persistent expansion" of the executive branch's national-security powers and the evolving balance between liberty and security).
[153] *Ibid* at 1435, 1436. Elaborating on John Locke's claims on security and ordinary citizens' knowledge, which the author sees as rejection of Hobbes's absolutism and final account on security (individuals' inability to decide, individually or in group, about their own security), leading to legitimacy of State action or, "popular accountability."

sovereign involves a concession of authority and trust for a competent, knowledgeable, and fair determination of interests based on the events the sovereign knows or confronts.

In this sense, the events the sovereign (the government) does not confront but deliberately fabricates are intrinsically and indisputably exogenous. Notwithstanding constitutional precedents (e.g., *Political Questions Doctrine*[154] in the United States, or *Collateral Fact Doctrine*[155] in United Kingdom), investing the executive or legislative branch of government with exclusionary powers on immigration, foreign policy, and national security, constitutional review is necessary to counterbalance such power and its embedded original concession of trust. After all, unlimited powers are exogenous in democracies too. Consider, for instance, recent cases in United Kingdom and Canada, in which human rights have been used as constitutional limitations vis-à-vis government's authority on national security. In a recent decision on surveillance programs,[156] the U.K. Supreme Court found that the Exclusionary Clause (section 67.8 or "ousted judicial review") contained in the *U.K. Regulation of Investigatory Powers Act of 2000*[157] (creating the Investigatory Powers Tribunal to supervise intelligence agencies developing surveillance programs) to be incompatible with Article 7 of the *Convention of Human Rights of 1998* (right to privacy).[158] The Court asserted its jurisdiction on national security surveillance programs by considering that the British Parliament did not expressly limit its original jurisdiction.

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[154] According to the *Political Questions Doctrine* or "non-justiciability doctrine" (US Supreme Court), courts shall not intervene with the otherwise constitutionally and naturally allocated political decisions of the executive and legislative branches of government. This applies to foreign policy and some determinations on national security. See *Oetjen v Central Leather Co*, 246 US 297 (1918) (establishing the *Political Questions Doctrine*); *Baker v Carr*, 369 US 186 (1962) (developing more broadly the *Political Questions Doctrine* as jurisdictional limitation on nonjusticiable issues); Hawaii, *supra* note 151 (extending the *Political Questions Doctrine* to immigration powers); see also Gaona, *supra* note 25.

[155] Drawing on the principle of *Sovereignty of the Parliament*—that is, not having a written Constitution, the decisions-acts enacted by the UK Parliament vested with the authority of the Crown are considered superior, sovereign, and prime sources of law—the *Collateral Fact Doctrine* (House of Lords) acknowledges the constitutional possibility for the Parliament to "expressly and unambiguously" limit the judicial review of its acts. Thus, any error of law found in a public institution act makes such act null (judicial review) unless the Parliament's original concession of authority creating the institution (not the institution's act) precludes such review. See *Anisminic Ltd v Foreign Compensation Commission* [1969], 2 AC 147, 2 WLR 163.

[156] *R v Investigatory Powers Tribunal* [2019], UKSC 22 [2017] EWCA Civ 1868.

[157] *United Kingdom Regulation of Investigatory Powers Act 2000*, *An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and electronic surveillance* [among others], 38 July 2000, Part IV, c 23, s 67(8).

[158] *United Kingdom Convention of Rights and Freedoms*, c 42, Part I, art 8, ss 1, 2 (Schedule 1 to the Human Rights Act 1998: "*Right to respect for private and family life"*).

Despite growing criticism on the insufficient legal protection of the right to privacy,[159] *Canada National Security Act of 2017*[160] (amending, in part, critical human rights deficits found in the *Anti-Terrorism Act of 2015*),[161] introduced constitutional safeguards limiting the government's national security power by promoting the need for institutional accountability and transparency.

This trend, however, seems different in the U.S. where both the judiciary has affirmed constitutional precedents diluting judicial review on the government's exclusionary powers on national security (*Political Questions Doctrine*)[162] and the executive branch has expanded the national security apparatus toward migrants and refugees (increasingly identified as national security threats). Such conceptualization led the Trump administration to commit human rights violations—particularly in the context of asylum seekers and migrant children while being under the custody of U.S. authorities.[163]

The *conceptualization* of national security interests has become a convoluted and often misunderstood purpose. Institutional restrictions that nation-states place in the name of national security over its 'primary' (citizens) and 'added' members (immigrants and refugees) cannot be framed under the flawed premise of an invariably homogeneous nation-state. That is, populist, ethno-nationalistic, and xenophobic accounts countervailing the growing number-power of minorities in each country. In fact, the apocryphal idea of preserving one culture and one national identity in each nation-state regardless of others is intrinsically debunked by the rise of pluri-ethnic, multicultural and mobile societies, which make the very idea of homogenous nation-states

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[159] See Cara Zwibel, *Intervention of the General Counsel of the Canadian Civil Liberties Association before the House Committee, Committee Meeting* (Ottawa: House of Commons, 7 December 2017), online: *HOUSE OF COMMONS* <https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-90/evidence>; University of Toronto (Citizen Lab) & University of Ottawa (CIPPIC), "Analysis of the Communications Security Establishment Act and Related Provision in Bill C-59" by Christopher Parsons et al (Toronto: Citizen Lab & CIPPIC, December 2017), online (pdf): *CITIZEN LAB* <https://citizenlab.ca/wp-content/uploads/ 2017/12/C-59-Analysis-1.0.pdf>.

[160] House of Commons, Bill C-59, *An Act Respecting National Security*, 42nd Parl, 1st Sess, (assented to 19 June 2018).

[161] House of Commons, Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 41st Parl, 2nd Sess, (assented to 13 December 2018).

[162] Hawaii, *supra* note 151 at 10.

[163] J Mauricio Gaona, "Is the U.S. Committing Crimes Against Humanity on its Southern Border?" *NY Daily News* (5 July 2019) (analyzing human rights violations of migrant children in the US), online: <https://www.nydailynews.com/opinion/ny-oped-crimes-against-humanity-southern-border-20190705-ttwha2f43nefbdyx7ozmabadii-story.html>.

not only arcane but ultimately fallacious. At present, the population of 'traditional host countries' is increasingly made by people from around the world.[164]

Upward trends in international migration prove it (Figure 1). International migrant population has reached 272 million in 2019 (51 million new migrants since 2010).[165] Considering migration dynamics (mobile and intercultural societies), national identity is no longer a homogenous but an evolving concept. *Ergo,* the fear, the conflict, and the struggle for power. The reasons preceding the establishment of national security interests become evolving assertions of reality informed by the very values on which nation-state's identity is not only built but evolves (when evolves). Hence, invoking one historic reference only ("White Germany" or "White America") in exclusion of any other reference is, in itself, a source of conflict. Yet calling for sociocultural differences arising out of a country's evolved identity ("multi-ethnic America," "multicultural Canada") acknowledges reality and fosters a much-needed evolution: ***The right to be equally different***.

The key, in my view, hinges on the preservation/integration processes of all groups and cultures (previous, growing, upcoming) into one yet dissimilar-evolving identity. This only will be possible when equality reflects our necessary (e.g., language) and unnecessary differences (e.g., race). That is, when rather than prohibiting the expression of values inherent to a given minority in order to protect the values deemed essential to the ruling majority (language, culture, religion), the law (as social institution) will be used to protect the expression of all values of all groups within a democratic framework. The first process, I argue, is *preservation*; the second one, however conflicting it might appear, is *integration*. Such processes cannot take place suddenly but gradually. Still, only more advanced civilizations will surmount the apparent differentials (race) of our common design (human beings).

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[164] For instance, a quarter (20,5 million) of Germany's population (83 million) has immigrant background. Canada's population increased by over half a million from July 2017 to July 2018; that is, one person every minute in 12 months (518,588 people). The highest increase is attributed to international migration (303,257 immigrants).With a population of 37 million in Canada, these figures are relevant. See Chase Winter, "Germany: 20.8 Million People with Immigrant Background" *DW* (21 August 2019), online: <https://www.dw.com/en/germany-208-million-people-with-immigrant-background/a-50108141>; see also Statistics Canada, *Canada's Population Estimates: Total Population—July 1, 2018* (27 September 2018) at 1, online: *GOVERNMENT OF CANADA* <https://www.150.statcan.gc.ca/n1/en/daily-quotidien/18 0927/dq180927c-eng.pdf?st=-lBImDwD>.

[165] UN reported a net increase of 51 million new migrants worldwide. See UN, "The Number of International Migrants Reaches 272 Million, Continuing an Upward Trend in All World Regions, Says UN" *UN News* (17 September 2019), online: *UN* <https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.html>.

II. DEVELOPMENT: FROM NATIONAL SECURITY TO NATIONALISM

The critical inquiry here is whether distrust toward immigrants and migrants is either an incidental or a justifiable axiological feature in the conceptual development of the relationship between immigration and national security (from nation-states security to modern national security). One of the most difficult yet defining connections affecting refugee protection lies in the common drivers of fear (for what is different), distrust (for the unknown), and rejection (for what appears to be inadmissibly different). Notwithstanding recognizable threats through history, current refugee reception systems (laws and policies) do increasingly single out the race, religion, political opinion, and national origin of the migrant, not—at least factually—the actual risk their reception and eventual integration poses. If proved, I argue, such dimension constitutes a detriment to the human rights of migrants as well as a contradiction on refugee and national security protection.

A. Building Paradigms: Distrust and Suspicion toward Immigrants and Refugees

There are historic references on selection and exclusion of immigrants and migrants based on security and race. For instance, following U.S. President William McKinley Jr.'s assassination during his second term on September 14, 1901, by a U.S. citizen of Polish descent (second generation),[166] the U.S. Congress passed the *Anarchist Exclusion Act of 1903*[167] enabling U.S. authorities to remove "anarchists" (including U.S. citizens) from the United States. In fact, during his speech to Congress, President Theodore Roosevelt underscored this concern:

> "I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government."
>
> —Theodore Roosevelt, *Address to Congress* (1903).[168]

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[166] See LeRoy Parker, "Anarchism and the Assassination of McKinley" (1901) 11:2 Yale L J 80 at 82-94.
[167] *United States Anarchist Exclusion Act 1903*, *An Act to Regulate the Immigration of Aliens into the United States*, 57th Congress, Pub L 57-162, 32 Stat 1213 (signed into law on 3 March 1903).
[168] US President Theodore Roosevelt, *First Annual Message to Congress–National Archives* (3 December 1901), online: *MILLER CENTER* <https://millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message>.

Yet, once the constitutionality of the statute was challenged by a British national before the Southern District of New York, the U.S. Supreme Court ascertained Congress immigration powers (*U.S. ex rel. Turner v. Williams*)[169] on a dissimilar removal ground by focusing on the alien's race instead:

> "No limits can be put by courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens **whose race or habits** render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein."[170]

The interest to protect the security of States derived from fear and distrust toward "enemy aliens" (migrants coming from enemy nations). In the 20th century, the demographics of the world's population were, in fact, quite different. Nation-states—now populated by millions of people of different ethnicity and ancestors—became even more diverse thanks to massive migration across the globe triggered by the industrial revolution and the subsequent economic expansion of the West.[171] Although the first years of the 20th century were defined by migration toward Europe and North America coming mostly from China, the Middle East and Africa,[172] the aftermath of war periods (Interwar, Postwar, Cold War) and the development of international terrorism became core references defining the modern relationship between immigration and national security, which eventually affected refugee protection.

The first shift on immigration law and policy (associated to the security of the nation-state) both in Europe and North America took place during World War I. During this period, the number of immigrants arriving to the United States and Canada descended significantly as the exclusion of immigrants from certain nations (e.g., Germany, China) increased considerably.[173] Slowly, knowing and controlling the population entering the host country became a critical security asset

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[169] *US ex rel Turner v Williams*, 194 US 279 (1904).
[170] *Ibid* at 291 (quoting Justice Shiras' opinion in *Wong Wing v United States*, 163 US 228, 1896) [Emphasis added].
[171] See generally Timothy J Halton & Jeffrey G Williamson, *Global Migration and the World Economy: Two Centuries of Policies and Performance* (Cambridge, Massachusetts: MIT Press, 2008).
[172] *Ibid.*
[173] For instance, following US Declaration of War to Germany in 1917, public opinion and policy shifted in the US with respect to immigrants. This led Congress to pass *the Emergency Quota Act of 1921* and *the Immigration Act of 1924* creating a national system of quotas to admit foreigners based on the existing population (census data of 1910 and 1890, respectively), while promoting immigration from North-western Europe and deterring Asian and Eastern immigration. See *United States Emergency Immigration Act of 1921*, *An Act to Limit Immigration of Aliens into the United States*, 67th Congress, Pub L 67-5, 42 Stat 5 (signed into law on 19 May 1921; *United States Immigration Act 1924*, 68th Congress, Pub L 68-139, 43 Stat 153 (signed into law on 24 May 1924).

leading to increasingly 'selected' and 'racially oriented' immigration systems around the world.[174] In due course, immigrants from certain regions (West Europe, North America) and races (White European descent) were preferred by western countries—this as the entry of immigrants from Latin America, East Europe, Africa, and Asia was restricted.[175]

While some of those restrictions appeared legitimate and relatively justified by national security concerns (foreign nationals from enemy countries in times of war, e.g., Japanese citizens living in the U.S. during World War II),[176] current immigration law restrictions on migrants in general and refugees in particular are steadily intertwined to racially oriented public policy controls to prevent migrants and immigrants—as members of a minority groups within host countries—from threatening not merely the security of the State but inherently the interests of the dominant group in the host country (legal, political, electoral, economic, social).

Social sciences studies offer proof (Deer 2006, Henry & Tator 2010, Jablonsky 2012)[177] on racially oriented laws and policies designed by the dominant social group (institutional power) to control racial-groups' interaction ("acceptable migrants") and racial-groups' development ("acceptable minority rights"). During the 19th and 20th centuries, for instance, the White-European dominant group in the U.S. used immigration laws (*Exclusion Acts*) to deter and preclude immigrants from

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[174] See David Theo Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (Oxford: Wiley-Blackwell, 2009) at Chapters 7 and 8 (describing migration as "racial Europeanization" and "racial latinamericanization").
[175] Immigration Act of 1924, *supra* note 173. Setting an annual cap of 154,227 immigrants for the Eastern Hemisphere.
[176] In World War II, President F D Roosevelt ordered the confinement of Japanese citizens (110,000) living in the US Moreover, the US Congress passed an Act authorizing the establishment of military areas to hold such nationals. Both executive and congressional actions were motivated by national security concerns regarding possible espionage in a time of war against the Japanese Empire. Still, since some of the people secluded by the government were US citizens, there were constitutional challenges on the Executive Order and the Act of Congress. See US President F D Roosevelt, Executive Order No 9066: *Authorizing the Secretary of War to Prescribe Military Areas*, National Archives, GR 11 (19 February 1942); *Military Zones Act*, 77th Congress, Pub L 77-503, 56 Stat 173 (signed into law on 21 March 1942) [codified 18 USC § 97a; 50 USC § 4212]. See also *Korematsu v United States*, 323 US 214 (1944) (rejecting the idea that the seclusion of Japanese nationals or citizens of Japanese descendants was motivated on racial grounds, while affirming the constitutionality of "rational concern" provisions in times of war).
[177] See Glenn Deer, "The New Yellow Peril: The Rhetorical Construction of Asian Canadian Identity and Cultural Anxiety in Richmond" in Cheryl Teelucksingh, ed, *Claiming Space Rationalisation in Canadian Cities* (Waterloo, Ontario: Wilfrid Laurier Press, 2006) at 34 (reflecting on the *status quo* of White-Canadian man and the experience of Chinese immigrants in Vancouver); Frances Henry & Carol Tator, *The Colour of Democracy: Racism in Canadian Society* (Toronto: Thomas Nelson, 2010) at 60 (analyzing the interplay of racism vis-à-vis Chinese Canadians); Nina G Jablonsky, *Living Color: The Biological and Social Meaning of Skin Color* (Berkeley: University of California Press, 2012) at 132 (elaborating on the establishment of races).

China, Japan, South Asia, and Latin America,[178] while adopting racially oriented public policies (segregation) to dilute their constituency power as minority group (healthcare, education, social exclusion).[179] In Canada, the White-European dominant social group used immigration policies (selection and integration)[180] on pre-selected areas where Chinese migrants were allowed to live, while enacting public policies fostering legal and social inequalities (e.g., a Chinese migrant could be paid much less than a citizen, i.e., salaries, healthcare).[181]

Moreover, distrust toward immigrants from enemy countries (Great War and Russian Civil War) led the United States,[182] Canada,[183] and United Kingdom[184] to authorize espionage on immigrants whose activities and ideas were viewed as a direct threat to the stability of the government ("the red peril"). The notion of "enemy aliens" representing a "national danger" was printed in the law that regulated government powers to control the entry of migrants.[185]

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[178] See US Department of Commerce and Labor, *Facts Concerning the Enforcement of the Chinese Exclusion Laws* (Washington, DC: US Printing Office, 1906), online: *HARVARD UNIVERSITY LIBRARY* <https://curiosity.lib.harvard.edu/immigration-to-the-united-states-1789-1930/catalog/39-990067798120203941>.

[179] Goldberg, *supra* note 174 at 71.

[180] Huhua Cao & Olivier Dehoorne, "Changing Territorial Strategies: Chinese Immigrants in Canada" in Huhua Cao and Vivian Poy, eds, *The China Challenge: Sino-Canadian Relations* (Ottawa: University of Ottawa Press, 2011) at 222-240 (describing Canada's immigration laws on Chinese migrants during the 20th century).

[181] Beverly-Jean M Daniel, "Critical Discussion of Terms" in Beverly-Jean M Daniel, ed, *Diversity, Justice, and Community: The Canadian Context* (Toronto: Canadian Scholars' Press, 2016) at 19.

[182] During the Great War, the US Government spied on German immigrants. This as Congress passed the *Espionage Act of 1917* criminalizing assistance to enemy states or disruption on military recruitment. See Matthew Stibbe, "Enemy Aliens and Internment" *International Encyclopedia of the First World War 1914-1918* (2014) at 20, online:<https://en cyclopedia.1914-1918-online.net/pdf/1914-1918-Online-enemy_aliens_and_internment-2014-10-08.pdf>; *United States Espionage Act 1917*, *An Act to punish acts of interference with the foreign relations, and the foreign commerce of the United States, to punish espionage, and better to enforce U.S. criminal laws*, 65th Congress, Pub L 24, 40 Stat 217 (signed into law on 15 June 1917); see also *Schenk v United States*, 249 US 47 (1919) (upholding the constitutionality of the Act following First-Amendment constitutional challenge on freedom of speech).

[183] Fears on the influence of the Bolshevik Revolution led the Canadian Government to authorize law-enforcement agencies to spy on ethnic groups and the so-called "radical left." See J L Granatstein, "After the Fighting, A Nation Changed" *Maclean's* (1 November 2018), online: <https://www.macleans.ca/after-fighting-nation-changed/>.

[184] The UK Parliament passed the *Aliens Restriction Act of 1914* authorizing the espionage of suspicious aliens and ordering the registration of aliens from enemy states (Germany, Hungary, Austria) entering and living in the UK. Laws regulating immigrants' entry and State conditions were soon implemented—this included deportation system for violating those conditions. See *United Kingdom Aliens Restriction Act 1914*, *An Act to enable His Majesty in time of war or imminent national danger or great emergency by order in Council to impose restrictions on aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect*, 5 August 1914, Acts of Parliament, Chapter 12.

[185] Aliens Restriction Act 1914, *ibid* (title).

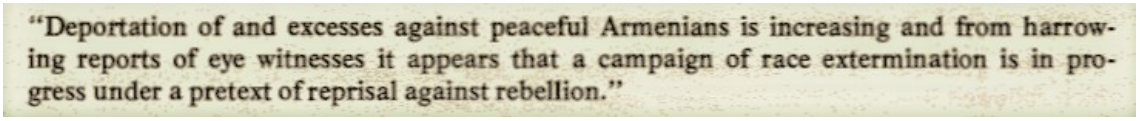
Gradually, host countries moved from restricting "enemy aliens" to detaining "suspected aliens." Nonetheless, the conceptualization of refugees—as distinct from, for instance, immigrants—ensues as an *inherently moral* and *eventually legal* assertion of reality fostering a distinct depiction between those willing and those forced to migrate. *Ad initio*, at most, this critical distinction was subscribed to the persuasive nature of compassion that sometimes people exhibit in the face of human suffering. It follows that the legal protection of foreign citizens from their own government and non-state actors embodies a *moral justification* informed by aspirational values of civility and humanity (compassion, human dignity).

In fact, prior to the emergence of *international refugee law*, countries were not obligated to offer legal protection in their territory to foreign citizens fleeing persecution in their home countries. As such, *international refugee law* ensues from a moral-legal acquisition proposing an unequivocal distinction between civilized and uncivilized actions. Though the League of Nations provided specific arrangements to protect millions of migrants arriving to Europe from Russia and Armenia during the first quarter of the 20th century, international refugee protection begins after *War World II* through United Nations resolutions and conventions giving rise to *international refugee law* within the context of democratic and human rights protection. More particularly, the international protection of refugees emerges through the political, institutional, and legal vindications of the *Postwar Paradigm*—specifically, values and principles promoting civil, peaceful and tolerant relations among States.

The conceptualization of refugees as a gradually distinct legal and sociopolitical phenomenon finds its roots in the first ethnic persecutions of the 20th century. The *Armenian Genocide* constitutes the first event influencing the legal construction of the *Postwar Refugee Paradigm*. This genocide is defined as the ethnic annihilation, massive atrocities, and deportations of Armenian Christian population and other minorities (Greeks and Assyrians) living across the Ottoman Empire in pro of the "Turkification" of Anatolia and the sociopolitical and cultural rejection of a multi-ethnic society (1915-1916).[186] It is estimated that one and a half million

[186] Atrocities against the Armenian Christian population included executions, rape, abduction, torture, and starvation, which were categorized by the international legal system as crimes against humanity and civilization ("Genocide"). They have been officially recognized by Uruguay (1965), Italy (2000), France (2001), Canada (2004), the Netherlands,

Armenians were killed, as over 2 million[187] fled their homeland to seek protection in more than 20 countries.[188] The atrocities committed by the Turkish administration were described as "racial extermination" by the U.S. Government.


"Deportation of and excesses against peaceful Armenians is increasing and from harrowing reports of eye witnesses it appears that a campaign of race extermination is in progress under a pretext of reprisal against rebellion."

—Telegram, *U.S. Ambassador Henry Morgenthau* to *U.S. State Secretary Robert Lansing* (16 July 1915).[189]

The *Russian Civil War* (1918-1921) is akin to the emergence of international refugee law. This war is described as the organized violence and subsequent expulsion of people and minorities opposing the Bolshevik Government that ended the Romanov Empire in 1917, after which approximately one and a half million Russians fled the country. The scale of the atrocities committed, along with the forced migration of millions of Russians and Armenians, led to the empirical reference of "refugees" as an identifiable group of people fleeing ethnic and religious persecution and whose legal protection by other countries was not (until then) recognized by law.

In 1921, however, the recently created League of Nations stated that Russians who had left their home country due to persecution did not acquire for that fact another nationality but instead an identifiable migratory condition known as "**refugees**."[190] Alongside, it is estimated that more than

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Argentine, Canada (2004), the United States (2007), and Germany (2015). See Le Monde, «La Reconnaissance du Genocide Armenian dans le Monde» *Le Monde* (3 March 2010), online: <https://www.lemonde.fr/erope/article/2010/03/05/la-reconnaissance-du-genocide-armenien-dans-le-monde13151383214.html>; President of Germany Norbert Lammert, "100th Anniversary of the Armenian Massacre" (24 April 2015), online (speech): *DEUTSCHER BUNDESTAG* <https://www.bundestag.de/en/documents/textarchive/kw17armenier-371446>; France 24, "France Marks First National Commemoration of Armenian Genocide" *France 24* (24 April 2019), online: <https:// www.france24.com/en/20190424-france-national-commemoration-armenian-genocide>.

[187] US House of Representatives (Foreign Affairs Committee), *US Affirmation of the United States Record on the Armenian Genocide*, Res HR 262 of 2010, 111th Congress, 2nd Sess, Report No 111-262, (22 September 2010) at 4, online: *US CONGRESS* <https://www.congress.gov/111/crpt/hrpt622/CRPT-111hrpt622.pdf>.

[188] See Armenian Genocide Institute, "Armenian Genocide" by Rouben Paul Adalian (Washington, DC: Armenian Genocide Institute, 2019), online: *ARMENIAN GENOCIDE* <https://www.armenian-genocide.org/genocide.html>.

[189] See US Department of State, *Remarks on the Armenian Genocide*, National Archives of the Ronald Reagan Library, Collection Donald Fortier: The Turkish Armenian File, RAC Box 19 (1983) at 5, online (pdf): *RONALD RAEGAN LIBRARY* <https://www.reaganlibrary.gov/sites/default/files/digitallibrary/smof/nsc-politicalandmilitaryaffairs/fortierd/R19/turkisharmenianfile.pdf>.

[190] League of Nations, *Conference on the Question of the Russian Refugees*, Resolutions adopted by the Conference on 24 August 1921, OJ 2nd year, No 8 (Geneva, Switzerland: October 1921) at 899-902.

10 million people were forcibly displaced during World War I.[191] Although the number of refugees remains inexact (due to the absence of demographic standards),[192] available data indicate that more than 3 million people were at some point refugees; that is, migrants crossing international borders after fleeing persecution in their home country.[193]

Some of the most significant changes leading to the **Postwar Refugee Paradigm** occurred during the Interwar period (1918-1939). The then regnant *principle of reciprocity* used to control immigration (benefits granted or penalties imposed to the citizens of a State are reciprocally granted or imposed to the citizens of other State)[194] was substituted following the emergence of the League of Nations and the appointment of the Special High Commissioners for Refugees (first, for Russia),[195] by either naturalization or repatriation of migrants whose identity could not be established through routine measures (passport, ID records). Still, the number of refugees produced during the *Russian Civil War* led the allies to establish a different type of document recognizing the temporary migratory status of Russian (later, Armenian) refugees known as the *Nansen Passport* or *Certificate* (Geneva Agreement of 1922).[196]

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[191] Peter Gatrell, "Refugees" *Encyclopedia of the First World War: 1914-1918* (8 October 2014) at 2, online (pdf): *ENCYCLOPEDIA* <https://encyclopedia.1914-1918-online.net/pdf/1914-1918-Online-refugees-2014-10-08.pdf>.

[192] At the time, neither the legal concept of refugee nor its measurable references (number of refugees) were fully developed. Refugees fled in different waves and directions, and some were forced to return to their home countries. See Eugene M Kulischer, "Displaced Persons in the Modern World" (1949) 262 The Annals of the Am Acad'y of Pol & Soc Sc 166 at 167 (describing migration waves in Europe from Russia and the Ottoman Empire).

[193] It is estimated that nearly 2 million Armenians were forced to leave their homeland during the Armenian Genocide. Reports of the Netherlands, British, French, and German governments further indicate that at least 1.5 million refugees from Belgium fled to these countries during the Great War. In 1919, the International Committee of the Red Cross (ICRC) repatriated more than 425 thousand Russian, Austrian, German and Hungarian refugees held as POWs during the Great War. See US House of Representatives, *supra* note 187 at 4; Martin Banks, "How Belgians Became Refugees During the First World War" *Brussels Times* (17 December 2018) (citing government sources and historians), online: <https://www.brusselstimes.com/all-news/magazine/52562/how-belgians-became-refugees-during-the-first-world-war/>; International Committee of the Red Cross, "A Look Back at the First World War's Most Vulnerable'" (19 January 2018), online: *ICRC* <https://www.icrc.org/en/document/look-back-world-war-ones-most-vulnerable>.

[194] See generally Robert O Keohane, "Reciprocity in International Relations" (2009) 40:1 Intern'l Org 1 at 3-27.

[195] Prior to the establishment of the UN High Commissioner for Refugees (a coordinated response to refugee crises in Europe), the League of Nations appointed two special UN High Commissioners: one for Russian, Armenian, Assyrian, Christian and Czechoslovakian Refugees (1922) and another for German Refugees (1933). See Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Burlington: Ashgate, 2014) at 18.

[196] *Ibid* at 19. The *Nansen Certificate* was never meant to be a permanent solution to the refugee crises in Russia and Armenia. This type of document, in fact, did not confer path to permanent settlement or citizenship.

World War II led to the highest number of refugees in record (more than 40 million).[197] The war fostered the need for peace and stability among States (international relations theory and legal order) and triggered critical reflections on individual rights (international human rights conventions, Figure 2) as precondition of dignity, tolerance, equality, and liberty among people and countries. Both the *Nuremberg Trials* and the massive migration movements of the *Postwar Era* pushed States to implement domestic and international legislation oriented at settling millions of refugees (e.g., *U.S. Displaced Persons Act of 1948*, *UN Relief and Rehabilitation Program UNRRA*, *UN High Commissioner for Refugees UNHCR*).[198] However, among the laws promoting compassion, human dignity and humanity toward those in need, the one that compels the highest degree of civility—along with what I later refer as ***"a moral choice with legal effects"*** (chapter 4)—is *international refugee law*.

From its very inception, *international refugee law* describes refugees as victims of persecution in their home country, while promoting their reception and treatment with human dignity in host countries. Notwithstanding being foreign to their kind and despite the lack of prior legal connection (duty to protect), host countries according humanitarian, legal, and political protection in their territories to foreign citizens fleeing persecution do undoubtedly make a *moral choice*, which legal effects (rights and duties) ensue from the most basic equations of civility and humanity. The eventual recognition of this unprecedented legal protection through the *1951 Refugee Convention*[199] and *1967 Asylum Protocol*[200] defines the very assertion of the **Postwar Refugee Paradigm** of the 20th century.

Such paradigm is further characterized by the development of gradually identifiable grounds of legal protection (race, religion, national origin, political opinion, membership in a particular social group), uncovering a set of aspirational values (human dignity, liberty, equality) aimed at protecting individuals facing subjective (well-founded fear) and objective (credible persecution)

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[197] Mona Chalabi, "What Happened to History's Refugees?" (25 July 2013), online (data-blog): *THE GUARDIAN* <https://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees>.
[198] See James L Carlin, "Significant Refugee Crises Since War World II and the Response of the International Community" (1982) 3:1 Michigan JIL 3 (describing reactions toward refugees in the wake of World War II).
[199] Refugee Convention, *supra* note 55.
[200] UN General Assembly, *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967).

forms of persecution on the account of those protected grounds and values.[201] The legacy of the **Postwar Refugee Paradigm** conveys an inexorable choice that oppose each country's values to the ones *international refugee law* promotes: human dignity, liberty, civility, humanity.

B. Shifting Paradigms: Recharacterization of Migrants and Refugees

The recharacterization of migrants in general and refugees in particular represents the first shift of paradigm from **Postwar Refugee Paradigm** to **Modern Refugee Paradigm**, proposing a regressive legal protection whereby refugees go from being viewed in the 20th century as victims of forms of persecution and conflict (civil war, famine, ethnic cleansing, gender persecution, drug trafficking, gangs violence) in their home countries based on their race, national origin, religion, political opinion or membership in a particular group, to being received and treated in the 21st century as suspects subject to various forms of prosecution (detention, suspicion, surveillance) in host countries due to their race, national origin, religion, political opinion or membership in a particular group (refugees). This shift of paradigm is affected, in particular, by two events: The *Cold War* and *terrorism*. The association of these events to national security and immigration seems nonetheless substantial, in that both spies and terrorists (as national security threats) have used immigration systems to enter the countries their organizations or nation-states aim to attack.

The first major recharacterization of migrants occurred during ***the Cold War***. Suspicion toward these groups is mainly ideological (*communism v. capitalism*). A war fought through intelligence and counterintelligence measures did identify immigration as the weapon through which enemy States could infiltrate the national security apparatus of other countries. Given the growing social and political mistrust between the East and the West following the ideological restructuration of Europe, the movement of people from one part of the ideologically influenced world to the other became a critical element of concern and security.[202] For example, the U.S. Supreme Court upheld the constitutionality of powers vested by the Congress in the Executive to deny entry, detain, and

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[201] See generally James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014).
[202] See Deborah Welch Larson, *Anatomy of Mistrust: U.S.-Soviet Relations During the Cold War* (Ithaca: Cornell University Press 1997) at Chapter 1.

expel migrants coming from countries whose political affiliation[203] represents a threat (e.g., *Carlson v. Landon*, *Kleindienst v. Mandel*, *Fiallo v. Bell*).[204]

The second yet most defining recharacterization of migrants (as "foreign threat") occurred with *terrorism*. The terrorist attacks that took place in New York City, Pennsylvania, and D.C. (9/11) constitute a critical event shifting the relationship between immigration and national security—and, through political association, the perception on refugees—affecting legal systems around the world. After 9/11, 140 countries changed their national security and immigration laws.[205] Some of these changes, in fact, were promoted by the UN Security Council (Figure 3).

India, for example, suffered two subsequent terrorist attacks in October (Srinagar) and December 2001 (Indian Parliament), which led to a major legal debate in the country concerning the vague definition of "terrorism" (attributable to law enforcement abuses and human rights violations)[206] and public policy changes on national security introduced with the *India Prevention of Terrorism Act of 2002 (POTA)*. In 2003, the Supreme Court of India upheld the constitutionality of the Act, while acknowledging the rise of the terrorist threat as a defining point domestically and internationally: "Terrorism is affecting the security and sovereignty of the nation. It is not State-specific but trans-national."[207] The more surprising yet ambivalent aspect of POTA's approach (national security trumps human rights) relates to its contradicting results. More than 100 terrorist

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[203] *US Immigration National Act of 1965 (INA)*, 89th Congress, Pub L 89-236, 79 Stat 911, § 212(a)(3)(D) (signed into law on 3 October 1965) [as modified by *Immigration Act of 1990*] ["INA"].

[204] See *Carlson v Landon*, 342 US 524 (1952) (holding that under Congress power to regulate the exclusion, admission, and expulsion of aliens, ideology constitutes sufficient motives for US immigration authorities to expel communist aliens form US territory). See also *Kleindienst v Mandel,* 408 US 735 (1971) at 769; *Fiallo v Bell*, 420 US 787 (1977) (affirming the ineligibility of an alien ideologically identified with communism). Both *Mandel* and *Fiallo* decisions became the legal basis for the modern statutory discretion vested in immigration authorities to deny entry or deport certain inadmissible aliens, INA, §§ 212(a)(3)(D), 1182(f). *Mandel* further established a lower legal bar on related national security determinations; that is, the use of the *Rational Basis Test* (lowest constitutional scrutiny test under US law) to assess the risk posed by an alien whereby a court only needs to ascertain: (i) whether the government action is reasonable, (ii) facially neutral (legitimate), and (iii) based on a *bona fide* motive.

[205] Human Rights Watch, "In the Name of Security: Counterterrorism Laws Worldwide Since September 11" (Washington, DC: Human Rights Watch, June 2012), online: *HRW* <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>.

[206] *India Prevention of Terrorism Act (POTA)*, Parliament Joint Sess, Act No 15 of 2002, art 3(1)(a) (assented to 18 March 2002) [repealed on 21 September 2004].

[207] See C Raj Kumar, "Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties" in Sudha Setty, ed, *Constitutions, Security, and the Rule of Law* (New York: IDEBATE Press, 2014) at 243 (quoting decision issued by the Supreme Court of India).

attacks occurred in India since POTA was passed, along with high-record number of human rights violations committed by law enforcement agencies across the country while acting under POTA.[208]

The evolving approach of Canada on *national security v. human rights* indicates that civil liberties and human rights can only be restricted under more specific (limited) circumstances. For starters, the Canadian legal system does not define the term *"terrorism"* in a single document. Nor is there a ubiquitous reference across different disciplines (constitutional law, criminal law, immigration law, human rights law, refugee law). In fact, it is possible to find several legal references and sources within the *Canadian legal system*. For instance, the *crime of terrorism* is defined in *Canada's Criminal Code*,[209] along with its consequences (property forfeiture, aggravated punishment, financing) and associated terms ("terrorist activity," "terrorist group," "terrorist act"). Yet the *Anti-terrorist Act of 2011* (Bill 51) had been criticized by human rights experts[210] and perceived by the public as invasive, secretive, inhumane, and anti-Canadian. The initially excessive national-security measures introduced in Canada after 9/11 led to human rights abuses on migrants (prolonged detention, inhumane detention-conditions, due process violations).[211] The government's surveillance and interception-of-communications powers became public concern for Canadian citizens and permanent residents leading Prime Minister Justin Trudeau to propose a different conceptualization between national security needs and human rights values.[212]

The result, a more transparent *Anti-terrorism Act* (2017) by which government institutions become more accountable as human rights become part of the security assessment over immigrants and refugees concerning terrorist threats, activity or organization. *Canada's Anti-Terrorism Act of*

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[208] *Ibid* at 241. Human rights violations under POTA have been recorded and reported by NGOs operating in India as well as by the National Human Rights Commission (NHRC) and State commissions at local level.
[209] Canada, *Criminal Code*, RSC, C-46 (1985), Part II-I *Terrorism*, s 83-01.
[210] See generally Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).
[211] Between 2003 and 2004, there were 13,413 immigration detainees in Canada. Other deterrence mechanisms include immigration documents costs, elimination of appeals on asylum proceedings, reduction of legal aid. See François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRPP Choices 16; Ashifa Kassam, "Immigrant Deaths Expose 'Legal Black Hole' of Canada's Detention System" *The Guardian* (17 May 2016), online: <http://www.theguardian.com/world/2016/may/17/canada-immigration-detention-deaths-border-services-agency>.
[212] Prime Minister Justin Trudeau, "Remarks by Liberal Party of Canada Leader Justin Trudeau on Bill C-51" *Liberal* (4 February 2015), online: <https://www.liberal.ca/remarks-by-justin-trudeau-on-bill-c-51/>.

2017 (Bill-59) comes with a comprehensive list of "terrorist activities" provided such assessment is made in relation to similarly applicable restrictions under domestic and international law (e.g., *Canadian Charter of Rights and Freedoms*, *Canadian Criminal Code*, *Official Secrets Act*, *Canadian Evidence Act*, *Proceeds of Crime Act*, *Canadian Security Intelligence Act*, *Immigration and Refugee Protection Act IRPA*, along with UN Conventions and Protocols on Terrorism and Counterterrorism).[213] This "integral approach" on national security, human rights, immigration, refugee protection and terrorism encompasses several layers of security (country, citizens, non-citizens). This approach, moreover, seeks to protect the country's population through the immigration system, not despite the immigration system. The *Canadian Immigration and Refugee Act of 2001* (IRPA) regulates not only terrorism as "inadmissibility ground,"[214] but also the circumstances in which the terrorist attack occurs (knowledge, intent).[215] In the Canadian legal system human rights apply with respect to national security determinations on suspect aliens:

> "In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments."
>
> —Supreme Court of Canada, *Suresh v. Canada* (2002).[216]

Under the proposed balance (both by the federal government and by the Supreme Court of Canada) between national security needs and human rights values, domestic legislation includes national security threats provisions (IRPA, ss 19, 34.1, 98) and constitutional human rights protections afforded by the *Canadian Charter of Human Rights and Freedoms*. However, gaps (preventive and unwarranted detentions)[217] and ambiguous provisions remain (deportation to torture under serious national security threat, the threshold for relevance and admissible evidence in asylum hearings, and the investigative role of the judge).[218]

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[213] See James C Simeon, "Terrorism in Canada: Combatting Terrorism through the Defense of Human Rights" in Satvinder S Juss, ed, *Beyond Human Rights and the War on Terror* (New York: Routledge, 2019) at 144.
[214] *Canada Immigration and Refugee Protection Act (IRPA*), SC 2001, c 27, s 34(1)(c) (assented to 1 November 2001) [amended and consolidated on 19 June 2014].
[215] *Ibid*.
[216] *Suresh v Canada* (*Citizenship and Immigration*), (2002) SCC 1, [2002] 1 SCR 3 at para 4 ["Suresh"].
[217] This considering that ICCPR applies both in time of peace and war. See ICCPR, *supra* note 56, art 9(3).
[218] Some of these, in fact, have been challenged before the Supreme Court of Canada. See e.g. Simeon, *supra* note 213 at 160-163; *Dagenais v Canadian Broadcasting Corporation*, (1994) SCC 39, [1994] 3 SCR 835 (analyzing the scope of judicial investigative powers in immigration and asylum hearings).

In the United States, aside from common restrictions on public health,[219] criminal activity,[220] political affiliation[221] and immigration law violations,[222] there was no terrorism included ground affecting the admissibility, exclusion or removal of foreign nationals. Yet, under President Bill Clinton and, more particularly, following the terrorist attack in New York City of 1993 (World Trade Centre's bombing), Congress included "terrorist activities" as ground for inadmissibility and deportability of aliens.[223] But it was not until 9/11—and, more specifically, after the 9/11 Commission Report singling out critical gaps on national security between intelligence and immigration services (ability to detect terrorists and information on terrorist threats)[224]—that Congress extended inadmissibility and deportability grounds of aliens to a greater circumspection of relationships and activities (planning, funding, facilitating or perpetuating terrorist activities).[225]

The recharacterization of forced migrants within the European immigration system (*Common European Asylum System CEAS*) evolves alongside the European integration process[226] through

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[219] Since its inclusion as inadmissibility ground in 1982 and based on the legal articulation of those concerns (communicable diseases of public health significance and mental health illnesses with potential harm to others) in 1990 and 1996. See *United States Immigration Act of 1882*, 47th Congress, Pub L 47-376, 22 Stat 214 (signed into law on 3 August 1982); *United States Immigration Act of 1990*, 101st Congress, Pub L 1001-649, 104 Stat 4978 (signed into law on 29 November 1990); *United States Illegal Immigration Reform and Immigration Responsibility Act of 1996*, 104th Congress, Pub L 104-208, 110 Stat 3009 (signed into law on 30 September 1996); INA, *supra* note 203, § 212(a)(1)(A)(ii).

[220] Criminal convictions involving moral turpitude offenses (INA, § 212(a)(2)(A)(i)(I)), along with criminal activity related to prostitution (INA, § 212(a)(2)(D)), drug trafficking (INA, § 212(a)(C)), human trafficking (INA, § 212(a)(2)(H)), and money laundering (INA, § 212(a)(2)(I)). INA, *supra* note 203.

[221] *Ibid* INA, § 212(a)(3)(D).

[222] *Ibid* INA. Prior 2001, failure to attend removal hearing under INA § 212(a)(6)(B), or unlawful entry under § 212(a)(9)(C)(i)(I).

[223] The US Congress enacted provisions on terrorist activities committed by aliens and special witness protection for foreign nationals informing on terrorist activities through the nonimmigrant visa "S." See *United States Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),* 110th Congress, Pub L 104-132, 110 Stat 1214 (signed into law on 24 April 1996).

[224] US 9/11 Commission, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report)*, Final Report Y3-2/T27/2 (Washington, DC: 9/11 Commission, 22 July 2004) at 35, online (pdf): *US GOVERNMENT* <https://www.9-11commission.gov/report/911Report.pdf>.

[225] Congressional Research Service (CRS), *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia & Ruth Ellen Wasen (Washington, DC: CRS, January 2010) at 3, online: *FAS* <https://fas.org/sgp/crs/homesec/RL32564.pdf>.

[226] Unlike other regional instruments on refugee protection (*OAU Convention of 1969* and *Cartagena Declaration of 1984*), the Common European Asylum System (CEAS) was conceived more as relocation instrument concerning States' responsibilities, decision-making processes, and reception of refugees within the EU. It was established following the Tampere European Council of 1999 to create a common system of asylum, and later developed through Council regulation ("Dublin II"). See European Asylum Support Office (EASO) & International Association of Refugee Law Judges (European Chapter), "An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis" (Valletta, Malta: EASO & IARLJ, August 2016) at 11-13, online (pdf): *EASO* <https://

several phases, which I describe as ***legal synergy cycles***. The premise of an integrated Europe propelled the development of a common response to a myriad of migratory, humanitarian, human-rights and national-security challenges that member States confronted in light of the increase of religiously motivated terrorism (terrorist attacks in Madrid 2004, London 2005, Paris 2015, Nice 2016, Brussels 2016, Berlin 2016, Manchester 2017, and Barcelona 2017)[227] and regional refugee crises (mostly in the Balkans, the Middle East, Africa, and South America).[228] To begin with, we find a community of nation-states integrated through sectorial communities organized by strategic interests (European Coal and Steel Community ECSC, European Atomic Energy Community EURATOM, and European Economic Community EEC),[229] in which asylum remained under members States' exclusive jurisdiction or, *national sovereignty cycle.*

Next, we find a gradual transposition of a community of nation-states to a Union of nation-states whose membership hinges on common interests (pillars),[230] functional policies (freedoms),[231] and shared values (human dignity, human rights, liberty, equality, solidarity, justice, democracy, respect for the rule of law),[232] in which asylum became not merely a related interest but also

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www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>; EU Council, Regulation (EC) No 343/2003 of 25 February 2003, *Establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national*, OJ L 50, p 1-10 ["Dublin II Regulation"].

[227] Historical data (2001-2016) show a net increase since 9/11 in the number of incidents and terrorist attacks across Europe. See Anthony H Cordesman, "Trends in European Terrorism: 1970-2016" (18 August 2017) at 35-55 (analyzing terrorist attacks in Western Europe), online: *CSIS* <https://www.csis.org/analysis/trends-european-terrorism-1970-2016>; EUROPOL, "2019 European Union Terrorism: Situation and Trend Report" (The Hague: Europol, 2019) at 30 (indicating 7 "jihadist terrorist attacks" and 16 "plots" disarticulated in 2018), online (pdf): *EUROPOL* <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-sat>.

[228] European Council, *Treaty on European Union* (TEU "Maastricht Treaty"), (1992) OJ C 191, 1; 31 ILM 253.

[229] See generally Martin J Dedman, *The Origins and Development of the European Union: 1945–2008*, 2nd ed (New York: Routledge, 2010).

[230] The *Treaty of Maastricht* represents a critical step in the European integration process because it provides a social, institutional and political dimension to the sectorial-economic integration. The Union was formed on three pillars: the *first pillar* absorbing the European Communities (EC), the *second pillar* fostering a common foreign and security policy (CFSP), and the *third pillar* promoting a common space for justice and home affairs (JIHA). See European Council, *The Pillars of Europe: The Legacy of the Maastricht Treaty after 25 Years* (November 2018) at 10, online (pdf): *EUROPA* <https://publications.europa.eu/en/publication-detail/-/publication/a2843718-ec76-11e8-b690-01aa75ed71a> ["EC The Pillars of Europe"].

[231] A critical realization for the functioning of the "Single European Market" hinges on the reciprocal respect of four basic freedoms concerning the unrestricted movement of capital, goods, services and persons. See generally Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th ed (Oxford: Oxford University Press, 2016).

[232] Such values were gradually introduced through different documents, declarations, protocols and treaties. They were articulated in the *European Charter of Fundamental Rights* and confirmed by the *Treaty of Lisbon of 2009*. The Preamble of the *European Charter*, in fact, states: "The peoples of Europe, in creating an ever-closer union amongst

eventually a common policy (intergovernmental cooperation within the EU's third pillar under the *Treaty of Maastricht of 1992*)[233] shared by member States but attributed to exclusive competences ("One-stop-shop Principle," *Dublin Convention of 1997*)[234] or, *shared sovereignty cycle*.

Then, we turn to the progressive development of an European Union requiring a different degree of legal synergy (economic and social cohesion under the *Single European Act of 1986*)[235] in order to function as a territorially connected, socially coherent and economically integrated Union, in which asylum is harmonized through a common system of responsibilities ("Dublin II Regulation") and throughout the transfer of member States' jurisdiction to the thereby established European Union (supranational jurisdiction within the EU's first pillar under the *Treaty of Amsterdam of 1997*)[236] or as I call it, *restricted sovereignty cycle*.

Later, we find the higher degree of legal synergy between EU institutions, policies and legal values portraying a seemingly consolidated Union of member States articulated through regional (ECtHR),[237] supranational (CJCE), constitutional (domestic courts), and legislative precedents (EU Charter), in which asylum is protected not only as a common interest but as a fundamental

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them, are resolved to share a peaceful future based on common values." See European Council, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Preamble ["European Charter"].

[233] European Council, *supra* note 228 at 10.

[234] See EC The Pillars of Europe, *supra* note 230. States agreed on asylum requests under EU law provided each member State is responsible for asylum claims lodged in its jurisdiction, unless provisions on family reunification, previous residence, permit of entry, waivers or precedent orders apply. See European Council, *Dublin Convention of 1997*, *Determining the State responsible for examining applications for asylum lodged in one of the member States of the European Communities*, 19 August 1997, OJ C 254, p 1-12, arts 4-8 (entered into force on 1 September 1997) ["Dublin I"].

[235] *The Single European Act* (SEA) of 1986 constitutes a critical moment in the European integration. Not only did SEA pave the path to the eventual realization of the monetary union but further introduced the idea of various levels of integration organized through basic *pillars* and *principles*. This was an important step toward the organization of *asylum policies* through intergovernmental cooperation (third pillar, Maastricht Treaty). [235] See *Single European Act of 29 June 1986*, OJ L 169, p 1-18 (entered into force 1 July 1987).

[236] This transition includes the "communitarisation" of *Schengen Acquis* (abolishment of internal and strengthening of external borders through EU) and Title IV EC. See Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017) at 23.

[237] For instance, in *Tarakhel v Switzerland*, the European Court of Human Rights held that returns of refugees to Italy require individual assessments and guarantees of protection concerning the claimant's vulnerability (e.g. children, women). See *Tarakhel v Switzerland*, App No 29217/12 (ECtHR, 4 November 2014).

right (subject to international and supranational restrictions)[238] or, as I described, *international sovereignty cycle*—this one acknowledging regional precedents and international legal provisions.

Finally, we find a residual development of a highly contested Union (by member-states' authorities and citizens) requiring member States' commitments vis-à-vis massive migration in Europe and fissures in its increasingly ambivalent (systematic detention of migrants, U-Turn agreements, extraterritorial migratory controls), detrimental (migrants deaths and smuggling), and debilitated integration system (member States' rejections, threats and withdrawals), in which the often-viewed as failed yet common asylum system propels member States and EU institutions toward the development of extraterritorial migration controls[239] (FRONTEX, EUROSUR, EBCGT)[240] or, *extended sovereignty cycle*. I argue that this one is the most endemic cycle because it resolves the arguably conflicting interests of State security and States' international and human rights commitments (refugee protection and migrants' human rights) in favour of member States' security, propelling the ascension of the **Final Refugee Paradigm**.

This cycle further promotes what I refer as ***the outsourcing of humanity*** by relocating the reception of refugees and asylum seekers to "extraterritorial partners" who, thereafter, take care of

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[238] International because the right to asylum under the *European Charter* does specifically refer to the *UN Geneva Convention of 1949* and the *UN Refugee Convention of 1951*, on the one hand, and supranational because the EU reception of international refugee law precludes member States from violating the *Non-refoulement principle*, on the other. To that end, the *EU Charter of Fundamental Rights*, art 15 (*Right to Asylum*) provides that asylum shall be guaranteed with due respect for the rules of the *Geneva Convention* and the *Asylum Protocol*, the Treaty on European Union, and the Treaty on the Functioning of the European Union ("the Treaties"). Art 19(2) of the Charter states, "no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." See European Charter, *supra* note 232, arts 15, 19(2).

[239] Moreno-Lax, *supra* note 236 at Chapter 6. These institutions and coordinated response surge as the EU proposal to manage EU's external borders while replacing the intergovernmental approach (British position) by the communitarisation and, therefore, supranational management approach (French and German positions). FRONTEX has extensive independence and legal capacity as well as financial and administrative autonomy (EU mandates and design), which make its operations highly sensitive considering the national security powers the agency holds.

[240] EU Council, Regulation (EC) No 2007/2004 of 26 October 2004, *Establishing European Agency for the Management of Operational Cooperation at External Borders of member States of the European Union*, OJ L 349, p 1-11 ["FRONTEX Regulation"]; see also EU Council, Regulation (EC) No 1052/2013 of 22 October 20013, *Establishing the European Border Surveillance System*, OJ L 295, p 11-26; EU Council, Regulation (EC) No 2016/1624 of 14 September 2016, *Regulating the European Border and Coast Guard*, OJ L 251, p 1-76 [amending Regulation (EC) No 2016/399]; EU Council, Regulation (EC) No 863/2007 of 6 September 2016, *Establishing a mechanism for the creation of Rapid Border Intervention Terms*, OJ L 199/30, p 1-76 [amending Regulation (EC) No 2007/2004].

the increasingly viewed as unwelcome migrants in exchange of a 'fee' (EU-Turkey Agreement)[241] depriving thereby both refugees of human dignity and international refugee law of its moral-legal content.[242] The trend of externalizing forced migration (using "pushback" policies, refugees, relocation and extraterritorial migratory controls)[243] to prevent undesirable migrants from reaching host countries does not only contradict the very fabric of the legal protection asylum law accords, but also uncovers the reform of *international refugee law* at domestic law (national security law). This is increasingly the case in the U.S., United Kingdom, Italy,[244] Germany, and Australia.[245]

This *extraterritorial reception* of refugees and asylum seekers encompasses the outsourcing of immigration controls to third States. Such reception, in my view, fosters the very practice international refugee law aimed to prevent: discrimination, refoulement, expulsion (chapter 2).[246] Moreover, notwithstanding United Nations efforts toward a more articulated and humane system of reception and treatment of refugees (*New York Declaration for Refugees and Migrants of 2016*

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[241] See Dana Shmalz, "Global Responsibility Sharing and the Production of Superfluity in the Context of Refugee Protection" in Stefan Salomon et al, eds, *Blurring Boundaries: Human Security and Forced Migration* (Boston: Brill Nijhoff, 2017) at 23-47 (analyzing legal and geopolitical repercussions of the EU-Turkey Agreement); European Commission, *EU-Turkey Joint Action Plan* (15 October 2015), online: *EUROPA* <http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm>.

[242] For instance, the Turkish Government's use of refugees as political instrument by threatening to open its borders should the EU condemn Turkey's invasion of Syria. See Natasha Turak, "Turkey's Erdogan Threatens to Release Millions of Refugees into Europe over Criticism of Syria Offensive" *CNBC* (10 October 2019), online: <https://www.cnbc.com/2019/10/10/turkeys-erdogan-threatens-release-of-refugees-to-europe-over-syria-criticism.html>.

[243] See Bill Frelik, Ian M Kysel & Jennifer Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants" (2016) 4:4 J of Migration & Hum Security 190 at 193 (describing the notion of "externalization of migration controls") ["Frelik"]; UN Human Rights Council, *Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants,* report by the UN Special Rapporteur on the Human Rights of Migrants (François Crépeau), 32nd Sess, Agenda 3, A/HRC/23/46, (24 April 2013) at 14-16 (describing the "externalization trend" in the EU), online (pdf): *OHCHR* <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf>; Sally Hayden, "The U.N. Is Leaving Migrants to Die in Libya" *Foreign Policy* (10 October 2019), online: <https://foreign policy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war/>.

[244] Italy, Ministero degli Affari Esteri e della Cooperazione Internazionale, *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all' immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana* (Roma: Governo Italiano, 2 February 2017), online: *REPPUBLICA* <http://www.repubblica.it/esteri/2017/02/02/news/migranti_accordo_italia-libia_ecco_cosa_contiene_in_memorandum-157464439/> ["Italian Memorandum"].

[245] Frelik, *supra* note 243 at 203 (describing so-called "Pacific Solution" on asylum seekers in Australia).

[246] The EU invests more the 8 billion euros per year in North Africa (Niger, Sudan) to control the flow of refugees. See Francesco Guarascio & Gabriela Baczynska, "EU Offers Carrot, Stick to Africa to Help Curb Migration" *Reuters* (7 June 2016), online: <https://www.reuters.com/article/us-europe-migrants-eu-aid/eu-offers-carrot-stick-to-africa-to-help-curb-migration-idUSKCN0YT1ME>.

and the *Global Compact for Migration of 2018*),[247] the domestic and the regional reception and treatment of refugees reflect instead dehumanized immigration laws.

Consequently, I argue that the **Final Refugee Paradigm** does not result from States placing capricious or unnatural restrictions to the entry of refugees inasmuch as from States placing unjustifiable, conflicting, regressive and unnecessary restrictions to preclude certain groups of migrants from becoming members of a given society due to ethnic, racial, religious and political interests (tensions), not to—in *stricto sensu*—security concerns. Though national security interests have been articulated through legitimate concerns on foreigners entering or living in host countries, the same cannot be always said in relation to the disarticulation of human rights and civil liberties.

III. THREATS: IMMIGRANTS AND REFUGEES AS SECURITY THREATS

While host-countries' national security interests are recognized under international law (including the *Refugee Convention*),[248] structural characterizations on threats to such interests are defined by each country's legal system. For example, right after the Postwar Era, the United States developed one of the world's most comprehensive legislations to ascertain national security threats. First, the *National Security Act of 1947*[249] established the legal ("threats to the United States, its people, property, or interests") and national-security institutional structure (National Security Council NSA, Central Intelligence Agency CIA, National Security Resources Board NSRB).[250] Yet Congress did not mention or treat here "immigrants" (much less "refugees") as national security threats. Still, the evolving and ambivalent relationship between immigration and terrorism led the U.S. Government to identify immigrants and refugees as national security threats.[251]

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[247] UN General Assembly, *New York Declaration for Refugees and Migrants*, 19 September 2016, A/RES/71/1, Agenda 13, 17 (recognizing the need for international cooperation to manage more effectively global migration challenges); *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regulate Migration*, UN GA Res, 72/244-72/280, A/CONF231/3 (Marrakech: 11 December 2018).
[248] Refugee Convention, *supra* note 55, art 9.
[249] *US National Security Act 1947*, 80th Congress, Pub L 80-235, 61 Stat 496 (signed into law on 26 July 1947) [codified 50 USC Ch 15, § 401; amended on 19 January 2018].
[250] *Ibid* at § 2 (indicating that, "in enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of United States").
[251] In his report to Congress, the US Director of National Intelligence described human displacement and the arrival of refugees–along with Cyber, terrorist, technological and transnational criminal threats–as a major national-security threat to United States. See Daniel R Coats (US Director of National Intelligence), "Statement for the Record,

One of the most common assumptions pundits make while articulating risk assessments (national-security threats) on national security refers to the number of people, not the potential threat in itself.[252] True, the number of confirmed spies that used the immigration system to enter the U.S. during the *Cold War* ascended to only 7 people (with an annual average during the 60s of 38 detections/detentions mostly concerning intellectuals and government critics).[253]

Admittedly, however, one spy might be all what is needed to infiltrate the national security of a country and obtain, for instance, State secrets. Similarly, of the millions of migrants arriving to the U.S. every year, only few were needed to commit the major terrorist attack in modern history (9/11) that killed 3,218 people (i.e., 2,977 people killed during the attacks in New York City, Pennsylvania, and D.C., plus 241 NYPD officers deceased since then due to related illnesses).[254] In fact, nearly all 19 terrorists that participated in the 9/11 attacks used non-immigrant visas to enter the country (student, training and tourist visas).[255] I submit such proposition does no longer hold in today's world because enemy countries do nowadays use technology not only to spy on other countries but also to inflict greater harm over their national infrastructure (e.g., Russia on U.S. electoral system),[256] while terrorist organizations use it to turn the host-country's citizens into their radicalized operatives (self-radicalized and lone-wolf attacks) without establishing direct connection with them (e.g., terrorist attacks in Oslo 2010, Orlando 2016).[257]

Worldwide Threat Assessment of the U.S. Intelligence Community before Senate Select Committee on Intelligence on 13 February 2018" in Andrew Borene, Adam Pearlmen & Harvey Rishkof, eds, *The U.S. Intelligence Community Sourcebook: A Compendium of National Security Related Laws and Policy Documents* (Chicago: ABA, 2019) at 15.

[252] The security risk should not be associated with the number of people entering a country but with the potential risk ensuing from what such people can do. See David Bier, "The Cold War's Lesson for Immigration Policy" (23 August 2016), online: *CATO* <https://www.cato.org/publications/commentary/cold-wars-lesson-immigration-policy>.

[253] *Ibid.*

[254] The 2,977-figure does not include the 19 terrorists who died during the attack. The 241 number refers to NYPD officers who have died during the last 18 years due to 9/11-related illnesses. See History, "September 11" *History* (12 September 2019), online: <https://www.history.com/news/september-11-attacks-photos>; see also Aaron Katersky & Sejal Parekh, "241 NYPD Officers Have Died from 9/11 Illnesses, 10 Times the Number Killed in the World Trade Center Attack" *ABC News* (9 September 2019), online: <https://abcnews.go.com/US/241-nypd-officers-died-911-illnesses-10-times/story?id=65430201>.

[255] See Appendix, Chapter 3, Table 11.

[256] US Congress (Senate Select Committee on Intelligence), *Report on the Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, 116th Congress, 1st Sess, Report No 116-XX, Vol 1, (Washington, DC: US Senate, 2019) at 21 (describing Russian interreference in US elections), online (pdf): *US SENATE* <https://www.intelligence.senate.gov/sites/default/files/documents/ReportVolume1.pdf>.

[257] See Ingrid Melle, "The Breivik Case and What Psychiatrists Can Learn from It" (2013) 12:1 World Psychiatry 16 (profiling 'lone wolf' terrorist attack in Oslo 2010); Public Safety Canada, *2016 Public Report on the Terrorist Threat to Canada* (Ottawa: Public Safety Canada, 2016) at 15 (identifying the use of social media to spread terrorist

Moreover, the concept of nation-states' security involving dissimilar or similar values evolves to promote stable and peaceful relationships among States (*postwar paradigm*). Such evolution is informed by the protection of core national values,[258] the security challenges States face, and the conventional interpretation of international law principles of *Sovereignty* and *Self-determination*. In democratic systems, however, national security powers—as most constitutional powers—derive from the constituency. I argue that national security powers cannot be absolute, for which any restriction on fundamental rights (human and constitutional rights) needs to be equated vis-à-vis the values and rights such constituency allegedly promotes. Unless otherwise a constitutional paradox results, this critical disquisition (*security v. values*) leads to a seemingly unavoidable assessment on competing interests by which national security conveys 'necessary' restrictions on those rights, not their complete elimination. *Ergo*, human dignity, liberty, equality, and due process rights are at their *lowest ebb* when national security assessments trigger restrictive State action.

State action violating the most basic human rights of migrants (e.g., prolonged detention) can neither be justified under international law nor under national security law. Anthropological evidence indicates that security is not an ideological proposition but rather a co-existential need all humans share regardless of their ethnicity, race, or political inclinations. Thus, equating national security to a value is not only a dangerous proposition but a constitutional misconception.

> "It is also clear, however, that it would be equally disastrous to jettison our liberties in the name of fighting terrorism. That way we lose as well. We may combat terrorism, but the terrorists will effectively have deprived us of what we hold most dear –our democratic liberties. As Benjamin Franklin famously pronounced, "Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." To lose our liberties is to lose our sense of who we are. Our civil liberties are not accidental accretions borrowed from foreign civilizations. They are deeply rooted in Canada's own unique history. We cannot deny them without denying our history and ourselves… It follows from what I have said that we cannot view the problem in terms of "either-or" – either rights or terrorism. Our only option is to fight terrorism while maintaining our constitutional rights and freedoms to the maximum extent possible."
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> —Honourable Beverly McLachlin, Chief Justice of Canada, *Symons Lecture* (2008).[259]

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propaganda in targeted countries), online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2016-pblc-rpr-trrrst-thrt/2016-pblc-rpr-trrrst-thrt-en.pdf>; Khaled A Beydoun, "Lone Wolf Terrorism: Types, Stripes and Double Standards" (2018) 112 Northwestern L Rev 2 at 3 (describing 'lone wolf' classification in the War on Terror along with racial-profiling presumptions).

[258] The identification of so-called "acquired values" is the defining element to establish national security interests. See Walter Lippman, *U.S. Foreign Policy* (Boston: Little, Brown & Company, 1943) at 51; Wolfers, *supra* note 24 at 484.

[259] Beverly McLachlin (Chief Justice of Canada), *Symons Lecture*, Supreme Court of Canada (2008), online: *SCC* <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2008-10-21-eng.aspx>.

A. Apparent Threats

Following 9/11, the U.S. Government declared the *War on Terror* ("Global War on Terrorism") calling for an international military campaign targeting terrorist organizations and sponsoring States (e.g., Al-Qaeda, Tehrik-i-Taliban, the Taliban, the Islamic State).[260] Nonetheless, the *War on Terror* has been often misrepresented as a war between religions and cultures.[261]

The U.S. doctrine on the *War on Terror* has been extended throughout the world. In fact, several countries in South Asia (Singapore, Malaysia, Indonesia, the Philippines) launched a systematic crack down on Jihadist terrorists believed to be affiliated to Al Qaeda.[262]

Literature on the *War on Terror* further assents concerning consequences portraying anti-terrorist laws as the new normal and the *War on Terror* as an unavoidable clash of civilizations.[263] This as President Obama ended the *War on Terror* doctrine and shifted U.S. national security approach on counterterrorism by instructing the military and intelligence agencies to focus instead on "terrorist

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[260] US President George W Bush, *Address to a Joint Session of Congress* (21 September 2001), online (speech): *CNN* <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> [Transcript].

[261] Religious extremism promoted by terrorist organizations did eventually alter the perception of Islam in the West. From a theological point of view, however, the association between terrorism and Islam finds various theoretical contentions. Still, evidence indicate such association cannot be automatically dismissed as racist or expressions of hatred because religious extremism has been, in fact, part of the underlying message some terrorist organizations promote (e.g. Al Qaeda, ISIL, Lashkar e-Taiba, Hezb-e Islami Gulbuddin, Salafia Jihadia-a, Jama'at al-Tawhid wal-Jihad, Army of Islam, AQI, Islamic Jihad of Yemen, Boko-Haram, Al-Shabaaab, AQIM, MOJWA in Africa). See Daniel Byman, *Al Qaeda, The Islamic State, and the Global Jihadist Movement* (Oxford: Oxford University Press, 2015) at Chapter 7; Zuleyha Keskin & Fatih Tuncer, "Causes of Radicalization: Theological Arguments as the Ultimate Trigger" in Felhi Mansouri & Zuleyha Keskin, eds, *Contesting the Theological Foundations of Islam and Violent Extremism* (Cham, Switzerland: Palgrave, 2019) at 15; US Central Intelligence Agency (CIA), *The World Factbook: Terrorist Groups–Foreign Based* (2019), online: *CIA* <https://www.cia.gov/library/publications/the-world-factbook/fields/396.html>.

[262] This includes arrests and interrogations of Muslim citizens in Manila and East Timor. See Jayson S Lamchek, *Human Rights-Compliant Counterterrorism: Myth-making and Reality in the Philippines and Indonesia* (Cambridge: Cambridge University Press, 2019) at 210-213 (describing detentions of Muslim citizens in the Philippines and Indonesia as well as diplomatic tensions between the United States, Malaysia, and Singapore).

[263] Since counterterrorism measures often lead to legal and constitutional restrictions on civil liberties and human rights (privacy), unwarranted national-security powers have devastating consequences over the wellbeing, security, and dignity of migrants in general and refugees in particular (e.g. psychological trauma, human security, physical integrity, due process violations). See Sudha Setty, "Assessing Unconventional Applications of the "Terrorism" Label" in Satvinder S Juss, ed, *Beyond Human Rights and the War on Terror* (London: Routledge, 2019) at 6-18 (analyzing cases concerning the *United States Anti-Terrorism and Effective Death Penalty Act of 1996*, the *USA Patriot Act of 2001*, and the *India Prevention of Terrorism Act of 2002*).

networks"[264]—this, in part, due to terrorist groups' diversification and the increase of terrorist organizations. A more defining distinction on national security threats ensues between the Obama and the Trump administrations. Under President Obama, national security strategy for counterterrorism considers values at stake and State action, whereas under President Trump the strategy hinges exclusively on State action and security goals.[265]

Notwithstanding a global decrease of 27% in the number of deaths from terrorism (2016-2017),[266] terrorism remains a serious national security threat, particularly in countries in state of conflict or war (Figure 4). Although terrorism affects nowadays 67 countries (reporting at least one death from terrorism),[267] 84% of terrorist attacks in the world occur in ten developing countries (Figure 5). Here, refugees encounter a dual yet often overlooked risk; that is, despite their frequent depiction as security threats to host countries, they face a higher risk of being victims of terrorism in their home countries (e.g., Syrian, Afghan and Somali refugees).

National security interests and threats are intertwined, even though each one responds to different prongs of analysis (valuation). On the one hand, national security interests respond to a more consolidated, internalized, and gradually acquired/shared values on which the preservation, development and security of a nation-state is defined (*objective valuation*). On the other hand, national-security threats assessments derive from a more dynamic, temporal and challenging environment, in which acquired/evolving values are confronted to emerging and potential security threats that may or not occur (*subjective valuation*). Such an assessment not only tests "national values" but often sacrifices other equally necessary values (international legal values). Since legal and public-policy determinations on national security cannot be sheltered from political processes,

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[264] Paul D Shinkman, "Obama: 'Global War on Terror' Is Over" *US News* (23 May 2013), online: <https://www.usnews.com/news/articles/2013/05/23/obama-global-war-on-terror-is-over>.
[265] Comparing the two strategies, *US values* become the leading legal principle under President Obama ("adhering to US values"), while *State action* is the guiding principle under President Trump ("pursue terrorist at their source"). See Congressional Research Service, *The Trump Administration's National Strategy for Counterterrorism: Overview and Comparison to the Prior Administration*, report by John W Rollins CRS IN11027 (Washington, DC: CRS, January 2019) at 2, online (pdf): *FAS* <https://fas.org/sgp/crs/terror/IN11027.pdf>.
[266] Institute for Economics and Peace, "Global Terrorism Index 2018: Measuring the Impact of Terrorism" (Sydney: IEP, 2018) at 2, online (pdf): *VISION OF HUMANITY* <http://visionofhumanity.org/app/uploads/2018/12/Global-Terrorism-Index-2018.pdf> ["IEP Global Terrorism"].
[267] *Ibid.*

the misuse, abuse or radicalization of this constitutional power endanger both the security it aims to attain and the preservation of the very values the acting government claims to be protecting.

1. International Terrorism, Immigrants and Refugees: *Proportionality Test*

After 9/11 (the most devastating attack in the history of international terrorism),[268] the U.S. Congress passed the *U.S.A. Patriot Act of 2001*[269] (expanding government surveillance programs, funding, institutional cooperation and mechanisms to prevent, fight and investigate terrorism),[270] the *Homeland Security Act of 2002* (creating the Department of Homeland Security),[271] and the *REAL ID Act of 2005* (providing guiding principles for the "War on Terror" and funding for military operations).[272]

Under the administration of President George W. Bush (2000-2008), the perception-conceptualization of national security threats in the U.S. reached a global dimension (events threatening the constitutional system of the United States, its economy and its military interests around the world).[273] Moreover, under President Barack Obama (2008-2016), national security threats were not only analyzed in light of U.S. security interests but also extended to the security

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[268] World Atlas 2019 (online), World Facts, "Worst Terrorist Attacks in World History," online: <https://www.worldatlas.com/articles/worst-terrorist-attacks-in-history.html>.

[269] *U.S.A. Patriot Act of 2001*, *Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism*, 107th Congress, Pub L 107-56, 115 Stat 272 (signed into law on 26 October 2001) [codified 18 USC Ch 113B]. The Act led to a fundamental addition of INA instructing immigration authorities to ascertain inadmissibility and deportability of aliens based on terrorist activities (INA, § 212(a)(3)(B), (F)). Moreover, Title IV of the Patriot Act ("border security") criminalized the act of "engaging" in terrorist activities, such as: (i) committing or inciting another to commit a terrorist act, indicating under the circumstances, the intent to cause death or serious bodily injury, (ii) planning or preparing a terrorist action, (iii) gathering information on terrorist targets, (iv) soliciting funds for or supporting terrorist activities or organizations, (v) engaging in such activity while being a member of a terrorist organization, or (vi) conspiring, hijacking, detaining, or threating to kill, attack, assassinate, or use biological agents, explosives, chemicals for targeting terrorist activities.

[270] The constitutionality of this Act has been challenged due to the "unchecked powers" resulting from the contended institutional enhancement (US Attorney General) that surveillance programs provide. See ACLU, "Surveillance Under the USA/Patriot Act" (2018), online: *ACLU* <https://www.aclu.org/other/surveillance-under-usapatriot-act>.

[271] *United States Homeland Security Act of 2002*, *An Act to Establish the Department of Homeland Security*, 107th Congress, Pub L 107-296, 116 Stat 2135 (signed into law on 25 November 2002) (harmonizing information on terrorist threats through immigration and national security between the Departments of Homeland Security, Justice, and State).

[272] *US REAL ID Act of 2005*, HR 1268, 109th Congress, Pub L 109-13, 119 Stat 231 (signed into law on 11 May 2005).

[273] US President George W Bush, NS Presidential Directive I: *Organization of the National Security Council System* (13 February 2001).

of U.S. allies.[274] Under President Donald Trump, however, the global dimension and the security of U.S. allies were no longer viewed as legal references to assess national security threats. Instead, the U.S. Government developed a protectionist legal approach on counterterrorism (domestic protection) despite national security threats abroad. For instance, President Trump's order to withdraw U.S. troops from Syria did not only propel the Turkish invasion of northern Syria affecting the security of a key U.S. ally in the fight against terrorism ("the Kurds"), but also the possibility for hundreds of ISIL terrorists to escape from prison.[275] This suggests a contradiction in targeting thousands of migrants from Central America (including children) in the U.S.-Mexican border (Image 4) while enabling hundreds of ISIL fighters to flee from jail in Syria (Image 5).

In this context, exploring the case of asylum seekers in the United States is quite revealing. The identification of these migrants as national security threat ("foreign threat") has led the U.S. Government to develop the world's most aggressive legal system of reception of migrants, which policies include: detention of migrant children and separation from their parents; prolonged detention and temporary expulsion of asylum seekers; systematic exclusion of millions of asylum seekers; refoulement of asylum seekers[276] (Chapter 2); and government's characterization of migrants and refugees from Latin America, Africa, and the Middle East as "animals," "disease carriers," "criminals," "rapists," and "terrorists" (Chapter 3).

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[274] US President Barack Obama underscored the strategic importance of economic prosperity and universal values as part of national security interests. US President Barack Obama, *National Security Strategy* (May 2010), online: *THE WHITE HOUSE* <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf>.

[275] See Deborah Haynes, "Islamic State Fighters Escape in Syria" *Sky News* (14 October 2019) (reporting 920 ISIS fighters fleeing from prison in northern Syria), online (video): <https://youtu.be/GrTfKUXG8tM>.

[276] Threating economic sanctions, the US pressured the Guatemalan Government into signing an agreement by which the latter is considered (despite the country's record on human rights violations and gangs' violence) a safe third country, precluding migrants passing through Guatemala from seeking asylum in the US. Yet, under international refugee law (art 33 of the *Refugee Convention*), the refoulement of asylum seekers includes their forced return not only to the country they fled from but to any country where their life or wellbeing could be threatened. See Steve Holland & Sofia Menchu, "Guatemala Agrees to New Migration Measures to Avoid Trump Sanctions Threat" *Reuters* (26 July 2019), online: <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemala-agrees-to-new-migration-measures-to-avoid-trump-sanctions-threat-idUSKCN1UL2KR>; Inter-American Commission on Human Rights, "The Situation of Human Rights in Guatemala" Doc 208/17 (31 December 2017) at 123 (describing risks that migrants face in Guatemala), online (pdf): *RELIEFWEB* <https://reliefweb.int/sites/reliefweb.int/files/resources/Guatemala2017-en%20%281%29.pdf>; UN High Commissioner for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* (January 2018) at 14 (describing gangs' violence in Guatemala), online (pdf): *REFWORLD* <https://www.refworld.org/pdfid/5a5e03e96.pdf>.

Although 9/11 revealed critical gaps between immigration and national-security information systems, refugees represent the lowest probable threat vis-à-vis any other migrant group using immigrant visas, non-immigrants visas, permanent residence (Table 1). Data indicate that of the 3,391,203 refugees admitted to the U.S. from 1975 to 2017, only 25 were considered potential (plots) or actual (attacks) terrorists, representing a security risk of 0,00074% in 40 years. Of the 25 identified terrorists, 3 attacks killed 3 people (all in the 70s). The projected risk (mathematical probability) of being killed by a refugee in the U.S. is 1 in 3,855,342,265 (Table 1). And of the 732,168 asylum seekers admitted from 1975 to 2017, 11 were identified as terrorists, representing a security risk of 0,0015% (3 of them committing attacks after becoming U.S. citizens). The projected risk of being killed by an asylum seeker in the U.S. is 1 in 1,285,114,088 (Table 1).

Though mathematically justified,[277] *probability* cannot be viewed as an uncontested legal fact (refugees are not terrorists) but rather as a mathematical valuation of the security risk their reception poses (refugees are less likely to commit terrorist attacks). As such, I argue, *probability* can be used to inform ***proportionality*** as leading (yet not exclusive) reference. *Proportionality*, moreover, has been accepted across legal disciplines and systems around the world as a justifiable legal method of rationalisation/interpretation in decision-making processes concerning rights or interests in conflict,[278] for which it can serve to outweigh objectively and subjectively common differentials between refugee and national security protection. If not *proportionality*, on what other principle there is to make an objective-subjective valuation between protecting the national security of the host country or the life of the refugee or asylum seeker? On the one hand, the host country appears holding a *constitutional duty*—recognized under international refugee law (Articles 32.1 and 33.2 of the *Refugee Convention*)—to protect its population and territory even if this means rejecting refugees. On the other hand, refugees have been already rejected, abandoned, and persecuted by their home country. I view *proportionality* here as legal principle promoting a more reasonable reference between arguably competing interests.

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[277] See Johns Hopkins University (Department of Biostatistics), "The Strength of Statistical Evidence" by Richard Royall (1999) at 2 (describing the value and limitations of statistical evidence).

[278] From constitutional law (fundamental rights), criminal law (self-defence), international humanitarian law (use of force), contracts law (unconscionable contracts) and torts law (comparative negligence) to arbitration (invest-state arbitration) and human rights law (State interference), *proportionality* is considered a *general principle of law* for the resolution of conflicts between competing interests and rights. See Max Planck Encyclopedia of International Law (online), *Public International Law*, "Proportionality."

The number of admitted asylum seekers linked to terrorist activities has been acknowledged as an admissible legal and public-policy reference to specifically evaluate the threat that the reception of these migrants poses to the national security of the U.S.[279] Still, using the number of terrorist attacks committed by refugees as the sole reference (key factor) to either systematically justify or dismiss national security restrictions on these migrants can be misleading and ultimately counterproductive. In the end, all that it takes to change public opinion (and policy) on the perception/conceptualization of similarly categorizable refugees (by race, nationality or religion) is one refugee committing a terrorist attack. This has occurred in France (Paris synchronized attacks of 2015),[280] Germany (Berlin Christmas market attack of 2016),[281] Finland (Turku market square attack of 2017),[282] and in the Netherlands (Amsterdam Central Station attack of 2018).[283]

Assuming, however, that the security threat is identified by focusing exclusively on the immigration system, the immigration status that the perpetrator had before or during the attack (or that never even had, e.g., asylum application rejected) can be far more dangerous than the security threat national security assessments aim to contain. In fact, a flat depiction/valuation of the security threat ("at some point the terrorist was a refugee; therefore, refugees from the terrorist's country

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[279] See e.g. *United States Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)*, 108th Congress, Pub L 108-458, 118 Stat 3638, § 5403(b), (signed into law on 17 December 2004) [codified 50 USC Ch 15, § 401].

[280] In 2015, a synchronized terrorist attack in Paris killed 129 people. Prosecutorial evidence indicated that a *Refugee Travel Passport* belonging to a Syrian national was found on one suspect. Although questions as to whether the passport belonged to the suspect remain, authorities from Serbia and Greece confirmed the passport was used by a Syrian national entering the island of Lesbos in Greece who claimed asylum in Serbia. See Maclean's, "With the World on Edge, France Seeks Clues, World Debate Answers" *Maclean's* (15 November 2015), online: <https://www.macleans.ca/news/world/with-the-world-on-edge-police-seek-clues-leaders-debate-answers/#gallery/portraits-of-paris-in-mourning/slide-1>.

[281] In 2015, an asylum seeker from Tunisia whose claim had been denied drove a truck into a crowd in a market located in central Berlin killing 12 people. Although the German Parliament (*Deutscher Bundestag*) ordered an official inquiry. Preliminary reports underscore structural failures in national security information systems. See Ben Knight, "Germany Launches New Investigation into Berlin Market Attack Failures" *DW* (1 March 2018), online: <https://www.dw.com/en/germany-launches-new-investigation-into-berlin-christmas-market-attack-failures/a-42788351>.

[282] In 2017, a self-radicalized asylum seeker whose claim had been denied killed two people with a knife in a public market located in the city of Turku. See Thomson Reuters, "Refugee Denied Asylum Receives Life Sentences in Finland Stabbing Attack" *CBC* (15 June 2018), online: <https://www.cbc.ca/news/world/finland-mass-stabbing-sentence-1.4707384>.

[283] In 2018, a self-radicalized refugee from Afghanistan living in Germany traveled to Amsterdam's Central Station where he stabbed two American tourists. See "Man Jailed for 26 Years for Stabbing US Tourists in Amsterdam Terror Attack" *Dutch News* (14 October 2019), online: <https://www.dutchnews.nl/news/2019/10/central-station-stabber-jailed-for-26-years-for-attacking-american-tourists/>.

are terrorists") constitutes not only a gross mischaracterization of the security threat—and, for that matter, refugee populations—but also a disingenuous valuation of the security threat.

Consider, for instance, the publicized terrorist attacks in Boston (2013) and Lyon (2019). In the first case, the two brothers that subjected Boston to excruciating hours of terror after exploding a bomb during the city's marathon committed this heinous act as U.S. citizens.[284] Yet they entered the country with a non-immigrant visa and subsequently claimed asylum protection.[285] Assuming that either the vetting process used during their asylum application a decade earlier did not meet national security standards, or that they waited 10 years to perpetuate the attack—suggesting, incidentally, seeking asylum was their most effective path to their terrorist goal—is misleading. In the second case, the fact that an Afghan refugee was found attacking French citizens with a knife in Lyon would have indicated that refugees from Afghanistan represent a national security threat to France. Yet prosecutorial investigation revealed that the refugee was mentally ill.[286] Therefore, overcoming assumptions based on the immigration status of the attacker enable authorities to understand the underlying threats both refugees and host-countries' citizens face: mental illness and self-radicalization—this one being a growing national-security threat uncovering a critical yet often-missed interjection between international and domestic terrorism.

These assertions are counterproductive because data show that anyone can be a terrorist, which includes not only refugees but mostly host-countries' citizens (Table 2). My research indicates that of the 89 terrorists who perpetuated 78 jihadist terrorism-related attacks in Australia, Europe, and North America between September 2014 ("Califate State" ISIL-proclamation) and December 2018, 6 were refugees and only 3 were asylum seekers (Table 2). As it turns out, most terrorists (48 perpetuators) were citizens born in the country where the terrorist attack occurred (Table 2). Only 8 terrorists were naturalized citizens, 1 used an immigrant visa (fiancée), and 2 others used nonimmigrant visas (student and tourist visas, Table 2).

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[284] See BBC, "Profile: Who is Boston Bomber Dzhokhar Tsarnaev?" *BBC News* (8 April 2005), online: <https://www.bbc.com/news/world-us-canada-31734557>.
[285] *Ibid.*
[286] See CBS, "At least 1 Killed in France Knife Attack" *CBS News* (1 September 2019), online (video): <https://www.cbsnews.com/video/french-police-detain-afghan-man-deadly-knife-attack-near-lyon/>.

These findings suggest three things. *First*, the greatest national security threat arising out of jihadist terrorism for these countries relates to their own citizens, not refugees. *Second*, the foreign threat of refugees as terrorists (9 here) pales in comparison, proportion, and relation to the 34 million refugees worldwide. *Third*, although the possibility of refugees committing terrorist attacks in these countries cannot be dismissed, it cannot however lead to conclude refugees pose a major national security threat to these countries—particularly when some of the perpetuators became self-radicalized after their refugee status was granted or denied.

I maintain that national security law and policy should consider not merely *proportionality* but also evidence through factual assessments, irrespectively of the perpetuator's race, religion, nationality, or immigration status; none of which, however, seems to determine the proclivity of an individual to become a terrorist. This further means that the legal restrictions (rights deprivation) host countries place on refugees and asylum seekers (detention, expulsion, criminalisation, rejection)[287] in the name of national security must be *proportional* to the security threat that these migrants allegedly pose. The *principle of Proportionality* thereby applied is commensurate with the indisputable need to promote proportional share of the world's refugee population considering not only the size of each country's population but its economic resources.

2. Economic "Burden" and Cultural Identity: *Differential Test*

While the number of refugees entering host countries seems relatively relevant in relation to terrorism, this number is nonetheless viewed by critics as the leading factor supporting the increasingly unjustified *economic security claim* whereby refugees constitute a socioeconomic threat ("burden") to wealthy host countries.[288]

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[287] See generally UN High Commissioner for Refugees (UNHCR), *2014-2019 Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-seekers and Refugees* (Geneva: UNHCR, 2019); Human Rights First, "Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions" (New York: HRF, January 2018) (reporting asylum-seekers convictions on illegal entry and reentry), online (pdf): *HRF* <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf>.

[288] Gretchen Frazee, "4 Myths about How Immigrants Affect the U.S. Economy" *PBS* (2 November 2018), online: <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy>; David Cameron, "Taking More and More Refugees, Not Answer" *BBC News* (2 September 2015), online: <https://www.bbc.com/news/uk-politics-34130067>; Gill Plimer, "Rising Refugee Flows Test Britain's Housing Resources" *Financial Times* (16 February 2016), online: <https://www.ft.com/content/eacb29b0-d0df-11e5-92a1-c5e23ef99c77>; Diane Francis, "Trudeau's Holier-than-thou Tweet Causes Migrant Crisis–Now He Needs to Fix What He

However, *the economic-burden threat* falls short on its own corollary premise ("too many refugees") because despite the publicized figures (e.g., "Canada resettled more refugees than any other country")[289] and language describing refugees ("influx," "hordes," "waves")[290] conveying the very idea that developed countries are being invaded by these migrants, along with the actual size of current refugee populations living in these countries preclude, in fact, such claim. By the end of 2018, the number of refugees in the United States (313,241), China (312,756), Japan (1,895), United Kingdom (126,720), France (368,352), Italy (189,243), Brazil (11,327) and Canada (114,109), represented only tiny fractions (0.09%, 0.02%, 0.001%, 0.2%, 0.5%, 0.3%, 0.005%, 0.3%, respectively) compared with the population of each and one of these countries (Table 3). What is more, even in the case of Germany—hosting the largest refugee population among the world's wealthiest countries (1,063,837 refugees)—the size of the refugee population represents only 1.2% (Table 3). As it turns out, of the total number of refugee-resettlement claims made worldwide (1.4 million based on UNHCR data),[291] only 92,400 people (6.6%) were granted refugee status (visa).[292] And of these, only 16% were resettled in developed countries.[293] Thus, refugees can barely pose an economic threat to these countries' economy, social services, employment opportunities, or economic development. If anything, in fact, integrated refugees and immigrant populations are known to drive and boost host countries' economic growth.[294]

Started" *Financial Post* (13 July 2018), online: <https://business.financialpost.com/diane-francis/trudeaus-holier-than-thou-tweet-causes-migrant-crisis-now-he-needs-to-fix-what-he-started>.

[289] Paul Chiasson, "Canada Resettled More Refugees than Any Other Country in 2018, UN Says" *The Canadian Press* (20 June 2019), online: *CBS* <https://www.cbc.ca/news/politics/canada-resettled-most-refugees-un-1.5182621>.

[290] See e.g. Jane Onyanga-Omara, "Record Refugee Crisis Hits All Parts of Globe" *USA Today* (91 November 2015), (stating that, "nations worried about the costs of housing migrants and threats from terrorists sneaking across borders amid the hordes of refugees"), online: <https://www.usatoday.com/story/news/world/2015/11/19/migrants/32039203/>; Justin Giovannetti, "Influx of Refugees Fleeing U.S. Is Putting Ottawa to the Test" *The Globe and Mail* (14 April 2017), online: <https://www.theglobeand mail.com/news/national/influx-of-refugees-fleeing-us-are-putting-ottawa-to-the-test/article34087595/>; Neetu Garcha, "Wave of Syrian Refugees Coming to Okanagan" *Globalnews* (19 February 2016), online: <https://globalnews.ca/news/2529476/wave-of-syrian-refugees-coming-to-the-okanagan/>.

[291] *Ibid.*

[292] *Ibid.*

[293] *Ibid.*

[294] See Centre for Global Development, "The Economic and Fiscal Effects of Granting Refugees Formal Labor Market Access" by Michael Clemens et al (Washington, DC: CGD, October 2018) at 7-8 (describing refugees' economic contributions to communities that integrate them), online (pdf): *CGD* <https://www.cgdev.org/sites/default/files/economic-and-fiscal-effects-granting-refugees-formal-labor-market-access-brief.pdf>; Dany Bahar, "Why Accepting Refugees Is a Win-Win Formula" (19 June 2018), online (blog): *BROOKINGS* <https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/>; Daniel Oberhaus, "30 Years of Data Shows Asylum Seekers Are Not an Economic Burden" *VICE News* (20 June 2018), online: <https://www.vice.com/en_us/article/ywejb5/30-years-of-data-shows-asylum-seekers-are-not-an-economic-burden>.

There is a trend, especially among the world's wealthiest countries, promoting the *outsourcing of humanity* fostering the reception of unwelcome refugees and asylum seekers in poor and developing countries either in exchange of financial support or upon the threat of economic sanctions (e.g., EU-Turkey Asylum-seekers Agreement, Italy-Libya U-Turn Agreement, Germany's extraterritorial migratory controls in North Africa, Turkey's proposed 'safe zone' for Syrian refugees in Syria, U.S. temporary expulsion of asylum seekers to Mexico, or U.S. Third-safe-country-*like* agreements with Guatemala, Honduras, and El Salvador).[295]

Despite both the socioeconomic and political challenges many of these countries face and the persistent human rights violations and state of conflict in some of them, data confirm (Table 3) that the largest refugee populations are hosted in poor (Sudan 1,078,287, Uganda 1,165,653, Ethiopia 903,226, Lebanon 946,666, D.R. of Congo 529,061, Chad 451,210, Cameroon 380,329, Yemen 264,369) and developing countries (Turkey 3,681,685, Pakistan 1,404,019, Colombia 1,174,000, Bangladesh 906,645, Iran 979,435, Jordan 715,312). Therefore, it is not only disproportionate to portray refugees as economic burden for developed countries but amoral to advance such claim as some poor and developing countries try to abide to their international law commitments. Even then, refugees can only represent an economic threat to host countries that are either receiving a large number of refugees with reception/seclusion systems (i.e., admitted but not integrated, e.g., Turkey, Bangladesh),[296] or with reception/integration systems but without economic resources to host refugees (e.g., Ethiopia, Libya, Yemen).[297]

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[295] See BBC "Trump Immigration Plans: US Signs Deal to Deport Migrants to Honduras" *BBC News* (26 September 2019), online: <https://www.bbc.com/news/world-us-canada-49834644>; EU Council, *EU-Turkey Statement* (18 March 2016), online: *REFWORLD*: <https://www.refworld.org/docid/5857b3444.html>; Amanda Holpuch, "US Sends Asylum Seekers to Mexico's Border Towns as It Warns Citizens of Violence in Region" *The Guardian* (10 October 2019), online: <https://www.theguardian.com/us-news/2019/oct/10/us-migrants-return-mexico-border-towns-violent-crimes>; Melvyn Ingleby, "Europe's Complicity in Turkey's Syrian-Refugee Crackdown" *The Atlantic* (29 August 2019), online: <https://www.theatlantic.com/international/archive/2019/08/europe-turkey-syria-refugee-crackdown/597013/>; DW, "Italy Approves Military Mission to Curb Migration in Niger, North Africa" *DW* (17 January 2018), online: <https://www.dw.com/en/italy-approves-military-mission-to-curb-migration-in-niger-north-africa/a-42194515>; AFP, "Germany, Netherlands Back Niger Border Force to Counter Migration" *The Local* (1 November 2018), online: <https://www.thelocal.de/20181101/germany-netherlands-back-niger-border-force-to-counter-migration>.

[296] See Refugees International, "Insecure Future: Deportations and Lack of Legal Work for Refugees in Turkey" by Izza Leghtas (Washington, DC: Refugees International, September 2019), online: *RI* <https://www.refugeesinternational.org/reports/2019/9/18/insecure-future-deportations-and-lack-of-legal-work-for-refugees-in-turkey>; Human Rights Watch, "Bangladesh Is Not My Country" (Washington, DC: Human Rights Watch, August 2018), online: *HRW* <https://www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar>.

[297] Danny Glenwright, "In an Orderly Ethiopian Camp, South Sudanese Refugees Face Malnutrition, Trauma" *Toronto Star* (24 March 2019), online: <https://www.thestar.com/news/world/2019/03/24/in-an-orderly-ethiopian-camp-sou

In either case, I submit this problem is attributable to the disproportionate distribution of refugees, in which three countries end up hosting 25% of the refugee population on the planet; that is, Turkey 14.2%, Pakistan 5.4%, Colombia 4.5% (Table 3).[298] This often leads to humanitarian crises and socioeconomic tensions with local populations.[299] Incidentally, despite ever-present challenges (language skills, educational level, late job-market insertion, host country's economic development), the best results resettling refugees so far are to be found in host countries promoting reception-integration (e.g., Canada)[300] or self-reliance-integration systems (e.g., Uganda).[301] Although historical (longitudinal immigration data) and recent reports show significant differentials (employment rates/income) among refugee groups,[302] Canada offers public and private programs (refugee sponsorship program) directed at enabling refugees to be more effectively integrated and eventually become an asset to the Canadian economy and the

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th-sudanese-refugees-face-malnutrition-trauma.html>; Karen McVeigh, "Life-saving: Hundreds of Refugees to Be Evacuated from Libya" *The Guardian* (10 September 2019), online: <https://www.theguardian.com/global-development/2019/sep/10/hundreds-refugees-evacuated-libya-to-rwanda>.

[298] This occurs in the world's three wealthiest countries. First, the US reduced the admissibility cap on refugees to 18,000 people for the fiscal year 2019-2020 (October 2019–September 2020). Next, the number of asylum seekers in China–incidentally, the world's most populated country (Table 3)–is 603 people. Of the 321,756 refugees settled in China by the end of 2018, 300,000 were from Vietnam. Then, Japan, accepting only 42 refugees out of 10,439 applications filed in 2018. See US Presidential Determination on Refugee Admissions for Fiscal Year 2020, *supra* note 38; Shi Jiangtao, "China Willing to Open its Pockets, But Not Borders, to Middle East Refugees" *South China Morning Post* (26 June 2017), online: <https://www.scmp.com/news/china/diplomacy-defence/article/2099908/china-willing-open-its-pockets-not-borders-middle-east>; UN High Commissioner for Refugees (UNHCR), *The People's Republic of China: Fact Sheet* (December 2015), online: *UNHCR* <https://www.unhcr.org/en-us/protection/operations/5000187d9/china-fact-sheet.html>; Sakarai Mesimaki, "The Quiet Desperation of Refugees in Japan" *The Diplomat* (23 August 2019), online: <https://thediplomat.com/2019/08/the-quiet-desperation-of-refugees-in-japan/>.

[299] See e.g. Vali Nasr, "Shadow Government: Don't Let Venezuela's Crisis Take Down Colombia Too" *Foreign Policy* (25 October 2019) (describing increasing tensions in local populations across the Colombian border with Venezuela), online: <https://foreignpolicy.com/2019/10/25/dont-let-venezuelas-crisis-take-down-colombia-too-refugees/>; International Crisis Group, "Turkey's Syrian Refugees: Defusing Metropolitan Tensions" Report No 248 (Brussels: International Crisis Group, January 2018) at 3 (describing rising tensions between Syrian refugees and local communities in Turkey), online: *CRISIS GROUP* <https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/248-turkeys-syrian-refugees-defusing-metropolitan-tensions>.

[300] See Migration Policy Institute (MPI), "The Economic Integration of Refugees in Canada: A Mixed Record?" by Lori Wilkinson & Joseph Garcea (Washington, DC: MPI, April 2017) at 1 (analyzing advantages and disadvantages on the reception-integration system), online: *RELIEFWEB* <https://reliefweb.int/report/canada/economic-integration-refugees-canada-mixed-record>.

[301] See Oxford Department of International Development, "Refugee Economies in Uganda: What Difference Does the Self-Reliance Model Make?" by Alexander Betts et al (Oxford: Oxford Department of International Development, January 2019) at 35-36 (comparing critical advantages in fully integrated and self-reliance model of refugee reception implemented in Uganda vis-à-vis regulatory and assistance models in other African countries), online (data): *UNHCR* <https://data2.unhcr.org/en/documents/download/68402>.

[302] Statistics Canada, *Labour Market Outcomes Among Refugees to Canada*, by Garnett Picot et al (11 March 2019) at 6, online: *GOVERNMENT OF CANADA* <https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019007-eng.pdf?st=zwZVb7-0>; Sarah Deardorff Miller, "Assessing the Impacts of Hosting Refugees" World Refugee Council Paper No 4 (August 2018) at 1-3.

communities that resettle them.[303] Uganda—hosting the largest refugee population in Africa—offers refugees education, health care, the possibility to move freely, and a parcel of land to work and live in. Despite economic challenges (funding, environmental impact, resources), the system has replicated in the country's economic growth.[304]

The size of refugee populations in developed countries raises a defining premise ("in fact, not that many") that precludes the corollary depiction ("too many, too different") of refugees as *cultural identity threats*. First, the previously cited figures on resettled refugees and asylum seekers in developed countries clearly indicate they could barely make enough difference as to influence—much less destroy—the language, traditions, religion or culture of these host nations (e.g., the 718,994 asylum seekers in the U.S. affecting the national identity of approximately 330 million Americans, 29,040 asylum seekers in Japan threatening the traditions of more than 126 million Japanese, 603 asylum seekers changing the cultural identity of nearly 1,400 million Chinese, or 78,808 asylum seekers destroying the values and culture of 37 million Canadians).

Second, the portrayal of refugees as *cultural identity threat* assumes that refugees are not just "too many" but intrinsically a commonly related group (minority) representing a threat to the host country's dominant population. Yet data show that refugees in developed countries neither come from the same country nor speak the same language or even profess the same religion. Such depiction is so disingenuous that even if we concede there are "too many" refugees in these countries (based on data, they are not), refugees would represent a threat not merely to the host country's culture but to themselves because they come from different cultures too.

Third, aside from the hypocritical contention and rising proclivities toward xenophobia, anti-Semitism, nationalism, and populism promoting the necessary preservation of an arguably pre-existing "uniform society" in exclusion to others, while proclaiming the value of a diverse one

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[303] See Audrey Macklin, "Resettler Society: Private Refugee Sponsorship and Citizenship" Centre for Ethics University of Toronto (17 January 2018), online (video): *YOUTUBE/Ethics@Noon* <https://www.youtube.com/watch?v=iyzq0uiUTjY>.
[304] Tessa Coggio, "Can Uganda's Breakthrough Refugee-Hosting Model Be Sustained?" *Migration Policy* (October 2018), online: <https://www.migrationpolicy.org/article/can-ugandas-breakthrough-refugee-hosting-model-be-sustained>.

encompasses, in itself, either a fatal assumption or an insurmountable contradiction. Namely, host countries are uniform yet diverse societies and, as such, cannot survive the challenges of dealing with the differences (language, race, religion, traditions) refugees bring. In truth, however, refugees are not just now arriving to these countries; they have been doing it long before anyone reading these lines was even born. As such, I argue, migrants are already part of the alleged "society" believed to be at risk. In many ways, migrants have become part of the history and strength of the nations that nowadays reject them; migrants have defended the countries that once welcomed them in wars and may nowadays be found in government, the judiciary, the media, education and technology sectors; migrants are already embedded in the food, music, language and social interactions among and within the alleged "uniform culture"; migrants, in a nutshell, are "us" and many of us, in fact, are "them." I therefore wonder: when refugees are presented as *cultural identity threat*, who does this proposition truly reject: "them" or "us"?

Consider the case of Canada. Data on resettled refugees in this country show that 76% of refugees are widely eager to learn one of the official languages to get access to employment and provide for their families and their future.[305] Data further reveal that cultural assimilation to Canadian languages and culture is among refugees' paramount interests as those who take more time to learn the language and adapt to their local communities see both educational and income access opportunities delayed for years.[306] Official reports indicate that 93% of immigrants in this country have knowledge of English or French, along with a "strong sense of belonging to Canada."[307] If there is a country in the world where the reception of refugees conveys the aspirational achievement of an increasingly diverse and multicultural society, that country is Canada. In fact, based on last census data (Figure 5), 1 in 5 people living in Canada (21.9%) are immigrants.[308] While religious tensions are notorious within local populations (e.g., legal restrictions on civil servants wearing religious symbols at work in Quebec),[309] there is a declining trend on the

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[305] *Ibid* at 3.
[306] *Ibid.*
[307] Canada Ministry of Immigration, Refugees and Citizenship, *2018 Annual Report to Parliament on Immigration* (Ottawa: Immigration Canada, 2018) at 3, online (pdf): *GOVERNMENT OF CANADA* <https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2018.pdf>.
[308] Eric Grenier, "21.9% of Canadians Are Immigrants, the Highest Share in 85 Years: StatsCan" *CBC News* (25 October 2017), online:<https://www.cbc.ca/news/politics/census-2016-immigration-1.4368970>.
[309] See BBC, "Quebec Passes Religious Symbols Secularism Bill" *BBC News* (17 June 2019), online: <https://www.bbc.com/news/world-us-canada-48477086>.

country's religious majority (Christians), along with a net increase in the number of Canadians religiously unaffiliated;[310] a trend followed by immigrants who either declare themselves non-religious or convert to the already established religious groups and minorities in Canada.[311]

Still, refugees and asylum seekers bear an inherent obligation to respect the cultures and identities of the country that host them. As mentioned in Section I, host countries have an indisputable *legal and constitutional right* to protect their national identity (languages, cultures, traditions, symbols) as a foreseeable expression of their sovereignty and self-determination rights. Such premise is recognized by international refugee law as well. Host countries have exclusive jurisdiction to reject or expulse from their territory those who threaten their national security interests.

The right to preserve a nation's identity does not extend to the right to obliterate other nations, cultures, or people's identities. International relations theory and law, in fact, hinge on this very premise. This means that when a country systematically excludes a particular type of migrants based on their race, ethnicity, language, national origin or religion, that country is not exercising an indisputable right to protect its own but a quite disputable attribution to exclude or deprive others of their human dignity after being persecuted by—arguably, one expects—a less civilized actor. It would be then hypocritical to hold refugees as a *cultural identity threat* to developed countries but not to the poor and developing ones hosting them by millions; unless one assumes such countries have no language or culture worth to be protected.

Conversely, even though refugees do not represent a security, economic, or even cultural identity threat to developed host countries, the detention and exclusion of refugees and asylum seekers in poor and developing countries can give rise to socioeconomic tensions with local populations hosting a rather disproportionate number of refugees. This often is due to the host-country's limited economic resources, on the one hand, and the reception model (received but not integrated), on the other. This finding is replicated in major refugee populations across the world. For example,

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[310] Michael Lipka, "5 Facts About Religion in Canada" (1 July 2019), online: *PEW* <https://www.pewresearch.org/fact-tank/2019/07/01/5-facts-about-religion-in-canada/>.
[311] See P F & Erasmus, "New Canadians Are Injecting Vigour into the Country's Religious Life" *The Economist* (25 July 2018), online: <https://www.economist.com/erasmus/2018/07/25/new-canadians-are-injecting-vigour-into-the-countrys-religious-life>.

Venezuelan refugees in Colombia—hosting the largest refugee population in America (1,174,000 refugees, Table 3)—have gradually outnumbered the population and economic resources in the border city of Cúcuta. Economic (local unemployment) and social (migrant prostitution) tensions have developed between Venezuelans and Colombians notwithstanding similar cultural references (language, religion).[312] This is also the case of Syrian refugees in Turkey (3.6 million), where notwithstanding governmental initiatives (housing, social services, work permits), there is a growing concern among local populations over unemployment in general and low-skill employment competition in particular.[313] Similarly, macroeconomic impacts on prices, wages, and poverty have been reported along the Teknaf-Cox's Bazar highway (region) in Bangladesh—hosting the largest refugee population in Asia (906,645 refugees, Table 3)—where Rohingya refugees are mostly located.[314] In Uganda—hosting the largest refugee population in Africa (1,165,653 refugees, Table 3)—social tensions have been reported as well.[315]

I maintain these tensions ensue from a problem of *proportionality*, not security. These findings contradict current legal (regulations) and public-policy determinations (U-Turn policies and extraterritorial immigration controls). These findings show a factual disconnect between the contended threats refugee populations pose (security, economic burden, cultural identity) and the legal restrictions imposed through national security and immigration law over refugee populations in developed countries (detention, rejection, expulsion, exclusion). Hence, facts being the critical event (element) of legal reasoning—including decision-making process on allegedly competing or even conflicting interests (e.g., host-countries' protection versus refugee protection)—current legal restrictions leading to human rights and refugee rights violations are indefensible under the very premises that gave rise both to national security law (*objective and subjective valuations*) and international refugee law (*principles and protections*).

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[312] See World Bank, "Migración desde Venezuela a Colombia" (Washington, DC: World Bank, 2018) at 73-90 (describing institutional, social and economic tensions between Venezuelan refugees and Colombians), online: *WB* <http://documents.worldbank.org/curated/en/911381540835286885/Migración-desde-Venezuela-a-Colombia>.
[313] IOM Turkey, ""MCOF: Migration Crisis Operational Framework 2018-2019" (Ankara: International Organization for Migration, 2018), online (pdf): *IOM* <https://www.iom.int/sites/default/files/our_work/DOE/MCOF/mcof-turkey-2018-2019.pdf>.
[314] UN Development Program, *Impacts of the Rohingya Refugee Influx on Host Communities* (November 2018) at 71-75 (providing quantitative-qualitative data on macroeconomic impacts), online: *RELIEFWEB* <https://reliefweb.int/report/bangladesh/impacts-rohingya-refugee-influx-host-communities>.
[315] Coggio, *supra* note 304 at 3.

B. Emerging Threats

There is a set of emerging and, quite often, underestimated (or neglected) national and international security threats capable of deterring not only the national security of host countries, but the most basic human rights of migrant and refugee populations around the world.

1. Domestic Terrorism and Self-Radicalization

The inconsistency of a rather theoretical contention describing refugees as national security threat arising out of the interplay between international terrorism (jihadist related attacks) and immigration[316] is debunked not only by the number of refugees (actually) engaging in terrorist attacks in host countries (Table 2), but also by sociopolitical mechanisms nowadays used (self-radicalization, empowered extremist ideologies, fear and hate narratives).[317] This is further accentuated by the dramatic decrease in the number of jihadist terrorism-related attacks in recent years (showing a fall of 75% in Europe and 27% worldwide)[318] vis-à-vis the exponential increase of domestic terrorism in North America,[319] Europe,[320] New Zealand,[321] and Australia[322] (Table 4). In fact, only 4 terrorists are known to have used the asylum legal system (Paris attacks).[323]

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[316] See e.g. Centre for Migration Studies, "Treating Syrian Refugees as a National Security Threat: Do the Means Fit the End?" by Donald Kerwin (2016), online: <https://cmsny.org/publications/kerwin-syrians-national-security/>; UN High Commissioner for Refugees (UNHCR), *Refugees, Migrants Branded 'Threats', Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity,* Dialogue with the UN High Commissioner for Refugees, Filippo Grandi, GA 3rd Committee, 73rd Sess, 41st Meeting, GA/SHC/4247 (31 October 2018), online: *UN* <https://www.un.org/press/en/2017/gashc4247.doc.htm>.

[317] Radicalization understood as the process of "developing extremist beliefs, emotions, and behaviors" contradicting social and human rights values. See Simona Trip et al, "Psychological Mechanism Involved in Radicalization and Extremism: A Rational Emotive Behavioral Conceptualization" (2019) 10:437 Front Psych 1-8.

[318] As reported in the Global Terrorism Index (GTI) for the year 2016-2017. This following a trend of global decrease in the last three years. See IEP Global Terrorism, *supra* note 266 at 2.

[319] *Ibid.*

[320] *Ibid.*

[321] Soufan Center, "White Supremacy Extremism: The Transitional Rise of the Violent White Supremacist Movement" (New York: Soufan Center, September 2019) at 26 (analyzing Christian church attack in New Zealand), online (pdf): *SOUFAN CENTER* <https://thesoufancenter.org/wp-content/uploads/2019/09/Report-by-The-Soufan-Center-White-Supremacy-Extremism-The-Transnational-Rise-of-The-Violent-White-Supremacist-Movement.pdf>.

[322] Jade Hutchinson, "Violent Extremism and Far-Right Radicalism in Australia: A Psychological Perspective" (2017) 9:11 Counter Terrorist Trends and Analyses 16 at 17 (describing Muslim communities' experiences).

[323] Anthony Faiola & Souad Mekhennet, "Tracing the Path of Four Terrorists Sent to Europe by the Islamic State" *Washington Post* (22 April 2016), online: <https://www.washingtonpost.com/world/national-security/how-euro pes-migrant-crisis-became-an-opportunity-for-isis/2016/04/21/ec8a7231-062d-4185-bb27-cc7295d35415_story.html>.

In truth, terrorists nowadays require no visa or immigration status to perpetuate terrorist attacks. All they need is an internet connection preceded by a profound and often unnoticeable social disconnection.[324] Studies indicate that terrorist organizations around the world have developed social media infrastructure (presence, propaganda, diversified platforms)[325] directed at reaching host countries' populations regardless of the race, national origin, or immigration status.

These increasingly common paths of radicalization (self and online-radicalization)[326] are leading to an emerging yet far-more dangerous national security threat: *domestic terrorism*. The latter is defined as violent criminal acts emerging from domestic influences driven by political, religious or racially motivated views as well as by anti-government and sexual-orientation/gender rejection ideologies directed at intimidating the public or a particular minority group.[327] The risk is indisputable. Domestic terrorists are already living in the countries and communities they attack. Since the large majority are born citizens, authorities cannot use similar systems (immigration) to ID and profile eventual attackers. Unlike refugees and most asylum seekers, domestic terrorists inspired by extremist ideologies are often entitled to plain constitutional rights, which preclude authorities from exercising the same type of controls that apply to migrants fleeing persecution (long vetting processes, detention and, if any, diluted constitutional rights).

Some countries face gaps (adequate legal framework) to fight domestic terrorism, starting with its legal definition. In practice, most countries are forced to prosecute terrorists under hate-related

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[324] Weiyi Cai & Simone Landon, "Attacks by White Extremists Are Growing. So Are Their Connections" *The New York Times* (3 April 2019) (analyzing white extremist groups reach in North America, Europe, and Oceania), online: <https://www.nytimes.com/interactive/2019/04/03/world/white-extremist-terrorism-christchurch.html>.

[325] See generally Imran Awan, "Cyber-Extremism: Isis and the Power of Social Media" (2017) 54:2 Soc'y 138.

[326] This form of self-radicalization is viewed as "violence catalyzer." Studies show self-radicalization (including online-radicalization) being used both by jihadist terrorists and by extremist groups. See International Centre for the Study of Radicalization, "Research Perspectives on Online Radicalization: A Literature Review 2006-2016" by Alexander Meleagrou-Hitchens & Nick Kaderbhai (London: ICSR, 2017) at 6, online (pdf): *ICSR* <https://icsr.info/wp-content/uploads/2017/05/ICSR-Paper_Research-Perspectives-on-Online-Radicalisation-A-Literature-Review-2006-2016.pdf>; Brennan Center for Justice, "Rethinking Radicalization" by Faiza Patel (New York: Brennan Center, 2011) at 9 (indicating modern terrorism is not necessarily religious), online (pdf): *NYU* <https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf>.

[327] See US Federal Bureau of Investigations (FBI), *Terrorism Definitions* (2019), online: *FBI* <https://www.fbi.gov/investigate/terrorism>; Public Safety Canada, *2018 Public Report on the Terrorist Threat to Canada* (Ottawa: Public Safety Canada, April 2019) at 6, online (pdf): *GOVERNMENT OF CANADA* <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cn d-2018-en.pdf>.

crimes[328] despite the emergence of two separated yet increasingly intertwined global phenomena: *extremism* and *populism*. While I do elaborate on the resulting product (radical-populism) of this event in Chapter 3 (Section II), suffice it to say now that the rise of extremist groups alters the perception/conceptualization of terrorism and, in the process, the protection of refugees.

2. Enhanced Discrimination and Selective Diversity

Though not objectively (actual and probability data) and subjectively supported (multicultural populations, history of migration, economic resources, assimilation), fear and hate narratives promoted by extremist groups, government officials, and political leaders have increased expressions of xenophobia, racial discrimination and violence against refugees in the United States,[329] Australia,[330] Hungary,[331] Poland,[332] Germany,[333] Italy,[334] Mexico,[335] Panama,[336] Peru,[337] and South Africa.[338]

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[328] While the term "domestic terrorism" is broadly defined ("acts dangerous to human life") in the *USA Patriot Act of 2001* (18 USC Ch 113B), there is no federal crime on terrorist acts initiated or taking place inside the US.

[329] See World Refugee Council, "Xenophobia toward Refugees and Other Forced Migrants" by Sarah Deardorff Miller, Research paper No 5 (September 2018) at 5, online (pdf): *RELIEFWEB* <https://reliefweb.int/sites/reliefweb.int/files/resources/WRC%20Research%20Paper%20no.5.pdf>.

[330] *Ibid.*

[331] See Elżbieta M Goździak, "Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary Built on Cultural Diversity" *Migration Policy* (10 October 2019), online: <https://www.migrationpolicy.org/article/orban-reshapes-migration-policy-hungary>.

[332] European Institute for Public Affairs, "The Wages of Fear: Attitudes Toward Refugees and Migrants in Poland" by Beata Laciak & Justyna Seges Frelak (Maastricht: European Institute for Public Affairs, 2016).

[333] See BBC "Germany Hate Crime: Nearly 10 Attacks a Day on Migrants in 2016" *BBC News* (16 February 2017), online: <https://www.bbc.com/news/world-europe-39096833>.

[334] See Jon Sharman, "UN Condemns Italy's 'Unashamed Racism and Xenophobia' in Human Rights Statement" *The Independent* (21 November 2018), online: <https://www.independent.co.uk/news/italy-immigration-rules-security-decree-matteo-salvini-un-human-rights-migrants-asylum-a8645161.html>.

[335] Darin Graham, "Migrant Caravan Ignites 'Xenophobia' in Tijuana as Protesters Shout Get Out!'" *Euronews* (19 November 2018), online: <https://www.euronews.com/2018/11/19/migrant-caravan-ignites-xenophobia-in-tijuana-as-protesters-shout-get-out>.

[336] Ezra Fieser & Matthew Bristow, "In Panama, Xenophobia 'Is Constant' for Refugees from Venezuela" *Post-Gazette* (6 March 2018), online: <https://www.post-gazette.com/news/world/2018/03/06/In-Panama-xenophobia-is-constant-for-refugees-from-Venezuela/stories/201803050213>.

[337] Associate Press, "In Latin America, Fears of Rising Discrimination, Xenophobia against Venezuelan Migrants" *NBC News* (18 October 2019), online: <https://www.nbcnews.com/news/latino/latin-america-fears-rising-discrimination-xenophobia-against-venezuelan-migrants-n1068536>.

[338] See Amnesty International, "South Africa: Anti-foreigner Attacks Have Been Stoked by Years of Rhetoric and Inaction" *AI News* (4 September 2019), online: <https://www.amnesty.org.uk/press-releases/south-africa-anti-foreigner-attacks-have-been-stoked-years-rhetoric-and-inaction>.

The transcending proposition of the **Final Refugee Paradigm** promoting the rejection of asylum seekers and refugees[339] does not only suggest a conflicting *moral* and *legal choice* but an unsurmountable contradiction with respect to international and constitutional law. On the one hand, the legal protection afforded by international law to refugees and asylum seekers derives from the corollary premises upheld by international human rights law proscribing all forms of discrimination based on the race (*International Convention on the Elimination of All Forms of Racial Discrimination*),[340] religion (*Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights ICCPR*, *1981 UN Declaration*),[341] ethnicity and nationality (*Inter-American Convention Against Racism*, *Racial Discrimination and Related Forms of Intolerance*)[342] as well as political opinion (*UDHR*, *ICCPR*, *and International Covenant on Economic, Social and Cultural Rights*)[343] and membership in a particular social group.[344]

On the other hand, as illustrated in this Chapter, current national security and immigration law consider refugees as foreign security threats, which determination is often based, precisely, on the very same grounds of legal protection international human rights afford: race (e.g., Hispanics, Africans),[345] religion (e.g., non-Christian refugees),[346] ethnicity (e.g., Muslims, Mexicans),[347]

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[339] See e.g. US President Donald J Trump, Executive Order 13769: *Protecting the Nation against Foreign Terrorist Entry into the United States,* 27 January 2017, 82 FR 8977 (1 February 2017), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.

[340] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 1 (entered into force on 4 January 1969).

[341] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Res 217 A (III) (1948), art 18 ["UDHR"]; ICCPR, *supra* note 56, art 18(1), (3).

[342] *Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance*, Organization of American States, 5 June 2013, A-68, 43rd Sess, art 1 at para 2 (entered into force on 11 November 2017), (indicating that, "Racial discrimination may be based on race, color, lineage, or national or ethnic origin").

[343] UDHR, *supra* note 341, art 19; ICCPR, *supra* note 56, art 19 at paras 1, 2, 3; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 1 at para 1, 2 at para 2 (entered into force 3 January 1976).

[344] Refugee Convention, *supra* note 55, art 33(1).

[345] Following President Trump's remarks on migrants from El Salvador and Haiti, the US ended temporary legal protection known as DACA and TPS. See Eli Watkins & Abby Phillip, "Trump Decries Immigrants from 'Shithole Countries' Coming to US" *CNN* (12 January 2018), online: <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html>; Jose Mauricio Gaona, "DACA and TPS" (15 January 2018), online (blog): *MCGILL EXPERTS* <https://www.mcgill.ca/newsroom/channels/news/experts-daca-and-tps-283863>.

[346] See Jan Cienski, "Why Poland Doesn't Want Refugees" *Politico* (21 May 2017), online: <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/>.

[347] Presidential Executive Order 13769, *supra* note 339; US Homeland Security Secretary, *Memorandum for Implementation of Migrant Protection Protocols* (25 January 2019) (regulating the temporary return of asylum seekers from the US to Mexico), online: *DHS* <https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf>.

national origin (e.g., refugees from Yemen, Iran, Syria, El Salvador, Honduras, Guatemala).[348] *Constitutional law*, moreover, does not only envision the ultimate realization of individual constitutional rights (e.g., freedom of religion under either the *U.S. Bill of Rights* or the *Canadian Charter of Freedoms and Rights*)[349] but also the constitutional protection of minorities based on their distinguishable characteristics that subject them to a history of discrimination that constitutional law aims to redress (judicial review on State action).

Diversity becomes an aspirational constitutional value whose legal importance is protected by negative (discriminatory restrictions) and positive (affirmative action) constitutional provisions. This means that a government that promotes the legal protection of a majority in exclusion of any other minority is violating both *constitutional* and *international law*. Therefore, it is incompatible with international and constitutional values that promote diversity and human dignity to portray refugees from certain religion, culture, nationality or race as cultural identity threats when such races, religions or ethnicities correspond to those of minorities living under the constitutional safeguard of the government enforcing such discrimination; unless, otherwise, national security fosters *selective diversity* (migrants of certain race or country). The ultimate ascension of a *uniform society* presupposes the gradual yet systematic extinction of a diverse one. *Diversity* is therefore threatened through the regressive disarticulation of minority rights (individual and collective, e.g., human dignity)[350] and the legal exclusion of its potential members (immigration controls).

CONCLUSION

Anthropological, historical and legal distinctions on security and immigration support the primary choice of national security over refugee protection. Both national security law (as a rule) and

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[348] David Smith, "Trump Grants Troops Guarding Border Authority to Use 'Lethal Force'–Report" *The Guardian* (21 November 2018), online: <https://www.theguardian.com/us-news/2018/nov/21/trump-us-mexico-border-troops-decision-memorandum-force-report>.

[349] *United States Bill of Rights*, First Amendment (ratified on 15 December 1791; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 *being Schedule B to the Canada Act 1982* (UK), s 2(a) (assented to 29 March 1982).

[350] The very dichotomy of the civil rights movement (minority v majority rights) lies in the eventual assertion of people being included, respected and valued for their own individuality rather than excluded due to their membership in a group different (diverse) from the ruling majority. See Afroze Eqbal, *The Protection of Minorities and Human Rights* (New Delhi: Innovative Imprint, 2018) at 43 (describing core connections between civil and minority rights).

international refugee law (as an exception) acknowledge the preeminence of national security over refugee protection. The very emergence of nation-states—and, in the process, national security—is informed by principles of sovereignty and self-determination whereby countries hold a constitutional and international legal obligation to protect their territories, population, and strategic interests.

While critical events in the 20th century reaffirm nation-states' duties toward their citizens, some equally distinguishable events gave rise to individual and human rights as well as refugee protections. Still, subsequent events in the 20th and the 21st centuries, along with a political internalization of the often presented as competing interests (refugees v. host countries' protection) have led to different trends of legal protection of refugees (*postwar, modern and final refugee paradigms*) showing not only various choices but gradually, a regressive protection.

Sociopolitical claims with enduring legal effects (inapplicability of human rights and refugee law at domestic level) describing refugees as security, economic, and cultural identity threats to host countries are mostly unfounded. Although socioeconomic and cultural tensions may occur in countries where the size of the hosted refugee population appears not merely disproportionate but inexorably excluded, an indisputable finding (factual-mathematical) shows lack of proportionality in the share of the world's refugee population and the cruelty of immigration and national-security law restrictions on refugees and asylum seekers. This lack of proportionality, not the contented threats ("too many," "too dangerous," "too expensive," "too different"), is what poses the greatest security threat both for refugees and for host countries as it misrepresents the security threats, while neglecting emerging ones (self-radicalization, discrimination).

Hence, an integral, proportional, and gradual reception of refugees—as opposed to a secluded, disproportionate, and sudden reception—appears more realistic and humane. I argue that the use of probability data and the legal *principle of proportionality* would help national security regain contact with its most quintessential factor of rationalisation: *the facts* (subjective and objective valuations). The security choice (national security "trumps" refugee protection) is not supported by facts, appearing increasingly in conflict with constitutional and international legal references (values, principles) societies claim to protect: Equality, liberty, diversity, human dignity.

Chapter 2
Reception and Protection of Refugees

INTRODUCTION

International refugee law is falling into desuetude. Its domestic application (legal protection) is becoming, at best, residual (if not, exceptional) and, at worst, inoperant. Moreover, basic human rights (human dignity, liberty, equality, due process) and even the most fundamental legal protections otherwise accorded under international humanitarian law to prisoners of war (food, water, sanitation, shelter, medical attention)[1] are not being granted to all refugees and asylum seekers around the world.[2]

Images portraying the treatment of refugees and asylum seekers in the 21st century speak volumes: children in cages, toddlers being taken away from their parents' arms (including children with disabilities),[3] asylum seekers' property being confiscated,[4] prolonged detention in the 'free world', and thousands of refugees dying during their journey for safety as millions of asylum seekers being exposed to migrant smugglers, human traffickers, labour exploitation, drug cartels, overcrowding facilities, high temperatures, sleep deprivation, sexual abuse, violence, and dire humanitarian conditions.[5]

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[1] See International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

[2] See Human Rights Watch, "World Report 2019: Events of 2018" (Washington, DC: Human Rights Watch, 2019) at 46 as well as at 97, 127, 231, 353, 362, 368, 397, 526, 552, 579, 625, 627 (describing the mistreatment and violence against asylum seekers and refugees in Australia, CAR, Greece, Lebanon, Libya, Malaysia, Mexico, South Africa, Sudan, Thailand, the United States, respectively), online (pdf): *HRW* <https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf> ["HRW 2019"]. See also Lauren Aratani, "Fears for US-Detained Asylum Seekers as Hunger Strike Enters Fourth Month" *The Guardian* (4 February 2020) (reporting asylum seekers' depravations at ICE federal detention centres in the US), online: <https://www.theguardian.com/us-news/2020/jan/30/asylum-seekers-hunger-strike-louisiana-ice-detention>.

[3] See HRW 2019, *ibid* at 625.

[4] See Harriet Agerholm, "Denmark Uses Controversial 'Jewelry Law' to Seize Assets from Refugees for First Time" *The Independent* (1 July 2016), online: <https://www.independent.co.uk/news/world/europe/denmark-jewellery-law-migrants-refugees-asylum-seekers-unhcr-united-nations-a7113056.html>.

[5] See Doctors Without Borders, "Asylum Seekers Strained and Exposed to Violence in Mexico" *DWB News* (18 October 2019), online:<https://www.doctorswithoutborders.org/what-we-do/news-stories/story/asylum-seekers-stranded-and-exposed-violence-mexico>; Dianne Solis, "In Mexico, Kidnappings and Misery for Asylum-Seekers Waiting in Camps for a Shot at Life in the US" *Dallas News* (21 December 2019), online: <https://www.dallasnews.com/news/immigration/2019/12/21/in-mexico-kidnappings-and-misery-for-asylum-seekers-waiting-in-camps-for-a-shot-at-life-in-the-us/>; Human Rights Watch, "US: Mexican Asylum Seekers Ordered to Wait" *HRW News* (23 December 2019), online:<https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait>; UNHCR, "Amid Rising Xenophobic Attacks in South Africa, UNHCR Ramps Up Aid for Refugees, Calls Urgent Action" *UNHCR*

This chapter advances a critique on the legal reception (models of reception) and treatment of refugees and asylum seekers in the 21st century. The chapter argues that *international refugee law* protections (non-discrimination, non-refoulement, non-penalization, access to courts, wage-earning employment, housing, education, freedom of movement) are not only being violated but dismantled both at domestic and at regional levels. As a result, refugees and asylum seekers are no longer being received and treated as victims of persecution and conflict, but as suspects subject to prosecutorial treatment (prolonged detention, confinement, expulsion, deportation) and exclusion (legal, political, economic, social).

The core question of this chapter is this: Will the current models of reception and treatment of refugees end their international legal protection? It is the contention of this chapter that neither national security interests nor law (domestic or international) can be genuinely used as attributable reference to justify the risks, cruelty, and human suffering fostered through domestic and regional regulations and policies—especially considering the dehumanization of refugees and the increasingly common practice of systematic and diplomatic rejection of asylum seekers (another's problem-*like* agreements, e.g., safe third country agreements, asylum bans, U-turn agreements). In truth, a sequence of legal and political decision-making processes, regulations, and immigration policies have led (at least, in practice) to the seemingly inconspicuous disarticulation of core principles (humanitarian protection, non-discrimination, non-refoulement) and moral-legal values (human dignity, equality, liberty) informing *international refugee law*. Further, the international legal system designed to protect victims of persecution and conflict in the 20th century has failed—notwithstanding both its domestic internalization in more than 140 countries and its international assertion (via treaty and customary international law)—vis-à-vis refugee crises erupting all over the world (Syria, Afghanistan, Yemen, South Sudan, Sudan, Somalia, Eritrea, CAR, Myanmar, Venezuela, El Salvador, Honduras, Guatemala, Mexico).[6]

News (20 September 2019), online: <https://www.unhcr.org/en-us/news/briefing/2019/9/5d848f694/amid-rising-xenophobic-attacks-south-africa-unhcr-ramps-aid-refugees-calls.html>.

[6] See UN High Commissioner for Refugees (UNHCR), *Global Appeal 2020-2021* (Geneva: UNHCR, 2020) at 13 online (pdf): *UNHCR* <reporting.unhcr.org/sites/default/files/ga2020/pdf/Global_Appeal_2020_full_lowres.pdf>; Suleiman Momodu, "Africa Most Affected by Refugee Crisis" *Africa Renewal* (December 2016–March 2017), online: *UN* <https://www.un.org/africarenewal/magazine/december-2016-march-2017/africa-most-affected-refugee-crisis>.

The regressive protection of refugees and asylum seekers as well as the gradual dismantling of *international refugee law* find a threefold pattern. First, host countries are gradually adopting legal restrictions and policies (going from administrative reception to "crimmigration")[7] aimed at deterring refugees and asylum seekers from even considering lodging a protection claims in their intended "host country," making this regressive form of protection a threat to the very safety and integral security of refugee populations all over the world.

Second, the rather traditional systems of reception of refugees and asylum seekers promoting their legal protection (host country's direct reception and third country's temporary reception) are being transformed through these policies into aggressive systems of reception-removal ("apply and leave system") fostering instead their legal rejection and social exclusion.

Third, traditional (showing a historic record hosting refugees, e.g., United States, Canada, France, United Kingdom, Australia, Argentina), incidental (responding to regional refugee crises, e.g., Germany, Turkey, South Africa, Mexico, Brazil, Chile), and contingent host countries (where reception of refugees is rather exceptional, e.g., China, Japan, South Korea, United Emirates Arab) are reducing their refugee intake-cap—promoting thereby the refoulement of refugees, while leading poor and developing countries to host the largest number of refugees.

The once thought to be legal and humane treatment of refugees is becoming a historical reference. Not merely the current rhetoric used by leaders and politicians in host countries, but also the domestic policies and regulations in these countries concerning the treatment of refugees do, in effect, cast doubt on the humanity, morality, and legality of "refugee protection."

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[7] Throughout this Chapter, I use the term "crimmigration" to refer to the public policy trend of criminalizing immigration in general and the undocumented entry of asylum seekers in particular (e.g. Hungary, United States, Turkey). This term, however, must be distinguished from the emerging research field known as "crimmigration law," which concerns a gradual intersection between criminal and immigration law at domestic level. See generally César Cuauhtémoc García Hernández, *Crimmigration Law* (Chicago: ABA, 2015); Office of the UN High Commissioner for Human Rights (OHCHR), *Statement of the United Nations Special Rapporteur on the Human Rights of Migrants* (Felipe González Morales) (Budapest: OHCHR, 17 July 2019) (denouncing the criminalisation of humanitarian assistance to asylum seekers), online: *OHCHR* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>; HRW 2019, *supra* note 2 at 625 (describing US policy criminalizing asylum-seekers parents entering the United States with children).

I divide this chapter in two parts, half normative (reception), half doctrinal (treatment). Part I analyzes the domestic yet regressive legal protection of refugees by decoding traditional models of reception across the world which appear increasingly residual due to the gradual dismantling of international refugee law at domestic and regional levels. Part II exposes the treatment refugees and asylum seekers encounter today, while analyzing current legal treatment and emerging models of reception of refugees (*putative reception*).

I. RELOCATION

Since its inception, the reception of refugees embodies the moral fabric and legal nature of *international refugee law*, in that it allows forced migrants not merely to lodge a protection claim in a host country (system) but also eventually to become members of the society that protect them. Hence, whether refugees are completely (legal-reception and social-assimilation paths) or partially accepted (either under temporal reception or legal reception without social assimilation) depends on the applicable model of reception. Recently developed legal systems and reception models can go as far as to deny—despite claimants' *objective* (credible persecution) and *subjective* (well-founded fear) accounts—any form of protection, while procuring instead their legal rejection (prosecution, refoulement, expulsion) and, as a result, their legal and social exclusion.

The dynamics of forced migration (as global phenomenon) and refugee (figures, types, root-causes, trends) in the last century have led to political, social, economic, and even racial tensions across the world (chapter 1) resulting in two traditional (resettlement and direct reception) and one novel model of reception (putative reception).

All sources considered (jurisprudence, doctrine, international law, see thesis introduction), refugees are individuals who have been forced to flee their home country due to a credible well-founded fear of persecution based on their race, ethnicity, nationality, religion, political opinion, gender, sexual orientation or membership in a particular social group subject to the established persecution or similar form of conflict that precludes their willful and safe return (civil war,

famine, natural disasters, overspread non-state violence).[8] In this context, the relocation of refugees is effectuated either through *transitional settlements*—as distinct from simply temporary ones[9]—or *resettlements*. Although *relocation* is the most common form of reception of refugees, *transitional settlements* in its various forms (refugee camps, safe haven territories, unofficial settlements) are the rule whereas resettlement is the exception.

A. Transitional Settlements

Otherwise referred as "temporary settlements" (rural, urban, formal, informal settlements, emergency shelters),[10] *transitional settlements* are designated territories within the country of conflict (for internally displaced persons IDPs) or in another country (for refugees) used to relocate forced migrants during a certain period of time, an humanitarian emergency, or while their migratory situation and immigration status is determined. Yet considering the realm of our study ("refugee protection"), the *transitional settlements* to which this chapter refer are those located outside the country of conflict or persecution from where migrants have fled. In this context, there are three types of transitional settlements: *refugee camps*, *safe haven territories*, and unregulated or *unofficial transitional settlements*.

Whether refugees and asylum seekers procure for themselves a unofficial settlement while waiting for either a refugee visa or asylum claim to be granted, the situation of their home country to change, for an opportunity to settle in the country of refuge, or for assistance to resettle to another country (e.g., UNHCR's resettlement programs), transitional settlements of refugees are the norm.

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[8] UNHCR recognizes the likelihood of refugee status over natural disasters provided these are related to other form of conflict from which the former emerges ("nexus dynamics"). See UN High Commissioner for Refugees (UNHCR), *Climate Change and Disaster Displacement* (Geneva: UNHCR, 2020), online: *UNHCR* <https://www.unhcr.org/en-us/climate-change-and-disasters.html>; Marie McAuliffe et al, "Migration and Migrants: A Global Overview" in Marie McAuliffe & Binod Khadria, eds, *World Migration Report 2020* (Washington, DC: MPI, 2019) at 45.

[9] Transitional settlements last longer than days or a few weeks. Many refugees use them for months or even years. See UN High Commissioner for Refugees (UNHCR), *Global Strategy for Settlement and Shelter 2014-2018* (2019).

[10] *Ibid* at 16, 22. Under its mandate ("reduce refugees' vulnerabilities, facilitate camp management, and increase self-reliance opportunities"), UNHCR considers various types of temporary settlements: namely, rural (promoting agricultural activities), urban (under zoning regulations), informal (unplanned or under illegal occupation) and formal settlements (regulated and controlled housing).

Considering the regional conflicts leading to a global migration crisis in the 21st century (counting nowadays more than 70 million forced migrants,)[11] relocation via *transitional settlement* is the form of reception for nearly 26-million migrants.[12] In 2018, 20.4 million refugees were under UNHCR's mandate while 5.5. million refugees were registered with the UN Relief and Works Agency for Palestine Refugees (UNRWA).[13] Yet the number of refugees that year reached nearly 29 million people worldwide—including more than 3.4 million people in refugee-*like* situation produced by the Venezuelan crisis by the end of 2019.[14] Still, of nearly 26-million-refugees reported in 2018, only 92,400 were resettled with UNHCR's assistance.[15] Since 2011, the number of refugees has increased 70%.[16]

While the war in the Syrian Arab Republic has produced the largest number of refugees so far (6.7 million), along with the war in Afghanistan,[17] famine in South Sudan, Somalia, and Sudan,[18] and ethnic cleansing in Myanmar,[19] I submit that Venezuelan refugees could soon lead to the world's largest refugee population[20] (currently 5.1 million and 8.2 million refugees projected by the end of

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[11] UN High Commissioner for Refugees (UNHCR), *Figures at Glance: 2019* (Geneva: UNHCR, 2020), online: *UNHCR* <https://www.unhcr.org/en-us/figures-at-a-glance.html>.
[12] *Ibid.*
[13] See McAuliffe, *supra* note 8 at 39. It is worth noting that the 2018-figure on refugees (25.9 million) did not initially include Venezuelans refugees because the UNHCR (source) did not include Venezuela. See UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2018* (June 2019) at Chapter 2 (Figure 5), online: *UNHCR* <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2019/06/2019-06-07-Global-Trends-2018.pdf>. At present, UNHCR appears far less hesitant to acknowledge the refugee-*like* situation migrants from Venezuela face. See Liz Throssell (UNHCR's Spoke Person), "Majority Fleeing Venezuela in Need of Refugee Protection—UNHCR" *UNHCR News* (21 May 2019) (recognizing a change in UNHCR's original view), online: <https://www.unhcr.org/en-us/news/briefing/2019/5/5ce3bb734/majority-fleeing-venezuela-need-refugee-protection-unhcr.html>.
[14] UN, "Venezuelan Refugees Now Number 3.4 Million; Humanitarian Implications Massive, UN Warns" *UN News* (22 February 2019) (citing UNHCR's and IOM's 2018-data), online: <https://news.un.org/en/story/2019/02/1033361>.
[15] McAuliffe, *supra* note 8 at 41.
[16] See Emi Suzuki, "The Number of Refugees Has Increased 70% Since 2011" *World Bank* (5 September 2019), online (blog): *WEFORUM* <https://www.weforum.org/agenda/2019/09/newly-released-data-show-refugee-numbers-at-record-levels/>.
[17] See Umar Farooq, "As America Shuts Its Doors, Afghan Refugees Are Stuck in Turkey" *Foreign Policy* (24 January 2020) (describing the ordeal Afghan refugees have faced since 1982), online: <https://foreignpolicy.com/2020/01/24/trump-asylum-afghan-refugees-helped-us-troops-stuck-limbo-turkey/>.
[18] See Migration Policy Institute (MPI), "Spiraling Violence and Drought Drive Refugee Crisis in South Sudan" by Getachew Zeru Gebrekidan (Washington, DC: MPI, October 2017), online: *MIGRATION POLICY* <https://www.migrationpolicy.org/article/spiraling-violence-and-drought-drive-refugee-crisis-south-sudan>.
[19] See UN "'No Other Conclusion,' Ethnic Cleansing of Rohingyas in Myanmar Continues—Senior UN Rights Official" *UN News* (6 March 2018) (quoting Andrew Gilmour, UN Assistant Secretary-General for Human Rights), online: <https://news.un.org/en/story/2018/03/100423>.
[20] The size of the Venezuelan population (nearly twice Syria) and the nature of the Venezuelan conflict (humanitarian, socioeconomic, political), along with the incidental elements in conflict (geopolitical interests, urban starvation, rural

2020).[21] With an average prediction of 200 million climate migrants by 2050,[22] current numbers barely represent a fraction of what we will see in coming decades.

The world's response to the global refugee crisis seems to favour the rejection of asylum seekers and gradual reduction on refugees' intake-limits ("fiscal year caps") in developed countries. This is leading to a *world of transitional settlements* whereby rich countries are increasingly closing their doors to refugees while promoting their reception and relocation in the developing and third world. The once thought to be legitimate concerns (national security and cultural identity challenges, see chapter 1) do not longer add up. Using these concerns to justify cruel and inhumane State action against the most vulnerable populations on the planet are untenable, yet undoubtedly consequential (e.g., deportation of Rohingya refugees from India to Myanmar, removal by force of Central-American asylum seekers from Mexico to their home countries, summary deportations of Salvadoran asylum seekers from the U.S. to El Salvador, forced repatriation of Eritrean migrants from Israel to Ethiopia, or systematic rejection of Venezuelan refugees in Peru).

1. Refugee Camps, Safe Haven Territories, and Informal Settlements

Refugee camps are defined as temporary settlements to receive forced migrants in refugee-*like* situation until either such situation is legally established (immigration status) or the event

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malnutrition) constitute the perfect storm to make the Venezuelan refugee crisis enduring and global. See J Mauricio Gaona, "The Venezuelan Exodus Is No Longer Just a Regional Crisis" *Washington Examiner* (21 December 2018), online: <https://www.washingtonexaminer.com/opinion/op-eds/the-venezuelan-exodus-is-no-longer-just-a-regional-crisis>. The world's largest refugee population in the 21st century so far came from Syria (6.7 million refugees in 8 years of conflict). Still, the Venezuelan crisis has produced more than 5.1 million refugees in less time, and it is estimated it will produce up to 8.2 million refugees by the end of 2020. See Organization of American States (OAS), *Informe del Grupo de Trabajo de la Organización de los Estados Americanos para Abordar la Crisis de Migrantes y Refugiados Venezolanos en la Región*, report by David Smolansky et al (Washington, DC: OAS, June 2019) at 7 (projecting the number of refugees between 7.5 and 8.2 million by the end of 2020), online: *RELIEFWEB* <https://reliefweb.int/report/colombia/informe-del-grupo-de-trabajo-de-la-oea-para-abordar-la-crisis-de-migrantes-y>; see also Regional Inter-Agency Coordination Platform (UN General-Secretary, UNHCR, IOM, NGOs), *Coordination Platform for Refugees and Migrants from Venezuela R4V: DATA* (counting 5,180,615 Venezuelan refugees on 5 August 2020), online (data): *UNHCR* <https://data2.unhcr.org/en/situations/platform> [accessed 30 August 2020, 11:26 PM-ET].

[21] *Ibid.* It must be noted that this number reflects only a portion of the total of Venezuelan refugees, many of whom are either on the move or have not been registered.

[22] See International Organization for Migration (IOM), "Migration and Climate Change" Migration Research Series No 31 (Washington, DC: IOM, 2008) at 29; J Mauricio Gaona, "Environmental Refugees" (31 December 2018), online (podcast): *EVOLUTION/IHEART* <https://www.iheart.com/podcast/269-evolution-46370961/episode/environmental-refugees-a-global-picture-english-46380154/>.

(persecution or conflict) forcing those migrants to flee changes in a way that favours their safe and willful return.[23] Although refugee camps do often meet only basic human needs in light of an emergent situation, these settlements are regulated, authorized, and run by the host country (e.g., Kutupalong refugee camp in Bangladesh,[24] with the assistance of the UN Agency for refugees UNHCR and NGOs), regional (EU) or international organizations (International Committee of the Red Cross). Notwithstanding refugee camps were prevalent in the 20th century[25] (enabling a more organized account on refugees), the dynamics of forced migration in the 21st century have dramatically shifted the ways refugees procure *transitional settlements* for themselves. At present, refugee camps host less than one-third of the refugee population worldwide.[26]

The most frequent transitional settlements are *informal* or *unofficial settlements* (known but unauthorized by the country of refuge). This includes private arrangements between the refugee and members of the local population (e.g., "Casa-Hogar Puente in Mexico),[27] migrants in homeless-*like* situation (e.g., thousands of Central American migrants living in the streets of Ciudad Juarez in Mexico),[28] and unauthorized illegal settlements characterized by lack of services

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[23] This definition introduced derives from theoretic-practical assertions. See UN High Commissioner for Refugees (UNHCR), *Refugee Camps* (2020), online: *UNHCR* <https://www.unrefugees.org/refugee-facts/camps/>; UN, *Refugees* (2020), online: *UN* <https://www.un.org/en/sections/issues-depth/refugees/>; Simon Turner, "What Is a Refugee Camp? Explorations of the Limits and Effects of the Camp" (2016) 19:2 J of Refugee Studies 139 at 141-148.

[24] Bangladesh authorized transitional settlements—including Kutupalong hosting 600 thousand refugees—located through Cox's Bazar District in the south. This is not only the world's largest refugee camp but a city in its own. See Victoria Milko & Claire Hammond, "The World's Largest Refugee Camp Is Becoming a Real City" *Citylab* (27 September 2019), online: <https://www.citylab.com/equity/2019/09/rohingya-refugees-kutupalong-camp-design-myanmar-bangladesh/597076/>. Initially organized by the government with the assistance of international organizations and NGOs, Rohingya refugees are now demanding a more active role in the management of the camp. See Kaamil Ahmed, "Stop Ignoring Us: Rohingya Refugees Demand Role Running Camps" *The Guardian* (5 February 2020), online: <https://www.theguardian.com/global-development/2020/feb/05/rohingya-demand-role-in-running-camps-and-tell-ngos-stop-ignoring-us-bangladesh-cox-bazar>.

[25] See generally Michel Agier, *Un Monde de Camps* (Paris: La Découverte, 2014).

[26] See Cristiano D' Orsi, "Refugee Camps Versus Urban Refugees: What's Been Said—and Done" *The Conversation* (4 November 2019) (indicating that 17.5 million refugees worldwide do not live in refugee camps), online: *PRI* <https://www.pri.org/stories/2019-11-04/refugee-camps-versus-urban-refugees-whats-been-said-and-done>.

[27] Located in Tijuana, "Casa Hogar" is a private effort to assist Central American refugees with transitional refuge in their journey to the United States. See Gustavo Solis, "Migrantes Centroamericanos Construyen Refugio en Tijuana" *Los Angeles Times* (5 September 2019), online: <https://www.latimes.com/espanol/mexico/articulo/2019-09-05/migrantes-centroamericanos-construyen-refugio-en-tijuana>.

[28] Despite 50 thousand people killed in the last six years in the midst of Mexico's Drug War in Ciudad Juarez, thousands of Central American asylum seekers live in the streets of this city as they wait for US immigration decisions on their asylum claims. See J Weston Phippen, "Trapped in Juarez: Life in the Migrant Limbo" *The Atlantic* (16 September 2019), online: <https://www.theatlantic.com/international/archive/2019/09/us-mexico-mpp-ciudad-juarez/597796/>.

and dire humanitarian conditions (e.g., Idomeni settlement in Greece, "Calais Jungle" in France).[29] In most cases, asylum seekers have no other option than to occupy private property or public spaces to survive (e.g., Venezuelan refugees living in public parks in Colombia).[30] This has led to acts of violence and even trespassing charges (e.g., asylum seekers in South Africa, Video 1). In June 2019, for example, the Government of Lebanon ordered the eviction of 600 Syrian refugees from the informal settlement known as Deir-al-Amar.[31]

While the term *"safe haven territory"* is also employed in a pejorative fashion to describe areas of conflict that end up being everything but safe (e.g., Srebrenica in Bosnia), or for areas providing necessary conditions for a specific population to survive ("safe haven territory for insurgents"), in the context of forced migration the term *"safe haven territories"* refers to above-average transitional settlements for migrants fleeing sexual and gender-based violence (e.g., safe haven shelters and territories in Colombia, Kenya, Thailand, Haiti).[32] Aside from structural gaps found in *safe haven shelters*,[33] both *refugee camps* and *unofficial settlements* exhibit dire humanitarian conditions for refugees and asylum seekers; a trend that includes wealthy host countries, too. In various detention centres of Australia, for instance, the conditions in which these migrants are being held amount to human rights violations and, in some cases, to torture[34] (e.g., Nauru island).[35]

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[29] See Pamela DeLargy, "Europe's Humanitarian Response to Refugee and Migrant Flows: Volunteerism Thrives as the International System Falls Short" (2016) 67 HE 5 (describing conditions for refugees in Greece and France).
[30] Infobae, "Parques Dormitorio, la Opción Desesperada de venezolanos sin Casa en Colombia" *Infobae* (12 March 2020) <https://www.infobae.com/america/agencias/2020/01/14/parques-dormitorio-la-opcion-desesperada-de-venezolanos-sin-casa-en-colombia/>.
[31] See Amnesty International, "Lebanon: Wave of Hostility Exposes Hollowness of Claims that Syrian Refugee Returns Are Voluntary" *AI News* (12 June 2019), online: <https://www.amnesty.org/en/latest/news/2019/06/lebanon-wave-of-hostility-exposes-hollowness-of-claims-that-syrian-refugee-returns-are-voluntary/> ["AI Lebanon"].
[32] See Human Rights Center at the University of California–Berkeley, "Safe Haven: Sheltering Displaced Persons from Sexual and Gender-Based Violence" by Kim Thuy Seelinger & Julie Freccero (May 2013) (presenting a comparative case study on safe haven shelters in Colombia, Thailand, Haiti, and Kenya), online (pdf): *LAW BERKELEY* <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Safe-Haven-Comparative-Report-May-2013.pdf>.
[33] *Ibid.*
[34] The Special Rapporteur's visit concerned Australia's migration policies and borders management, which included meetings with federal and State authorities, civil society, trade unions, migrants, and human rights organizations in detention centres. See UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru* (François Crépeau), A/HRC/35/25/Add3 (Geneva: UN Human Rights Council, 24 April 2017) at paras 77, 78, online (pdf): *RELIEFWEB* <https://reliefweb.int/report/australia/report-special-rapporteur-human-rights-migrants-his-mission-australia-and-regional>.
[35] *Ibid*; see also Amnesty International, "Island of Despair: Australia's "Processing" of Refugees on Nauru" (Washington DC: Amnesty International, 2016) at 6, 7, online (pdf); *AMNESTY* <https://www.amnesty.org/download/Documents/ASA1249342016ENGLISH.PDF> ["AI Nauru Island"].

Refugees and asylum seekers confront gross human rights violations and dire humanitarian conditions in Europe as well. While at least 50% of the migrants that have been relocated to the Greek islands of Lesbos and Samos are women and children,[36] overcrowding facilities and lack of food in reception centres are common. The humanitarian conditions in some of the Greece's largest reception centres (Moria and Samos) are quite revealing.[37] Although the camp's maximum capacity was estimated in 3,100 asylum-seekers, there are reports of up to 7,200 asylum seekers registered at once in the camp in 2018.[38] What it is more, despite the migrants being in vulnerable situation (unaccompanied minors, pregnant women, people with disabilities, victims of torture and sexual violence), the Greek Government does not provide health services for them. Nor do the camps have hygienic toilers or bathing facilities with privacy for woman and children.[39] Similarly, reports on dire humanitarian conditions affecting more than 900 thousand Rohingya refugees living both in refugee camps (Kutupalong-Balukhali and Nayapara) and in unofficial settlements (32-identified informal settlements) located across the border region of Cox's Bazar at Chittagong,[40] indicate lack of drinking water, sanitation facilities for women and children.[41]

Refugees often encounter inadequate housing too. NGOs have reported thousands of asylum seekers (including children) sleeping in improvised shelters in Serbia (Belgrade near Hungary's border, Image 1) with temperatures dropping down to minus 20 degrees centigrade at night.[42] Thousands of Central American asylum seekers in Matamoros Mexico ("Makeshift camp" near

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[36] See Human Rights Watch, "Greece: Dire Conditions for Asylum Seekers on Lesbos" *HRW News* (November 2018) (describing conditions in refugee camps in the Greek islands of Seekers and Lesbos), online: <https://www.hrw.org/news/2018/11/21/greece-dire-conditions-asylum-seekers-lesbos>.

[37] Following his visit to Greece in May 2016, the UN Special Rapporteur on the Human Rights of Migrants reported that Moria was housing around 3,000 migrants even though the centre's capacity is for 2,000. The Special Rapporteur found the reception centre of Vathy in Samos island partially operating with a capacity for 250 people yet housing 950 migrants (including families with children). In addition to overcrowded facilities, inadequate sanitary services, food, health care, housing were also reported. See UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Greece* (François Crépeau), A/HRC/35/25/Add2 (Geneva: UN Human Rights Council, 24 April 2017) at paras 53, 57, online: *RELIEFWEB* <https://reliefweb.int/report/ greece/report-special-rapporteur-human-rights-migrants-his-mission-greece-ahrc3525add2-enar>.

[38] *Ibid.*

[39] *Ibid.*

[40] Observer Research Foundation, "The Rohingya Crisis: A Health Situation Analysis of Refugee Camps in Bangladesh" by Sreeparna Banerjee (New Delhi: ORF, July 2019) at 4, online (pdf): *ORF* <https://www.orfonline.org/wp-content/uploads/2019/07/ORF_SpecialReport_9 1%20_Rohingya.pdf>.

[41] *Ibid* at 6-9.

[42] Lydia Gall, "Asylum Seekers Left in the Cold" *HRW News* (6 January 2016) (describing the situation of nearly 2,000 asylum seekers in Belgrade while waiting for Hungary to let them in), online: <https://www.hrw.org/news/2017/01/06/asylum-seekers-left-cold>.

the Texas' border) have built their own shelters as they wait for U.S. response on their asylum claims for months and even for years.[43] Moreover, poor physical and mental health conditions are some of the major risks asylum seekers and refugees face in the world today.

The World Health Organization has called for urgent action on outbreaks in refugee camps both in Africa (e.g., malaria and lack of water in Kulle Refugee Camp in Ethiopia)[44] and in Europe.[45] In addition to human rights violations related to the mistreatment and decreasing health conditions of asylum seekers and refugees held in Nauru island by the Australian Government,[46] anxiety, depression, and even suicide attempts have been reported in Dadaab (Kenya)—one of Africa's largest refugee Camp.[47] Scientific studies on trauma-related psychological disorders in refugees currently living in Germany, and who have been exposed to war conditions (post-traumatic stress syndrome PTSD), indicate lack of access to psychological treatment and language barriers, along with prevalent social misconceptions on the psychological risks refugees experience.[48]

Likewise, the presence of mental health disorders and PTSD in migrant children was recently denounced by the U.S. Office of the Inspector General,[49] following the implementation of the so-called "Zero Tolerance policy" by the Trump administration in May 2018. This policy, issued by U.S. Attorney General Jeff Sessions, announced criminal prosecution for all adults entering

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[43] See Acacia Coronado, "Conditions Deteriorating at Makeshift Camp on the Rio Grande Where Thousands Await U.S. Asylum" *The Texas Tribune* (25 October 2019), online: <https://www.texastribune.org/2019/10/25/conditions-deteriorating-migrant-camp-thousands-await-asylum/>.

[44] World Health Organization Africa (WHO), "WHO Takes Urgent Action to Address Health Situation in Kulle South-Soudanese Refugee Camp, Gambella in Ethiopia" *WHO News* (2014) (reporting malaria and shortcuts in water supply, immunization, and sanitation in Kulle Refugee camps hosting 35,000 refugees), online: <https://www.afro.who.int/news/who-takes-urgent-action-address-health-situation-kulle-south-soudanese-refugee-camp-gambella>.

[45] World Health Organization (WHO), *Report on the Health of Refugees and Migrants in the WHO European Region: No Public Health without Refugee and Migrant Health* (Geneva: WHO, 2018), online: *WHO* <http://www.euro.who.int/en/publications/abstracts/report-on-the-health-of-refugees-and-migrants-in-the-who-european-region-no-public-health-without-refugee-and-migrant-health-2018>.

[46] See UN Special Rapporteur's Visit to Australia, *supra* note 34 at para 77; AI Nauru Island, *supra* note 35 at 6.

[47] See Medicines Sans Frontières, "Kenya: Shut Out and Forgotten, Refugees in Dadaab Appeal for Dignity" *MSF News* (19 November 2019) (reporting cases of mental illness and depression), online <https://www.msf.org/forgotten-refugees-kenya-dadaab-camps-appeal-dignity>.

[48] J M Fegert et al, "Psychological Problems in Traumatized Refugee Families: Overview of Risks and Some Recommendations for Support Services" (2018) 12:5 Child and Adolescent Psychiatry Mental Health 1 at 2-8.

[49] US Department of Health and Human Service (Office of the Inspector General), *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody,* Report No 0EI-09-18-00431 (Washington, DC: Office of the Inspector General, September 2019) at 4, online (pdf): *OIG* <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf>.

"illegally" the United States. The policy further instructed U.S. immigration authorities to separate migrant children from their parents and place them in unaccompanied children detention centres. The policy was challenged on constitutional grounds (Fifth Amendment, due process rights) before federal district court. In *Ms. L. v. U.S. Immigration and Customs Enforcement*,[50] the Southern District Court of California granted a motion for class-wide preliminary injunction (class action) against the government's practice of separating families as a violation of due process rights and family integrity indicating that:

> "The context of the family separation practice at issue here, namely an international border, does not render the practice constitutional, nor does it shield the practice from judicial review. On the contrary, the context and circumstances in which this practice of family separation were being implemented support a finding that Plaintiffs have a likelihood of success on their due process claim. First, although parents and children may lawfully be separated when the parent is placed in criminal custody, the same general rule does not apply when a parent and child present together lawfully at a port of entry seeking asylum. In that situation, the parent has committed no crime, and absent a finding the parent is unfit or presents a danger to the child, it is unclear why separation of Ms. L. or similarly situated class members would be necessary. Here, many of the family separations have been the result of the Executive Branch's zero tolerance policy, but the record also reflects that practice of family separation was occurring before the zero tolerance policy was announced, and that practice has resulted in the casual, if not deliberate, separation of families that lawfully present at the port of entry, not just those who cross into the country illegally. Ms. L. is an example of this family separation practice expanding beyond its lawful reach, and she is not alone."[51]

In a letter addressed to U.S. President Donald Trump in 2018, the American Psychologists Association warned about the psychological harm both children and parents are experiencing (empirical evidence).[52] Clinical researchers have further indicated that the "*Zero Tolerance policy*" inflicts by itself psychological trauma: "this is cruel to children and hugely disruptive to their sense of safety and well-being."[53] The prolonged detention and dire humanitarian conditions in which migrant children (asylum seekers) are being held by the Trump administration amount to human rights violations. This includes overcrowded detention centres, inadequate food, sleep deprivation, high temperatures, physical and verbal abuse, lack of sanitation, water, beds, clothing, and medical

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[50] *Ms L v US Immigration & Customs Enforcement*, (26 June 2018) 310 F Supp 3d 1133 (SD Cal 2018).
[51] *Ibid* at 13.
[52] See Jessica Henderson Daniel & Arthur C Evans, "Letter of the American Psychological Association to the President of the United States of America, Donald J. Trump" (14 June 2018), online: *APA* <https://www.apa.org/advocacy/immigration/separating-families-letter.pdf>.
[53] See Heather Stringer, "Psychologists Respond to a Mental Health Crisis at the Border" (September 2018) *APA Monitor on Psychology* (quoting UCLA Professor, Carola Suárez-Orozco).

attention.[54] UN Special Rapporteurs denounced the U.S. policy of using the detention of children to deter irregular migration, while stressing the gravity of this practice: "Detention of children is punitive, severely hampers their development, and in some cases may amount to torture."[55]

The gross disregard of the most basic needs, human dignity, and well-being of refugees and asylum seekers in many refugee camps and transitional settlements around the world violate not only welfare provisions of the *Refugee Convention* (rationing, housing, public education),[56] but even provisions concerning the treatment of prisoners of war set forth by international humanitarian law (*Third Geneva Convention*). This includes right to medical attention, no physical or mental torture, hygiene and not unhealthy shelters, dormitories with minimum cubic space, bedding and blankets, premises adequately heated and lighted, separate dormitories for men and women, food rations to keep good health, clothing, sanitary measures to ensure cleanliness and healthfulness, baths, showers, water, soap, and monthly medical inspections.[57]

2. Human Dignity, Confinement, and Freedom of Movement

Article 26 of the *Refugee Convention* accords refugees and asylum seekers *freedom of movement* provided that: (i) such protection is also afforded to other aliens in similar circumstances, and (ii) refugees and asylum seekers are lawfully present in the territory. Article 12(1) of the *International Covenant on Civil and Political Rights* recognizes *freedom of movement* to any person without distinction as to her or his migratory condition or immigration status.[58] For the most part, refugees and asylum seekers are deemed to be lawfully present in the host country when, irrespective of their mode of entry ("legal," "illegal"), they have been admitted by the host country's immigration

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[54] J Mauricio Gaona, "Is the U.S. Committing Crimes Against Humanity on Its Southern Border?" *NY Daily News* (5 July 2019) (analyzing human rights violations of migrant children in the US), online: <https://www.nydailynews.com/opinion/ny-oped-crimes-against-humanity-southern-border-20190705-ttwha2f43nefbdyx7ozmabadii-story.html>.
[55] Office of the UN High Commissioner for Human Rights (OHCHR), "Release Migrant Children from Detention and Stop Using Them to Deter Irregular Migration" *OHCHR News* (22 June 2018) (quoting UN Special Rapporteurs), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>.
[56] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, arts 20-22 (entered into force 22 April 1954) ["Refugee Convention"].
[57] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention*), 12 August 1949, 75 UNTS 135, arts 15, 17, 20, 22, 25, 26, 27.
[58] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, arts 12(1) (entered into force 23 March 1976) ["ICCPR"].

authorities, the asylum seeker entered the host country with a valid nonimmigrant visa and this one has not yet expired or, if it has, it has not yet exceeded a deadline to lodge an asylum claim, or simply because an asylum claim is pending. Under *international refugee law*, *freedom of movement* means that refugees and asylum seekers have the right to choose their place of residence and move freely within the host country. In practice, however, such freedom is rarely afforded.

As I will illustrate in section II of this chapter, the confinement of asylum seekers in detention-*like* facilities is becoming a customary international law practice. Suffice it to say for now that although cases of host countries affording *freedom of movement* to asylum seekers still exist (e.g., Colombia, Canada, Argentina, Costa Rica, New Zealand),[59] the detention of asylum seekers is a prevalent practice across the world.[60] It is becoming a highly profitable business for private companies designing or running different types of confinement facilities.[61] I argue that both the prolonged *confinement* of adult refugees (sometimes detained for years) and the unnecessary detention of migrant children (exposed to human rights violations and psychological trauma) violate the core legal value of international law: *human dignity*.[62] Prolonged detention of asylum seekers is not an administrative (civil) measure to handle these migrants (already facing psychological effects of persecution, conflict and treacherous journeys) but a punishment for being or intended to become a refugee or asylee. A strictly temporary detention to ascertain their identity, purpose of entry, or national security risks may hold as justifiable yet not necessarily as the most intelligent option.

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[59] For instance, under New Zealand's immigration and criminal law (section 200(1)(d) of the *Corrections Act of 2004*), the detention of asylum seekers is circumscribed to cases of false identity or national security threats. See *New Zealand Corrections Act 2004*, Pub Act 2004, No 50, s 200(1)(d) (assented to 3 June 2004); New Zealand Human Rights Commission (HRC), *Treating Asylum Seekers with Dignity and Respect* (Wellington: HRC, July 2017) at 5, online (pdf): *HRC* <https://www.hrc.co.nz/files/5715/0060/6797/ESC_Rights_Discussion_ONLINE.pdf>.

[60] See generally Global Detention Project, "Country Detention Reports" (2020), online: <https://www.globaldetention project.org/category/publications/country-detention-reports>.

[61] See Glenn C Altschuler, "For-Profit Immigration Detention Centers Are a National Scandal" *The Hill* (12 August 2019), online: <https://thehill.com/opinion/immigration/457067-for-profit-immigration-detention-centers-are-a-natio nal-scandal>; Manny Fernandez & Kathy Benner, "The Billion-Dollar Business of Operating Shelters for Migrant Children" *The New York Times* (21 June 2018), online: <https://www.nytimes.com/2018/06/21/us/migrant-shelters-border-crossing.html>.

[62] From its historical inception and philosophical development as value (intrinsic *worth*), the basic premise on human dignity lies in its evolving relationship (moral and legal values) propelling the rule of law toward an inherent right and duty (limit) whereby all men are born free and equal in dignity. See Cristopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" International Law and Justice Working Paper No 2008/8 (3 October 2008), online (pdf): *NYU SCHOOL OF LAW* <http://iilj.org/wp-content/uploads/2016/08/McCrudden-Human-Dignity-and-Ju dicial-Interpretation-of-Human-Rights-2008-1.pdf>; see also Thomas E Hill, "Kantian Perspectives on the Rational Basis of Human Dignity" in Marcus Düwell et al, eds, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014) at 215-222.

The detention of migrant children cannot pass basic human-rights-law prongs (standards and conventions). In addition to the psychological trauma detention inflicts to children, these migrants constitute one of the most vulnerable populations on the planet. The confinement of migrants for months or even years in *camps* and *transitional settlements* denies the structural protection these systems of reception purport to provide (temporary protection) and the migrants' ability to continue with their lives beyond the state of persecution and place of refuge. Refugee camps operating for years, in short, reveal the structural failure in turning a temporary solution into a mode of reception.[63]

As asylum seekers face the permanent threat of arbitrary detention, refugees encounter confinement within the country of refuge. Hence, the critical element hinges on whether considering increasingly present dire humanitarian conditions of their confinement, refugees' confinement amounts to a form of arbitrary (indefinite) detention. At first, the voluntary arrival or alleged right to leave when the refugee pleases seem to contradict the premise of this question. Refugees hope to stay in refugee camps only for a few days, yet many remain there for months or even years.[64] The country of refuge is offering a seemingly voluntary, yet endemic system of 'reception' aimed at procuring (in paper, at most) the refugee's safety. Here, different types of confinements (refugee camps and secluded areas) affect the refugee's ability to integrate, develop and assimilate within the country of refuge.[65] It is thus clear that despite the country-of-refuge's intentions and the migrant's apparent options, relocation fails because it does not allow the migrant

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[63] See e.g. Elizabeth Cullen Dunn, "The Failure of Refugee Camps" *Boston Review* (28 September 2015) (describing the situation of prolonged confinement of refugees in Jordan, Tanzania, Palestine, Turkey, Hungary, and Georgia).

[64] For example, Dadaab refugee camp in Kenya has been operating for almost 30 years. Most refugees have been there for years. See Rael Ombuor, "Fate of Dadaab Refugee Camp in Limbo as Kenya Presses Closure" *VOA News* (16 May 2019), online: <https://www.voanews.com/africa/fate-dadaab-refugee-camp-limbo-kenya-presses-closure>.

[65] Refugees in age to work encounter various barriers to find jobs in the country of refuge. See e.g. International Rescue Committee & Airbel Center, "Solving the Refugee Employment Problem in Jordan: A Survey of Refugees" (2015) (describing challenges Syrian refugees encounter in Jordan based on a semi-structured qualitative survey on refugees conducted in Mafraq, Irbid, and Aman), online (pdf): *IRC* <https://www.rescue.org/sites/default/files/document/1527/irc-syrianrefugeeemployment-72dpi-041117.pdf>. Most refugees face challenges to continue with their education (only 61% of children and 23% of teenagers have access to primary and secondary education, respectively). See Alexander Court, "The 5 Biggest Refugee Myths: Debunked" *WEF Global Agenda* (19 August 2019), online: *WEFORUM* <https://www.weforum.org/agenda/2019/08/debunked-the-5-biggest-refugee-myths/>. Rohingya refugees in Bangladesh are limited by dire humanitarian conditions they confront daily (lack of electricity and security) and the social structures emerging inside refugee camps ("Majhi system"). See Victoria Milko, "'Conditions Here Are Inhumane': Rohingya in Bangladeshi Camps" *Al Jazeera* (21 August 2019) (reporting living conditions and security risks inside the camps), online: <https://www.aljazeera.com/news/2019/08/rohingya-refugees-bangladesh-fa ce-hope-repatriation-190821062348499.html>.

to transcend the stage of transitional reception into a dignified, integral, and humane form of reception; refugees can leave but, in practice, they cannot. Consequently, considering the dire humanitarian conditions refugees encounter and the psychological impact their prolonged confinement encompasses, such confinement constitutes a form of *human stagnation*.

B. Resettlement

Resettlement is the best-known form of reception for refugees because it enables them not only to find permanent protection in the country of refuge but also to develop as human beings while becoming active members of society by opening paths of assimilation, residence, and naturalization.

1. UNHCR's Resettlement (Assistance)

The UNHCR defines *resettlement* as, "the transfer of refugees from an asylum country to another country that has agreed to admit them and ultimately grant them permanent settlement."[66] In practice, the *resettlement of refugees* is rather residual as most host countries continue to lower their refugee intake-caps and not all have agreed on resettlement programs.[67] Notwithstanding having set forth a leading resettlement program with UNHCR that led to more than 200,000 refugees resettled in 1980,[68] the U.S. has reduced the refugee intake-cap (fiscal year ceiling) from 238,000 in 1980 to 18,000 refugees in 2020 (Figure 1). That is, the lowest refugee intake-cap in U.S. history. In 2018, Canada hosted more refugees than the U.S. (28,000 compared to the 22,900 refugees resettled in the U.S., Figure 2) becoming the world leader in refugee resettlement.[69]

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[66] UN High Commissioner for Refugees (UNHCR), *Resettlement* (2020), online: *UNHCR* <https://www.unhcr.org/en-us/resettlement.html>.

[67] UNHCR has various resettlement agreements ("in urgent need of assistance") with Argentina, Australia, Brazil, Canada, United States, United Kingdom, Chile, Paraguay, Uruguay, Czech Republic, Denmark, Finland, Iceland, Ireland, The Netherlands, Norway, Sweden, and Portugal. See Cassidy Rappaport, "Resettlement" (2020), online: <www.refugeelegalaidinformation.org/resettlement> [accessed 15 March 2020, 4:00 AM-ET].

[68] See Council on Foreign Relations (CFR), "How Does the U.S. Refugee System Work?" (New York: Council on Foreign Relations, October 2018) (describing the beginnings of the US resettlement program), online: *CFR* <https://www.cfr.org/backgrounder/how-does-us-refugee-system-work>.

[69] See BBC, "Canada Resettled More Refugees than Any Other Country in 2018" *BBC News* (19 June 2019), online: <https://www.bbc.com/news/world-us-canada-48696974>.

Still, in 2019, only 4.5% of the global ressetlement needs were met.[70] This means that out of the 1.4 million refugees in urgent need, only 63,696 were resettled through UNHCR's assistance.[71]

The UNHCR sees the resettlement of refugees as part of "three durable solutions": namely, *voluntary repatriation* (return in safety and with dignity), *local integration* (host-country's protection through asylum), and *resettlement* (transfer from the country of refuge to a third country with permanent residence status).[72] Based on the systematic reduction on national annual quotas on refugees,[73] however, the resettlement of refugees is becoming a residual form or reception.

2. Ad-Hoc Resettlement

Aside from UN guided resettlement programs (under UNHCR's mandate), there are informal, occasional or ad-hoc resettlement programs run by other governments and international agencies (IOM). For instance, the Government of Thailand runs several refugee camps located on the Thai-Myanmar Border. In practice, these programs are treated as *ad-hoc resettlement programs* because of Thailand's lack of legal framework on refugees. Thailand has neither signed the *Refugee Convention* nor developed an immigration system to adequately host refugees, including Myanmar

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[70] UNHCR, "More Resettlement Needed as Only 4.5 Per cent of Global Resettlement Needs Met in 2019" *UNHCR News* (5 February 2020), online: <https://www.unhcr.org/en-us/news/press/2020/2/5e3a81c04/resettlement-need ed-only-45-cent-global-resettlement-needs-met-2019.html>.
[71] *Ibid.*
[72] UN High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Handbook* (Geneva: UNHCR, 2011) at 28.
[73] For example, the US has reduced the annual intake-refugee-cap from 232,000 in 1980 to 30,000 in 2019 and has further limited the refugee ceiling for 2020 to 18,000 people. See Jens Manuel Krogstand, "Key Facts About Refugees to the U.S." *PEW News* (7 October 2019) (describing US ceiling limits on refugees from 1980 to 2019), online: <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>; US President Donald J Trump, Memorandum for the Secretary of State: *Presidential Determination for Refugee Admissions for Fiscal Year 2020* (1 November 2019), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presi dential-actions/presidential-determination-refugee-admissions-fiscal-year-2020/>. Several countries have followed suit. See e.g. Sweden, Migrationsverket, "The Swedish Resettlement Program (3 March 2020) (setting the refugee reception for 2020 in 5,000 refugees), online: *MIGRATION SWEDEN* <https://www.migrationsverket.se/English/About-the-Migration-Agen cy/Our-mission/The-Swedish-resettlement-programme.html>; Atika Shubert & Nandine Schmidt, "Germany Rolls Up Refugee Welcome Mat to Face off Right-wing Threat" *CNN* (26 January 2019) (reducing the refugee intake-cap from 200,000 to 185,000 refugees), online: <https://www.cnn.com/2019/01/26/europe/germany-refugee-deportations -intl/index.html>; Sabrina Martin, "Nuevas Medidas para Reducir el Flujo de venezolanos en la Region" *Panama Post* (26 August 2019) (describing legal measures to reduce the number of Venezuelan refugees across the region), online: <https://es.panampost.com/sabrina-martin/2019/08/26/nuevas-medidas-venezolanos/>; Nathan Park, "South Korea Is Going Crazy Over a Handful of Refugees" *Foreign Policy* (6 August 2018) (describing legal measures to reduce the intake of refuges in South Korea), online: <https://foreignpolicy.com/2018/08/06/south-korea-is-going-crazy-over-a-handful-of-refugees/>.

refugees. As a result, Myanmar refugees confront a very difficult choice between either remaining in the camps without freedom of movement or right to work, or staying outside the refugee camps yet subject to deportation.[74] What is more, mental distress and suicides have been reported[75] in the nine remaining ad-hoc resettlement camps in Thailand hosting nearly 100 thousand Myanmar refugees (97,439 as of 2019).[76]

II. DIRECT RECEPTION

I define *direct reception* as the host country's international legal recognition concerning the asylum protection granted by such country to a foreign national arriving to the host country upon fleeing persecution in the migrant's home country on account of race, religion, nationality, political opinion or membership in a particular social group, or upon escaping various forms of conflict triggering such protection (e.g., civil war, famine, drug trafficking, gangs' violence).

By its very acquiescence and objective/subjective valuation, such recognition should provide the claimant with both legal status to remain in the host country and path toward legal assimilation (residence, citizenship)[77] and social integration (employment, education, housing).[78] Though once conceived as an integral form of protection, *direct reception* of asylum seekers is becoming residual, especially considering the number of asylum claimants being hosted worldwide (Chapter 1, Table 3).

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[74] See Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers" (Washington, DC: HRW, 2012) at 2 (explaining the dilemma Myanmar refugees faced in Thailand due to lack of an adequate legal framework), online (pdf): *HRW* <https://www.hrw.org/sites/default/files/reports/thailand0912.pdf>.

[75] See Emma Batha, "Suicide Rate "Alarming" in Thai Camp for Myanmar Refugees—Study" *Reuters* (19 June 2017), online: <https://.reuters.com/article/us-thailand-myanmar-refugees/suicide-rate-alarming-in-thai-camp-for-myanmar-refugees-study-idUSKBN19A294>.

[76] See Rina Chandran, "Too Scared to Return Home, Myanmar Refugees in Thai Camps Face an Uncertain Future" *Thompson Reuters Foundation News* (14 January 2019) (describing the situation inside refugee camps in Thailand in 2019), online: <https://news.trust.org//item/20190114005252-xqkkj/>.

[77] Though eventual legal assimilation paths (permanent residence, citizenship) would enable irregular migrants to become documented or "regular" migrants, the path toward naturalization is automatic neither under immigration law nor under customary international law (e.g. Global Compact for Safe, Orderly and Regular Migration). See François Crépeau, "Toward a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact on Migration" (2018) 30:4 IJRL 650 at 664 (describing legal gaps on facilitating mobility and, more particularly, "regularization" of undocumented migrants).

[78] See e.g. Government of Canada, *How Canada's Refugee System Works* (27 November 2019), online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role.html>.

The *direct reception* model applies only to asylum seekers, for which it is worth to distinguish the situation between asylum seekers (direct reception) and refugees (resettlement). In the first case, the asylum seeker lodges a claim for asylum protection directly in the intended host country (inside or at the port of entry). In the second case, the refugee files a petition for a refugee visa while being outside the host country (e.g., UNHCR's resettlement programs). As such, once the claim is lodged, an international and domestic legal relationship ensues between the claimant and the thereby selected or designated host country. Under refugee law—international and, for the most part, domestic—this relationship imposes legal restrictions on the migrant's intended host country (non-discrimination, non-refoulement) as well as basic legal protections (due process) the host country must afford to the claimant while the petition is being decided.

International refugee law established a set of core principles as transcending moral-legal values going from *international human rights law* values (human dignity, liberty, equality) to *international refugee law* principles (non-discrimination, non-refoulement, non-penalization, access to courts, wage-earning employment, housing, public education, freedom of movement). This means that the legal protection refugees and asylum seekers receive presupposes, at minimum, basic standards of legal protection against unlawful and violent actions from the persecuting agent (State and non-state actors) as well as legal restrictions against any other agent that could jeopardize such protection. Thus, the host country is expected to provide refugees and asylum seekers with civilized, humane and dignify treatment. Anything less, I argue, violates the basic legal contention ("*la raison d'être*") of refugee protection. It follows that in spite of modern proclivities toward racial, religious, political, and even economic discrimination against refugees and asylum seekers, *international refugee law* imposes an inherent legal obligation on the selected host country to make sure the asylum seeker is not only allowed to lodge a claim and remain in the country until such claim is decided, but is also treated with human dignity.

Host countries (signatories of the *1951 Refugee Convention* and *1967 Asylum Protocol* as well as those applying *international customary law*) face intrinsic (moral) and normative (legal) restrictions that preclude them from exposing (through State action or inaction) claimants to harm, torture, or death while their claim is being decided. Ensuring refugees are received and treated with dignity and without discrimination, irrespectively of their status, entry (documented,

undocumented, illegal) or condition (economic, physical) is akin to the relationship between the right to claim protection and the duty to protect. Thus, once the asylum claim is properly lodged or the refugee visa granted, migrants cannot be expulsed, imprisoned, abandoned, or denied access to the host-country's courts due to their race, nationality, lack of documents or money.

It is therefore embedded in the moral-legal fabric of *international refugee law* not to discriminate or punish the one already fleeing various forms of discrimination (race, religion, ethnicity, national origin, political opinion), violence or conflict. Yet the most basic protections provided by international refugee law are being systematically and increasingly violated by host countries. And it is further the contention of this thesis that the gradual and ostensible violation of the most basic principles *international refugee law* affords to refugees and asylum seekers is turning direct reception—and, for that matter, resettlement—into residual and exclusionary forms of reception.

A. Non-penalization for "Illegal" Entry or Presence

Article 31(1) of the *Refugee Convention*[79] provides refugees with international legal protection (non-penalization) against host-countries' denial based on the claimant's unauthorized presence (lack of immigration documents), unlawful means employed to entry (e.g., fraudulent documents, smugglers, human traffickers) or remaining in the country (e.g., expired immigration documents).

The protection afforded therein is subject to three conditions requiring for the refugee to: (i) come *directly* from a country (territory) where the migrant's freedom was threatened on any of the accounts lawfully protected under the *Refugee Convention*, (ii) present her or himself *without delay* before the host country's authorities, and (iii) irrespectively of the unauthorized (lack of documents), illegal entry (fraudulent documents, unlawful means, e.g., *Marmouzian v. Ashcroft*)[80]

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[79] Refugee Convention, *supra* note 56, art 31(1).

[80] It must be noted, however, that the use of false statements to enter a country must be—for the most part— strictly circumscribed to the purpose of fleeing persecution. That is, asylum seekers cannot keep using false documents or making false statements after their arrival or lodging an asylum claim. See e.g. *Marmouzian v Ashcroft*, 390 F3d 1129, 1138 (9th Cir 2004) (proscribing US authorities to hold against asylum applicants the use of fake a green card, visa or US passport should this use be strictly connected to the need of escaping persecution).

or presence (expired documents), show *good cause* for the illegal entry or lack of authorization to be or remain in the intended host country.

This protection further compels the host country to disregard the lack of authorization or the illegal entry in order to ascertain the legality of the migrant's claim of persecution, for which no penalties shall derive from the lack of documents or illegal entry. While some countries may be willing to disregard the illegal entry linked to the need to escape persecution (as a matter of law and policy), not all countries treat willful and unknown misrepresentations as excusable (waivable) asylum seekers' misconduct. For example, under U.S. immigration law aliens (non U.S. citizens) may be held inadmissible for making willful misrepresentations of material facts leading to direct immigration benefits (INA § 212(a)(6)(C)),[81] or for not having legal-entry documents (INA § 212(a)(7)).[82] Nonetheless, Immigration law in this country provides specific waivers for successful asylum seekers (INA § 274(C)(7)).[83] Likewise, under Canadian immigration law (IRPA s 40(1)),[84] both willful or "direct" (e.g., *Mendiratta v. Canada*)[85] and unknown or "indirect" misrepresentations (e.g., *Wang v. Canada*)[86] of material facts informing authorities' determinations may lead to inadmissibility ("criminal inadmissible alien") and ineligibility (5-years bar). Still, immigration law in Canada states that refugees are exempted from this inadmissibility ground (IRPA s 22(1)).[87] In Germany, further, an asylum seeker's misrepresentation concerning motive to enter the intended host country does not preclude the migrant from lodging later on an asylum claim. In *Beschluss der 1. Kammer des Zweiten Senats*,[88] the Constitutional Court of Germany ("BVerfG") vacated a lower court decision (Administrative Court of Potsdam) denying the asylum protection claim of a Sudanese national who entered Germany using a research visa. Here, the lower court declared unfounded the claimant's petition

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[81] *United States Immigration National Act of 1965 (INA)*, 89th Congress, Pub L 89-236, 79 Stat 911, § 212(a)(6)(C)(i), (ii), (iii) (signed into law 3 October 1965) [as modified by the Immigration Act of 1990] ["INA"].
[82] INA, § 212(a)(6)(C)(i),(ii), (iii) 212(a)(7).
[83] INA, § 212(a)(6)(C)(i),(ii), (iii) 274(C)(7).
[84] *Canada Immigration and Refugee Protection Act (IRPA)*, SC 2001, c 27, s 40(1)(a), (b), (c), (d) (assented to 1 November 2001) [amended and consolidated on 19 June 2014] ["IRPA"].
[85] *Mendiaratta v Canada* (2005) FC 1059 [2005] (holding removal order of an immigrant from India due to material misrepresentation on landing record indicating the immigrant was a widow when she was, in fact, still married).
[86] *Wang v Canada* (2005), FC 293 [2005] (holding exclusion order against permanent resident from China due to "unknown" misrepresentation of material fact concerning undisclosed previous marriage).
[87] IRPA, *supra* note 84, s 22(1).
[88] See *Beschluss der 1 Kammer des Zweiten Senats* (2019), BVerfG 2 BvR 1193/18 [25 February 2019].

to review the merits of his asylum case due to his prior misrepresentation to enter Germany. The Constitutional Court, however, held that such misrepresentation could not give rise to a summary review of the case by disregarding the merits of his asylum claim, including the likelihood of torture if deported to Sudan. In this regard, the Court stated that:

> "(b) The Administrative Court also violated the complainant's right to a hearing under Article 103.1 of the Basic Law by disregarding his further substantiated submissions on his detention and torture by Sudanese military personnel as an intensified and therefore unbelievable submission… (c) The challenged decisions of the Federal Office and the Administrative Court also violated the complainant's fundamental right under Article 3.1 of the Basic Law in its significance as a prohibition of arbitrariness. The rejection of his applications as manifestly unfounded was essentially justified both by the Federal Office and by the Administrative Court on the grounds that he was alleged to have deceived about his true identity. He was supposed to be a researcher for the Sudanese government, who was to participate on behalf of the government in a UN conference in Bonn. If all the evidence available was assessed in a reasonable manner, this assumption seemed downright absurd."[89]

While several inferences may be drawn from the controlling terms defining the established conditions ("directly," "without delay," "show good cause"), only those preceding their legal assertion guide their interpretation. To this end, *les travaux préparatoires* leading to the elaboration of Article 31(1) of the *Refugee Convention* elucidate the extent of non-penalization.[90] Coming directly from the country where the life or freedom of the migrant is in danger means the country where the persecution occurred, not the country (or countries) the refugee passed through. This interpretation acknowledges not few exceptions (e.g., the refugee sought protection in another country, the intended host country has a safe third agreement with a country the migrant passed through, the migrant's conduct indicates asylum is neither sought nor necessary.)

The need for the asylum seeker to *present themself* "without delay" before the host country's authorities encompasses reasonable delays assessed in light of the circumstances the claimant encounters and the deadline stated in the host country's immigration laws to file an asylum claim—this varies depending on whether the claimant is or not placed in removal proceedings.[91]

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[89] *Ibid* at paras 11, 12.

[90] See Guy S Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection" UNHCR Working Paper for the Global Consultation Department (October 2001) (describing discussions held during *les travaux préparatoires* concerning the sprit and meaning of art 31(1) of the *Refugee Convention*) at 4, online: *UNHCR* <https://www.unhcr.org/3bcfdf164.pdf> ["Goodwin-Gill"].

[91] In the United States, for instance, arriving asylum seekers are placed either in *court removal proceedings* (administrative judge makes legal assessment on asylum claim under INA, § 1229a(a)(1)), or in *expedite removal*

The asylum seeker must show also *good cause* for the illegal entry or presence. That is, show that she or he is "a refugee with a well-founded fear of persecution."[92] A word of caution, however. Although the *Refugee Convention* uses the term "illegal"[93] to underscore the fact that, in order to benefit from the legal protection afforded by *international refugee law*, the refugee could have violated the host country's immigration law (e.g., entering through an unauthorized port of entry or lying about their migratory intent upon entering the country.)

Yet such violation neither informs nor does preclude the entity or legal extent of the asylum seeker's persecution claim. In fact, Article 31(1) of the *Refugee Convention* imposes host countries a twofold restriction. Host countries cannot use the illegal entry or presence to deny the refugee's lawful right to seek asylum. Host countries, in short, cannot use the illegal entry or presence to impose penalties (e.g., imprisonment, fines, expulsion, deportation). Thus, host countries' measures aimed at punishing the migrant's conduct otherwise proscribed by immigration law are unlawful (e.g., traveling without a valid passport or visa, entering through unauthorized points of entry, reminding in the host country beyond the authorized time.)

B. Necessary, Arbitrary, and Indefinite Detention

The detention of asylum seekers, the detention of migrant children, and the prolonged detention of migrants raise a fundamental inquiry as to whether such confinements are lawful, necessary, or arbitrary. In the context of immigration, national security, and refugee protection, the alleged *necessary detention* of migrants should be rather exceptional or, otherwise, circumscribed within limits of an administrative and strictly temporary detention subject to the purpose of assessing the migrant's identity, admissibility grounds, record the entry, and perform a security screen; even if

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proceedings (immigration border agent makes legal determination on asylum claim without judicial hearing under INA, § 235-3(b)(1)). The latter can further lead to a *credible fear interview* (USCIS Asylum Officer) should the claimant states "fear of return" during the expedite removal. Although claimants may seek review before administrative judge, recent changes in US immigration law aim to restrict asylum seekers' right to lodge an asylum claim (e.g. safe third country agreement or illegal entry). DHS 2019 Notice enables immigration law enforcement agencies (CBP, ICE) to place aliens in *expedite removal proceedings* (without seeing a judge) should aliens be unable to prove their physical presence in the US for at least 2 years, counting from the moment of their "illegal entry." See INA, *supra* note 81, § 1229a(a)(1) [In general] and § 235.3(b)(1) [Applicability]; see also US Department of Homeland Security (DHS), FR 84, No 141 (23 July 2019) [Notice].

[92] Goodwin-Gill, *supra* note 90 at 11.

[93] Despite the used of the term "illegal," migrant or not, no one is—*stricto sensu*—illegal.

the latter gives rise to further detention. The UN Human Rights Committee issued a general comment on the purpose of asylum-seeker's detention indicating that:

> "Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security."[94]

The *necessary detention* of migrants is defined by its *administrative purpose*, which measure is exceptional (time and circumstances) yet legitimate (grounds and purpose). UNHCR has issued specific detention guidelines for the detention of asylum seekers conveying the very assertion whereby "detention can only be resorted to when it is determined to be **necessary**, **reasonable** in all circumstances and **proportionate** to a legitimate purpose" (Guideline 4.2).[95] This means that the detention of asylum seekers must be circumscribed to a lawfully ascertained legitimate purpose and in light of the migrant's individual circumstances. As such, the detention of migrants regardless of their particular situation (victims of torture, children, women, or migrant's disabilities, age, sexual orientation)[96] could not be held as necessary—much less as proportional or even reasonable. Then, is the detention of migrant children even necessary?

Considering the United States is the country that has more actively implemented a detention policy on migrant children (both unaccompanied and accompanied but separated), it is important to ascertain that need in light of current immigration policies and risks in this country. As it turns out, national security records and data (Chapter 1, Tables 1 and 2, and Chapter 3, Table 9) on terrorist attacks perpetuated in the United States during the last 40 years show no indication of attacks being committed, planned, or financially supported by children.

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[94] UN Human Rights Committee, *General Comment No 35* at para 18 (16 December 2014).
[95] UN High Commissioner for Refugees (UNHCR), *Detention Guidelines* (Geneva: UNHCR, 2012), Guideline 4.2, Comment 33, online (pdf): *REFWORLD* <https://www.refworld.org/pdfid/503489533b8.pdf>.
[96] These restrictions are set forth by the UNHCR. *Ibid* Guidelines 9, *Special Circumstances* (underscoring the asylum-seeker's special circumstances regarding victims of torture and trafficking, e.g. children, women, elderly).

Based on employment data (displacement costs), there is no evidence that migrant children—who often do not even speak English, are not in age to work, and are often employed as farmworkers[97]—are taking jobs from citizens in this country.[98] Form a cultural perspective, migrant children are among the most successful assimilated immigrant groups thanks, precisely, to their young age and their ability to adapt more easily to the new culture and country.[99] Nevertheless, between 2013 and 2015, the United States detained more than a quarter million migrant children (278,885).[100] And 2019, the U.S. detained 72,873 migrant children. In 2018, moreover, there were 330,000 migrant children detained in 74 countries.[101]

The detention of migrant children is not merely ungrounded but also constitutes a violation of international law. In effect, Articles 3 and 22 of the *UN Convention on the Rights of Children* ("CRC")[102] establishes the "best interests of the child" as standard to ascertain any measure or regulation affecting them, along with restrictions on non-discrimination (Article 3 of the *Refugee Convention* and Article 2 CRC),[103] the child's right (including asylum-seekers and refugees) to develop (Article 6 CRC)[104] and not be separated from her or his parents (Articles, 5, 8, 16 CRC).

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[97] See e.g. Karen Coates & Valeria Fernandez, "The Young Hands that Feed Us" *Pacific Standard* (9 July 2019) (citing up to 524,000 migrant children employed as farmworkers in the US in 2014), online: <https://psmag.com/social-justice/the-young-hands-that-feed-us>.

[98] Data show that the impact of displacement costs related to migration is rather small. If anything, migration drives economic growth. At present, evidence does not support the characterization of migrant children as economic threat to host countries' populations. See Sari Pekkala Kerr & William R Kerr, "Economic Impacts of Immigration: A Survey" Harvard Business School Working Paper No 09-013 (January 2011) at 24 (concluding that, "the likelihood and magnitude of adverse labour market effects for natives from immigration are substantially weaker than often perceived"). See also Brennan Hoban, "Do Immigrants "Steal" Jobs from American Workers?" (24 August 2017), online (blog): *BROOKINGS NOW* <https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/>; Alan Travis, "Are EU Migrants Really Taking British Jobs and Pushing Down Wages?" *The Guardian* (20 May 2016), online: <https://www.theguardian.com/politics/2016/may/20/reality-check-are-eu-migrants-really-taking-british-jobs>.

[99] Aside from racial barriers related to their "foreign-sounding names," migrant children are among the most successful immigrant integrated-assimilated groups. See Stanford Institute for Economic Policy Research, "What History Tells Us About Assimilation of Immigrants" *Stanford News* (25 April 2017) (describing assimilation of migrant children in the United States), online: <https://publicpolicy.stanford.edu/news/what-history-tells-us-about-assimilation-immigrants>; Emily Badger "Children of Poor Immigrants Rise, Regardless of Where They" *The New York Times* (28 October 2019), online: <https://www.nytimes.com/2019/10/28/upshot/immigration-america-rise-poor.html>.

[100] UN, *United Nations Global Study on Children Deprived of Liberty*, by Manfred Nowak (Pretoria, South Africa: UN South Africa, November 2019) at 461.

[101] *Ibid* at 41.

[102] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, arts 3(1), (2), (3), 22(1).

[103] *Ibid,* art 2; Refugee Convention, *supra* note 56, art 3.

[104] Convention on the Rights of the Child, *supra* note 102, art 6(1), (2).

The UN Working Group on Arbitrary Detention ("WGAD") has indicated that the deprivation of liberty of migrant children (unaccompanied or separated) is prohibited by international law (Revised Deliberation No. 5).[105] In fact, he UN Committee on the Rights of the Child stated that: "regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable."[106]

Arbitrary detention of migrants is the default state of necessary detention once this one is no longer reasonable and proportional. Thus, the *arbitrary detention* of asylum seekers lacks legitimate purpose, reasonableness, and proportionality either because the detention is systematically enforced (as a matter of law and policy) and regardless of the special and individual circumstances the detained migrant face, or because it is used to punish the migrant's intent to seek asylum. *Ius cogens* (peremptory norm) regards the detention of migrants as last-resort practice limited by the exceptional circumstances of the migrant and the measure to be imposed.[107] It follows that exceptional justifications, however reasonable they may appear (national-security, public-order, or public-health protection), do not turn arbitrary detentions (systematic or indefinite) into legitimate ones. This means that even in cases of national security governments must have a legitimate purpose to detain migrants. State action must thus appear reasonable and proportional based on the migrant's special circumstances, which presupposes a case-by-case analysis before depriving the migrant of her or his liberty. Consequently, although there may be legal grounds and legitimate purpose to detain an asylum seeker, such deliberation does not provide governments with unlimited powers to automatically detain any migrant. Law is, after all, a social institution of measurable and justifiable references (*legitimacy*, *reasonability*, *proportionality*).

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[105] UN Human Rights Council (Working Group on Arbitrary Detention), *Revised Deliberation No 5 on Depravation of Liberty of Migrants* at para 11 (7 February 2018) (indicating that, "the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited") ["WG Deliberation No 5"]. The UN Working Group on Arbitrary detention was established by Commission of Human Rights (Res 1991/42) pursuant General Assembly mandate (GA Res 60/251). The Group's mandate was extended for three years by the UN Human Rights Council (Res 42/22).

[106] UN Committee on the Rights of the Child (CRC), *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration* (Geneva: CRC, 28 September 2012) comment 32, online: *REFWORLD* <https://www.refworld.org/docid/51efb6fa4.html>.

[107] *Ibid* at paras 7, 8, 22, 23, 24.

Indefinite detention is a subset of *arbitrary detention* that does not hinge on the lack of legitimate purpose but on the very idea that the measure (seemingly legitimate) is either unreasonable or disproportionate. This is particularly relevant in the case of asylum seekers (prolonged incarceration beyond necessary detention), which practice has been condemned. For example, it is difficult to consider the detention of asylum seekers for years as reasonable or proportional, especially since under international law seeking asylum is not a crime but a human right (Article 14(1) *of the Universal Declaration of Human Rights* and WGAD Deliberation No. 5).[108]

Australia has been a case of particular concern. The practice of *indefinite incarceration* of asylum seekers in Australia was condemned by the UN Human Rights Council (Working Group on Arbitrary Detention) in two recent opinions. The first case involves an asylum seeker form Sri Lanka, who was fleeing torture and later was diagnosed with schizophrenia. He was detained near Christmas Island in 2010 by the Department of Home Affairs of the Australian Commonwealth Government and placed in custody in Villawood Immigration Detention Centre in New Wales. His detention was held on unlawful entry grounds (*Australia Migration Act of 1958*).[109] In June 2010, the migrant lodged an asylum claim before the Australian Government, which was denied in 2011 following a national security assessment effectuated by the Australian Security Intelligence Organization. This asylum seeker has been incarcerated in Australia for more than 9 years, which propelled the UN Working Group to issue an opinion condemning the case.[110] The second case concerns an asylum seeker from Afghanistan who was intercepted and detained near Christmas Island by the Australian Government in 2008. The asylum seeker here was placed on detention through several detention centres in Australia. He lodged a claim (denied) for protection in 2009 based on persecution by the Taliban in Afghanistan. He was then found ineligible for visa

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[108] See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art14(1) (indicating that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution"). See also WG Deliberation No 5, *supra* note 105 at para 9 (stating that, "seeking asylum is a universal human right, the exercise of which must not be criminalized").

[109] *Australia Migration Act of 1958*, No 62/1958, ss 189(1),196(1)(3) (assented to 8 October 1958).

[110] UN Human Rights Council (Working Group on Arbitrary Detention), *Opinion No 1/2019 Premakumar Subramaniyam (Australia)*, A/HRC/WGAD/2019/1, 84th Sess, (24 April–3 May 2019) at para 99 (indicating that the deprivation of liberty of Mr Subramaniyam violates arts 2, 3, 7, 8 and 9 of the UDHR as well as arts 2, 9, 16 and 26 of the ICCPR and, as such, is "arbitrary and falls within categories II, IV and V").

protection or community residence. Here too, the UN Working Group denounced the deprivation of liberty of this asylum seeker as human rights violation.[111]

Finally, consider the case of Venezuelan refugees in Brazil. Following an official report issued by the Ministry of Public Security and Justice of Brazil in 2019 (leading institution on national security and immigration in the country), the government decided to make a direct application of the *Declaration of Cartagena of 1984* on Venezuelan nationals entering Brazil.[112] Accordingly, starting in 2019, Venezuelans arriving to Brazil to remain permanently after fleeing persecution in their country will be granted refugee status without detention and, in most cases, without an interview.[113] For the government (based on the report), the risks associated with the security, human rights violations, torture and generalized state of persecution these migrants face are abundantly clear, for which applying the *Declaration of Cartagena* to acknowledge their status and simplify their direct reception is a logical step. Just in 2019, Brazil granted refugee status to more than 21,000 Venezuelans.[114] In a historic decision (international precedent), following the government's official recognition of "serious and generalized violation of human rights in the Venezuelan territory" ("grave e generalizada violação de direitos humanos no território venezuelano"), the National Committee for Refugees of Brazil granted in block (at once) refugee status to 17,000 Venezuelans on January 31, 2020.[115] That is, in less than a year, Brazil granted refugee status to nearly 40,000 Venezuelans without ordering their preventive, necessary or

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[111] UN Human Rights Council (Working Group on Arbitrary Detention), *Opinion No 42/2017 Mohamman Naim Amiri*, A/ HCR/WGAD/2017/42, 79th Sess, (21-25 August 2017) at para 47 (holding that the deprivation of Mr Amiri violates arts 2, 3, 7, 8, 9, art 14 of the UDHR, and arts 2, 9, 16, 26 of the ICCPR).

[112] Brazil, Ministério da Justiça e Segurança Pública (MJSP), *Estudo de País de Origem–Venezuela* SEI/MJ No 8757617 (Brasilia: MJSP, June 2019), online (pdf): *GOVERNO FEDERAL* <https://www.justica.gov.br/news/collective-nitf-content-1564080197.57/sei_mj-8757617-estudo-de-pais-de-origem-venezuela.pdf> ["MJSP Report"]. See also *Cartagena Declaration on Refugees* ("Declaración de Cartagena Sobre Refugiados"), Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, 19-22 November 1984 (Cartagena de Indias, Colombia), online (pdf): *ANCUR* <https://www.acnur.org/5b076ef14.pdf>.

[113] MJSP Report, *ibid* at 13 (para 10.1). In its report, the Ministry of Public Security and Justice of Brazil sets forth six criteria to simplify the reception of Venezuelan refugees. Although those measures aim to reduce administrative steps to adjudicate refugee protection (including eliminating interviews on credible fear), exceptionally interviews may occur in relation to criminal organizations, complementary information, or even changes in Venezuela.

[114] Ministério da Justiça e Segurança Pública, "CONARE Reconhece Como Refugiados 17 Mil Venezolanos" *MJSP Noticias* (31 January 2019), online: *GOVERNO FEDERAL* <https://www.novo.justica.gov.br/news/conare-reconhece-como-refugiados-17-mil-venezuelanos>.

[115] *Ibid*.

arbitrary detention. Then, again, is the detention and prosecution of migrants truly necessary—let alone, justified? Based on the reasons and cases previously considered, I conclude, it is not.

C. Access to Courts

Considering human rights and international law violations on refugees and asylum seekers at hands of law enforcement authorities across the world, the global trend of restricting their access to domestic courts in order to review such actions constitute one of the most consequential violations of *international refugee law*. Article 16 of the *Refugee Convention*[116] guarantees refugees access to courts of law in the country of refuge. This encompasses basic due process protections otherwise provided to citizens and residents ("equal access to courts"), such as access to legal counsel, judges, bail and, more broadly, judicial review. In practice, however, the right of asylum seekers and refugees to access domestic courts is being restricted and violated through State action.

The situation of asylum seekers seeing their access to domestic courts increasingly diminished in the United States is particularly revealing. In October 2019, the Trump administration launched federal pilot programs aimed at accelerating assessment and deportation proceedings on asylum seekers, which winded up restricting migrants' access to legal counsel and judicial review. The *Prompt Asylum Claim Review* (PACR) authorizes asylum seekers to be held under the custody of the U.S. Customs and Border Protection facilities rather than being sent to ICE federal detention centres. This reduces the time that asylum seekers under ICE's custody have to seek legal counsel directly or through the legal clinics operating in detention centers (e.g., RAICES Texas). This was, in fact, the constitutional challenge (on due process grounds) raised by ACLU's in a recent lawsuit filed before the U.S. Federal District Court for the District of Columbia on behalf of two Salvadorian families held in CBP facilities.[117] Similar challenge was filed against the *Humanitarian Asylum Review Process* (HARP) that applies to asylum seekers from Mexico.

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[116] Refugee Convention, *supra* note 56, art 16.

[117] See ACLU Texas, "ACLU Files Lawsuit Challenging Programs that Rush Migrants through Asylum Screenings without Access to Attorneys in Border Patrol Facilities" (6 December 2019), online: *ACLU-TX* <https://www.aclutx.org/en/press-releases/aclu-files-lawsuit-challenging-programs-rush-migrants-through-asylum-screenings>.

Aside from the incidental and consequential restriction to access to courts in the U.S., CBP detention facilities or "hieleras" ("iceboxes") do literally put asylum seekers in harm ways.[118] In 2018, the U.S. Department of Homeland Security proposed new rules precluding the release on bail ("bond") of children asylum seekers, unless they can be released to their parents or legal guardians. In practice, this means that migrant children without parents or legal guardians must remain under U.S. immigration authorities' custody (ICE, CBP).[119] More recently, in *Matter of R-A-V-P*,[120] the U.S. Board of Immigration Appeals (BIA) denied an asylum claimant's request for bond on humanitarian grounds while his claim was decided, notwithstanding the claimant's evidence on well-founded fear and credible persecution. In its decision, BIA underscored a critical distinction between proving credible persecution and eligibility for asylum protection; the latter, BIA ascertains, imposes on the asylum claimant a higher "legal standard."[121] In *Thuraussigiam v. USDHS*,[122] an asylum claimant from Sri Lanka challenged his removal from the U.S. to Sri Lanka on due process grounds by relying on constitutional precedent (*Smith v. U.S. Customs & Border Protection*),[123] while contending the presence of asylum seekers in expedite removal proceedings due to the very nature of their claim: the right to seek protection and judicial review. Considering the implications of this ruling, the Trump administration appealed the Ninth Circuit decision before the U.S. Supreme Court (*writ of certiorari*), which eventually upheld the "express" removal of asylum seekers without judicial review (*Department of Homeland Security et al v. Thuraussigiam*).[124]

In Bangladesh (Cox's Bazar refugee camps), access to Bangladesh's courts for Rohingya refugees is decided (restricted) by the official responsible for the camp administration ("GoB

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[118] *Ibid*.
[119] See Diane Eikenberry & Tara Tidwell Cullen, "NIJC's Public Comment on the Trump Administration's Proposed Regulations to Indefinitely Detain Children and Families" (8 November 2018) (describing DHS proposed rules), online (blog): *IMMIGRANT JUSTICE* <https://immigrantjustice.org/staff/blog/nijcs-public-comment-trump-administrations-proposed-regulations-indefinitely-detain>.
[120] *Matter of R-A-V-P*, 27 I&N Dec 803 (BIA 2020) (deciding appeal on bail sought by an asylum seeker from Honduras fleeing persecution on sexual-orientation discrimination grounds).
[121] *Ibid* at 806.
[122] *Thuraussigiam v USDHS*, No 18-55313 (9th Cir 2019) at 11a.
[123] See *Smith v US Customs & Border Protection*, 741 F3d 1016 (9th Cir 2014).
[124] *Department of Homeland Security et al v Thuraissigiam*, 591 US _ (2020) at 36 (holding that due process rights for aliens are circumscribed only to those rights "regarding admission that Congress provided by statute").

representative").[125] Under-staffed and often under-resourced courts has led to 3.6 million cases with pending hearings affecting poor and rural populations (including Cox's Bazar refugee camps).

In *Ilias and Ahmed v. Hungary*,[126] two asylum seekers from Bangladesh appealed domestic courts' decisions based on lack of access to asylum proceedings in Serbia (lack of proper notice and translation),[127] restrictions to legal counsel in Hungary (legal counsel granted after hearing ordering removal from Hungary's transit zone on grounds that Serbia was, a "safe third country"),[128] and violations to the *European Convention of Human Rights* (Article 3, "Torture") and EU asylum law (Directive 2013/32/EU, "Asylum Procedures") before the European Court of Human Rights. The Court underscored the violation of Article 3 of the *Convention* with respect to the asylum seekers' removal from Hungary to Serbia.[129] As to whether the restriction to access courts encompasses the claimant's access the asylum system (procedures), the Court held that:

> "… Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned."[130]

D. Non-Discrimination

Article 3 of the *Refugee Convention* establishes the *principle of non-discrimination*[131] providing that the contracting States must apply the Convention "without discrimination as to race, religion, or country of origin."[132] The *principle of non-discrimination* in *international refugee law* is inspired by the principle of equality seeking to promote non-discrimination through equal

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[125] See International Rescue Committee (IRC), "Access to Justice in Crisis: Legal Empowerment for Rohingya Refugees Living in Cox's Bazar, Bangladesh" (October 2019) at 9, online: *IRC* <https://www.rescue-uk.org/sites/default/files/document/2078/accesstojusticeincrisis.pdf>.
[126] See *Ilias and Ahmed v Hungary*, App No 1121JUD004728715 (ECtHR, 21 November 2019).
[127] *Ibid* at 6.
[128] *Ibid* at 5 (holding Hungary immigration authorities' decision based on Government Decree); see also Hungary, Government Decree No 191/2015 (VII 21) (2015).
[129] *Ibid* at 72.
[130] *Ibid* at para 134.
[131] Refugee Convention, *supra* note 56, art 3.
[132] *Ibid.*

protection. In general, the *principle of nondiscrimination* in international law is also embedded in moral and legal acquisitions of aspirational equality and human dignity.[133]

The *principle of nondiscrimination* arising out of the *Refugee Convention* compels State actors to provide refugees with a dignified and humane reception and legal treatment by making sure their laws regulating their reception do not discriminate against migrants due to their race, gender or religion. Otherwise, a legal impossibility and inconsistency would result since millions of refugees flee persecution on the account of gender violence, racial discrimination and religious persecution. Some of the most recurrent violations of *international refugee law* take place through regulations promoting inhumane, cruel and unlawful rejection of refugees and asylum seekers in the United States (Mexican and Central-American asylum seekers), Czech Republic (Muslim refugees), Hungary (Muslim refugees), Greece (Syrian and Pakistani refugees), India (Rohingya refugees), and Peru (Venezuelan refugees).

1. **Diplomatic Rejection** (Safe Third Country-*like* Agreements)

A Safe Third Country Agreement ("STCA") is a bilateral immigration agreement whereby two countries declare themselves safe for refugees, precluding citizens from other countries from claiming asylum or refugee protection should they arrive in or pass first through any of the thereby declared "safe countries." In theory, this type of agreement aims to reduce the flow of migrants in the signatory States, while providing them with more effective tools to monitoring migrants

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[133] See e.g. UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, A/RES/45/154, art 24 (indicating that, "every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law"); UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (stating in its preamble that, "discrimination [against women] violates the principles of equality of rights and respect for human dignity"); UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/13, art 4 (providing that, "those belonging to minorities must be able to enjoy all their human rights, not just minority rights"); UN General Assembly, *UN Declaration on the Rights of Indigenous Peoples,* 2 October 2007, A/RES/61/295, Preamble (establishing that, "… recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such"); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 2(1)(a) (entered into force 4 January 1969) (providing that, "each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation").

arriving to their shared border. I argue that, in practice, these agreements constitute a seemingly inconspicuous system of *diplomatic refoulement or rejection*.

One of the most well-known STCA is the one signed in 2004 by Canada and the United States.[134] Although the agreement helped Canada deter migrants crossing or traveling from the U.S., legal scholars have found its provisions and practice to be inconsistent with Canadian values[135] and the "irregular immigration" these types of measures allegedly prevents.[136] In fact, the agreement was declared invalid by Federal Court in Ottawa because the U.S. is no longer a safe third country and, as such, the agreement violates Section 7 of the Canadian Charter of Rights and Freedoms (life, liberty, and security of the person)[137]—which is particularly relevant in light of President Trump's immigration policies exposing migrants to human rights violations.[138]

Considering the way countries have used safe third country-*like* agreements to evade international refugee law protections and deter certain type of migrants, these agreements violate both the *Non-refoulement* and the *Non-discrimination principles*. For example, with aims to countervail the arrival of thousands of Central American asylum-seekers traveling in caravans (mostly from Guatemala, El Salvador, and Honduras) to the United States, the Trump administration issued the so-called "*Zero Tolerance policy*" directed at dissuading unwelcome migrants from even considering the U.S. as their host country, while permitting U.S. immigration authorities to arrest

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[134] Government of Canada, *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (5 December 2002), online: *REFWORLD* <https://www.refworld.org/pdfid/42d7b9944.pdf>.
[135] See Audrey Macklin, "The Value(s) of the Canada-US Safe Third Country Agreement" Caledon Institute Social Policy (2003) at 19, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=557005>.
[136] See Efrat Arbel, "Between Protection and Punishment: The Irregular Arrival Regime in Canadian Refugee Law" in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solidarity Confinement* (London: Palgrave MacMillan, 2015) at 197 (arguing that the Canada-US STCA fosters both discourses of "criminality" and "illegality" on refugees and the irregularity the Agreement aims to punish).
[137] The decision issued in July 2020 was nonetheless suspended (declaration of invalidity) until January 2021 "to allow time for Parliament to respond." See *Canadian Council for Refugees v Canada (Immigration, Refugees, and Citizenship)*, 2020 FC 770 [2020] at paras 162, 163. See also *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 *being Schedule B to the Canada Act 1982* (UK), 1982, c 11, s 7.
[138] Reports indicate that the conditions in which migrant children are currently detained in the US amount to torture. See Gaona, *supra* note 54; Physicians for Human Rights, "You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation" by Hajar Habbach et al (New York: Physicians for Human Rights, February 2020) at 8, 27 (describing psychological implications of family separation policies and detention of migrant children in the United States), online (pdf): *PHP* <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>.

them (upon entering U.S. territory), temporarily expulse them to Mexico, and eventually return them to a designated 'safe country' (including the asylum seeker's home country). This, further, following U.S. bilateral immigration agreements (Asylum Cooperation Agreements "ACA") with El Salvador,[139] Guatemala,[140] and Honduras.[141]

I claim that the U.S. Government has taken five different yet synchronized actions. *First*, removing the factual and legal basis of asylum protection for Central American asylum claimants by eliminating the otherwise established policy (precedent) of adjudicating asylum protection on the account of membership in a particular social group defined by gangs' and domestic violence (*Matter of A-B*);[142] these two, in practice, the most recurrent persecution claim raised by Central American women and unaccompanied children before U.S. immigration authorities.[143] *Second*, creating the appearance of the so-called "safe country" with respect to El Salvador, Honduras, and Guatemala, by eliminating official warning travel restrictions to these countries.[144] *Third*, forcing safe-third-country-*like* agreements (ACA) with each one of these countries under economic threats (imposing tariffs to Guatemala, cutting humanitarian aid to El Salvador, and eliminating remittances services from the U.S. to Honduras),[145] while implementing a legal ban ("ACA

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[139] US Department of Homeland Security (DHS) & Ministry of Foreign Relations of the Republic of El Salvador, *Agreement for Cooperation in the Examination of Protection Claims* (20 September 2019) (establishing procedures for the refoulment or "referral" of asylum claimants from the United States to El Salvador), online (pdf): *THOMPSON REUTERS* <https://fingfx.thomsonreuters.com/gfx/mkt/12/6447/6378/DHS%20Cooperative%20Agreement%20with%20El%20Salvador.pdf> ["El Salvador Agreement"].

[140] See Priscilla Alvarez, "Read: US-Guatemala Agreement on Asylum Claims" *CNN* (1 August 2019) (posting copy of the Asylum Cooperation Agreement between the United States and Guatemala), online: <https://www.cnn.com/2019/08/01/politics/guatemala-asylum-agreement-doc/index.html>.

[141] Governments of the United States of America & the Republic of Honduras, *Agreement for Cooperation in the Examination of Protection Claims ("Asylum Cooperation Agreement")*, 25 September 2019, online: *AILA* <https://www.aila.org/infonet/us-honduras-sign-asylum-cooperative-agreement>.

[142] See 27 I&N Dec 316 (AG 2018) at 319, 320 ["Matter of A-B"]. US Attorney General Jeff Sessions overruled BIA decision (*Matter of A-R-C-G,* 16 I&N Dec 318, BIA 2014) on asylum protection of a women from El Salvador claiming persecution as member in the particular group of women suffering domestic and gangs' violence.

[143] See *NRLB v Wyman Gordon Co*, 394 US 759 (1969) (establishing policy precedent granting asylum protection through "adjudication"); see also *Eco Tour Adventures, Inc v Zinke*, 249 F Supp 3d 360, 370 (DDC 2017) (stating the need to evaluate the likelihood of irreparable harm should the asylum claim be denied); *Grace et al v Mathew G Whitaker*, 344 F Supp 3d 96 (DDC 2018) (blocking AG Session's decision on injunctive relief).

[144] See e.g. Nicole Narea, "The State Department Is Telling US Tourists that El Salvador Is Now as Safe as Denmark" *Vox* (2 October 2019), online: <https://www.vox.com/policy-and-politics/2019/10/2/20894552/state-department-el-salvador-travel-alert-safe>; US Department of State, *El Salvador Travel Advisory* (moving the travel warning from level 4 "do not travel" to level 2 "exercise increased caution"), online: *STATE* <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html> [accessed 2 October 2019, 6:30 AM-ET].

[145] See BBC, "Guatemala Signs Migration Deal with US After Trump Threats" *BBC News* (27 July 2019), online: <https://www.bbc.com/news/world-latin-america-49134544>; Michelle Hackman & Juan Montes, "U.S., El Salvador

ban")[146] on asylum seekers from these countries, enabling thereby immigration authorities to return them upon entering the U.S. southern border to any of these countries and irrespective of the human rights risks such migrants may confront in the designated safe third country.[147] *Fourth*, establishing a temporary relocation system with Mexico through the so-called "*Remain in Mexico policy*" or *Migrant Protection Protocols* ("MPP")[148] by arresting and expulsing asylum claimants in the U.S. to Mexico until their claims are decided or their presence is required ("asylum hearing" at the border or abroad). *Fifth*, a yet more conflicting aspect of the Trump administration policies on asylum seekers arriving to the southern border lies in the fact that neither the temporary (Mexico) nor the eventually designated host country (El Salvador, Honduras, Guatemala) offers safe or voluntary return for these migrants[149]—particularly since Mexico, acting under the threat of U.S.

Reach Deal on Asylum Seekers" *Wall Street Journal* (20 September 2019) (threating to cut humanitarian aid to El Salvador), online: <https://www.wsj.com/articles/u-s-el-salvador-reach-deal-on-asylum-seekers-11569006377>; see also "Las Repercusiones Que Honduras No Acepte Ser Tercer País Seguro, Amenazas a las Remesas y la Maquila" *Proceso Digital* (16 September 2019) (threatening to cut remittances from the US to Honduras, along with tariffs on industrial production), online: <https://www.proceso.hn/nacionales/9-nacionales/las-repercusiones-que-honduras-no-acepte-ser-tercer-pais-seguro-amenazas-a-las-remesas-y-la-maquila.html>.

[146] US Department of Homeland Security (DHS) & US Department of Justice (DOJ), *Implementing Bilateral and Multilateral Asylum Cooperation Agreements Under the Immigration and Nationality Act*, DHS-US Citizenship and Immigration Services Docket No USCIS-2019-0021, DOJ Executive Office for Immigration Review Docket No 19-0021, AG Order No 4581-2019 (14 November 2019) at 6, 8, 10, online (pdf): *FEDERAL REGISTER* <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-25137.pdf?1574084724> ["DOJ Cooperation Agreements"]. Following the "Asylum Cooperation Agreements ACA," both the US Department of Justice and the Department of Homeland Security issued an "Interim Final Rule" based on INA, § 208(a)(1), 8 USC § 1158(a)(1) ("Asylum is a discriminatory immigration benefit") and the *Interim Final Rule*, which operates as a "Third Country Transit Bar" by establishing an eligibility (ban) to remain in the US for Central American migrants–including unaccompanied children passing through Mexico or another US designated safe third country ("Asylum Cooperation Agreements"). The rule orders the removal of asylum seekers from El Salvador, Honduras, and Guatemala due to the increase in the number of applications ("too many"), immigration detention centres "pushed to capacity," and the number of aliens that "consumes DOJ resources." See US Department of Justice & Department of Homeland Security, *Eligibility and Procedural Modifications Rule*, 84 FR 33829, 33820 (16 July 2019) ["DOJ Eligibility"].

[147] See Human Rights Watch, "Deported to Danger: United States Deportation Polices Expose Salvadorans to Death and Abuse" (Washington, DC: HRW, February 2020) (describing human rights violations in El Salvador, gangs' violence, abductions, and deported asylum-claimants killings), online (pdf): *HRW* <https://www.hrw.org/sites/default/files/reportpdf/elsalvador0220_web_0.pdf> ["HRW Deported to Danger"]; Human Rights Watch, "World Report 2019" (Washington, DC: Human Rights Watch, 2020), online: *HRW* <https://www.hrw.org/world-report/2019/>. See also The Economist, "The World's Most Dangerous Cities" *The Economist* (31 March 2017), online: <https://www.economist.com/graphic-detail/2017/03/31/the-worlds-most-dangerous-cities>.

[148] US Department of Homeland Security, *Memorandum: Policy Guidance for the Implementation of the Migrant Protocols*, Memorandum No 20528 (25 January 2019), online (pdf): *DHS* <https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf> ["Migrant Protection Protocols"].

[149] A survey by Amnesty International on migrants from El Salvador, Guatemala, and Honduras arriving to Mexico in 2018, indicated that 84% of them had no desire to return to their countries. See Amnesty International, "Overlooked, Under-Protected: Mexico's Deadly Refoulment of Central Americans Seeking Asylum" (2018) at 5, online (pdf): *AMNESTY* <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

tariffs,[150] is retuning asylum seekers to Central America by force (Video 3). International reports further indicate that asylum seekers who were refouled by the U.S. to their countries have been killed by the very non-state actors (gangs)[151] from which they escaped (death, sexual abuse).[152]

The rationale of the Trump administration to justify these policies, such as the "large number of applications" for asylum,[153] that the number of asylum seekers is "pushing the capacity" of immigration detention centres (including children),[154] or that migrants consume institutional resources,[155] are not only outside legal applicable exceptions set forth by *international refugee law* (national security, public order, prior serious non-political crime, subsequent criminal convictions, crimes against humanity), but also violate the very premise of the *non-refoulement principle*.

As of November 2019, more than 60,000 migrants had been refouled to Mexico under MPP; this includes, more than 16,000 kids under 18 years of age, 4,000 toddlers under 5 years of age, and 500 babies under 12 months of age.[156] The data is particularly troublesome considering both the dire humanitarian conditions in which asylum seekers are abandoned upon their refoulement throughout the U.S.-Mexican border[157] and the risks to which these migrants are exposed while waiting for their claims to be decided (rape, human trafficking, drug cartels violence).[158]

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[150] See Alejandra Macias Delgadillo, "As Mexico Abuses Migrants Under Trump's Orders, Where Is Congress" *The Hill* (4 February 2020), online (blog): <https://thehill.com/blogs/congress-blog/politics/481474-as-mexico-abuses-migrants-under-trumps-orders-where-is-congress>; BBC, "Mexico Under Pressure As Asylum Applications Skyrocket" *BBC News* (15 October 2019), online: <https://www.bbc.com/news/world-latin-america-50040477>.

[151] See HRW Deported to Danger, *supra* note 147 at 28, 31.

[152] See Ben Fox, "Report: At least 138 Sent from US to El Salvador Were Killed" *Associated Press* (5 February 2020), online: <https://apnews.com/5648a26b9f44313ff09cd09a3f4e38db>.

[153] See DOJ Cooperation Agreements, *supra* note 146 at 6.

[154] *Ibid* at 8.

[155] *Ibid* at 10.

[156] Refugee and Immigration Center RAICES, "You Can Help Stop MPP" (20 November 2019), online: *RAICES* <http://www.raicestexas.org/2019/11/20/you-can-help-stop-mpp/>.

[157] See Nicola Narea, "The Abandoned Asylum Seekers on the US-Mexican Border" *Vox* (20 December 2019), online: <https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez>.

[158] See Maria Verza, "Migrants Stuck in Lawless Limbo Within Sight of America" *Associated Press* (17 November 2019) (reporting kidnapping, human trafficking, gangs' and drug-cartels' violence in Nuevo Laredo, Matamoros, Ciudad Juarez, and Tamaulipas), online: *USNEWS* <https://www.usnews.com/news/best-states/texas/articles/2019-11-16/migrants-thrust-by-us-officials-into-the-arms-of-the-cartels>; Wendy Fry, "Cartel Violence Drives Surge of Mexican Asylum-Seekers to Border Towns" *The San Diego Union Tribune* (24 October 2019) (reporting thousands of Mexican asylum-seekers fleeing drug cartel violence in southern Mexico, yet forced to wait months in Tijuana for their claim to be decided in the United States), online: <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-11/mexican-asylum-seekers-waiting-in-line-behind-thousands-in-tijuana>.

2. Systematic Rejection (Asylum Bans and Summary Deportations)

Increasingly, more countries are implementing a zero-tolerance-*type* policy oriented at systematically denying (preventing asylum claims to be filed) asylum seekers at their borders, irrespectively of their human suffering, persecution and credible account of fear and torture. This trend threatens to end *international refugee law*, especially considering the rejection of refugees through either "*diplomatic*" and "*systematic denials*" derived from conjunctural (political, economic, racial), not legal grounds. The case of Greece rejecting thousands of Syrian and Pakistani refugees at its northern border is quite revealing. Following the Turkish invasion of northern Syria—and, more particularly, the killing of Turkish troops and the lack of NATO's military support afterwards[159]—the Turkish Government decided to open its border with Europe on February 27, 2020.[160] As a result, thousands of Syrian and Pakistani refugees rushed to the Turkish border with Greece where they were received with tear gas (Video 4) and faced systematic rejection.[161] These actions led to the suspension of asylum applications.[162]

True, no country can suddenly be forced to open its doors to millions of refugees at once. There are economic, social and security tensions that need to be considered as they become part of everyday reality both refugees and local communities confront (Chapter 1). Indifference of EU leaders, Greek and Turkish authorities is not a proper response, however. After all, refugees across the world are nowadays increasingly trapped between violence they flee from in their home countries and violence and indifference they encounter in the countries that either host them or reject them. The case of Syrian refugees being pushed by the Turkish Government to leave Turkey and the attacks they encounter at hands of the police and the military in Greece—this one backed up by the government and EU leaders—is therefore the clearest example of this trend.[163]

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[159] See Al Jazeera, "33 Turkish Soldiers Killed in Syrian Air Raid in Idlib" *Al Jazeera* (28 February 2020), online: <https://www.aljazeera.com/news/2020/02/turkish-soldiers-killed-air-raid-syria-idlib-200227211119672.html>.
[160] See Amnesty International, "Explained: The Situation at Greece's Border" *AI News* (5 March 2020), online: <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/>.
[161] *Ibid.*
[162] See Martina Stevis-Gridneff, "Greece Suspends Asylum as Turkey Open Gates for Migrants" *The New York Times* (1 March 2020), online: <https://www.nytimes.com/2020/03/01/world/europe/greece-migrants-border-turkey.html>.
[163] See Jon Stone, "EU Chief Praises Greece as "Shield" of Europe After Police Attack Refugees at the Border" *The Independent* (4 March 2010), online: <https://www.independent.co.uk/news/world/europe/greece-refugees-border-eu-police-ursula-von-der-leyen-a9373281.html>.

Nevertheless, I argue, ***ending refugee protection will end neither forced migration nor refugees***. There is unsurmountable evidence (documental and epidemiological-quantitative) on the mistreatment, racial discrimination, and the effects suffered by Syrian and Pakistani refugees in Greece.[164] Notwithstanding a positive initial legal response, discrimination against Syrian and Pakistani refugees is preceded by questionable interception-at-Sea practices (including secret expulsion of refugees)[165] and the deteriorating reception of refugees implemented by the Greek Government across the so-called "pre-removal detention centres"[166] and "resettlement sites."[167]

Another case of discrimination against refugees (based on race and ethnicity) is the systematic crackdown of the Indian Government on Rohingya refugees. Just as Turkey is pushing away Syrian and Pakistani refugees toward Greece, India is systematically rejecting and pushing away Rohingya refugees toward Bangladesh. In January 2020, following threats of summary deportation around 1,300 Rohingya refugees moved from India to Bangladesh.[168] After the election of the leader of the Hindu-nationalist Bhartiya Party (BJP) in 2014, Narendra Modi, as Prime Minister of India, the escalation of violence and growing social, cultural, legal and political tensions with the Muslim minority eventually led Modi's Government to single out the Rohingyas as a threat to

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[164] Using a cross-sectional population and quantitative survey (experience questionnaire) identifying up to 728 Syrian refugees being hosted in eight different locations across Greece (with independent sample from each site), physicians documented refugees' experiences of violence and mental health conditions. See Jihane Ben Farhat et al, "Syrian Refugees in Greece: Experience with Violence, Mental Health Status, and Access to Information During the Journey and While in Greece" (2018) 16:40 Med BMC 1. See also Amnesty International, "Greece 2017/2018" (Washington, DC: Amnesty International, 2019) (reporting 50 hate-motivated attacks against Pakistani refugees in Greece between August 2016 and the end of 2017), online: *AMNESTY* <https://www.amnesty.org/en/countries/europe-and-central-asia/greece/report-greece/>.

[165] There are reports indicating that more than 1,000 refugees being secretly expelled and at least 1,072 asylum seekers being dropped at the Sea by Greek officials. See Patrick Kingsley & Karam Shoumali, "Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea" *The New York Times* (14 August 2020), online: <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html>.

[166] UN Human Rights Council*, Report of the Special Rapporteur on the Human Rights of Migrants (François Crépeau) on His Mission to Greece*, A/HRC/35/25/Add2 (Geneva: UNHRC, 6-23 June 2017) at paras 44, 52 (indicating that, "The Special Rapporteur deeply regrets the policy of increasing the use of detention of persons irregularly entering Greek territory, including unaccompanied children and families. Measures must be taken to ensure a proper individual assessment of all migrants in order to identify vulnerabilities, with a determination of the limited number of migrants for whom detention is necessary, the reason why it is necessary, and the immediate release all the other migrants with an appropriate status"), online (pdf): *RELIEFWEB* <https://reliefweb.int/report/greece/report-special-rapporteur-human-rights-migrants-his-mission-greece-ahrc3525add2-enar> [Special Rapporteur's second visit].

[167] See Izza Leghtas, "Unnecessary Suffering for Asylum Seekers on the Greek Islands" (13 July 2017), online (blog): *REFUGEES INTERNATIONAL* <https://www.refugeesinternational.org/reports/2017/greekislands>.

[168] Zeenat Saberin, "Over 1,000 Rohingya Flee India for Bangladesh Fearing Crackdown" *Al Jazeera* (16 January 2020), online: <https://www.aljazeera.com/news/2019/01/1000-rohingya-flee-india-bangladesh-fearing-crackdown-190116164623256.html>.

national security[169] and what he claims to be the very fabric of the Indian society. Little by little, Prime Minister Modi's rhetoric describing Rohingya refugees as "illegal Bengalis" has influenced India's current immigration law and practices as well as social attitudes toward the approximately 40 thousand Rohingya refugees.[170] The government's crackdown has drastically reduced Rohingyas' access to work, education, shelter, sanitation facilities, and healthcare. Law-enforcement's human rights abuses against Rohingyas in India (Jammu and Hiryana regions) include extortion, arbitrary detentions, and beatings.[171] Though India signed neither the *1951 Refugee Convention* nor the *1967 Asylum Protocol of 1967*, the country ratified the *Universal Declaration of Human Rights of 1948* (Article 14.1).[172] Further, India has hosted millions of refugees through long-term visas (LTV) viewed as minorities in the countries from where they fled (e.g., Tibetans fleeing China, Chakmas fleeing Bangladesh, Christians fleeing Afghanistan, Tamils fleeing Sri Lanka).[173]India, in short, has established international precedent by hosting millions of refugees, which presupposes a *customary legal obligation* to respect refugees' human rights (including nondiscrimination).[174]

Systematic discrimination against refugees based on their *religion* is pervasive in Czech Republic and Hungary. Public declarations issued by the President of Czech Republic Miloš Zeman against Muslim refugees indicate a trend of rejection.[175] President Zeman has portrayed Muslim refugees as "Islamist who are coming to subjugate Europe" and "criminals." The Foreign Affairs Minister, Hynek Kmoníček, referred to these migrants as "dangerous foreign blood."[176] The government's

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[169] See Suchitra Mohanty & Rupam Jain, "India Calls Rohingya Refugees 'Threat to National Security'" *Reuters* (14 September 2017) (quoting government officials' declarations before the Supreme Court of India), online: <https://www.reuters.com/article/us-myanmar-rohingya-india/india-calls-rohingya-refugees-threat-to-national-security-idUSKCN1BP24M>.
[170] See Ashley Starr Kinseth, "India's Rohingya Shame" *Al Jazeera* (29 January 2019), online: <https://www.aljazeera.com/indepth/opinion/india-rohingya-shame-190125104433377.html>.
[171] *Ibid.*
[172] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Res 217 A (III) (1948), art 14(1) ["UDHR"].
[173] See Times of India, "Why India Is Refusing Refuge to Rohingyas" *Times of India* (6 September 2017), online: <https://timesofindia.indiatimes.com/india/why-india-is-refusing-refuge-to-rohingyas/articleshow/60386974.cms>.
[174] See Daniel M Bodansky, "The Concept of Customary International Law" (1995) 16:3 Michigan JIL 667 at 668.
[175] See BL, "Czech President Miloš Zeman: The Immigrants Are Islamists. They Are Trying to Subjugate Europe" *Britské Listy* (5 November 2015), online:<http://blisty.cz/art/79737.html>; BL, "Czech President Miloš Zeman: The Refugees Are Criminals" *Britské Listy* (6 November 2015), online: <http://blisty.cz/art/79745.html>.
[176] See BL, "Head of President Zeman's Foreign Department Compares the Refugees to "Dangerous Alien Blood"" *Britské Listy* (25 October 2015), online: <http://blisty.cz/art/79568.html>.

rhetoric soon translated into a call for a systematic ban on Muslim refugees.[177] Both the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein,[178] and the European Commission against Racism and Intolerance[179] publicly condemned the regulations and the government's statements. Systematic discrimination against Muslim refugees ("Islamization of Europe") in Hungary is well documented,[180] along with asylum bans on Muslim refugees.[181]

Racial discrimination leading to asylum bans is present in South America as well. Notwithstanding Peru's initial positive response on Venezuelan refugees, the country has gradually shifted social attitudes[182] and laws[183] on Venezuelan refugees while banning their claims in Peru's northern border.[184] After Colombia, Peru hosts the largest number of asylum seekers from Venezuela in the region (377,047 asylum seekers). At present, however, reports indicate that unless the claimant has family members with immigration status in Peru, the government (Comisión Especial Para

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[177] Tom Batchelor, "Czeck President Calls for Total Ban on Refugees to Prevent 'Barbaric Attacks'" *Express* (2 August 2016), online: <https://www.express.co.uk/news/world/695871/Migrant-crisis-Czech-President-calls-TOTAL-ban-refugees-prevent-attacks>.

[178] See OHCHR, "Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees" *OHCHR News* (22 October 2015), online <https://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=16632&langid=e>.

[179] See European Commission Against Racism and Intolerance (ECARI), "ECRI Report on the Czech Republic. Fifth Monitoring Cycle" (Brussels: ECARI, October 2015), online: *COE* <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/>.

[180] See Brookings Institute, "Anti-Muslim Populism in Hungary: From the Margins to the Mainstream" by Péter Krekó, Bulcsú Hunyadi & Patrik Szicherle (Washington, DC: Brookings Institute, July 2019) (quoting Hungary's Government rhetoric on the "Islamization of Europe" and the "perishing of Christian Europe," while describing criminalisation of asylum proceedings in Hungary with regards to Muslim refugees), online: *BROOKINGS* <https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream/>.

[181] See Emilie Shultheis, "Viktor Orbán: Hungary Doesn't Want 'Muslim Invaders'" *Politico* (January 8 2018), online: <https://www.politico.eu/article/viktor-orban-hungary-doesnt-want-muslim-invaders/>.

[182] See Caracas Chronicles, "The Making of a Public Enemy: Venezuelans in Peru" *Caracas Chronicles* (30 September 2019), online: <https://www.caracaschronicles.com/2019/09/30/the-making-of-a-public-enemy-venezuelans-in-peru/>; Christine Armario, "Mounting Venezuela Exodus Sparks Fears of Rising Xenophobia" *AP* (21 October 2019), online: *TELEGRAPH HERALD* <https://www.telegraphherald.com/ap/international/article7dec3f1e-d0a0-5afa-b047-b24288417a66.html>.

[183] See e.g. EFE "Perú Exigirá Visado a los venezolanos a Partir del 15 de Junio" *EFE* (7 June 2019) (reporting on the elimination of the temporary permit to stay or "Permiso Temporal de Permanencia PTP," along with new visa requirements), online: <https://www.efe.com/efe/america/sociedad/peru-exigira-visado-a-los-venezolanos-partir-del-15-de-junio/20000013-3994883>.

[184] Changes include requiring passport (issued by the Venezuelan Government), eliminating both the temporary stay permit ("Permiso de Permanencia Temporal PPT"), and humanitarian exceptions on asylum procedures precluding Venezuelan nationals from lodging claims at the border. See Amnesty International, "In Search of Safety: Peru Turns Its Back on People Fleeing Venezuela" (Washington, DC: Amnesty International, February 2020) at 15, online (pdf): *AMNESTY* <https://www.amnesty.org/download/Documents/AMR4616752020ENGLISH.PDF>.

Refugiados "CEPR") is systematically rejecting Venezuelan asylum seekers arriving to Peru's northern border regardless of the claimant's humanitarian condition or asylum claim.[185]

One of the greatest discrimination cases against asylum seekers takes place in the United States. As it turns out, U.S. regulations increasingly preclude migrants from even applying for asylum protection notwithstanding objective (credible persecution), subjective (well-founded fear) and inherently embedded risks (death, torture, rape, violence, human trafficking) they confront when their asylum claims are systematically rejected (e.g., "asylum ban"). Simply put, such regulations find no legal justification under international law—or, for that matter, U.S. constitutional law despite the often diluted constitutional rights afforded to migrants in America (*Zadvydas v. Davis*).[186] It is therefore my contention that the embedded constitutional legitimacy of the U.S. President to enact and the U.S. Supreme Court to uphold such provisions violate (as stated) *international human rights law* and *international refugee law*.

In April 2019, the U.S. Immigration and Citizenship Services (Directorate) issued the often-cited "Lesson Plan on Credible Fear of Persecution and Torture Determinations" ("*Lesson Plan*"). That is, the Trump administration policy changing immigration guidelines to conduct credible fear interviews ("CFI"). The new regulation was challenged before the U.S. District Court for the District of Columbia (*Kiakombia v. Mcleenan*)[187] on the grounds that it drastically ("unlawfully") narrows asylum seekers' access to immigration courts. In *Mcleenan*, the Court granted preliminary injunction precluding the application of the "*Lesson Plan*" by holding that the rule violates both U.S. immigration law (8 U.S.C. § 1158(b)(2)(C), (a)(1)) and customary international law, "which likewise provides for the right to seek asylum, mandates a fair process for determination of protection claims, and prohibits torture, cruel, inhumane and degrading treatment." In *Mcleenan*, moreover, the Court reflected on the rationale behind the government's policy which found aligned

[185] See La ley, "Cancillería Suspende Atención a Extranjeros Solicitantes de Refugio Hasta Nuevo Aviso" *La Ley* (13 February 2020) (reporting the suspension of asylum services to Venezuelan refugees in Peru).
[186] See *Zadvydas v Davis*, 533 US 678 (2001) at 689 (holding that while the plenary power doctrine enables US authorities to detain aliens, such doctrine does not authorize their indefinite detention). The ruling was later cited as precedent in *Clerk v Martinez*, 543 US 371 (2005) at 6 (acknowledging due process rights to aliens).
[187] *Kiakombua v Mcaleenan*, Civil Action No 19-cv-1872 (KBJ) (DDC 2019).

with the then candidate Trump's rhetoric "demonizing immigrants and refugees—particularly those who are not (or are not perceived as) "white."[188]

Furthermore, the often-cited as "*Interim Final Rule*" ("Asylum Eligibility and Procedural Modifications" or "Travel Ban 2.0")[189] excluding asylum applications from aliens entering the United States through the southern border at a place other than a "lawful point of entry."[190] The rule was challenged before the U.S. District Court for the Northern District of California. In *East Bay Sanctuary Covenant et al. v. Trump et al*.,[191] the federal district court granted preliminary injunction against the government's "*Interim Final Rule*." This means that the Court found merits on the plaintiff's lawsuit casting doubt on the legality of the contended government regulation—this one held by the lower jurisdiction as inconsistent with U.S. immigration law (8 U.S.C. § 1158(a)(1)), in that irrespective of the point of entry, aliens physically present in the U.S. have the right to apply for asylum. This preliminary injunction also means that the Trump administration must receive asylum applications regardless of the migrant's port of entry as if the *Interim Final Rule* had not been issued and until, otherwise, a superior court vacate the injunction. The Court's ruling emphasizes the lack of concern on the government vis-à-vis the risks that asylum seekers encounter at the border. The Court underscored that regardless of the often-depicted "illegal entry," in the U.S. asylum is a right, for which its outright preclusion appears legally unjustified: "evidence demonstrates that deaths at the border are a serious, longstanding, and ongoing problem."[192] As to the change of policy, the Court found that the contended "*Interim Final Rule*" did not comply with two requirements contemplated in the *Administration Procedure Act*—specifically, 30-day notice for comments on change of policy and the government's invocation grounds to justify the shift on well-established immigration policies ("good cause" and "foreign affairs powers").[193]

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[188] *Ibid* at paras 56, 57 [Emphasis added].
[189] See DOJ Eligibility ("Interim Final Rule"), *supra* note 146.
[190] Although a similarly oriented Presidential Protocol was issued alongside with the "Interim Final Rule" to bar asylum seekers entering through the southern border (not through lawful points of entry), this proclamation was not challenged. It was, in fact, codified into U.S. immigration law. See US President Donald J Trump, Proclamation: *Addressing Mass Migration Through the Southern Border* ("Procedures for Protection Claims"), 83 FR 55934 (9 November 2018) [codified 8 CFR §§ 208, 13(c)(3)]. Henceforth, aliens can no longer seek withholding from removal upon detention at deportation proceedings; notwithstanding such protection was granted both under the *Immigration and Nationality Act* (8 USC § 1231(b)(3)) and the ratified *UN Convention Against Torture* (8 CFR § 208-30(e)(5)).
[191] *East Bay Sanctuary Covenant et al v Trump et al,* 3:18-cv-06810-JST (ND Cal 2018).
[192] *Ibid* at 24, 25.
[193] *Ibid* at 18, 20.

The Court further ascertained a nationwide scope on its injunction as it applies to situations occurring all over the southern border and beyond the State of California.[194] The Court's order was then appealed before the U.S. Court of Appeals for the Ninth Circuit. In *East Bay Sanctuary Covenant et al. v. William Barr*, the Court of Appeals initially ruled (based on a "stay pending appeal" before the U.S. Supreme Court) that, "while this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit."[195] In other words, the Court of Appeals focused its legal analysis on the extension of the preliminary injunction—and, more particularly, on whether it should apply in California only or nationwide as well—vacating in the meantime the injunction to the extent that it applies outside California until otherwise the District Court justifies, "the breath of the injunction imposed."[196] More recently, the U.S. Ninth Circuit Court of Appeals upheld the federal district court's preliminary injunction.[197]

Still, in *Barr et al. v. East Bay Sanctuary Covenant et al.*,[198] the U.S. Supreme Court granted a stay-in-full order restoring the U.S. Government ban on asylum seekers ("*Interim Final Rule*") arriving to the southern border, pending disposition of the government's appeal before the U.S. Court of Appeals for the Ninth Circuit, along with the petition of a writ of certiorari should this one be sought. Although the federal district court found constitutional precedent (as a matter of law and policy) to temporarily block (preliminary injunctive relief) the Trump administration ban on asylum seekers entering through the southern border (not the authorized points of entry), I maintain that by enabling the U.S. Government to continue with its "deportation to death policy," the U.S. Supreme Court ruling winds up neglecting international and domestic law.

Here is why. *First*, the *non-refoulement principle* was incorporated in U.S. law by signing the *UN Protocol Relating to the Status of Refugees of 1967* and by agreeing (without reservation) to Articles 1(1) and 7(1) of the *Protocol* (non-refoulement). Constitutional precedent (*INS v. Aguirre-*

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[194] *Ibid* at 29 (holding that, "given the circumstances, Defendants still have not explained how the Court could tailor a narrower remedy to provide complete relief to the Organizations… operating centers in Georgia, North Carolina, Missouri, and Oregon, and on-the-ground support at the southern border").
[195] *East Bay Sanctuary Covenant et al v William Barr*, No 19-16487 (9th Cir 2019) at 12.
[196] *Ibid.*
[197] *East Bay Sanctuary Covenant v Trump*, Nos 19-17274 and 18-17436 (9th Cir 2020).
[198] *Barr et al v East Bay Sanctuary Covenant et al*, 588 US_ (2019) ["Bar et al"].

Aguirre)[199] confirms this interpretation ("incorporation by reference"). *Second*, the *UN Convention Against Torture of 1984* (CAT) was ratified by the United States on October 21, 1984. While the U.S. made reservations, none refers to the *non-refoulement principle*.[200] CAT was eventually codified in federal law (8 U.S.C. § 1231), expressly precluding refoulement as a matter of public policy.[201] *Third*, the *non-refoulement principle* was further internalized through the *U.S. Refugee Act of 1980* (§ 203(h)(1))[202] and codified in federal law (8 U.S.C. § 1251). Though the *Refugee Act* enumerates four exceptions on *non-refoulement* (alien persecutor, previous criminal conviction, serious non-political crime, danger for the community, the security of the United States),[203] none includes the country of origin, the number of asylum claimants, or detention centres' capacity. *Fourth*, the government's change of policy is arbitrary. In a joint dissenting opinion (*Barr et al*),[204] Justices Sotomayor and Ginsburg criticized the government's blunt approach to suddenly shift decades of immigration policies by indicating that:

> "The rule here may be, as the District Court concluded, in significant tension with the asylum statute. It may also be arbitrary and capricious for failing to engage with the record evidence contradicting its conclusions. It is especially concerning, moreover, that the rule the **Government promulgated topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere**—without affording the public a chance to weigh in."[205]

Domestic and regional practices, along with regulations and policies are turning the *relocation* of asylum seekers and the *resettlement* of refugees into residual or, otherwise, exceptional models of reception. The current treatment of refugees and asylum seekers, moreover, is paving the path to an emerging yet far more degenerative model of reception (*putative reception*), which shows the eventual effect of **Final Refugee Paradigm**: Ending refugee protection.

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[199] See *INS v Aguirre-Aguirre*, 526 US 415, 427 (1999) (holding that, "the Protocol incorporates by reference Articles 2 through 34 of the UN Convention Relating to the Status of Refugees").
[200] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 3 and "Reservations" ["Convention Against Torture"].
[201] *US Foreign Affairs Reform and Restructuring Act of 1998*, 105th Congress, Pub L No 105-277, 112 Stat 2681, 12 USC § 2242 (providing that, "it shall be the policy of the United States not to expel, extradite, or otherwise") [codified 8 USC § 1231].
[202] *US Refugee Act of 1980*, 96th Congress, Pub L No 96-212, 94 Stat 107, § 203(h)(1) (signed into law on 17 March 1980).
[203] *Ibid,* § 203(h)(2) at para 1.
[204] *Barr et al*, *supra* note 198.
[205] *Ibid* at 4 [Emphasis added].

III. PUTATIVE RECEPTION ("Apply and Leave Model")

I use the term *putative reception* to describe the most recent yet endemic model of reception-then-refoulement of refugees in the 21st century: reception in paper, refoulement in practice. In effect, aside from the semantics used to justify its practice ("safe zone," "security mechanism," "peace corridor," "international security zone"),[206] the *putative reception* of asylum seekers procures their removal from host countries after the asylum claim is lodged. Though the most degenerative and detrimental model of reception yet, *putative reception* is becoming customary as well.

The *putative reception* of refugees and asylum seekers is being developed through regional (e.g., EU-Turkey Agreement on Syrian refugees)[207] and domestic immigration policies, practices and regulations oriented at redirecting these migrants to other countries (including their own) in order to reduce the flow of undesirable or *unwelcome refugees*.[208] The model, in short, aims at dissuading "undesirable" migrants from considering certain countries as potential host countries. These migrants are being summarily deported to their home country (e.g., Turkey's summary deportations of Syrian refugees to Syria, or Mexico's summary deportations of Central American refugees),[209] returned to "safe zones" located in the refugee's home country (e.g., Turkey's safe

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[206] In September 2019, Turkish President Recep Tayyip Erdoğan proposed a "safe zone" in northern Syria to resettle between 1 and 2 million Syrian refugees. See Patrick Wintour, "Recep Tayyip Erdoğan Proposes 'Safe Zone' for Refugees in Syria" *The Guardian* (24 September 2019) (quoting President Erdoğan, "if this safe zone can be declared, we can resettle confidently somewhere between 1 to 2 million refugees"), online: <https://www.theguardian.com/world/2019/sep/24/erdogan-proposes-plan-for-refugee-safe-zone-in-syria>; US Embassy and Consulates in Turkey, *Statement on Joint Military Talks Regarding Syria (US-Turkey)* (7 August 2019) (indicating that "the safe zone shall become a peace corridor"), online: *US GOVERNMENT* <https://tr.usembassy.gov/sttement-on-joint-military-talks-regarding-syria/>; BBC, "Turkey's Syria Offensive Explained in Four Maps" *BBC News* (14 October 2019) (quoting the use of the term "security mechanism" by American and Turkish militaries), online: <https://www.bbc.com/news/world-middle-east-49973218>. Turkey's plan to use of refugees as a "buffer zone" to protect Turkey's and Europe's national-security interests was supported by Germany's Defense Minister Annegret Kramp-Karrenbauer, who describes it as an effective way to "resume the fight against terror and the Islamic State," while offering refugees the possibility to "return voluntarily" to their home country. See Austin Davis, "German Defense Chief Recommends International Security Zone in Syria" *DW* (22 November 2019) (proposing an "internationally controlled security zone"), online: <https://www.dw.com/en/german-defense-chief-recommends-international-security-zone-in-syria/a-50924304>.

[207] European Council & Government of Turkey, *EU-Turkey Statement and Action Plan* (18 March 2016), online: *EUROPA* <www.europarl.europa.eu/legislative-train/theme-toward-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>.

[208] See DW, "The EU-Turkey Refugee Agreement: A Review" *DW* (18 March 2018), online: <https://www.dw.com/en/the-eu-turkey-refugee-agreement-a-review/a-43028295> [Permalink: https://p.dw.com/p/2uXcl].

[209] Throughout this thesis, I refer to the term "summary deportations" to indicate domestic deportation of asylum seekers in violation of international refugee law (non-expulsion principle), humanitarian law (deporting civilians to

zone proposal, Video 5), temporarily expulsed to a neighboring country (e.g., U.S. Migrant Protection Protocols),[210] and permanently removed from the destination country to a third—yet not necessarily safe—country (e.g., U.S. Safe Third Country Agreement with El Salvador).[211]

A. Non-Refoulement: Principle and Exceptions

Article 33 of the *1951 Refugee Convention* ("Refugee Convention") and the *1967 Protocol Relating to the Status of Refugees*—this one signed by 146 States ("Asylum Protocol")[212]—prohibits the expulsion, return, or "refoulement" of refugees and asylum seekers to any territory (not solely the migrant's home country), where their life or freedom may be threaten.[213] Although the *non-refoulement principle* was introduced by the *Refugee Convention* to specifically protect refugees and asylum seekers (*lex specialis*), it is nonetheless increasingly entrenched as international law principle by virtue of its inclusion in international law conventions.

To begin with, Article 45 of the *Geneva Convention Relative to the Protection of Civilians Persons in Time of War of 1949* prohibits the transfer of civilians to a country where they may "…fear persecution for his or her political opinions or religious beliefs."[214] Further, Article 3 of the *Convention Against Torture of 1984* prohibits the refoulement ("to expel, return, extradite") of any

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war zones), and human rights law (due process rights, e.g. deportation without hearing). See Amnesty International, "Sent to a War Zone: Turkey's Illegal Deportations of Syrian Refugees" (Washington, DC: Amnesty International, October 2019) (reporting summary deportation cases) at 5, online: *AMNESTY* <https://www.amnesty.org/download/Documents/EUR4411022019ENGLISH.pdf>. As of November 2017, 10 provinces in Turkey suspended asylum seekers registration. See Human Rights Watch, "Turkey Stops Registering Syrian Asylum Seekers: New Arrivals Deported, Coerced Back to Syria" *HRW News* (16 July 2016), online: <https://www.hrw.org/news/2018/07/16/turkey-stops-registering-syrian-asylum-seekers>; Infobae, "México Inicio la Deportación de Migrantes Centroamericanos que Ingresaron al País a la Fuerza" *Infobae* (21 January 2020), online: <https://www.infobae.com/america/mexico/2020/01/22/mexico-inicio-la-deportacion-de-migrantes-centroamericanos-que-ingresaron-al-pais-a-la-fuerza/>.

[210] In January 2019, the US Government implemented the so-called "Remain in Mexico policy" (Migrant Protection Protocols MPP) enabling US authorities to return to Mexico asylum seekers arrested while entering the US southern border until their claim is decided. See Migrant Protection Protocols, *supra* note 148.

[211] Despite gangs' violence and human rights abuses in El Salvador, the US signed a safe third country agreement with this country. See HRW 2019, *supra* note 2 at 193; see also El Salvador Agreement, *supra* note 139.

[212] UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees* and *the 1967 Protocol* (2020), online: *UNHCR* <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> [accessed 3 February 2020; 5:50 AM-ET].

[213] UN General Assembly*, Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, art 33 (entered into force 4 October 1967) ["Asylum Protocol"].

[214] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, art 45.

a person to another State where there is a substantial risk such person could face torture based on the country's human rights records and risk of torture, death, inhuman and degrading treatment.[215]

This express inclusion is concomitant with corollary relations of human dignity, including Article 7 of the *International Covenant on Civil and Political Rights of 1966* ("ICCPR") precluding similar transfer of people in relation to torture, cruel, inhuman and degrading treatment. The latter, in fact, has been confirmed by the UN Human Rights Committee.[216] As a result of its legal articulation in international law, moreover, several jurisdictions acknowledge not only the constitutional recognition of the *non-refoulement principle* at domestic level, but also the need to justify and limit its applicable exceptions (let alone widespread use) precluding the once thought to be States' restriction to remove and return asylum seekers to another State where they may face substantial risk of torture, death, and inhuman or degrading treatment.

The Court of Justice of the European Union ("CJEU") has ascertained the application of the *non-refoulement principle* under its constitutional interpretation of Article 4 of the *Charter of Fundamental Rights of the European Union* to include not only torture but also the risk of inhuman treatment. In *Federal Republic of Germany v. Hamed and Omar* ("*Bundesrepublik Deutschland gegen Adel Hamed Amar Omar*"),[217] a case involving two Syrian nationals who had been found inadmissible in Germany and ordered deported to Bulgaria where their refugee status had been previously granted (under Article 33(2)(a) of EU Directive 2013/32), the CJEU established that notwithstanding their refugee status in Bulgaria, the systematic deficiencies in asylum procedures as well as the strong risk of inhuman and depredating treatment[218] such migrants could face (should they be returned to Bulgaria) constituted a lawful and justifiable exception to the application of the Directive under a broader reading of Article 4 of the *Charter*.[219] Similarly, the European Court

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[215] See Convention Against Torture, *supra* note 200, art 3.
[216] UN Human Rights Committee (HRC), *CCPR General Comment No 20: Article 7*, 10 March 1992, (indicating that, "the aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity").
[217] Cases C-540 and C-54/17, *Bundesrepublik Deutschland gegen Adel Hamed und Amar Omar* [Vorlage zur Vorabentscheidung], ECLI:EU C:2019, 964 (2019).
[218] *Ibid* at para 44.
[219] European Council, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, art 4 (indicating that, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment").

of Human Rights (under Article 3 of the *European Convention on Human Rights*)[220] has treated torture as an express limitation in cases of extradition (*Soering v. United Kingdom*)[221] and deportation (*Chahal v. United Kingdom*).[222]

Exceptions to the *non-refoulement principle* are viewed as lawful (admissible) determinations concerning previous *serious non-political crimes*, *war crimes*, *crimes against humanity* (Article 1(F)(a)-(b) of the *Refugee Convention*),[223] and *voluntary repatriation* (UNHCR Handbook) as well as risks associated to the host-country's *national security* and *public order*, along with *migrants' subsequent criminal convictions* (Articles 32(1), 33(1), 33(2) of the *Refugee Convention*).[224]

Nonetheless, the refoulement of refugees to their home country only proceeds when it is safe for the refugee to return. And it is safe, when the hosting country has diligently considered the "current" conditions in the country from which the refugee fled and aims to return. This was, in fact, the holding of the Supreme Court of Italy (Civil Section, "Cassazione Civile") in the case *Ordinanza 24388*,[225] involving a refugee from Gambia challenging Italian immigration authorities' order to return him to Gambia, holding that "general conditions of violence" in Gambia were not worse than the conditions of violence in other places. The Supreme Court of Italy annulled an Italian Court of Appeals' decision (deportation order) by considering that once the claimant has fulfilled the burden of proof to support his claim (credible persecution and well-founded fear), it is the duty of the host country ("the judge") to ascertain, even *ex officio*, the risks the protected claimant may face if returned. The Court held that:

> "When a foreign citizen who requests the recognition of international protection has fulfilled the burden of alleviating facts supporting his claim, the judge has the power-duty to ascertain, also *ex officio*, whether, and to what extent, the phenomenon of indiscriminate violence appears in the foreign country of origin, which exposes civilians to serious and individual threat to life or person."[226]

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[220] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, art 3 [amended by Protocols No 11, 14].
[221] *Soering v United Kingdom,* (1989) 11 EHRR 439.
[222] *Clahal v United Kingdom*, (1996) 23 EHRR 413.
[223] Refugee Convention, *supra* note 56, art 1(F)(b).
[224] Asylum Protocol, *supra* note 213, art 32.
[225] *Ordinanza No 24388*, Corte Suprema di Cassazione (Prima Sezione Civile), R 25412/2018 (30 September 2019).
[226] *Ibid* at 5.

The exceptions to the *non-refoulement principle* have been fully articulated through case law in domestic jurisdictions. The Supreme Court of Canada, for instance, has made critical distinctions between the "deportation" (lawful) and "removal" (unlawful) of forced migrants. The Court has further extended its international and constitutional law analysis to legal differentials on *national security* and *extradition*. In *Suresh v. Canada*, the Court made a defining constitutional acknowledgment on *non-refoulement principle* in Canadian law by indicating that:

> "Recognition as a Convention refugee has a number of legal consequences; the one most directly relevant to this appeal is that, under s. 53(1) of the Immigration Act, generally the government may not return ('refouler') a Convention refugee 'to a country where the person's life or freedom would be threatened'."[227]

The Supreme Court of Canada has recognized the *national security exception* to deport a refugee (even when the status has been granted) within a singular limitation to its application: *the security of the refugee*. The Court has held that notwithstanding objectively ascertained risks a refugee may pose to the national security of Canada, the government's decision to "deport to torture" (sending a refugee to his or her home country where he or she can face torture or death) is discretionary, yet exceptional. This rationale was unequivocally stated in the landmark decision in *Suresh* with respect to the deportation of a refugee from Sri Lanka, who was later found (after being granted permanent residence) to be member of the terrorist organization the Liberation Tigers of Tamil Eelam ("LTTE") and, as such, likely to face torture if deported from Canada to Sri Lanka. In balancing the refoulment of a refugee to the risk of torture vis-à-vis substantial national security concerns, the Court used principles of fundamental justice and the "notion" of *proportionality* ("fundamental to our constitutional system")[228] to frame the choices the government face. The Court concluded that such balance "will usually come down against expelling a person to face torture,"[229] allowing refoulement in exceptional cases. As to the possibility to deport a refugee to face substantial risk of torture, moreover, the Supreme Court of Canada held that:

> "On the other hand, stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society—liberty, the rule of law, and the principles of fundamental

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[227] *Suresh v Canada* (*Citizenship and Immigration*), (2002) SCC 1, [2002] 1 SCR 3 at para 7 ["Suresh"]. The contested provision (Immigration Act, RSC 1985, c 1-2, s 53) is the current section 115 of IRPA, for which the constitutional precedent of *Suresh* applies. See also *R v Hape*, (2007) SCC 26, [2007] 2 SCR 292.
[228] *Suresh* at paras 47, 48, 49.
[229] *Ibid* at 58, 129.

> justice—**values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed**. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments…We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the Charter."[230]

The recognition of the *non-refoulement principle* in Canadian law has led the Supreme Court in this country to make critical distinctions on the government's power to use both the previously committed (before landing in the host country) *serious non-political crime* and the subsequently imposed (after landing in the host country) *criminal-conviction* exceptions. In *Németh v. Canada*, moreover, the Court addressed final determinations concerning *serious non-political crimes, extradition* and *non-refoulement principle*. The Court considered the appeal of a Roma refugee against the Minister of Justice's determination to extradite him to Hungary after becoming permanent resident in Canada and following an international arrest warrant charging him with fraud committed in Hungary prior his arrival to Canada. Although the Court held *extradition* to be a constitutional and internationally admissible exception to the *non-refoulement principle*, it indicated that the latter must also inform the government's decision to deport a refugee; even if such principle is not expressively mentioned in the applicable extradition Act. The Court held that:

> "At the heart of the protections accorded to refugees under the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") are the provisions relating to expulsion and return. Article 33 of the Refugee Convention embodies in refugee law the principle of non-refoulement which prohibits the **direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations** … While it is accepted that protection against refoulement under the Refugee Convention applies to expulsion by extradition and where possible statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law, the presumption that legislation implements Canada's international obligations is rebuttable."[231]

In *Gavrić v. Refugee Status Determination Officer*,[232] a case involving a Serbian nationalist seeking asylum in South Africa by claiming political persecution based on a pending criminal

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[230] *Ibid* at paras 4, 5 [Emphasis added].
[231] *Németh v Canada* (Justice), (2010) SCC 56, [2010] 3 SCR 281 at para 1 ["Németh"] [Emphasis added].
[232] *Gavrić v Refugee Status Determination Officer Cape Town and Others*, (2018) CCT217/17, [2018] ZACC 38. To set aside the government's decision on deportation or extradition based on the *serious non-political crime exception*, the claimant must establish: "(a) whether the motive was political rather than for personal or financial gain, (b) whether there was a direct link between the crime, the political motivation and the specific political goal, (c) whether the crime was proportional, and (d) whether the political goal is in line with our constitutional values" (*Idem*).

conviction for the assassination of a paramilitary leader in his country, the Constitutional Court of South Africa upheld the constitutionality of the *non-refoulement principle* in South African immigration law (s 4(1)(b) of *South Africa's Refugee Act*). This as the Court applied the *serious non-political crime exception* due to the claimant's inability to connect the crime to his political motivation,[233] by providing doctrinal reference on this exception ("predominance test"):

> "Where there is no clear link between the crime and its alleged political objective, then nonpolitical motives are predominant. This is referred to as the "predominance test". Egregious acts of violence, such as acts commonly considered to be of a "terrorist" nature that are wholly disproportionate to any political objective, will be unlikely to pass the predominance test. In addition to the predominance test, the Handbook suggests that factors such as the motivation, context, methods and proportionality of a crime to its objectives, ought to be considered in order to determine whether the crime is of a political nature. Guideline 5 emphasizes that for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles."[234]

In the U.S., however, immigration authorities use a differential-analysis test ("*proportionality*") to ascertain the nature of the political action should the link between the crime and political objective appear diluted. In *Matter of McMullen*, the U.S. Board of Immigration Appeals stated that:

> "In evaluating the political nature of a crime, we consider important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature."[235]

Another exception to the *non-refoulement principle* known as *subsequent criminal convictions* was recently tested in Bangladesh, in a case concerning a member of the persecuted Rohingya minority who was convicted and sent to prison for violation of Bangladesh criminal statute (*Foreigners Act of 1946*, s 14 "illegal entry"). The question before the court was: Considering that Bangladesh has not yet ratified the *Refugee Convention* and that the "detenu" is neither citizen of Bangladesh nor of Myanmar, once the jail time is accomplished should the Court order the "detenu" to be released to a refugee camp or deported to Myanmar? In *Refugee and Migratory Movements Research Unit*

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[233] *Ibid* at para 115 (holding that: " the applicant has failed to provide information within his knowledge about the commission of the offences. There are no objective or proven facts from which this Court can conclude or draw the inference that the offences were political … Consequently, while there is credible evidence to support a reasonable belief that the applicant has committed a serious crime (murder), there is no basis upon which this Court can find that this crime was politically motivated").
[234] *Ibid* at paras 94, 95 (referring to UNHCR Guidelines on International Protection No 5, *Application of the Exclusion Clauses*, art 1(F) of the *1951 Refugee Convention*, issued on 4 September 2003).
[235] *Matter of McMullen*, 19 I&N Dec 90 (BIA 1984 at 97-98).

v. Government of Bangladesh,[236] the Supreme Court of Bangladesh held that, although Bangladesh has not ratified the *Refugee Convention*, the *Convention* is part of Bangladesh legal system via international customary law, for which the *principle of non-refoulement* applies. The Court ordered the release of the detainee to the Refugee Camp of Cox's Bazar under the custody of the Ministry of Disaster Management and Relief.[237] As to the *non-refoulement principle* the Court held that:

> "It is true that as per Article 33 of the Convention relating to the Statute of Refugees, 1954, no contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened … Though Bangladesh has not formally ratified the Convention relating to the Status of Refugees, yet all the refugees and asylum-seekers from scores of countries of the world to other countries have been regulated by and under this Convention for more than 60 (sixty) years. This Convention by now has become a part of customary international law which is binding upon all countries of the world, irrespective of whether a particular country has formally signed, accepted to or ratified the Convention or not."[238]

There are also countries that, although signatories the *Refugee Convention* or *Asylum Protocol*, do nonetheless apply what I refer to as the "*sovereignty exception*." That is, a legal interpretation of domestic law (based on national security and immigration law) that disregards the *non-refoulement principle* when domestic authorities find the refugee or asylum seeker to be (irrespective of their status or intent to lodge a claim) in violation of domestic immigration law. For example, the High Court of Australia held constitutional the interception and subsequent refoulement of refugees and asylum seekers at sea (beyond the so-called "international contiguous zone") by Australian authorities.[239] In *CPCF v. Minister for Immigration and Border Protection*,[240] a case involving 157 asylum seekers traveling from Sir Lanka to Australia, who were intercepted by Australian authorities about 16 miles near the Australian territory of Christmas Island and, afterwards, refouled to India. The High Court held that notwithstanding the plaintiff's claim refereed to the *non-refoulement principle* (citing Article 33(1) of the *Refugee Convention* and Article 3 of the *Convention Against Torture*),[241] the power to intercept and return such migrants was constitutional

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[236] See *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, Supreme Court of Bangladesh [2017], S Ct No 10504, 2016 (31 May 2017).
[237] *Ibid* at 11.
[238] *Ibid* at 9, 10.
[239] It is worth noting that Australia does not have a constitutional guarantee of human rights, such as the Canadian Charter. The constitutional structure in Australia is constituted of the traditional British pure parliamentary sovereignty (plus federalism). The Australian High Court cannot alter the Parliaments' decisions. Nor can the Court rely on international law to protect refugees against the will of the Parliament.
[240] See *CPCF v Minister for Immigration and Border Protection*, (2015) HCA 1 [28 January 2015] ["CPCF"].
[241] *Ibid* at para 9.

by virtue of Australia's sovereignty over persons and vessels found to be in violation of its immigration laws (migrants arriving to Australian territory without visa).[242]

Rather than considering the plaintiff's claim under *international refugee law* (*non-refoulement principle*), the Court constructed the country's power to return asylum seekers based on the *principle of Sovereignty* under section 61 of *the Australian Constitution*,[243] the *UN Convention on the Law of the Sea* (Articles 2(1), 33(1)(A)),[244] and the *International Convention on Maritime Search and Rescue*.[245] In referring to the "safe return" of intercepted refugees and the possibility of substantial risk of torture if returned, the Court placed such determinations under the umbrella of a domestic statute (*Maritime Powers Act*, section 72.4), not the *Refugee Convention*. As such, the refoulement of an asylum seeker is decided exclusively on national security grounds ("reasonable grounds"). The Court indicated that it would be safe for the migrant to be returned provided the country to which the migrant is refouled has authorized the return. It held that:

> "Section 72(4) of the Maritime Powers Act 2013 (Cth) did not authorise a maritime officer to detain and take the plaintiff to India when, at the time that destination was chosen, the plaintiff had neither the right nor permission to enter India. Subject to that limitation, s 72(4) authorised a maritime officer to detain and take the plaintiff, a person reasonably suspected of having been on the Indian vessel when it was detained under that Act, to a place outside Australia determined by the National Security Committee of Cabinet, and to place the plaintiff in that place if the officer was satisfied, on reasonable grounds, that it would be safe for the plaintiff to be in that place."[246]

As noted, one of the most endemic exceptions to the *non-refoulement principle* is to be found in what I refer as "diplomatic rejection agreements" (e.g., safe third country-*like* agreements).

B. Safe Zones, Voluntary Returns, and Summary Deportations

One of the most flagrant violations of the *non-refoulement principle* may be found in Turkey; the country hosting nowadays the largest refugee population on the planet (3.7 million refugees).[247]

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[242] *Ibid* at para 75.
[243] *Australian Constitution*, 9 July 1900, s 61 (*Executive Power*).
[244] CPCF at para 19. Concerning the sovereignty of a coastal state (extension) and the international contiguous zone of 12 miles from coastal limit—which the High Court later ascertains, "not being part of Australian law" (at para 78).
[245] *Ibid* at para 16.
[246] *Ibid* at para 174.
[247] UNHCR Global Trends 2018, *supra* note 13 at 3.

Following the withdraw of U.S. troops from Syria supporting Kurdish militias (October 2019), the Turkish Government begun immediately thereafter the military invasion of Syria with the purpose to allocate between 1 and 2 million Syrian refugees along a 20-mile stretch of Syria's northern border, while using these migrants as a "buffer zone" to protect Turkey's interests.[248] The "safe zone"[249] was eventually supported by Germany with a slight shift ("international safe zone")[250]—this one, in particular, following Turkey's threat to release millions of refugees in Europe.[251]

The proposal was formally presented by the President of Turkey Recep Tayyip Erdoğan to the UN Secretary-General in November 2019.[252] After their meeting in Ankara, the Secretary-General stressed the principle of a "voluntary, safe and dignified return of refugees," while instructing the UN High Commissioner for Refugees to study the proposal and begin discussions with the Turkish Government[253] according to the mandate of UN Security Resolution 2254 ("A roadmap for ceasefire and a peace process in Syria").[254] Although this resolution acknowledges the need to provide solutions for the "voluntary return" of refugees and internally displaced persons (IDPs) to their home areas, it does nonetheless limit such provisions within the framework of applicable international law (*Refugee Convention* and *Asylum Protocol*).[255]

Considering the proposal suggests a $26-billion investment on real estate infrastructure and related services (education, healthcare, housing, security), the legal challenge for both the UN and the Turkish Government is twofold. On the one hand, they must justify the Turkish military invasion

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[248] Colum Lynch & Lara Seligman, "Turkey Pitches Plan to Settle 1 Million Refugees in Northern Syria" *Foreign Policy* (18 December 2019) (referring to the refoulment of refugees as "safe zone"), online: <https://foreignpolicy.com/2019/12/18/turkey-pitches-plan-settle-1-million-refugees-northern-syria-erdogan-kurds/>.
[249] See Julian E Barnes & Eric Schmitt, "Trump Orders Withdrawal of U.S. Troops from Northern Syria" *The New York Times* (13 October 2019), online: <https://www.nytimes.com/2019/10/13/us/politics/mark-esper-syria-kurds-turkey.html>.
[250] See Austin Davis, "German Defense Chief Recommends International Security Zone in Syria" *DW* (22 November 2019), online: <https://www.dw.com/en/german-defense-chief-recommends-international-security-zone-in-syria/a-50924304>.
[251] Ian Bremmer, "Erdogan Threatens to Flood Europe with 3.6 Million Refugees" *Time* (8 March 2020), online: <https://time.com/5798139/what-happens-next-with-europes-latest-refugee-crisis/>.
[252] UN General-Secretary, *Readout of the Secretary-General's Meeting with H.E. Mr. Recep Tayyip Erdoğan, President of Turkey* (1 November 2019), online: *UN* <https://www.un.org/sg/en/content/sg/readout/2019-11-01/readout-of-the-secretary-general's-meeting-he-mr-recep-tayyip-erdogan-president-of-turkey>.
[253] *Ibid.*
[254] UN Security Council, Res 2254 (2015), *Endorsing Road Map for Peace Process in Syria, Setting Timetable for Talks*, SC/12171, 7588 Meeting (18 December 2015) [unanimously adopted].
[255] *Ibid*, art 14.

of Syria to refoul potentially up to two million refugees amid an ongoing civil war, human rights violations and persecution by the Syrian regime,[256] along with the humanitarian situation such an invasion purports.[257] On the other hand, and notwithstanding the $26-billion investment, they must guarantee the return of refugees is not only voluntary but safe.

Nevertheless, given both past experiences with "safe zones"[258] and Turkey's current practices on summary deportations, it seems quite disingenuous to promote the idea of a "voluntary return," which by its very nature should include, at minimum, refugees willful desire to return (free from public policies, discriminatory practices and domestic pressures in Turkey against Syrian refugees to make them 'want to return'). Unless the *non-refoulement principle* is otherwise violated, the safe return of refugees requires official guarantees that by returning them such migrants will not face a substantial risk of torture, inhuman treatment or death, which seems quite questionable in light of the fact that Syria is still a country in state of war. The High Representative of the EU did not only criticize the Turkish proposal of a "safe zone" as "unlikely" given the instability in the region, but also portrayed any attempt to resettle Syrian refugees in such conditions as "unacceptable."[259]

The proposal's weakest defence, however, lies in the fact that refugees are being presented as a "buffer zone" to protect Turkey's geopolitical and national-security interests. Hence, Syrian refugees would be then used to break the political influence of the Kurdish minority (15.4 million)

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[256] See Vivian Yee & Hwaida Saad, "Syrian Children Freeze to Death. Bombs Rain Down. And 'Nobody Cares'" *The New York Times* (26 February 2020), online: <https://www.nytimes.com/2020/02/26/world/middleeast/syria-idlib-refugees.html>.

[257] The actions taken by the Turkish government following the retreat of US troops from the northern Syrian border were denounced by EU Council and EU Parliament as well as by international legal scholars as "military invasion." See EU Parliament, "MEPs Call for Sanctions against Turkey over Military Operation in Syria" *EU News* (24 October 2019) (using the expression, "Turkish military invasion in northeast Syria"), online: *EUROPA* https://www.europarl.europa.eu/news/en/press-room/20191017IPR64569/meps-call-for-sanctions-against-turkey-over-military-operation-in-syria>.

[258] In the past, "safe zones" have proven to be anything but safe. They have been used by non-state actors and paramilitary groups to recruit displaced population. See e.g. Lama Fakih, "Turkey's 'Safe Zone' Would Be Anything But: Plan Increases Risks for Returned Refugees" *HRW News* (11 October 2019), online: <https://www.hrw. org/news/2019/10/11/turkeys-safe-zone-would-be-anything>.

[259] European Council, *Declaration by the High Representative on Behalf of the EU on Recent Developments in North-East Syria* (9 October 2019), online: *CONSILIUM* <https://www.consilium.europa.eu/en/press/press-releases/2019/10/09/declaration-by-the-high-representative-on-behalf-of-the-eu-on-recent-developments-in-north-east-syria/>.

in Turkey,[260] while alleviating mounting tensions between Syrian refugees and Turks.[261] No matter how the UN decision on the proposal is framed, what UNHCR is currently discussing with Turkey is the very future of international refugee protection.[262] Should the UN decide to back up the Turkish plan, what then could prevent other countries to use similar approach and start refouling refugees to the countries from where they have fled? This, I firmly believe, is the corollary challenge brought by the **Final Refugee Paradigm**: rejecting refugees based on political interests (popular, conjunctural), not the contended security, economic, and cultural threats.

Returning refugees and asylum seekers to the countries from where they fled constitutes the most palpable violation of *international refugee law* and the *non-refoulement principle*. As noted, *international refugee law* provides very few exceptions for returning refugees; none, however, includes the military invasion of the refugee's home State to make the migrant's country "safe" right in the midst of a civil war. And while the international law exception known as "*voluntary repatriation of refugees*" conveys a UN mandate[263] toward the "safe and voluntary return" of refugees (when possible) to their home States and, as interpreted by the UNHCR,[264] this mandate

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[260] Turkey's geopolitical interests in the region predate the Syrian Civil War. This includes the Turkish Government crackdown on minorities (Kurdistan Workers Party) and terrorist attacks inside and outside Turkey. See Council on Foreign Relations, "Conflict between Turkey and Armed Kurdish Groups" (14 February 2020), online: *CFR* <https://www.cfr.org/interactive/global-conflict-tracker/conflict/conflict-between-turkey-and-armed-kurdish-groups>.

[261] After years hosting Syrian refugees under a rather diluted assimilation system (into Turkish labour-market and society), economic and political tensions as well as incidents of violence and ethnic rivalry are increasingly common. See International Crisis Group, "Turkey's Syrian Refugees: Defusing Metropolitan Tensions" Europe Report No 248 (29 January 2018) at 3-5, online (pdf): <https://d2071andvip0wj.cloudfront.net/248-turkey-s-syrian-refugees.pdf>.

[262] Turkey's proposition creates a dangerous international precedent by using refugees as political, economic, and even military instruments for host-countries' own interests. The use of refugees to protect the host-country's civil population is not merely appalling but inherently unlawful. International humanitarian law, human rights law, and international refugee law proscribe the use of protected persons. Fourth Geneva Convention, *supra* note 214, arts 45, 49, 147; ICCPR, *supra* note 58, art 13; Council of Europe, *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 September 1963, ETS No 046 (entered into force 2 May 1968), art 3(1); Organization of American States (OAS), *American Convention on Human Rights*, 22 November 1969, art 22(9); Organization of African Unity (OAU), *African Charter on Human and People's Rights*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), art 12(5) (entered into force 21 October 1986); UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, ISBN No 92-9227-227-6, arts 6(e), 7(1)(d), 8(2)(a)(vii) (entered into force 1 July 2002) [last amended 2010]; Refugee Convention, *supra* note 56, art 32.

[263] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), art 2 (indicating that, "calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions… (d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees").

[264] UN High Commissioner for Refugees (UNHCR), *Handbook Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996) at 5 (interpreting UN Res 428 as mandate).

cannot be treated as absolute;[265] advancing thereby the idea that the eventual repatriation of refugees to their home countries is the ultimate goal of refugee and asylum protection.

In fact, the very basic contention of refugee protection is that *refugees should not remain forever refugees*, which presupposes different mandates and scenarios, including, specifically, the direct resettlement and assimilation of asylum seekers and refugees in host countries.[266] Otherwise, I argue, international refugee law principles (non-refoulement, non-discrimination, access to courts, public education, housing) would make no sense—much less international law provisions calling for refugees' and asylum-seekers' assimilation (resettlement, naturalization).[267] I thus contend that despite the increasing number of refugees, making "voluntary repatriation" a rule of refugee protection (not the exception), turns individual human-rights considerations into State powers over people already in powerless situations. This is particularly problematic considering the lack of basic humanitarian conditions and the risk of human rights violations most refugee populations would encounter if returned. As such, human rights (human dignity, liberty, equality), not transactional values (cost-benefit) or political interests (electoral, conjunctural), must prevail. After all, refugee law deals with human suffering, not with the sale of goods**.**

While the *voluntary repatriation of refugees* might eventually appear as a practical option to manage millions of refugees hosted in one country, it is nonetheless questionable to treat as "safe zone," "safe return," or "peace corridor" an area that: (i) is being taken by force using bombs

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[265] While I agree with the liminal contention whereby voluntary repatriation of refugees could have been originally envisioned by the drafters of the *UNHCR Statute* as an ideal solution for the States temporarily hosting persecuted migrants (Goodwin-Gill), I do nonetheless reject the premise of voluntary repatriation being a refugee protection rule. Instead, I agree with the scholarly position whereby making voluntary repatriation the rule—and not what aims to be, the exception—will inexorably break the very fabric of refugee protection (Chimni, Hathaway, Adelman, Barkan), which ultimately considers the refugee's embedded aspirations, risks, and fears. See Guy S Goodwin-Gill, *The Refugee in International Law*, 2nd ed (Oxford; New York: Oxford University Press, 1996) at Chapter 4 (presenting voluntary repatriation as UNHCR's ideal solution for handling refugees); see also B S Chimni, "The Meaning of Words and the Role of UNHCR in Voluntary Repatriation" (1993) 5 IJRL 442 at 445-460 (stressing risks of public policy expressions such as "safe return," which work in detriment of refugees); James C Hathaway & Michelle Foster, "Persons No Longer Needing Protection" in James C Hathaway & Michelle Foster, eds, *The Law of Refugee Status,* 2nd ed (Cambridge; New York: Cambridge University Press, 2014) at 462-523 (elaborating on voluntary repatriation and refoulment); Howard Adelman & Elazar Barkan, *No Return, No Refuge: Rites and Rights in Minority Repatriation* (New York: Columbia University Press, 2011) at Chapter 3 (providing historical context on voluntary repatriation).
[266] UN General Assembly, *Statute of the Office of the UN High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), art 2.
[267] *Ibid.*

(Video 2), (ii) in the very State where millions of Syrian refugees were—and, in fact, many other internally displaced people still are—systematically persecuted (Idlib Province attacks),[268] (iii) produces new refugees and internally displaced people (Video 2), (iv) is located nearby detention centres hosting the terrorists that persecuted millions of those refugees (Figure 1), and (v) takes place while the country is still in state of war.

In spite of the Turkish proposal ("safe zone" within invaded Syria) or its German variation ("international safe zone" in Syria), the idea of building a safe zone to enable the "voluntary return" of millions of Syrian refugees fleeing from Syria seems, in practice, quite unlikely given Turkey's summary deportation policy returning migrants to war-torn zones in Syria.[269] Considering the risks associated to death, torture and persecution, I therefore contend that this military initiative—at times portrayed as a "humanitarian mission"[270]—violates *international human rights* treaties and *international refugee law* principles.

Another case underscoring the trend of summary or "*de facto* deportations" occurs in Ecuador where thousands of Venezuelan refugees intercepted at the Ecuador's border with Colombia have been summarily deported without hearing or any possibility to lodge an asylum claim. In August 2018, after the number of Venezuelan refugees entering Ecuador through Colombia reached 200,000, the Government of Ecuador issued a Decree ("*Acuerdo Ministerial No. 000242*") precluding Venezuelan nationals from entering Ecuador when they fail to provide a valid passport or identity card issued by the Venezuelan Government. Nonetheless, several Venezuelan refugees acting with the support of Ecuador's Ombudsman, challenged the constitutionality of the decree based on constitutional provisions and Ecuador's international legal obligations (*non-refoulement principle*). In the case *0014-19-IN*, the Constitutional Court of Ecuador declared the suspension of the decree indicating that:

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[268] See Joseph Hincks, "Syrian Refugees Fleeing Assad's Onslaught in Idlib Have Nowhere to Hide" *Time* (25 February 2020), online: <https://time.com/5790278/syria-idlib-humanitarian-catastrophe-assad/>.
[269] See Refugees International, "Insecure Future: Deportations and Lack of Legal Work for Refugees in Turkey" by Izza Leghtas (Washington, DC: Refugees International, September 2019), online (pdf): *RI* <https://www.refugees international.org/reports/2019/9/18/insecure-future-deportations-and-lack-of-legal-work-for-refugees-in-turkey>.
[270] *Ibid.*

> "[24] Based on the information presented by the plaintiffs, this Court judges that the application of the challenged provisions might increase the risks and dangers such migrants, for their own condition, already encounter. This, at the same time, could increase the situation of vulnerability and the likelihood of being victims of abuses and human rights violations. [25] On the other hand, the plaintiffs argue that the application of the contended provisions has led to the rejection in the border and return through de facto deportations of persons in need of international protection. [26] In this context, this Court considers necessary to refer to the right and principle of *nonrefoulement* ["principio a la no devolución"], recognized both in Articles 66 sections 14 and 41 of the Constitution of the Republic as well as in Article 22 section 8 of the American Convention on Human Rights and Article 33.1 of the Refugee Convention of 1951."[271]

Conversely, despite international condemnation and reports describing the genocide and ethnic cleansing of the Rohingya in Myanmar,[272] the Government of India is pursuing a plan to summarily deport up to 40,000 Rohingya refugees from India to Myanmar. Notwithstanding a *writ petition* to the Supreme Court of India,[273] seven Rohingya refugees who had been imprisoned since 2012 under illegal entry charges were deported to Myanmar in 2018.[274] The Home Affairs Ministry's order ("Union Minister of State for Home Affairs") instructed law enforcement authorities to identify and monitor Rohingya refugees to prepare a massive deportation. The decision has been criticized by human rights experts as a violation of the *principle of non-refoulement*.[275]

Another case highlighting the global trend toward *discrimination* and *refoulement* of refugees occurs in Israel. In 2018, using "voluntary return orders" to underscore the need for Israel to "maintain the Jewish character of the state,"[276] the Minister of Interior issued notices to African migrants in Israel threatening them with imprisonment should they decide to remain in Israel, while offering them $3,500 to leave the country by April 2018. This administrative regulation is preceded

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[271] Caso No 0014-19-IN, Corte Constitucional del Ecuador (27 March 2019).
[272] See UN Human Rights Council, *Myanmar: Myanmar: UN Fact-Finding Mission Releases its Full Account of Massive Violations by Military in Rakhine, Kachin and Shan States*, A/HRC/39/64 (18 September 2018), online: *OHCHR* <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>.
[273] *Rausham Tara Jaswal v Union of India*, S Ct D 29453 (2017) [15 September 2017].
[274] See Human Rights Watch, "India: 7 Rohingya Deported to Myanmar" *HRW News* (4 October 2018), online: <https://www.hrw.org/news/2018/10/04/india-7-rohingya-deported-myanmar>.
[275] See Office of the UN High Commissioner for Human Rights (OHCHR), "UN Human Rights Expert Alarmed by India Move to Deport Rohingya Men" *OHCHR News* (2 October 2019) (quoting UN Special Rapporteur on Racism and Xenophobia denouncing the deportation of Rohingya men from India to Myanmar as "flagrant denial of their right to protection and could amount to refoulement"), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23674&LangID=E>.
[276] See Cristina Maza, "Israel to Deport African Refugees, Threatens Jail Time for Thousands of 'Infiltrators'" *Newsweek* (2 January 2018) (citing Israel motives to deport African refugees as, "government argues that expelling them is necessary to maintain the Jewish character of the state"), online: <https://www.newsweek.com/israel-deport-african-migrants-jail-time-thousands-infiltrators-768645>.

by reports of institutionalized racism, police brutality, and discrimination against Eritrean refugees. In paper, the deportation orders single out African migrants without refugee status. Yet, in practice, of the more than 40,000 African migrants in Israel ("persons of concern"),[277] less than 10 were granted asylum protection between 2009 and 2014.[278] The Israeli Government used "informal" agreements on "temporary non-deportation" of Eritrean and Sudanese refugees to Rwanda, Ethiopia, and Uganda to avoid a direct violation of the *non-refoulement principle*.

The High Court of Justice of Israel upheld this policy both under constitutional (Amendment 4 of *Israel's Constitution*) and international customary law (Israel practice and humanitarian obligations under Article 33(1) of the *Refugee Convention*) by considering that: (i) Israel is not deporting the migrants ("infiltrators") to their home country where they may face danger, torture or persecution, (ii) not all migrants deported ("Sudanese") have been protected by Israel under the *Refugee Convention*, and (iii) deportations are taking place to countries with whom Israel has diplomatic relations and pose no human right risk for the temporarily deported migrant. In *Eitan–Israeli Immigration Policy et al.*,[279] the High Court of Justice of Israel held that:

> "Correct to date, Israel does not deport Eritrean nationals or Sudanese nationals to the countries of their origin. Eritrean Citizens are not deported from Israel within a framework of temporary policy of deportation. This is in accordance with the principle of non-refoulement whereby one cannot be deported to the place where there is imminent danger to his life or liberty. The "Non-refoulement" principle is a customary principle in international law and is anchored in Article 33 of the Refugee Convention… On the other hand, with regard to Sudanese nationals, as a declared policy… Israel does not provide any protection. Since 2012, South Sudanese nationals are deported; a country with which Israel has diplomatic relations, back to their country of origin, subject to individual examination of asylum requests."[280]

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[277] Cristiano d' Orst, "To Stay or to Leave? The Unsolved Dilemma of Eritrean Asylum-Seekers in Israel" (2018) 59 Harv ILJ 137 at 138 (citing "40,274 persons of concern" as of 31 December 2016).
[278] See Gerry Simpson, "Dispatches: Israel Fails African Asylum Seekers" *HRW News* (25 February 2015) (citing 4 Eritrean nationals who have been granted asylum out of 2,408 applications filed between 2009 and 2015), online: <https://www.hrw.org/news/2015/02/25/dispatches-israel-fails-african-asylum-seekers>.
[279] See *Eitan–Israeli Immigration Policy et al* v *Government of Israel*, Israel Supreme Court HCJ 7385/13 and 8425/13 (2014) [22 September 2014].
[280] *Ibid* at para 32.

Still, the Jerusalem Special Court of Appeals held that Eritrean migrants can be deported to their home country in light of the peace agreement between Ethiopia and Eritrea,[281] and despite recurrent human rights abuses and concerns.[282]

In Lebanon, moreover, there are reports of human rights violations as well as documented cases of civilian and law-enforcement violence against Syrian asylum-seekers as drivers for voluntary returns or to make them 'want to return, which practices violate the *principle of refoulement*.[283]

All the way from India, Israel, Turkey, Greece, Italy, Hungary, Czech Republic, Lebanon, South Africa, Mexico, United States, Peru, and Ecuador, *non-discrimination* and *nonrefoulement principles* are being contested by governments hosting refugees. Notwithstanding a seemingly favourable judicial interpretation of customary international law at domestic level, the *principle of non-refoulement* is being treated as residual principle.

CONCLUSION

The effects associated to the eventual ascension of the **Final Refugee Paradigm** are changing (if not gradually ending) the protection of refugees in the 21st century. Traditional (*relocation and direct reception*) and emerging models of reception of refugees (*residual reception*) and asylum seekers (*putative reception*) across the planet have a common denominator: the legal protection provided by *international refugee law* as well as the human rights acquisitions of the 20th century are becoming, at best, optional and, at worst, historical references. States practices (voluntary and forced repatriation), regulations (diluted protection, criminalized entry and intent), *diplomatic* (safe third country-*like* agreements, safe zones, U-Turn policies) and *systematic rejection* of migrants (summary deportations) as well as constitutional challenges to international refugee

[281] Yonah Jeremy Bob, "Lower Court: Eritrean Asylum Seekers Can Be Deported to Country of Origin" *The Jerusalem Post* (15 August 2018), online: <https://www.jpost.com/Israel-News/Lower-court-Eritrean-asylum-seekers-can-be-deported-to-country-of-origin-564916>.
[282] See Human Rights Watch, "Eritrea: Events 2019" (Washington, DC: Human Rights Watch, February 2020) (describing situations of indefinite military service, forced labour and arbitrary detentions), online: *HRW* <https://www.hrw.org/world-report/2020/country-chapters/eritrea>.
[283] See AI Lebanon, *supra* note 31.

protections before domestic and regional courts further uncover the political exploitation of migrants, along with the mistreatment to unwelcome refugees (arbitrary detention).

Simply put, current models of reception and legal treatment of refugees in the 21st century cannot be justified under international law. Both Immigration law and policies built under the often alleged unlimited purview of national security law are steadily disconnected from the most basic protections provided by international humanitarian law (protected persons), human rights law (human dignity), and international refugee law (non-refoulement, non-discrimination, non-penalization, freedom of movement, access to courts). The reception and treatment of refugees and asylum seekers in the 21st century is, in brief, the most ostensible proof that *international refugee law* (core principles) is falling into desuetude.

Chapter 3
The Perceptional Gap:
Security, Reality, Diversity, Humanity

INTRODUCTION

Do we truly understand the global migration crisis? What are the drivers of this crisis? Is legal reasoning sufficiently equipped to avoid sociopolitical distortions of reality (e.g., populism, extremism), recast current and emerging tensions on security, forced migration, diversity and humanity, and redress resulting and historic patterns on discrimination, social exclusion, racism, antisemitism, xenophobia, and nationalism? What if our very understanding of the world's refugee crisis is part of the problem and the solutions we advance to resolve it constitute, at best, circular progressions of reality that not merely miss but eventually create new problems? And what happen when legal and public-policy determinations on migration and security appear increasingly disconnected not only from legal principles and values, but from reality?

Thinking that law is all we need to understand the global refugee crisis[1] and the resulting yet gradually regressive entanglements of security, morality, humanity and reality is already part of the problem we face: our encoded inability to think differently about our problems and, as such, understand them. In fact, the rupture between domestic and international law concerning the most basic protections on refugees—going from being considered victims of unlawful persecution in the 20th century to become suspects subject to lawful prosecution in the 21st century—is so severe that legal reasoning alone cannot handle the complexities breaking from inside out legal and social systems, including core relations (tolerance, respect, trust) and values (equality, liberty).

In this chapter, I develop a multidisciplinary analysis aimed at providing a scientific reference to better understand current fractures on legal-reasoning assertions and public-policy determinations affecting factual connections between refugee protection and national security.

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[1] In my view, there are distinguishable patterns in today's refugee crises across the world. First, the *mobility patterns* forced migrants follow indicate that, albeit initially domestic and gradually regional, most refugee crises become eventually global considering the number of countries hosting these migrants. Second, the *number of refugees* such crises are producing exceeds root-causes associated to globalization or "regular migration patterns."

Based on current immigration policies and regulations, the axiological understanding (evolving perception-conceptualization) of the global migration crisis[2] is embedded in the notion of threat; that is, a threat to the security, economic stability, cultural and identity values of host countries. Domestic and regional regulations have been put in place by governments across the world to either exclude, preclude, deter, relocate, or suspend the entry of refugees as well as to dissuade, prevent, or discourage them from even attempting to reach such countries.

Law, nevertheless, is instrumental. I argue that the complexity of the modern migration crisis is such that it cannot be resolved exclusively through the law; if it could, it would have been resolved many years ago. Notwithstanding institutional efforts (e.g., UNHCR), from Syria, Iraq, Afghanistan, Ukraine, Myanmar, Somalia, DRC, South Sudan and Libya to Venezuela, Honduras, Guatemala and El Salvador, domestic, regional and international legal systems have failed to timely address and properly respond (let alone resolve) current refugee crises. Gradually equidistant prongs of intelligence, humanity, and civility have yielded to circular, unintelligent, and increasingly inhumane legal and public-policy decisions directed at diluting the most basic protections acquired through constitutional law, international human rights law, and refugee law in the 20th century. Such proposition aims to reject a reality that most governments do not understand, care to understand or can truly envision. In the end, the legal structures built to protect host countries from the 'refugee threat' suffer from a ***perceptional gap****: the* ***redirection of reality***.

My theoretical proposition is this: the *redirection of reality* uncovers the ulterior transformation from which refugee protection in the 20th century becomes refugee threat in the 21st century. This process further leads to the eventual reemergence of the 'diversity threat'; that is, the very idea that allowing others from different races, religions and cultures to live among "us" threatens our

[2] The refugee crisis is global. Although it encompasses a wide range of regional conflicts (e.g. Syria, Afghanistan, Venezuela, Honduras, Domenica, Myanmar, South Sudan, Libya, Somalia) triggered by various causes (starvation, civil war, ethnic persecution, gender violence, economic implosion, environmental impact, religious persecution), there are nonetheless two defining features that make it global: conflicts emerging across regions (Africa, the Middle East, the Balkans, Central America, the Caribbean, South America, Asia) and the forced migrants they produce claiming protection around the world. For instance, Syrian refugees have claimed protection in more than 126 countries while Venezuelan nationals have claimed asylum in more than 41 countries. See Office of the UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2017* (Geneva: UNHCR, 2018), online (pdf): *UNHCR* <https://www.unhcr.org/5b27be547.pdf> ["UNHCR 2017"]; J Mauricio Gaona, "The Venezuelan Exodus Is No Longer Just a Regional Crisis" *Washington Examiner* (21 December 2018), online: <https://www.washingtonexaminer.com/opinion/op-eds/the-venezuelan-exodus-is-no-longer-just-a-regional-crisis>.

race, religion, culture and, in the process, identity. Reality is redirected when we distort the facts in order to create a new reality that, albeit present and existent, could not have existed but by the distorted perception of the precedent reality through which a new conceptually redirected one eventually emerges. Here, precedent reality is a sociopolitical distortion; the conceptual-redirected one, however, a legal misconstruction. Yet, an advanced perception-conceptualization of reality (*quantum reality*) will indicate that a more accurate depiction of reality (visualization of what we see as problems and solutions) is to be defined solely neither by our original nor by our selected or physical perception of reality but by our multidimensional understanding about it.

I further contend that the breakable element of modern human social evolution is defined by its circular progression: inherently regressive (e.g., supporting Nazis in the 30s and later Neo-Nazis in 2018) and intrinsically circular (e.g., governments fostering racism in the 18th century, fighting it over in the 19th century, rejecting it in the 20th century, and then overtly and implicitly supporting it again in the 21st century). This progression results in regulations and policy solutions that are not only less intelligent but increasingly more inhumane.

Unintelligent because notwithstanding the apparent sequence of thoughts in various areas of knowledge indicating some level of progress (acquiescence and development of both theoretical and practical knowledge), the measure of our propositions and decisions is symmetrical, when not limited, to our current existence. As if no one will be alive after we leave this world (i.e., our solutions aim to resolve problems only as they emerge).

Inhumane because the very premises society nowadays uses to justify certain decisions (e.g., exclusion of migrants) in order to solve correlated problems (host countries' security) are part of the problem (e.g., discrimination based on national origin or religious values).

Using a multidisciplinary analytical structure (biology, anthropology, neuropsychology, social sciences, physics, quantum mechanics, law), I deconstruct in two sections of this chapter the announced *perceptional gap* that leads to legal bias. Section I titled, "Perception-Assertion of Reality," tackles the formation and consequences of legal bias by exploring natural and evolving attributes of human perception affecting the way we describe and treat refugees (prime, selective,

and physical perception). Section II titled, "Perception-Conceptualization of Reality," analyzes major distortions of reality leading to a gradual disconnect between the problems we perceive and the solutions we propose by looking into regressive, yet dimensional assertions and constructions of reality concerning security, migration and refugee protection.

To put it succinctly, moving from the facts as we observe them (*biology, mathematics, anthropology*), the facts as we assimilate them (*neuropsychology, social sciences, law*), the facts as we measure them (*physics and law*), to the facts as they are told (*populism, extremism*), the facts as they are framed (*legal reasoning*) and the facts as we understand them (*quantum theory, forced migration, legal theory*), this chapter deciphers the corollary yet flawed relationship between our idea of reality and law defined by a perceptional gap (*redirection of reality*) affecting the perception and conceptualization of refugees across the world (*reception and treatment*).

I. PERCEPTION-ASSERTION OF REALITY

Prime or natural perception of reality refers to the perception of the world that is encoded in our biological, psychological, anthropological and social nature. *Natural perception* ensues from our senses and available resources (internal and external) that influence our perception of reality: what we are, what we have become, what others and we think others-and-we are. In a sense, perception flows naturally from each and all these entities leading to our understanding of the world. *Evolving perception*, however, refers to the way the information we perceive evolves since it is either new or different. Yet, there are natural (e.g., bias) and unnatural (e.g., politics) distortions of reality that are formed not only in our minds, but also through our social relations. These distortions affect our perception of reality and, as a result, our conceptualization of the world (the way we perceive others). This is particularly tangible in the case of refugees as distorted perceptions of reality (e.g., "refugees are suspects, not victims") lead to gravitational concepts (e.g., "exclusion of suspects conforms to national security") from which a newly redirected (through populism) and constructed reality (migration policies) emerges: ***refugees are not welcome***.

Conversely, it would be a gross mischaracterization to portray certain facts that are often manipulated through distorted sociopolitical-perception of reality as being themselves distortions.

Terrorism and socioeconomic strain to local/small communities are problems that can be associated with migration. For example, 9/11 attackers used non-immigrant visas to enter the U.S. (Table 11). Socioeconomic tensions in local communities following the arrival of thousands of migrants have been reported in Britain (Westbeach),[3] Bangladesh (Ukhia),[4] Ecuador (Tulcán),[5]and Lebanon (Akkar)[6]. These tensions often lead to expressions of xenophobia,[7] social exclusion,[8] and violence.[9] Their occurrence does not turn all refugees into suspects, however. Taking these facts separately to claim that refugees constitute a threat does not solve problems related to national security or refugee protection (terrorist attacks continue and the number of refugees increases every year). Nonetheless, such a claim distorts the sociopolitical perception of migrants leading to their social and legal exclusion based on nationality, religious beliefs, or race. Thus, neglecting the human suffering of those who desperately claim protection based on the very reasons we now use to reject them is not merely unintelligent, but inherently inhumane.

A. Prime Perception: The Facts as We Observe Them

Using dissimilar references (biology, mathematics, anthropology), I describe here the way natural and evolving perception occur. That is, the prime initial observation of the world in its relation to life, humans and their evolution. As such, *mathematics* evolves through logical assertions designed to test reality (truth/false numerical and non-numerical conjunctions),[10] while *biology* does it

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[3] See e.g. Evan Davis, "The Day Immigrants Left" *BBC* (25 October 2016), online (video): <https://youtu.be/bqo-7rtGwOU> [TV Documentary Series].

[4] See e.g. Clare Baldwin & Andrew R C Marshall, "Rohingya Refugees Test Bangladeshi Welcome as Prices Rise and Repatriation Stalls" *Reuters* (27 February 2018), online: <https://uk.reuters.com/article/uk-myanmar-rohingya-bangladesh-tensions/rohingya-refugees-test-bangladeshi-welcome-as-prices-rise-and-repatriation-stalls-idUKKCN1GC08S>.

[5] See Tom Phillips, "Fleeing Venezuelans Face Suspicion and Hostility as Migration Crisis Worsens" *The Guardian* (19 August 2018), online: <https://www.theguardian.com/world/2018/aug/19/fleeing-venezuelans-suspicion-hostility-migration-crisis-ecuador>.

[6] See e.g. Ali Alsheikh & Diego Ibarra Sanchez, "Syrian Refugees: Tension and Solidarity in Exile in Lebanon" *Al Jazeera* (6 May 2018), online: <https://www.aljazeera.com/indepth/inpictures/syrian-refugees-tension-solidarity-exile-lebanon-180506093057204.html>.

[7] See Megan Janetsky, "Fears Stoke Backlash against Venezuelans in Peru" *BBC News* (1 August 2019), online: <https://www.bbc.com/news/world-latin-america-49156814>.

[8] UN Department of Economic and Social Affairs (UNDESA), "*Refugees and Social Integration in Europe*" by Mihaela Robila (New York: UNDESA, May 2018) at 8, online: *UN* <https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/RobilaEGM2018.pdf >.

[9] See BBC, "Venezuela Crisis: Brazil Deploys Troops After Migrant Attacks" *BBC* (20 August 2018), online (video): <https://youtube/woa3AUFafCw>.

[10] See Alfio Quarteroni et al, *Numerical Mathematics* (New York: Springer, 2000) at Chapter 2.

through experimentation of life (recorded observations of natural living beings),[11] and *anthropology* through a wide range of research methods (ethnography, epistemology, behavioral observation, cross-cultural research, sampling selected participation, geospatial and social-network analyses)[12] aimed at uncovering what we once were to better understand what we have become. Albeit different in their scientific goals, these sciences use perception as part of the observation process from which theories and principles emerge.[13]

1. Perception, Information, Assertion, and Conceptualization

The triggering event of human reasoning is perception. The very assimilation of human evolution hinges on our perception of the world as it structures the information from which our understanding of that world develops. I argue that perception drives the conceptualization of reality; *prime perception*, in particular, ensures critical depictions of reality without interferences other than those naturally encoded in the observer (physical/intellectual capacity limitations).

It is worth noting, however, that some scholars view information as the triggering factor of reasoning. In his book, "Decoding Reality,"[14] Oxford Physics Professor Vlatko Vedral visualizes information as the departing point for rationalisation processes. For Vedral, "we build on information (not on matter, energy, or love); that is, the building block on which everything is constructed."[15] Professor Vedral portrays information as the product of logic resulting from an inverse probability-propensity assertion:[16] we know something might happen because it tends to happen. While I agree with the broad argument whereby information accomplishes a quintessential role in our conceptualization of the world, in that we cannot conceptualize what we do not know even exist, I do not think of "information" as the triggering event of reasoning. I only consider it

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[11] See Sandra Alters, *Biology: Understanding Life* (Boston: Jones & Bartlett, 2000) at Chapter 2.
[12] See H Russel Bernard, *Research Methods in Anthropology* (Lanham, Maryland: Altamira, 2006) at 109. See also Michael Paolisso, "Anthropological Research Methods" University of Maryland, Department of Anthropology (26 February 2016), online (pdf): *SESYNC* <https://www.sesync.org/sites/default/files/education/michael_methods.pdf>.
[13] Perception is a vital element in the scientific process. We make scientific observations on what we perceive, elaborate questions predicting possible outcomes driving from such observations (*hypothesis*), test through experimental methods our predictions (*premises*), and arrive to a conclusion from which principles emerge (*theories*).
[14] Valko Vedral, *Decoding Reality: The Universe as Quantum Information* (Oxford: Oxford University Press, 2010) at 10.
[15] *Ibid*.
[16] *Ibid* at 29.

as the necessary transition (stage) between perception and conceptualization: we cannot know whether something exists if the "something" (event) was not perceived in the first place.

In a simile, information is the metaphysical place to put the data we collect through our senses (*perception*) before we come about, rationalize, and define its existence and meaning (*conceptualization*). We do not know things magically; the data on which we build is not self-collected. As such, I argue, *perception is precedent, information transitional, and conceptualization the product of the cognitive-conscious mind*. Albeit intrinsically connected, perception precedes information because the latter cannot even occur without the former. Information distinguishes itself from conceptualization, in that information is neither an idea nor a theory or a concept, but data waiting to be studied and reflected upon. As the creator of calculus, Gottfried Wilhelm Leibniz, puts it, reasons cannot be known to us.[17]We discover them through the cognitive process that begins with perception.

Therefore, perception, information, assertion, and conceptualization of reality are sequentially connected. *Perception* uncovers reality by making us aware of its existence. The product of the reality we perceive is *information*. The initial assessment of that information constitutes *assertion* of reality, that is, the process whereby we become fully aware of its existence. The meaning and subsequent assessment of that information constitutes our *conceptualization* of reality.

2. Circular Progression: "Progress Not Evolution, Much Less Humanity"

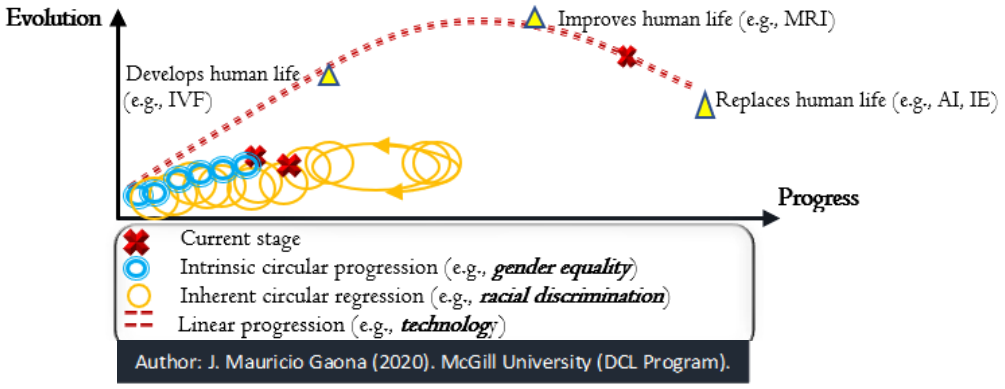
We first observe and perceive the world before rationalizing about it, for which our questions/interpretations (*hypothesis*) and explanations/propositions (*theories*) of reality emerge as concepts directed at defining such reality in the attempt to construct our understanding of the

[17] Leibniz distinguishes between perception (*unconscious state of mind*) and apperception (*conscious state of mind*). The first one is described as an internal representation of the external world, while the second one is depicted as a progressive, reflective and conscious exploration of the internal representation. For Leibniz, in short, all beings are capable of perception (animals) but only humans can achieve (through apperception) the conception of self. Hence, "we know is there" (e.g. perception of danger based on implicit memory, i.e. *learning attribute*) is therefore different than "we know what it means" (e.g. understanding of danger based on functional/behavioural patterns, i.e. *rational attribute*). See Gottfried W Leibniz, "Principles of Nature and Grace Based on Reason" in Roger Ariew & Daniel Garber, eds, *G.W. Leibniz: Philosophical Essays* (Indianapolis: Hackett, 1889) at 210.

world, from which a next reality can be built. This, in a nutshell, is progression, which can be linear (new reality defined by new questions and theories) or circular (new reality revisits all or some of previous contentions).

Nonetheless, progression becomes regression when notwithstanding the pass of time the circular progression does not merely lead to similar propositions but events (Figure 1). Yet regressive models do not deny reality; only our ability to evolve. Here is why the gap between the reality we observe (*perception*) and the ideas we develop from it (*conceptualization*) is so critical. Should perception and conceptualization no longer match, our very understanding of the world (not the reality we should construct but the one we are directed to create, i.e., *redirected reality*) will invariably change.

FIGURE 1: PROGRESSION-REGRESSION MODELS OVER EVOLUTION-PROGRESS DIFFERENTIAL PATTERNS: $P \neq E$



I submit that human evolution and progress are not merely alike but gradually equidistant; we have reached technological progress, but we have not evolved as much as such progress may lead us to believe. In fact, we are in a unique time of history, in which three major technological revolutions are about to change the core functionality of labour, acquisition of knowledge, rationalisation, and intellectual capacity. Even in the presence of the third digital (*digital 3.0*), the fourth industrial (*industry 4.0*), and the quantum revolutions (*final core*) both products (e.g., 3D home-made automatic weapons, remote industrial automatization, machine learning functionality, and upcoming quantum-integrated algorithms) and reasons (e.g., war power, greed unprecedented income differentials on productivity, costs and liabilities) related to our technological progress are separating those who own and can access such technologies from the rest of the world. The already

exponential level of income and social inequality among people and countries (including human rights challenges such progression encompasses) will increase.[18]

Compared to other areas (e.g., gender equality, racial discrimination), technology has reached a higher point of social evolution (Figure 1), but it is being developed bearing in mind almost exclusively innovation-profit as driver of progress.[19] We are creating self-driving vehicles, engineering quantum computing, and improving global communication, while there are nearly 80 million human beings across the planet[20] searching for shelter, food and, when available, humanity (Image 1). In this, our 'modern world', progress does not equate to evolution *{P ≠ E}*, for which our legal conceptualization (immigration laws) on refugees appears increasingly disconnected from reality. As a result, modern civilization attains progress, but it does not truly evolve.

I argue that the ***ethos of modern civilization is progress not evolution, much less humanity***. We have gone from pushing cars in ancient times to cars driving us in the modern ones (Image 2). Yet our social progression is not only circular[21] but in many cases regressive and, as such, degenerative.[22] Notwithstanding our modern technological progress and the more than 9 million of human lives lost during the Nazi Holocaust, society has seen different generations supporting Nazis in 1930 and Neo-Nazis in 2018 (Image 3). History is part of evolution; neglecting one, neglects the other. This is important for understanding how legal reasoning connects perception-conceptualization from facts to the rule of law, on the one hand, and how legal bias disconnects perception from reality (and reality from conceptualization), on the other.

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[18] For example, using neurotechnology and computer science, current state-of-the-art on intelligence enhancement (IE) research aims to increase human brain's storage and analytical capabilities by connecting the human brain to computer networks; something that could result in the evolving ability to profile humans and their minds. Jose Mauricio Gaona, "Human Rights without Humans: The Final Line between Artificial and Superhuman Intelligences" *The Hill* (27 October 2018), online: <https://thehill.com/opinion/technology/413464-human-rights-without-humans-the-final-line-between-artificial-and>.

[19] *Ibid.*

[20] UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2019* (Geneva: UNHCR, June 2020) at 2, online (pdf): *UNHCR* <https://www.unhcr.org/5ee200e37.pdf>.

[21] Circular because it aims to repeat cycles of progression (e.g. society affords women the right to vote and from then keeps questioning whether they are ready to run a country).

[22] If technology progresses through its acquisitional values but society does not significantly evolve, all we are doing is developing more efficient tools to support a cognitive yet unevolved mind.

3. Prime and Evolving Perception

Natural perception of reality ensues from our observation of the world through our senses. Observation is a defining element of scientific knowledge. In fact, the scientific process will prove or disprove the existence of facts and the reasonability of our propositions through three defining yet distinguishable forms of reasoning: *deductive* (logical conclusion), *inductive* (extrapolated conclusion), and *abductive* (best possible conclusion). All of them derive from information (evidence) collected through perception of reality, which ultimately makes the projected result plausible. Consider, for instance, the following *deductive propositions* and correlations in biology, mathematics, anthropology, and astronomy:

> ***Biology*:** Based on the observation of plants and the sun, we estimate Sun light enables photosynthesis.
> ***Mathematics***: Considering values of "X" being "2," "Y" being "5," we calculate that $X + Y = 7$
> ***Anthropology***: Based on sampling conducted exclusively on President Trump's immigration-policy supporters, we can estimate that most Central American refugees that came to America during his first presidential period were criminals.
> ***Astronomy***: Based on scientific observations of the 20th century, we estimate that Pluton is a planet.

Evolving perception of reality occurs when the information we perceive is unknown or differs from previous information. This leads to a different perception of reality (here, "light," "X," "Central American refugees," "Pluton") from where a different conceptualization of photosynthesis, mathematical equation $\{x + y\}$, Central American refugees, and the solar system emerges:

> ***Biology***: Based on the observation of plants under artificial light, we now estimate that photosynthesis may occur without sun light.[23]
> ***Mathematics***: Considering that "X" is "1" not "2," we now estimate that: $X + Y = 6$
> ***Anthropology***: Based on a sample that focuses directly on Central American refugees, we can estimate that most Central American refugees that came to America during the Trump presidency were not criminals but, in fact, children and families, who show rather lower criminality rates.
> ***Astronomy***: Using dissimilar points of explorations and more advanced equipment that have improved our perception of the solar system, we now estimate that Pluton is not a planet.[24]

Consequently, *evolving perception* of reality leads us to different conceptualizations, which, in turn, may affect here decisions on agriculture (e.g., urban food production), mathematical certainty

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[23] See Eva Darko et al, "Photosynthesis under Artificial Light: The Shift in Primary and Secondary Metabolism" (2014) 369:1640 Phil Trans Biol'y Sc 1 at 3.
[24] Maison Inman, "Pluto Not a Planet, Astronomers Rule" *National Geographic* (24 August 2006), online: <https://news.nationalgeographic.com/news/2006/08/dwarf-planet-pluto-astronomy/>.

(e.g., non-numerical values), immigration (e.g., criminal propensity claims should not function as inadmissibility ground), and space exploration (e.g., future missions should not include Pluton). Hence, when factually connected to conceptualization, perception of reality enables and transforms life; otherwise, the reality we create will not be a natural flaw of our linear evolution but a regressive manifestation of our circular progression and, therefore, inability to evolve.

Even in cases of *inductive* and *abductive reasoning* we may find ourselves facing limited or scope-oriented information, for which our inferred estimations and objective assumptions need to be based on the evidence gained through perception. Although *inductive reasoning* force us to accept inferred correlations that may later be found incorrect through new evidence, these correlations are nonetheless factual, not ideological. For example, anthropology's longstanding theory of the "*Bearing strait*" claims that the first settlers in America (*Clovis people*) entered the continent throughout the ice-free corridor of the land bridge of Bearing 13,500 years ago.[25] Yet recent geological evidence indicating the discovery of prior settlements in Chile and North America situated more than 14,000 and 16,000 years ago respectively, suggests the *Bearing Strait Theory* is only a hypothesis, for which making an extrapolation of its scientific basis to the entire continent seems, as of today, inaccurate.[26] Here, new information collected through scientific observation (*perception*) force us to reconceptualize our premise on the first settlers in America.

In science at least, we do not make claims of reality expecting that evidence will follow. Instead, we perceive reality expecting it will support our claim with evidence. Thus, given their conceptual determination, biology, anthropology, mathematics, and astronomy serve at describing the critical role perception accomplishes in the conceptualization of reality and our understanding of the world, which varies when perception changes or is distorted.

B. Selective Perception: The Facts as We Assimilate Them

Are national security concerns the only referent affecting our perception-conceptualization of refugees? Does race play any role as to how we perceive and treat such migrants? More

[25] Todd J Braje et al, "Finding the First Americans" (2017) 358:6363 Sc 592 at 594.
[26] *Ibid.*

particularly, do we perceive what we perceive, what we choose to perceive, or what we know we are perceiving? Can we model our perception to adapt reality to our pre-conceptualization of the world? To answer these questions, I explore the *perceptional gap* as it is formed through our differentials of reality driven by perception as well as by cognitive and legal biases in their relation to our conceptualization of refugees and other migrants.

1. Perception Theories

Perception is defined as the preliminary cognitive function consisting in the recognition of the world through our stimuli (senses).[27] Modern psychology, however, breaks perception (sensorial-visual perception) in two major theories: *The Bottom-Up* (*ecology*) and *the Top-Down-Processing* (*constructivism*) theories. Although both theories acknowledge the critical role of perception in the understanding and conceptualization of the world, they differ with respect to the cognitive elements that intervene and predetermine our perception.

On the one hand, the *Bottom Up Theory* (Gibson, 1966)[28] depicts perception as an inane attribute encoded in human nature that starts and ends with the stimuli or sensorial contact of the environment evolving from simple to complex cognitive tasks, for which neither prior knowledge nor interpretation of the collected information or precedent learning-acquired abilities need to be integrated within our perceptional development of reality ("what you see is what you get"). In a sense, the information we collect is obtained through *perception*; our understanding of that information (meaning) is *conceptualization*. Hence, *information* is the product of *perception*.

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[27] Accordingly, perception is the most vital cognitive function there is. It precedes (informs) human understanding and enables reasoning based on experience and prediction. The latter is akin to human interaction (emotional intelligence), while the former is necessary for human development. See Markus Raab, "What Is Performance Psychology?" in Markus Raab et al, eds, *Performance Psychology: Perception, Action, Cognition, and Emotion* (Oxford: Elsevier, 2016) at 4-8.

[28] James Gibson, *The Senses Considered as Perceptual Systems* (Boston: Houghton Mifflin, 1966) (arguing that the environment in general and the light reaching the eye in particular provide enough information for perception to occur directly without processing or requiring further knowledge on the information we perceive); see also James Gibson "A Theory of Direct Visual Perception" in Joseph Royce & William Rozenboom, eds, *The Psychology of Knowing* (New York: Gordon & Breach, 1972).

On the other hand, the *Top Down Processing Theory* (Gregory, 1970)[29] ascribes perception not to our encoded-native abilities but to our experienced-acquired abilities that enables us to recognize reality evolving from experience to prediction, for which perception is described as a constructive process that does not end with the stimuli but further extends to the interpretation of the stimuli and collected information that help us recognize future information. Here, knowledge precedes perception, turning perception into a cognitive construction of reality that results from recognizing and interpreting prior information functioning as the conceptual predetermination of the world. In fact, some attempts to distinguish perception's attributions (merely psychological, rather cognitive, or both) may be found in classic philosophy. For example, the *Aristotelian view of perception* goes to describe it as a realization process that the observer experiences while going from being potentially to actually aware of the perceptible object.[30]

Psychology's *constructivist* and *ecology theories* of perception, moreover, find similar propositions in modern philosophy (Hanna & Chadha, 2011),[31] which dispute whether perception is predetermined by concepts. Accordingly, *non-conceptualist theory* of perception acknowledges that the "representational content" (reality) is informed not solely by conscious conceptual capacities but sometimes solely by non-conceptual capacities, in which case the simple act of collecting information through our stimuli defines perception.[32] Under the *conceptualist theory* of perception, however, only a conscious conceptual predetermination of the "representational content" defines perception. As such, conceptual-perception encompasses the ability to conceptualize the information we collect even before this one is collected.[33]

The problem with theories proposing an amalgam of perception-conceptualization (*bottom up and conceptualist theory*, i.e., prior conceptual knowledge precedes perception) is that they suffer from

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[29] See generally Richard Gregory, *The Intelligent Eye* (London: Weidenfeld & Nicolson, 1970).
[30] The Aristotelian—in my view—unfinished theory of perception has been widely disputed by scholars and philosophers indicating that either the *Aristotelian perception* relates either to the physiological function of receiving reality through sensor-organs (*reception theory*) to the gradual conscious transition altering an individual's stage of mind (*cognitive theory*), or to a progressive reconciliation between these attributes (*reconciliation theory*). See S Marc Cohen, "Aristotle on Perception" (3 April 2008), online (pdf): *UNIVERSITY OF WASHINGTON* <https://faculty.washington.edu/smcohen/433/Perception Lecture.pdf> [Lecture].
[31] See Robert Hanna & Monima Chadha, "Non-Conceptualism and the Problem of Perceptual Self-Knowledge" (2011) 19:2 Eur J of Phil 184 at 190.
[32] *Ibid.*
[33] *Ibid.*

a circular and fatal assertion of reality, in that for conceptualization to exist—or at least, to be the defining precedent element of the product of perception (whether this is called information or representational content)—the concepts that tell us we are in presence of such reality must be elaborated before that reality is perceived. *Innuendo*, we must know something before we observe it. Then, *arguendo*, we define things before we know they even exist. Hence, the flaw such corollary propositions embody does uncover a critical misunderstanding of the entities that drive human understanding, evolution and interaction: perception, information, conceptualization and, from then on, experience and prediction.

These 'amalgam theories' seem to connect better with current populist propositions of reality whereby we know something before we observe it. Consider, for instance, U.S. President Donald Trump's statements on forced migrants that were traveling in the so-called "Migrant Caravan" from Central America to the United States in 2018. During a press conference, President Trump first stated that he had "very good information" that there were "Middle Easters" traveling in the Caravan.[34] When asked by a reporter about the evidence he had to back up his claim, President Trump replied: "*there is no proof of anything, but there could very well be."*[35] Aside from the xenophobic implications of President Trump's statement on the presence of "Middle Easters" in the migrant caravan—that is, even if *international refugee law* makes no such distinction—the statement further implicates not only that people from the Middle East are dangerous but are not entitled to refugee protection. The corollary proposition then suggests that a claim of reality can be made in absence of or even before evidence to support such claim is obtained. The conceptualization of reality ("Middle Easters" are in the caravan) occurs before the actual knowledge or perception of the very fact in question takes place (there are Middle Easters in the caravan, and they are dangerous). If admitted, this means that reality would not be defined for what it is but for what we imagine should be, leading us thereby to *subjective reality*.

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[34] Bill Hutchinson et al, "Trump Admits He Has 'No Proof' of 'Middle Easters' in Caravan, 'But There Could Very Well Be'" *ABC News* (23 October 2018), online: <https://abcnews.go.com/US/trump-admits-proof-middle-easterners-cara van/story?id=58686056>.
[35] *Ibid.*

Furthermore, both the *Top Down* and *Conceptualist Theories* of perception find resistance in science as well as in philosophy. Since its introduction, the *Top Down Theory* has found greater scientific opposition[36] than its counterpart, the *Bottom Up Theory*. This, precisely, in light of the evidence obtained, i.e., newborn studies on native-natural perception (De Casper & Fifer, 1980; Slater et al., 1996).[37] These series of seminal studies, essentially, back up the existence of native abilities embedded in humans that determine our perception of the world.[38] The *Top Down Theory* has been further criticized due to its scientific gap on sensorial information, which nowadays experts consider critical in perception—particularly after the introduction of fMRI technology and subsequent studies showing inherent brain activity during the perception of reality as well as in relation to objects and other people.[39]

The *Conceptualist Theory* has been rejected by classic philosophers, modern neurologists, and psychoanalysts. In fact, both philosophers and psychologists have not merely situated *perception* as the original-precedent step of reasoning but have further distinguished it from *conceptualization*—which, for the most part, they view as a more complex stage of rationalisation.[40] For instance, *Plato's epistemological exploration* on the meaning of knowledge led him to dispute the very idea that knowledge is perception.[41] Instead, he regarded perception as a sensory task deprived of its categorical meaning.[42] For Plato, this suggests that perception cannot be knowledge because the one who does not know could not perceive and, as such, would remain ignorant. Plato further distinguishes perception from knowledge (*conceptualization of reality*) in two separated yet connected cognitive functions: the perception and the understanding of the

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[36] Saul McLead, "Visual Perception Theory" *Simply Psychology* (2008), online: <https://www.simplypsychology.org/perception-theories.html>; see also Alan Slater et al, "Newborn Infant's Perception of Partly Occluded Objects" (1996) 19:1 Infant Behavior and Develop 145 at 146.
[37] Anthony J Decasper & William P Fifer, "On Human Bonding: Newborns Prefer Their Mothers' Voices" (1980) 208:4448 Sc 1174 at 1175.
[38] *Ibid.*
[39] Lena Groeger, "Making Sense of the World, Several Senses at a Time: Sensory Cross Talk Help Us Navigate the World" *Scientific America* (28 February 2012), online: <https://www.scientificamerican.com/article/making-sense-world-sveral-senses-at-time/>.
[40] See Plato, *Theaetetus* (Indianapolis: Hackett, 1997) at 144.
[41] *Ibid* at 164a-b (advancing the very idea that knowledge neither precedes nor defines perception, for which a man can see things he does not know). In this precise exchange of Plato's dialogue (*Theaetetus*), Plato raises the question of what we make of a man that sees something he can remember but then must acknowledge he does not see it because he does not know it.
[42] *Ibid* at 164d-e (refuting *Protagoras' assertion of knowledge* by distinguishing between identity of knowledge and that of perception).

world. The former (he argues), is universal to all species while the latter is exclusive to humans.[43] Under *the Platonian view on evolution*, this apprehension of reality serves at explaining the differentials between humans and other species (animals). I argue that if we only perceive what we know, we would not be able to perceive what we do not know; even if we are, in fact, observing it. Such perception of reality denies reality, unless we assume we know all reality there is.

Neurologist and psychoanalyst, Sigmund Freud, sees perception as a precedent event to the conscious mind, from which the core element of our brain and personality (*ego*) emerges.[44] For Freud, *ego* starts from our perception system, and it is the *ego* that defines our very understanding of the world (including the possibility to change or adapt).[45] Hence, perception is an archetypal element in *Freudian constitutional psychoanalytical systems* (unconscious, preconscious and conscious mind). He describes perception as the recognition of information that may either form in the preconscious or travel from the unconscious to the preconscious mind.[46] Freud, as Aristotle[47] and Plato, envisions the progression-relation of perception-consciousness as an evolving state of mind; nonetheless, separating perception. That is, a precedent factor-formation divided into *external perception* (acquired through experience and affecting the *ego* in the *preconscious system*)[48] and *internal perception* (acquired through instincts and affecting the *Id* in the *unconscious system*)[49] that evolves to subsequent factors of conceptualization (person either remembers or learns through memory adaptations of the stimuli) resulting in external and internal roots of perception.[50]

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[43] *Ibid.*
[44] Richard Wollheim, *Sigmund Freud* (New York: Cambridge University Press, 1971) at 214.
[45] *Ibid.*
[46] Sigmund Freud, *"*An Outline of Psycho-Analysis" (1940) 21 Intern'l J of Psycho-Analysis 42 at 43.
[47] *Ibid.* Both Freud and Aristotle refer to the "potentiality" of events as being perceived and, from then on, evolved—notwithstanding differentials—conscious (gradually aware) state of mind.
[48] In the *Freudian brain-personality constitution* (ego, superego, Id), humans are defined by the rather unavoidable interaction of three conflicting psychological forces: *unconscious*, *preconscious*, and *conscious*. Freud's evolving psychoanalytical relations on perception acknowledge the possibility that one remembers what one sees (throughout experiences stored in our memory), for which the adaptation of reality (or element that forces the *ego* to assume a position) is concurrent; turning perception into a *conscious state of mind*. Freud further recognizes the possibility of perceiving new or completely unknown events (e.g. images not suitable to immediate/reflective thoughts). Here, the formation of facts is a subsequent learning process leading to a transformation from the unconscious to the *perception-conscious system*. See Sigmund Freud, *Das Ich und das Es* (Vienna: Internationaler Psycho-analytscher Verlag, April 1923) at 20; Freud, *supra* note 46 at 28.
[49] *Ibid* at 42.
[50] This has been confirmed by neuro and social sciences. Using fMRI's latest techniques to monitor blood changes in our brain and neural stimuli responses, neuroimaging and social studies indicate neurological responses are driven by

We cannot assume perception and conceptualization are two independent and fully autonomic cognitive functions of reasoning; they are very much intertwined as they enable our understanding of reality. It may well occur that conceptualization helps sharp our perceptual experience connecting perception to conceptualization almost immediately (e.g., red colour may symbolize danger).[51] When we see a red car we may know (when we see it) that it is "red" and it is a "car" because we have learned to know what a car is and how the red colour looks like.[52] This does not mean that knowledge substitutes perception as we still need to see the car to know—as oppose to imagine—that the car is there and is red; assuming, nevertheless, that previous knowledge will accelerate our conceptualization process. In this sense, we are not born knowing what a car and the red colour look like. Instead, after constant perception, infants learn to identify the car and the red colour almost immediately after observing it[53] (despite the complexities of memory).[54]

Moreover, when a child sees someone yelling, that child might not be fully aware as to the meaning of such action. Yet after numerous interactions (experiences), the child may come aware of the meaning of "yelling," which depending on the circumstances may indicate frustration, angry, or happiness. The next time the child hears someone yelling will be easier for the child to associate the meaning of "yelling" through his or her other associations (*mirroring effect*),[55] but still the child will need to sensor the act of "yelling" before attributing its occurrence to one of its formed (known) concepts, for which being aware that something exists (object, person, event, feeling)

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our perceptions of our self and others. See Lauri Nummenmaa & Andrew J Calder, "Neural Mechanisms of Social Attention" (2009) 13:3 Trends in Congn Sc 135 at 137-143 (formulating both quantitative social-attention analysis of human neuroimaging based on perception gaze and socio-cognitive inferences); Ritta Hari & Miiamaaria V Kujala, "Brain Basis of Human Social Interaction: from Concepts to Brain Imaging" (2009) 89:2 Phys Rev 453 at 455-479 (proposing an interdisciplinary-analytical model of neuroimaging information that suggests an innate connection between perception-action or "inner-world" and the development of external influences driven by social stimuli).

[51] See e.g. Andrew J Elliot & Markus A Maier, "Color and Psychological Functioning" (2007) 16:5 Ass for Psych Sc 251 (presenting learned associations on the perception of red colour and subsequent intellectual responses). As of today, however, research on perception of colour is limited more to empirical applications than doctrinal elaborations.

[52] Still, data show variations in the way adults and children conceptualize their perception of colour. See Catherine M Sandhofer & Linda B Smith, "Why Children Learn Color and Size Words So Differently: Evidence from Adults' Learning of Artificial Terms" (2001) 130:4 J of Exp Psych —General 600 at 605-620.

[53] *Ibid.*

[54] Perception does not equate to memory. What we perceive may be in our memory but may not be, however, easily accessible. Research shows that people struggle remembering certain events (dates, time, numbers) and objects they have perceived (even repeatedly) due to "encoding" gaps. See Hillary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22:4 IJRL at 479 (introducing evidence on common objects).

[55] See Ritta Hari et al, "Attending to and Neglecting People: Bridging Neuroscience, Psychology and Sociology" (2016) 371 Phil Trans Rev Soc B 3.

does not automatically lead to its inexorable meaning. For example, here, the concept of frustration or angry will certainly help the child identify and associate more easily the context in which a future "yelling" takes place. But that very exercise is part of the conceptualization, not the perception process, for which the "yelling" still needs to be perceived before it is interpreted as "yelling" and not, for instance, as "laughing"—this one further leading to concepts the child might not yet be familiar with (e.g., sarcasm).

2. Cognitive Bias: Decoding Perception of Refugees

Bias is defined as a tendency, inclination, or prejudice toward or against something or someone.[56] In psychology, *bias* is defined as a perceptional and motivational shortcut of reality, in that it replaces (consciously or unconsciously, i.e., *explicit or implicit bias*) actual with modeled perception of the observer's registered yet selected information by including elements that are not perceived or by leaving out others that, albeit present, are ignored.

Bias is therefore a corrosive assertion of reality resulting from an inverse proposition of human reasoning whereby conceptualization of reality is subjectively constructed before reality is even perceived, for which rather than gradual internalization and rationalisation processes (*perception-information-conceptualization*), the observer only registers (or if the desired information is not available, adjusts) the factual elements that conform to the observer's pre-conceptualized world.

There are two types of cognitive biases: *confirmation* and *attribution*. *Confirmation bias* is defined as a psychoneurological formation of facts whereby the observer's perception of reality selects only the information that supports the observer's beliefs, neglecting—or, at most, adjusting when necessary—any fact contrary to those beliefs.[57] For example, to justify lowering even more[58] the admission intake-cap of refugees in 2019 (from 45,000 to 30,000),[59] U.S. President Donald Trump

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[56] Psychology Today (online), *Psychology*, "Bias," online: <https://www.psychologytoday.com/intl/basics/bias>.
[57] *Ibid.*
[58] Under US immigration law, the executive branch must submit to Congress every fiscal year a proposal concerning refugees' admission-cap. See *United States Immigration National Act of 1965 (INA)*, 89th Congress, Pub L 89-236, 79 Stat 911, § 207(d)(1), (e) (signed into law 3 October 1965) [as modified by *Immigration Act of 1990*] ["INA"].
[59] The US Government proposal on refugees' admission-cap for the fiscal year of 2018-2019 introduces a reduction from 45,000 in 2018 to 30,000 in 2019. US Department of State, Department of Homeland Security & Department of

stated that "some refugees" admitted to the U.S. pose risks to national security.[60] This statement was made notwithstanding the Trump administration had received an official report a few weeks earlier,[61] issued by the government's leading intelligence and counterterrorism organization (National Counterterrorism Centre),[62] indicating that refugees do not constitute a significant threat to the national security of the United States[63]—this one, a finding that not only corresponds to previous studies[64] but that was further corroborated by the former Chief of the Refugee Affairs Division at U.S. Citizenship and Immigration Services (USCIS), Barbara Strack.[65] Still, President Trump ordered the Department of Homeland Security and the Department of Justice to produce new reports to ascertain national security threats posed by foreign-born individuals; a goal that clearly exceeds the realm of the refugee definition both under U.S. law (INA § 101(a)(42)) and International law (*Refuge Convention*, Article 1(a))—especially when the reports incorporate terrorists captured overseas and brought to face trial in the U.S.[66] Current U.S. public policy on refugees based on national security determinations is therefore inherently biased.[67]

Attribution bias is defined as the prejudice that results from attributing reasons to someone's actions without evidence supporting such attribution.[68] Consider, for example, the perception of refugees fostered by Czech Republic's President Miloš Zeman through the media. Despite lack of evidence, President Zeman portrayed refugees arriving to Europe as "Islamists … trying to

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Health and Human Services, *Proposed Refugee Admissions for Fiscal Year 2018* (Washington, DC: USDS, 2017) at 14, online (pdf): *US GOVERNMENT* <https://www.state.gov/documents/organization/286401.pdf>.

[60] See Dan De Luce & Julia Ainsley, "Trump Admit Rejected Report Showing Refugees Did Not Pose Major Security Threat" *NBC News* (5 September 2018), online: <https://www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681>.

[61] *Ibid.*

[62] The National Counterterrorism Centre is the US Government's gravitational centre leading both national and international security efforts, including assessment of terrorist and foreign threats. For more on the role and functions of the NCC, see Office of the United States Director of National Intelligence, *The National Counterterrorism Center: Mission*, online: <https://www.dni.gov/index.php/nctc-who-we-are> [accessed 12 April 2020, 6:15 AM-ET].

[63] De Luce, *supra* note 60.

[64] See e.g. Alex Nowrasteh, "Terrorism and Immigration: A Risk Analysis" (2016) 798 *Policy Analysis* 1 at 8-26 (making a risk-assessment analysis on terrorism and immigration in relation to migrants entering the US between 1975 and 2015, and describing the risk to be victim of a terrorist attack perpetuated by a foreign citizen entering the US through the immigration system as "1 in 3.6 million").

[65] Psychology Today, *supra* note 56.

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

subjugate Europe"[69] and as "criminals"[70] to justify search-and-seizure of refugees' property,[71] along with their prolonged detention (up to 90 days).[72] These policies, molded through *attribution bias*, were criticized by the UN High Commissioner of Human Rights as systematic human rights violations as, "they appear to be an integral part of a policy by the Czech Government designed to deter migrants and refugees from entering the country or staying there."[73] *Confirmation* and *attribution biases* presuppose, at minimum, the existence of a *cognitive* ***perceptional gap*** between what reality is and what the observer wishes and believes reality shall be.

Thanks to technological developments and studies on Magnetic Resonance Imaging (MRI),[74] researchers have been able to locate the area of the brain where bias (including racial prejudice) is formed. Using Functional Magnetic Resonance Imaging (fMRI), topographic brain-studies indicate that *bias* is produced in the amygdala area (Image 4). That is, a small organ located within the brain's medium temporal lobe near the hippocampus (memory function area). The amygdala is connected to the limbic system, which is the area where emotions are produced (e.g., fear, distress, sadness). Thanks to measurements on neural activity, neuroscientific studies on race-related bias have established that the amygdala drives the formation of prejudice, which has been particularly tested on the account of racial distinctions and discernment. Two seminal studies in 2000 (Hart et al; Phelps et al),[75] found key correlations on racial attitudes toward Young Afro-Americans whose face pictures were perceived by most races as a threat irrespectively of the race

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[69] See BL, "Czech President Miloš Zeman: The immigrants Are Islamists. They Are Trying to Subjugate Europe" *Britské Listy* (5 November 2015), online: <http://blisty.cz/art/79737.html>.
[70] See BL, "Czech President Miloš Zeman: The Refugees Are Criminals" *Britské Listy* (6 November 2015), online: <http://blisty.cz/art/79745.html>.
[71] See UNHCR, "Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees" *UNHCR News* (22 October 2015), online: <https: //www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=16632&langid=e>.
[72] *Ibid.*
[73] *Ibid.*
[74] Thanks to a non-invasive small sensor introduced on MRI technology, researchers can now read brain activity not only by looking at changes in blood flow but also by observing electronic impulses through different areas of the brain. See Anne Trafton, "Monitoring Electromagnetic Signals in the Brain with MRI" *MIT News* (22 October 2018), online: <http://news.mit.edu/2018/monitoring-electromagnetic-signals-brain-mri-1022?fbclid=IwAR33cYxjqA-TOPAQuk RdCWK9eNQb0vmXSzb3U-u8QDIdATaITXrzEELcWB0>.
[75] Allen J Hart et al, "Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli" (2000) 11:11 Neuro-Report 2351 at 2352-2355 (describing fMRI neurological response in the amygdala to the presentation of racial outgroup v ingroup faces); Elizabeth A Phelps et al, "Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation" (2000) 12:5 J of Cogn Neurosc 729 (analyzing fMRI neural activity related to White and Black groups describing how cultural assertions on social groups may evolve).

and gender of the observer.[76] These findings were corroborated by subsequent studies using methodologically different experiments but similar focus-reading on the amygdala's neural activity (Wheeler and Fiske, 2005).[77] More recent neurological studies have proved the existence of implicit or unconscious racial bias in employment discrimination cases (Korn et al, 2012), judicial system (Kang et al, 2012),[78] education (Skiba et al, 2011),[79] healthcare (Chapman et al, 2013),[80] the media (Dixon et al, 2003),[81] and Internet (Josey et al, 2009).[82]

3. Legal Bias: Describing Forced Migrants

Law being a fundamental social institution, both the narrative that precedes its elaboration and the actions that follow its application become institutional endorsements of what its authority aims to accomplish. I argue that if law does not conform to the factual elements of the problem that motivates its very ascension, law is then just another part of the problem, in that notwithstanding the semantics of its text, law ends up serving as the most powerful institutional tool of discrimination, racism, and xenophobia any country may adopt. And since—as I have illustrated—our perception of reality is rooted through external and internal sources of information, it is expected that both the law (as social institution) and the government (as political authority) will play a major role shaping the perception of future generations vis-à-vis refugees. In a sense, law

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[76] *Ibid.*

[77] See Mary E Wheeler & Susan T Fiske, "Controlling Racial Prejudice: Social-Cognitive Goals Affecting Amygdala and Stereotype Activation" (2005) 16:1 Psychol Sc 56 at 58-63 (developing experimental observations on racial stereotyping and brain-activity responses in the amygdala area using functional magnetic resonance imaging).

[78] Jerry Kang et al, "Implicit Bias in the Courtroom" (2012) 59:5 UCLA L Rev 1124 at 1130-1186 (following behavioural realism trajectories on criminal justice, employment discrimination cases, and implicit bias).

[79] Russell J Skiba et al, "Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline" (2011) 40:1 Psych Rev 85 at 95-107 (introducing a study on racial bias on school official's discipline referrals on minorities studying in 365 elementary schools across the United States).

[80] See Elizabeth N Chapman et al, "Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities" (2013) 28:11 J of Gen Internal Med 1504 at 1505-1510 (presenting evidence on how cultural stereotypes may influence clinical decision-making processes on patient treatment).

[81] Travis L Dixon et al, "The Portrayal of Race and Crime on Television Network News" (2003) 47:4 J of Broadcasting and Electronic Media 498 at 501-523 (indicating gross underrepresentation of African-Americans as victims of crime in the news).

[82] Christopher Josey et al, "The Portrayal of Race Online: A Content Analysis of the Portrayal of Racial Stereotypes in a New Media Environment" in Rebecca A Lind, ed, *Race/Gender/Media: Considering Diversity across Audiences, Content, and Producers* (Boston: Pearson Education, 2009) 135 at 138-142 (indicating under-representation of minorities in online news outlets and in relation to headlines, stories, and images portrayed by those outlets).

may not only capture various preexisting biases (religious, racial), but develop them through a different proposition of reality; that is, the reality that the law once implemented does create.

Legal bias, I argue, ensues as an axiological institutional disparity between the information we construct to be the problem and the legal conceptualizations and subsequent regulations we adopt to resolve it. In this context, *legal bias* is not merely an extension of *cognitive bias*, but a *legal and social misconstruction of reality*; a redirected reality produced by a ***perceptional gap***.

It is critical to understand when legal bias forms and when it does not, however. This means that a government may have legitimate national security concerns in suspending the entry of certain migrants that pose a threat to the population or territory such government controls. For instance, 9/11 proved that the idea of foreign nationals using a country's immigration system (here non-immigrant visas, Table 11) to penetrate the country and harm its population is neither a fabrication nor bias, but a real national security threat.

Yet, as I will show in the upcoming section, reality is never absolute but, if anything, relative. As such, the use of an immigration system by terrorists does not mean that all immigration systems (refugee system included)—or, for that matter, all those using it—are terrorists. I hold that the gradual dismantling of the most basic human and refugee rights across the world cannot be easily justified on national security grounds—particularly with respect to what appears to be racially-motivated policies (e.g., treatment of Central American refugees in the United States).

In effect, it is quite difficult to assume that a government that calls refugees "poison"[83] or "animals,"[84] or that refers to the programs that such government institutes to handle immigration as "catch and release"[85] or "catch and return" is acting to protect the national security of a country.

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[83] See e.g. Lydia Gall, "Hungary's War on Refugees" *HRW News* (16 September 2016), online: <https://www.hrw.org/news/2016/09/16/hungarys-war-refugees>.

[84] See e.g. Elise Foley, "Trump Refers to Immigrants as 'Animals.' Again" *Huffington Post* (17 May 2018), online: <https://www.huffingtonpost.ca/entry/trump-calls-immigrants-animals-again_n_5afca15fe4b0779345d59e2a?ri18n=true>.

[85] In 2018, DHS Secretary Kirstjen Nielsen stated that aliens, "will wait for an immigration court decision while they are in Mexico, catch and release will be replaced with catch and return." Kate Smith, ""Catch and Return:" U.S. Asylum Seekers Will Have to Wait in Mexico" *CBC News* (20 December 2018), online: <https://www.cbsnews.com/news/catch-and-return-us-asylum-seekers-immigrants-migrant-caravan-wait-mexico-2018-12-20-live-update/>.

In fact, racial and religious biases have been particularly identified in the sociopolitical narrative increasingly preceding public policy determinations on refugee protection around the world.

As it turns out, current migration policies depicting a regressive disarticulation of refugee protections at domestic and regional levels (U-Turn and extraterritorial asylum policies)[86] are preceded by a sociopolitical narrative that promotes discrimination, exclusion, and rejection of minorities, refugees and asylum seekers based on their national origin, religion, or race. For instance, following historic marches that openly promoted a "White Europe"[87] during the celebrations of the National Independence Day in Poland in 2016 and 2017 (gathering more than 75,000 and 60,000 supporters, respectively),[88] Polish Prime Minister Mateusz Morawieck announced his government would not accept, "migrants from the Middle East and Africa."[89] In fact, nearly all populist and far-right parties in Europe have won regional and national elections by promoting narratives against migrants and minorities. This has been the case of the AfD (*Alternative for Germany*), which nowadays constitutes the major opposition party in Germany.[90] This was also the case of the political coalition (*League and Five Star*) that took Matteo Salvini to power in Italy, who before his election announced, "we are no longer about north v. south but against those invading our country."[91] Likewise, in one of his most criticized remarks, Hungary's Prime Minister Viktor Orbán stated that, "we do not want to be a multi-colored country"[92] and declared: "we will never allow Hungary to become a target country for immigrants. We do not

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[86] EU Commission, *EU-Turkey Joint Action Plan* (15 October 2015), online: *EUROPA* <http://europa.eu/rapid/press-release_MEM O-15-5860_en.htm>; see also Lorne Look, "EU Looks to African Nations, Border Control to Stop Migrants" *AP News* (18 October 2018), online: <https://www.apnews.com/419ce119564d479dbebc0a54d8508754>.
[87] See Matthew Taylor, "White Europe': 60,000 Nationalists March on Poland's Independence Day" *The Guardian* (12 November 2017), online: <https://www.theguardian.com/world/2017/nov/12/white-europe-60000-nationalists-march-on-polands-independence-day>.
[88] *Ibid.*
[89] See Lydia Kelly & Justyna Pawlak, "Poland's Far-right: Opportunity and Threat for Riling PiS" *Reuters* (3 January 2018), online: <https://www.reuters.com/article/us-poland-politics-farright/polands-far-right-opportunity-and-threat-for-ruling-pis-idUSKBN1ES0BK>.
[90] See Melissa Eddy, "Alternative for Germany: Who are They, and What Do They Want?" *The New York Times* (25 September 2017), online: <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html>.
[91] See Frances D'Emilio, "Anti-migrant Leader Pushes to Win National Power in Italy" *Chicago Tribune* (10 December 2017), online: <http://www.chicagotribune.com/news/nationworld/ct-italy-northern-league-20171210-story.html>.
[92] Tom Miles, "U.N. Human Rights Chief Calls Hungarian PM Orbán a Racist" *Reuters* (6 March 2018), online: <https://af.reuters.com/article/worldNews/idAFKCN1GI272>.

want to see significantly sized minorities with different cultural characteristics and backgrounds among us. We want to keep Hungary as Hungary."[93]

In the end, the narrative promoting aggressive policies and regulations on refugees makes difficult to reconcile alleged national security concerns on terrorism, economic stability, and national identity with what increasingly appears to be *diversity conflicts* (xenophobia, antisemitism, racism, nationalism). In this sense, *legal bias* is the most degenerative product of modern populist governments because it aims not only to distort reality but to create a new dimension of reality that denies the existing one through a different factual basis and institutional actions capable of developing a ***redirected reality***, in which refugees are perceived and treated as dangerous people. This, I call it, "***the fabrication of law***;" that is, ***remaking the facts to make the law***.

Legal bias on refugees, in particular, destroys vital correlations of reality by redirecting it (e.g., detention of migrant children), while using a baseless sociopolitical claim ("refugees are criminals") that misinforms the legal conceptualization of refugees and asylum seekers (i.e., foreign security threat, e.g., U.S. Presidential Executive Order "*Affording Congress an Opportunity to Address Family Separation*").[94]

Hence, *legal bias* contradicts not merely principles of justice (fairness) and law (equality) but the most basic correlations of the scientific process (perception, information, formulation, experimentation, conclusion, conceptualization) from which other critical processes depend (decision-making process). If we claim, for instance, that photosynthesis needs no light to occur, the conclusion will lead us to believe we do no longer need light to produce food. Yet because photosynthesis is a scientific concept, we will then use evidence from perception to test first whether plants can, in fact, survive without any light at all. And once plants die (as they do without light), we will then discredit the claim as false.

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[93] Nick Thorpe, "The Man Who Thinks Europe Has Been Invaded" *BBC News* (6 April 2018), online: <https://www.bbc.co.uk/news/resources/idt-sh/Viktor_Orban>.
[94] US President Donald J Trump, Executive Order No 13841: *Affording Congress an Opportunity to Address Family Separation*, DCPD-201800439 (20 June 2018).

4. Empathy, Distrust and Dehumanization of Minorities, Refugees and Migrant Populations

Bias is not an inborn attribute but a formed and gradually molded distortion of reality. Although *bias* corrodes both perception and conceptualization processes through the pre-conceptualization of reality it advances, *bias* is formed through external information that at some point was acquired through original perception that gradually became a misconstruction of reality.

Social science studies show that *bias* can be formed early on through external information received from sources of authority (parental, law, the media).[95] The encoded information may be explicit ("that people is dangerous, do not look at them") or implicit (parent neither treat nor does reply to people of other races, religions, sexual orientation). Biology studies confirm that humans are more likely to learn apprehensions of fear and safety from ingroups,[96] for which ingroups' perception, categorization and conceptualization influences social acquired attitudes toward outgroups.

Bias can be developed and even exploited through subsequent interactions and experiences (e.g., law-enforcement experiences, opposite sex rejection, different race competition). For instance, parents represent the most direct and immediate source of authority from which infants decode the first conceptualizations (and biases) on the world.[97] Yet parents themselves are exposed to other sources of authority (their parents, the government, the law), which can either nourish or deter existing prejudices.[98]

Findings in neuroscience have established direct correlations of *empathy and distrust* in relationships between ingroups and outgroups.[99] These studies also confirm that the categorization

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[95] See Zoe Liberman & Amanda L Woodward, "The Origins of Social Categorization" (2017) 21:7 Trends in Cogn Sc 556 at 558-568 (underscoring the importance of social categorization while acknowledging its consequences—namely, prejudice, discrimination, and stereotyping through various sources of authority and influence).
[96] See Armita Golkar et al, "Social Learning of Fear and Safety Is Determined by the Demonstrator's Racial Group" (2014) 11 Biol'y Lett 2 (analyzing transmission of social perception-information through experimental cases with different racial ingroups and outgroups).
[97] *Ibid.*
[98] *Ibid.*
[99] See Anne Trafton, "Neuroscientists Explore How Longstanding Conflict Influences Empathy for Others" *MIT Medical Press* (23 January 2012) (analyzing ingroups and outgroups relationships when perceived as conflicting or

of outgroups and the threats they allegedly pose (e.g., "they are not us," "them or us") triggers universal outgroup stereotypes,[100] which serve at justifying current or more aggressive actions toward the stereotyped group (e.g., foreign citizens, migrants, minorities).[101]

Current research on *dehumanization patterns*[102]—this one defined as degenerative bias favouring the perception of minorities as being less valuable than humans—shows ascending and differential levels (Table 1) on blatant dehumanization (i.e., going from subtle racial aversion to outright violence)[103] of ingroups (White-European Americans) vis-à-vis outgroups in the United States (African Americans, Arab Americans, Muslim Americans, Mexican immigrants). Among the various types of biases humans may experience vis-à-vis other humans, *dehumanization* is the most pervasive one as it induces *moral disengagement* on our judgement of others[104] and the aggressive measures the ingroup sees as necessary to contain or even punish the outgroup.[105] Dehumanization research shows critical correlations on prejudice/perceived threats,[106] indicating ingroups diluted support for African and Hispanic migration[107] and aversion toward Muslims.[108]

I contend that *distrust* and *dehumanization patterns* (affecting human perception and interaction) are very much present in the sociopolitical distortions of reality and subsequent legal propositions informing legal and public-policy understanding (conceptualization) on refugees and the threat

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unrelated sides), online: <https://medicalxpress.com/news/2012-01-neuroscientists-explore-lon gstanding-conflict-empathy.html>.

[100] See Jennifer A Richeson et al, "Eye-gaze Direction Modulates Race-related Amygdala Activity" (2008) 11:2 Group Processes & Intergroup Relations 232 at 233 (explaining the importance of compound stimulus clues in the perception of racial and social groups based on fMRI neural response of the amygdala).

[101] See John T Jost, "The Role of Stereotyping in System-Justification and the Production of False Consciousness" (2011) 33:1 British J of Soc Psych 1 at 4-27 (depicting core and consequential relationships between stereotyping, groups-interests, and social bias to protect individuals or group's advantageous positions).

[102] See Nour Kteily et al, "The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization" (2018) 109:5 J of Personality and Soc Psych 901 at 905-931 (introducing a theoretical and empirical model on blatant dehumanization while on research concerning subtle dehumanization and "infrahumanization," which model is constructed based on data obtained from studies conducted on different nationalities, minorities, and outgroups in the United States).

[103] Jost, *supra* note 101 at 25.

[104] *Ibid*.

[105] *Ibid* at 26.

[106] *Ibid* at 25 (indicating that higher levels of dehumanization are found near the time actual terrorist attacks take place, implicating subsequent increase of racism, prejudice, and violence toward members of the out-groups).

[107] *Ibid* at 13.

[108] Brian Resnik, "The Dark Psychology of Dehumanization, Explained" *Vox* (7 March 2017), online: <https://www.vox.com/science-and-health/2017/3/7/14456154/dehumanization-psychology-explained>.

their reception and assimilation allegedly encompasses. Consider, for instance, the case of Hungary. *Dehumanization* of refugees in this country goes from Police throwing food (Video 1) and hitting asylum seekers (Image 5) to Hungary's Prime Minister Viktor Orbán calling them "poison,"[109] "religious and cultural threat,"[110] while recruiting teams of "*Határvadász*" or "border hunters" to capture them.[111] Such ***depiction of 'humanity'*** that evolves as *distrust* vis-à-vis forced migrants is built on government propaganda (i.e., billboards containing images and questions on terrorist attacks and refugee populations)[112] directed at creating fear and distrust among Hungarians as it fosters sociopolitical support to introduce some of the government's most hostile and radical immigration policies, including: the construction of wired fences across the Serbian and Croatian borders,[113] the detention of migrants (counting children),[114] the criminalisation of humanitarian help for refugees,[115] and a refugee referendum rejecting EU's quotas-settlement policy.[116] Consider, further, U.S. President Trump *dehumanizing language* on migrants stating:

> "We have people coming into the country or trying to come in —we're stopping a lot of them. You wouldn't believe how bad these people are. **These aren't people, these are animals,** and we're taking them out of the country at a level and at a rate that's never happened before."[117]

During a meeting with members of Congress to discuss a bipartisan agreement to extend the Temporary Protection Status (TPS) of nearly 200,000 Salvadorians and 60,000 Hattians—whose

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[109] Amnesty International UK, "Hungary's Anti-refugee Campaign" *AI News* (19 October 2016), online: <https://www.amnesty.org.uk/hungary-anti-refugee-campaign>.
[110] Center for Policy Studies, "Dominant Islamophobic Narratives: Hungary" by Zsuzsanna Vidra (2017) at 17, online: *CPS* <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/publication/2923/cps-working-paper-countering-islamophobia-dominant-islamophobic-narratives-hungary-2017_0.pdf> ["CPS"].
[111] See Karen McVeigh, "Fear Stalks Migrants Huddled along Hungary's Border" *The Guardian* (19 March 2017), online: <https://www.theguardian.com/global-development/2017/mar/19/hungary-serbia-border-migration-controls-containers>.
[112] CPS, *supra* note 110 at 11 (reporting how the Hungarian Government posted billboards across the country with images and questions of terrorist attacks in Paris, the number of refugees entering Europe, and their home countries).
[113] Alsadair Sandford, "Hungary Completes New Anti-migrant Border Fence with Serbia" *Euronews* (28 April 2017), online: <https://www.euronews.com/2017/04/28/hungary-completes-new-anti-migrant-border-fence-with-serbia>.
[114] See Kitty McKinsey, "On Visit to Hungary, UNHCR Chief Calls for End to Detention and Greater Solidarity with Refugees" *UNHCR News* (12 September 2017), online: <https://www.unhcr.org/news/latest/2017/9/59b7fb324/visit-hungary-unhcr-chief-calls-end-detention-greater-solidarity-refugees.html>.
[115] See Patrick Kingsley, "Hungary Criminalizes Aiding Illegal Immigrants" *The New York Times* (20 June 2018), online: <https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html>.
[116] See BBC, "Hungary PM Claims EU Migrant Quota Referendum Victory" *BBC News* (3 October 2016), online: <https://www.bbc.com/news/world-europe-37528325>.
[117] See Julie Hirschfeld Davis, "Trump Calls Some Unauthorized Immigrants 'Animals' in Rant" *The New York Times* (16 May 2018) (quoting US President Donald Trump), online: <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

immigration protection was lost following the government's decision not to renew it—President Trump asked:

> "Why are we having all these people from shithole countries come here?" "Why do we need more Haitians?" "Take them out!"[118]

Donald Trump's statements show *distrust language* on migrants. Both as candidate and as President, Donald Trump made remarks creating distrust between the ingroup (Americans, i.e., "the best") and the outgroup (Mexican immigrants, i.e., "drugs, crime, rapists"):

> "When Mexico sends its people, they're not sending the best. They're not sending you; they're sending people that have lots of problems and they're bringing those problems. They're bringing drugs, they're bringing crime. They're rapists and some, I assume, are good people…"[119]

Then, in 2018, he referred to his past remarks as being "100 percent right" while pointing out rape rates regarding the so-called migrant caravan traveling from Central America through Mexico:

> "They're not putting their good ones. Remember my opening remarks at Trump Tower when I opened. Everybody said 'Oh, he was so tough'. I used the word rape. Yesterday, it came out where this journey coming up, women are raped at levels that nobody has ever seen before."[120]

U.S. President Trump's claims on Mexicans are not backed by available official data, however. In fact, when exploring the actual numbers and estimated projections of the total Mexicans (1,629,521) entering the United States in the fiscal year of 2017 (from October 1, 2016, to September 30, 2017), only 8% were apprehended by U.S. authorities. This, in effect, is an extremely low projection on Mexican immigrants' alleged criminality considering that the official apprehension rate (Table 2) includes all possible legal violations (e.g., DUIs, visa violations, sexual offenses). What is more, even if one tries to extrapolate the total number of Mexican migrants vis-à-vis the total number of migrants from all countries entering through all ports of

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[118] See Ryan Teague Beckwith, "President Trump Called El Salvador, Haiti 'Shithole Countries': Report" *Time* (11 January 2018), online: <http://time.com/5100058/donald-trump-shithole-countries/>.
[119] See Suzanne Gamboa, "Donald Trump Announces Presidential Bid By Trashing Mexico, Mexicans" *NBC News* (16 June 2015), online: <https://www.nbcnews.com/news/latino/donald-trump-announces-presidential-bid-trashing-mexico-mexicans-n376521>.
[120] See Nick Allen, "Donald Trump Claims Women 'Raped at Levels Never Seen Before' on Mexico Immigrant Caravan" *The Telegraph* (5 April 2018), online: <https://www.telegraph.co.uk/news/2018/04/05/donald-trump-claims-women-raped-levels-never-seen-mexico-immigrant/>.

entry (airports, south and north borders) who were apprehended based on sexual convictions or charges (137 people), that figure represents only 0,009%. Hence, regardless of one's various complexions of reality, 0,009% represents hardly "some… good people" among the 1,629,521 Mexican nationals President Trump insists Mexico "sends." The language used by the then candidate and later President of the United States against Mexican migrants does not merely constitute distrust pattern but regretfully, a lie.

Knowing how *bias* is formed and works is certainly critical to fully appreciate current policy perceptions and determinations on migrants who, for the most part, are viewed as foreign to host-countries' costumes, identity, race, religion, language, and values. In this context, the underscored evidence raises three major consequences. *First*, it shows that *bias* does not only derive from sociopolitical distortions of reality but is further internalized through neuropsychological perception of that reality, which ultimately affects the conceptualization of refugees. *Second*, evidence pinpoints the presence of racial-related *bias* across different areas of human interaction; its pervasive effects cannot be dismissed, particularly considering current *distrust* and *dehumanization* patterns on refugees. *Third*, evidence indicates that notwithstanding *bias* may be formed early on in life, it can be nonetheless taught and untaught. *Bias* can be redressed—starting by the very institutional figures that promote it (law, parental and government authorities).

By uncovering the formation and development of racially motivated *bias* in social and neuropsychological human behaviour, *selective perception* reveals serious *dehumanization* and *distrust* patterns on refugees, which formulations delve into a gradually 'distorted' perception and mischaracterization affecting the way such migrants are received and treated. Still, *physical perception* goes a step further: it breaks embedded distortions of reality by establishing a critical connection between perception and conceptualization in a linear rather than circular fashion.

C. Physical Perception: The Facts as We Measure Them

The area of knowledge in which perception has reached its highest level of evolution is *physics*. This is so because, unlike other areas and forms of reasoning, *physics* considers not only what we observe but what we cannot yet but should observe to better understand how the universe works.

In a sense, *perception* in physics is not only questioned for what it captures but for what it misses too. Here, we test by measuring perception before even elaborating a theory about it. This makes *conceptualization of reality* a major step in human evolution and *perception*, the *prime source of rationalisation*. Perception and conceptualization in physics are therefore intrinsically intertwined: We aim to turn what appears to be a complex perception of reality into a simple equation that supports its most plausible explanation, for which should our perception of reality be wrong, our conceptualization about it would be simply implausible.

Once perception is scientifically explained (proved) humans adapt and develop. This has led to mankind's major scientific progress going from the most basic notions (energy, mass, particles), motions (acceleration, motion-action, reaction), relations (time, space, speed), theories (relativity, quantum mechanics, thermodynamics, string), and forces (gravity, electromagnetic, nuclear) explaining how the universe works to its most consequential discoveries (earth's shape, the pass of time, electricity) [121] and defining applications (three digital, four industrial, and two quantum-mechanics revolutions).

The ***redirection of reality*** that ensues from the ***perceptional gap*** informing current legal conceptualization on refugees is defined through our physical perception of the world: *the perception of reality itself*. After all, the inexorable and most pressing question that this and any other research should raise to unravel the apparently intricate yet allegedly juxtaposed equations of security, morality, diversity, and humanity concerning refugee protection should be based on sound, logical, and critical contentions/relations of reality.

Then, I wonder, do national security concerns truly justify current immigration systems promoting the exclusion and rejection of refugees? Are these governments rejecting refugees for what we are told they are (threats) or for what they represent (diversity)? Admittedly, what otherwise could have been answered through critical propositions, nuances, and premises of national security,

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[121] For example, the shape of our planet originally thought to be flat by ancient Chinese and early Egyptians, round by Greeks, spherical by Copernicus, oblate by Newton and, more recently, neither round nor oblate but a "bumpy spheroid" by gravitational-pull theorists. See Charles Q Choi, "Strange But True: Earth Is Not Round" *Scientific American* (12 April 2007), online: <https://www.scientificamerican.com/article/earth-is-not-round/>.

constitutional law, international refugee law, and human rights law does nonetheless need now a more comprehensive interdisciplinary perspective because what quite often is being questioned in the relationship between refugee protection and national security is reality itself. I do not refer here solely to the populist narratives of "fake news," "take our country back," or "our country first," but to the evolving institutional narratives that convey in their very resolution the affirmation whereby reality exists once it is stated. For example, that "refugees are criminals," that they come to "harm us," to "rape women," to "take our jobs," to contaminate us with "incurable diseases," to "change our language, religion, and culture."[122]

It is therefore difficult to understand the global refugee crisis—provided we still accept that such understanding is a critical rational step to resolve a problem—without tackling the core relations and distortions that impede its resolution and deter the development of applicable, effective, and intelligent solutions. It is even more difficult to think of viable solutions when we do not truly visualize the problem we think we face, especially when each side debating what it believes constitute its 'knowledge of the problem' does not merely based that knowledge on its own opinion but their own facts in order to validate its pre-conceptualized version of the world. At this juncture, we must reset the basics of rationalisation. A debate on reality is therefore unavoidable.

Everything about physics proposes a critical connection between *perception* and *reality*; this connection exists provided perception is either measured or measurable. In the first case, experiments will test reality; in the second, however, its likelihood. Yet likelihood in physics often becomes reality when perception evolves. Hence, the announced inescapable question on the ***perceptional gap*** driving the modern conceptualization (reception and treatment) of refugees becomes a short yet complex inquiry: What is reality? Do we create reality, or it already exists? By lying to justify policies on the 'refugee threat', do governments simply distort, create or redirect reality? To answer these questions, I propose a sequential analysis depicting core differentials on legal and physics assertions of reality. I explore the evolving perception of reality through some of

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[122] See Catherine Lucey et al, "Trump Strokes Pre-election Fear of Immigrants to Drive Voters" *PBS* (31 October 2018), online: <https://www.pbs.org/newshour/politics/trump-stokes-pre-election-fear-of-immigrants-to-drive-voters>; see also Sarah Bosely, "Myths about Migrants Spreading Disease 'Inform Hostile Policies'" *The Guardian* (5 December 2018), online: <https://www.theguardian.com/society/2018/dec/05/myths-about-migrants-spreading-disease-inform-hostile-policies>.

physics' most distinguishable theories leading to a progressive understanding of reality, on the one hand, and static perception (perception-conceptualization of refugees) depicting a conflicting understanding of reality,[123] on the other.

1. Physical Assertion of Reality: Measuring Objectivity, Subjectivity, and Relativity

Albeit multidimensional, the resulting correlation of perception and reality in physics is rather simple: once our perception of the world changes, our reality changes, for which perception is both a triggering event of reasoning and a directional element of reality. In this context, populist governments' most dangerous perception on refugees lies in their intangible proposition of reality; untested, emotional, temporary and gradually degenerative, going from 20th century's Postwar paradigm on equality ("all human beings are equal") and dignity ("refugees are victims of unlawful persecution") to 21st-century's regressive paradigms on diversity ("all Muslims are terrorists," "refugees are terrorists," "Mexicans are criminals"). Yet physics—that is, the study of reality and its primary functions and relations—builds on opposite premises proposing a tangible approach to reality; tested, rational, evolving (e.g., from "time slows down" or *Special Theory of Relativity* to "time slows down near the gravitational force of an object" or *General Theory of Relativity*).

The first premise of reality in physics hinges on its *measurable existence* whereby reality is and, as such, exists because it is measurable. Accordingly, we perceive (not imagine) the world because our perception has been measured (objects in motion), which despite difficult measurable evidence does nonetheless remain measurable (e.g., the speed of light). Once our perception evolves (through experimentation) our reference and conceptualization of reality frequently evolve as well. Here lies the evolving nature of reality in physics: We do not assume ideas, imagination or feelings are by themselves reality; we only internalize the scientific values we can measure or calculate, even if such measurements (references) and calculations change.

[123] I analyze here the case of the United States because as the world's largest economy is capable to respond to the humanitarian needs of millions of refugees hosted by developing and poor countries, on the one hand, and because the US has developed some of the world's most aggressive immigration policies, on the other.

The second premise of reality in physics indicates that our physical world aims not to be *subjectively* but *objectively measured* so that its resulting conceptualizations/relations may become universal (therefore, applicable) scientific values. This one, however, is the second core element that increasingly radical-populist governments question: the existence of an ***objective truth***. The existence of an objective representation of reality is quintessential not just for the scientific process to evolve but for the realization of dissimilar yet vital institutional-socialization processes—including political, legal, economic and social systems. In the alternative, I argue, should everyone be entitled to behave based on his individual and subjective perception of reality, not only conflict but chaos would result, making institutional socialization implausible.

The problem develops when the subjective view rises through institutional-socialization processes and is presented as ***universal truth*** via extrapolation/affirmation sources conveying the idea that *if someone is found to be or do something, others can be similarly categorized to be or do the same* (e.g., "if the perpetuator of the terrorist attack was Muslim; all Muslims are terrorists"). Such premise is self-defeated in physics, however. We may question, for instance, personal experience while traveling to the moon, but we cannot extrapolate this experience and affirm that the moon is the earth just because both have gravitational properties or "a friend of mind" once visited the moon and "told me so."

Yet, in the current sociopolitical process (discourse, e.g., media coverage)[124] informing public opinion and policy on national security and refugee protection, the *subjectivity of reality* is an increasingly common proposition. As it turns out, the narrative indicating that, "all Muslims are terrorists," "refugees are terrorists," "Mexicans are criminals," "most Central-American are gang-members," is not the same as saying, for instance, "the terrorist happens to be Muslim," or "the criminal to have Mexican descent"—particularly when White-Europeans, White-Canadians, or White-Americans can be terrorists or criminals too.[125]

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[124] Studies conducted between 1992 and 2017 indicate that media coverage on terrorist attacks tends to focus more on attacks perpetuated by Muslims, despite the growing number of terrorist attacks perpetuated by non-Muslims. See Erin Kearns, Allison Betus & Anthony Lemieux, "Why Do Some Terrorist Attacks Receive More Media Attention Than Others?" (April 2018) *Justice Quart* 1 at 6-11; Caroline M Corbin, "Terrorists Are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda" (2017) 86:2 Fordham L Rev 456 at 459-485.

[125] See e.g. Joanna Plucinska, "Study Says White Extremists Have Killed More Americans in the U.S. than Jihadists Since 9/11" *Time* (24 June 2015), online: <http://time.com/3934980/right-wing-extremists-white-terrorism-islamist-j

Therefore, one may at least admit that immigration policies targeting particular racial groups and minorities seem to correlate more with *conflicts of diversity* (xenophobia, antisemitism, racism, nationalism) than with *problems of security* (terrorism, criminality, public safety). In the end, such counterintuitive, counterproductive, and polarizing form of reasoning is preventing governments from confronting the challenges modern society faces (e.g., terrorism, cybersecurity, AIG development, climate change, short-term rationalisation, or any form of inequality) more intelligently (e.g., stopping terrorists, not races, i.e., focusing on what people are not on what they represent). Though experience (subjective valuation) affects our perception, our individual experiences cannot be equally (much less automatically) validated as universal concepts of reality; unless and until such experiences are rationalized in light of others' experiences, which may include not only people we do not know but circumstances of time, space and motion that often circumscribe our understanding of reality.[126]

The third applicable premise of reality in physics is that *reality is not absolute but relative*. Objectivity opposes to subjectivity but not necessarily to relativity. After all, even relativity needs objectivity to be considered a plausible scientific theory. We may accept that reality changes with respect to the observer's perception of reality making its measurable marks relative (time, space, acceleration), if not variable, depending on the observer's position (at rest or moving) with respect to other observers and the object or reality being observed.

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ihadi-dangerous/>; New America, "Jihadist Terrorism 17 Years After 9/11: A Threat Assessment" by Peter Bergen & David Sterman (Washington DC: New America, 2018) at 7 (indicating that the greatest national security threat to United States is "almost entirely home ground" with 84% of terrorist attacks perpetuated by US citizens or legal residents), online (pdf): <https://d1y8sb8igg2f8e.cloudfront.net/documents /ISP_17_Years_DI GITAL_Final.pdf>.

[126] *Time*, *space,* and *movement* are quintessential in the understanding of reality in physics. Such understanding, moreover, has transcended to a myriad of rationalisation processes in other areas. For instance, elaborating on his evolving perception of an apple falling from a tree to the idea of comets and the moon falling from the sky, *Newtons' laws of motion* concerning the conceptualization of our scientific understanding on how and why objects move, find concrete applications in our everyday understanding of reality. According to Newton's structural contribution, *Principia*, the first law of movement ("*motion*") states that: "Every 'body' perseveres in its state of rest, or of uniform motion in a right line, unless it is compelled to change that state by forces impressed thereon," i.e. an object in motion stays in motion unless acted out by an outside-encountering force; a conceptualization on perceived motion of objects that has been gradually internalized in sports (e.g. football, hockey) and communications (e.g. redirected signals). Newton's second law of motion, *acceleration* (*F=ma*), "the alteration of motion is ever proportional to the motion force impressed … and is made in the direction of the right line in which that force is impressed," has become a defining reference in modern industrial revolutions. And Newton's third law of motion, *reaction*, indicating that, "to every action there is always opposed an equal reaction," has influenced chemistry, physics, medicine, biology, the development of space travel, and international relations. See Isaac Newton, *Newton's Principia: The Mathematical Principles of Natural Philosophy* (New York: Daniel Adee, 1846) at 83 ["*Principia*"].

This is best explained through the evolving perception informing the axiomatic progression of the *theory of relativity*. A core theoretical perception of reality is defined through its references, for which, I argue, we evolve in our understanding of reality by measuring the references we perceive to inform reality. In this context, Albert Einstein's prime observations on reality consider *time*, *space*, and *exponential motion* (represented by the highest then known-possible acceleration, i.e., the speed of light). His *Special Theory of Relativity* (Table 3), sets out his initial understanding of the relationship that ensues from these three core elements through perceived motion patterns over objects moving near the speed of light. *Einstein's special relativity premise* is simple: "time slows down," the faster one moves through space, the slower one moves through time and, vice versa. His appraisal of reality portrays an observer perceiving the clock's hands of a tower clock while traveling at the speed of light in a train. The result reveals that the observer's motion (here traveling at twice the speed of light) makes the space-time relationship relative with respect to the observer's very motion. The resulting core-unit informing reality (time-space) is neither *absolute* with respect to the clock's hands ("it moves at one unique pace") nor *subjective* with respect to the observer's thought to be reality ("it moves at my pace"), but *relative* in relation both to the clock's hands and to the observer's motion (it moves according to the observer's motion-acceleration and the object's position). Hence, measurement will be ***objective reality*** when time-space are experienced equally by different observers traveling in the same seat of the same train (*observer's position*), at the same speed (*observer's motion*), yet ***relative*** in relation to someone else traveling, for instance, in another train, another seat, at a lower speed, or dissimilar direction. According to *the Special Theory of Relativity* time passes differently in deferent places depending on how the observer and the object move in their times and spaces with respect to one and other.

The *General Theory of Relativity* is developed to reconcile divergent assertions of reality with respect to a dual and, as such, apparently ambivalent nature of speed thought to be sometimes relative and others absolute.[127] To surmount this contradicting premise, Einstein included a new

[127] Einstein's approach on time-space (as reference of reality) evolves when he realizes an implausible connection between *Newton's motion law*, "velocities [speed] are never absolute but always relative"—from which the *special theory of relativity* does, in fact, emerge (i.e. motion)—and *Maxwell's electromagnetic field theory* whereby the speed of light is always absolute regardless of the observer. The latter, moreover, when "the speed of an electromagnetic wave such as light is fixed." This precludes the *objectivity factor* that enables relativity to have universal application as speed cannot be simultaneously both absolute and relative, unless—as Einstein's eventually figured out—

element in his equation of reality ("gravity"), which explains why time not only passes differently in different places, but also at different pace or speed. His premise holds that, "time slows down in proportion to the gravitational pole of a nearby object,"[128] for which time passes differently at different speed in earth with respect to the space, or in one planet with respect to another planet, depending on the gravitational straight of the space in which time is being measured. This makes *time-space* the same dimensional fabric upon which reality unfold.

2. Creating by Redirecting Reality

What happens with events or objects we do not perceive: Are they still reality? Do or can we create reality? In a sense, *perception* help us identify and become aware of reality, not to create it. Thus, reality exists even if we are yet unaware of its multidimensional existence. A contrary proposition would, neglect—as government leaders and politicians often do—the most basic lesson of science: Our place, role, and time in the universe is both limited and relative. In truth, one needs only to contextualize our time-space as humans in relation to the size of our planet (or even our solar system) knowing the former or the latter are both just tiny fractions in the universe we know so far. Hence, we are not—and, in fact, barely could be—everywhere all the time for *time-space* to pass everywhere. A different proposition, I am afraid, will be derive from arrogance, not logic.

Classic physics considers that reality happens regardless of whether humans do or not perceive such reality. For example, despite recent mathematical calculations on fossil evidence tracing back modern human's mitochondrial DNA as far as 200,000 years ago,[129] we do know so far that the

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something else other than speed itself explains such ostensible variation. See generally Paul W Hodge, *Theory of Relativity* (New York: The McMillan Company, 1958).

[128] *Ibid*.

[129] Applying population theories and quantitative genetics over different fossil records, a recent study casts doubt on Darwin's sudden or "discrete selection" theory, suggesting instead a "lengthy process" of biological evolution that connects modern human DNA (*mitochondrial*) to fossil records as far as 100,000 and 200,000 years ago (*genetic drift*) —which would lead to a different conceptualization of human evolution based on found and thereby perceived evidence. This finding correlates with another fossil evidence found in Israel last year (dated as far as 177,000–194,0000 years ago) suggesting that humans emigrated out of Africa earlier than previously thought and making *Homo Sapiens* dispersal genetic process possible. In other words, affecting our perception-conceptualization on the *Homo Sapiens*. See Timothy D Weaver, "Did a Discrete Event 200,000–100,000 Years Ago Produce Modern Human Beings?" (2012) 63:1 J of Hum Ev 121 at 122-126; Israel Hershkovitz et al, "The Earliest Modern Human Outside Africa" (2018) 356:6374 Sc 456.

Homo Sapiens appeared only 300,000 years ago;[130] that is, nearly 558 million years after the first species (characterized by complex form of life or "*Dickinsonia*") populated the earth,[131] for which suggesting that anything happening before or in between did not happen (therefore existed) because it was not perceived by modern humans, or that only existed (therefore became reality) when perceived 558 years later by paleontologists is, at best, ludicrous. So it is, for instance, governments' leaders conveying a universal version of reality as if this one would depend on their perception, conceptualization or knowledge of the world (e.g., "these or that people from this or that country are criminals or terrorists, therefore anyone else coming from such countries must be viewed and treated as criminals and terrorists too").

Immanuel Kant further advanced a philosophical and biological disquisition on physical perception of reality by dividing it between *priori cognition* (i.e., independent form our experience and imbedded in the logic of the human brain, e.g., instincts) and *posteriori cognition* (those reflected through our experience, e.g., charity).[132] In the *Kantian reflection on perception* — envisioning a progressive assertion of reality moving from the appearance of an object (*pure intuition*) to its actual sensation or encounter (*empirical intuition*)—*time-space* is viewed as *priori thoughts*. Kant considers reality encoded in the known and unknown (yet-to-be-known) worlds.[133]

Einstein's basic theoretical proposition of reality (occurring at a different times and in different places) agrees with *Kant's inherent formulation of reality* as this one happens regardless of our time and place, for which Kant further acknowledges the existence of objects even when these are away from the observer.[134] Objects need not to be in our present to be real. *Ergo*, I submit,

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[130] Ann Gibbons, "World's Oldest *Homo Sapiens* Fossils Found in Morocco" *Science Mag* (7 June 2017), online: <https://www.sciencemag.org/news/2017/06/world-s-oldest-homo-sapiens-fossils-found-morocco>.

[131] Until recently, paleontologists were unsure as to in which period the first complex form of life (multicellular organisms) appeared in our planet. The first fossil found in Australia in 1947 did not provide clues on its cellular structure. In 2018, a fossil found in Northwest Russia ("*Dickensonia*") containing traces of cholesterol confirmed that the first terrestrial fauna emerged 558 years ago. See Illya Bobrovskiy et al, "Ancient Steroids Establish the Ediacaran Fossil Dickinsonia as One of the Earliest Animals" (2018) 361:6408 Sc 1246.

[132] Immanuel Kant, "Critique of Pure Reason" in Paul Guyer & Allen W Wood, eds, *Kant* (Cambridge: Cambridge University Press, 1998) at 3, 4.

[133] *Ibid* at 155, 156.

[134] *Ibid* at 156, 157. The principles of pure thinking encompass Kant's "transcendental aesthetic." Accordingly, the logical sequence of reality begins with *priori* formations informed by pure intuition the encoded *appearance* of objects, i.e. "sensibility in the mind" (encoded form of the world) that evolves through *posteriori* formations (concepts) triggered by the direct sensation of objects informed by our empirical intuition from which our understanding of the

perception does not create but uncovers reality (through its evolving awareness). Therefore, casting doubt on physical assertions of reality occurring beyond our time and place describes a nonsensical proposition: past and future cannot exist unless we do exist—again, arrogance, not logic.

We can ***create reality by redirecting it***, not through perception (*the triggering event of reasoning*) but through conceptualization (*a subsequent event of reasoning*) and decision-making process (*a consequential event of reasoning*). Based on physics, the reality that we be creating is our own reality, for which reality elsewhere still happens regardless of our redirected (sense of) reality—this one viewed by classic physicists as *principle of locality*[135] opposed to modern or quantum physicists (*quantum-entanglement*), which I will address in the last section of this chapter (*multidimensional perception*).

This further depends on the extent of our variation or ***redirection of reality*** (home, neighborhood, city, country, planet, solar system, galaxy). The reality we create through our actions or redirect through our reactions is the reality affecting us (motion-action, *Newton's first law of motion*)[136] and others encountering our world (motion-reaction, *Newton's third law of motion*).[137] For instance, during the Syrian Civil War the state of reality shows indifference[138] and slow reaction on the part of most governments of Europe vis-à-vis millions of migrants escaping Syria.[139]

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world emerges. In *Kant's logical sequence*, time and space are presented as ground or *priori* cognitions, for which we do not represent reality without space or time. Otherwise, human reasoning (due to lack of understanding) would be an implausible proposition because without space-time "*appearances*" the former would not exist.

[135] This one, a principle whereby nature and reality exist independently of the human mind. Elaborating on pre-quantum world theories (Newton's motion/gravitational laws and Einstein's relativity theories), Albert Einstein, Boris Podolsky, and Nathan Rosen affirmed that space and time situate reality happening at different times in different locations (*localized reality*). Hence, for an event that is taking place at a different location to be affected by another event occurring at another location something needs to travel (happen) between the two time-space locations. See Albert Einstein, Boris Podolsky & Nathan Rosen, "Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?" (1935) 47:10 Phys Rev 777 at 778-780.

[136] *Principia*, *supra* note 126 at 83.

[137] *Ibid.*

[138] See Filippo Grandi, "Refugees Deserve Action and Investment, Not Indifference and Cruelty" Intervention of the UN High Commissioner for Refugees at the 2016 Humanitarian World Forum (Istanbul: UN General-Secretary, 2016), online: *WEFORUM* <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-in difference-and-cruelty/>.

[139] See Sam Jones, "1.7m Syrian Refugees Face Food Crisis As UN Funds Dry Up" *The Guardian* (1 December 2014), online: <https://www.theguardian.com/world/2014/dec/01/syrian-refugees-food-crisis-un-world-programme>.

Inaction, along with slow and dysfunctional reaction[140] set forth the reality that **Syrian refugees** encounter: violence in their homeland;[141] death,[142] detention,[143] and dire humanitarian conditions in Europe. [144] The image of Alan Kurdi (Image 6), a 3-years-old Syrian asylum seeker who drowned in the Mediterranean Sea in 2015 while being smuggled from Turkey to Greece, changed (for a few months, at least)[145] the perception of European citizens[146] and governments' public policies (e.g., Germany welcoming Syrian refugees)[147] on refugee crisis in Syria. Alan's picture appeared around the world[148] and became a symbol of indifference and human suffering.[149] The *redirection of a different reality* here is constructed by increasing immigration admissibility quotas in most host countries resulting in a period of *empathy* toward refugees ("welcoming of refugees").

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[140] See Cathryn Costello & Minos Mouzourakis, "The Common European Asylum System: Where Did It All Go Wrong?" in Maria Fletcher, Ester Herlin-Karnell & Claudio Matera, eds, *The European Union as an Area of Freedom, Security and Justice* (London, England: Routledge, 2017) at 263. See generally Elizabeth Collet, *The Asylum Crisis in Europe: Designed Dysfunction* (Washington, DC: Migration Policy Institute Press, 2015).

[141] Damien M Sweeny et al, "UNHCR Syria End of Year Report 2015: Protecting and Supporting the Displaced in Syria" *UNHCR News* (2015) at 9-11, online: <https://www.unhcr.org/news/editorial/2016/2/56cad5a99/unhcr-syria-2015-end-of-year-report.html>; see also United Nations Independent International Commission of Inquiry, "Isil Rule of Terror: Living Under Isis in Syria" (Geneva: UNHCR, November 2014), online: *RELIEFWEB* <https://reliefweb.int/report/syrian-arab-republic/rule-terror-living-under-isis-syria>.

[142] See UNHCR, "Refugees and Migrants Face Heightened Risks While Trying to Reach Europe" *UNHCR News* (2017), online: <http://www.unhcr.org/news/press/2017/2/58b458654/refugees-migrants-face-heightened-risks-trying-reach-europe-unhcr-report.html>.

[143] Jesuit Refugee Service, "Becoming Vulnerable in Detention" (June 2010), online (pdf): *EUROPA* <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf>.

[144] See Patrick Wintour, "Hungary to Detain Asylum Seekers in Container Camps" *The Guardian* (7 March 2017) (reporting Hungary's PM description of migrants as threats to European Christian identity and culture), online: <https://www.theguardian.com/world/2017/mar/07/-hungary-to-detain-all-asylum-seekers-in-container-camps>.

[145] See The Independent, "Alan's Kurdi's Death Did Change the World, If Only for an All-too-brief Time" *The Independent* (1 September 2016), online: <https://www.independent.co.uk/voices/editorials/alan-kurdi-s-death-did-change-the-wo rld-if-only-for-an-all-too-brief-time-a7220561.html>.

[146] See Laura G E Smith et al, "After Alan Kurdi: How Tweeting About Death, Threat, and Harm Predict Increased Expressions of Solidarity with Refugees Over Time" (2018) 29:4 Psych Sc 623 at 625-634 (introducing a *longitudinal paradigm* over more than 40,000 social media posts indicating how images and discussions on Alan Kurdi's death influenced public perception while fostering expressions of solidarity toward refugees). See also Markus Dettmer et al, "German Companies See Refugees As Opportunity" *Spiegel* (27 August 2015), online: <http://www.spiegel.de/international/germany/refugees-are-an-opportunity-for-the-germanec onomy-a-1050102>.

[147] Emma Graham-Harrison et al, "Cheering German Crowds Greet Refugees After Long Trek from Budapest to Munich" *The Guardian* (5 September 2015), online: <https://www.theguardian.com/world/2015/sep/05/refugee-crisis-warm-welcome-for-people-bussed-from-budapest>; Paul Carrel & Noah Barkin, "Refugee Crisis Shows the Changing Soul of Germany" *Reuters* (13 September 2015), online: <https://www.reuters.com/article/us-europe-migrants-germany-insight/refugee-crisis-shows-the-changing-soul-of-germany-idUSKCN0RD0JU20150913>.

[148] See Patrick Kingsley & Safak Timur, "Stories of 2015: How Alan Kurdi's Death Changed the World" *The Guardian* (31 December 2015), online: <https://www.theguardian.com/world/2015/dec/31/alan-kurdi-death-canada-refugee-policy-syria-boy-beach-turkey-photo>; Joel Gunter, "Alan Kurdi: Why One Picture Cut Through" *BBC News* (4 September 2015), online: <https://www.bbc.com/news/world-europe-34150419>.

[149] See Rebecca Alder-Nissen, Katrine Emilie Andersen & Lene Hansen, "Images, Emotions, and International Politics: The Death of Alan Kurdi" (2020) 46:1 Rev of Intern'l Studies 75 at 76.

For example, in this period Germany—the European country that welcomed more Syrian migrants (Figure 1)—saw a net increase in 2015 of 303.4% on the number of asylum applications (*Federal Basic Law*, Article 16.a) lodged by Syrian nationals with respect to the year 2014 (Table 5). Yet a volatile combination of factors taken place in Europe—terrorist attacks in France,[150] Belgium,[151] Germany[152] as well as growing expressions of hatred,[153] xenophobia and violence[154] toward refugees and minorities, along with the ascension to power of radical-populist leaders and parties[155]—led to a *regressive assertion of reality* and gradual shift of perception and conceptualization on refugees following *fear and hate narratives*[156] whereby refugees went from being considered victims of conflict to being viewed (Table 6), received,[157] and treated[158] as suspects.[159] This led Germany[160] and other European countries[161] to change their immigration

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[150] See Gavin Hewitt, "Paris Attacks: Impact on Border and Refugee Policy" *BBC News* (15 November 2015), online: <https://www.bbc.com/news/world-europe-34826438>.
[151] See Steven Erlanger, "Brussels Attacks Fuel Debate Over Migrants in a Fractured Europe" *The New York Times* (22 March 2016), online: <https://www.nytimes.com/2016/03/23/world/europe/belgium-attacks-migrants.html>.
[152] See PEW, "Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs" by Richard Wike et al (Washington, DC: PEW, 2017) at 3 (indicating a direct correlation between the terrorist attacks in Paris and Brussels and the public perception of Europeans toward refugees as security and economic threats), online: *PEW* <http://www.pewglobal.org/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/>.
[153] See Spiegel, "Is the Ugly German Back? Flames of Hate Haunt a Nation" *Spiegel* (24 July 2015), online: <http://www.spiegel.de/international/germany/germany-registers-sharp-increase-in-attackson-asylumseekers-a-1045207.html>.
[154] See DW, "More than 3,500 Attacks on Refugees in Germany in 2016: Report" *DW* (26 February 2017), online: <http://www.dw.com/en/more-than-3500-attacks-on-refugees-in-germany-in-2016-report/a-37719365>.
[155] UN Human Rights Council, *Banking on Mobility Over a Generation: Follow-up to the Regional Study on the Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants*, report by the Special Rapporteur on the Human Rights of Migrants (François Crépeau), A/HRC/29/36 (Geneva: UNHRC, 2015) at 6-7, online: *OHCHR* <https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session29/pages/listreports.aspx>.
[156] See e.g. Jennifer Newton, "Swedish Foreign Minister Claims the Country Is 'Facing Collapse' Because of the Mass Influx of Refugees" *The Daily Mail* (30 October 2015), online: <http://www.dailymail.co.uk/news/article-3297317/>.
[157] See e.g. Patrick Kingsley, "Prisoners of Europe: The Everyday Humiliation of Refugees Stuck in Greece" *The Guardian* (6 September 2016), online: <https://www.theguardian.com/world/2016/sep/06/prisoners-of-europe-the-everyday-humiliation-of-refugees-stuck-in-greece-migration>.
[158] See e.g. Rick Lyman, "Already Unwelcoming, Hungary Now Detains Asylum Seekers" *The New York Times* (18 April 2017), online: <https://www.nytimes.com/2017/04/18/world/europe/hungary-orban-populism-migrants-border-european-union.html>.
[159] See Amnesty International, "Greece: Refugees Detained in Dire Conditions Amid Rush to Implement EU-Turkey Deal" *AI News* (7 April 2016), online: <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-ami d-rush-to-implement-eu-turkey-deal/>.
[160] See Eric Maurice, "Germany Makes a U-turn on Syrian Refugees" *EU Observer* (11 November 2015), online: <https://euobserver.com/migration/131062>.
[161] See e.g. J Jiménez Gálvez, "Refugiados: España No Es un País Para Asilados" *El País* (22 September 2015), online: <http://politica.elpais.com/política/2015/09/22/actualidad/1442919246_574978.html>; Francesco Grignetti, "Patto fra Libia e Italia per Fermare i Flussi dei Migranti dal Sud" *La Stampa* (2 February 2017), online: <http://lastampa.it/2017/02/15/esteri/patto-fra-libia-e-italia-per-fermare-i-flussi-dei-migranti-dal-sudLs9eNzMeZPV8MePZ6HXOQO/pagina.html>; see also Rowena Mason, "Theresa May Resists Calls for UK to Accept More Syrian

policies and promote regional (EU-Turkey) and extraterritorial (Germany, Italy) agreements aimed at deterring refugees from reaching Europe.[162] The formation of a ***redirected reality*** emerged: **"unwelcome refugees."**[163] Germany saw a decrease of 81.6% in the number of first-time asylum applications lodged by Syrian nationals in 2017 with respect to the year 2016 (Table 7). In 2016, migrants smuggled to Europe[164] made this the deadliest year with a toll of 5,076 death migrants.[165]

Evidence indicates that physical assertions of reality use a methodological, logical, and linear approach on reality by constructing sequential relations on perception, measurement, conceptualization, and decision-making process. Moreover, sociopolitical assertions of reality on forced migration portray a dissimilar approach to reality based on transitory, circular ("indifference toward refugees," then "open-doors to refugees," but then again, "indifference toward refugees"), and regressive projection of reality ("indifference toward refugees victims of persecution," then "open-doors to refugees" to "not only indifference but distrust toward suspect migrants").

3. Legal Assertions of Reality: Measuring Forced Migration as Security Threat

U.S. President Donald Trump indicated that migrants arriving to the southern border are "illegal immigrants" or are entering "illegally" the United States. On January 18, 2019, President Trump denounced a "national security crisis"[166] taking place in the southern border:

Refugees" *The Guardian* (19 September 2016), online: <https://www.theguardian.com/uk-news/2016/sep/19/theresa-may-resists-calls-uk-accept-syrian-refugees-aid>.

[162] See Human Rights Watch, "Europe's Refugee Crisis: An Agenda for Action" (Washington, DC: Human Rights Watch, 2015), online: *HRW* <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>.

[163] See e.g. Alberto Nardelli, "Syrian Refugees: Empathy Wanes in US and UK as more Voters Say Shut Borders" *The Guardian* (20 November 2015), online: <https://www.theguardian.com/world/2015/nov/20/syrian-refugees-public-opinion-border-security>.

[164] In 2015, 90% of forced migrants traveling to Europe used smugglers. It is estimated the smuggling industry received up to 6 million euros that year. See Europol, "Migrant Smuggling in the EU" (The Hague: Europol, 2016) at 2, online: *EUROPA* <https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu>; Michael Bornbaum, "Smuggling Refugees into Europe Is a New Growth Industry" *Washington Post* (3 September 2015), online: <https://washingtonpost.com>.

[165] See IOM, "Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079" *IOM News* (1 June 2017), online: <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079>; UN, "UN Refugee Agency: 2016 Is Deadliest Year for Refugees Crossing Europe Via Central Mediterranean" *UN News* (2 September 2016), online: <https://refugeesmigrants.un.org/un-refugee-agency-2016-deadliest-year-refugees-crossing-europe-central-mediterranean>.

[166] See Globalnews, "Donald Trump Releases Video Calling Southern Border 'National Security Crisis'" *Globalnews* (18 January 2019), online (video): <https://globalnews.ca/video/4866265/donald-trump-releases-video-calling-south

> "A lot of people want to come into our country and there are a lot of people we do not want; we have criminals, we have gang members, we have human traffickers, we have drug smugglers and people that we do not want."[167]

Similarly, in order to justify President Trump's request to Congress of $5.7 billion to build a wall across the U.S.-Mexico border, U.S. Homeland Security Secretary Kirstjen Nielsen indicated that:

> "CBP detected over 3,000 of what we call "special interest aliens" trying to come to the country on the southern border; these are aliens that the intel community has identify of concern" (Video 2, at 5:55).

In an interview, White House Press Secretary Sarah Huckabee Sanders stated that:

> "We know that roughly nearly 4,000 known or suspect terrorists are coming to our country, and we know that our most vulnerable point of entry is our southern border" (Video 2, at 6:15).

Still, a press release posted on the website of the U.S. Department of Homeland Security indicates:

> "… we stop on average 10 individuals on the terrorist watchlist per day from traveling to or entering the United States—and more than 3,700 in Fiscal Year 2017. Most of these individuals are trying to enter the U.S. by air, but we must also be focused on stopping those who try to get in by land."[168]

Are these immigration and national security assertions of reality objective, subjective or relative? I hold, they are none. A contradiction is neither an objective nor a subjective or a relative assertion of reality because rather than proposing a different perception of reality it does suggest the possibility of such reality being untruth. We know so far that for the assertion of reality to be physically objective or relative similar marks of reality are required (time-space). Here, those references do not exist as the figure on forced migrants entering the U.S. represents a different time (2017), and the place of entry a different space (by air). These legal assertions of reality cannot be subjective either because subjectivity does not hinge on fabrication but on perception of reality.

These assertions are, at best, misleading representations of reality and, at worst, baseless claims (distortions). Not only did the DHS Secretary contradict herself with respect to the data released

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ern-border-national-security-crisis>; Donald J Trump, "Speech"@realdonaldtrump, online (*twitter*): <https://twitter.com/realDonaldTrump/status/1086446833541570560> [released 18 January 2019, 9:14 PM-ET].

[167] *Ibid.*

[168] US Department of Homeland Security (DHS), *MYTH/FACT: Known and Suspected Terrorists/Special Interest Aliens* (7 January 2019), online: *DHS* <https://www.dhs.gov/news/2019/01/07/mythfact-known-and-suspected-terroristsspecial-interest-aliens>.

by the institution she was leading,[169] but also with regards to U.S. Border Patrol records (indicating that only 6 individuals were detained in 2018 under the suspicion of being related to people or terrorist organizations)[170] and State Department data.[171] I maintain that the way the Trump administration constructed the otherwise critical relationship between national security and refugee protection underscores the role that perception and the resulting assertion of reality accomplishes in relation to security and humanity.

Based on these 'factual assertions of reality', the Trump administration issued some of the most aggressive immigration regulations on forced migrants in the world, which include: the systematic exclusion (based on their national origin) of more than 8 million refugees worldwide;[172] the detention,[173] incarceration,[174] and separation of migrant families and children;[175] the return of

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[169] *Ibid.*

[170] See Julia Ainsley, "Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March" *NBC News* (7 January 2019), online: <https://www.nbcnews.com/politics/immigration/only-six-immigrants-terrorism-database-stopped-cbp-southern-border-first-n955861>; Kevin Kelleher, "4,000 Suspected Terrorists Stopped at the Mexico Border, Says White House. Actually, It's More Like Six, Reports U.S. Customs" *Fortune* (7 January 2019), online: <http://fortune.com/2019/01/07/4000-suspected-terrorists-stopped-mexico-border-white-house-six-reports-customs/>.

[171] De Luce, *supra* note 60.

[172] That is, the "US travel ban" precluding certain refugees and migrants from entering the US. As of July 2018, there were more than 6.3 million refugees from Syria, 986,400 million from Somalia, 280,692 refugees from Yemen, and 670,972 forced migrants in Libya, 34,969 asylum seekers from Iran, 204 from North Korea, along with special qualifications on Venezuelan asylum seekers and Iranian refugees. See UN High Commissioner for Refugees (UNHCR), "Global Trends: Forced Displacement in 2017" (2018) at 14, online: *UNHCR* <https://www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html>; UN High Commissioner for Refugees (UNHCR), *Yemen UNHCR Update—March 2018* (Geneva: UNHCR, 2018), online (pdf): *RELIEFWEB* <https://reliefweb.int/report/yemen/yemen-unhcr-update-march-2018>; DTM, "Libya's Migrant Report Round 22: September–October 2018" by Tassilo Tepport (2018), online: *DTM* <http://www.globaldtm.info/libya/>; World Data, "Refugees from Iran" (2018), online: <https://www.worlddata.info/asia/iran/asylum.php> [accessed 30 January 2019, 4:45 AM-ET]; World Data 2018, *"Refugees from North Korea"* (2018) [accessed 30 January 2019, 4:50 AM-ET]; US Department of State, *June 26 Supreme Court Decision on Presidential Proclamation 9645* (26 June 2018), online: *US GOVERNMENT* <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html?wcmmode=disabled>.

[173] Data indicate the US detains more asylum seekers than any other country in the world. By the beginning of 2018, 57,820 migrants were in detention. See US Department of Homeland Security & Department of Justice, *Alien Incarceration Report: Fiscal Year 2018, Quarter 1* (Washington, DC: DHS, June 2018) at 1, online: *CIS* <https://cis.org/sites/cis.org/files/data-portal/Alien_Incarceration_Report_2018_Q1.pdf>; Global Detention Project, "United States Immigration Detention" (2018), online: <https://www.globaldetentionproject.org/countries/americas/united-states> [accessed 30 January 2019, 5:00 AM-ET].

[174] See Stephen Kang, "Judge Block Blanket Detention of Asylum Seekers" (5 July 2018), online (blog): *ACLU* <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/judge-blocks-blanket-detention-asylum-seekers> .

[175] In 2018, US Attorney General Jeff Sessions issued a memorandum known as "zero-tolerance policy" ordering all federal prosecutors across the southwest border to prosecute anyone entering unlawfully the United States. In due course, the memorandum led to the separation of thousands of families seeking asylum in the US by placing parents

asylum seekers found at the U.S.-Mexican border;[176] the deployment of the military across the southern border along with the commander in chief's authorization to use lethal force against migrants;[177] the removal of the protective status TPS and DACA affecting more than 1 million migrants and leading to the first self-induced government shutdown;[178] and the pledge to Congress of $5.7 billion to build a "wall" across the southern border causing the longest (35 days) government shutdown in U.S. history affecting more than 800,000 federal employees, national

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under the custody of the Immigration Customs Enforcement (ICE), while being prosecuted (immigration law violations) after taking away their children—these ones placed in detention centres under the custody of the US Department of Health and Human Services. Yet, following public backlash after reports indicating that nearly 2,000 children had been separated, President Trump issued an Executive Order suspending the policy while instructing the Attorney General to renegotiate the "*Flores Agreement*" (court order settling down limits on child detention, *Reno v Flores*). In 2018, two children and asylum seekers from Guatemala, Felipe Gomez Alonzo and Jakelin Caal, aged 8 and 7 respectively, died while being held under the custody of US authorities. See *Reno v Flores*, 507 US 292 (1993); US Office of the Attorney General, *Memorandum for Federal Prosecutors Along the Southwest Border* (Washington, DC: DOJ, April 6, 2018), online: *US GOVERNMENT* <https://www.justice.gov/opa/press-release/file/1049751/download>; see also BBC, "Why the US Is Separating Migrant Children from Their Parents" *BBC News* (15 June 2018), online: <https://www.bbc.com/news/world-us-canada-44503514>; Sonia Perez, "2nd Child Dead in US Custody Mourned in Guatemala Village" *US News* (30 December 2018), online: <https://www.usnews.com/news/politics/articles/2018-12-30/trump-blames-democrats-not-his-team-for-border-deaths>; Executive Order No 13841, *supra* note 94; see also Muzaffar Chishti & Sarah Pierce, "Trump Administration's New Indefinite Family Detention Policy: Deterrence Nor Guaranteed" *Migration Policy* (September 2018), online: <https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy>.

[176] Following the policy "*Migrant Protection Protocols*" (MPP) related to asylum seekers and unlawfully present aliens detained at the southern border, US Homeland Security Secretary Kirjsten Nielson issued a memorandum instructing immigration authorities to return those migrants to Mexico after their asylum hearing. Accordingly, asylum seekers entering the southern border must wait there until final court ruling, which violates the *principle of non-refoulement* (art 33(1) *Refugee Convention*) as well as human rights provisions (art 22(8) of *the American Convention on Human Rights* and art 3 of *the Convention Against Torture*). See US Department of Homeland Security (DHS), *Memorandum for Implementation of Migrant Protection Protocols* (Washington, DC: DHS, 25 January 2019), online: *DHS* <https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf>; US Department of Homeland Security (DHS), *Migrant Protection Protocols* (Washington, DC: DHS, 24 January 2019), online: *DHS* <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Amnesty International, "USA: "You Don't Have Any Rights Here" (Washington, DC: Amnesty International, 2018), online: *AMNESTY* <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/>; Azam Ahmed et al, "Mexico Protests U.S. Decision to Return Asylum Seekers" *The New York Times* (25 January 2019), online: <https://www.nytimes.com/2019/01/25/world/americas/mexico-asylum-seekers.html>. See also UN General Assembly, *1951 Refugee Convention*, 28 July 1951, 189 UNTS 137, art 31(1) (entered into force 22 April 1954); Organization of American States, *American Convention on Human Rights* ("Pact of San Jose"), 22 November 1969, art 22(8); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

[177] Nancy A Youssef & Alicia A Caldwell, "Trump to Deploy 5,200 Troops to Southern Border" *Wall Street Journal* (30 October 2018), online: <https://www.wsj.com/articles/military-to-deploy-5-000-troops-to-southern-border-u-s-officials-say-1540820650>; David Smith, "Trump Grants Troops Guarding Border Authority to Use 'Lethal Force'—Report" *The Guardian* (21 November 2018), online: <https://www.theguardian.com/us-news/2018/nov/21/trump-us-mexico-border-troops-decision-memorandum-force-report>.

[178] See Jose Mauricio Gaona, "DACA and TPS" (15 January 2018), online (blog): *MCGILL EXPERTS* <https://www.mcgill.ca/newsroom/channels/news/experts-daca-and-tps-283863>; Jose Mauricio Gaona, "Trump's Self-Induced Government Shutdown" *Toronto Star* (22 January 2018), online: <https://www.thestar.com/opinion/contributors/2018/01/22/trumps-self-induced-government-shutdown.html>.

security operations (airport security,[179] FBI investigations,[180] cybersecurity[181] organization), public safety services (food inspection,[182] air traffic controllers[183] and other operators) and millions across the country.[184] This is, in a nutshell, the ***redirected reality*** of a country that once proclaimed equality, liberty, and the pursuit of happiness to be its core constitutional values.

Under U.S. national security law (8 U.S.C. § 1226(a) *mandatory detention of terrorist aliens* and (c) *detention of criminal aliens*),[185] constitutional law (U.S. Constitution, Article II, § 2,[186] along with U.S. Supreme Court decisions *Chae Chan Pin v. United States*,[187] *Kleindienst v. Mendel*,[188] *Fiallo v. Bell*,[189] upholding Congress exclusionary and plenary powers over aliens), immigration law (8 U.S.C. § 1182(1)(A)(i),[190] INA, § 212(f),[191] on inadmissible aliens), and public international law (*principles of self-determination and sovereignty*), the United States has the right to protect its population and territory against foreign threats.

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[179] Jamie Ducharme, "'We Cannot Even Calculate the Level of Risk.' Air Traffic Controllers Issue Dire Warning About Safety During the Shutdown" *Time* (24 Jan. 2019), online: <http://time.com/5511886/air-traffic-controllers-shutdown-warning/>; John Bacon, "10 Percent of TSA Workers Call in Sick as Government Shutdown Drags on" *USA Today* (21 January 2019), online: <https://www.usatoday.com/story/news/nation/2019/01/21/tsa-government-shutdown-workers-call-in-sick/2636495002/>.

[180] See Kelly Cohen, "FBI Group Warns: Shutdown Is Delaying Criminal, Counterterrorism, Child Trafficking Cases" *Washington Examiner* (22 January 2019), online: <https://www.washingtonexaminer.com/news/fbi-agents-association-warns-shutdown-is-delaying-criminal-counterterrorism-child-trafficking-cases>; see also Kerri Breen, "FBI Agents Association Says U.S. Government Shutdown Could Impact National Security" *Globalnews* (10 January 2019), online: <https://globalnews.ca/news/4834363/fbi-association-government-shutdown/>.

[181] Kate Fazzini, "How the Government Shutdown Is Putting National Cybersecurity at Risk" *CNBC* (14 January 2019), online: <www.cnbc.com>.

[182] See Maggie Fox, "Government Shutdown Stops FDA Food Safety Inspections" *NBC* (9 January 2019), online: <https://www.nbcnews.com/health/health-news/government-shutdown-stops-fda-food-safety-inspections-n956716>.

[183] Association of Flight Attendants, "Air Traffic Controllers, Pilots, Flight Attendants Detail Serious Safety Concerns Due to Shutdown" (25 January 2019), online: *AFA* <https://www.afacwa.org/air_traffic_controllers_pilots_flight_ attendants_detail_serious_safety_concerns_due_to_shutdown>.

[184] See Alan Blinder, "Government Shutdown Across America" *The New York Times* (13 January 2019) online: <https://www.nytimes.com/2019/01/13/us/government-shutdown-impact.html>; Tom McCarthy, "America Shuts Down: How the Federal Government Closure Is Impacting Millions" *The Guardian* (12 January 2019), online: <https://www.theguardian.com/us-news/2019/jan/11/america-government-shutdown-trump-federal-workers>.

[185] 8 USC § 1226(a).

[186] *Constitution of the United States of America*, Article II, § 2, c 2 (*Commander in Chief*) ["US Constitution"].

[187] *Chae Chan Ping v United States*, 130 US 581 (1889) (challenging the *Scott Act of 1888*, that is, an addendum to the *Chinese Exclusion Act of 1882*).

[188] *Kleindienst v Mandel*, 408 US 753 (1972) (holding that the US Attorney General has the right to refuse an alien's entry based on his political opinion).

[189] *Bell v Fiallo*, 430 US 787 (1977) (deciding on preferential immigration status derived from illegitimate child).

[190] 8 USC § 1182(1)(A)(i).

[191] See INA, *supra* note 58, § 212(f).

Nevertheless, under international refugee law and human rights law, the entry of forced migrants who aim to claim asylum protection cannot be considered "illegal" because the right to apply for asylum cannot be unilaterally proscribed it by one country (Article 14(1) *Universal Declaration of Human Rights of 1948*,[192] and Article 31(1) of the *Refugee Convention*[193] in conjunction with Article II, Section 2, Clause 2[194] of the *U.S. Constitution*). Under international humanitarian law (*jus ad bellum*), moreover, asylum seekers are not considered enemy combatants—not even under U.S. domestic law (*Hamdi v. Rumsfeld*)[195]—for which the use of force on unarmed migrant children and their parents (Image 7) would not pass the otherwise applicable *proportionality test*: security justification v. humanitarian need.[196]

In this context, President Trump's *decision memorandum* authorizing the military to use lethal force against forced migrants violated international humanitarian law[197]—especially considering that among these migrants there were thousands of children (e.g., 8,389 unaccompanied children from Mexico, El Salvador, Honduras, and Guatemala were detained in 2018 while entering the U.S. southern border, Table 8). President Trump's *memorandum* infringes also international human rights law (Articles 2, 3, and 37 of the *UN Convention on the Rights of the Child* in conjunction with Articles 1, 3, 5 and 14(1) of the *Universal Declaration of Human Rights* of 1948).[198]

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[192] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Res 217 A (III) (1948), art 14(1) ["UDHR"].
[193] Refugee Convention, *supra* note 176.
[194] US Constitution, *supra* note 186.
[195] The US Supreme Court has used the government's definition to establish its constitutional meaning: "an individual who [was] part of or supporting forces hostiles to the United States or coalition partners." This is a profile that children fleeing persecution with their parents barely fit, however. See *Hamdi v Rumsfeld*, 542 US 507 (2006) at 9 (upholding due process rights to US citizens detained as "enemy combatants").
[196] See Theodora Christodoulidou & Kalliopi Chainoglou, "The Principle of Proportionality from a *Jus ad Bellum* Perspective" in Marc Weller, ed, *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) at 1187.
[197] US President Donald J Trump, Memorandum for the Secretary of Defense: *Department of Defense Support for Border Protection* (20 November 2018), online: *JUST SECURITY* <https://www.justsecurity.org/wp-content/uploads/2018/11/decision-memorandum-department-of-defense-support-for-border-security.pdf>; Jonathan Allen, "Trump Says Troops Will Use 'Lethal Force' at the Border 'If They Have to'" *NBC News* (22 November 2018), online: <https://www.nbcnews.com/politics/white-house/trump-says-troops-will-use-lethal-force-border-if-they-n939321>.
[198] Even though the principle of "best interest of the child" is recognized under US law, the United States has not yet ratified the *Convention on the Rights of the Child*. See *Troxel v Granville*, 530 US 57 (2000) (ordering State courts to apply a presumption on non-parent visitation petitions when they are consistent with the best interests for the child).

Data do not support the 'legal assertions of reality' made by President Trump (Video 3) and members of his cabinet (Video 2) concerning the security threat refugees allegedly pose at the time such measures were implemented. Data provided by U.S. authorities responsible for protecting the border show historic low-levels (comparable to 1970) of migrants apprehended while entering the U.S. (Figure 2). According to the U.S. Border Patrol, 396,576 immigrants were detained at the border in 2018; this is the fifth lowest number since 1973. It is then difficult to envision a "national security crisis" posed by forced migrants when we know that at least 40% of those detained were unaccompanied children and families (Figure 3). Data show that refugees do not represent a security threat to the U.S. In fact, terrorist attacks in U.S. soil have been committed mostly by U.S. citizens, legal permanent residents, or foreign nationals holding non-immigrant visas (Table 9).

The perpetrators' motive to commit these attacks were formed while they were already living in the U.S. In fact, only two of the perpetrators (Abdul Razal Ali Artan and Mohamed Osman Mohamud) are known to have entered the country through refugee status; yet, as minors. The assailants committed terrorist attacks while holding U.S. citizenship and lawful permanent residence status, respectively. They were self-radicalized and posed no risk upon arrival.

It is therefore critical for any given society to share common standards of reality. This allows members of society to communicate, discuss, predict, and resolve their differences. In a nutshell, reality enables evolution, which is particularly important when society is diverse as more perspectives and perceptions of reality end up informing common conceptualizations in such society. Yet when some members of that society suddenly decide to consider only their subjective values, perception, and interests, not only an increasingly polarized society results but critical detachments breaking society from inside out emerge while making it more violent, intolerant, regressive: a *disconnect from reality*, on the one side, and a *moral detachment*, on the other.

Questioning the very existence of any *objective truth* brings the corollary premise that what we think is reality, is not. This further implies that our perception-assertion of reality hinges on our *subjective truth*. Yet as classic physics shows both premises have proven wrong because we know that reality is, at most, *relative*, i.e., resulting from reality's benchmarks of perception (*time, space, motion*). Once we recognize the critical function perception accomplishes in our understanding of

the world and how perception evolves through prime, selective and physical influences, we are in a better position to appreciate the differentials of reality: *progressions* (regressive, circular or linear), *distortions* (distrust, dehumanization or bias), and *attributes* (objective, subjective or relative) by stating the facts as we observe, assimilate, and measure them.

As the evidence shows, current perception-assertion of refugees is rather regressive, degenerative, biased, dehumanized, and contradicting. Legal assertion of reality portrays these migrants as a threat to national security, for which it proposes the most endemic forms of reception (incarceration, separation, expulsion, return, rejection, and even, if necessary, lethal force) and treatment (suspects subject to prosecution). This ***redirection of reality*** is not merely the result of gaps on perception-assertion of reality (*misperceptions*), but also the product of pervasive interpretations of the thought to be 'refugee threat' (*mis-conceptualization*).

II. PERCEPTION-CONCEPTUALIZATION OF REALITY

The perception-conceptualization of reality refers to the *meaning of facts*. Once we are aware of reality we aim to understand its significance. This is often done through a myriad of rationalisation processes (logical, critical) that provide meaning to the facts we perceive. Such processes are not automatic, however. They convey a natural categorization of reality we use to simplify both conceptualization and learning processes by using known (*comparative approach*, e.g., concepts, conventions, forms) or assimilated references (*inductive-deductive approaches*).

Empirical research on social categorization often portrays immediate categorizations of gender and race (Stoller & Freeman, 2017).[199] Categorizations are themselves conceptualized, which accomplishes three functions: *comprehension*, *prediction,* and *action*.[200] This, in turn, enables social interaction. Hence, our *conceptualization of reality* varies depending on how many versions of reality each dimension (reasoning) embrace.

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[199] See Ryan M Stoller & Jonathan B Freeman, "A Neural Mechanism of Social Categorization" (2017) 37:23 J of Neurosc 5711 at 5715-21(indicating that humans do readily sort one another into multiple social categories).
[200] Lawrence W Barsalou, *Cognitive Psychology: An Overview for Cognitive Scientists* (New York: Psychology Press, 2014) at Chapter 7.

A. Unidimensional Perception: The Facts as We Tell Them

One dimension of perception means that there is only one possible version of reality on which our conceptualization of reality is built. A *unidimensional perception-conceptualization* of reality proposes a uniform reality, for which any other event not conforming to this unique version of the world is rejected, neglected, and treated as untruthful.[201] This is the less evolved form of perception-conceptualization, in that it denies a basic attribute of reality: *relativity*. Surprisingly, this is becoming a recurrent form of rationalisation on refugee protection for some governments. Worst yet, this form of rationalisation is gradually expanding among extremist groups across the world who see themselves as the holders of the only truth there is: their *unidimensional version of reality*. This phenomenon can be appreciated through common forms of unidimensional perception-conceptualization: *populism*, *extremism* and, more recently, *radical-populism*.

1. Populism, Extremism, and Radical-Populism

Despite their gradually intertwined connections (fear and hate narratives, similar constituency support) and similar tools of persuasion (emotions over reason, juxtaposed reality, blaming-others rhetoric), *extremism* and *populism* are not alike. On the one hand, *extremism* is defined as the holding of extreme political or religious views, leading to intolerant, violent or non-violent yet radical actions.[202] This notion suggests the existence of different types of extremism (e.g., religious, ideological, racial, or combined forms), sociological approaches (e.g., foreign induction, self-induction, domestic radicalization), and legal treatments (international and domestic threats).

On the other hand, *populism* appears as a broader notion encompassing dissimilar social perceptions (positive, negative) and temporal conceptions (traditional, modern) attached to a wide range of ideological prints (nationalism, socialism, totalitarianism, communism). *Populism* is also

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[201] See e.g. Chimamanda Ngozi Adichie, "The Danger of a Single Story" *TED Global* (July 2009) (exploring misinformed and often unidimensional cultural default positions from one society to another), online (talk): *TED* <https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story?language=en>.

[202] Angus Stevenson & Christine A Lindberg, "Extremism" New Oxford American Dictionary (Oxford: Oxford University Press, 2010).

viewed as a disputed concept with multiple associations.[203] It appears often as a conflicting perception of power directed to protect the "little man" against the 'abusive' establishment or elite.[204] *Populism* is further described as an ideology built upon homogeneous yet antagonistic groups whose divided depiction of society is deemed to be not only moral but necessary to advance the interests of the people,[205] which the populist actor often characterizes as those belonging to the majority represented in the "little" or "forgotten" man.[206]

I hold that nowadays we confront populism's most dangerous version yet: *radical-populism*. First, *radical-populism* is gradually expanding toward main structures of political power and governments in some of the world's most developed countries, which reveals the potential of a global effect. Second, the use of social media platforms to spread populist messages across the world makes the most extreme versions of populism not just different but more dangerous. Third, the gradually intertwined relationship between technology, the social effects of corporate democracies (income inequality), the ability to misinform an increasingly biased public opinion, and the connection among populism, extremism, xenophobia, and terrorism leading to an unprecedented scenario that populist leaders use to appeal and distort voters' perception and conceptualization of reality.

The critical distinction between *populism* and *radical-populism* is that the former uses emotional distortion of reality to promote the idea of a "little man" forgotten by the establishment whereas the latter uses racially motivated bias to portray the "little man" as a victim of migrants in general and refugees in particular. These migrants are depicted not only as a threat but as the cause of a wide range of problems both the "little man" and alleged 'uniform society' faces. This form of *populism* is far more degenerative because *does not only distort reality but diversity*. As such, *radical-populism* not only uses but produces emotions by replacing reason with an alternative yet unidimensional perception-conceptualization of reality the less fortunate are told either face or

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[203] Dwayne Woods, "The Many Faces of Populism: Diverse but Not Disparate" in Dwayne Woods & Barbara Wejnert, eds, *The Main Faces of Populism: Current Perspectives* (Bingley, England: Emerald Group Publishing, 2014) at 5.
[204] *Ibid* at 6-10.
[205] See Cas Mudde, "Populism in Europe: A Primer" *Open Democracy* (12 May 2015), online: <https://www.opendemocracy.net/can-europe-make-it/cas-mudde/populism-in-europe-primer>.
[206] *Ibid.*

could—should populist narrative be defeated—eventually face. Modern populist rhetoric does not only disagree with but *redirects reality*. This turns populism into a power-tool from which other forms of authoritarianism may emerge. It is dangerous when the distortion of reality comes not only from a populist leader but from a populist powerful government. After all, geopolitical considerations aside, the global effects of public policy decisions issued by a populist president in a poor country may not have the same repercussions than those issued by a populist president in the United States or a chancellor in Germany.

Radical-populism employs technological, political, legal and social deterrence mechanisms both to foster its narrative and to silence critics and institutions that either disprove such narrative or correct voters' distortion of reality (e.g., scientists, the media). Nonetheless, *populism* does not convey a unique political view but a wide range of positions that can be perceived as right, left, or centre ideologies. Hence, I rather use the term *radical-populist governments* here to highlight the pejorative nature and geopolitical context in which *populism* and *extremism* meet—particularly when *populism* becomes a tool to attain political power or exercise it.

I argue that the gradual connection between *populism* and *extremism,* along with the rapid expansion of populist parties, leaders and governments across the world has fostered regressive *trends of dehumanization* nourished by xenophobic and racially-oriented *bias* toward refugees. This, in turn, by using a narrative that transcends to policies threating social (identity) and legal values (human dignity), while promoting the gradual dismantling of institutional, economic and political support vis-à-vis the protection of international human rights and refugee protections.

The rise of *extremism* and its gradual connection with populism triggers a different dynamic that challenges traditional conceptualizations on *populism*. I maintain that the interest of the alleged 'majority' that a populist government claims to defend is not necessarily represented but redirected. This form of *populism* promotes *fear and hate narratives* against immigrants, minorities and refugees often categorized as "terrorists," "criminals," and "invaders."[207] These

[207] UN, "Hungary Urged Halt Campaign Portraying Refugees and Migrants As 'Invaders'—UN Agency and Partners" *UN News* (21 December 2015), online: <https://news.un.org/en/story/2015/12/518692-hungary-urged-halt-campaign-portraying-refugees-and-migrants-invaders-un-agency>.

migrant populations are not only attacked for their migratory intent but for what their very presence endangers: the development of a uniform and racially-oriented society.

As noted in previous chapters, anti-immigrant and anti-refugee rhetoric have led to expressions of violence,[208] hatred,[209] xenophobia, and antisemitism.[210] Aside from a steadily similar rhetoric (anti-immigrant and anti-establishment narratives) and constituency support (e.g., white extremists supporting both far-right movements and Donald Trump's government), *extremism* and *populism* are expanding toward new forms, groups, and countries. In the U.S., for instance, historic data on violent and non-violent individual hate attacks[211] indicate a global increase of extremism across different lines of radicalization (far-right, Islamist, single issue, far-left) with far-right extremism showing the highest number of incidents.[212] Recent data show an increase with respect to hate crime incidents (17% since Donald Trump became President)[213] and created hate groups.

Accordingly, hate groups in America have not only diversified into new groups but increased exponentially in the last years, tripling from 2015 to 2016 and growing 13% in 2017.[214] While there are many countries where hate crime incidents have been reported (e.g., Russia, Australia, Pakistan, Myanmar, South Africa), police in these countries do not officially classify hate crimes. Yet in countries where hate crimes are officially reported, data in 2016 show a net increase of hate crimes of 1.7% in Germany, 3.8% in Canada, 38% in Denmark, 45% in Italy, 57% in the U.S., and

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[208] See e.g. BBC, "Germany Hate Crime: Nearly 10 Attacks a Day on Migrants in 2016" *BBC News* (26 February 2017), online: <https://www.bbc.com/news/world-europe-39096833>.
[209] See e.g. CBC, "Syrian Refugees Confused, Disappointed by Pepper Spray Attack in Vancouver" *CBC News* (9 January 2018), online: <https://www.cbc.ca/news/canada/british-columbia/vancouver-police-chief-constable-speaks-on-hate-motivated-pepper-spray-incident-1.3397228>.
[210] See David Smith, "Donald Trump's Rhetoric Has Stoked Antisemitism and Hatred Experts Warn" *The Guardian* (29 October 2018), online: <https://www.theguardian.com/us-news/2018/oct/29/donald-trumps-rhetoric-has-stoked-antisemitism-and-hatred-experts-warn>.
[211] See PIRUS (Kshif) & National Consortium for the Study of Terrorism and Responses to Terrorism (1946-2016), *Profiles of Individual Radicalization in the United States* (2017), online: <http://www.start.umd.edu/profiles-individual-radicalization-united-states-pirus-keshif> [accessed 30 December 2018: 5h:50 PM-ET].
[212] *Ibid.*
[213] US Federal Bureau of Investigations (FBI), *2017 Hate Crimes Statistics* (Washington, DC: FBI, November 2018), online: *FBI* <https://ucr.fbi.gov/hate-crime/2017/resource-pages/hate-crime-summary.pdf> ["Uniform Crime Report"]; see also Jaweed Kaleem, "Attacks on Religious and Racial Minorities Fueled Sharp Rise in Hate Crimes in 2017, FBI Says" *Los Angeles Times* (13 November 2018), online: <https://www.latimes.com/nation/la-na-fbi-hate-crimes-20181113-story.html>.
[214] Southern Poverty Law Center, "2017: The Year in Hate and Extremism" by Heidi Beirich and Susy Buchanan (Montgomery, Alabama: SPLC, 2018), online: *SPLC* <https://www.splcenter.org/fighting-hate/intelligence-report/2018/2017-year-hate-and-extremism>.

233% in Poland (Figure 4). What is more, *extremism* has *push* (alienation, isolation, identity crisis, inability to compete, government inaction) and *pull factors* (sense of belonging, acceptance, direction, empowerment) that expose disenfranchised groups[215]—which further explains extremist groups' attraction to the *fear and hate narratives* on migrants.

2. Expansion of Populist Governments and Anti-Immigrant Policies

The expansion of populist governments and political parties in host countries across the world explains, in part, the way migrants are being treated. The growing disconnection between domestic and international law is related to the ascension to power of populist parties and leaders (progressive expansion through the electorate). Nowadays more populist leaders are being elected as members of parliament, prime ministers, or presidents (Table 10). At present, populist governments control the United States, Poland, Italy, Austria, Hungary, Slovakia, Greece, Guatemala, Venezuela, Bolivia, Mexico, Brazil, Egypt, Equatorial Guinea, Burundi, Myanmar, and the Philippines. Populist political forces have emerged as well in Sweden, Germany, and France. In these countries populism is becoming a major political force either controlling part of the government or having the ability to influence immigration policy. This occurred in France where the populist candidate Marine Le Pen obtained more than 10 million votes representing 33% of the votes in the last presidential election (Table 10).

It happened in Germany where the far-right party AfD obtained 12.6% of seats in parliament becoming the third political force and major opposition party in the country. It occurred in Italy where the populist parties, League and Five Start Movement, obtained more than 50% of seats in parliament becoming the main political force. Populist parties have presence in parliaments in Denmark, the Netherlands, Switzerland, Sweden, Belgium, Finland, and New Zealand (Table 10).

Radical-Populism has been expanded in developed countries because the once traditional drivers of populism in developing countries (income inequality, widespread corruption, poverty) are

[215] See EU RAN Centre of Excellence, "The Root Causes of Violent Extremism" by Magnus Ranstrop (Brussels: EU-RAN, January 2016) at 3, online (pdf): *EUROPA* <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-papers/docs/issue_paper_root-causes_jan2016_en.pdf>.

increasingly present in developed countries, along with newly yet deeply eroding drivers (corporate democracies, technological disruptions).[216] True, developed countries such as the U.S. or Australia are rich countries, but only a fraction of their population profits from this wealthy.[217]

The U.S. is the most revealing example of modern *radical-populism*. Following his slogans "America first" and "get our country back"—which from the very outset praise division between those who allegedly hold the country and those who wanted back—Donald Trump became the 45th President of the United States in 2017. The consequences of Mr. Trump's presidency have been felt inside and outside the country. The rise of *populism* in America and the expansion of *radical-populism* in Europe and Latin America show actions and public-policy correlations that cannot be neglected.[218] Following President Trump's populist rhetoric, the leader of the United Kingdom Independence Party (UKIP), Nigel Farage, pushed the U.K. to leave the EU (*Brexit*) by convincing his fellow citizens that, "we want our country back."[219]

The trend of getting back their countries from those of different race (especially migrants),[220] religious beliefs or political opinion became a central platform for right-wing and left-wing parties in Europe. Le Front National, led by Marine Le Pen (ending second in the last presidential election, Table 10), promoted the preeminence of the interests of France based on the exclusion of all other values considered foreign to French culture, history, identity, and society.[221] In the Netherlands, the far-right people's party PVV led by Geert Wilders (second in the general election) called for

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[216] Jonas R Kunts, "Inequality May Lead to Violence and Extremism" *UiO Psychology* (17 Julye 2017), online: <https://www.sv.uio.no/psi/english/research/news-and-events/news/inequality-may-lead-to-violence-and-extremism.html>.

[217] Joseph E Stiglitz, "Wealth and Income Inequality in the Twenty-First Century" (June 2017), online (pdf): *COLUMBIA* <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Wealth%20and%20Income%20Inequality%20in%20the%20Twenty-First%20Century.pdf>; see also Organization for Economic Cooperation and Development (OECD), "Income Inequality Remains High in the Face of Weak Recovery" (Paris: OECD, 2016) at 6, online: *OECD* <https://www.oecd.org/social/OECD2016-Income-Inequality-Update.pdf>.

[218] Jose Mauricio Gaona, "Venezuela Nears the Road's End between Populism and Dictatorship" *Washington Examiner* (29 July 2017), online: <https://www.washingtonexaminer.com/venezuela-nears-the-roads-end-between-populism-and-dictatorship>.

[219] Mona Charen, "Taking Our Country Back: From Whom?" *Real Clear Politics* (21 August 2015), online: <https://www.realclearpolitics.com/articles/2015/08/21/taking_our_country_back_from_whom_127842.html>.

[220] See Eline Schaart, "Under Far-right Pressure, Europe Retreats from UN Migration Pact" *Politico* (30 November 2018), online: <https://www.politico.eu/article/migration-un-viktor-orban-sebastian-kurz-far-right-pressure-europe-retreats-from-pact/>.

[221] See FN, «Discours de Marine Le Pen aux Estivales de Fréju» *Le Front National* (18 September 2016), online: <http://www.frontnational.com/videos/discours-de-marine-le-pen-aux-estivales-de-frejus/>.

the development of more aggressive anti-immigrant public policies.[222] The AfD party (forcing government coalitions)[223] has rejected refugee settlement in Germany and promoted anti-immigrant policies.[224] Alice Widel, coleader of the AfD, stated, "we are taking our country back from the politicians who have given up on it."[225] In Italy, the populist government of Matteo Salvini announced a package of anti-immigrant and anti-refugee policies, including the abolition of humanitarian protection status, the exclusion of asylum seekers from reception centres promoting social inclusion, and their prolonged detention in return centres. This led various UN Special Rapporteurs to denounce hatred against migrants in Italy.[226] This occurred as populist parties in Poland, Czech Republic, and Hungary cancelled the reception of refugees,[227] and those in Norway (Progress Party), Sweden (Sweden Democrats), Finland (Finns Party), and Denmark (Danish People's Party) increased constituency support based on anti-immigrant platforms.[228]

Populist anti-immigrant *narrative* has gone beyond the U.S. and Europe. Using the slogan "Argentina first," along with a narrative compelling the rejection of migrants and refugees ("refugees from poor countries in Latin America bring crime"), Argentina's President Mauricio Macri issued a presidential decree banning refugees from poor countries in Latin America.[229]

I hold that the most fatal effect of *radical populism* is that it makes hatred popular and enforceable. Originally an extreme view, eventually part of mainstream discourse, and increasingly public

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[222] Bill Chappel, "Geert Wilders Takes Second Place in Closely Watched Election" *NPR* (16 March 2017), online: <https://www.npr.org/sections/thetwo-way/2017/03/16/520376715/geert-wilders-dutch-donald-trump-takes-second-place-in-closely-watched-election>.
[223] See Matthew Karnitschnig, "Germany Gets New Government" *Politico* (4 Mars 2018), online: <https://www.politico.eu/article/germanys-social-democrats-endorse-grand-coalition/>.
[224] See Melissa Eddy, "Alternative for Germany: Who are They, and What Do They Want?" *The New York Times* (25 September 2017), online: <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html>.
[225] Elizabeth Schumacher, "AfD: Meet the Far-right Bosses" *DW* (3 December 2017), online: <http://www.dw.com/en/afd-meet-the-far-right-bosses/a-41632235>.
[226] See UN Special Rapporteurs, "Legal Changes and Climate of Hatred Threaten Migrants' Rights in Italy, Say UN Experts" *OHCHR* (21 November 2018), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=E> [Joint declaration].
[227] See Will Hutton, "Beware the Illiberal Alliance of Poland and Hungary, A Grave Threat to the EU" *The Guardian* (7 January 2018), online: <https://www.theguardian.com/commentisfree/2018/jan/07/hungary-poland-had-enough-of-liberal-democracy-eu-must-act>.
[228] Migration Policy Institute (MPI), "The Growth of the Radical Rights in Nordic Countries: Observations from the Past 20 Years" by Anders Wildfeldt (Washington, DC: MPI, 2018) at 7.
[229] See Simon Romero & Daniel Politi, "Argentina's Trump-Like Immigration Order Rattles South America" *The New York Times* (4 February 2017), online: <https://www.nytimes.com/2017/02/04/world/americas/argentinas-trump-like-immigration-order-rattles-south-america.html>.

policy, this corrosive form of *populism* depicts *diversity* (religious, racial, ideological, sexual orientation) as a threat to the promoted yet distorted version of a *uniform society*.

Radical populism is becoming not only global but intrinsically normal. Discrimination against minorities, refugees, and immigrants is pervasive. "Our countries first," "our countries back," "our countries alone"; a narrative-policy that is deterring the effective protection of international human rights and refugee protections in the world. The regressive effect of *radical populism* further shows countries withdrawing from institutions and mechanisms that guarantee common preservation of humanity. I submit that by "taking their countries back," radical-populist governments aim to reverse social integration, diversity, and tolerance. *Radical-populism* seeks to take countries back, on time; a time in which *diversity* was a residual element in social and political development.

B. Bidimensional and Tridimensional Perception: The Facts as We Frame Them

How does a bidimensional or even a tridimensional perception of reality affects our perception-conceptualization on refugees? What are the dimensional features and restrictions of reality? Is law one of them? Do the laws we make reflect the reality we face? Every dimension of reality provides a different perspective from where we can perceive reality; the more perspectives we have, the more complex yet integral perception-conceptualization of reality will be. Yet law cannot be categorized in one single dimension as this depends on the structural elements of its application and purpose. As such, the judicial process—viewed as a legal formula to resolve social conflict[230]—embodies, at minimum, a bidimensional perception of reality; that is, two parties presenting two different versions of reality on which their interests and positions are framed. The legislative process—corollary formula to make the law[231]—encompasses different equations of reality (political, social, economic), which depending on its actors or "lawmakers" can result in a unidimensional, bidimensional, or tridimensional perception of reality. Here we consider the same fact from one or different perspectives. Hence, a country may decide to categorize refugees as security threat if the only perception-conceptualization of refugees in the making of the law in

[230] Whether the judge aims to apply or make law, the judge's primary function is to resolve conflict. See Benjamin N Cardozo, *The Nature of the Judicial Process* (Mineola, New York: Dover, 2005) at 10.
[231] *Ibid.*

such country comes from a lawmaker holding biased or pre-conceptualized views on refugees. Different categorizations on refugees may result, however, when the lawmaker acts without *bias* or considers both national security concerns and the people to whom such regulations apply (e.g., children). This explains, in part, why often law does not reflect reality.

Despite economic and climate change challenges both Bangladesh[232] and Uganda[233] face, these countries host approximately more than 2 million refugees.[234] *Rohingya refugees* in Bangladesh as well as *Sudanese* and *DR Congo refugees* in Uganda are not generally viewed as cultural, religious, or security threats. Instead, they are perceived and conceptualized as victims of conflict.[235] Different perceptions lead to dissimilar conceptualizations from which different actions (State action) emerge (Image 8).

1. Legal Reasoning: The Meaning-Effect of Facts

Does reality differ from legal reality? As discipline, law studies the *meaning-effect of facts*. From State (international relations, war, money making), global (migration, climate change), individual

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[232] There were 3.3 million people living in extreme poverty in Bangladesh in 2019. Despite welcoming initially more than 700 thousand Rohingya refugees (more than 1 million by December 2019), food and economic resources become a challenge as rising sea levels are likely to force more than 200 thousand residents to migrate inland. World Bank, "Bangladesh Development Update: Building on Resilience" *WB News* (9 April 2018), online: <https://www.worldbank.org/en/news/feature/2018/04/09/bangladesh-development-update-building-on-resilience>; International Food Policy Research Institute, "New Study: Sea Level Rise to Force 200,000 to Migrate from Bangladesh Coastal Areas" *IFPRI News* (22 October 2018), online: <https://www.ifpri.org/news-release/new-study-sea-level-rise-force-200000-migrate-bangladesh-coastal-areas>.

[233] Thanks to the agri-food system (extended to refugees), Uganda saw an economic growth of 2% in 2018. Still, 21,4% of the population in this country lives in poverty. World Bank, "Uganda's Economy Expected to Grow at 6% and Above" *WB News* (20 November 2018), online: <http://www.worldbank.org/en/news/press-release/2018/11/20/ugandas-economy-expected-to-grow-at-6-and-above>; Price Water House Cooper, "Uganda Economic Outlook 2018 (Kampala: PwC, 2018) 5, online (pdf): *PwC* <https://www.pwc.com/ug/en/assets/pdf/ug-economic-outlook-2018.pdf>.

[234] As of 2020 (August), Uganda hosts 1.429,268 million refugees while Bangladesh hosts 860,697 refugees. UN High Commissioner for Refugees (UNHCR), *Uganda Comprehensive Refugee Response Portal* (31 December 2018), online: *UNHCR* <https://data2.unhcr.org/en/country/uga> [accessed 31 August 2020: 9:09 PM-ET]; UN High Commissioner for Refugees (UNHCR), *Rohingya Refugee Response/Bangladesh* (31 August 2020), online: *UNHCR* <http://data2.unhcr.org/en/documents/details/78973> [Factsheet].

[235] See UN, "UN Chief Applauds Bangladesh for 'Opening Borders' to Rohingya Refugees in Need" *UN News* (1 July 2018), online: <https://news.un.org/en/story/2018/07/1013672>; Migration Policy Institute (MPI), "Can Uganda's Breakthrough Refugee-Hosting Model Be Sustained?" by Tessa Coggio (Washington, DC: MPI, October 2018), online: *MPI* <https://www.migrationpolicy.org/article/can-ugandas-breakthrough-refugee-hosting-model-be-sustained>; Joseph Goldstein, "As Rich Nations Close the Door on Refugees, Uganda Welcomes Them" *The New York Times* (28 October 2018), online: <https://www.nytimes.com/2018/10/28/world/africa/uganda-refugees.html>.

(contracts, torts) and corporate facts (manufacturing, services) to public (marriage, elections, taxes, employment) and natural facts (birth, death, aging), legal reasoning provides a set of tools to identify those facts, establish their meaning, and assign an effect to their existence; their legal-proven existence. The references of reality still apply (space, time, motion) but the attributes of reality (objectivity, subjectivity, relativity) find other measurement tools (admissibility) leading to a different proposition of reality: *the reality that matters to the law is legal reality*. As such, legal reasoning conveys the identification of critical-proven facts[236] framing the conflict from which the rule of law eventually (when not analogically)[237] emerges. Although such critical thinking process encounters exclusive methods, nuances and factors of interpretation, the factual basis on which a legal proposition is built—whether in the making of the law or the resolution of a conflict—constitutes its most critical element, in that *without facts there is no law*.

1.1. Legal Reality: Framing Reality

Legal reality is defined through its own references and filters: relevance, legality, constitutionality. Hence, for a fact to be admitted as evidence of reality, that fact must survive conventional tests of *formality* (how it was produced, e.g., hearsay, U.S. F.R.E. 801; Canada Evidence Act Rule A.2.1), *proportionality* (non-prejudicial evidence, probative value), *competence* (reliability, authenticity), and *relevance* (its admission tends to make the fact of consequence on which the legal effect is adjudicated more or less probable than it would be without it).

Further, legal reality covers things that happen as well as those that do not. For example, *silence*. There is a propositional reference of time-space in which silence must operate to produce legal effects; even if silence, at most physically, appears unmeasurable. Not sending notice to an employer or a landlord before the expiration of a contract or lease constitutes a legal fact (lack of notice) to which the law assigns different effects (e.g., contract automatic renewal). This is so because in law we aim to conceptualize not merely what we do but also what we intend. This force

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[236] Suggesting a critical connection or appraisal of reality between reasons and laws. See André Lalande, *La Raison et Les Normes: Essai sur le Principe et Sur la Logique des Jugements de Valeur* (Paris: Hachette, 1948) at 10.
[237] Llyod L Weinreb, *Legal Reasoning: The Use of Analogy in Legal Argument* (New York: Cambridge University Press, 2016) at Chapter 2.

us to consider different perspectives, for which the way we frame (present) the facts show not only their alleged occurrence but the intended meaning-effect we claim.

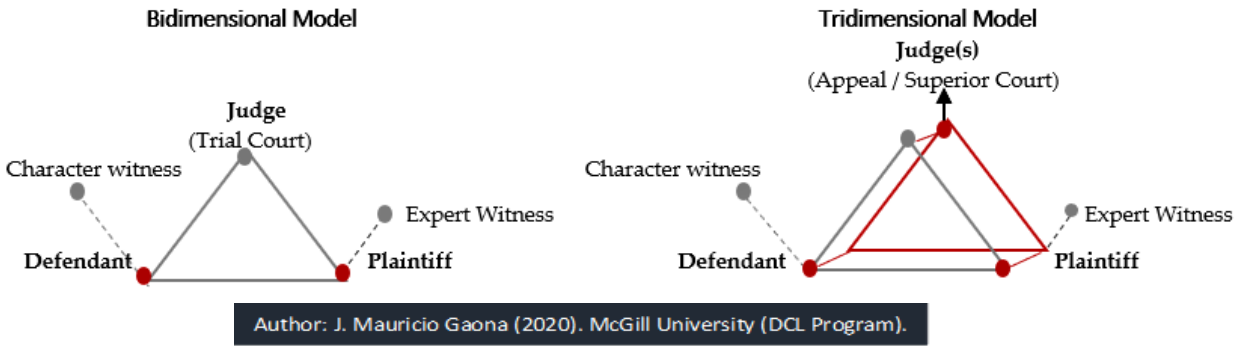
When law is conceptualized through the legislative process, the results not always show different dimensions, but sometimes the dimension of its maker (restrictions, emotions, ideas). Still, depending on whether judicial or legislative process takes place, the perception of reality may be unidimensional, bidimensional or tridimensional.

1.2. Judicial System: Bidimensional and Tridimensional Perceptions

Trial litigation embraces at least a bidimensional perception and gradual conceptualization of the reality that is presented in court. Parties in court often present two punctual versions of reality that appear to be in conflict. Yet the presence of others offering similar and dissimilar versions than those held by the parties (e.g., witnesses) does not truly exceed the bidimensional perception-conceptualization as these other perspectives are eventually aligned with one or the other party (Figure 5). Nor does the presence of a judge adds another perspective as this one is limited by the facts both parties present (Figure 5). Nevertheless, appeal—that is, the process whereby a superior magistrate reviews the decision of a trial judge based on legal, procedural or constitutional grounds—may trigger a "limited tridimensional perception," in that appeal judges make their assertion of reality by assessing the parties' predicament from the trial judge's original perspective (ruling). With very few exceptions (e.g., substantial evidence), appellate courts face limited standards that restrict their *perception of facts* and *conceptualization of the law*.

Despite dimensional restrictions, the judicial system is the only opportunity available for asylum seekers to attain a different perspective fostering a perception-conceptualization of reality that incorporates not solely the policy rejecting them, but the human drama they encounter. This as the legislative process (nowadays controlling the perception-conceptualization on refugees) is increasingly preventing, if not reducing, procedural opportunities for these migrants to present their case (hearings, access to evidence, interpreter and legal counsel).

FIGURE 5: BIDIMENSIONAL AND TRIDIMENSIONAL PERCEPTION-CONCEPTUALIZATION MODELS (JUDICIAL SYSTEM).



1.3. Legislative Process: Legal and Sociopolitical Facts

Legal reasoning is affected by two types of facts: legal and sociopolitical. *Legal facts* are the facts that matter to the law, in that their very occurrence produce legal effects. These facts, essentially, exist because they have been or can be legally proved. In this context, the first test is an axiological assessment on *legal relevance*: Are these facts important (if not critical) to the issue at hand? The second test encompasses a different assessment of reality: Do these facts legally exist? Accordingly, *legal facts* may or may not conform to reality as their very perception is narrowed through tests of legal reality. We further test these facts by reflecting on their analogical, customary and conventional application.[238] These are the facts contended before the judiciary.

Sociopolitical facts are social circumstances havening enough political entity to raise political action. These are the operative facts that trigger the process of making the law, whether such process ensues from the legislative or the executive branch. The conception of law and public policy is therefore affected by the identification of the *political facts* upon which the making of the law rests: the law that is needed, the law that must be modified, the law that must be abolished. Yet, unlike *legal facts*, *sociopolitical facts* are not subject to the common filters of legal reality present in most legal systems across the world: *relevant* and *non-prejudicial evidence*.

[238] See Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) at 14.

Instead, *sociopolitical facts* are the product of social formation (sometimes transformation) arising out of public debates and, as such, formed before their conceptual basis fully develops. Sociopolitical perception of reality precedes the political facts that eventually become relevant and pertinent to society before turning them into (through the legislative process) *legal facts*. Although there are perceptional limitations (e.g., hearsay) that may question the admissibility of certain 'legal facts', the ***perceptional gap*** here is formed before law and public policy even develop.

Unavoidable distortions of reality (political process) will not alter by themselves the existent reality. For example, a government may use asylum seekers to promote xenophobic views by invoking national security concerns even when these are unfounded. This is the case of President Trump describing the first caravan of Central American migrants traveling to the United States through Mexico as "bad hombres,"[239] even though it has been reported that of the 4,000 migrants traveling in that caravan more than 2,000 were, in fact, children.[240] As to the children at least, they are not "hombres" ("men") and their criminal intent is yet to be established. Unlike *legal facts*, *sociopolitical facts* need no proof to trigger the institutional process of the making-of-the-law, for there it only needs popular followed by political support. As such, unidimensional perception-conceptualization on refugees alters humanity, equality, human dignity, and reality.[241]

2. Legal Rupture: Domestic and International Protection of Refuges

One of the most palpable features of the ***perceptional gap*** affecting refugees lies in the disconnect between the facts defining refugee protection and the laws society apply within its unidimensional or bidimensional competing interests: *national security v. refugee protection*. This explains, in part, regressive trends on refugee and human rights protections from the 20th to the 21st century. After all, international law aims to assure a critical relation of accountability between States and

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[239] Amien Kacou, "Trump's Flailing Ratchet: From "Bad Hombres" to "Zero Tolerance"" Harv L & Pol Rev (July 2018), online: <https://harvardlpr.com/2018/07/02/trumps-flailing-ratchet-from-bad-hombres-to-zero-tolerance/>.
[240] See Susan Ormiston, "U.S.-bound Migrant Caravan Rolls North through Mexico Despite Obstacles" *CBC News* (4 November 2018), online: <https://www.cbc.ca/news/world/migrant-caravan-mexico-united-states-1.4890996>.
[241] This is the case of the often-inadvertent situation migrants face while being deprived of the most basic channels of communication with host countries' authorities. See François Crépeau, "Diversity Statement: Changing Our Mindset and Understanding the Complexity of Migration" (27 August 2018), online (statement): *MAX PLANCK INSTITUTE FOR THE STUDY OF RELIGIOUS AND ETHNIC DIVERSITY* <https://www.mmg.mpg.de/151861/statement-by-francois-crepeau> [Statement at the Goethe-Göttingen Critical Exchange's Roundtable].

people (freedom) subject to their power (sovereignty) and rights, which includes human dignity.[242] Whether it is to reject an institutional decision a country does not agree with (e.g., U.S. and Israel withdrawing from UNESCO),[243] deny criminal liability (e.g., the Philippines and Burundi leaving the International Criminal Court),[244] neglect the country's human rights and humanitarian violations (e.g., Venezuela withdrawing from the Organization of American States),[245] reject the country's international commitments (e.g., Hungary, Poland, and Czech Republic announcing their decision not to take more refugees),[246] the path from multilateralism to nationalism promoted by populist governments hinges on the rupture between international and domestic law.[247]

2.1. Diluted Protection: Human Rights

At present, refugees move from a tridimensional (considering the refugee's own conflict, the interest of the international community to protect human life, and the interest of the State hosting the refugee) to a unidimensional perception of reality (bearing in mind almost exclusively the host-country's alleged interests). In a sense, I argue, refugees leave their home country as victims of persecution under the protection of international law to arrive as suspects (slowly as criminals) to the host country under provisions that deprive them of their liberty, equality, dignity and humanity.

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[242] Some legal scholars refer to this phenomenon as "*fiduciary principle*" depicting an inherent relationship of sovereignty, security, and freedom. See Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016) at 29.

[243] Thomas Adamson, "U.S. and Israel Officially Withdraw from UNESCO" *PBS* (1 January 2019), online: <https://www.pbs.org/newshour/politics/u-s-and-israel-officially-withdraw-from-unesco>.

[244] See AFP, "Burundi Becomes First Nation to Leave International Criminal Court" *The Guardian* (28 October 2017), online: <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>; Karen Lema & Neil Jerome Morales, "Duterte to Withdraw Philippines from ICC After 'Outrageous Attacks'" *Reuters* (14 March 2018), online: <https://www.reuters.com/article/us-philippines-duterte-icc/duterte-to-withdraw-philippines-from-icc-after-outrageous-attacks-idUSKCN1GQ0MA>.

[245] See EFE "Venezuela Formally Withdraws from OAS" *EFE* (29 April 2017), online: <https://www.efe.com/efe/english/portada/venezula-formally-withdraws-from-oas/50000260-3252030>.

[246] See Judith Mischke, "Brussels to Sue Hungary, Poland, and Czech Republic over Asylum-seekers" *Politico* (7 December 2017), online: <https://www.politico.eu/article/refugees-europe-brussels-to-sue-hungary-poland-and-czech-republic-over-asylum-seekers/>.

[247] Populist governments eliminating citizens' most basic human rights. Jose Mauricio Gaona, "Democratic Blending: The New Model of Dictatorships in Latin America" (June 2018) Columbia J of Intern'l Aff SIPA (analyzing the use and abuse of constitutional powers in Latin America to violate constitutional and human rights), online: *JIA* <https://jia.sipa.columbia.edu/online-articles/democratic-blending-new-model-dictatorships-latin-america>.

Some governments are using domestic legal systems to dilute the application of international law and deny migrants basic due process rights. As noted in Chapter 2 (Section II), detention of refugees and asylum seekers in the 'free-world' is pervasive and often takes place in violation of due process rights. The detention of migrants is not only frequent but also occurs under dehumanizing conditions, against migrants' will, and during prolonged periods of time. Abusive detention and dire humanitarian conditions have been reported in the United States,[248] Greece,[249] Italy,[250] and Hungary.[251] Prolonged detention of migrants has been denounced in Australia,[252] Japan,[253] Canada,[254] and United States[255]—this latter attempting to even institute a blanket policy on indefinite detention of children, yet overturned by the judiciary.[256]

Refugees' due-process rights have been neglected and, in some instances, even eliminated. For instance, U.S. return policy prevents asylum seekers forcibly removed to Mexico from getting

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[248] Human Rights Watch, "In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells" (Washington, DC: Human Rights Watch, February 2018), online: *HRW* <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

[249] See Human Rights Watch, "Greece: Dire Conditions for Asylum Seekers on Lesbos" *HRW News* (21 November 2018), online: <https://www.hrw.org/news/2018/11/21/greece-dire-conditions-asylum-seekers-lesbos>.

[250] See Jon Henley, "EU's Migrant Centres Could Breach Human Rights, Say Campaigners" *The Guardian* (29 June 2018), online: <https://www.theguardian.com/world/2018/jun/29/eus-migrant-centres-could-breach-human-rights-say-campaigners>.

[251] See DW, "Hungary Opens Shipping Container Camp for Refugees" *DW* (28 March 2017), online: <https://www.dw.com/en/hungary-opens-shipping-container-camp-for-refugees/a-38152515>.

[252] See UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Centres in Nauru* (François Crépeau), A/HRC/35/Add3 (Geneva: UN Human Rights Council, 2016), online (pdf): *RELIEFWEB* <https://reliefweb.int/sites/reliefweb.int/files/resources/G1709891.pdf>. See also Ben Doherty, "UN Body Condemns Australia for Illegal Detention of Asylum Seekers and Refugees" *The Guardian* (7 July 2018), online: <https://www.theguardian.com/world/2018/jul/08/un-body-condemns-australia-for-illegal-detention-of-asylum-seekers-and-refugees>.

[253] See BBC, "Japan Detention Centre Immigrants Start Hunger Strike" *BBC News* (17 April 2018), online: <https://www.bbc.com/news/world-asia-43794909>.

[254] See Petra Molnar & Stephanie J Silverman, "Migrants Are Dying in Canadian Detention Centres. The Government Needs to Act" *McClean's* (15 November 2017), online: <https://www.macleans.ca/opinion/migrants-are-dying-in-canadian-detention-centres-the-government-needs-to-act/>; Ashifa Kassam, "Canada Detains Hundreds of Children for Immigration Violations, Report Finds" *The Guardian* (22 September 2016), online: <https://www.theguardian.com/world/2016/sep/22/canada-children-detention-immigration-solitary-confinement>.

[255] See Reade Levinson, "Asylum Seekers Sue U.S. Government over Prolonged Detention" *Reuters* (15 March 2018), online: <https://www.reuters.com/article/us-usa-immigration-asylum/asylum-seekers-sue-u-s-government-over-prolonged-detention-idUSKCN1GR2E3>.

[256] Myriam Jordan, "Court Block Trump Administration from Blanket Detention of Asylum Seekers" *The New York Times* (2 July 2018), online: <https://www.nytimes.com/2018/07/02/us/asylum-court-ruling-detention.html>.

access to proper legal representation.[257] In some countries, bail for detained refugees is denied or too expensive.[258] And in United Kingdom, refugees have little or no access to basic healthcare.[259]

2.2. Inconsistent Protection: Victims But Suspects

The corollary premise of the Postwar paradigm of the 20th century was to form an international community of States attached to common principles of civility, humanity, and respect for the rule of law as the preferable and more civilized form to address differences and preserve peace, security and stability. The very premise of refugee protection was to afford foreign citizens the most basic human and refugee protections against unlawful forms of persecution. These forms included (among others) race, religion and national origin. They are an integral part of what protecting a refugee is about. Hence, if States sanction various forms of discrimination within their domestic legal systems with respect to their own citizens, how could then they justify discrimination against refugees based on their national origin, religious beliefs, or race? On balance, this is the core element embedded in the principle of "*non-discrimination*" against refugees: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin" (Article 3 of the *1951 Refuge Convention*).

The domestic protection of refugees afforded by host countries is increasingly inconsistent. Consider, for instance, current policies and narratives depicting refugees as threats due to their race (e.g., "Central Americans as gang members," "Mexicans as criminals," "Muslims as terrorists") or national origin ("U.S. Travel Bans") and even their religion—particularly when most host countries have minority groups practicing different religions[260] ("their religion is incompatible with our religion") cast doubt not only on the civility of the host country but on its very identity.

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[257] See Leif Reigstad, "Trump Administration Will Require Asylum Seekers to Wait in Mexico" *Texas Monthly* (20 December 2018), online: <https://www.texasmonthly.com/news/trump-administration-will-require-asylum-seekers-wait-mexico/>.

[258] Daniel Bush, "Under Trump, Higher Immigration Bonds Mean Longer Family Separations" *PBS* (28 June 2018), online: <https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations>.

[259] See Equality Human Rights (EHR), "Asylum Seekers in Britain Unable to Access Health Care" *HER News* (29 November 2018), online: <https://www.equalityhumanrights.com/en/our-work/news/asylum-seekers-britain-unable-access-healthcare>.

[260] Despite Canada's relatively small population (37,360,966), the country's religious landscape encompasses Roman Catholic, Protestant Christians, Islamists, Hinduists, Sikhists, Buddhists, and Judaists. See World Atlas 2019, *Major*

C. Multidimensional Perception: The Facts as We Understand Them

Considering the apparent dichotomy between refugee and national security protection (competing interests), is our perception-conceptualization of security accurate? I submit that, aside from cyclical, often generational and necessary alignment of reality manifested throughout human history, it is important to tackle the social (*identity*, each country's test of values) and legal ruptures (*consistency*, domestic/international legal values), while breaking the patterns of circular-regressive progression by developing a different perspective of reality. And because a different perception/perspective leads to a different perception/conceptualization and, as a result, understanding of the world, a *multidimensional perception of reality* is the most effective path to redress the inhumane, counterintuitive, inconsistent, and counterproductive ***redirection of reality***. This, I firmly believe, is the prologue of a genuinely civilized, modern, and more advanced society.

1. Testing Reality: Quantum Leap, Probability, and Entanglement

The idea of a multidimensional reality is developed through *quantum mechanics*. By exploring and testing reality at a more fundamental level (*microscopic subatomic level*, i.e., protons, neutrons, electrons) we have been able to revolutionize our understanding of the world across fields and applications (e.g., computation, internet, electronics, communications, space travel, medicine, neurotechnology, nanotechnology). Challenging classic physics' core attribution (measurement of the physical world to predict reality with certainty), *quantum theory* proposes a different assessment of reality (measurement of the physical world to predict reality with probability) by promoting a yet more relative perception (reasoning) that forces us to observe and consider reality from a multidimensional perspective. Three experimental observations serve at explaining it: *quantum leap*, the *double-slits*, and the *Bell's inequality experiments*.

According to the *Quantum Leap's* experimental observations, electrons' energy comes from specific minimum quantities (quantum) that cannot be subdivided. These subatomic particles jump

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Religions of Canada (2019), online: <https://www.worldatlas.com/articles/religious-composition-of-canada.html>; Statistics Canada, *Canada's Population Clock* (2019), online: <https://www150.statcan.gc.ca/n1/pub/71-607-x/71-607-x2018 005-eng.htm> [accessed 8 February 2019, 5:44: PM-ET].

from one position (orbit) to another without traveling through space.[261] Using a vacuum space (a glass-tube containing gasses), the *quantum leap* experiment shows that when light is turned on inside the tube and observed through a prism (Image 9), a number of distinctive and well-defined line colours appear. Under microscopic observation, electrons start appearing randomly in different places (*quantum jump*) while changing the atom energy levels and stage.[262] This experiment led us to understand that the atom is made of tiny sub-particles (electrons) whose energy varies as particles explode (jump) from one place to another; a behavioral pattern until then unknown in classic physics, raising the question: Is there another type of reality? Or, since matter is made of particles and these of sub-particles, is there another way to understand reality?

The *double-slit experiment* leads to a different assertion of reality, in which probability, not certainty, becomes the predictability tool. The initial premise or "Bold Hypothesis" was that if light-waves behave like particles, then particles of matter behave like waves (Louis de Broglie).[263] In 1926, Erwin Schrödinger publishes his quantum mechanics equation describing particles as waves,[264] which Max Born referred to as "waves of probability"[265]—this one being commensurate with Werner Heisenberg's "uncertainty principle" whereby the position of a particle cannot be measured with its velocity (momentum) at the same time.[266] Experimental observations show that the initial trajectory of waves changes upon crossing a barrier with two slits, not in two waves as expected from the two slits, but on multiple waves whose peaks and valleys either combine or cancel each other leading bigger waves to impact the wall (Image 10). Using a laser fire-electrons gun passing through a barrier containing two slits, the experiment aims to assess particles' mobility patterns. The expectation is that every time the gun is fired in direction to the wall, the electrons will hit the wall in the same place as this one can only pass through the barrier's slits. Yet electrons

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[261] This considering "Bohr Atomic Model," i.e. model describing the atom structure. See Niels Bohr, "On the Constitution of Atoms and Molecules, Part I" (1913) 26:151 Phil Mag 1 at 4-24.
[262] Energy lost by the electron during this transition is equal to the energy of the quantum of the emitted light, $E = QL$.
[263] Louis de Broglie, "A Tentative Theory of Light Quanta" (1924) 47:6 Phil Mag 446 at 448-458.
[264] Using a linear yet partial/differential equation that describes particles in relation to a wave-function of a quantum-mechanical system whereby it is possible to predict the behavior of dynamic systems while showing how the quantum wave-function changes. See Erwin Schrödinger, "An Undulatory Theory of the Mechanics of Atoms and Molecules" (1926) 28:6 Phys Rev 1049 at 1054-1070.
[265] Indicating that Schrödinger's equation could be used to predict probability as to the most likely place to find the particle. See Max Born, "Zur Quantenmechanik" (1926) 34:1 Zeitschrift für Physik 858 at 859-888.
[266] See Werner Heisenberg & Wolfgang Pauli, "Zur Quantendynamik der Wellenfelder" (1929) 56:1 Zeitschrift für Physik 172 at 174-198.

hit the wall randomly in different places despite the barrier's holes. The more electrons are fired, the more patterns appear on the wall showing more defined lines. Random prediction suddenly becomes probable prediction; the more bullets are fired, the more precise "probability" predictions result. In fact, the electron appears in certain location rather than another (Figure 6).

These results led to two basic correlations informing *quantum theory*: waves are made of electrons (as they behave similarly) and all matter in the universe is made of particles that are ruled by probability, not certainty. Hence, ***probability not just relativity, defines reality***.[267] We cannot know where a single or a couple of electrons will be located before firing the laser gun, but we can predict with surprising accuracy where hundreds of them will be by observing not merely the gun, the barrier, or the wall, but each one and all of them together through emerging patterns.

The *Bell Test* or *Inequality Experiment*[268] (Clauser & Freedman, 1972; Aspect et al, 1981)[269] responds to an experimental question[270] posed by John Stewart Bell in 1964[271] aimed at solving two partially contradicting views on quantum and classic mechanics (observations of particle's dependent, independent, or relative reality).

On the one hand, Neils Bohr, holding that the measurement (act of observing a particle) defines the particle's properties, for which two particles are entangled—that is, connected (synchronized) and linked (sharing communality of characteristics)—despite being thousands of miles apart one from each other. This because it is when we measure one particle that their properties reveal.

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[267] According to quantum theory, matter in the universe is made by particles that are ruled by probability, not certainty. Yet probability can be precise in predicting particles' positions. See Edward G Steward, *Quantum Mechanics: Its Early Development and Road to Entanglement and Beyond* (London: Imperial College Press, 2012) at 135.
[268] Measurements of pairs of particles interacting yet separated showing correlations after sequential measurements testing different possible (inequal) settings as in: *Ch (a,c) – Ch (b,a) – Ch (B,c) < 1*, i.e. *Bell inequality equation*.
[269] See John Francis Clauser & Samuel J Freeman, "Experimental Test of Local Hidden-variable Theories" (1972) 28:938 Phys Rev Lett 938 at 939-41. See also Alain Aspect et al, "Experimental Tests of Realistic Local Theories Via Bell's Theorem" (1982) 47:7 Phys Rev Lett 460 at 461-463.
[270] Does a choice of measurement on one particle affects the measurement of another particle? Based on Bell's theorem (*mathematical formulation on locality and realism*), it is more likely than not that particles are dependent which favours *realism* over *locality*. Accordingly, things only happen when we measure them, for which they need not to move from one location to another (through space-time) for them to occur. Still, under Bell's mathematical realizations there are occasions where quantum measurement does not apply, for which absolute determinism seems an implausible solution. See John Bell, "On the Einstein Podolsky Rose Paradox" (1964) 1:3 Phys 195 at 196-200.
[271] *Ibid.*

On the other, classic physicists Albert Einstein, Boris Podolsky and Nathan Rose contending that this connection violates the *principle of locality*, i.e., suggesting immediate connection-dependence between particles without time-space constitutes a "spooky at distance" connection because the properties of particles are defined before everything is set in motion (determinism), for which two particles cannot be entangled without considering (existing) space and time between them.[272] Using protons rather than electrons and more accurate measurement tools, the *Bell experiment* proves that two particles can be entangled despite their location (near or thousands of miles away). While this does not disprove the existence of space-time as reference of physical reality altogether, it does suggest that at subatomic level the *locality principle* does not apply.[273]

2. The Nature of Reality: Developing a Different Perception-Conceptualization on Refugees

Quantum perception does not necessarily question the reality we observe but our inability to perceive the one we do not. In a sense, I argue, it is not that we miss different realities but that we rather choose to neglect all its probable dimensions. Quantum evolving applications (e.g., quantum algorithms) further preconize that the same entity (object-particle) can be in two different places at the same time. I, for once, submit this proposition embodies its limitation in its own predicament, not in different places but dimensions. In quantum reality, multidimensional observation is thus core. Our ability to resolve a problem lies first in our ability to observe it and, as such, to find it. Thus, I hold, assumption without integral perception of reality is reasoning's most common flaw. Then, after quantum, ***reality is neither objective nor subjective or merely relative but exponentially multidimensional***. For instance, if an auto mechanic attempts to fix an engine problem by looking only at one side of the engine (Image 11), the mechanic will be unable not only to solve the problem but more importantly to see it and, as a result, understand it. Yet this is

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[272] See Albert Einstein, Boris Podolsky & Nathan Rosen, "Can Quantum Mechanical Description of Physical Reality Be Considered Complete?" (1935) 12:10 Phys 989.

[273] This challenges *causality* (particle's interaction origin), *locality* (space-time measurements), and *determinism* (everything is set forth before we measure it). Nevertheless, the results are not absolute. Still, there is a "*hidden variable element*" that produces such instantaneous connection beyond the speed of light or the *locality principle*. John Bell, *Speakable and Unspeakable in Quantum Mechanics* (New York: Cambridge University Press, 1987) at 65.

how some governments proceed; they rule a reality they do not even understand. Their solutions are therefore 'stylistic' (sometimes 'eloquent') references of the circular progression they follow.

Eventually, a different perspective does not only refer to how things appear before us but also to how we may see things once we adopt a different position (Image 12). The more references we have, the better will we understand the reality we confront as our prediction of the probable cause increases with every observation we add. To break the ***perceptional gap*** revealed through the paradigm of inhumane, inconsistent and degenerative reception and treatment of refugees in the 21st century affected by policies and regulations that do everything but protect migrants, I propose a multi-perceptional analytical model of reality built on *quantum theory*. This, in turn, will have a direct impact in the way we receive and treat (e.g., detention, prosecution, exclusion) refugees, which further can be devised through (progressive) parallel structures.

Parallel structure 1 (unidimensional perception), *"Them" threat approach.* Based on current domestic predictions on refugees, these are considered as threats to national security. In the United States, for instance, the legal perception that refugees are terrorists, potential criminals (e.g., rapists), unlawful actors and threats to the stability of the country has led to the conceptualization of the 'refugee threat', which is developed by Presidential Executive orders 13769 and 13780 (*"Protecting the Nation against Foreign Terrorist Entry into the United States"*). The perception of migrants as terrorists has led to the legal concept of "foreign threat," which ultimate prediction-conceptualization creates by redirecting a different type of reality (reception and treatment of migrants) proposing their detention, prosecution, rejection, or expulsion. As illustrated in chapter 2, examples of this type of legislation exist all over the world (Hungry, Poland, Australia, Peru). Although the contended nature of legal reasoning may lead to different interpretations, the law follows the political print of its makers. Here, I argue, *law serves politics, not politics law.*

Parallel structure 2 (bidimensional perception), *"Them" or "us" ineluctable-choice approach.* The proposition here is this: either we protect refugees ("them") or we protect citizens ("us") as

both, however, cannot coexist.[274] Security threats' narratives (e.g., national identity)[275] and refugee protection are increasingly presented and analyzed as contradicting values. Given that public international law in general (*self-determination and sovereignty principles*) and international refugee law in particular (*Refugee Convention*) acknowledge the critical importance of national security, this one preempts refugee and, incidentally, human rights protection. As a result, refugee, due process, and other human rights become, at best, residual.

Parallel structure 3 (multidimensional perception), *"them" is "us" approach.* My proposed quantum interpretation on refugee and national security protections is this: Protecting refugees, protects humanity; protecting humanity, protects security. Therefore, the protection of refugees is the protection of national security. In the alternative, should we place security and human dignity as contradicting values, we become, in itself, the contradiction. If we neglect refugees to protect ourselves only, we neglect ourselves to protect something we are not. The parallel structure shows that only by assembling various dimensions (the security of the host country, the security of refugees, our culture, their culture, the culture) of the reality we face (refugee crisis) or think we face (a choice), we will be in a *super* yet *entangled position* to differentiate reality, along with its dimensional limitations that preclude us from seeing its multidimensional entity.

Consider this case.[276] Imagine a two-way road offering not only astonishing scenic views but given its topography, little margin for error (Image 13). Picture a woman in a sunny day driving a convertible in her legally assigned side of the road as she leaves enough space for upcoming traffic to pass. Let us further imagine that a man, driving a second automobile (driving with loud music), approaches the woman's vehicle from behind, but before he attempts to overtake the woman's car,

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[274] Legal doctrine diffuses this tension by presenting these interests as complementary. I argue that a different connection (dimension of reality) is required. The complementary approach does not truly advance a direct solution to change the perception-conceptualization on refugees. Nor does this approach resolve the problem between two seemingly complementing yet admittedly different entities. Instead, protecting "them" is not merely complementary but axiologically related to what we are or, at most, claim to be (same interest but in a different dimension/perspective). See William W Burke-White, "Human Rights and National Security: The Strategic Correlation" (2004) 17:249 Harv Hum Rts J 254 (describing national security and human rights protection as complementary interests).

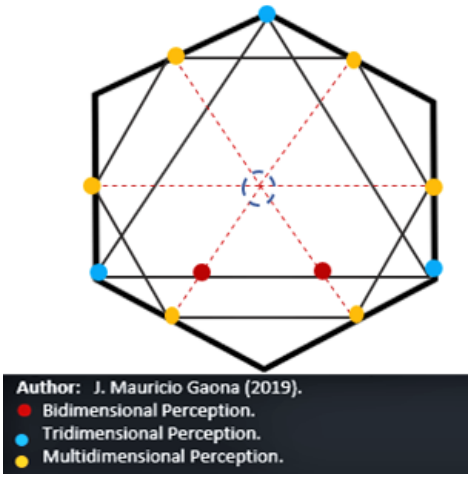
[275] See François Crépeau & Charles Taylor, "A Lawyer and A Philosopher on "Us and Them"" (10 March 2017), online (video): *FRANÇOIS CRÉPEAU* <http://francoiscrepeau.com/a-lawyer-and-a-philosopher-on-us-and-them/>.

[276] I elaborate on Kuhn's reflections and examples on shift of paradigm to portray not merely dissimilar but evolving layers of perception, which, I argue, may lead to a multidimensional conceptualization of reality. See generally Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

she starts waving her right hand forward. Perhaps misled by this signal, the man decides to place his car side-to-side to the woman's vehicle to speak to her. The more the woman waves her hand forward and sounds the klaxon, the more the man believes she is showing some interest. When the man realizes she is pointing forward to warn him about something, a bus traveling in the opposite direction appears forcing the man to drive out of the road and fall into the ocean.

A *unidimensional perspective* account (version of reality viewed from the man's position) will describe a man driving a vehicle in the two-way road who drives out of the road and falls into the ocean. In a *bidimensional perspective* (two versions of reality viewed from the man's and the woman's positions) two contradicting versions emerge. On the one hand, the woman will state that she: (i) was driving in the right side of the road, (ii) was trying to warn the man about upcoming traffic, and (iii) did all she could to prevent the accident (e.g., waving her hand, using the klaxon), but the man continued driving next to her until it was too late to avoid the accident. On the other hand, the man would (if he could) explain that he: (i) saw a woman flattering with him on the road, and (ii) wanted just to approach and speak to her when he suddenly saw a bus coming.

FIGURE 7: MULTIDIMENSIONAL PERCEPTION-RATIONALISATION MODEL.



From a *tridimensional perspective* (adding the bus driver's position), the bus driver will say he saw two people fighting on the road, one being on the wrong side, and that there was no place to move to avoid the collision. From a *multidimensional perspective* (Figure 7), we will benefit from additional layers of perception showing a comprehensive depiction of reality on what each one

saw and what a fourth (man, woman, bus driver, us) and even a fifth (aerial view, e.g., helicopter) dimensions of reality could tell us: a misunderstanding leading to an accident took place.

Eventually, this ***quantum mechanics multidimensional-legal application*** indicates two things: (i) the more layers of perception we add/have, the more accurate our perception of reality is, and (ii) a multidimensional perception of reality does not come from what we are told are the facts, but from our ability to see beyond the information we receive by moving across different positions and reflecting on those facts from each and all positions at once. Then, the question that follows is this: If reality is multidimensional, why should we embrace a restricted dimension to observe it?

"Them," "us," "we all," are therefore dimensional forms to perceive and conceptualize refugees (legal protection). Imagine that at the table of the multidimensional model (Figure 7) we find the host country's government (advocating for national security), refugees (advocating for refugee protection), host country's citizens (advocating for their own protection), and even more extreme positions (advocating for racially oriented version of society). Each position considered individually is unidimensional (therefore, limited). Yet at a higher level of reasoning (quantum level), all positions considered simultaneously force us to visualize reality from its potential connections and relations by circulating our interests through each position at the table.[277] In a sense, positions are unidimensional, differences bidimensional, solutions (at best) tridimensional, but once we move to a different position, we start seeing all these dimensions for what they are: limited perceptions-conceptualizations of reality. And once we reach a multidimensional perception of positions and solutions at stake, we can better ascertain relations on problem/ solution, connections/disconnections. Therefore, the proposed model of rationalisation conveys the ability to think differently at once; that is, to consider each position (perspective) in its relation to each and all positions (perspectives). This increases perception and provides a more accurate, functional and intelligent conceptualization of reality by enabling the observer to visualize ensuing relations and other possible (unthought) connections. For instance, how could refugees contribute to host countries' security?

[277] It is possible to visualize a greater dimensional perspective by considering all and every perspective at once. The model not only uncovers different positions from where the observer can reflect on reality but also different relations (connections-disconnections) that explain it.

CONCLUSION

Perception is the triggering event of human reasoning (including legal reasoning) that precedes some of the most critical processes of life (social interaction, decision-making, evolution). Perception is defined by prime and evolving assertions (linear, circular, regressive), distortions (bias), selections (external, internal), and measurements of reality (time, space, motion). This vital function/relation enables human interaction in relation to our understanding of other humans and the universe. The cognitive path that goes from perception to conceptualization shows that reality is neither objective nor subjective or merely relative, but ultimately multidimensional. The complexity of reality can only be pictured at this level. This is particularly evident in the way most governments perceive and conceptualize (receive, reject, treat, exclude) refugees and asylum seekers—which results in a ***perceptional gap of redirected reality***.

Upon decoding the laws and the policies that present these migrants as a threat to host countries, patterns of distrust and dehumanization emerge across the world depicting a regressive, circular, inhumane, and unintelligent version of refugee protection: victims in the 20th century; suspects and criminals in the 21st century. This regressive progression denies evolution and deters humanity. And upon breaking those patterns in different dimensions, the reasons (sociopolitical and legal facts) that allegedly support them vanish (national security, economic stability, cultural and religious identity), not because the dichotomy between security and migration does not exist but because the way it has been built makes it increasingly indefensible.

The expansion of radical-populist governments around the world shows fatal correlations of language, narrative, laws and policies reflecting conflicts of diversity (xenophobia, antisemitism, nationalism) and reality (contradictions, fallacies, distortions), not security—particularly when the most basic prongs of security (basic legal protections) affecting the most vulnerable populations are being violated. Such perception-conceptualization of refugees may be redressed by tackling individual (bias) and collective (radical-populism) sources promoting unidimensional rather than multidimensional versions of the world. This will lead to a more advanced civilization genuinely structured through security, diversity, and humanity, in which we are what we claim to be. Hence, I conclude, protecting “them” protects “us.

Chapter 4

The Legal Gap:
Law, Morality, Security

INTRODUCTION

The realization of the **Final Refugee Paradigm** occurs when the very premise that led to the creation of international refugee law (the protection of forced migrants beyond their home countries) is superseded by other considerations (e.g., electoral interests, racial discrimination) fostering deterrence mechanisms and institutional forms of exclusion (detention, prosecution, indifference, abandonment). This, in turn, uncovers the greatest danger forced migrants eventually encounter: *Being a refugee in the 21st century*.

The *Final Refugee Paradigm* is developed through two distinguishable yet intertwined phenomena: the ***perceptiona*l** and the ***legal gap***—that is, a misconception of reality (*redirected reality*) followed by a misconception of law (*misdirected purpose*). This chapter focuses on the ***legal gap*** which is defined by the risks the contended relationship between national security and refugee protection does not contemplate as well as by the pervasive contradictions (amid actions, law, values, principles) and gradual disconnect between international law (human rights law, international refugee law, humanitarian law) and domestic law (constitutional law, immigration law, national security law).

Both *perceptional gap* and *legal gap* use the *security claim* (favouring national security) to justify the abrogation of the *moral claim* (favouring refugee protection). These gaps promote the very idea that national security and refugee protection as are competing (if not, conflicting) interests.

The inquiry of this chapter is this: Considering perceptional and legal gaps' most distinguishable traits (*redirected reality* and *misdirected purpose*) fostering the idea of an ineluctable choice between national security and refugee protection, how could we asses and, if possible, redress the resulting disarticulation of international refugee law embedded in the Final Refugee Paradigm? I argue that both the reality the law is missing and the connections the law is losing define the ***legal gap*** between what international human rights and refugee law aim to accomplish (the protection

of human life, all human life) and what immigration law and national security law—as used by many governments today—aim to avoid (the reception of undesirable migrants).

To begin with, I contend that the *legal gap* derives from the risks that the law does not even contemplate. For example, in order to assess credible fear of persecution, immigration officers are often instructed to elucidate *subjective* (well-founded fear) and *objective* factors (credible persecution or ascertainable conflict) that forced the migrant to leave her or his home country to seek protection abroad. One must ponder, however: Are these truly all the risks 21st-century refugees face? What about the risks and the humanitarian situation migrants nowadays encounter in their journey for safety—including the risks triggered by modern systems of reception—such as smuggling, human trafficking, kidnapping, death, sexual exploitation, rape, starvation, dire humanitarian conditions or, more recently (under Covid-19's global lockdown), abandonment? Should the law that regulates such migrants' protection consider those risks as well? Incidentally, should these risks inform the contended ineluctable choice between protecting refugees or protecting national security? Does the effective protection of human dignity and liberty of refugees depend on its domestic or constitutional recognition? Since more host countries are becoming, in their own way, persecutors through laws and policies that promote the detention, rejection, and exclusion of migrants, are current legal systems truly directed at protecting refugees?

I maintain that the contradictions arising out of the disconnect between legal systems (international, regional, domestic) and the often-cited "national identity values" that many countries claim to defend (diversity, multiculturalism, tolerance, civility, plurality, dignity, equality, liberty) unveil increasingly unlawful and inhumane State action leading to the development the *legal gap*. This chapter further contends that considering the moral nature of *international refugee law*, the *legal gap* encompasses a profound *moral gap* showing governments across the world neglecting the most vulnerable population on the planet in the most vulnerable time (COVID-19 pandemic).

It is the final contention of this thesis that, when the law does no longer mirror the purpose of its creation but the unintended goal of its decadence, the law loses its social institutional role while becoming a tool of oppression. And when such an oppression subjugates the human dignity of the

most vulnerable ones (including millions of children), the law thereby constructed becomes a tool of human suffering as well. At this stage, there is little that sovereignty and national security can offer to justify the uncivilized actions of civilized nations. Then, I conclude, the **Final Refugee Paradigm** ensues.

This chapter is divided in two sections. The first one concerns the *security and human-rights risks* 21st–century refugees encounter in their journey for safety. The categorization of these risks is a novel—yet, in my view, necessary—enterprise. It conveys, essentially, the reality the law misses and, as such, a critical aspect of ***the legal gap***.

The second section of this chapter proposes a twofold inquiry to uncover critical inconsistencies (State action and law) and disconnections between moral-legal values, legal principles, and legal systems. Such contradictions constitute another critical aspect of the *legal gap*. More particularly, the section explores the choices (*moral and legal*) host countries nowadays confront by asking some difficult, yet fundamental questions aimed at decoding actions from values, principles from values, and values from the law.

Finally, using multidimensional assimilations on *quantum theory* and *legal theory* (as proposed in this thesis) as well as the concept of *constitutional morality*, the section analyzes the legal choice host countries face between prosecuting, rejecting, excluding or protecting refugees. These interdisciplinary reflections, I conclude, serve at redressing the **Final Refuge Paradigm**.

I. SECURITY AND HUMAN-RIGHTS RISKS

Under *international refugee law*,[1] once the preliminary legal determination of *subjective* (well-founded fear) and *objective* (persecution) elements is established, individuals forced to leave their home country due to a credible fear of persecution on account of their political opinion, race, religion, nationality, or membership in a particular social group and who, due to such fear, cannot or are unwilling to return to their home country, are entitled to seek refugee or asylum protection.

[1] UN General Assembly, *1951 Refugee Convention*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

Although this rule of international law finds different limitations, applications, and interpretations in domestic asylum and immigration law, international refugee protection conveys nonetheless a minimum level of human rights protection[2] afforded by the international community[3] to individuals fleeing the conflicts of modern civilization. Unmistakably, *the* ***refugee paradigm*** I introduce in this thesis does not only describe the circumstances, paradoxes and risks refugee populations across the globe nowadays face, but further underscores the endemic failure of the international legal system to assure their protection at regional and domestic levels.

Inherently, at most, the legal protection of refugees encompasses minimum standards of human dignity, stability, and security, which, as noted, both international refugee law and human rights law accord to individuals fleeing different forms of persecution and conflict.[4] This standard, in fact, has been set forth not only by the *Refugee Convention* but also by a wide range of international instruments.[5] This progressive legal construction has further led to the development of an international legal framework on human dignity and humanitarian protections supporting the eventual conceptualization of "human security" as the final and natural aspiration of humanity in modern and civilized societies.

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[2] UN General Assembly, *United Nations Declaration for Refugees and Migrants*, 19 September 2016, A/11820, Declaration A/71/L1, 71st Sess, 3rd to 7th Meetings.

[3] The *Refugee Convention* intended precisely to provide a minimum level of legal and humanitarian protection to those facing human rights violations in their home countries and, as a result, claiming protection abroad. In fact, from the outset, the Convention highlights in its Preamble the international community's commitment vis-à-vis refugee protection by indicating that: "...United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of those fundamental rights and freedoms." See Refugee Convention, *supra* note 1, Preamble at para 2; see also *Canada v Ward (Attorney General)*, [1993] 2 SCR 689, 692 (underlying Canada's commitment toward refugees' basic human rights).

[4] Notwithstanding apparent constitutional dichotomies on societies that have incorporated human dignity at the highest level of their legal systems (e.g. Canada) and those who have prioritized privacy and autonomy instead (e.g. United States), human dignity is the corollary expression of the Postwar paradigm influencing public international law (i.e. UN Charter and institutions). In fact, several constitutions around the world have internalized "human dignity" either within the scope of *equality rights*, or independently and directly as a *fundamental right*. See e.g. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 *being Schedule B to the Canada Act 1982* (UK), s 15.1 (assented to 29 March 1982); *Grundgesetz für die Bundesrepublik Deutschland*, 23 May 1949, art 1 (last amended on 28 March 2019) [Germany's "Basic Law"]; *Nihonkoku Kenpō*, 3 May 1947, art 24 [Japan's Constitution]; *La Costituzione della Repubblica Italiana*, 27 December 1947, art 3 [Constitution of Italy]; *Bunreacht na hÉireann*, 29 December 1937, art 40, s 1 [Constitution of Ireland]; *Constitución Política de Colombia*, 4 July 1991, art 1 [Constitution of Colombia]. See generally Erin Daily, *Dignity Rights: Courts, Constitutions, and the Worth of Human Person* (Philadelphia: University of Pennsylvania Press, 2012). See also Ved P Nanda, "History and Foundations for Refugee Security, Health, and Well-being under International Law" in James D White & Anthony J Marsella, eds, *Fear of Persecution* (Lanham, Maryland: Rowman & Littlefield, 2007) at 151.

[5] See e.g. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Res 217 A (III), 3rd Sess, Supp No 13 (1948) 71, art 1 ["UDHR"].

While the concepts of humanity[6] and civilized society[7] could appear *ab initio* abstract or aspirational, the effectiveness of refugee law (international and domestic) hinges on its very preservation and development. Therefore, uncovering the *multidimensional risks* refugees and asylum seekers encounter in today's world is essential for better understanding the sequential and consequential nature of the **Final Refugee Paradigm** affecting international refugee protection—especially when, in spite of the criminalisation of migrants, there are still millions of refugees[8] (persecuted/conflict migrants) and millions more yet to come (environmental/conflict migrants).

Security and human-rights risks are the risks 21st-century migrants face from the moment they are forced to leave their home country (and throughout their journey) to the moment their claims of persecution (as refugees or asylum seekers) are finally decided, which extends to risks associated to their migratory status, refoulement, exclusion or rejection. These risks concern the security of the migrant from a multidimensional perspective threatened by the *persecutor agent* (State or non-state actor) forcing the person to migrate, *incidental agents* benefiting from migrants' precarious situations and needs (smugglers, human traffickers, drug cartels, illegal armed groups, terrorist organizations), and *host-country's settlement agents* whose actions (systems, policies, practices, regulations) may further endanger the wellbeing and security of migrants (e.g., dire humanitarian conditions, security risks, psychological trauma, starvation).

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[6] The term "humanity" conveys a moral imperative that has been gradually internalized in the letter of public international law since World War II to express a limit, restriction, the need for security and, in more advanced legal systems, a sense of duty toward those in need for compassion, legal protection, and human dignity. See Robin Coupland, "Humanity: What Is and How Does It Influence International Law?" (2001) 83:844 IRRC 969 at 971 (analyzing humanity in the context of people's security and well-being). Moreover, morality predisposes our understanding of humanity, in that it requires moral standards of rationalisation (principles) to make humanity a reference by itself. See Richard Dean, *The Value of Humanity in Kant's Moral Theory* (London: Oxford Scholarship Publishing, 2006) at 6 (reflecting on humanity as an end in itself).

[7] The idea of a civilized society (on civility) relates to a more tolerant, conscious, and respectful society, which notion is rooted in the need for tolerance. See Clifford Orwin, "Civility" in Peter Berkowitz, ed, *Endangered Virtues Essays* (Stanford, California: Stanford University, 2011), online (pdf): *HOOVER* <http://media.hoover.org/sites/default/files/documents/Endangered_Virtues_Orwin_Civility.pdf>; Mike Farrell, "A Civilized Society" (7 August 2013), online (blog): *HUFFINGTON POST* <http://www.huffingtonpost.com/mike-farrell/a-civilized-society_b_3552099.html>.

[8] The number of refugees has grown exponentially across the planet going from 15.2 million of refugees in 2008 to 25.9 million in 2018; that is, nearly 1 million refugees more every year. UN High Commissioner for Refugees (UNHCR), *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva: UNHCR, 2009) at 3, online: *UNHCR* <https://www.unhcr.org/4a375c426.pdf>; see also UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2018* (Geneva: UNHCR, June 2019) at 2, online (pdf): *UNHCR*: <https://www.unhcr.org/5d08d7ee7.pdf>.

Some risks, moreover, constitute human rights violations (e.g., rape, kidnapping, sexual exploitation, human trafficking). Here, I distinguish two types of *security and human-rights risks*. On the one hand, *evolving risks*, which term I use to define the risks refugees encounter while becoming refugees (*causal and transitional risks*) going from the triggering event of persecution forcing the migrant to leave her or his home country to the *de facto*, putative, or legal recognition of such migrant as refugee or asylum seeker. On the other hand, *emerging risks*, which term encompasses risks arising out of the dehumanization, criminalisation, and prosecution (treatment) of refugees in the 21st century (*exclusion and status-related risks*).

A. Evolving Risks: Becoming a Refugee

In the 21st century, becoming a refugee has become, in itself, a security and human-rights risk because it exposes forced migrants not only to human rights violations (sexual exploitation, human trafficking, rape, kidnapping, death), but also to a myriad of security risks threatening their dignity, well-being and safety, as well as their physical and moral integrity (detention, imprisonment, starvation, psychological trauma).

The security and human-rights risks that refugees encounter in the 21st century are directly associated to the realization of the **Final Refugee Paradigm**: Persecution, prosecution, rejection, abandonment. My theoretical-practical approach here is this. *Evolving risks* are the risks an individual face while becoming a refugee in today's world. This includes risks associated to the triggering event of persecution or conflict causing the forced migration outside the migrant's home country, as well as those risks related to the transition the migrant experiences from the moment the migrant is forced to leave her or his home country to the moment the migrant arrives to her or his intended or unintended yet designated destination (country of refuge), irrespectively of whether the migrant's protection claim is granted or denied (*de facto*, putative, actual reception). In fact, both immigration officers and judges explore not only the risks refugee and asylum claimants might face should they be forced to return to their home countries, but also the risks such migrants allegedly confront while being in their home country.

Refugees confront a wide range of risks while making the most treacherous journeys across different regions and conflicts (e.g., sexual assault, labour exploitation, starvation, death).[9] Yet, under *international refugee law*, the term "refugee" does not require the claimant to be granted refugee status for the migrant to be considered a refugee. Article 1 of the *Refugee Convention*[10] states that the term refugee refers to: "any person who …owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country defines a refugee as the individual."

It follows that refugee protection exclusively circumscribed to the moment in which such protection is claimed would be contrary to what refugee protection aims to accomplish: protecting migrants against persecution, which neither begins with their arrival to their final destination nor when protective status is granted or denied. Hence, denying refugee protection only because refugee status has not been yet claimed or granted would violate Article 31 of the *Vienna Convention on the Law of Treaties*,[11] requiring that treaties such as the *Refugee Convention* be interpreted, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

1. Causal Risks: Persecution and Conflict

I describe *causal risks* as those associated to the very same elements that precede the determination on the forced migrant's claim or refugee status (credible well-founded fear and persecution), which ultimately force migrants to flee their home countries. *Causal risks* encompass a wide range of risks primarily connected to the type of persecution or conflict forced migrants encounter—

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9 See Office of the United Nations High Commissioner for Human Rights (OHCHR) & UN Support Mission in Libya, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (Geneva: OHCHR, December 2018) at 27-28, online (pdf): *OHCHR* <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> ["OHCHR 2018"]; see also DW, "More than 3,500 Attacks on Refugees in Germany in 2016: Report" *DW* (26 February 2017), online: <https://www.dw.com/en/more-than-3500-attacks-on-refugees-in-germany-in-2016-report/a-37719365>.

10 Refugee Convention, *supra* note 1.

11 UN General Assembly, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

including non-state actors' violence (e.g., gangs in El Salvador,[12] guerrillas in Colombia,[13] drug cartels[14] in Mexico, terrorist organizations in Syria), State actors' persecution (e.g., political repression in Venezuela,[15] chemical attacks[16] in Syria), ethnic and religious conflicts (e.g., Muslims persecution in Myanmar,[17] Christians persecution[18] in Nigeria), famine (e.g., Yemen, Somalia, South Sudan),[19] environmental impact (e.g., Bangladesh,[20] Nauru[21] island) and gender (e.g., women in Honduras)[22] or sexual-orientation persecution (e.g., LGBTQ individual persecution in Russia).[23]

I contend that each one of these risks must be fully and properly considered to develop a modern legal framework on refugee protection. I define *causal risks* as the risks that cause or force a person

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[12] See e.g. Jonathan Watts, "One Murder Every Hour: How El Salvador Became the Homicide Capital of the World" *The Guardian* (22 August 2015), online: <https://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place>.

[13] See e.g. DW, "Refugiados Colombianos en Ecuador: No Regresarán" *DW* (22 September 2016), online: <http://www.dw.com/es/refugiados-colombianos-en-ecuador-no-regresar%C3%A1n/a-19568279>.

[14] See e.g. Nathaniel Parish Flannery, "Is Mexico Really the World's Most Dangerous War Zone" *Forbes* (10 May 2017), online: <https://www.forbes.com/sites/nathanielparishflannery/2017/05/10/is-mexico-really-the-worlds-most-dangerous-warzone/#726f3c0e5e3f>.

[15] See e.g. Jose Mauricio Gaona, "Dictatorship in Venezuela Will Soon Be Reality" *The Globe and Mail* (30 July 2017), online: <https://www.theglobeandmail.com/opinion/dictatorship-in-venezuela-will-soon-be-reality/article35839985/>; Esteban Villarejo, "Venezolanos en España: Más Solicitudes de Asilo que los Sirios" *ABC España* (3 August 2017), online: <http://www.abc.es/internacional/abci-venezolanos-espana-mas-solicitudes-asilo-sirios-201707030238noticia.html>.

[16] See e.g. Russell Goldman, "Assad's History of Chemical Attacks, and Other Atrocities" *The New York Times* (5 April 2017), online: <https://www.nytimes.com/2017/04/05/world/middleeast/syria-bashar-al-assad-atrocities-civilian-deaths-gas-attack.html>.

[17] See e.g. BBC, "Myanmar Wants Ethnic Cleansing of Rohingya—UN Official" *BBC Asia* (24 November 2016), online: <http://www.bbc.com/news/world-asia-38091816>.

[18] See e.g. Harriet Sherwood, "Christians Flee Growing Persecution in Africa and Middle East" *The Guardian* (13 January 2016), online: <https://www.theguardian.com/world/2016/jan/13/christians-flee-growing-persecution-africa-middle-east>.

[19] See e.g. UN High Commissioner for Refugees (UNHCR), "UNHCR Says Death Risk from Starvation in Horn of Africa, Yemen, Nigeria Growing, Displacement Already Rising" *UNHCR News* (11 April 2017), online: <http://www.unhcr.org/news/briefing/2017/4/58ec9d464/unhcr-says-death-risk-starvation-horn-africa-yemen-nigeria-growing-displacement.html>.

[20] See e.g. DT, "Bangladesh Listed as One of 7 Climate Change Spots" *Dhaka Tribune* (24 June 2017), online: <http://www.dhakatribune.com/climate-change/2017/06/24/bangladesh-listed-one-7-climate-change-hotspots/>.

[21] See e.g. Ben Doherty & Eleanor Ainge Roy, "World Bank: Let Climate-threatened Pacific Islanders Migrate to Australia or NZ" *The Guardian* (8 May 2017), online: <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-all ow-open-migration-for-pacific-islanders-threatened-by-climate-says-report>.

[22] See e.g. La Prensa Libre, "5 Mil Mujeres Han Sido Asesinadas en Honduras Durante 11 años" *La Prensa Libre Costa Rica* (11 July 2017), online: <https://www.laprensalibre.cr/Noticias/detalle/116357/5-mil-mujeres-han-sido-asesinadas-en-honduras-durante-11-anos>.

[23] See e.g. Antoun Issa, "Why Russia's Persecution of Its LGBTQ Community Matters" *Huffington Post* (19 April 2017), online: <https://www.huffpost.com/entry/why-russias-persecution-of-its-lgbt-community-matters_b_58f78163e4b0c892a4fb7452>.

to migrate and become a refugee. These are the first risks forced migrants encounter in their journey for safety. *Causal risks* are recognized through the **Postwar Refugee Paradigm** leading to the *Refugee Convention* and increasingly broad international and domestic case law.

Causal risks are therefore defined by the danger each migrant does objectively experience as well as by the subjective perception every migrant has vis-à-vis the specific risks such migrant encounters. This *objective-subjective assertion* determines the legal viability of the cause-event forcing the migrant to leave (and not want to return) to her or his home country. Under international and domestic refugee law these preliminary *triggering-effect conditions* constitute the factual basis to ascertain the legal viability of refugee and asylum claims; inherently formed through objective and subjective reasons that cause a migrant to seek legal protection abroad. As such, the danger migrants face must be showed through an *objective legal standard*. That is, anyone facing similar triggering event (persecution or conflict) would objectively appreciate the particular danger as an imminent leading to the migrant to flee the home country and seek protection abroad. This *objective standard* relates to the factual persecution or conflict the migrant faces, which presupposes an *objective-subjective link* between the persecution (event) and the migrant's particular situation (apprehension).[24] This, essentially, requires for the claimant to prove ("clear probability of persecution")[25] that she or he is the target of persecution or victim of conflict.

Objective persecution grounds are statutorily (race, religion, nationality, political opinion) and judicially defined (membership in a particular social group, as to the social group), while the grounds of persecution associated to conflict derive from recognized situations of danger

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[24] For instance, the High Court of South Africa requires refugee claimants to specifically prove "a well-grounded apprehension of harm" showing no other satisfactory remedy. See *AI and Others v Director of Asylum Seeker Management (Department of Home Affairs)*, 22059/18 [2019] ZAWCHC 114, South Africa's High Court (2019) at paras 25, 26, 27 (holding the statutory application of a required "well-grounded apprehension of harm").

[25] See e.g. *INS v Cardoza-Fonseca*, 480 US 421 (1987) (setting forth constitutional precedent on "clear probability of persecution" as the required standard of proof on asylum claims in the US); *Kwiatkowsky v Minister of Employment and Immigration*, [1982] 2 SCR 856; *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 9 ["Singh"] (reaffirming Kwiatkowsky precedent while holding "more likely than not" to be Canada's burden of proof on refugee claimants). Domestic courts in Europe dealing with protection claims lodged under the European Common System of Asylum (CEAS, Directive 2011/95/EU) have set forth basic standards requiring a defining legal analysis on both the objective and the subjective nature of persecution. See European Asylum Office Support (EASO), "Un Analisi Giuridica: Valutazione delle Prove e della Credibilità nell'Ambito del Sistema Europeo Comune di Asilo" (Marsa, Malta: EASO & IARLI, 2018) at 40, 93 (asserting the objective nature of meaningful persecution facts or "fatti significative," along with the subjective nature of its probable verification or "probabilmente verificable").

frequently portrayed as conflicts in modern society (e.g., civil war, famine, ethnic cleansing, religious persecution, female genital mutilation, gender discrimination). Still, refugees may also encounter other types of persecution based on the work, the decisions they make, or the nature of the conflict they confront (e.g., publishing controversial political material, expressing personal views against the military or authoritarian governments).

Causal risks must further meet a *subjective legal standard* based on a well-founded credible fear of persecution,[26] which requirement aims to facilitate a coherent and inherent connection between the objective and subjective circumstances of persecution or conflict leading to the refugee's ultimate decision to seek protection abroad. The legal assessment that immigration officials make encompasses a legal analysis on the migrant's perception, explanation, apprehension, and account of persecution. This means that the claimant must connect the need to escape and the unwillingness to return to the persecution or conflict by showing how the persecution or conflict threaten him or her in particular. Although the test on this legal assessment may vary from one jurisdiction to another, two major elements must be clearly satisfied: the fear must be credible as well as timely, factually and individually connected to the alleged persecution or conflict. This means that the triggering event of persecution or conflict would have caused anyone in the migrant's situation to leave the country. The *Refugee Convention*[27] and most domestic legislations[28] require connection between these two elements by imposing on claimants the need to prove that their "fear of persecution" is related to the persecution from which they fled.[29]

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[26] James Hathaway argues that the legal standard ("test") is exclusively objective as the fear is merely anticipatory (if return), not psychological. See James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 100-110.

[27] See Refugee Convention, *supra* note 1, art 1(A)(2).

[28] See e.g. *United States Immigration National Act of 1965 (INA)*, 89th Congress, Pub L 89-236, 79 Stat 911, § 101(a)(42)(A). (signed into law 3 October 1965) [as modified by *Immigration Act of 1990*].

[29] Among the persecution grounds broadly accepted today, the one being more frequently disputed before courts is migrant's membership in a particular social group. This ground—initially conventional and eventually doctrinal—has paved the way to evolving (unenumerated) yet equally decisive forms of persecution and conflict. See e.g. *Benitez v Holder*, 589 F3d 426, 428 (7th Cir 2009) (defining "particular social group"); *Matter of Acosta*, 19 I&N Dec 211, 233 (BIA 2006) (introducing the concept of "social visibility"). It must be noted, however, that *Matter of Acosta* was partially overruled by *Matter of Mogharrabi* in 1987 (on other grounds), which did not affect the way the BIA has been using the concept of social visibility. *Matter of Mogharrabi*, 19 I&N Dec 439, 441 (BIA 1987).

2. Transitional Risks: Criminality, Migrant Smuggling, Human Trafficking

I define *transitional risks* as those a forced migrant encounters from the moment the migrant leaves the home country to the moment the asylum or refugee status is *de facto* or legally granted. These risks are associated both to logistical limitations migrants encounter in their journey to their intended or designated country of refuge and to incidental risks arising out of the dysfunctional and increasingly hostile reception of refugees and asylum seekers in the 21st century.

Transitional risks derive from the evolving yet endemic nature of the **Modern** and the **Final Refugee Paradigms**. I maintain that *transitional risks* may subject refugees and asylum seekers to further, unexpected, or greater danger than otherwise they would face should a more organized and adequately distributed system of reception be developed. The effects of the **Final Refugee Paradigm**—namely, the closure of domestic borders, indifference toward refugees' wellbeing, and the outsourcing of refugee reception to poor and developing countries (e.g., "EU-Turkey Agreement" reporting the highest death toll on record right after the agreement was signed, Figure 1)—force refugees to take greater risks and use the very agents (e.g., smugglers in Africa and the Mediterranean, or drug cartels in Mexico) that increase the likelihood of harm or death. *Transitional risks* may lead to greater danger than the otherwise triggered by *causal risks*. This also encompasses risks refugees encounter while confronting State and non-state actors in their journey for safety, which includes violence,[30] kidnapping,[31] rape,[32] starvation,[33] torture,[34] and migrant smuggling risks (sexual violence, human trafficking, forced labour, death). Between 2015

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[30] See Congressional Research Service (CRS), *Mexico's Immigration Control Efforts* (Washington, DC: CRS, February 2020) at 1 (reporting police corruption and abuse of migrants in Mexico), online: *FAS* <https://fas.org/sgp/crs/row/IF10215.pdf>.

[31] UN High Commissioner for Refugees (UNHCR), *Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders—January-December 2018* (Geneva: UNHCR, 2019) at 18 (reporting the kidnapping of refugees from East and Horn Africa while crossing the Eritrea-Sudan border), online (pdf): *UNHCR* <https://data2.unhcr.org/en/documents/download/67712>.

[32] *Ibid* at 19 (reporting cases of rape of Somali refugees by smugglers in Libya); Juliana Oliveira Aaraujo et al, "Prevalence of Sexual Violence among Refugees: A Systematic Review" (2019) 53 Rev de Saúde Pública 1 at 10 (describing sexual violence against refugees based on a cross-referenced, bibliographic and global study).

[33] Migrant smugglers in Africa hold migrants in temporary locations ("hangars, warehouses, unfinished buildings or apartment blocks, houses and farms") where they face starvation. See OHCHR 2018, *supra* note 9 at 27.

[34] *Ibid* at 28 (reporting cases of torture of Sudanese refugees in Libya by migrant smugglers).

and 2018, more than 15,000 asylum seekers died at sea while attempting to reach Europe (Figure 2). The risks migrants encounter can only be perceived through their accounts:

> "I'm not a criminal but I was in prison [in Libya] for three years. There was no sunlight in Tajoura [detention centre]. There were women with little babies. We were kept in closed hangars, men and women separate. We were taken out to work all day and returned to the hangar at midnight. We were punished by the police. Women were taken away by police and slapped and raped."
>
> —*Testimony [transcript] of a Somali refugee to the NGO Médecins Sans Frontières after being rescued in the Mediterranean Sea* (Italy, January 2020).[35]

> "We arrived in the desert and the Libyans trapped us. They imprisoned us. We went to Tajoura. It was a big place, but there were a lot of families inside. The other side, for the men, is where the bomb [struck]. We heard the "boom" sounds. The shots—"boom, boom, boom." Me and my cousin, we fled. My husband, he remained there. The bomb struck my husband. He died."
>
> —*Testimony [audio] of a Somali refugee to the NGO Médecins Sans Frontières after escaping the bombing of a migrant detention centre in Libya* (Tripoli, January 2020).[36]

> "They [Colombians] saw that we came with a Venezuelan flag and they helped us. But when we entered [the country], they did not want us. And on our way here [Ecuador] not everyone was lucky enough to survive like we did. We lost four companions. Three of them died of hypothermia; that was, a 22-years-old girl and two chamos [young men]. They froze to death in Pamplona… When we left Venezuela, we were 43 people. When we arrive to Ecuador, we were only 7 people."
>
> —*Testimony [audio] of a 38-years-old man asylum-seeker from Venezuela on his journey while crossing "Los Andes" mountains from the Venezuelan-Colombian border to Ecuador* (Tabacundo, 2018).[37]

> "We were 700-800 people in a large hangar… They would keep shooting [migrants and refugees] in the legs if they couldn't pay, and then let them bleed to death... My son, five years old at the time, was hit on the head with a big metal bar to pressure us to pay quickly… I saw many people die in this place, from beatings and hunger. There was a Somali boy, he was skin and bones. He couldn't even stand on his two feet and they [smugglers] would still beat him. He died… until now, when I close my eyes, I am haunted by his face."
>
> —*Testimony [transcript] of a 26-years-old asylum seeker from Sudan before the UN Supporting Mission in Libya* (Tripoli, 2018).[38]

> "I was sold to a criminal gang in Bani Walid. They wanted my family to transfer 600,000 CFA (1,000 USD) to an account in Egypt… They poured petrol on my leg and lit it on fire. I still cannot walk. They beat everyone, raped women. My two-year-old was burned with a cigarette… I saw so many people die there."

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[35] *Ibid.*

[36] See Médecins Sans Frontières (MSF), "Refugees Trapped in Libya: Nowhere to Go But the Sea" by Natasha Lewer (15 January 2020) (showing the testimony of a refugee who escaped the bombing of a detention centre in Libya), online (audio): *MSF* <https://www.msf.org/mediterranean-escape-route-migrants-and-refugees-trapped-libya>.

[37] See Edu León, "En su Propia Voz: 10 venezolanos Narran el Éxodo a través de los Andes" *Univisión* (23 August 2018) (containing the audio of Venezuelan asylum-seeker Douglas Hernández "Se nos murieron cuatro compañeros"), online (audio): <https://www.univision.com/noticias/crisis-en-venezuela/el-exodo-venezolano-en-diez-historias>.

[38] OHCHR 2018, *supra* note 9 at 33.

—*Testimony [transcript] of a 27-years-old refugee from Côte* d'Ivoire before the UN Supporting Mission in Libya (Tripoli, 2017).[39]

"My name is Nancy. I am Salvadorian and I was kidnapped from April 13 to June 22. I was grabbed in Coatzacoalcos, Veracruz… We drove around the road to Reynosa [Mexico] for about fifteen minutes and before we got to the safe house they took us down to a place where they rent cargo trucks, because they said the Zetas [Mexican Drug Cartel] were going to tell us [something]. Afterwards, they put us in a white pickup, and we were all piled up in the back. We arrived at a very big house that is in front of a soccer field. In that house they kept us until the following happened: there was a Honduran woman named Sara, who was pregnant and had been kidnapped for a long time. She only told me that that was her name, and that maybe there would come a time when she would forget her name, so she asked me to remind her when this happened. And it was true, after a few days she no longer remembered her name, and only cried. Then, the baby's birth begun, and no one helped her. On the contrary, she was beaten so that she stopped complaining. The baby was born, but the placenta never came out, so after two hours of no one helping her, she died there, bleeding to death. The baby was taken away and I don't know what happened to it. The kidnappers didn't do anything with Sara's body, but left it there, and we had to live with the body, until it began to smell so bad that the neighbors noticed and warned the army that something strange was happening in that house. I heard that the immigration authorities warned the kidnappers and then, they moved us and left Sara's body there."

—*Testimony [transcript] of a 24-years-old asylum-seeker from El Salvador* to NGOs (Coahuila, 2017).[40]

"We were in Bor Kul La forest. We had found a place to rest and had been sleeping. It was morning time. [The soldiers] surrounded us… Almost everyone ran away, but they captured me and around 20 other women. I don't know how many times I was raped. I was unconscious for three days afterwards… My relatives had to carry me here."

—*Testimony [transcript] of a Rohingya refugee to Amnesty International personnel in Kutupalong Refugee Camp on the violence she experienced on her journey from Myanmar to Bangladesh* (Cox's Bazar, January 2018).[41]

Migrant smuggling risks have become common across the globe.[42] Yet, migrant smuggling must be distinguished from human trafficking, in that the latter involves not only movement of people against their will but *exploitation* (e.g., prostitution). Nonetheless, refugees may also be subject to human trafficking (e.g., Central American migrants crossing the Guatemalan-Mexican border).[43]

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[39] *Ibid* at 34.

[40] See Belén Posada del Migrante, Frontera con Justicia & Humanidad Sin Fronteras (NGOs), "Testimonios de Migrantes Víctimas de Secuestro–Anexo 1" (2017) at 1-2, online (pdf): *OHCHR* <https://www2.ohchr.org/english/bodies/cmw/docs/ngos/prodh_Mexico_CAT47_Annex1.pdf>.

[41] See Amnesty International, ""We Will Destroy Everything" Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar" (Washington, DC: Amnesty International, 2018) at 94 (reporting the testimonies of rape and other sexual violence members of the Rohingya minority suffered during their journey to Bangladesh), online (pdf): *AMNESTY* <https://www.amnesty.org/download/Documents/ASA1686302018ENGLISH.PDF>.

[42] Marco Borraccetti, "Trafficking in Human Beings and Human Security: A Comprehensive Approach" in Stefan Salomon et al, eds, *Blurring Boundaries: Human Security and Forced Migration* (Boston: Brill Nijhoff, 2017) at 187.

[43] See International Crisis Group, "Easy Pray: Criminal Violence and Central American Migration," Latin America and Caribbean Report No 57 (Brussels: ICG, July 2016). online (pdf): <https://d2071andvip0wj.cloudfront.net/057-easy-prey-criminal-violence-and-central-american-migration.pdf> ["ICG 2016"].

The case of North-triangle refugees (from El Salvador, Honduras, Guatemala) is representative. The territorial expansion of the two main gangs (MS-13 and Barrio 18) has forced women and children to leave these countries due to overspread gangs' and domestic violence.[44] On their arrival to the southern border of Mexico, many of these migrants[45] face abuse and discrimination.[46] In fact, there are reports of migrant women caught within criminal networks of human trafficking and prostitution operating in the east and central areas of Mexico.[47]

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[44] *Ibid* at 1; Stephanie Nolen, "Menaced by Gangs, El Salvador's Children Are Running for Their Lives" *The Globe and the Mail* (25 August 2015), online: <https://www.theglobeandmail.com/news/world/menaced-by-gangs-el-salvadors-children-are-running-for-their-lives/article26151568/>; UNICEF, "La Crisis de los Refugiados Migrantes: Infancia en Peligro" (2016) at 2. Moreover, refugees that evade these human trafficking networks must find a smuggler or "coyote" in very dangerous regions. See Marc Champion, "Mexico Now World's Deadliest Conflict Zone After Syria: Survey" *Bloomberg* (9 May 2017), online: <https://www.bloomberg.com/news/articles/2017-05-09/mexico-now-world-s-deadliest-conflict-zone-after-syria-survey>; US Department of State, *Mexico Travel Warning* (8 December 2016), online: *US GOVERNMENT* <https://travel.state.gov/content/passports/en/alertswarnings/mexico-travel-warning.html> [accessed 10 August 2019, 4:15 AM-ET]. Those who survive the hazardous journey crossing tunnels, rivers, and deserts face discrimination and, if caught, detention. See Human Rights First, "U.S. Detention of Families Seeking Asylum: A One-Year Update" (New York: Human Rights First, June 2015) at 3, online: *HRF* <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.

[45] See Janna Ataiants et al, "Unaccompanied Children at the United States Border, A Human Rights Crisis that Can Be Addressed with Policy Change" (2018) 20:4 J of Immigrant & Minority Health 1000 (analyzing human rights and health implications concerning the treatment unaccompanied children encounter in the US southern border).

[46] Attacks on asylum seekers on the move have been reported in Mexico, Brazil, Croatia, and Hungary. See El Colegio de la Frontera Norte (COLEX), "La Caravana de Migrantes Centroamericanos en Tijuana 2018-2019–Segunda Etapa" (Coahuila, Mexico: COLEF, March 2019) at 22 (describing local officials' and residents' attitudes in Tijuana toward Central American migrants), online (pdf): *COLEF* <https://observatoriocolef.org/wp-content/uploads/2019/03/2o.-Reporte-Caravana-Tijuana.250319compressed1.pdf>; Jackson Félix & Emily Costa, "Após Ataques de Brasileiros, "1,2 Mil Venezuelanos Deixaram o País, Diz Exército" *Globo Brasil G1* (19 August 2018), online: <https://g1.globo.com/rrroraima/noticia/2018/08/19/pacaraima-tem-ruas-desertas-apos-confronto-entre-brasileiros-e-venezuelanos.html>; see also Amnesty International, "Croatia: EU Complicit in Violence and Abuse by Police against Refugees and Migrants" *AI News* (13 March 2019) (reporting Croatia's police brutality against migrants crossing the so-called "Balkan route"), online: <https://www.amnesty.org/en/latest/news/2019/03/croatia-eu-complicit-in-violenc e-and-abuse-by-police-against-refugees-and-migrants/>; Marc Santora & Benjamin Novak, "Hungary's Migrant Abuse Is 'Matter of Urgency,' European Agency Finds" *The New York Times* (21 May 2019), online: <https://www.nytimes.com/2019/05/21/world/europe/hungary-migrant-abuse-report.html>.

[47] Human trafficking networks operating in Mexico (e.g. the "Meléndez gang") are known to target migrants crossing rural areas near Puebla, Tlaxcala, Oaxaca, and Mexico City. See Municipions, "Atrapan a Jefe de Banda de Trata de Personas en Puebla y Tlaxcala" *Municipios* (27 March 2020), online: <https://municipiospuebla.mx/nota/2019-02-13/izucar-de-matamoros/atrapan-jefe-de-banda-de-trata-de-personas-en-puebla-y-tlaxcala>; UN Economic Commission for Latin America and the Caribbean (CEPAL) & Centro Latinoamericano y Caribeño de Demografía (CELADE), "Panorama de la Migración Internacional en México y Centroamérica" report by Alejandro I Canales Cerón & Martha Luz Rojas Wiesner (Santiago: CEPAL & CLADE, June 2018) (describing human trafficking of migrants in Mexico) at 51, online (pdf): *CEPAL* <https://repositorio.cepal.org/bitstream/handle/11362/43697/1/S1800554_es.pdf>.

Prostitution and recruitment of Venezuelan refugees by armed groups ("guerrillas") in the Colombian border are increasingly common (Cúcuta and Arauca).[48] Sexual violence against migrants is present in South Africa[49] and Europe as well.[50] This, in turn, is making migrant smuggling one of the world's most profitable criminal enterprises[51] (Video 1), costing thousands of lives (Figure 3), while forcing migrants to take the most unthinkable risks (Image 1).

B. Emerging Risks: Being a Refugee

Mischaracterizations[52] and rejection[53] of refugees turn the political discourse into increasingly 'indefensible'[54] immigration laws fostering social exclusion, violence, and indifference. I define

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[48] See NPR, "Fleeing Crisis, Some Venezuelans Are Recruited by Rebel Forces Fighting in Colombia" *NPR* (18 January 2019) (reporting recruitment of migrants by illegal armed groups in Colombia), online: <https://www.npr.org/2019/01/18/685850399/fleeing-crisis-some-venezuelans-are-recruited-by-rebel-forces-fighting-in-colomb>.

[49] See Theresa Alfaro-Velcamp & Robert H McLaughlin, "Rape without Remedy: Congolese Refugees in South Africa" (2019) 6:1 J Cogent Med 1 at 10, 15 (describing cases of rape of Congolese refugees in South Africa).

[50] See World Health Organization (WHO), *Sexual Violence against Refugee Women on the Move and within Europe*, report by Gianna Roberts, Gunta Lazdane & Dinesh Sethi (Geneva: WHO, 2016) at 26-28.

[51] In 2017, the smuggling of migrants from El Salvador, Honduras, and Guatemala to the United States generated up to 2.3 billion (USD). Rand Corporation-Homeland Security Operational Analysis, "Human Smuggling and Associated Revenues" (Santa Monica, California: Rand Corporation, 2019) at 15 (xv), online: *RAND* <https://www.rand.org/pubs/researchreports/RR2852.html>. In 2016, migrant smuggling reached 2.5 million people generating between 5.5 and 7 billion (USD). See UN Office on Drugs and Crime (UNODC), *Global Study on Smuggling of Migrants 2018* (New York: UNODC, June 2018) at 9, online (pdf): *UNODC* <https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf>.

[52] See Helen Davidson, "Australia's Politicians Have Promoted Xenophobia: UN Expert" *The Guardian* (18 November 2016), online: <https://www.theguardian.com/australia-news/2016/nov/18/australias-immigration-policies-have-promoted-xenophobia-un-expert>; see also Jeffrey Gettleman, "Kenya Plans to Expel Somali Refugees from Dadaab Camp, Citing Terror Threat" *The New York Times* (11 May 2016), online: <https://www.nytimes.com/2016/05/12/world/africa/kenya-citing-terror-threat-plans-to-expel-somali-refugees.html>; Jill Goldenziel, "Five Myths About Refugees and Migrants" *Washington Post* (15 September 2015), online: <https://www.washingtonpost.com/opinions/five-myths-about-refugees/2015/09/25/ecd8a9d6-6149-11e5-b38e-06883aacba64story.htm>; DW, "Arab Monarchies Turn Down Syrian Refugees over Security Threat" *DW* (25 January 2016), online: <http://www.dw.com/en/arab-monarchies-turn-down-syrian-refugees-over-security-threat/a-19002873>.

[53] See Filippo Grandi, "Refugees Deserve Action and Investment, Not Indifference and Cruelty" Intervention of the UN High Commissioner for Refugees at the 2016 Humanitarian World Forum (Istanbul: UN Secretary-General, 2016), online: *WEFORUM* <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-in difference-and-cruelty/>; Cameron Stewart & Rachel Baxendale, "You're Worse than Me, Trump Told Turnbull" *The Australian* (4 August 2017), online: <http://www.theaustralian.com.au/national-affairs/immigration/youre-worse-than-me-on-refugees-trump-told-turnbull/news-story/bfbad7417c5f0a882994f42df1891c28>; Ashley Fantz & Ben Brumfield, "More than Half of the Nation's Governors Say Syrian Refugees Are Not Welcome" *CNN* (19 November 2015), online: <http://www.cnn.com/2015/11/16/world/parisattacks-syrian-refugees-backlash/>.

[54] There is a legal connection between immigration powers and penal jurisdiction that nation-states use to control "illegal immigration." As Professor Kaufman notes, the resulting lines of constitutional deference granted by the judiciary with respect to the federal government's constitutional prerogatives have enabled the government to establish a gradually segregated imprisonment system of foreign citizens (mostly Mexicans) in the United States in spite of valid Equal-Protection Clause claims ("unequal subjected category but with equal rights"). See Emma Kaufman,

emerging risks as those intrinsically associated with the legal status and human condition of being a refugee in the 21st century. Emerging risks are one of the most palpable expressions of the ***Final Refugee Paradigm's*** effects of dehumanization, criminalisation, and exclusion.

1. Status-Related Risks: Intent, Prosecution, Criminalisation

Status-related risks refer to risks arising out of the migrant's expressed intent ("to become a refugee") or immigration status ("as refugee") leading to prosecutorial treatment (beginning with confinement or detention). Unlike the ***Postwar Refugee Paradigm*** promoting human rights and international legal protection of refugees as victims of persecution, the ***Modern Refugee Paradigm*** promotes the prosecution (and the ***Final Refugee Paradigm*** the criminalisation) of the status of refugee ("intent").

In effect, a prosecutorial proceeding takes place (detention beyond administrative purpose) in the host country, not for a crime the migrant did commit, but for the migrant's intent to become a refugee or asylum seeker.

As illustrated in chapter 2, some countries are criminalizing the very presence of migrants in their territory or the request of asylum as an "illegal act" often punished by detention, summary deportation, expulsion, or confinement. The systematic and institutionalized detention (e.g., United States, Australia, Libya, Hungary, Greece, Serbia, Croatia) of refugees and asylum seekers constitutes a palpable expression of their criminalisation.[55] This notwithstanding personal liberty is not only a constitutional but a human right protected under international law.[56]

"Segregation by Citizenship" (2019) 132:5 Harv L Rev 1380 at 1383 (analyzing constitutional lines of deference and Equal-Protection claims).

[55] See UN Human Rights Council (Working Group on Arbitrary Detention), *Revised Deliberation No 5 on Depravation of Liberty of Migrants* at paras 9, 10, 11 (7 February 2018) (stating that seeking asylum is a "universal right," for which irregular entry and stay in country "should not be treated as a criminal offence").

[56] See UDHR, *supra* note 5, art 13.

The *detention of migrants and refugees* is prevalent across the world.[57] *Detention* is one of the most archetypical *status-related risks* refugees confront. For example, although the average length of detention of migrants in Canada has decreased in previous years (from 26 days in 2014-2015 to 13 days in 2018-2019), the number of migrants detained increased 5.1% in the fiscal year 2018-2019 (8,781 migrants detained) with respect to the FY 2017-2018.[58] Still, the U.S. has built by far the world's largest detention system for migrants. With an exponential growth of twentyfold (from 1979 to 2019), this country detains nowadays annually 316,391 migrants[59] (including women and children). In 2019, moreover, following the government's crackdown order on illegal migration, Thailand detained more than 200 asylum seekers from Vietnam, Cambodia, and Pakistan (including 50 children separated from their parents).[60] There are reports of prolonged detention (for years) of Rohingya refugees in Saudi Arabia.[61] Likewise, citing "irregular migrant status," thousands of Venezuelan migrants have been denied asylum protection in Curaçao. Instead, they have been imprisoned (in "foreign barracks") while facing gross human rights violations.[62]

Some scholars have proposed the term "*crimmigration*,"[63] which refers to the promoted nexus nationalist governments are building between immigration and criminalisation of migrants in the name of security and cultural preservation of their countries. At times, it appears undistinguishable: Are governments policing (when not, militarizing) migration or is the police managing migration? Under *Australia's Migration Act*, for instance, NSW police is authorized to question (section 188)

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[57] In the United States, for example, only asylum seekers entering legally are exempted from detention ("affirmative process"). US Citizenship and Immigration Services (USCIS), *Obtaining Asylum in the United States* (2020), online: *USCIS* <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-united-states>.

[58] Canada Border Services Agency (CBSA), *Annual Detention Statistics—2012-2019* (2020), online: *CBSA* <https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html>.

[59] See Emily Kassie, "Detained: How the United States Created the Largest Immigrant Detention System in the World" *The Guardian* (September 2019), online: *MP* <https://www.themarshallproject.org/2019/09/24/detained>.

[60] Human Rights Watch, "World Report 2019" (Washington, DC: Human Rights Watch, 2020) at 579, online: *HRW* <https://www.hrw.org/world-report/2019/> ["HRW 2019"].

[61] Areeb Ullah, "Revealed: Hundreds of Rohingya Imprisoned 'Indefinitely' in Saudi Arabia" *MEE* (13 November 2018), online: <https://www.middleeasteye.net/news/revealed-hundreds-rohingya-imprisoned-indefinitely-saudi-arabia>; Saba Aziz, "'We're Broken': Rohingya on Hunger Strike in Saudi Detention" *Al Jazeera* (17 April 2019), online: <https://www.aljazeera.com/news/2019/04/broken-rohingya-detainees-hunger-strike-saudi-190417124752481.html>

[62] Amnesty International, "Venezuelans Denied Protection in Curaçao" (2018) at 11, online (pdf): *AMNESTY* <https://www.amnestyusa.org/wp-content/uploads/2018/09/AMN_18_45_rapport-Curacao.pdf>.

[63] Leanne Weber, *Policing Non-Citizens* (London: Routledge, 2013) at 3. See also Juliet P Stumpf, "Doing Time: Crimmigration Law and the Perils of Haste" (2011) 58:6 UCLA L Rev 1705 (analyzing the collateral effects of crimmigration on both the community and the non-citizen); D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) (using the term, "crimmigration crisis").

and detain (section 189) non-citizens should these not be legally (using one type of visa) in Australia (*Powers and Responsibilities Act of 2002*). Police powers in Australia over non-citizens include neighboring lockdowns and use of dogs.[64]

Another *Status-related risk* is the increasingly frequent *systematic crackdown* on refugees and asylum seekers. Police harassment and arbitrary detentions of Rohingya refugees in India[65] are forcing these refugees to leave India as they find themselves often unprotected within the so-called "*zero-line zone*" (India-Bangladesh border).[66] In Morocco, for example, the crackdown on refugees (viewed as "illegal migrants") has led to human rights violations, law enforcement abuses, and the abandonment of thousands of sub-Saharan refugees.[67]

2. Exclusion Risks: Social, Economic and Legal Exclusion

Exclusion risks refer to risks that derive directly from refugee status, which portrays migrants being socially, economically, legally, and culturally excluded in host countries. These risks are externalized through various forms of discrimination,[68] exclusion,[69] and violence.[70]

I argue that the *socioeconomic exclusion* of migrants is an *exclusion risk*. Diluted international legal protection (due to domestic regulations hindering such protection and lack of coordination on refugee reception among host countries), along with systems of reception discouraging the

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[64] *Ibid* at 27.
[65] See Ashley Starr Kinseth, "India's Rohingya Shame" *Al Jazeera* (29 January 2019), online: <https://www.aljazeera.com/indepth/>.
[66] Phelim Kine, "India's Ominous Threat to Rohingya Muslim Refugees" *Asia Times* (17 January 2020), online: <https://asiatimes.com/2020/01/indias-ominous-threat-to-rohingya-muslim-refugees/>.
[67] Amnesty International, "Morocco: Relentless Crackdown on Thousands of sub-Saharan Migrants and Refugees Is Unlawful" *AI News* (7 September 2018), online: <https://www.amnesty.org/en/latest/news/2018/09/morocco-relentless-crackdown-on-thousands-of-sub-saharan-migrants-and-refugees-is-unlawful/>.
[68] Discrimination takes place both during their journey for safety and after protection is granted. See e.g. Alfredo Corchado, "Central American Migrants Face Grueling Journey North" *Dallas Morning News* (2014), online: <http://res.dallasnews.com/interactives/migrantroute/>. See also Mohammed Sabour, "The Socio-Cultural Exclusion and Self-Exclusion of Foreigners in Finland: The Case of Joensuu" in Paul Littlewood et al, eds, *Social Exclusion in Europe: Problems and Paradigms* (London: Routledge, 2017) at 219.
[69] See e.g. Ignacio Correa-Velez, Ramon Spaaj & Susan Upham, ""We Are Here to Claim Better Services than Any Other:' Social Exclusion among Men from Refugee Backgrounds in Urban and Regional Australia" (2012) 26:2 IJRS at 163 at 166-186 (proposing a different approach on resettlement of refugees based on a social-exclusion study).
[70] See e.g. HRW 2019, *supra* note 60.

assimilation of migrants while precluding them from getting access to public education, employment or social benefits, lead to *socioeconomic exclusion*. Notwithstanding the progress made toward assimilation of refugees in some countries (e.g., Jordan's Migration Compact,[71] Canada's sponsor programs on refugees,[72] Colombia's work permits[73] for Venezuelan refugees), the trend of *socioeconomic exclusion* of refugees and asylees is pervasive. In Greece, for instance, less than 15% of migrant children hosted in the islands of Samos and Lesvos as only 1 in 2 on mainland have access to education.[74]

In South Korea, a petition signed by more than 700,000 citizens requested the government to review or eliminate the legal protection (상세보기 or "Visa-Free Policy") accorded to Yemeni refugees[75] hosted in Jeju island—this notwithstanding the Republic of Korea is a party to the *Refugee Convention* and *Asylum Protocol* since 1992.[76] Among others, the petition states that:

> … there are doubts that the refugees who came to receive the application may be truly refugees, and there are doubts as to the reason why they came to distant Korea, not to nearby Europe. Europe and other developed countries have historical precedents to apologize for the refugee issue. I hope you will think again whether there is a reason for Korea to accept refugees. I ask that you first take care of the

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[71] In 2018, the Government of Jordan approved the Global Migration Pact. The government issued up to 160,000 work permits for Syrian refugees and provided access to public education. See HRW 2019, *supra* note 60 at 323.

[72] Canada's refugee program provides settling and resettling support, which includes language training, assistance for education, and labour-market insertion. See Government of Canada (IRCC Evaluation Division), *Evaluation of the Settlement Program* (Ottawa: IRCC, November 2017) at 2, online (pdf): *GOVERNMENT OF CANADA* <https://www.canada.ca/content/dam/ircc/documents/pdf/english/evaluation/execsum-e2-2016-settlement-en.pdf>; see also Canada Immigration and Refugee Services, *How Canada's Refugee System Works* (27 November 2019), online: *GOVERNMENT OF CANADA* <https://www.canada.ca/en/immigration-refugees-citizenship/ser vices/refu gees/canada-role.html>.

[73] See Reuters, "Colombia Offers Work Permits to Hundreds of Thousands of Venezuelan Migrants" *Reuters* (29 January 2020), online: <https://www.reuters.com/article/us-venezuela-politics-colombia/colombia-offers-work-perm its-to-hundreds-of-thousands-of-venezuelan-migrants-idUSKBN1ZS2YE>. Notwithstanding public policy efforts on employment protection, both COVID-19's national lockdown and lack of economic resources to materialize labour-Market opportunities are driving away Venezuelans. See Natalie Gallón, "Refugiados Venezolanos Regresan a Casa en Medio de la Pandemia de Coronavirus" *CNN en Español* (7 April 2020), online: <https://cnnespanol.cnn.com/2020/04/07/refugiados-venezolanos-regresan-a-casa-en-medio-de-la-pandemia-de-coronavirus/>.

[74] HRW 2019, *supra* note 60 at 231.

[75] See 청원내 ["Petition"], 제주도 불법 난민 신청 문제에 따른 난민법, 무사증 입국, 난민신청허가 폐지/개헌 청원합니다 ["Petition for Abolition-revision of the Refugee Act, Visa-Free Entry, and Refugee Application Permission Due to the Illegal Refugee Application Issue in Jeju Island"] (2018) (providing petition contents followed by response from the Minister of Justice of Korea, Park Sang-Ki), online: *PRESIDENT OF KOREA* <https://www1.president.go.kr/petitions/269548?navigation=best-petitions> [petition contents under the title "청원내용"] [accessed 22 June 2020; 12:55 PM-ET].

[76] UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (2020), online: *UNHCR* <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> [accessed 10 June 2020, 11:10 AM-ET].

> safety and security of your own citizens and other social problems other than illegal stays and abolish or revise the overall system and reviewing criteria for permitting the entry of refugees."[77]

In his response, the Minister of Justice of Korea, Park Sang-Ki, addressed some critical concerns regarding the arrival and settlement of Yemeni refugees in Korea:

> "[Question by Jung Hye-Seung, Media Secretary of Cheong Wa Dae's (Korean Media Outlet)]: There is also concern that even after being recognized as a refugee under rigorous screening, it will be a problem while not adapting to our society with a heterogeneous culture… "[Answer] Minister of Justice Park Sang-Ki: If recognized as a refugee, we will make social integration education on our legal order and culture mandatory and introduce a mentoring system to support settlement and management… We will protect the basic human rights of refugees, but if they act to damage or violate our legal order, culture, and values, we will consider ways to take various measures such as cancellation or withdrawal of refugee status and disadvantage in staying."[78]

As to the abolition of refugee protection in Korea, the Minister responded that:

> "Given the problems of national interests such as the international status of Korea, the weakening of the international community's right to speak out, and international isolation when leaving the Convention, it is practically difficult to withdraw from the Refugee Convention or abolish the Refugee Act… Eliminating the domestic refugee application process is the same as leaving the refugee agreement. As a member of the international community, Korea is also in a position to fulfill its responsibility to protect refugees. The Korean Government is struggling to come up with ways to reduce concerns among our people while fulfilling our international responsibilities."[79]

The challenges the Korean Government faces are certainly enlightening. As noted, the protection of refugees cannot be fully understood under the exclusive purview of law. It is a far more complex issue that requires a multidimensional perspective in a global context. Still, governments' rhetoric on human rights protection and the emerging trend toward the disarticulation, abandonment and removal of refugee protection are becoming, in practice, indisputable. In the end, of the 480 applications filed by Yemeni nationals in Korea in 2018, the government only granted 2.[80] What is more, of the total of 6,015 asylum applications filed by nationals from different countries in South Korea in 2018, the government only granted 91.[81] This trend is found in Hungary as well granting in the same year asylum protection to only 54 claimants out of the 3,119 filed

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[77] See 청원내 ["Petition"], *supra* note 75 [under the rubric "청원내용," last paragraph].

[78] *Ibid* [under the title "답변원고" or "answer manuscript"].

[79] *Ibid.*

[80] Choe Sang-Hun, "Just 2 of More than 480 Yemenis Receive Refugee Status in South Korea" *The New York Times* (14 December 2018), online: <https://www.nytimes.com/2018/12/14/world/asia/yemen-south-korea-refugees.html>.

[81] *Ibid*.

applications.[82] Likewise, Japan, signatory of the *Refugee Convention* and the *Asylum Protocol*, did only accept 7 asylum applications from Syrian nationals between 2011 and 2016.[83] Data show that the rejection of Syrian refugees in Japan is preceded by negative public perception.[84] And in Turkey, the lack of papers of Syrian refugees ("mülteci kayıt kartları," or refugees registration cards) precludes their mobility and ability to find jobs and integrate into the country's labour market—which further leads to their socioeconomic exclusion across the country.[85]

Another *exclusion risk* is *xenophobia*. Though xenophobia has been present through history and across different conflicts and migration waves, it is worth noting its ubiquitous presence as social exclusion risk that 21st-century refugees still encounter. In South Africa, for instance, exclusion of refugees has led to attacks and violent expressions of *xenophobia*;[86] a trend that can be found in Chile,[87] Peru,[88] Panama,[89] Kenya,[90] Hungary,[91] Australia,[92] Germany,[93] and the United States.[94]

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[82] *Ibid* at 232.
[83] See Atsushi Yamagata, "Conflicting Japanese Responses to the Syrian Refugee Crisis" (2017) 15:24 The Asia-Pacific J 3 at 4.
[84] *Ibid* at 6.
[85] See Kırkayak Kültür, "The DOM The "Other" Asylum Seekers from Syria: Discrimination, Isolation and Social Exclusion" by Kermal Viral Tarlen et al (2019) at 29 (describing living conditions and exclusion of Syrian refugees in Turkey, Lebanon, and Jordan), online (pdf): *STGM* <http://panel.stgm.org.tr/vera/app/var/files/t/h/the-dom-the-other-asylum-seekers-from-syria-report.pdf>.
[86] See Pumla Rulashe, "Refugees Affected by Xenophobic Attacks in South Africa in Need of Urgent Support" *UNHCR News* (14 May 2019) (describing episodes of violence and xenophobia against refugees in Durban, South Africa), online: <https://www.unhcr.org/afr/news/stories/2019/5/5cda7da04/refugees-affected-by-xenophobic-attacks-in-south-africa-in-need-of-urgent.html>.
[87] See Megan Janetsky, "Venezuelans Face New Barriers, Xenophobia across South America" *Al Jazeera* (14 August 2019) (describing xenophobic attacks against Venezuelan refugees in Chile and Peru), online: <https://www.aljazeera.com/indepth/features/venezuelans-face-barriers-xenophobia-south-america-190809183548040.html>.
[88] *Ibid.*
[89] Andrés Castellano, "Panamanian Xenophobia against Venezuelans Intensifies" *Panama Today* (30 August 2017), online: <https://www.panamatoday.com/panama/ panamanian-xenophobia-against-venezuelans-intensifies-5084>.
[90] See Sarah Deardorff Miller, "Xenophobia toward Refugees and Other Forced Migrants" World Refugee Council Research Paper No 5 (September 2018) at 4 (describing government policies inspired on ethnocentrism and nationalism in Hungary and Australia as well as xenophobic attacks against Somali refugees in Nairobi and Syrian asylum seekers in Budapest), online: *RELIEFWEB* <https://reliefweb.int/sites/reliefweb.int/files/ resources/WRC%20Research%20Paper%20no.5.pdf>.
[91] *Ibid*.
[92] *Ibid*.
[93] See John Borneman & Parvis Ghassem-Fachandi, "The Concept of *Stimmung*: From Indifference to Xenophobia in Germany's Refugee Crisis" (2017) 7:3 HAU J of Ethnographic Theory 105 at 107, 123 (providing a scientific description based on anthropological and cross-cultural references explaining the notion of "*Stimmung*" as a phenomenological form of *collective perception* or "national mood" toward refugees in Germany).
[94] See Michaela Hynie, "Refugee Integration: Research and Policy" (2018) 24:3 J of Peace Psych 265 at 267 (analyzing critical relations on perception of refugees as "real threats").

One of the most palpable and endemic *exclusion risks* is *abandonment*. Though reports[95] of refugees left at their fate during the COVID-19 pandemic have exposed the state of indifference toward their safety and well-being, their abandonment across the world began earlier. I describe the abandonment of refugees and asylum seekers as the final acquiesce and archetypical *exclusion risk* of the ***Final Refugee Paradigm***. I classify the gradual abandonment of refugees and asylum seekers in three different sequences*: pre-COVID-19*, *COVID-19 lockdown*, and *post-COVID-19.*

The *abandonment* of refugees prior the emergence of the COVID-19 has been evident in the last years and across the planet. This includes: Central American asylum seekers abandoned in the streets of Mexico at the mercy of drug cartels and human traffickers following their temporary expulsion from the United States where their claims are pending,[96] along with their removal by force from Mexico to Guatemala before they can even file protection claims in Mexico;[97] Syrian refugees summarily deported from Turkey to Syria;[98] Eritrean refugees facing a rather inhumane choice between indefinite imprisonment in Israel or deportation to Eritrea ("voluntary return order");[99] Rohingya refugees deported to Myanmar after years of imprisonment in India;[100]

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[95] See UN, "Amid COVID-19 Pandemic, Thousands Strained in Bay of Bengal 'Unable to Come Ashore'" *UN News* (6 May 2020), online: <https://news.un.org/en/story/2020/05/1063402>; Ben Doherty, Josh Taylor & Paul Karp, "Left with Nothing: Australia's Migrant Workforce Face Destitution Without Coronavirus Safety Net" *The Guardian* (1 April 2020), online: <https://www.theguardian.com/australia-news/2020/apr/01/left-with-nothing-australias-migrant-workforce-face-destitution-without-coronavirus-safety-net>.

[96] See Nicola Narea, "The Abandoned Asylum Seekers on the US-Mexican Border" *Vox* (20 December 2019), online: <https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez>; see also US Department of Homeland Security (DHS), Memorandum 20528: *Policy Guidance for the Implementation of the Migrant Protocols* (25 January 2019), online (pdf): *DHS* <https:/www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf>.

[97] See Appendix, Chapter 2, Video 1.

[98] See Vivian Yee & Hwaida Saad, "Syrian Children Freeze to Death. Bombs Rain Down. And 'Nobody Cares'" *The New York Times* (26 February 2020), online: <https://www.nytimes.com/2020/02/26/world/middleeast/syria-idlib-refugees.html>; Joseph Hincks, "Syrian Refugees Fleeing Assad's Onslaught in Idlib Have Nowhere to Hide" *Time* (25 February 2020), online: <https://time.com/5790278/syria-idlib-humanitarian-catastrophe-assad/>.

[99] See Al Jazeera, "Deportation or Prison: Israel's African Asylum Seekers" *Al Jazeera* (3 March 2018), online: <https://www.aljazeera.com/programmes/talktojazeera/inthefield/2018/03/deportation-prison-israel-african-asylum-seekers-180302143018483.html>; Yonah Jeremy Bob, "Lower Court: Eritrean Asylum Seekers Can Be Deported to Country of Origin" *The Jerusalem Post* (15 August 2018), online: <https://www.jpost.com/Israel-News/Lower-court-Eritrean-asylum-seekers-can-be-deported-to-country-of-origin-564916>.

[100] See Human Rights Watch, "India: 7 Rohingya Deported to Myanmar" *HRW News* (4 October 2018), online: <https://www.hrw.org/news/2018/10/04/india-7-rohingya-deported-myanmar>.

Venezuelan refugees living in abandoned buildings without electricity, water, and food in Brazil,[101] or left on their own after crossing Los Andes Mountains to find themselves banned and abandoned in Peru;[102] or the hundreds of Salvadoran asylum seekers who, after being summarily deported from the United States to El Salvador, end up being killed by the very same criminal gangs that forced them to seek protection abroad in the first place.[103]

This is, in a nutshell, the ***Final Refugee Paradigm in motion***. Examples of abandonment of migrants and refugees are everywhere and can be found every day. In truth, however, notwithstanding previously analyzed national security concerns and legitimate sovereignty arguments, there are no laws, international or domestic, that can justify the moral, social, and legal abandonment of migrants in the 21st century. It is not within the law's original purpose to punish victims of persecution with institutional forms of persecution, prosecution and indifference. The abandonment of refugees violates core international moral-legal values, including, human dignity.

A yet more characteristic expression of abandonment of refugees and asylum seekers occurs during the national lockdowns arising out of the COVID-19 pandemic. As these lines are being written, there is no confirmed cure for the virus. What is more, as of September 30, 2020, the virus has infected more than 30 million and killed 1 million people across the planet.[104] The number of causalities and its appearance in a foreign country (Wuhan, China)[105] as well as the nature, transmissibility, and global reach of the virus[106] led governments worldwide to stop immigration—

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[101] Doctors Without Borders, "Displaced Venezuelans Struggle to Survive in Northern Brazil" (New York: Doctors Without Borders, August 2019), online: *DOCTORS WITHOUT BORDERS* <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/displaced-venezuelans-struggle-survive-northern-brazil>.

[102] See Amnesty International, "In Search of Safety: Peru Turns Its Back on People Fleeing Venezuela" (Washington, DC: Amnesty International, February 2020) at 15.

[103] Human Rights Watch, "Deported to Danger: United States Deportation Polices Expose Salvadorans to Death and Abuse" (Washington, DC: Human Rights Watch, February 2020) (describing human rights violations in El Salvador, gangs' violence, abductions and deported asylum-claimants killings), online (pdf): *HRW* <https://www.hrw.org/sites/default/files/reportpdf/elsalvador0220_web_0.pdf>.

[104] Johns Hopkins University, "COVID 19: Dashboard by the Center for Systems Science and Engineering (CSSE)" (2020), online: *JOHNS HOPKINS* <https://coronavirus.jhu.edu/map.html> [accessed 30 September 2020, 4:40 PM-ET].

[105] See World Health Organization (WHO), *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, Visit 16-24, February 2020 (Geneva: WHO, March 2020) at 4-5 (describing the origin of the outbreak), online (pdf): *WHO* <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.

[106] World Health Organization (WHO), *Coronavirus Disease 2019 (COVID-2019)*, Situation Report No 66 (Geneva: WHO, March 2020) at 2, online (pdf): *WHO* <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200326-sitrep-66-covid-19.pdf?sfvrsn=9e5b8b48_2>.

including refugee and asylum applications, along with bans on migrant workers (e.g., Thailand's ban on neighboring migrant workers, Bangladesh's ban on new refugees in Cox's Bazar refugee camps)[107]—and substantially reduce the movement of people across borders.[108] Although most governments issued public health measures to contain the spread of the virus within their population, very few (national, regional and local governments, e.g., Italy, Ontario, New York, City of Chicago)[109] included measures to protect refugee and asylum-seekers populations. On the contrary, some countries started voluntary return programs and even mandatory expulsion of newcomers. For example, due to the COVID-19's national lockdown and the lack of public economic resources, hundreds of Venezuelan refugees in Colombia are returning to their home country.[110] In the U.S., moreover, the Director of the Centre of Disease Control (not the immigration authorities) ordered the temporary yet summary expulsion of non-citizens ("as soon

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[107] Bangkok Post, "Migrants Let through 'Shut' Checkpoints" *Bangkok Post* (24 March 2020), online: <https://www.bangkokpost.com/thailand/general/1884830/migrants-let-through-shut-checkpoints>; Humayun Kabir Bhuiyan, "Coronavirus: Critical Services Only in Rohingya Camps Since Wednesday" *Dhaka Tribune* (24 March 2020), online: <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2020/03/24/all-activities-to-be-suspended-at-cox-s-bazar-rohingya-camps-from-wednesday>.

[108] See e.g. US President Donald J Trump, Proclamation: *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus* (31 January 2020), online: *THE WHITE HOUSE* <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>; see also Shelby Thevenot & Kareem El-Assal, "New Canadian Immigration Instructions During Coronavirus Pandemic" *CIC News* (16 March 2020), online: <https://www.cicnews.com/2020/03/new-canadian-immigration-instructions-during-coronavirus-pandemic-0313909.html#gs.7z5tik>; UN, "COVID-19: Agencies Temporarily Suspend Refugee Resettlement Travel" *UN News* (17 March 2020), online: <https://news.un.org/en/story/2020/03/1059602>.

[109] The Ministry of Interior of Italy ordered Migrant Repatriation Centres throughout the country (CPRs) to regularly monitor the health of migrants. In Canada, the Government of Ontario expanded its provincial health care coverage for uninsured people needing COVID-19 medical services. In the US, the Government of New York opened testing facilities for migrant communities. And the mayor of the City of Chicago issued an executive order providing healthcare services to immigrants, refugees, and undocumented migrants to prevent the spread of the virus within the city. See Associazione per gli Studi Giuridici sull'Immigrazione, "ASGI Chiede alle ASL di Verificare il Respetto del Diritto alla Salute dei Migranti nei CPR" *ASGI Newsletter* (2 April 2020), online: <https://www.asgi.it/ allontamento-espulsione/cpr-detenzione-migranti-diritto-salute/>; see also Government of Ontario (Ministry of Health), "Ontario Expands Coverage for Care: Enhanced Health Care Coverage to Support Efforts to Contain COVID-19" *Ontario News* (20 March 2020), online: <https://news.ontario.ca/mohltc/en/2020/03/ontario-expands-coverage-for-care.html>; Governor of New York, "Pandemic, Governor Cuomo Announces Five New COVID-19 Testing Facilities in Minority Communities Downstate" (3 April 2020), online: *NY GOVERNOR* <https://www.governor.ny.gov/news/ amid-ongoing-covid-19-pandemic-governor-cuomo-announces-five-new-covid-19-testing-facilities> [address]; City of Chicago (Office of the Mayor), *Executive Order to Protect Immigrant and Refugee Communities During COVID-19* (7 April 2020), online: *GOVERNMENT OF CHICAGO* <https://www.chicago.gov/city/en/depts/mayor/pressroom/pressreleases/2020/april/EOImmigrantRefugeeProtection.html>.

[110] Gallón, *supra* note 73.

as possible") arriving to the U.S. either through Mexico[111] or Canada.[112] As for asylum seekers, the government instructed immigration authorities to summarily expulse (administrative expulsion) asylum seekers detained near the U.S. borders without screening the migrant's health condition.[113]

Finally, the abandonment—and, for that matter, the protection—of refugees and asylum seekers in a post-COVID-19 world remains uncertain at this juncture. There are, essentially, too many uncertainties precluding the replacement of speculation by legal analysis. To begin with, the so-called "Post-COVID-19 world" will only start once either a cure is found and distributed. Yet both the growing number of causalities and the fact that some countries expect a second wave of infections while others are still in the first one precludes me from making a definitive assertion at this point as to how the world will protect refugees after the pandemic.

Still, indifference toward the safety and health of refugees and asylum seekers (including millions of children) during the global lockdown caused by the pandemic only confirm the underlying trend of the ***Final Refugee Paradigm***: abandonment. Each country faces a decision to protect the public health of its population in light of transmissibility of the virus by preventing foreign nationals from entering their territories. And whether this measure may or not be scientifically effective, there are both constitutional and international legal grounds to make such determinations.[114] This, however,

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[111] US Department of Homeland Security (DHS) & Customs and Border Protection (CBP), *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico*, 85 FR 14547 (24 March 2020) [entered into effect 20 March 2020; 11:59 PM-ET].

[112] US Department of Homeland Security (DHS), *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada*, 85 FR 16548 (24 March 2020) [entered into effect 20 March 2020; 11:59 PM-ET].

[113] *Ibid.*

[114] Aside from *sovereignty principle* in international law analyzed in Chapter 1, most countries have set forth a legal and constitutional framework enabling their authorities to restrict the entry of foreign nationals when deemed necessary to protect public health. For instance, Canada's national security law on public health protection confers immigration powers over persons and property. *Canada Health Protection and Promotion Act*, RSO 1990, c H-7, s 21(4) [last amended 2020, c 13, Sched 3, s 4]; *Canada Quarantine Act*, SC 2005, c 20, s 58 [last amended 17 March 2020]; Canada Governor in Council, *Order: Minimizing the Risk of Exposure to COVID-19 in Canada* (26 March 2020) (prohibiting the entry into Canada from any country other than the United States). The United States has authorized since 1944 the Surgeon General to suspend ("in accordance with regulations approved by the President") the entry of persons and property by reason of "any communicable disease in a foreign country." This authority has been recently extended to the Director of the Centre for Disease Control (CDC). *United States Public Health Act of 1944*, 78th Congress, Pub L 78-410, 58 Stat 692 (signed into law 1 July 1944) [codified 42 USC § 265]; US Department of Health and Human Services (Center for Disease Control and Prevention), *Notice of order under Sections 362 and 365 of the Public Health Service Act suspending introduction of certain persons from countries where a communicable*

should not lead governments to expulse from or abandon within their territories the migrants that were already present or held in detention before the appearance of COVID-19. And it should not lead governments to forget about the health risks refugees confront no matter their location—which, incidentally, given the very nature of the disease, concerns the health of the entire world population and the ability to eradicate the virus.

Indifference, in short, is never an effective public policy. In fact, forced migration bans have proven to increase smuggling, just as indifference toward the wellbeing of migrants will increase the risk of outbreak. This, finally, should lead to a global effort to protect the most vulnerable population in the most vulnerable time. I am afraid, a different premise will be harshly judged by history and by future generations despite the circular reasons we nowadays use to justify the inhumane and increasingly uncivilized actions of civilized nations.

The final and most ambivalent exclusion risk is ***legal exclusion***. That is, the use of law not to protect but to inherently deny international legal protection through domestic regulations and policies aimed at deterring the reception of asylum seekers and the resettlement of refugees. This notwithstanding the legal recognition of social values promoting inclusion, diversity, pluralism, multiculturalism, and tolerance in these countries (e.g., freedom of expression and religion).[115]

As illustrated in Chapter 2, the reception of asylum seekers and refugees in the 21st century portray a growing trend of social, economic, legal, and cultural exclusion from potential host countries developing instead forms of *putative reception* (U.S. "Remain in Mexico Policy")[116] or *reception* outside their territories (e.g., Italy's Migration Agreement on Asylum Seekers with Libya,

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disease exists, 85 FR 17060 (26 March 2020) (prohibiting the entry of individuals other than US citizens and lawful permanent residents from Canada or Mexico).

[115] For instance, the very recognition of freedom of expression in Canada (*Charter of Rights and Freedoms*, s 2) or freedom of Speech in the United States (*US Constitution*, First Amendment) as "fundamental freedom" or "constitutional restriction" hinges on social aspirations of tolerance vis-à-vis dissimilar views of the world ("the quest of the tolerant mind"). See Lee C Bellinger, *The Tolerant Society* (New York: Oxford University Press) at Chapter 4. See also *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2; US Constitution, First Amendment (1791).

[116] See US Department of Homeland Security (DHS), *Memorandum: Policy Guidance for the Implementation of the Migrant Protocols*, Memorandum No 20528 (25 January 2019), online (pdf): *DHS* <https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf>.

Germany's migration controls as well as EU's plans on reception of migrants in North Africa, or Australia's "Pacific Solution"),[117] which systems aim to discourage asylum seekers' applications.

Legal exclusion leaves refugees facing uncertainty due to the ***legal gaps*** (regulation and policies) across domestic immigration systems impeding the effective international legal protection of refugees (e.g., endemic State practices on asylum protection in South Africa, thousands of migrants in the limbo in Mexico, deportation threats to Caribbean immigrants in United Kingdom).[118]

The realization of the ***Final Refugee Paradigm*** is defined, not by the reasons to protect migrants, but by the reasons not to protect them; that is, *misdirected legal purpose* or ***legal gap***. Such *legal gap* is attained, in part, by depriving international refugee law of its moral content; a global trend promoted through dehumanization, distrust, bias, and mischaracterizations of migrants.

II. MORAL AND LEGAL RISKS

The ***legal gap*** is defined by a diptych: moral on one side, legal on the other; yet, considered in its entirety, a moral-legal shortage. This thesis neither disputes nor promotes the connection between law and morality informing the very inception and eventual conceptualization of international refugee law. This thesis, instead, acknowledges it. As described in chapter 2, from the very first institutionally and internationally recognized refugee populations (Russian and Armenian refugees) to the utmost legal acquisition on refugee protection (*1951 Refugee Convention* and *1967*

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[117] See Governo Italiano, Ministero degli Affari Esteri e della Cooperazione Internazionale. *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all' immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana* (Roma: Governo Italiano, 2 February 2017); AFP, "Germany, Netherlands Back Niger Border Force to Counter Migration" *The Local* (1 November 2018), online: <https://www.thelocal.de/20181101/>; Delphine Nakache & Jessica Losier, "The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?" (July 2017) 35 E-Intern'l Relations, online: <https://www.e-ir.info/2017/07/25/>.

[118] See Amnesty International, "Living in Limbo: Rights of Asylum Seekers Denied" (Johannesburg: Amnesty International South Africa, 2019) at 5, online (pdf): *AMNESTY* <https://www.amnesty.org/download/Documents/AFR5309832019ENGLISH.PDF>; Alexa Liataud, "Thousands of Migrants in Tent City Limbo After Supreme Court Keeps 'Remain in Mexico' in Place" *NBC News* (12 March 2020), online: <https://www.nbcnews.com/news/latino/thousands-migrants-tent-city-limbo-after-supreme-court-keeps-remain-n1155996>; Jose Mauricio Gaona, "Amnesty for Caribbean Immigrants in Britain: A Question of Moral and Human Rights Protection" (18 April 2018), online (blog): *MCGILL NEWSROOM* <https://www.mcgill.ca/newsroom/channels/news/amnesty-caribbean-immigrants-britain-question-moral-and-human-rights-protection-286654>.

Protocol), refugee law is preceded and defined by a collective moral choice: Protecting foreign citizens from reproachable and gradually unlawful forms of persecution.

This section aims to explore the moral and legal risks arising out of the domestic disarticulation of international refugee protection (analyzed in chapter 2) and the gradual dehumanization of migrants (analyzed in chapter 3). Such exploration is required to better understand how the emergent, yet endemic trend of refugee protection (*Final Refugee Paradigm*) derives from the seemingly inconspicuous moral detachment of refugee protection. That is, a redirected misperception on the security risks countries face by hosting refugees used as the moral-legal justification to not even consider the risks migrants nowadays face.

The first inquiry proposed in this section refers to the moral content of *international refugee law*. In other words, the connection between law and morality (*moral justification*), which I argue not only precedes but inherently defines the very nature of international refugee protection. The second and final line of inquiry refers to constitutional and legal implications of losing such vital connection in order to accommodate populist mischaracterizations, public misperception, and transactional values (benefit, cost, risks)—as opposed to human rights values (human dignity)—along with some more legitimate (security, cultural identity, economic limitations, life-threatening diseases), yet not necessarily exclusive concerns (anyone not just refugees).

To begin with, the morality referred here is the one preceding the duty to protect foreign citizens facing unjustifiable forms of discrimination and persecution. Different sequences of rationalisation leading to an initially moral and eventually legal choice go from personal assessments (moral positions) and collective convictions (moral justifications) to social rejections (shared moral assertions) and legal recognitions (moral principles) that transcend to moral-legal values. I maintain that the morality that has not merely influenced the content but further determined the very existence of international refugee law (as a form of legal protection) is *collective morality*.[119]

[119] This as opposed to *individual morality*. For example, if one wishes to become Canadian citizen, one is purposefully accepting the consequences ("purposeful availment") that such citizenry imposes: Respecting the laws of Canada, irrespectively of whether one did or not participate in the making of those laws.

As Ronald Dworkin indicates, rationalisation leading to ascertain a moral value ensues from the "moral consensus" that favours or disfavours a given practice despite prejudices, moral convictions, aversions or positions.[120] It is this collective nature which gives morality a justification role so that we refrain from doing or decide what is the "right thing to do" (moral code) not only as an enforceable legal duty but intrinsically as a defensible moral duty. As such, the duty to protect foreign citizens outside their home country—and, when required, even against their own government—conveys, in my view, a *moral choice* to reject unjustifiable persecution notwithstanding such governments' constitutional powers over their own citizens.

In fact, neither the duty to protect these foreign citizens nor the unjustifiable reproach over the persecutor's conduct emerges as legal duty, right, or principle. As noted in chapter 2, the first refugees found no legal protection abroad. Instead, a gradually shared, increasingly collective, and eventually international consensus (via international conventions or *jus cogens*) depicting such persecution as unjustifiable, led to progressive forms of institutional and legal protection.

What is more, persecution was neither unlawful nor necessarily unjustifiable in the 18th or 19th centuries. Discrimination on the account of race, for instance, was practiced everywhere under a far more violent and inhumane form of subjugation: slavery. In fact, the practice of persecuting people due to their physical appearance, nationality, religious beliefs, or political opinion was known across the world.

As indicated, society made the *consensual moral-legal choice* in the 20th century to reject these forms of subjugation by protecting those fleeing the countries in which those forms take place. Aside from theoretical disquisitions on morality as foundational ground of law (e.g., pure interpretivism, hybrid interpretivism),[121] the prime connection between law and morality

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[120] In its corollary assertion on *political morality* (moral justification ensues from "rational morality"), Dworkin acknowledges the critical function of moral consensus to achieve a more compelling *moral justification*, which serves at explaining not just the reasons behind the act (decision) but also the principles on which the latter is supported. See Ronald Dworkin, "Liberty and Moralism" in David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein, eds, *Law and Morality: Readings in Legal Philosophy*, 3rd ed (Toronto: University of Toronto Press, 2007) 393 at 401.

[121] Under *Pure Interpretivism*, the normative content of law is determined only by institutional practices (actions and attitudes). *Hybrid Interpretivism*, however, considers both institutional practices and moral principles as the two lines of reference (influence) predetermining the normative content of the law—the latter, further, leads to a theoretical conceptualization of law (made of rules and principles) as an "hybrid creature" influenced by social and moral facts.

(providing prongs of rationalisation and justification) with respect to *international refugee law* is less abstract. In this sense, the moral fabric of refugee protection can be found both in its origin and in its content. First, we find the choice that some countries made in the 20th century to protect in their territories those foreign to their culture and identity, and who were not even their citizens at a time when there was no law compelling such protection. Then, we find emerging rules and principles that not only promote their protection but further preclude (restrict) those affording such protection from violating such rules and principles (e.g., non-refoulement, non-discrimination).

True, law and morality are separated entities. Legal (paying taxes) and moral duties (helping relatives) are not alike; they emerge from dissimilar prongs of analysis leading to a ubiquitous reference/difference. Namely, a *legal duty* is enforceable whereas a *moral duty* is merely, at best, socially reproachable—in this regard only and, more particularly, in view of the contended perspective of law (dimensional limitations) and its theoretical conceptualization (critical explanation), I agree with H. L. Hart. However, denying *necessary connections* between law and morality altogether as Hart suggests ("there are not necessary connections between the content of law and morality")[122] deprives law of its prime influence: *human nature*. Humans are moral beings, in that we are affected by our individual and collective moral choices, which is especially relevant in democratic systems where the rule of law develops as social institution.

Thus, unless unidimensional or bidimensional reasoning controls our understanding of the world, the decision to obey the law cannot be fully detached in all cases from its moral justification, for which, more often than not, people obey the law not just because it is the law but because by action (participation in the democratic process) or inaction (lack of interest in the democratic process) they made it the law. Further, people purposefully avail themselves to the law of a State when they decide to live or benefit from the State issuing that law.

See Joseph Raz, "Dworkin: A New Link in the Chain" (1986) 74(3) Cal L Rev 1103. See also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 78 (rejecting Raz's conceptualization of law through rules and principles).

[122] H L A Hart, *The Concept of Law* 2nd ed (Oxford: Oxford University Press, 1994) at 268.

The *moral choice*, moreover, involves a twofold political choice: an *individual choice* expressed through every individual's vote, on the one hand, and a *collective choice* manifested through the representatives such individuals collectively elect to make the law, on the other. This explains, in part, Dworkin's progressive assimilation of *moral justification* within its theoretical proposition on *political morality*;[123] from which, a critical explanation of law develops based on *justification* and *legitimacy*. And it is in this very disquisition, in my view, where a more rational justification preceding social assertion on what the law should or not be can be found. For example, cutting taxes on the wealthy to generate employment, or imposing taxes on the most affluent members of society to eradicate poverty, are not simply cost-efficient and policy approaches but social assessments often preceded by an undeniable collective moral choice with legal effects—the latter, in fact, makes the inobservance of this *collective moral choice* not only socially or morally reproachable but further legally enforceable.

In effect, there are laws that are very much defined by their moral content (or precedent) to the extent that the connection between law and morality is not just necessary but intertwined. Take the case of "*filial support*." Generally, it seems morally reprehensible for an adult child to run an opulent and luxurious life while her parents struggle to survive in poverty. Yet for centuries, *filial support* was only a moral duty entrenched in the moral fabric of personal and family relationships. Although *filial support* statutes imposing legal duties on adult children vis-à-vis their parents and siblings (e.g., burial expenses) may be found in English law (1601),[124] such duties remain barely enforceable today despite their moral and legal acquiescence.

Unlike Hart's claim denying necessary connections between law and morality, I argue that there are necessary and precedent connections between law and morality that define and even restrict the very content and assimilation of law (making, application, interpretation). Admittedly, not all laws are defined by their *moral justification*. Some are merely procedural (electronic signature), discretional (hiring or firing public officials), or functional (imposing toll fees to use highways, not because it is inherently right or wrong but because it is necessary in order to keep the highway

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[123] Dworkin, *supra* note 121 at 401.
[124] See Ann Britton, "America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents" (1990) 26:2 Cal Western L Rev 351 at 352.

functioning). Though not all laws have a necessary connection to morality (*moral justification*), those that hold such connection are defined by it.

Another theoretical perspective on the relationship between law and morality concerns the extent of this connection. I maintain that there are laws that are fundamentally (inherently) connected to morality (*moral justification*) whereas there are others whose connection to morality is rather incidental or, in a way, subtle. Take the case of the *notice requirement* for termination of lease agreements found both in contracts law and property law, whereby the lack of notice to terminate a lease may lead to the contract's automatic renewal and, in the process, the defaulting party's liability. There is a reason (*moral justification*) explaining why this legal requirement is ubiquitous not merely among legal systems (e.g., Quebec, California, Italy, Bahrain, South Africa, Singapore, Australia, Colombia)[125] but also from a legal tradition to another (common and civil law).[126] The reason, I am afraid, does not simply hinges on the previously-cited premise "because it is the law"—particularly when the law is not enacted by the same authority or within the same legal tradition—but on a consuetudinary moral choice that has transcended to a social practice gradually acknowledged in contracts law and property law.[127]

Therefore, in many instances, people obey the law not only because it is the law, but because their choices (moral justifications and social practices) indicate their willingness to make it (or observe it as) the law. Nonetheless, there are laws which content is directly defined, affected, or preceded by a *collective and undeniably moral choice*. For instance, criminalizing *incest* is a moral choice with profound social implications (reproach) and defined legal effects (imprisonment). This too (just as *notice requirement* to terminate a lease), is a *moral choice with legal effects* present across

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[125] *Canada Civil Code of Quebec*, SQ 1991, c 64, arts 1492, 1496; *California Civil Code*, 1872, Tit 5, c 2, § 1946(1); *Codici Civile Italiano*, Regio Decreto No 262, 16 March 1942, art 1351; *Bahrain Law No 27 of 2014*, 7 August 2014, ("Property Lease Law") (entered into force 7 February 2015); *South Africa Rental Housing Act 50*, 15 December 1990, s 5(3)(n), along with *Consumer Protection Act 68*, 2008, s 14(2)(b); *Singapore Conveyancing and Law of Property Act*, Ordinance 6, 1 August 1986, c 61, s 18 [modified by *COVID-19 Temporary Measures Act of 2020*]; *Victoria Residential Tenancies Act*, Aust L 1997, s 66 [modified by *COVID-19 Emergency Measures Act*, 29 March 2020]; *Código Civil de Colombia*, Ley 153 de 1887, art 2008 [Colombia Civil Code].

[126] See *Code Civil des Français* (« Code Napoléon »), 21 March 1804, art 1737; *United Kingdom Landlord and Tenancy Act* 1954, UK Pub G A 1954, c 56, s 4.

[127] It seems right for those whose interests are attached to a relation of trust conferring the right to use, enjoy, possess, and profit from the land circumscribing their relationship, that in the event that one of the parties decides to terminate such relationship, the other will have enough time to offer his property or find another one.

different countries, legal traditions and cultures (e.g., Canada, New York, Germany, Sweden)[128] to the extent that other countries have made a different moral choice of not criminalizing *incest* (e.g., France, Portugal, Russia, China, Japan).[129]

Consequently, there are necessary and indisputable connections between law and morality that can be found through different areas of law (tax law, contracts law, property law, criminal law, constitutional law) and across different legal systems. These connections are far more crucial in human rights and refugee law because the relationship that emerges between law and morality in these areas lies in their very inception.[130] For example, the reasons to provide people with human rights even in places where constitutional rights do not apply, or the reasons to protect foreign citizens against their own governments and non-state actors.

Refugee law is therefore defined by its moral content. *International refugee law*, in particular, is preceded and informed by a *law*/*morality* connection (justification) entrenched in the realization of the ***Postwar Refugee Paradigm*** when States began institutionalizing the protection of foreign citizens in their territories (despite cultural, religious or racial differences) due to reprehensible forms of persecution opposing to the very values those countries claimed to protect.

The moral content of refugee law is being threaten by the realization of *the* ***Final Refugee Paradigm*** as this one aims to break such vital connection through distrust, dehumanization, mischaracterization, and abandonment of refugee populations. In a sense, *international refugee law* is as moral as law can be—that is, a *collective moral choice* (protecting foreign citizens fleeing persecution and conflict in their home countries) *with legal effects* (rights and duties in host and temporary countries). Under *international refugee law*, moreover, host countries are expected to set aside cultural, racial, religious, economic, and social differences between their own citizens

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[128] See *Canada Criminal Code*, RSC 1985, c C-46, s 155(1); *New York Penal Law*, Part III, Tit O, § 255(55); *Strafgesetzbuch–StGB ("German Criminal Code")*, 13 November 1998, F LG I, p 3322, s 173 [last amended *Act of 19 June 2019*]; *Brottsbalken ("Sweden Criminal Code")*, SFS 1962, Kap 6, s 7.

[129] See Stuart P Green, "Incest" in Larry Alexander & Kimberly Kessler Ferzan, eds, *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Cham, Switzerland: Palgrave, 2019) 337 at 342.

[130] Form its inception, international refugee law presupposes the promotion of social and moral values (human dignity, liberty, equality, civility, diversity) unjustifiably threaten by State or non-state actors. There is an inherent moral-legal duty built on those values which eventually compels host countries to protect foreign citizens.

and the foreign citizens they protect. What is more, prior the ***Postwar Refugee Paradigm*** of the 20th century, the protection of those fleeing persecution was not legally recognized.

Eventually, what led countries to host persecuted migrants was not, "because it was the law"—especially since at the time, in fact, there was no law for that—but the moral choice that many countries made to protect people facing certain forms of persecution (145 States parties to the *1951 Refugee Convention*, 146 States to the *1967 Asylum Protocol*, and other States granting refugee protection under international customary law).[131] The ***legal gap***, however, is not explained by simply unveiling critical connections and gradual disconnections between *law* and *morality* concerning the protection of refugees, but by visualizing (again, from a different perspective) the type of *law* and *morality* defining such connection.

A. Moral Choice: Indifference, Abandonment, Protection

Albeit identifiable from one another, *moral* and *legal risks* affecting the application and interpretation of *international refugee law* are intertwined. It has been the contention of this thesis that ***international refugee law embodies a collective moral choice with legal effects***. That is, the choice made by hundreds of countries at some point in history to institutionalize the protection of those foreign to their culture and legal duties. Such choice was preceded by a moral sense of "doing the right thing" according to those countries' increasingly shared values: the need of protecting human life, liberty, equality, and dignity of those being persecuted due to their race, nationality, religion, political opinion or membership in a particular social group.

Here, further, the decision to reject references distinguishing one human from another (race, ethnicity, religion, opinion) in order to discriminate, target or persecute people is rooted in international law (through human rights and refugee conventions) and regulated in relation to unlawful persecutors (crimes against humanity) and their victims (refugees). It follows that unless

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[131] See UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (2020), online: *UNHCR* <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-conventio n-its-1967-protocol.html> [accessed 18 June 2020; 6:45 AM-ET]; see also *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, Supreme Court of Bangladesh [2017], S Ct No 10504 (31 May 2017).

we aim to resist human progression, the fundamental agreement among States is that in event of disagreement, minimum standards of civility and human dignity apply—particularly with respect to the reception and treatment of victims (refugees and asylum seekers).

1. National Security: What, If Any, Is the Limit?

Limits to national security powers (policy, regulations, practices) can be found both in domestic and in international law. As noted in chapter 1, national security surges as a necessary and corollary expression of State sovereignty to ensure the preservation of its most vital interests. As noted, further, national security derives from the sociopolitical and legal development of nation-states' dissimilar yet interrelated sources. Namely, individual (*liberty cause*), political (*necessary cause*), institutional (*legal cause*), and social authority (*preservation cause*).

The need to protect individual interests (liberty, property, well-being) in an organized society eventually moves toward the collective need to protect society's most quintessential interests by enabling the thereby institutionalized society to function as State—including the preservation of the State authority that guarantees such organization—for which the State must make sure that when individuals surrender their free will to do what they would otherwise please, such State assumes not merely the monopole to use force but also the defence of the territory and the interests subjected to its authority.

Notwithstanding the *principle of sovereignty* finds legal acquiescence both in domestic (*national sovereignty*) and in international law (*sovereign equality*), neither sovereignty (as legal principle) nor national security (as constitutional power) is deemed to be absolute. Historical, philosophical and legal disquisitions previously related (Aristotle, Bodin, Hobbes, Rousseau, Darwin, Weber, Pufendorf, Kelsen, Vattel)[132] as well as their jurisprudential assimilation are, in my view, conclusive. In the end, national security aims to provide security for States and their populations, not to furnish States with absolute powers above and beyond other States or foreign citizens.

[132] See Chapter 1 (this thesis) at 70.

Consistency between what the law says (rules) and the justification to say it (values) is the prime limit of any legal system. For instance, if a legal system (domestic, regional, international) assimilates initially moral and eventually social values (diversity, multiculturalism, equality, liberty, human dignity) as moral-legal values, State action regulated through that system is expected to reflect those values. National security is thus an expression of States' authority (not their absolute authority). As such, national security determinations are limited by the very values that inspire and guide domestic law. Such limit, however, requires that any exception to those values be morally justified and legally consistent.

Accordingly, the *legal limit* on States national-security powers concerning the reception and treatment of refugees and asylum seekers is circumscribed, in my view, by *multidimensional deferential tests* (layers of consistency). First, there is a *legitimacy test* aimed at determining whether the acting government has the legal and constitutional authority to act in the way it did. Next, we find a *legality test* directed at establishing whether the contended action finds legal or constitutional reference within the domestic legal system. Third, *a constitutional-morality test* imposed by the very nature of the rights at stake considers (through references of proportionality and consistency) whether State action on migrants does not just reflect the law but also the values that promote or proscribe such action. This refers both to the decision of accepting or rejecting migrants and to their treatment (detention, exclusion, abandonment). Actions reflect values; State action, further, reflects legally enforceable social-moral values. Finally, there is an *international law test* oriented at determining whether the country's action find legal resort in international law in light of the population being affected (foreign citizens), the country's international commitments (consuetudinary, conventional), and the nature of the rights at stake—particularly since human rights do not require constitutional reception.

Nevertheless, the major challenge the ***Final Refugee Paradigm*** poses is the regressive disarticulation of *international refugee law* through domestic and regional law (regulations, policies, practices), which is supported by two defining yet interrelated phenomena: The *perceptional* and *the legal gap*. First, as previously described (Chapter 3), the prime challenge embedded in the *Final Refugee Paradigm* shows States using the ***perceptional gap*** (*redirected reality*) to promote a moral detachment on refugee protection (through patterns of distrust,

dehumanization, bias and discrimination), while turning immigration law (including domestic asylum and refugee law) into a national security tool to develop an increasingly more aggressive national security policy toward refugees and asylum seekers ("migrants are dangerous, too many, too different, and too expensive"). Second, as noted in this chapter, the corollary challenge arising out of the ***Final Refugee Paradigm*** shows States using the ***legal gap*** (*misdirected legal purpose*) to move away from the very values (equality, liberty, human dignity, diversity) and prongs (nondiscrimination, minority protections) that once guided their decisions (prohibiting discrimination based on religion, race, nationality, political opinion, or membership in a social group). This, in turn, enables States to detain, prosecute, reject and eventually exclude refugees and asylum seekers (due to their religious beliefs, race, country of origin, political opinion, or migratory status).

The ***legal gap*** emerges between the promoted legally protected values and the legally enforceable State action depriving migrants, refugees and asylum seekers of their liberty, equality, and human dignity (chapter 2), while diluting their international legal protection vis-à-vis protected values (diversity, multiculturalism). Hence, national security powers—including public policy and regulations driven by national security (e.g., immigration law and domestic refugee law)—are limited by the moral content of international refugee law, which as explained throughout this thesis is supported by public international law in general and international human rights law in particular. The alternative (no limit on States' national security powers over migrants), however, would cast doubt on the international legal protection of migrants and the effectiveness of international law.
True, *international refugee law* acknowledges national security as an exceptional legal limit to ascertain or deny refugee protection (*Refugee Convention*, Articles 9 and 32.2).[133] True, further, the applicability of *international law* at domestic level often requires a legal and political process of internalization that takes place either through its ratification within the domestic legal system or its enactment through domestic legislation and constitutional interpretation. Nevertheless, human rights apply when (if not, specially) constitutional rights do not. Then, basic refugee rights and principles (e.g., non-refoulement, non-discrimination, access to courts) should also apply even

[133] Refugee Convention, *supra* note 1, arts 9, 32(2).

when domestic legal systems deter or preclude such principles. Otherwise, the very existence of human rights and international refugee law would have no meaning.

Therefore, I submit that considering the conventional (treaty law) and consuetudinary (international customary law) recognition of *international refugee law* and its embedded human rights protections (conventions on various forms of discrimination) and values (human dignity), leaving the reception and treatment of such migrants to be decided under the exclusive purview of national security interests would make each country' international legal commitments, at worst, unenforceable and, at best, merely persuasive. If we accept the underlying premise behind the inapplicability of international refugee law (Chapter 2) by which States assume that national security law has no limit—that is, countries holding unlimited constitutional powers over foreign citizens within their territory—we would be depriving international law of its institutional role to hold States accountable. International law then precludes States from promoting a sort of *What-happens-in-Vegas-states-in-Vegas Policy* whereby once asylum seekers enter their territory (or extraterritorial control), their fate hinges exclusively on what domestic law provides. This further precludes nationalistic rhetoric ("our country first," "our country back," "our people only") from becoming guiding principles in *international refugee law*.

2. Refugee Protection: How Many Are Too Many?

As described in chapter 1, one of the most distinguishable depictions of the *security threat* posed by the reception of refugees and asylum seekers lies in the number of migrants in the host country. This has been, in fact, the primary feature supporting the contended ***security claim***: The reception of refugees threatens the national security interests of host countries (particularly in large numbers). As such, the idea of "too many" refugees or asylum seekers entering a host country is viewed as national security threat because the large number of migrants is thought to jeopardize the country's economic resources, culture, national identity, and security.

The ***moral claim***, however, states that host countries hold a moral-legal duty ingrained in their international legal commitments toward the protection of human rights in general and refugees in particular. The *moral claim* further acknowledges national security powers as exception, for which

unless the host country's national security is threaten directly by the migrant (not the number of migrants), such country shall provide protection according to the migrant's condition (victim of persecution and conflict) and the host country's international legal commitments. The axiological question here then is this: Could the number of migrants (refugees or asylum seekers), by itself, constitute a national security threat to a given host country? In other words, even if the migrant is proven not to be a terrorist, a criminal, a public-order or disease threat, could the migrant's physical, cultural, geographical or even economic characteristics (race, ethnicity, religion, nationality, economic resources) make the migrant (as one of the "too many migrants") unwanted, undesirable, dangerous or, simply put, unwelcome?

On the one hand, these questions may be answered positively (*under the security claim*) by indicating that the international and constitutional assertion of State sovereignty and its modern institutional acquisition (national security) convey the legal power and fundamental duty to protect State, territory, and population to the extent that international refugee law acknowledges such power as an exception to deny refugee protection.

On the other hand, these questions can be answered negatively (*under the moral claim*) by disputing the ramifications of accepting a ban on migrants based on the fact that there are more migrants sharing similar characteristics (physical, cultural, geographical, economic)—leading, incidentally, to their valuation as collective threat even though individually considered the migrant in question might not be a threat. For there, if we accept that the number of migrants entering a country may constitute a national security threat, we would be then changing not just refugee protection (individual assertion of risk) but also the distinctive protection afforded by international human rights law vis-à-vis different forms of discrimination.

In truth, however, neither the *security claim* nor the *moral claim* (as constructed) could categorically answer these questions because they are both affected by ***perceptional and legal gaps***. In fact, using the tools of rationalisation previously developed (multidimensional assertion of reality, Chapter 3), this thesis answers these questions differently: **Yes and no**.

From a multidimensional perspective, the number of refugees entering a given host country may or may not constitute a national security threat to host countries. Such an approach requires first walking through the *perceptional* and the *legal gap* to defeat the underlying premise these questions raise—that is, national security and refugee protection are competing interests, making both security and moral claims inherently exclusive. To this end, it is important to ascertain the *perceptional gap* ("too many refugees entering the country") supporting the corollary assertion ("the number of refugees possess a collective national security threat").

As explained in Chapter 3, the most pervasive effect of the *perceptional gap* lies in the sociopolitical (*misperceptions*) and legal effects (*"the fabrication of law,"* i.e., *remaking the facts to make the law*) that the redirection of reality encompasses. Accordingly, both the language used to describe migrants (Chapter 1) and the mischaracterizations often employed to deny their legal protection (Chapter 3) lead to growing misperceptions in host countries affecting the reception and treatment of migrants.

Consider, for instance, the case of Canada where ***the perceptional gap*** on the number of refugees entering the country is rather persistent. The idea of "Canada resettling more refugees than any other country in the world"[134] has led to the misperception that the country is being invaded by an "influx" of refugees.[135] This notwithstanding the annual number of immigrants in Canada has increased only 0.1% in the last 30 years (Figure 1) counting nowadays around 300,000 immigrants per year, which represents only 0.9% of Canada's population.[136] In fact, there is a 50% disparity between the actual and the perceived number of refugees coming to Canada (Figure 2). Still, even though irregular crossings of migrants into Canada decreased 50% in 2019, at least 64% of Canadians recently described those crossings as a "crisis."

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[134] BBC, "Canada Resettled More Refugees than Any Other Country in 2018" *BBC News* (19 June 2019), online: <https://www.bbc.com/news/world-us-canada-48696974>.
[135] See Justin Giovannetti, "Influx of Refugees Fleeing U.S. Is Putting Ottawa to the Test" *The Globe and Mail* (14 April 2017), online: <https://www.theglobeandmail.com/news/national/influx-of-refugees-fleeing-us-are-putting-ottawa-to-the-test/article34087595/>
[136] Angus Reid Institute, "Immigration Views: Half Back Current Targets, But Colossal Misperceptions, Pushback Over Refugees, Could Debate" (Vancouver: Angus Reid Institute, October 2019) at 3, online (pdf): *ANGUS REID* <http://angusreid.org/wp-content/uploads/2019/10/2019.10.04_Immigration-Views.pdf>.

Misperceptions on the number of refugees and asylum seekers entering host countries have triggered massive protests followed by State action diluting migrants' protection around the world (e.g., Zimbabwean refugees in South Africa, Rohingya refugees in India, Yemeni refugees in South Korea, Venezuelan refugees in Peru, Syrian refugees in Hungary, Macedonia, and Montenegro).[137] Considering, moreover, that only three countries (Turkey, Pakistan, Colombia) are currently hosting a quarter of the world's refugee population (more than 6 million, Chapter 2, Table 3), it is quite difficult to justify a claim proposing that the number of refugees entering Canada, South Korea, South Africa, India, or Hungary constitutes a national security threat to these countries, especially when that number is analyzed vis-à-vis either the size of their population or in light of their economic resources.

Such assertion uncovers not merely a *perceptional gap* but an *endemic moral gap*; unless, again, we assume that neither Turkey nor Pakistan or Colombia have national security interests deserving similar protection (culture, identity, economy, security), or that poorer countries hosting millions of refugees face no security risk whatsoever (e.g., Yemen, Sudan, Eritrea).

Therefore, neither Canada (the world's 10th largest economy with a population of 37 million known as one of the most diverse on the planet hosting around 114,000 refugees and 79,000 asylum seekers representing 0.3% and 0.2% of its population, respectively)[138] nor India (the world's 5th largest economy with a population of 1.35 million hosting around 195,000 refugees and 12,000 asylum seekers representing 0.01% and 0.0009% of its population, respectively)[139] can reasonably claim that *the number of migrants* entering their countries constitute by itself a national security threat to their economies, national identity, culture, or security.

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[137] See Sikanyiso Masaku, "How South Africa Is Denying Refugees Their Rights: What Needs to Change" *The Conversation* (12 March 2020), online: <https://theconversation.com/how-south-africa-is-denying-refugees-their-rights-what-needs-to-change-135692>; Ashley Starr Kinseth, "India's Rohingya Shame" *Al Jazeera* (29 January 2019), online: <https://www.aljazeera.com/indepth/opinion/india-rohingya-shame-190125104433377.html>; Elise Hu, "Anti-Refugee Backlash In South Korea Targets Yemenis Fleeing War And Seeking Asylum" *NPR* (4 July 2008), online: <https://www.npr.org/2018/07/04/625915526/anti-refugee-backlash-in-south-korea-targets-yemenis-fleeing-war-and-seeking-asy>; Amnesty International, "Peru: Unlawfully Turning Away Venezuelans Seeking Protection" *AI News* (4 February 2020), online: <https://www.amnesty.org/en/latest/news/2020/02/peru-rechazo-ilicito-de-personas-venezolanas-que-buscan-proteccion/>; Gallup, "Syrian Refugees Not Welcome in Eastern Europe" *Gallup News* (5 May 2017), online: <https://news.gallup.com/poll/209828/syrian-refugees-not-welcome-eastern-europe.aspx>.
[138] See Appendix, Chapter 2, Table 3.
[139] *Ibid*.

Assuming countries hold an indisputable moral and legal duty to host refugees irrespectively of each country's political, economic and social circumstances is equally unconscionable. Such assumption, in fact, leads to a different set of problems: dire humanitarian conditions, socioeconomic exclusion, violence. No country shall be forced to suddenly open its doors and take millions of refugees at once as this would affect the security of both host country and refugee populations. As illustrated in chapter 2, evidence indicate that local populations hosting large number of refugees or asylum seekers without adequate infrastructure or economic and social resources see sooner than later the effects of socioeconomic disparity and migrant exclusion, along with growing expressions of violence, hatred and xenophobia. As illustrated in chapters 1 and 2, this trend does not change when the host country is the receptor of diplomatic benefits or economic assistance (e.g., Turkey, Bangladesh, Colombia).

After all, the values that precede international human rights law and refugee law are not transactional. This means that when poor and developing countries find themselves suddenly hosting millions of refugees both the country's national security interests and the security of refugees are threatened. Thus, depending on the host country's resources and condition (economic, social), the number of migrants entering such country can jeopardize the security of the host country and the refugee population. Yet more than a *perceptional gap*, this is due to a ***legal gap*** arising out of the *lack of proportionality* (unequal share of refugees between developed, developing and poor countries) and the *pro-indiviso approach* of domestic refugee law (case-by-case assessment on refugee protection).

Although recent diplomatic efforts (*Global Compact for Migration*)[140] are, in part, oriented at filling the legal gap produced by the lack of a globally coordinated management/distribution of the refugee crisis (not fully envisioned within the *1951 Refugee Convention* and *1967 Protocol*), such legal gap is rather prevalent because it has led many countries to develop inhumane systems of reception and treatment of refugees.

[140] UN General Assembly, *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regulate Migration*, Res 72/244-72/280, A/CONF231/3 (Marrakech: 11 December 2018).

B. Legal Choice: Reception, Rejection, Criminalisation

One of the conundrums of the ***legal gap*** on national security and refugee protection lies in the fact that the apparently independent choices (moral and legal) are so entwined that it becomes pointless to differentiate one from another. On the one hand, a ***moral choice*** taken aside from any other consideration (e.g., accepting only certain refugees from certain countries or taking no refugees at all) raises immediate correlations (rights, powers, duties, effects) to even entertain such a *moral choice* as a plausible option. On the other hand, a ***legal choice*** on the reception and treatment of asylum seekers (e.g., detention, prosecution, expulsion, reception-assimilation) encompasses a basic moral assertion on the way a country treats those foreign to its legal system and culture.

Hence, I argue, legal choices on refugee protection are inexorably moral. Although it is possible to envision separate moral and legal discussions concerning refugee law or national security law, when in conflict (as it is often the case), their most justifiable resolution will hinge on its multidimensional assessment. As in a diptych (a piece of art developed on two attached panels), one may choose observing one panel without looking at the other, but this will lead one to lose perspective and one's ability to understand the content and artistic value of the piece. Like the "Wilton Diptych" (1393)[141] portraying on one panel the three saints (Saint John, Saint Edward, Saint Edmund) presenting King Richard II to the Virgin Mary and the Christ child who appear on the other panel surrounded by a court of angels. Even if one chooses to look only at the panel portraying King Richard and the saints, or at the one showing the Virgin and the child, one must look to one in relation to the other to truly understand the scene taking place.

When it comes to *international refugee law protection*, legal and moral entities and correlated choices (here represented in the panels held together through the diptych) transcending from one to another (beginning in one panel but ending in the other). In its prime conception, I conclude, refugee protection is a distinguishable achievement of proposed values made of two seemingly

[141] The Wilton Diptych is one of the most quintessential pieces of classic art found in the artwork collection of King Richard II, which is nowadays housed at the National Gallery in London. To appreciate the diptych, see Institute of Historical Research & Royal Holloway, "The Wilton Diptych" (London: IHR University of London, 2007), online: <https://archives.history.ac.uk/richardII/contact.html>.

independent yet inherently intertwined moral-legal choices. These choices are circumscribed by two defining concepts: *constitutional entanglement* (uncovering connections between law, values, principles and legal systems) and *constitutional morality* (preserving those connections).

1. Constitutional Entanglement

This thesis argues that there is a constitutional entanglement between law, values, and principles guiding the entire rationalisation process on the rights society chooses to protect, the duties society chooses to enforce, and the powers society either grants or denies. Although legal values are rooted in social practices and moral justifications, the most recurrent ones often transcend into legal principles as rules that guide not merely the making but the interpretation of law. I argue that laws, values, and principles are legally entangled.

As illustrated in Chapter 3, using legal reasoning's most frequent metaphysical reference of rationalisation (bidimensional assertion), the parties to a controversy will most likely based their pleadings, contentions or defences on competing premises (drawing on their understanding of reality, i.e., facts and issues their interpretation raise). Still, using legal reasoning's most defining conjectural reference (tridimensional assertion), judges and deciders (public officials, arbitrators, mediators, etc.) will most likely try to find critical connections between actions (regulations, policies, practices), principles (guiding their interpretation), and values (restricting such actions).

The *legal gap* here will derive not only from what the law says but fundamentally from what it does not or misses, depending on the premise such tridimensional assertion finds to be preeminent (national security law v. international refugee law) or consistent (domestic refugee law v. international refugee law) with the values and principles guiding this rationalisation process. Notwithstanding legal conformity is proven not just frequent but also necessary to objectively resolve subjective or individual conflicts, it is however rather limited when used to resolve collective or social challenges (including governments' moral-legal choices on refugee and national security protection).

Aside from legal equations of conformity (legality, constitutionality) between State action (regulations, policies, practices), values (human dignity, liberty, equality) and principles (refoulement, non-discrimination), the most difficult challenges the ***legal gap*** raise hinge on how to reconcile, for instance, the systematic detention of migrant children and families vis-à-vis the constitutional values of liberty and human dignity—especially when juxtaposed to the principles that promote State action based on the well-being of the child and the protection of family as social and legal institution.

How could a country justify the rejection of migrants based on their religious beliefs, economic resources, physical appearance or nationality and, at the same time, promote legal and social values of plurality, diversity, or multiculturalism? This becomes particularly troublesome when a country rejects not just one migrant, but thousands (if not millions) often characterized by similar circumstances. For example, how can we justify safe third country-*like* agreements promoting the *diplomatic refoulement* of asylum seekers of certain countries vis-à-vis international refugee law protections (non-refoulement principle) and human rights law commitments (*Convention Against Torture*) precluding such refoulement. Do sovereignty and national security justify such an exception? What if State action seems to conform to one body of law (immigration, national security, constitutional law) but not to the other (international law)?

This thesis has proposed a different level of rationalisation (*multidimensional assertion of reality*) capable of reaching several layers of perception and connections among laws, values and principles (coded-decoded through dimensional risks both host countries and refugees face) by looking instead at the greater picture of security from a differential/inferential perspective (quantum legal-reasoning application). To this end, I use here *quantum theory*.

Although some previous attempts to bring natural and social worlds closer (proposing various yet limited applications between quantum theory and legal theory) can be traced as far as the 60s[142]

[142] See generally Edgar Bodenheimer, "A Neglected Theory of Legal Reasoning" (1969) 21:4 J Legal Education 373.

and the 90s,[143] legal theorists are often reluctant to embrace our evolving understanding of logic in the natural world (*predictable uncertainty*) within the realms of logic in the legal world (*necessary objectivity*) due to the limited dimensions of legal reasoning and the yet-to-be-understood correlations of quantum theory (realism, indeterminacy, multidimensional relativity).

Even though logic differentials in law or science escape the purpose of this thesis, suffice it to say that the application of quantum theory to human rights and refugee law is a novel enterprise. Nevertheless, it is the contention of this thesis that the complexity of the refugee crisis—including sociopolitical and legal yet increasingly regressive responses (dehumanization, indifference, disarticulation)—requires a multidimensional and interdisciplinary approach capable of overcoming circular debates fostered by endemic, systemic, and failing legal and public-policy responses. Specifically, a multidimensional approach to break through the unidimensional (national security protection), bidimensional (either national security or refugee protection), or tridimensional layers of legal reasoning (neither national security nor refugee protection *per se* but refugee protection as long as national security allows it), leading to incomplete, often inefficient, and gradually inconsistent solutions.

As Europe and the United States have shown (Chapter 2), closing the borders to refugees and asylum seekers either through *putative reception* ("apply and leave model"), *systematic rejection* (summary deportations, asylum bans), or *diplomatic refoulement* (safe third agreements, safe zones, U-turn policies, extraterritorial controls) does not end migration. It only triggers a new set of problems (migrants smuggling, human trafficking, labour exploitation, social inequalities, violence) threatening the very legal interest such actions allegedly protect (national security).

The proposed ***quantum legal-reasoning model*** (illustration) works as follows. Under *quantum theory*, the *principle of superposition* indicates that a particle (structural entity) can be in two different places at once (Chapter 3). This principle, in my view, finds reference in law as well. For instance, *human dignity* (our structural entity) can be found in different laws protecting different

[143] See R George Wright, "Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics" (1991) 18:3 Florida State Univ'y L Rev 855 at 856 (exploring connections between quantum theory and legal theory from the perspective of feminist theory, critical legal studies, law and economics movement).

interests at once. Limiting the number of migrant workers in one sector of the economy may appear as a necessary and justifiable measure to ensure domestic population employment and, as a result, human dignity. Likewise, promoting the reception of migrant workers provides them with a much-needed source of employment and basic standard to attain human dignity.

Protecting the security (structural entity) of host countries can be as equally important as protecting the security of refugees. The need to protect one structural entity (human dignity, security) of one group over the other is more the result of legal reasoning's circumvented dimensions (as necessary reference to decide interests in conflict) requiring an objective assessment of competing interests, in which one ultimately prevails. In a bidimensional legal world, plaintiff and defendant present dissimilar assertions of reality with pleaded or contended legal effects. In a tridimensional legal world, moreover, a judge cannot grant both the defendant's claim preclusion and the plaintiff's pleaded claim over the same disputed issue or case. In a quantum world, however, a multidimensional understanding of reality (structural entity's connections) could indicate that the very "ineluctable choice" is neither ineluctable nor necessary but, in fact, countervailing.

The second layer enabling a *multidimensional assertion of reality* is accomplished through the combined rationalisation of *quantum entanglement principle* and *superposition principle*; that is, notwithstanding a particle can be in two places at once (seemingly becoming two particles of one), the two particles are further linked, connected or intertwined in such a way that what happens to one particle happens to the other, irrespective of time and space between the two.

In *human rights* and *refugee law*, this means the same structural entity (the lives of host country's citizens and the lives of foreign citizens in the host country) are connected by a far more enduring and necessary legal principle (the protection of human life) supported by a defining legal value (human dignity). Then, the corollary question is this: If we accept that the same structural entity (protection of human life at risk) can be in two (national security law and refugee law) or more places (bodies of law) at once, and that there is an intrinsic connection between such entities arising out of their common constitutional root (same particle or entity, e.g., human dignity), would depriving one group of such structural entity (migrants' security) affect the other entity (host country's security)? In *quantum theory*, the answer is yes.

Despite physics' classic assertions of reality measuring its existence through a contingent (relative) valuation of motion, time, and space (Chapter 3), quantum mechanics and its driving theoretical principles (*superposition and entanglement*) indicate that although one particle can be in two (or exponentially more) places at once, the seemingly distinctive (super-positioned) particles are intrinsically connected (entangled) in such a way that what happens to one particle (even if placed millions of years apart) will happen to the other. The application of these principles can be found and proved in the most remarkable technological applications of the 20th and 21st centuries (e.g., laser technology, atomic clocks, space travel). A multidimensional valuation of law will uncover critical connections of law, values, and principles between legal systems and bodies of law.

Then, I conclude, in a quantum world (defining reality)—and, more importantly, following the proposed quantum-legal application—the *security and human-rights risks* refugees and asylum seekers encounter in today's world become *national security risks* for the countries that deny their protection. Smuggling, for example, does not merely affect the refugee being smuggled but the host country in which smugglers operate. The first layer of risk is not knowing who is entering the country, the second layer is not controlling who enters the country, and the third layer is fostering through action or inaction this pervasive cycle of rationalisation (*criminalizing victims*). As such, a multidimensional rationalisation process on national security and refugee protection would lead to a *different security-moral claim*, in which the risks that both refugees and host country's face would be aligned not only with one to another but with reality as well: Protecting refugees, protects both human and States' security. This, in my view, could effectively redress the ***Final Refugee Paradigm***, which benefits from limited dimensional perspectives to promote the protection of domestic and constitutional rights over the protection of refugees.

2. Constitutional Morality

It is the contention of this thesis that *international refugee law* is falling into desuetude via national security and immigration law (polices, practices, regulations, agreements). The 'reform' of international legal principles at domestic level encompasses a regressive disarticulation of international refugee protection arguably justified by—in my view—a *mis-constructed security claim* ("protecting national security interests irrespectively of the security of migrants") curbed

through populist morality. This one, moreover, uses ***perceptional and legal gaps*** not only to justify the inapplicability of those principles but to modify via national security powers *international refugee law*. As a result, migrants find themselves either detained and deported from the countries they intend to seek refuge or excluded and abandoned in those that accept them.

Using a different (improved) version of the doctrinal elaboration known as ***constitutional morality*** helps elucidate and redress that trend. Under the concept of *constitutional morality* stated and unstated yet progressively internalized morality (moral principles with legal effect) preserves the constitutional system (effectiveness, consistency)[144] from popular morality often diluting (if not, denying) the most basic protections to the most vulnerable populations. From India,[145] South Africa[146] and Zimbabwe[147] to United States,[148] Portugal[149] or Argentina,[150] the philosophical and theoretical aspiration of *constitutional morality* hinges on the need to prevent interpretations of law that appear to be distant, foreign, or inconsistent with the structural design of the constitutional system, notwithstanding the interpreter's views, political inclinations or interests.

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[144] See generally Richard H Fallon Jr, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100:6 Harv L Rev 1189.

[145]Although arts 19, 25 and 26 of the Indian Constitution refer to "morality," the doctrinal assertion of "constitutional morality" in India aims to protect constitutional values and principles from popular or trendy morality. See *Naz Foundation v Gov NCT of Delhi* (2009), High Court of Delhi WP(C) No 7455/200 at para 79 (holding that public disapproval of certain sexual acts is not a valid justification for restricting fundamental rights and that, "popular morality as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong").

[146] See Max du Plessis, "Between Apology and Utopia–The Constitutional Court and Public Opinion" (2002) 18:1 South African J on Hum Rts 1.

[147] See *Banana v State*, Zimbabwe Supreme Court [2000] 4 LRC, at 646 (declaring unconstitutional the criminalisation of homosexuality in Zimbabwe, Chief Justice Anthony Gubbay stated, "I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable… the courts cannot be dictated to by public opinion").

[148] See e.g. *Lawrence v Texas*, 539 US 558 (2003) at 567 (holding unconstitutional the criminalisation of sodomy, Justice Kennedy wrote, "the issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law… our obligation is to define the liberty of all, not to mandate our own moral code").

[149] See Acórdão No 144/2004, Tribunal Constituticional du Portugal [2004], Processo No 566/2003 at para 6 (holding unconstitutional the criminalisation of prostitution in Portugal, the Court limited State legislative powers based on the moral values that support human dignity and freedom of conscience as constitutional rights).

[150] See *Morales Solá, Joaquín Miguel s/Injurias*, Corte Suprema de Justicia de la Nación, [1996] CSJN causa 9448/No M442XXXI (12 November 1996) (assessing criminal intent on public officials' publications in light of US Supreme Court's precedents on *actual malice* and Germany Constitutional Court's decisions on *proportionality*). Of particular interest, Justice Adolfo Roberto Vasquez's opinion using abstract moral principles (moral integrity and honour) to ascertain constitutional protection on freedom of the press. *Ibid* at para 11.

Such consistency, I argue, is required not only within a domestic system (laws, principles) but also between legal systems (domestic and international). The disarticulation of international refugee protection begins with a *moral detachment* separating refugee protection from its core-conceptional references (principles) that ensure its effectiveness and applicability. As method of constitutional rationalisation (interpretation), *constitutional morality* is strategically located to ensure that such vital connections are preserved. In fact, the very inception of *constitutional morality* relies in the progressive, social, and institutional acknowledgment on the universality of individual and human rights beyond political proclivities, circular propositions, and popular morality. The implausible resolution on the growing bifurcation between applying human rights differently considering cultural, multicultural, or intercultural contexts of every country yet as universal practice in all countries, deters it most effective and increasingly neglected legal attribution: human rights apply everywhere, particularly when constitutional rights do not.

The *constitutional morality* in human rights can help modulate a much-needed *flexibility* while preserving equally needed *indivisibility*. I submit it is possible to align these apparently contradicting goals (human rights apply everywhere there are humans, even though humans are not alike everywhere) provided we use the references of an unconventional rationale. That is, the integrated feature of *quantum theory* (entanglement and superposition principles defying universality and locality principles through human rights' multidimensional nature), *legal theory* (a moral reading/justification of constitutional provisions connecting law, values, principles and actions), and *constitutional morality* (as modular tool to ascertain stated and unstated yet gradually internalized moral justifications over purely temporarily or popular narratives).

By now, based on the scholarly record,[151] we must at least concede that the so-called "universality of human rights" is not truly universal (or meant to be universally thought, understood, practiced). As such, it is safe to assume that human rights do not mirror an objective (universal) truth. We know also that human rights are not meant to be viewed as subjective references because, though human suffering may be inherently (and initially) subjective, such pro-indiviso approach would preclude us from extrapolating (through legal reasoning's devices, e.g., principle, analogy, custom)

[151] See generally François Crépeau & Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge: Cambridge Scholars Publishing, 2014).

its application (subjective-objective meaning) on similar circumstances but with different people—let alone cultures. It would be tempting, moreover, to affirm that human rights respond instead to a relative dimension (valuation) of reality—one in which, cultural differences can be accommodated. However, as it is often the case with "doctrinal temptations," the thereby constructed solutions are rather temporary—and eventually part of the problem (circular solutions). For instance, I do acknowledge the scholarly contribution of Sousa to break through the universality debate,[152] in that once we change the perspective of the object in dispute (universality) from legal value to aspirational standard, more differences can be accommodated as more people (including cultures) will feel more comfortable sharing aspirations than values—or, for that matter, their legally internalized version (principles).

But there is this: if we sacrifice universality in exchange for flexibility (greater acceptance) by sharing the ontological nature of human rights (aspirations, not values, much less principles), we will end up with *soft law references* facing *hard law references* (constitutional principles) where, in practice, matters the most (domestic application). Thus, rather than gaining *universality* through a more flexible proposition, we lose *effectiveness* through a dimensional misapprehension (aspirational standards, in practice, exceptionally applied).

Instead, I argue, we are better off accepting that reality (including human rights reality) is neither subjective nor objective or relative, but multidimensional, in that the very moral and legal acquiescence of human rights is that they aim to transcend time and differences. In a sense, human rights are everywhere regardless of how our views change everywhere with respect to anyone because human rights belong to every human being irrespectively of its ontological, physical, metaphysical, cultural, political, economic, legal and constitutional reasons.

Humans have a natural (inherent) right to be ***equally different*** (same rights despite their actual and thought to be differences, e.g., language, physical appearance). Humans rights are entangled to every human being's existence before we interpret such existence through our dimensional (legal,

[152] See Boaventura de Sousa Santos, "Human Rights: A Fragile Hegemony" in François Crépeau & Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge: Cambridge Scholars Publishing, 2014) at 17 (promoting the ontological conceptualization of universality of human rights as "aspirational standards").

cultural, political, moral) understanding of the world. Still, not all human rights are meant to be universal (social and cultural resistance), for which imposing an entire catalogue of codes of conduct at once seems not only impractical but mistaken.

Human dignity, however, is the only dimension that I foresee to be eventually universal, provided that such universality is neither subjective, nor objective or relative but multidimensional (two seemingly separated entities at once, i.e., individual and collective). It follows that "universality" should be attached to human rights within its embedded aspiration: protecting humans despite humans and their differences. This, at least, until a more advanced rationalisation of humanity, humans and their rights stops deferring legal adjudication based on people's physical (race, gender, age), geographical (ethnicity, nationality), cultural (religion, language), economic (developed, developing, poor) or political labels (liberal, conservator, independent).

A "moral reading" of constitutional provisions ensures a more efficient dynamic on constitutional morality. In fact, what protects the system against the system's gaps is its constitutional design.[153] Hence, the moral values that transcend into legal principles operate as constitutional restraint precluding fashionable changes while proposing instead, if needed, hard-thought, deliberated, and conscious reflections of change (e.g., constitutional amendments).[154]

Constitutional morality promotes the protection of values and principles to safeguard their effectiveness. What, in my view, makes *constitutional morality* particularly suitable to guarantee the preservation of critical connections (law, values, principles, legal systems) is the predicament that its very development aims to avert: if law becomes a moral and constitutional detached expression of the ruling majority, such law will go from being a social institution to a political tool of oppression. By then, human rights and refugee protections will be historical references.

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[153] Ronald Dworkin's premise on "moral reading" of constitutional clauses includes, for instance, abstract moral principles ("political decency and justice") to restrain State action, while ensuring "equal concern" (moral, political) vis-à-vis those subjected to the State's authority. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996) at 389.
[154] See William D Guthrie, "Constitutional Morality" (1912) 196:681 The North Am Rev 154 at 172.

As doctrinal elaboration, *constitutional morality* plays a critical role because it operates at domestic level where international human rights law in general and international refugee law in particular are becoming less effective. Given that the ***Final Refugee Paradigm*** benefits from the deterred connection between *law* and *morality* defining the structural design of refugee protection (victims of persecution), *constitutional morality* may also play a defining role to redress the disarticulation of international refugee law at domestic (e.g., migrant children detention, refoulement) and regional levels (e.g., U-Turn and safe-third-country agreements).

CONCLUSION

The *legal gap* ensues from two events: a *misdirected legal purpose* informed by misperceptions on security neglecting the human suffering and risks migrants face, on the one hand, and the resulting inconsistencies (legal and public-policy conceptualizations) and disconnections (amid laws, values, principles and legal systems), on the other. In this context, the most effective way to assess the disarticulation of international refugee protections is by considering the reality and risks 21st-century refugees and asylum seekers encounter. Based on the patterns found across the world, the assessment of those risks is better accomplished through the proposed categorization.

Accordingly, the *security and human-rights risks* affecting the wellbeing, dignity and safety of migrants can be classified as *evolving* (encounter while becoming refugees) and *emerging risks* (encounter once refugee protection is granted or denied). Given the dangers that force migrants to leave their home countries (*causal risks*) and the human rights violations reported in their journey for safety (*transitional risks*), I conclude that becoming a refugee in the 21st century is, in itself, the greatest risk of all.

Considering, moreover, their emerging criminalisation associated to their status (*status-related risks*) as well as their socioeconomic and legal exclusion (*exclusion risks*), I conclude that the *human suffering refugees experience is a moral fact with regressive legal effects*. Despite the suffering, misperceptions, and mis-conceptualizations arising out of the *legal gap*, States tend to favour the mis-constructed security claim (protecting national security by diluting refugee protection) over the moral claim (protecting refugees). This phenomenon can be explained by two

distinctive yet inherently intertwined choices: the moral (indifference, abandonment, or protection) and the legal choice (criminalisation, rejection, or reception). The two choices combined uncover a seminal assertion: *International refugee law embodies a collective moral choice with legal effects, that is, protecting human life vis-à-vis discrimination, persecution or conflict*.

I conclude that discriminating and criminalizing forced migration is a moral-legal inconsistency. To break through limited and circular patterns of rationalisation fostering such inconsistency (providing security to host countries' citizens by denying security to migrants) a different perspective is required. Using *quantum theory* and *legal theory*, a multidimensional assertion of the thought to be ineluctable choice between national security and refugee protection shows that this choice is neither ineluctable nor factually or rationally sound.

A multidimensional approach on the *security claim* indicates that national security powers are limited by the moral content, moral-social values, and moral-legal principles imposing references of proportionality, consistency, and congruency. A multidimensional approach on the *moral claim* indicates that the number of migrants may or may not pose a national security threat to host countries depending on similarly applied references considering host countries' resources. A multidimensional and interdisciplinary approach (*quantum theory, legal theory, constitutional morality*) on the *universality of human rights* reveals that unless we aim to truthfully overcome the dimensional limitations of legal reasoning (rights that we need but cannot apply), international refugee law will become, at best, a soft law reference. *Multidimensional security* means that national security and refugee protection are not only aligned one to another but connected through moral and legal choices, including a different security claim: Protecting refugees, protects national security.

CONCLUSION

The protection of refugees under international law is vanishing. In the contended "ineluctable choice" between national security and refugee protection, national security is the chosen option. Victims, suspects, criminals; a contradicting progression showing 21st-century refugees are, for the most art, no longer welcome—which nowadays includes millions of children and women fleeing persecution and conflict around the world to face indifference, prosecution, abandonment, and different forms of exclusion in host countries.

The current rationalisation on the relationship between national security and refugee protection as either competing or complementing interests is, in itself, a misconstruction. In the end, both premises place national security above any other interest (human rights and refugee protections). The difference between the two, however, is that the competing interests premise leads to *systematic rejection* of refugees using domestic law (summary deportations, asylum bans, systematic detention) to deter the international legal protection of migrants while the complementing interests premise develops *diplomatic rejection* mechanisms (extraterritorial migration controls, safe zones, U-Turn and Safe-third-country-*like* agreements) to evade international legal commitments.

After investigating the facts, the reasons, and the references through which facts and reasons interrelate, I conclude that neither law nor morality or reality justify the discrimination, criminalisation, exclusion, rejection, and abandonment of refugees and asylum seekers in the 21st century. This includes their *residual* (refugees) and *putative reception* (asylum seekers) as well as their inhumane treatment—this one considering the risks, cruelty, and indifference that these migrants nowadays encounter. I conclude, moreover, this trend can and must be redressed.

A substantive (the law we have but do not apply, the law we have but cannot apply, and the law we do not have but should), comparative (the interpretation of the law we have), and multidisciplinary review of the law (legal assertion of reality) further indicates that law alone cannot redress such progression. Law (national security law, immigration law, constitutional law)—as used by some governments—is very much part of the problem. That is, a tool that fosters

social, legal, economic, and institutional exclusion, oppression and human suffering. As such, the law thereby conceived mirrors its decadence, not its purpose.

Perceptional and legal gaps (*redirected reality* and *misdirected purpose*) affect the perception-conceptualization of migrants and, in the process, their reception and treatment across the planet. Misperceptions (distrust, suspicion, bias and dehumanization of migrants), inconsistencies (values, principles, practices, actions) and critical disconnections (reality, diversity, morality, humanity) uncover the effects of the resulting conceptualization.

Four findings support these assertions. *First, the evolution of international refugee protection leads to its gradual disarticulation*. Although anthropological evidence supports the *security claim* (rejection of the out-group by the in-group in different contexts), historic references show progressions suspecting (Ancient Greece), empowering (Roman Empire), rejecting (Middle Ages), excluding (Western countries during the first industrial revolution and War World I), welcoming (interwar period), protecting (postwar period), and criminalizing migrants (21st century).

The evolution of international refugee protection, which is gradually affected by—and eventually subjected to—national security protection, can be described through three defining paradigms. The *Postwar Refugee Paradigm* promoting the protection of refugees as victims of persecution and conflict due to their race, nationality, religion, political opinion or membership in a particularly targeted social group. The *Modern Refugee Paradigm* proposing the recharacterization of migrants and refugees as suspects ("foreign threat") increasingly subject to prosecutorial treatment (prolonged detention, seclusion, exclusion). And the *Final Refugee Paradigm* fostering the misperception and resulting mis-conceptualization of refugees as a threefold threat (security, economic, and cultural identity threats), while procuring the gradual disarticulation of international refugee law protections (non-refoulement, non-discrimination, non-expulsion, non-penalization, access to courts, housing, education) and embedded international human rights (human dignity, liberty, equality, children rights, protections against torture and various forms of discrimination), along with the most basic humanitarian protections otherwise afforded to prisoners of war (food, water, shelter, health assistance, sanitation facilities).

Second, the reception and treatment of refugees and asylum seekers across the world indicate that international refugee law is falling into desuetude. States' regulations, policies, practices, and agreements at domestic and regional level show that notwithstanding hundreds of countries once made a historic commitment of following international refugee law principles (via treaty law or international customary law), countries in all regions are not only neglecting their international legal commitments but more worryingly applying domestic law (national security law and immigration law) to circumvent international law (human rights and refugee protections).

Third, critical disconnections of reality (perceptional gap) and morality (legal gap) show conflicts of diversity, not security, which results in increasingly indefensible equations of national security and refugee protection. State sovereignty and national security remain as indisputable legal attributions (not absolute powers) to protect States' most vital interests; none, however, can truly justify the uncivilized actions of civilized nations (family separation, detention of children, confiscation of migrants' property, outsourcing humanity, abandonment). Accordingly, this thesis concludes that national security is not meant to be an absolute constitutional power, much less a rule—as opposed to what otherwise is (an exception)—guiding international refugee protection.

The *perceptional gap* (informing legal and public-policy conceptualizations) reveals a concerning trend exacerbated by the expansion of radical-populist governments in developed countries, which I describe as "*the fabrication of law*," that is, *remaking the facts to make the law*. Considering both the critical role of perception—the triggering event of human reasoning (including legal reasoning)—and the inability of law to deter sociopolitical distortions of reality, a different understanding of reality (including security) becomes the defining element. After all, this thesis finds, reality is not defined by its subjective, objective or relative nature, but by its multidimensional understanding.

The *legal gap* (*misdirected legal purpose*) results from both the *security and human-rights risks* domestic law does not take into account when regulating the reception and treatment of refugees and the untenable inconsistencies amid law, values, principles, and State actions (practices, regulations, policies, agreements).

Based on the scientific references that study reality (physics, neuropsychology, biology), this thesis further finds that the portrayal of refugees and asylum seekers as security, economic, and cultural identity threats ("too many, too dangerous, too expensive, too different") is unfounded. Data (probability, proportionality) on terrorist attacks (historic and current trends) show that refugees and asylum seekers do not constitute a significant or probable threat to host countries.

Considering the number of migrants hosted around the world, the number of terrorist attacks, the countries affected by terrorism, and the immigration status of the perpetuators, neither refugees nor asylum seekers can be reasonably described as terrorists. Data on criminal activity in the U.S. further debunk their depiction as "criminals" or "rapists." In fact, data on terrorism (domestic and international) indicate that most terrorists are born citizens, not refugees. Likewise, considering the number of migrants currently being hosted in developed countries, the diversity and size of their population, along with their economic resources (GDP), the contended economic and cultural identity threat is implausible; that is, in fact, "not that many, dangerous, expensive, or different."

Moreover, based on actual figures, legally protected social-moral values (diversity, multiculturalism, pluralism) and principles (human dignity, equality, liberty), claims depicting migrants as cultural identity threats are contradicting. The trend of outsourcing the reception of migrants to poor and developed countries makes the cultural identity claim by itself a *misconception*; unless, otherwise, it is assumed that poor and developing countries have no culture, identity, economy, or security to protect.

Still, evidence analyzed throughout this thesis shows undeniable socioeconomic tensions in communities and local populations across the world hosting large numbers of refugees and asylum seekers. Though such disproportionate share of the world's refugee population does not turn migrants into a security threat, it may jeopardize the security of both host-countries' communities and refugees, especially when the number is not only disproportionate with respect to other countries but in relation to the host country's economic resources.

Fourth, a theoretical and interdisciplinary proposition on constitutional entanglement and morality indicates that it is not only possible but inherently necessary to redress the effects of the

mis-constructed security claim promoting the protection of national security interests above the protection of migrants. Three considerations support this contention. *First*, protecting one interest above or in exclusion to the other, protects none. *Second*, international refugee protection ensues from a historic moral choice with legal effects aimed precisely at protecting refugees and migrants from various forms of persecution, conflict, discrimination, indifference, and abandonment. *Third*, the human suffering refugees experience throughout their journey for safety constitutes a moral fact with regressive—though often neglected—legal effects. In this context, the different forms of discrimination (race, nationality, religion), dehumanization (language, narrative, imprisonment), exclusion (social, economic, legal), rejections (systematic, diplomatic) and criminalisation (prosecutorial treatment, arbitrary detention, temporary expulsion, systematic deportation) that migrants encounter in the 21st century constitute an unsurmountable moral-legal inconsistency.

Both perceptional gap (*redirected reality*) and legal gap (*misdirected legal purpose*) have shaped the structural narrative of a seemingly unavoidable choice between protecting refugees and protecting host countries' national-security interests. Yet a multidimensional assertion of security will show that the choice between national security and refugee protection is neither ineluctable nor factually or rationally sound. On the one hand, national security (law, policy, powers) are limited by the moral-content, moral-social values, and moral-legal principles imposing functional references of consistency between legal systems (domestic and international), legal values (human dignity, liberty, equality) and legal principles (proportionality). On the other hand, national security and refugee protection are not only aligned one to another by virtue of their common goal (security), but inherently connected through moral (protecting or abandoning migrants) and legal choices (protecting or criminalizing migrants), including a different and far more efficient security-moral claim: *protecting refugees, protects national security*.

This thesis aims to serve as scholarly reference for current researchers and future public-policy makers looking for unconventional forms of reasoning to approach the challenges that the increasingly contentious relationship between refugees and host countries encompass. It shows the importance of developing a different (multidimensional) perspective to find actual problems before advancing inconsistent, disconnected, and circular solutions. It shows, moreover, the flaws and regressive progression of unidimensional, bidimensional and tridimensional versions of the world

It shows, finally, that we need to reconceptualize the entire relationship between national security and refugee protection based on a multidimensional recharacterization of security. This includes efforts to restore the applicability of international law at domestic level through more efficient models of constitutional assimilation (doctrines, references, mechanisms). This means that any enduring solution to the global refugee crisis cannot be exclusively engineered within the purview of international law (human rights violations, refugee protections) but within its multidimensional constitutional assertion (national, global, and human security).

This dissertation conveys a corollary reflection that must not be mistaken, however. *International refugee law* is falling into desuetude because the values and principles we hold deer appear gradually in conflict with State actions, inactions, and reactions. This does not mean, however, that the solution is to enact a new *Refugee Convention*, or to merely apply the one we already have. On the contrary, we must defend at all cost the only *Refugee Convention* we have; its reform in this juncture would end with no more than a few countries. As this thesis shows, law alone is not the way forward. We need more interdisciplinary and multidisciplinary research on refugee protection. We need to reestablish former connections, not just with reality, but especially with values, identities, principles and, more importantly, humanity. Multidisciplinary research is specially needed to overcome cultural and socioeconomic tensions between refugee and local populations. Moreover, we need to find new connections and creative solutions to deal with the complexity of refugee protection in a world in which legal indifference, subjective reality, and moral abandonment are becoming ubiquitous references of rationalisation.

I, for one, will built on the premises of this thesis to develop specific ways (policies, agreements) to make the protection of migrants the most effective way to protect national security. For instance, rather than promoting safe third countries-*like* agreements we should develop safe-first country agreements fostering more effective roots of assimilation, proportional distribution of migrant populations while empowering migrants and the communities that accept them. I firmly believe that a more intelligent, humane, and efficient version of the world lies ahead. History shows the best of mankind comes when its worst versions end; the very emergence of *international refugee law*, in fact, proves it. Once again, past is prologue.

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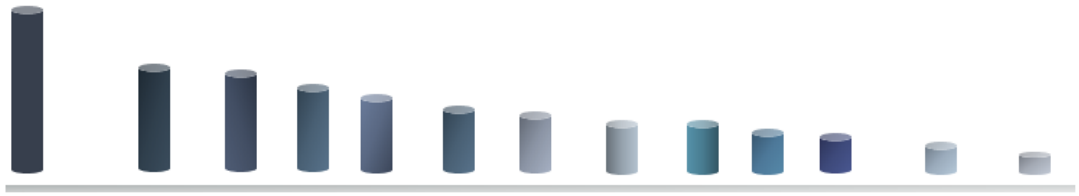
APPENDIX

CHAPTER 1
The Security Threat

FIGURES

FIGURE 1: INTERNATIONAL MIGRATION POPULATION IN TOP HOST COUNTRIES (JULY 2019)*



U.S.A.	Saudi Arabia	Germany	Russia F.	U.K.	U.A.E.	France	Canada	Australia	Italy	Spain	South Africa	Argentina
TP: 329,1	TP: 34,2	TP: 83,5	TP:145,8	TP: 67,5	TP: 9,7	TP: 65,1	TP:37,4	TP: 25,2	TP: 60,5	TP: 46,7	TP: 58,5	TP: 44,7
FB: 50,6	FB: 13,1	FB:13,1	FB: 11,6	FB: 9,5	FB: 8,5	FB: 8,3	FB: 7,9	FB: 7,5	FB: 6,2	FB: 6,1	FB: 4,2	FB: 2,2
PC: 15,4%	PC: 38,3%	PC:15,7%	PC: 8%	PC: 14,1%	PC: 87%	PC: 12,8%	PC: 21,3%	PC: 30%	PC: 10%	PC: 13,1%	PC: 7,2%	PC: 4,9%

Author: J. Mauricio Gaona (2020). McGill University (DCL Program).
Source: United Nations, Department of Economic and Social Affairs (Population Division) - International Migrant Stock 2019. United Nations, DESA (Population Division) - World Population Prospects 2019 (By Country).
***Note:** While in some countries the number of international migrants is relatively small, that number is very significant when considered in relation to the size of the total population in such countries (e.g., Qatar 2,2 million FB representing 87% TP, Luxembourg 291 thousand representing 47,4% TP; Singapore 2,1 million representing 37,1% TP; New Zealand 1 million representing 22% TP; and Sweden 2 million representing 20% TP).
** **TP:** Total Population (in each country estimated by millions).
FB: Foreign-born population (population born abroad living in the host country as of July 2019 and estimated by millions).
PC: Percentage of foreign-born population with respect to the host-country's total population.

FIGURE 2: POSTWAR HUMAN RIGHTS AND REFUGEE CONVENTIONS.

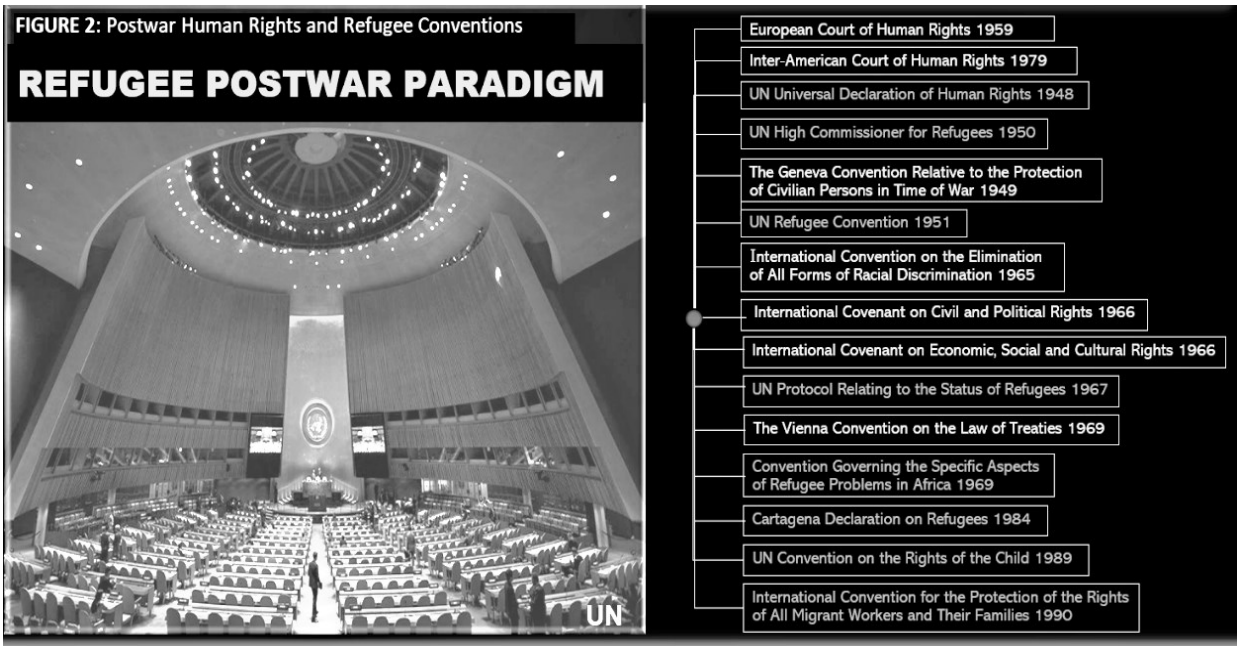


FIGURE 3: NATIONAL SECURITY LEGISLATION FOLLOWING 9/11 ATTACKS.

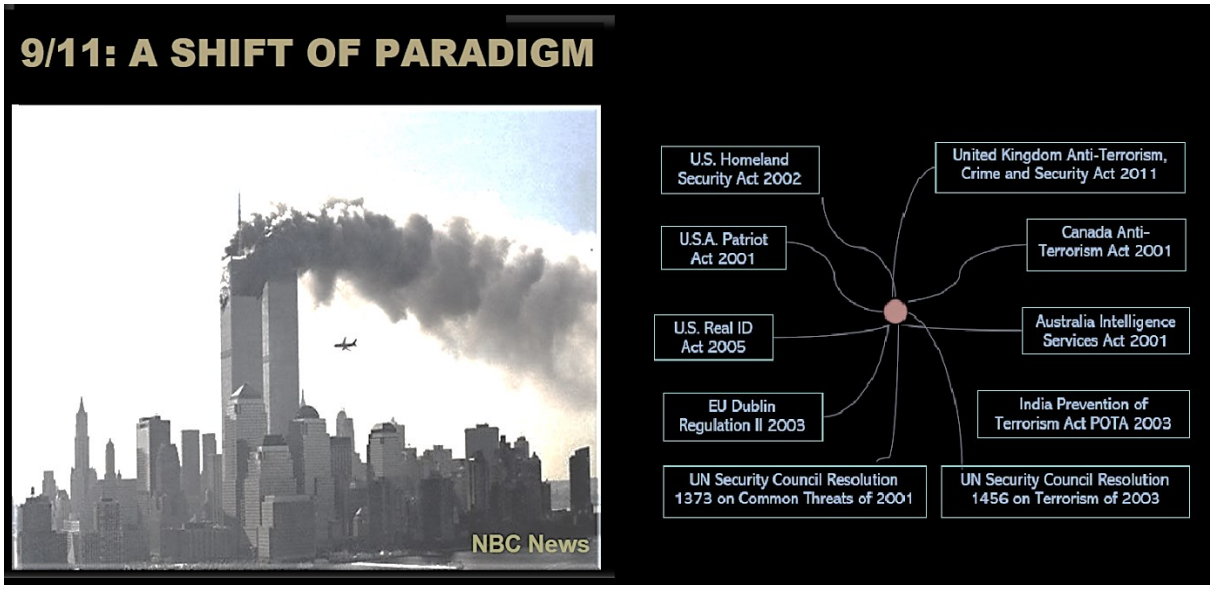
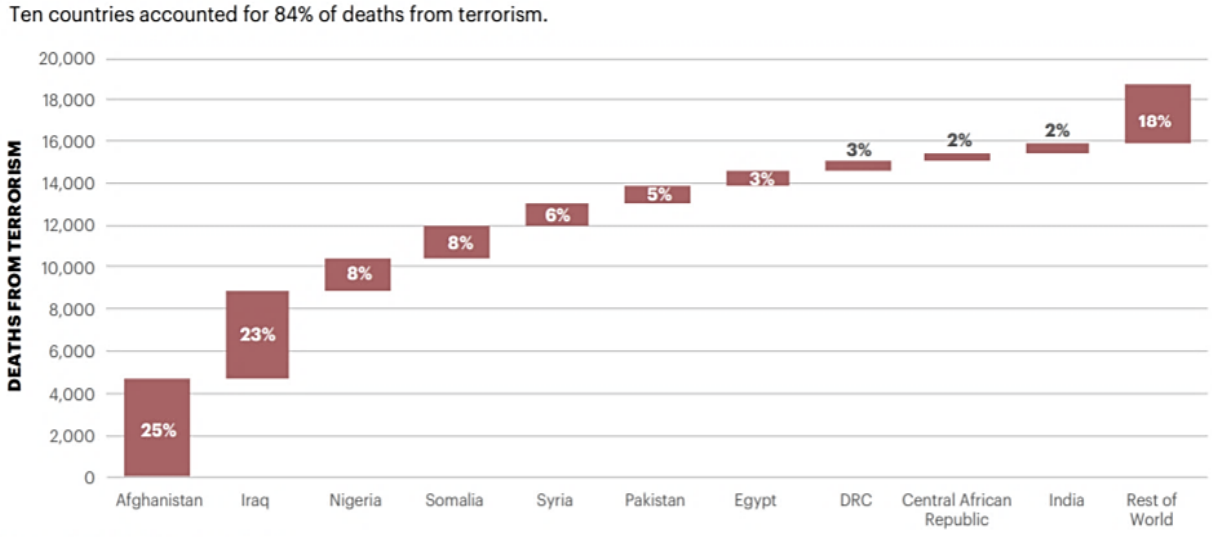


FIGURE 4: DEATHS FROM TERRORISM.

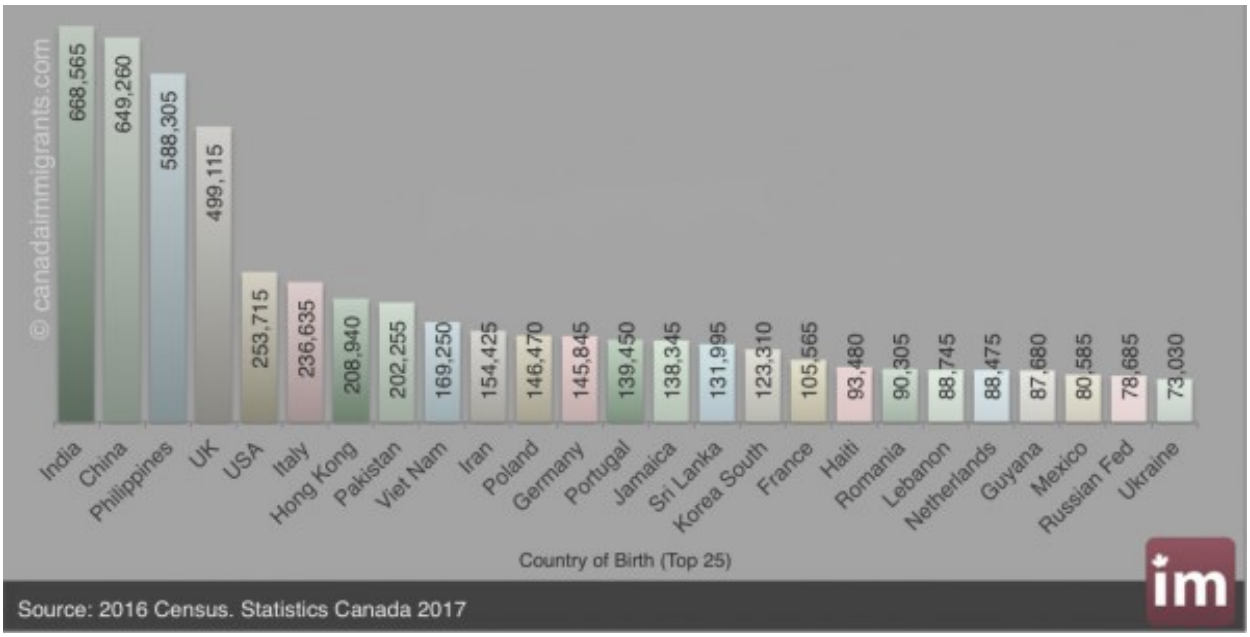
Author: Institute for Economics and Peace.
Source: Global Terrorism Index 2018: Measuring the Impact of Terrorism (page) – START GDT, IEP Calculations.
Observations: The Global Terrorism Index is a comprehensive study covering 99.7 percent of the world's population in 163 countries.

FIGURE 5: DEATHS FROM TERRORISM BY COUNTRY (2017).



Author: Institute for Economics and Peace
Source: Global Terrorism Index 2018 (page 13) – START GDT, IEP Calculations.

FIGURE 6: FOREIGN-BORN POPULATION IN CANADA (2016).



TABLES

TABLE 1: CHANCE OF DYING IN ATTACK BY A FOREIGN-BORN TERRORIST IN THE U.S. (1975-2017).

VISA CATEGORY	TERRORISM DEATHS PER VISA CATEGORY	ANNUAL CHANCE OF BEING KILLED
All	3,037	1 in 3,808,372
Tourist	2,829.4	1 in 4,087,797
Student	158.8	1 in 72,838,750
LPR	17	1 in 680,354,517
K-1	14	1 in 826,144,771
Asylum Seeker	9	1 in 1,285,114,088
Unknown	4.8	1 in 826,144,771
Refugee	3	1 in 3,855,342,265
VWP	1	1 in 11,566,026,795
Illegal [Undocumented]*	0	Zero

Author: Alex Nowrasteh (CATO Institute), (2019) 866 Policy Analysis 8.
Sources: U.S. Census Bureau (American Community Survey) and author calculations.
Observations:: Non-whole numbers for deaths result from dividing the number of victims of a single incident equally among multiple terrorist perpetrators. LPR (lawful permanent resident); VWP (Visa Waiver Program); K1 Fiancé(e) visa.
* Since, in *stricto sensu*, no one is illegal the word "undocumented" was added in this thesis.

TABLE 2: JIHADIST TERRORISM-RELATED ATTACKS IN AUSTRALIA, EUROPE AND NORTH AMERICA (2014-2018).

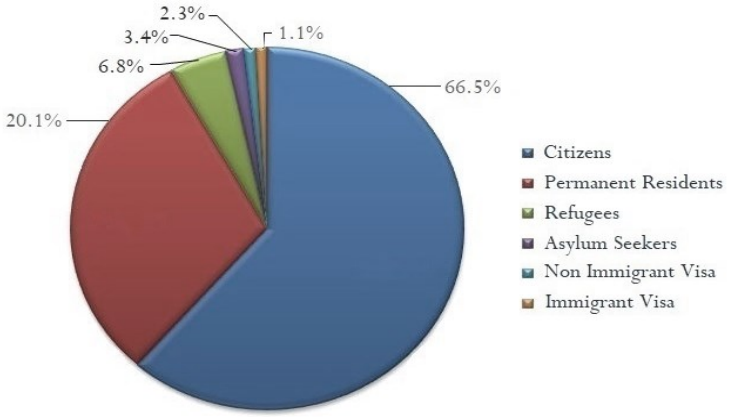
DATE	ATTACK	PLACE	PERPETUATOR	STATUS	DATE	ATTACK	PLACE	PERPETUATOR	STATUS
23/09/2014	Melbourne	M, Australia	A. N. Halder	Citizen*	22/03/2016	Metro Bombing	Brss. Belgium	K. al-Bakraoul	Refugee
24/09/2014	Beheading	K, USA	A. Nolen	Citizen	16/04/2016	Temple Bombing	Ess. Germany	Yusuf T.	Citizen
20/10/2014	Vehicle Ramming	QC, Canada	M. C. Rouleau	Citizen	16/04/2016	Temple Bombing	Ess. Germany	Mohammed B.	Citizen
22/10/2014	Parl. Shooting	ON, Canada	M. Z. Bibeau	Citizen	12/06/2016	Nightclub Attack	FL, USA	O. Mateen	Citizen
23/10/2014	Hatchet Attack	NY, USA	Z. H. Thompson	Citizen	13/06/2016	Police Stabbing	Mag, France	L. Abballa	Citizen
18/12/2014	Elderly Shooting	NC, USA	J. N. Sullivan	Citizen	14/07/2016	Vehicle Ramming	Nice, France	M. L. Bouhlei	LPR
20/12/2014	Police Stabbing	Tours, France	B. Nzohabonayo	Citizen	18/07/2016	Train Axe Attack	WH. Germany	. Ahmadzai	Refugee
07/01/2015	Charlie Hebdo	Paris, France	C. Kouachi	Citizen	24/07/2016	Suicide Bombing	Ans. Germany	M. Daleel	Refugee
07/01/2015	Charlie Hebdo	Paris, France	S. Kouachi	Citizen	26/07/2016	Church Attack	St E.R. France	A. Petitjean	Citizen
07/01/2015	Shooting	Paris, France	A. Coulibaly	Citizen	26/07/2016	Church Attack	St E.R. France	A. Kermiche	Citizen*
03/02/2015	Jewish Stabbing	Nice, France	M. Coulibaly	Citizen	06/08/2016	Machette Attack	Char. Belgium	K. Babouri	Undoc.
14/02/2015	Synagogue	Cp. Denmark	O. el-Hussein	Citizen	10/08/2016	Taxi Explosion	ON, Canada	Aaron Driver	Citizen
19/04/2015	Church Attack	Villej. France	S. A. Ghlam	Citizen	20/08/2016	Double Stabbing	VA, USA	W. Farooqui	Citizen
03/05/2015	AC Shooting	TX, USA	E. Simpson	Citizen	04/09/2016	Prison Attack	Osny, France	B. Taghi	Citizen
03/05/2015	AC Shooting	TX, USA	N. Soofi	Citizen	17/09/2016	Mall Stabbing	MN, USA	D. Adan	Citizen*
26/06/2015	Decapitation	St QF, France	Y. Salhi	Citizen	17/09/2016	Park Bombing	NY-NJ, USA	A. K. Rahimi	Citizen*
16/07/2015	Chattanooga	TN, USA	M. Abdulazeez	Citizen*	05/10/2016	Police Stabbing	Brss. Belgium	H. Diop	Citizen
21/08/2015	Train Stabbing	Arras, France	A. El-Khazzani	LPR	28/11/2016	OSU Stabbing	OH, USA	A. R Ali-Artan*	LPR
17/09/2015	Police Stabbing	Br. Germany	R. M. Yousef	LPR	19/12/2016	Christmas Attack	Br. Germany	A. Amri	Refugee
02/10/2015	Sídney Shooting	S, Australia	F. K. M. Jabar	LPR	06/01/2017	Airport Shooting	FL, USA	E. S. Ruiz	Citizen
04/11/2015	UCM Stabbing	CA, USA	F. Mohammad	Citizen	31/01/2017	Officer Shooting	CO, USA	. Cummings	Citizen
13/11/2015	Stade de France	Paris, France	B. Hadfi	Citizen**	03/02/2017	Louvre Attack	Paris, France	A. Hamamy	T-Visa
13/11/2015	Stade de France	Paris, France	A. al-Mohamed*	Refugee	18/03/2017	Airport Attack	Orly, Paris	Z. Belgacem	Citizen
13/11/2015	Rest. Shooting	Paris, France	B. Abdeslam	Citizen	22/03/2017	Vehicle Ramming	Westmin, UK	K. Masood	Citizen
14/11/2014	Batacalan	Paris, France	I. O. Mostefai	Citizen	07/04/2017	Vehicle Ramming	Stock. Sweden	R. Akilov	Asylum
14/11/2015	Batacalan	Paris, France	F. M. Aggad	Citizen	20/04/2017	Police Shooting	Paris, France	K. Cheurfi	Citizen
14/11/2015	Batacalan	Paris, France	S. Amimour	Citizen	22/05/2017	M. A. Bombing	Manchest, UK	S. R. Abedi	Citizen
13/11/2015	Stade de France	Paris, France	A. al-Iraqui	Refugee	03/06/2017	Bridge Attack	London, UK	Butt / Zaghba*	Citizens
13/11/2015	Rest. Shooting	Paris, France	C. Akrouh	Citizen**	03/06/2017	Bridge Attack	London, UK	R. Redouane*	LPR
13/11/2015	Rest. Shooting	Paris, France	A. Abaaoud	Citizen**	06/06/2017	N. Dame Attack	Paris, France	F. Ikken	S-Visa
02/12/2015	Shooting	S.B. CA, USA	T. Malik	F- Visa	17/08/2017	Barcelona Attacks	Barc. Spain	Terrorists (12)	*
02/12/2015	Shooting	S.B. CA, USA	S. R. Farook	Citizen	18/08/2017	Turku Attack	Turku, Finland	A. Bouanane*	Undoc
05/12/2015	Subway Stabbing	London, UK	M. Mire	Citizen	15/09/2017	L. Underground	London, UK	A. Hassan	Asylum
01/01/2016	Vehicle Ramming	Val, France	R. el-Ayeb	Citizen	31/10/2017	NYC Park Attack	NY, USA	S. Saipov	Citizen
07/01/2016	Police Shooting	PA, USA	E. Archer	Citizen	23/03/2018	S. France Attacks	SF, France	R. Lakdim	Citizen*
11/01/2016	Machette Attack	Mars. France	Minor	LPR	12/05/2018	Knife Attack	Paris, France	K. Azimov	Citizen*
18/02/2016	Elderly Stabbing	Rochdale, UK	Kadir & Speedy	Citizens	29/05/2018	Liège Attack	L, Belgium	B. Herman	Citizen
26/02/2016	Train St. Stabbing	HY. Germany	S. Schmitter	Citizen	31/08/2018	Amsterdam C. S	A, Nethelands	Jawed S.	Asylum
22/03/2016	Airport Bombing	Brss. Belgium	N. Laachraoutl	Citizen	09/11/2018	Melbourne Attack	M, Australia	Shire Ali	Citizen*

TABLE 3: REFUGEE AND ASYLUM-SEEKERS POPULATIONS DISTRIBUTION (2018).

WEALTHIEST COUNTRIES / HOSTING THE LARGEST POPULATIONS	RANK BY GDP	GDP U.S. DOLLARS (t) TRILLIONS (b) BILLIONS	COUNTRY TOTAL POPULATION	HOSTED REFUGEE POPULATION (PERCENT)	HOSTED ASYLUM SEEKERS (PERCENT)	SHARE WORLD'S REFUGEE POPULATION	SHARE WORLD'S ASYLUM-SEEKERS POPULATION
United States	1	21.24 (t)	327,167,430	313,241 (0.09%)	**718,994** (0.2%)	1.2%	**20.5%**
China	2	14.22 (t)	1,392,730,000	321,756 (0.02%)	603 (0.00005%)	1.2%	0.01%
Japan	3	5.18 (t)	126,529,100	1,895 (0.001%)	29,040 (0.02%)	0.07%	0.8%
Germany	4	3.96 (t)	82,927,920	**1,063,837 (1.2%)**	369,284 (0.4%)	**4.1%**	**10.5%**
India	5	2.97 (t)	1,352,617,330	195,891 (0.01%)	11,957 (0.0009%)	0.7%	0.3%
United Kingdom	6	2.83 (t)	66,488,990	126,720 (0.2%)	45,244 (0.07%)	0.4%	1.2%
France	7	2.76 (t)	66,987,240	368,352 (0.5%)	89,074 (0.1%)	1.4%	2.5%
Italy	8	2.03 (t)	60,431,280	189,243 (0.3%)	105,624 (0.1%)	0.7%	3%
Brazil	9	1.96 (t)	209,469,330	11,327 (0.005%)	152,690 (0.05%)	0.04%	**4.3%**
Canada	10	1.74 (t)	37,058,860	114,109 (0.3%)	78,806 (0.2%)	0.4%	2.2%
Rep. of Korea	11	1.66 (t)	51,635,260	2,903 (0.005%)	19,836 (0.03%)	0.01%	0.5%
Russian Fed.	12	1.61 (t)	144,478,050	77,397 (0.05%)	1,381 (0.001%)	0.2%	0.03%
Spain	13	1.43 (t)	46,723,750	20,457 (0.04%)	78,685 (0.1%)	0.07%	2.2%
Australia	14	1.42 (t)	24,997,320	56,933 (0.2%)	60,645 (0.2%)	0.2%	1.7%
Mexico	15	1.22 (t)	126,190,790	16,549 (0.01%)	23,847 (0.02%)	0.06%	0.6%
The Netherlands	17	914 (b)	17,231,020	101,837 (0.5%)	12,303 (0.07%)	0.3%	0.3%
Switzerland	19	707.57 (b)	8,516,540	104,037 (1.2%)	14,797 (0.2%)	0.4%	0.4%
Turkey	20	706.24 (b)	82,319,720	3,681,685 (4.4%)	311,719 (0.07%)	**14.2%**	8.9%
Sweden	23	547.12 (b)	10,183,170	248,226 (2.4%)	37,942 (0.3%)	0.9%	1%
Islam. Rep. of Iran	26	484.66 (b)	81,800,270	979,435 (1.1%)	33 (0.00004%)	**3.7%**	0.0009%
Austria	28	459.59 (b)	8,847,040	128,769 (1.4%)	37,364 (0.4%)	0.5%	1%
Malaysia	35	373.45 (b)	31,528,580	120,235 (0.3%)	41,809 (0.1%)	0.4%	1.1%
South Africa	37	371.30 (b)	57,779,620	89,285 (0.2%)	184,203 (0.3%)	0.3%	**5.2%**
Colombia	40	336.60 (b)	49,648,680	1,174,000 (2.3%)	2,729 (0.005%)	**4.5%**	0.07%
Bangladesh	41	314.66 (b)	161,356,040	906,645 (0.5%)	45 (0.00003%)	**3.5%**	0.001%
Egypt	42	299.59 (b)	98,423,600	246,749 (0.2%)	68,184 (0.06%)	0.9%	1.9%
Pakistan	44	278.02 (b)	212,215,030	1,404,019 (0.6%)	5,181 (0.002%)	**5.4%**	0.1%
Peru	50	232.08 (b)	31,989,260	2,529 (0.008%)	230,871 (0.7%)	0.009%	**6.5%**
Iraq	51	225.26 (b)	38,433,600	283,022 (0.7%)	14,015 (0.04%)	1.1%	0.4%
Kenya	64	99.25 (b)	51,393,010	421,248 (0.8%)	50,476 (0.09%)	1.6%	1.4%
Ethiopia	66	90.97 (b)	109,224,560	903,226 (0.8%)	2,153 (0.001%)	**3.4%**	0.06%
Lebanon	82	58.28 (b)	6,848,930	946,666 (13.8%)	16,423 (0.2%)	**3.6%**	0.4%
DR Congo	89	48.46 (b)	84,068,090	529,061 (0.6%)	5,767 (0.06%)	2%	0.1%
Jordan	93	44.26 (b)	9,956,010	715,312 (7.1%)	52,562 (0.5%)	2.7%	1.5%
Cameroon	96	39.22 (b)	25,216,240	380,329 (1.5%)	8,117 (0.03%)	1.4%	0.2%
Uganda	101	30.37 (b)	42,723,140	1,165,653 (2.7%)	25,269 (0.05%)	**4.5%**	0.7%
Yemen	102	29.08 (b)	28,498,690	264,369 (0.9%)	8,814 (0.03%)	1%	0.2%
Chad	138	11.37 (b)	15,477,750	451,210 (2.9%)	3,472 (0.02%)	1.7%	0.09%
Rwanda	141	10.21 (b)	12,301,940	141,617 (1.1%)	420 (0.003%)	0.5%	0.01%
Niger	142	9,72 (b)	22,442,950	175,418 (0.7%)	3,555 (0.01%)	0.6%	0.1%
South Sudan	161	3.51 (b)	10,975,920	291,842 (2.7%)	2,541 (0.02%)	1.1%	0.07%
Sudan	209	(millions)*	41,801,530	1,078,287 (2.8%)	17,622 (0.04%)	**4.1%**	0.5%

TABLE 4: FAR-RIGHT RELATED ATTACKS IN THE UNITED STATES AND CANADA (2014-2018).

DATE	ATTACK	PLACE	PERPETRATOR	TYPE
04/06/2014	RCMP Officers Killing	NB, Canada	J. Bourque	Anti-Government
11/08/2014	Firefighters Shooting	TX, USA	D. L. Leguin	Anti-Government
28/11/2014	Mexican Consulate Attack		L. S. McQuillians	Racially Motivated
17/06/2015	Methodist Church Attack	SC, USA	D. Roof	Racially Motivated
25/06/2015	Theater Shooting	LA, USA	J. R. Houser	Racially Motivated
01/10/2015	Community College Attack	OR, USA	C. S. Harper-Mercer	Racially Motivated
24/11/2015	Black Lives Matter Shooting	MN, USA	A. Lawrence, N. Gustavson, D. Macey, J. Backman	Racially Motivated
27/11/2015	Planned Parenthood Shooting	CO, USA	R. L. Dear	Anti-Government
02/01/2016	Wildlife Refuge Siege	OR, USA	A. Bundy, R. Bundy, C. Bundy, R. Finicum, S. Cox, R. Payne, B. Cavalier, and J. Ritzheimer	Anti-Government
07/07/2016	Dallas Police Shooting	TX, USA	M. X. Johnson	Anti-Government
17/07/2016	Louisiana Police Shooting	LA, USA	G. E. Long	Anti-Government
27/08/2016	Mosque Burning	MA, USA	J. Garguilo	Racially Motivated (+) Anti-Government
28/01/2017	Victoria Islamic Center Burning	TX, USA	M. V. Perez	Racially Motivated
29/01/2017	Islamic Centre Mosque Attack	QC, Canada	A. Bissonnette	Racially Motivated
22/02/2017	Foreign Citizens Killing	MO, USA	A. W .Purinton	Racially Motivated
20/03/2017	Sword Killing	NYC, USA	J. H. Jackson	Racially Motivated
16/05/2017	Sheriff's Deputy Killing	MT, USA	M. Barrus, Ll. Barrus	Anti-Government
20/05/2017	Student Killing	ML, USA	S. Urbanski	Racially Motivated
26/06/2017	Portland Stabbing	OR, USA	J. Christian	Racially Motivated
05/08/2017	Mosque Bombing	MN, USA	M. Hari, J. Morris, M. McWorther	Racially Motivated
14/07/2017	Priest Stabbing	WA, USA	L. M. Davis	Racially Motivated
12/08/2017	Vehicle Ramming	SC, USA	J. A. Fields	Racially Motivated
01/10/2017	Las Vegas Shooting	NV, USA	S. Paddock	*
22/10/2017	Sacramento Train Attack	CA, USA	T. Michael	Racially Motivated
17/12/2017	Highway Shooting	NM, USA	W. E. Atchison	Racially Motivated
02/01/2018	OC Stabbing	CA, USA	S. Woodward	Racially Motivated
14/02/2018	Parkland High School Shooting	FL, USA	N. J. Cruz	Racially Motivated
23/05/2018	Toronto Vehicle Ramming	ON, Canada	A. Minassian	*
22/05/2018	Waffle House Killings	TN, USA	T. Reinking	Racially Motivated
07/2018	Congressmen Shooting	VA, USA	J. T. Hodgkinson	Anti-Government
14/07/2018	Woman Killing	KS, USA	R. L. Kidwell	Racially Motivated
25/10/2018	Kroger Killings	KY, USA	G. Bush	Racially Motivated
26/10/2018	Mail Bombs	FL-DC, USA	C. A. Sayoc	Anti-Government
27/10/2018	Pittsburgh Synagogue Killings	PA, USA	R. G. Bowers	Racially Motivated
03/11/2018	Yoga Studio Killing	FL, USA	S. P. Beierle	Gender Motivated



METRICS TABLE 2

Author: J. Mauricio Gaona (2019), Researcher McGill University.
Sources: (1) ISPI, "Fear Thy Neighbord: Radicalization and Jihadist Attacks in the West" (2017), (2) U.S. Direction of National Intelligence - ODNI (Archives - Reports 2014 - 2018), (3) Interpol, Terrorism Data (News Archives), (4) Europol (TE-SAT Reports 2015-2018), (5) PM&C/NS Australia (Taskforce Reports), (6) BBC Archives, (6) Historica Fandom (Terrorists Profiles), (7) New America (Terrorists Profiles).
Methodology: Cross-reference collection on reported and highly publicized jihadist terrorism-related attacks.
- Porcentages consider a pool of 89 terrorists perpetuating a total of 78 attacks in Australia, North America, and Europe.
- Data only include actual (perpetuated) jihadist terrorism-related attacks, not plots or events under investigation or yet to be classified as jihadist terrorism-related attack.
- Citizens: Include born, naturalized, and EU citizens (4) not requiring visa to enter the country.
- Permanent Residents: Lawfully authorized by the country's government = LPR.
- Immigrant Visa: (1) person with fiancee visa.
- Non-Immigrant Visa: (2) people with student and tourist visa, respectively.

Observations: * Naturalized Citizens.
** EU Citizens (not requiring permit to enter EU countries).
- Immigration Status is the one the perpetuator had during the terrorist attack.
- London Bridge Attack (03/06/2017): Khuram Butt (Citizen/UK), Youssef Zaghba (EU Citizen/Italy).
- Barcelona Attaks (17/08/2017): Terrorist Cell included Moussa Oukabir (Citizen/Spain), Mohamed Houli, Younes Abouyaaqoub, El Houssaine Abouyaaqoub, Driss Oukabir, Said Aallaa, Youssef Aallaa, Mohamed Aallaa, Mohamed Hychami, Omar Hychami, Abdelbaki Es Satty, Younes Abouya Aqoub (permanent residents).

Geographical Scope: Canada, United States, Australia, and Europe (Both EU and UK).
Time Frame: 23 September 2014 to 31 December 2018.
Limitations: 11/01/2016 ("Marseille Machette Attack"): Due to his age, the name of the perpetuator was kept "undisclosed" by French authorities. The identity corresponds to a 15-years old LFP. Notwithstanding all major jihadist terrorism-related attacks have been reported here, it is possible that a minor or still under investigation attack is not reported here.

METRICS TABLE 3

Author: J. Mauricio Gaona. McGill University (2019).

Sources: (1) International Monetary Fund, *World Economic Outlook* (Revised, April 2019); (2) United Nations High Commissioner for Refugees (UNHCR), *Global Trends 2018* (12 June 2019) [Data, 31 December 2018]; (3) World Bank Data, *Population Total By Country* (2018); (4) World Review Population, *GDP By Country*; (5) Migración Colombia (IMMAP), *Refugiados y Migrantes Venezolanos con Vocación de Permanencia en Colombia* (31 December 2018).

Metrics: Country – Selected countries include only those hosting at least 100,000 refugees or asylum seekers by the end of 2018.
Wealthiest countries – The world's 15th largest economies measured by GDP as of 31 December 2018.
Hosting the largest populations – Countries hosting at least 500,000 refugees or asylum seekers by the end of 2018.

Methodology:

Time Frame: 31 December 2018 (data cut).
Geographical Scope: Countries in all regions using those hosting 100,000+ refugees or asylum seekers.
Hosted Refugee Population: Refugees already present in the host-country's territory following UNHCR process. Percentage is calculated by dividing the hosted refugee population and the host-country's total population.
Hosted Asylum-Seekers Population: It comprises asylum seekers' pending cases. Percentage is calculated as with refugees.
Share of the World's Refugee Population (WRP): Share of the world's refugee population each country assumed as of 31 December 2018. WRP was 25.9 million (UNHCR). Percentage of each country is calculated against this value.
Share of the World's Asylum-Seekers Population (WASP): As of 31 December 2018, WASP was 3.5 million (UNHCR).

METRICS
TABLE 4

Author: J. Mauricio Gaona. McGill University (2019).
Sources: (1) Terror from the Right (Archives 2014 – 2018); (2) New America (Terrorists Profiles, 2017); (3) Public Safety Canada, 2018; Public Report on the Terrorism Threat to Canada (April 2019).
Methodology: Cross-reference collection (direct-fact verification based on public archives/records).
Observations: * Domestic Terrorism-Related Attack, yet not officially attributable motive. Further, data only include actual (perpetuated) attacks, not plots or events under investigation. Although crime of domestic terrorism is yet to be defined under U.S. law, current attributions made by authorities during the course of their investigations and subsequent criminal indictments.
Geographical Scope: United States and Canada.
Time Frame: From 1 July 2014 to 31 December 2018.

IMAGES

Image 1: Armenian being forced out of Constantinople (1915).
Source: UPPA (Published in *The Telegraph*, 24 April 2015).

Image 3: Polish children wait to be repatriated at the end of World War I (1918).
Source: International Committee of the Red Cross (ICRC).

Image 2: Woman hands out bread to starving children during the Russian Civil War.
Source: Mary Evans and John Massey, *Stweart Collection* (Agefotostock).

Image 4: Asylum Seekers Detained in the United States.
Source: PBS (National News, 12 April 2019).

Image 5: ISIS Fighters Fleeing From Syria Jail Amid Turkish Bombing.
Source: The Sun (United Kigndom, 13 October 2019).

VIDEO

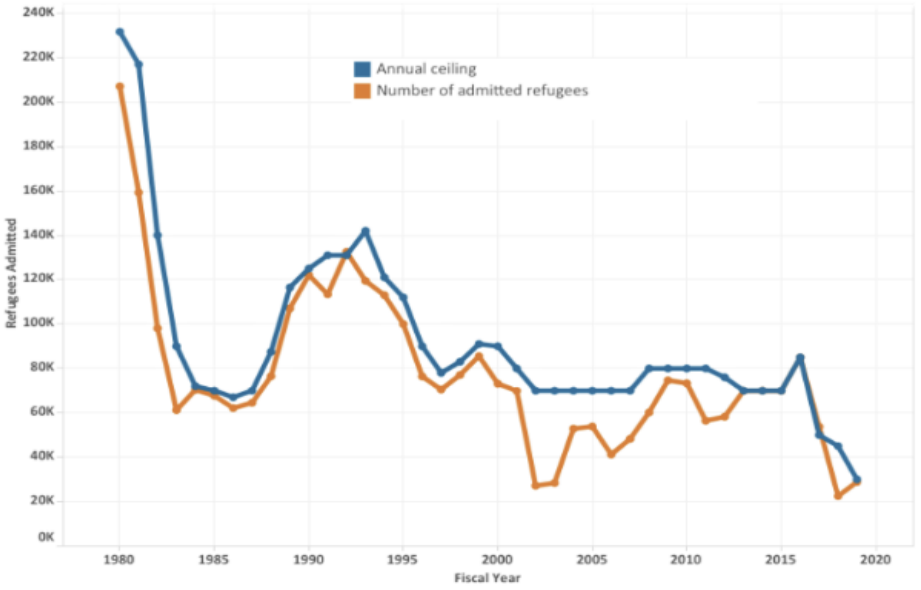
Video 1: Intervention of Polish MEP leader, Junasz Korwin-Mikke, before the EU Parliament (9 September 2015).
Source: "A Controversial Polish MEP" *The Brussels Times* (24 September 2015), online video available on Youtube (Click to watch).

CHAPTER 2

The Reception and Protection of Refugees

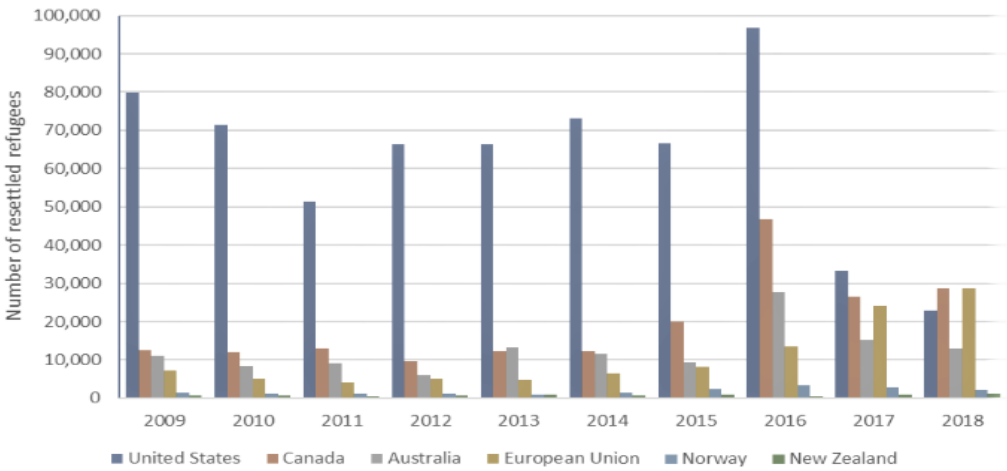
FIGURES

FIGURE 1: U.S. REFUGEE ADMISSIONS AND RESETTLEMENTS CEILINGS (FISCAL YEARS 1980-2019).



Source: Migration Policy Institute (MPI) – Data Hub (2019). Published on PBS News-Hour, *U.S. Claims Reducing Refugee Numbers Helps with the Asylum Backlog. Wil It?* (2 October 2019).

FIGURE 2: DESTINATIONS FOR RESETTLED REFUGEES (2009-2018).



Source: Global Trends Annex (Tables) *Resettlement Arrivals of Refugees* and UNHCR 2009 - 2017 (2018 estimates are self-reported by contributing governments). Published in Maclean's, By Jason Markusoff, *Canada Now Brings in More Refugees than the U.S.* (23 january 2019).

IMAGE **VIDEOS**

Image 1: Asylum Seekers Living in Appalling Conditions.
Source: Lydi Gold, Human Rights Watch (6 January 2017).

Video 1: Police Forcefully Remove 'Trespassing' Refugees from UNHCR Building in Pretoria.
Source: News 24 South Africa (15 November 2019).
Click on video to watch.

Video 2: Turkish Forces Clash with Kurdish Fighters in Syria.
Source: BBC (10 Oct. 2019) (click on image to watch video).

Video 3: National Guard Pepper Sprays Migrants Near Southern Border.
Source: RUPTLY (24 January 2020). Click on video to watch.

Video 4: Greek Police Fire Tear Gas to Stop Migrants Crossing From Turkey.
Source: NBC News (2 March 2020). Clock on video to watch.

Video 5: Speech of the President of Turkey, Recep Tayyip Erdoğan before the UN General Assembly (24 Sept. 2019) ("safe zone" at 15:10 mm/ss].
Source: PBS(click on image to watch video).

CHAPTER 3

The Perceptional Gap

Security, Reality, Diversity, Humanity

FIGURES

FIGURE 1: PROGRESSION-REGRESSION MODELS OVER EVOLUTION-PROGRESS DIFFERENTIAL PATTERNS: $P \neq E$

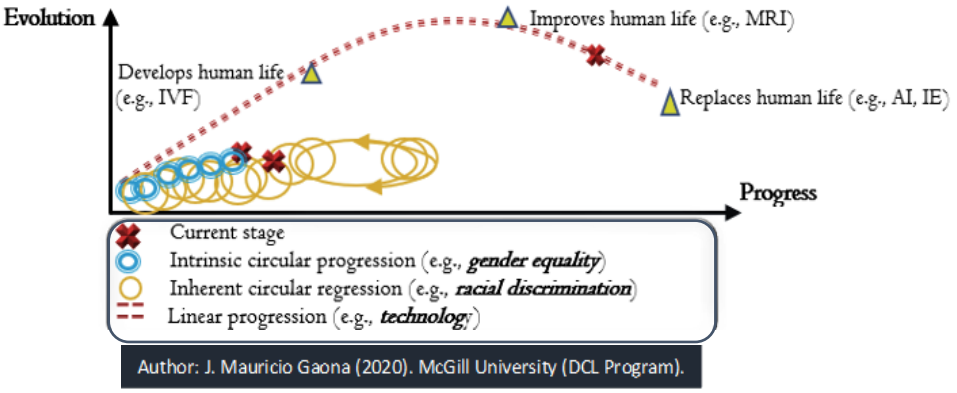
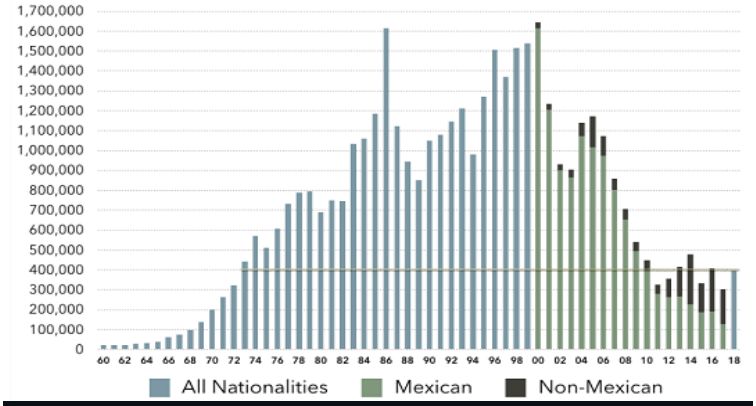
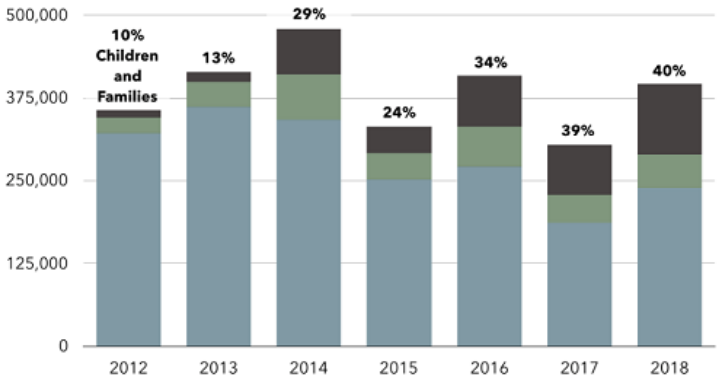


FIGURE 2: SOUTHWEST BORDER MIGRANT APPREHENSION LEVELS (1960–2015).



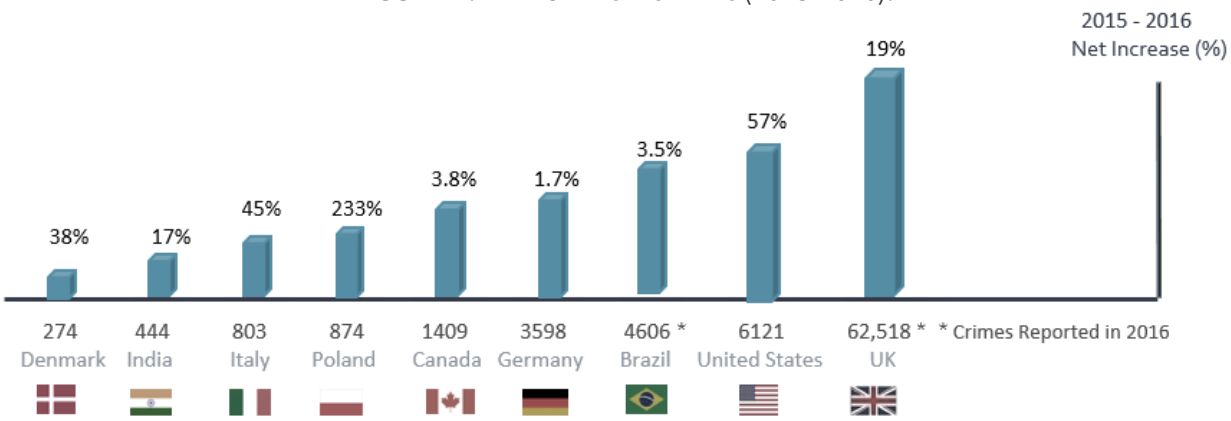
Sources: U.S. Border Patrol Archives (2018) / Adam Isacson, *The U.S. Government's 2018 Border Data*, WOLA (November 2018).

FIGURE 3: MIGRANT GROUPS TRENDS (2012–2018).



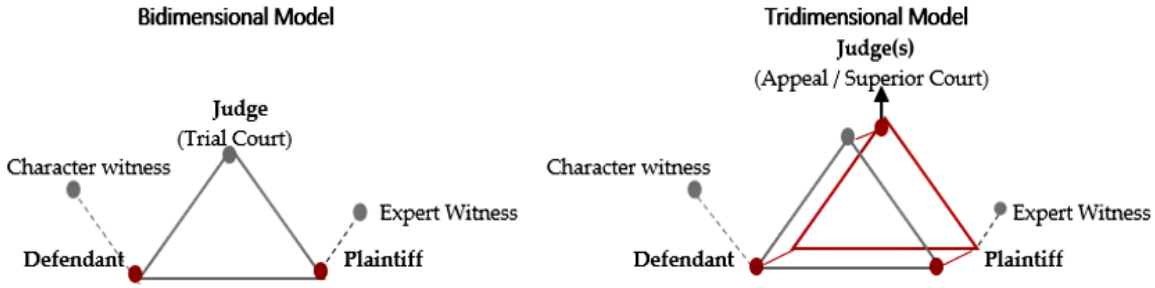
Sources: U.S. Customs Border Protection Stadistics (2018) / Adam Isacson, *The U.S. Government's 2018 Border Data*, WOLA (November 2018).

FIGURE 4: HATE CRIMES INCIDENTS (2015-2016).



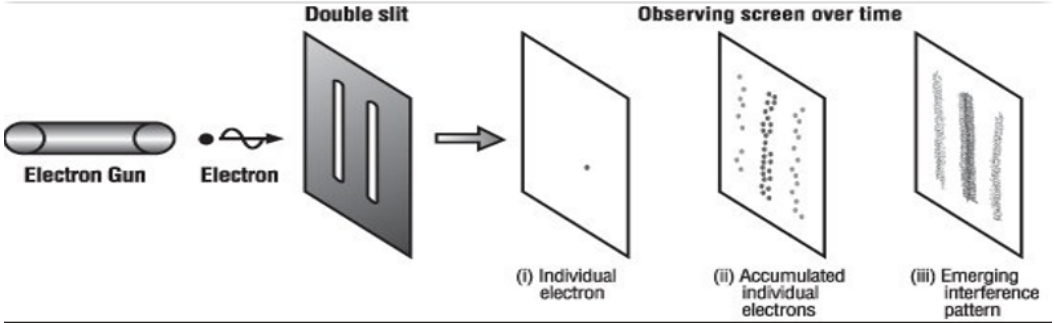
Author: J. Mauricio Gaona (2018).
Sources: FBI Hate Crime Statistics (2016), Statistics Canada (Police Reported Crime 2015-2016), United Kingdom Home Office (2016 Police Report), Organization for the Security and Cooperation of Europe OSCE (2016 States Consolidated Reports), Parliament of India (2016 Hearing), and Fórum Brasileiro de Segurança Pública (2017 Anuário Brasileiro de Segurança Pública).
* Hate crimes in Brazil reports are based on gender and sexual orientation bias. The 4606 reported cases correspond to crimes against women.
** Hate crimes officially reported by police to Home Office in UK only cover England and Wales. Moreover, hate crimes in England and Wales are on the rise in 2017 registering 80,393 offences, which represents an increase of 29% with respect to 2016 (Home Office 2017, p. 1).

FIGURE 5: BIDIMENSIONAL & TRIDIMENSIONAL PERCEPTION-CONCEPTUALIZATION MODELS (JUDICIAL SYSTEM)



Author: J. Mauricio Gaona (2020). McGill University (DCL Program).

FIGURE 6: DOUBLE-SLIT EXPERIMENT (PARTICLES - ELECTRONS).



Source: Rational Skepticism.

FIGURE 7: MULTIDIMENSIONAL PERCEPTION-RATIONALISATION MODEL.

TABLES

TABLE 1: AVERAGE LEVELS OF DEHUMANIZATION GROUPS IN THE UNITED STATES (SURVEY).

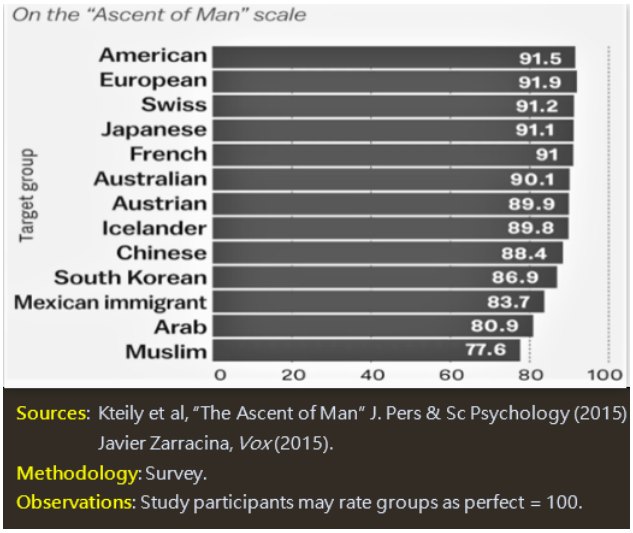


TABLE 2: MEXICAN MIGRANTS ENTERING THE U.S. (FISCAL YEAR 2017).

Number of Mexican-Immigrants Entering the United States in 2017				
Points of Entry	Number of Entries	Number of CBP Apprehensions * *All types of violations (criminal convictions included)*	Total Percentage *100%*	Apprehensions on Sexual-Offenses Convictions or Charges **Immigrants from all countries included*
Coastal Border (*a.k.a. Southeast*)	14,440	1,027		
Southwest Border	1,615,081	127,938		
South Border Total	1,629,521	128,965	8%	
All Points of Entry Combined				137 * *Note: Even if this figure is applied over Mexican-Immigrants exclusively* (1,629,521) *still a low projection of only* **0,009%** *results.*

Source: U.S. Border Patrol, *Alien Apprehensions from Mexico by Fiscal Year 2017* (CBP, 2018) at 2.
Author: J. Mauricio Gaona.

TABLE 3: SPECIAL-THEORY-OF-RELATIVITY'S MEASUREMENT.

Table 3. *Special-Theory-of-Relativity's Measurement* $E = mc_2$ *(proof)*

Considering,

E = Energy (i.e., transferable, measurable-*by-Jules*, transcended, and triggering property enabling work from one system to another, e.g., nuclear, radiant, kinetic, thermal, chemical, electrical, strain, gravitational)

m = Mass (i.e., body's inertia or body's matter at rest measurable *by kilograms*)

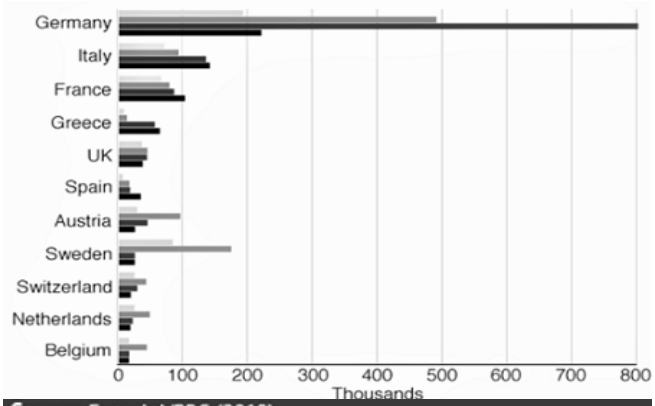
c = Speed of light (i.e., then-highest possible physical acceleration measurable *by kilometers [300,000 per second]* or *by miles [186,300 per second]*)

Einstein's establishes the existence of a relative –as opposed to random or absolute– relationship between Mass "***m***" and Energy "***E***" whose equivalence (transfer) hinges on the highest motion-rate of speed of light *c*, for which "***m***" by "***c***" multiplied by itself equals "***E***"

=> Energy = Mass x Speed of light x Speed of light
E = m x c x c
$E = mc_2$

Therefore, Mass and Energy, albeit different representations of reality, are equivalent.

TABLE 4: ASYLUM APPLICATIONS TRENDS IN EU (TOP 10 EU COUNTRIES, 2014–2017).



Source: Eurostat/BBC (2018).

TABLE 5: NUMBER OF ASYLUM APPLICATIONS IN GERMANY (2014–2015).

First-time asylum applications in 2013 and 2014, main countries of origin

	2014		2015		First-time applications for asylum, changes to the previous year in percentage	First-time applications for asylum, changes to the previous year, absolute figures
	First-time applications for asylum	Total applications for asylum	First-time applications for asylum	Total applications for asylum		
Total	**173,072**	**202,834**	**441,899**	**476,649**	**155.3%**	**268,827**
Syria	39,332	41,100	158,657	162,510	303.4%	119,325
Albania	7,865	8,113	53,805	54,762	584.1%	45,940
Kosovo	6,908	8,923	33,427	37,095	383.9%	26,519
Afghanistan	9,115	9,673	31,382	31,902	244.3%	22,267
Iraq	5,345	9,499	29,784	31,379	457.2%	24,439
Serbia	17,172	27,148	16,700	26,945	-2.7%	-472
Unclear	3,421	3,678	11,721	12,166	242.6%	8,300
Eritrea	13,198	13,253	10,876	10,990	-17.6%	-2,322
FYR Macedonia	5,614	8,906	9,083	14,131	61.8%	3,469
Pakistan	3,968	4,226	8,199	8,472	106.6%	4,231

Source: BAMF Deutschland, *Immigration, Integration, and Asylum*. Annual Policy Report (2016) at 46.

TABLE 6: PUBLIC PERCEPTION OF REFUGEES IN EUROPE FOLLOWING TERRORIST ATTACKS (2015–2016).

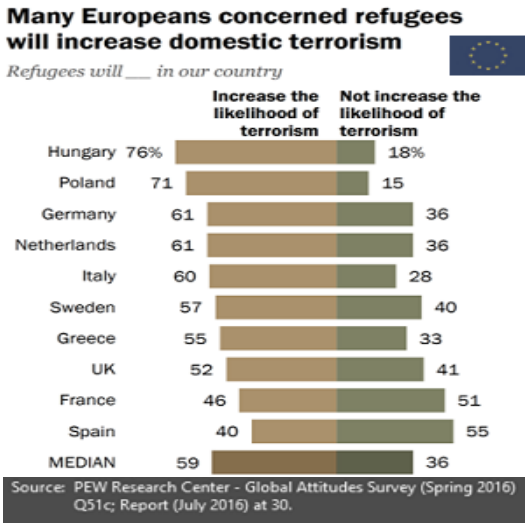


TABLE 7: FIRST-TIME ASYLUM APPLICATIONS IN GERMANY (MAIN COUNTRIES OF ORIGIN, 2016-2017).

First-time asylum applications and main countries of origin (2016 and 2017)

	2016		2017		First-time applications for asylum, changes to the previous year in %	First-time applications for asylum, changes to the previous year, absolute figures
	First-time applications for asylum	Total applications for asylum	First-time applications for asylum	Total applications for asylum		
Total	722,370	745,545	198,317	222,683	-72.5%	-524,053
Syria	266,250	268,866	48,974	50,422	-81.6%	-217,276
Iraq	96,116	97,162	21,930	23,605	-77.2%	-74,186
Afghanistan	127,012	127,892	16,423	18,282	-87.1%	-110,589
Eritrea	18,854	19,103	10,226	10,582	-45.8%	-8,628
Iran, Islamic Republic of	26,426	26,872	8,608	9,186	-67.4%	-17,818
Turkey	5,383	5,742	8,027	8,483	+49.1%	+2,644
Nigeria	12,709	12,916	7,811	8,261	-38.5%	-4,898
Somalia	9,851	10,232	6,836	7,561	-30.1%	-3,015
Russian Federation	10,985	12,234	4,884	6,227	-55.5%	-6,101
Unclear	14,659	14,922	5,554	6,005	-62.1%	-9,105

Source: BAMF Deutschland, *Migration, Integration, and Asylum*, Annual Policy Report (2017) at 42.

TABLE 8: UNACCOMPANIED MIGRANT CHILDREN (0-17 YEARS-OLD) ENTERING THE U.S. (FY 2017-2018).

	Unaccompanied Alien Children by Country	
Country	FY 2017	FY 2018
El Salvador	1,721	833
Guatemala	2,829	3,691
Honduras	1,173	1,655
Mexico	1,556	2,210

Source: United States Border Patrol Statistics FY2018 (December 2018).

TABLE 9: TERRORIST ATTACKS ON U.S. SOIL SINCE 9/11 (2001–2017).

TERRORIST ATTACK	CITY	YEAR	TERRORIST(S) NAME	TERRORIST AFFILIATION	COUNTRY OF ORIGIN	IMMIGRATION STATUS	DEATHS
9/11	NYC, NY	2001	Abdulaziz al-Omari, Wail al-Shehri, Waleed al-Shehri, Satam al-Suqami Mohand al-Shehri, Hamza al-Ghamdi, Ahmed al-Ghamdi, Hani Hanjour,, Khalid al-Midhar, Majed Moqed Nawaf al-Hazmi, Salem al-Hazmi, Ahmed al-Haznawi, Ahmed al-Nami, Saeed al-Ghamdi, Marwan al-Shehhi, Fayez Banihammad, Mohamed Atta, and Ziad Jarrah	al-Qaeda	Saudi Arab (15) United A.E. (2) Egypt (1) Lebanon (1)	Non-immigrant Visas Student F1 Tourist B1/B2 Training J	2,996
Logan Airport Failed Bomb	Boston, MA	2001	Richard Reid	al-Qaeda	United Kingdom	Visitor	0
O'Hare Airport Failed Bomb	Chicago, IL	2002	Jose Padilla	al-Qaeda	U.S.	U.S. Citizen	0
Brooklyn Bridge Failed Bomb	Brooklyn, NJ	2003	Iyman Faris	al-Qaeda	Kashmir	U.S. Citizen	0
University NC Chapel Hill	NC	2006	Mohammed Reza Taheri-azar	Self-Radicalized	Iran	U.S. Citizen	0
U.S. Army station Shooting	Little Rock, AK	2009	Abdulhakim Mujahid Muhammed	Self-Radicalized	U.S.	U.S. Citizen	1
Shooting	Fort Hood, TX	2009	Nidal Hasan	Self-Radicalized	U.S.	U.S. Citizen	13
Airport Failed Bomb	Detroit, MI	2009	Umar Farook Abdulmutallab	al-Qaeda	Nigeria	Visitor Visa	0
Times Square Attempt Bomb	NYC, NY	2010	Faisal Shahzad	Tehrik-e-Taliban	Pakistan	U.S. Citizen	0
Ceremony Attempt Bomb	Portland, OR	2010	Mohamed Osman Mohamud	Self-Radicalized	Somalia	U.S. Citizen	0
Military Facilities Shootings	DC	2011	Yonathan Melaku	Self-Radicalized	Ethiopia	U.S. Citizen	0
Marathon Bombing	Boston, MA	2013	Tamerlan Tsarnaev, Dzhokhar Tsarnaev	Self-Radicalized	Chechnya	P.R. + U.S. Citizen	3
Hatched Attack	NYC, NY	2014	Zale H. Thompson	Self-Radicalized	U.S.	U.S. Citizen	0
Chattanooga Shooting	Chattanooga, TE	2015	Mohammad Youssef Abdulazeez	Self-Radicalized	Kuwait	U.S. Citizen	5
Shootings	St. Bernardino, CA	2015	Syed Rizwan Farook, Tashfeen Malik	Self-Radicalized	U.S. + Pakistan	U.S. Citizen + P. R.	14
Shooting	Orlando FL	2016	Omar Mateen	Self-Radicalized	U.S.	U.S. Citizen	49
Bombings	NYC, NY New J. NJ	2016	Ahmad Khan Rahimi	Self-Radicalized	U.S.	U.S. Citizen	0
OSU Attack	Columbus OH	2016	Abdul Razal Ali Artan	Self-Radicalized	Somalia	P.R.	0
Truck Attack	NYC NY	2017	Sayfullo Hanibullaevich Saipov	Self-Radicalized	Uzbekistan	P. R.	8
Station bombing	NYC NY	2017	Akayed Ullah	Self-Radicalized	Bangladesh	P.R.	0

TABLE 10: POPULISTS LEADERS AND PARTIES (2014–2018).

COUNTRY	PARTY/LEADER/GOVERNMENT	ELECTION	YEAR	NUMBER OF VOTES	NUMBER OF SEATS
United States	Donald Trump Republican Party	Presidential (Elected)	2016	304 (Electoral College) 62,984,828 (Popular)	N/A
Germany	Alternative für Deutschland (AfD)	Parliamentary	2017	5,878,115	94 (12.6%)
Italy	Matteo Salvini - League (L) Five Star Movement (FS)	Parliamentary	2018	(L) 5,691,921 (FS) 9,713,763	73 (17.37%) 133 (32.66%)
Netherlands	Geert Wilders Party of Freedom	Parliamentary	2017	1,372,941	20 (13.1%)
France	Marine Le Pen (FN)	Presidential (Candidate)	2017	10,638,475	33.9%
Denmark	Danish People's Party	Parliamentary	2015	741,746	37 (21.1%)
Poland	Baeta Szydlo Law and Justice Party (PiS)	Prime Minister Parliamentary	2015	5,711,687	235 (37.5%)
Austria	Sebastian Kurz (ÖVP-Coalition) Austrian People's Party	Prime Minister Parliamentary	2017	1,595,526	47 (31.5%)
Switzerland	Toni Brunner Swiss People's Party	Federal	2015	740,967	85 (29.4%)
Belgium	Flemish Interest (VB)	Parliamentary	2014	247,746	3 (3.6%)
Hungary	Viktor Orbán / Fidesz-KFNP Jobbik – MFBH	Prime Minister Parliamentary	2018	2,824,206 1,092,669	133 (48%) 26 (21%)
Finland	Finns Party (PS)	Parliamentary	2015	525,054	38 (17.6%)
Sweden	Sweden Democrats (SD)	General	2014	801,178	29 (12.9%)
Slovakia	Direction-Social Democracy (Smer-DO)	Prime Minister Parliamentary	2016	737,481	49 (28.9%)
Czech Republic	Miloš Zeman (Far-Right SPO)	Presidential (Elected)	2018	2,853,390	51.3%
Greece	Alex Tsipras Coalition Radical Left (SYRIZA)	Prime Minister Parliamentary	2015	1,925,904	145 (35.5%)
Lithuania	Order and Justice (TT)	Parliamentary	2016	67,817	8 (5.5%)
Mexico	Andrés Manuel López Obrador Morena (Centre-Left)	Presidential (Elected)	2018	30,113,483	53.19%
Brazil	Jair Bolsanaro PSL	Presidential (Elected)	2018	57,797,847	55,13%
Venezuela	Nicolás Maduro (Far-Left PSUV)	Presidential (Reelected)	2013 2018*	7,587,579	50.6%
Guatemala	Jimmy Morales FCN	Presidential (Elected)	2015	2,751,058	67.4%
Bolivia	Evo Morales Movement for Socialism	Presidential (Elected)	2014	3,173,304	61.3%
Egypt	Abdel Fattah al-Sisi	Presidential (Elected)	2018	21,835,387	97%
Equatorial Guinea	Teodoro Obiang Nguema PDGE	Presidential (Elected)	2016	271,177	93.5%
Burundi	Pierre Nkurunziza	President (Elected)	2015	1,961,510	69.4%
Philippines	Rodrigo Duterte PDP-Laban	President (Elected)	2016	16,601,997	39%
Myanmar	Aung San Suu Kyi (NLD)	S. Counsellor (Elected)	2015	12,794,561 (HR)	395 (86%) Total
Indonesia *	Prabowo Subianto	Presidential (Candidate)	2019	N/A	N/A
New Zealand	New Zealand First	Parliamentary	2017	186,706	9 (7.5%)

METRICS TABLE 9

Author: J. Mauricio Gaona (2019). McGill University (DCL program).
Sources: FBI field offices (press releases) following each criminal conviction or investigation. For more information: link: http://archives.fbi.gov/archives [search box].
Observations: Table only includes cases whose investigation was classified as terrorist attack by the FBI. Hate crimes and domestic shootings are therefore not included. Further, Table does not include "terrorist plots." That is, FBI investigations or criminal convictions involving plans to commit terrorist acts, which were eventually prosecuted as conspiracy or solicitation.

METRICS TABLE 10

Author: J. Mauricio Gaona (2018). McGill University (DCL program).
Sources: U.S. Federal Election Commission (2016 Presidential Election); Bundeswahlleiter (Deutschland 2017); Ministero dell'interno (Camera di Deputati 2018); Kergegevens Report (21-03-17); Counseil Constitutionel de France (Résultats 2017); Denmark KVS (2015); Poland PKW Communicate (20-10-2015); Austria Interior Minister (2016–2018); Statistics Switzerland (2015 Elections); Belgium Federal Portal (2014 Elections); Hungary National Election Office (2018); Ministry of Finland (2018); Sweden Electoral Authority (Val Till Riksdagen 2014); Slovakia Statistical Office (Report 2016); Czech Republic Volby (2018); Ministry of Interior Greece (2015); Government of Lithuania (The Economist Report, 2016); CSIS Mexico (Elecciones 2018); CES Brasil (2018); Consejo Nacional Electoral de Venezuela (2013, 2018); Congreso de la República de Guatemala (2015); Organo Electoral Plurinacional de Bolivia (2014); Egypt National Election Authority HEC (2018); Government of Equatorial Guinea (2016); Burundi Independent National Election Committee (2015); Government of Philippines (2016); Myanmar Union Electoral Commission (2015); Jakarta Globe Elections (2018); Electorate Commission of New Zealand (2017).
Observations: Official results as reported by electoral authorities in each country [all visited on 31 October 2018).
* Countries in which one of the two final contenders was described as populist candidate.
* Venezuela's President Nicolás Maduro was elected by popular vote in 2013. His reelection in 2018 followed National-Constituent-Assembly's convocation for presidential elections.

IMAGES

Image 1: Technology, Humanity.
Sources: IMGCOP (*top left*), Fortune (*left*), NASA (*right*), UNHCR (*bottom*).

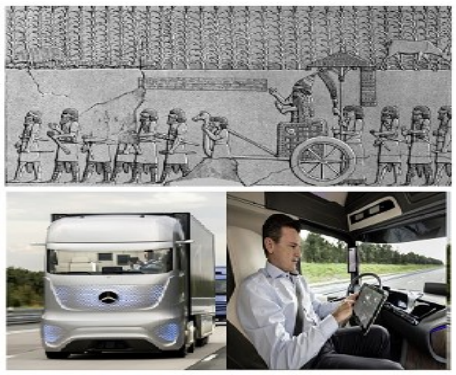


Image 2: Modern v. Ancient Transportation.
Sources: British National Museum (*top*) and Fleetowner (*bottom*).

Image 3: Nazis and Neo-Nazis (1930 - 2018).
Sources: Wikipedia (*top left*), Mashable (*left*), Wikipedia (*bottom left*), Qz (*top right*), ABC (*right*), IGD (*bottom right*).

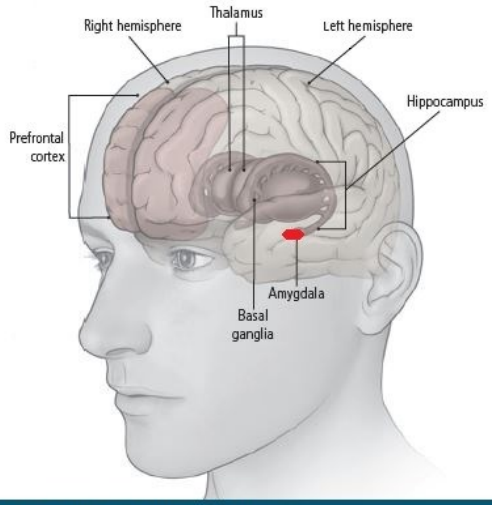


Image 4: Bias Formation - Amygdala.
Source: Harvard Health (2018).

Image 5: Detention and Treatment of Asylum Seekers by Hungary's Security Forces.
Sources: Reuters (*top*), The Guardian (*bottom*).

Image 6: Alan Kurdi, Lying Death on the Beach near Bodrum, Turkey (2 Sept. 2015).
Source: Nilüfer Demir, Doğan News Agency.

Image 7: U.S. Officers Tear Gas On Migrants at the border.
Source: The Guardian (26 November 2018).

Image 8: Refugees and Asylum Seekers in the United States and Uganda (dissimilar dimmensions).
Sources: OXc (*top right*), UNHCR (*top left*), CNN (*bottom left*), UNV (*bottom rights*).

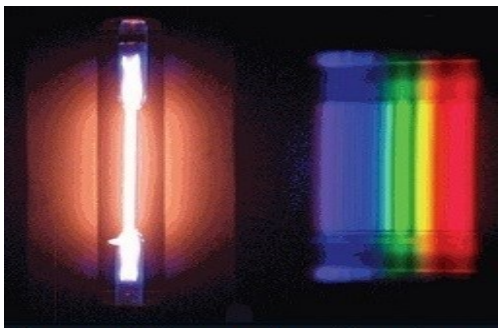


Image 9: Quantum Leap Experiment (heaters).
Source: Scientificsonline.com

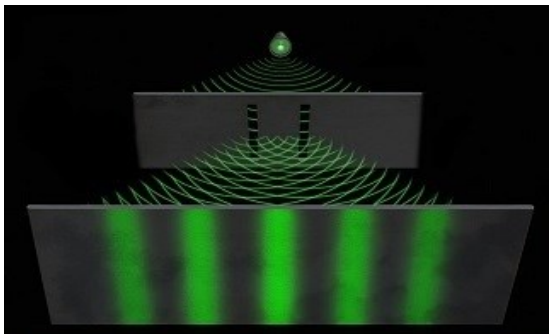


Image 10: Double-Slit Experiment (wavers).
Source: Reasonable Science Foundation.

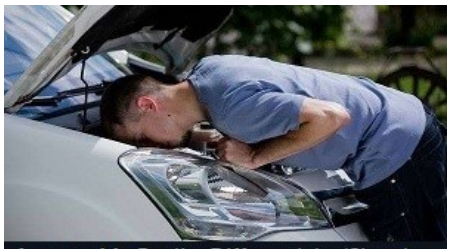


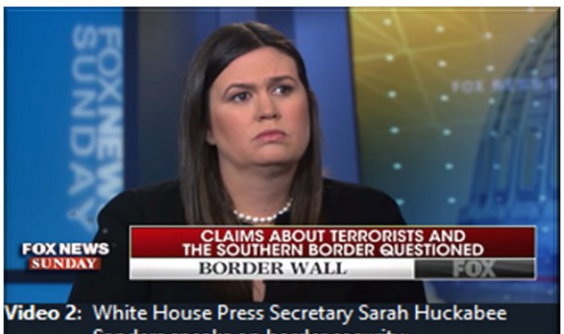
Image 11: Reality Differentials (Singular Perspective).
Source: Pexels.

Image 12: Reality Differential (Dimensional Perspective).
Source: Pexels.

Image 13: Multidimensional Perception of Reality.
Source: Free Images.

VIDEOS

Video 1: Hungarian Police Throwing Bread at Desperate Refugees.
Source: FRANCE 24 (11 Sept. 2015). Click on image to watch.
Link: https://youtu.be/kcRNfNS6HWo



Video 2: White House Press Secretary Sarah Huckabee Sanders speaks on border security.
Source: Fox News Sunday (2019)
Note: Click on image to watch video
Link: https://youtu.be/Rf0cvSTMz_s

Video 3: U.S. President Donald Trump addresses the nation from the Oval Office concerning security at the southern border.
Source: Benjamin Siegel & Jordyn Phelps, *ABC News* (8 January 2019).
Note: Click on image to watch video
Link: https://abcnews.go.com/Politics/trump-argue-national-security-crisis-southern-border-prime/story?id=60232539

CHAPTER 4

The Legal Gap

Law, Morality, Security

FIGURES

FIGURE 1: DEATH ON THE MEDITERRANEAN (2015-2017).

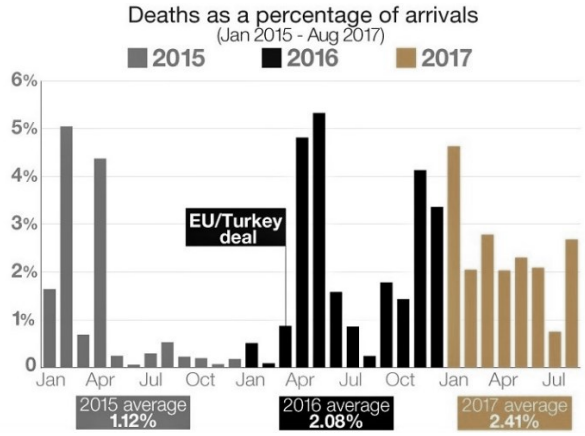
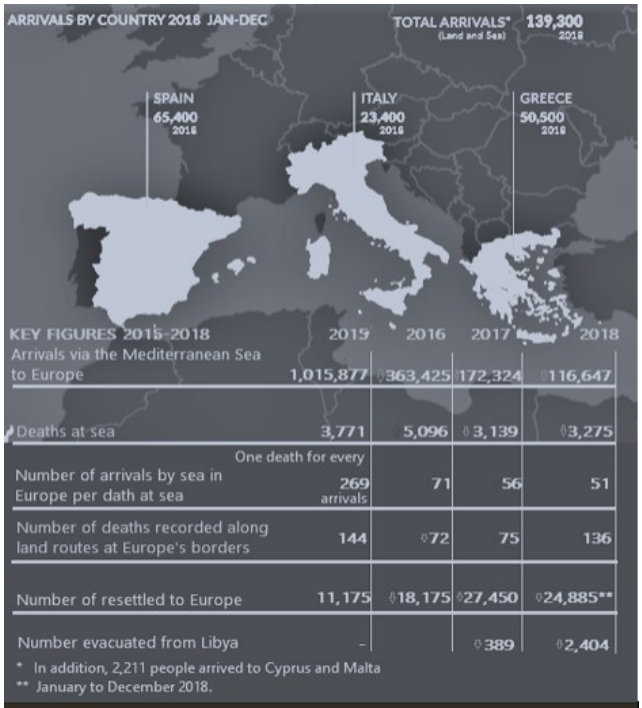
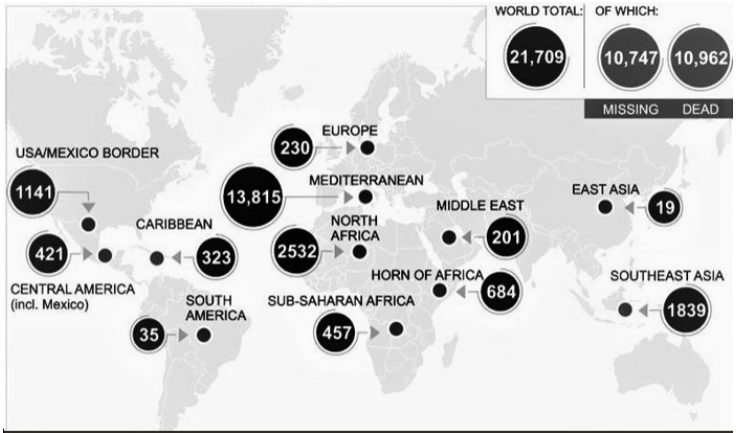


FIGURE 2: EUROPE'S KEY FIGURES ON MIGRANTS ARRIVALS BY COUNTRY (2019).



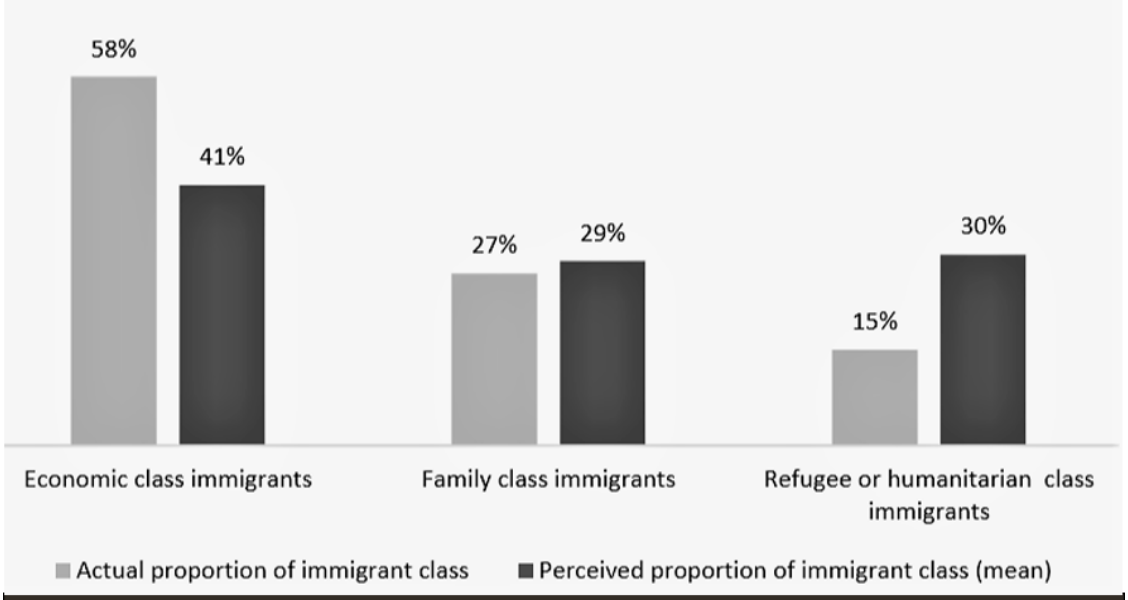
Source: UNHCR, *Desperate Journeys* (2019) at 7.

FIGURE 3: MIGRANT SMUGGLING – A DEADLY BUSINESS.



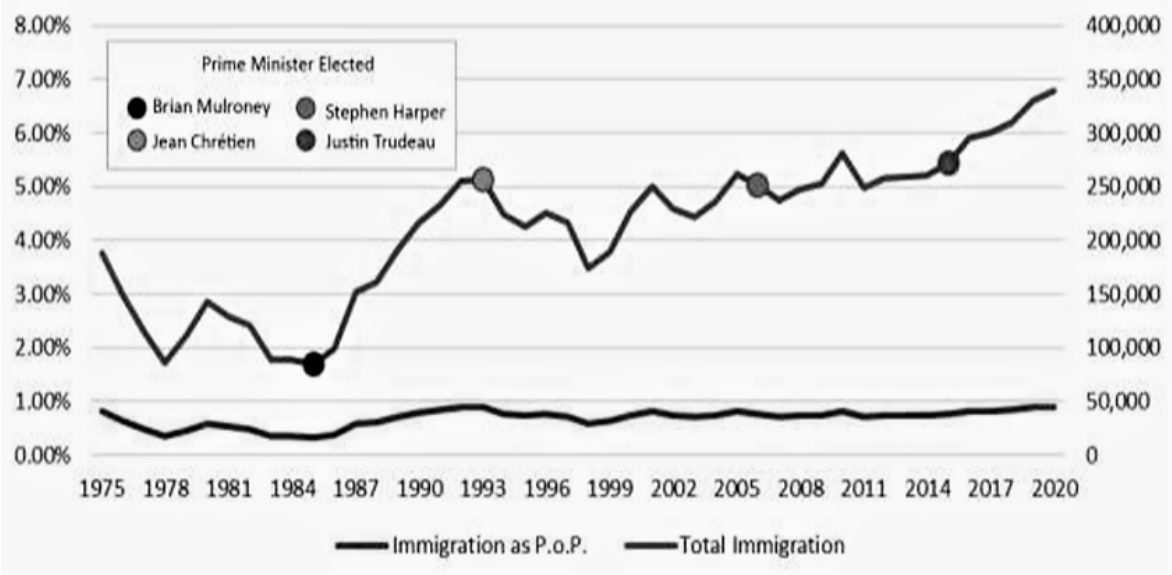
Source: International Organization for Migration (IOM), *MINDS Global Spotlight CTK* (2018).
Observations: Migrant Facilities, from January 2014 to May 2017 (dead and missing migrants).

FIGURE 4: ACTUAL VERSUS PERCEIVED PROPORTION OF EVERY IMMIGRANT CLASS IN CANADA (2019).



Source: Angus Reid Institute, Immigration Views (Vancouver: Angus Reid, October 2019) at 8.
Methodology: Survey (all respondents n= 1552).

FIGURE 5: CANADIAN IMMIGRATION TRENDS (1975 – 2020).



Source: Angus Reid Institute, Immigration Views (Vancouver: Angus Reid, October 2019) at 3.

IMAGES

Imagen 1: Migrant Smuggling.
Sources: From right to left (up-down), Mary Sanyou Uosire (January 2011), Getty images AFP/G. Arias (2019), The Independent (26 October 2016), Associated Press (27 April 2019).

VIDEO

Video 1: People Smuggling in Germany: A Multibillion Dollar Business.
Source: DW Documentary (19 Februray 2019). (Click on video to watch).