A Counterbalancing Exception: the Refugee Concept as a Normative Idea

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Abstract:

The refugee concept is a point of normative contentions. While the state is generally considered free to regulate access to its territory, the refugee concept refers to an exceptional claim to access. The article explores origin and structure of this concept and its legal codification. The term "refugee" emerges in the 17th century, a time in which the political order changes. In the developing framework of the territorial state, the territorial community is viewed as basis of all law. Against the general rule that the state is free to regulate access, political philosophers recognize in different versions the existence of an exception: that the state has an obligation towards the stranger at its border who otherwise faces serious harm. This normative idea of an exception successively joins with the refugee concept. It responds to the basic tension in the territorial state framework, which is based on universalist principles of human equality and freedom, while delimitating rights and obligations along territorial borders. The refugee concept reflects the idea that this delimitation must be corrected in extreme cases for the tension to remain tolerable. In that role of a constitutive exception, the refugee concept forms today both an object and an engine of critique: it can be seen to bolster the state's discretion in regulating entry, yet it can also assume a role in unsettling this prerogative, representing a cosmopolitan rights claim.

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1. Introduction

Conversations about the topics of migration and refugees regularly include debates regarding the proper use of terms. One illustrating instance was in the summer of 2015 when the broadcaster *Al Jazeera* announced that it would no longer use the term "migrants" to refer to persons risking their lives to reach Europe *via* the Mediterranean Sea, but would instead use "refugees."[1] The article calls out media outlets on their dehumanizing use of the term "migrants," emphasizing the severe reasons that force people to flee. The majority of people trying to cross the Mediterranean from Turkey to Greece were Syrians, along with others from Afghanistan, Iraq, and elsewhere. The situation in Syria was especially well known to the European public, as were the circumstances in surrounding countries such as Lebanon, Jordan, and Turkey, all of which received many refugees while their reception conditions successively deteriorated, making the dangerous journey onwards the sole choice for many. But, what exactly does *Al Jazeera's* statement refer to when it speaks of "refugees"? The article does not explicitly mention the definition of "refugee" in international law, although its mention of the UN High Commissioner for Refugees (UNHCR) references international legal structures. In contrast to the pejorative use of the term "migrants" that the article decries, "refugee" is taken to signify the recognition of a legitimate claim.

The fact that the term "refugee" is taken to indicate a legitimate claim is seen in other instances as well. Earlier, in January 2014, people from mostly Eritrea and Sudan were protesting in southern Tel Aviv, holding up "We are refugees" signs.[2] While these signs referenced a legal distinction between "economic migrants" – the label they opposed – and "refugees," they also seemed to appeal to a moral recognition by the public. The power of the refugee notion is equally visible in the "real refugee" trope, which is mostly used in negation. In that vein, the Daily Mail wrote about a group rescued before the Sicilian coast: "The tragic but brutal truth: They are not REAL refugees."[3] Similarly, the French newspaper *Figaro* wrote about the shutting down of Calais' informal settlements, known as "the jungle": "The

[1] See Barry Malone, "Why Al Jazeera will not say Mediterranean 'migrants'" (20 August 2015), online: *Al Jazeera* <www.aljazeera.com> [perma.cc/2UUY-K7JP].
[2] See Maeve McClenaghan, "Israeli protests: a refugee's story" (6 January 2014), online: The Guardian <www.theguardian.com> [perma.cc/SA5B-S4AQ].
[3] Sue Reid, "The tragic but brutal truth: They are not REAL refugees! Despite drowning tragedy thousands of economic migrants are still trying to reach Europe" (27 May 2016), online: *The Daily Mail* <www.dailymail.co.uk> [perma.cc/M435-C6V4]

truth must be said: the migrants of the jungle are not refugees."[4] Similar tropes are indeed found in academic contexts, such as when use of the term 'refugee' is considered "label fraud."[5] What is it about the notion of the refugee that prompts such invocations of truth and truthfulness? That authors reference the existence of a legal definition can hardly explain this. It is the nature of legal definitions that their applicability to a person or a situation remains contested at least until a judicial decision is rendered, and sometimes beyond. Whether a person is legally considered a refugee is up to designated state agents or courts to decide. Asylum statistics in the context of the concrete invocations in Europe suggest that the legal qualification of migrants was at least unclear. The existence of a legal definition does not explain the vehement invocation of truth as in the trope of the "real refugee". Numerous terms for which a legal definition exists also have a broader or diverging meaning in everyday language. Usually, the existence of a legal definition is not seen as a reason to police public usage of the term. The references to truth and truthfulness in using the label "refugees" indicate that the term as such carries a strong normative significance. To call persons "refugees," or to claim this label, expresses more than a belief about their legal status – it expresses a belief about the legitimacy of their presence or arrival. The refugee concept, apparently, has the potential to unsettle.

The refugee concept is complex, not only in the ways its use is embraced or resented, but also in the ways it is rejected. In July 2015, the movement which formed in the Oranienplatz in Berlin under the name "refugee movement" launched a campaign with the slogan, "stop calling freedom fighters refugees."[6] Open border proponents often oppose the refugee notion because it not only signifies a claim to entry and protection but, along with it, also backs the general rule of a state's discretionary decision about the crossing of a border. Among the various reactions that Al Jazeera's statement prompted were also such that took issue with the underlying distinction between refugees and other migrants.[7] This distinction

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[4] Xavier Saincol, "'Il faut dire la vérité, la plupart des migrants de la jungle de Calais ne sont pas des réfugiés'" (24 October 2016), online: *Le Figaro* <www.lefigaro.fr> [perma.cc/RUQ2-QZP5] [translated by author].

[5] Christian Hillgruber, "Flüchtlingsschutz oder Arbeitsmigration. Über die Notwendigkeit und die Konsequenzen einer Unterscheidung" in Otto Depenheuer and Christoph Grabenwarter, eds, *Der Staat in der Flüchtlingskrise: Zwischen gutem Willen und geltendem Recht*, 2nd ed (Leiden NL: Verlag Ferdinand Schöningh, 2016) 185 at 185, 191.

[6] "Stop Calling Freedom Fighters Refugees" (3 July 2015), online: *Berlin Refugee Movement* <oplatz.net/stop-calling-freedom-fighters-refugees/> [perma.cc/Y46C-456V].

[7] See Jørgen Carling, "Refugees are also Migrants. All Migrants Matter" (3 September 2015), online (blog): *Border Criminologies*, *University of Oxford Faculty of Law* <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also> [perma.cc/ZL3B-4MM6].

forms a central point of contention that pervades migration scholarship in the social sciences, law, and political theory: is the distinction of refugees and migrants something to uphold or to overcome? Is it useful analytically, is it adequate as a matter of legal categories, it is appropriate as a broader normative differentiation?

This paper seeks to shed light on these various contestations around the refugee concept. It advances an understanding of the refugee concept as a normative idea, offering a critical background to the legal regulation of refugee status while arguing in favor of the conceptual distinction. The refugee concept, it argues, represents the normative idea that in exceptional cases, the state has an obligation towards the stranger at its border. This idea developed alongside the framework of the territorial state, building on its underlying universalist principles of human equality and freedom, and counterbalancing their general territorial delimitation. Its central position in the legitimacy framework of the state can explain the ambivalence of the refugee concept, and the vehemence of its invocations and rejections. Since the refugee concept is entangled with fundamental questions of legitimacy, its contestations concern the balance between the universalism at the basis of modern law and the necessity of particular institutions. In that function, the concept retains a critical potential for a universalist discourse today.

The paper unfolds as follows: the subsequent section (2) looks at the different uses of the concept, including the legal definition of the 1951 Geneva Refugee Convention (GRC), which forms a central reference point of discussions today. Tracing the origins of the GRC definition, the third section (3) explores the emergence of the refugee notion in the 17th century and corresponding ideas in the political thought of the 18th and 19th centuries. Based on social contract theories and the emergence of the territorial state, the discretionary decision about access to territory is conceived as a legitimate expression of sovereign power. However, this rule of discretionary decision is accompanied by the idea of an exception: the stranger at the border has a claim to be accepted if he otherwise faces destruction. The fourth section (4) explores this normative idea and suggests viewing it as a counterbalancing exception: the obligation towards the stranger in dire need is necessary to reconcile the universalism at the basis of the territorial state with its delimitation along borders. While this normative idea is not per se linked to the refugee notion, the two become firmly joined in the early 20th century. The fifth section (5) traces the history of refugee protection becoming codified and discusses questions that this raises. Firstly, the legislation of criteria for refugee status takes place through institutions of the state, unlike the individual claim which confronts the state from

outside. Secondly, the successive codification in international law spotlights the European history of the refugee concept and its premises. When the GRC became formally universalized with the 1967 Protocol, this also gave rise to contestations of the definition's particular assumptions. The sixth section (6) looks at competing refugee definitions in international law and interprets the different regional approaches in light of the concept's universalist content. The paper closes with a section (7) that discusses how the refugee concept's emancipatory potential and a critique of its particular assumptions can go together. It suggests to understand the contestations of the refugee concept today as democratic iterations,[8] which reflect the significance of the normative idea and its interrelation with the legal rules.

2. Dimensions of the Refugee Concept

There are different uses of the refugee concept, which are not mutually exclusive. The term is used descriptively, it is defined in law and used as a legal concept, and it has a broader normative dimension. In a most general sense, the term "refugee" refers to a person migrating or having migrated for reasons of hardship.[9] The English word "refugee," over the French "réfugié," goes back to the Latin *refugium*: a place where a person can find shelter.[10] These terms highlights the aspect of a refugee being a person in search for, or who has found, shelter. In other languages, the corresponding term puts the emphasis on the flight itself.[11] What characterizes the refugee is thus foremost a movement from one place to another, and secondly an element of hardship and involuntariness, as the notions of flight and shelter indicate.

A descriptive use of the refugee concept builds on this general understanding. In that sense, the term is used with the view of displacement of various kinds and for various reasons, in relation to war, to environmental disasters, or most widely to persons migrating under deprived conditions. Even in this general descriptive sense, the refugee notion involves a dual demarcation: from persons not migrating, and from those migrating without reasons and conditions of hardship. It is along these demarcations that questions of definition arise. What constitutes hardship? How can one assess the often mixed and entangled motives for migration? And, up to which point in time do we distinguish persons who have "found shelter" from

[8] See Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, (New York: Cambridge University Press, 2004) at 178–81.
[9] Cf "Refugee" (last modified 14 March 2019), online: *Encyclopaedia Britannica* <https://www.britannica.com/topic/refugee> [perma.cc/V7BN-38QF].
[10] The same is the case for the term in Roman languages, such as "rifugiato" in Italian.
[11] This is the case for "Flüchtling" in German, "פָּלִיט" in Hebrew, or "беженец" in Russian.

permanent members of a community? These questions gain relevance where a consequence is attached to someone being called a refugee.

The main consequence that international law attaches to the refugee notion is the prohibition of refoulement: the prohibition to expel or return a person to the place she is fleeing. The GRC, in this regard, contains a detailed stipulation of who is to be considered a refugee.[12] It states that for its purposes, the term "refugee" shall apply to any person who:

> "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[13]

Several additions and specifications are contained in the GRC, to which I will turn below. This core definition, however, is pivotal today not only for international refugee law, but has shaped the understanding of who is a refugee further. It formulates three main criteria for refugee status: having crossed an international border, a well-founded fear of persecution, and the causality of one of the five enumerated reasons for persecution.

In addition to the quoted passage, the GRC stipulates several qualifications and exceptions as to whom the definition applies. It begins with a temporal limitation to flight resulting from events before 1 January 1951, which was lifted by the 1967 Protocol, which almost all state parties to the GRC have ratified.[14] Moreover, the GRC included the possibility to declare a geographical limitation of its applicability in order for it to exclusively apply to refugees coming from Europe.[15] This possibility was ended by the 1967 Protocol. Declared geographical limitations remained, however, valid.[16] Furthermore, the GRC contains exclusion clauses in its Article 1 D and F. Article 1 D exempts from its application persons who are under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near

[12] *Final Act and Convention Relating to the Status of Refugees*, 2 July 1951, 189 UNTS 150 art 1 (entered into force 26 November 1952) [*GRC*].
[13] *Ibid* at art 1A(2).
[14] United Nations High Commissioner for Refugees, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol" (2015) at 1, online (pdf): *UNHCR* <www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.
[15] *GRC*, *Supra*, note 12 at art 1B.
[16] *Ibid* (Four states have declared such limitations: Congo, Madagascar, Monaco and Turkey at 3).

East (UNRWA).[17] It does not mention the UNRWA explicitly but speaks of "persons […] receiving from organs or agencies of the United Nations other than the UNHCR protection or assistance"; the UNRWA has remained, however, the only case in which this applies. Article 1 F exempts from protection as a refugee persons who have committed serious crimes.

The refugee definition of the GRC is thus elaborate in its wording, and each of the criteria has been subject to interpretation by courts and administrative bodies.[18] Particularly, the criterion of "membership of a particular social group" has enabled a dynamic interpretation, which successively included for instance also persecution based on gender or sexual orientation.[19] The UNHCR issues, since 1979, a handbook that summarizes and guides the interpretation of the GRC refugee definition.[20] However, there is no institution with a binding last word on the interpretation of the GRC. The refugee concept of the GRC is complex and subject to evolving and competing interpretations. Nonetheless, the GRC definition has shaped the discourse on the refugee concept far beyond the legal realm. In contestations about states' obligations towards migrants, the definition often serves as a reference point. Yet despite its legal significance, the GRC definition must be seen in its specific context, embedded in a preceding history of the refugee concept and a subsequent development.[21] It neither forecloses differing legal definitions nor answers the question of who *should* receive protection.

Besides the descriptive uses of the refugee concept and its legal definition, the refugee is also referred to as a normative category in political philosophy.[22] Refugees, in that understanding, are a category of migrants with special entitlements; persons towards whom states have special obligations.[23] Such a perspective focuses on the claim to inclusion and to rights that is linked to the refugee concept. There has been much discussion about formulating a

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[17] *GRC*, *Supra*, note 12 at art 1D.

[18] See generally Andreas Zimmerman & Claudia Mahler, "Part Two General Provisions, Article 1 A, para. 2" in Andreas Zimmerman, Jonas Dörschner & Felix Machts, eds, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011).

[19] Maryellen Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1993) 26:3 Cornell Intl LJ 505 at 505, 520—21, 534—35, 539—40.

[20] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV. 4, February 2019.

[21] Competing legal definitions are discussed below in Section 6.

[22] The strand of political philosophy summarized here could be called Kantian approaches, in opposition to critical theory approaches, *CF* Dana Schmalz, "Social Freedom in a Global World: Axel Honneth's and Seyla Benhabib's Reconsiderations of a Hegelian Perspective on Justice" (2019) 26:2 Constellations 301 at 314.

[23] See David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge: Harvard University Press, 2016) at 78.

definition of the refugee in relation to this normative specificity.[24] The philosophical debate thereby does not take place in a legal void,[25] yet with the aim to arrive at an abstract understanding of what is specific to the refugee and what are adequate criteria of distinction.

Another strand of the debate, particularly in social and political sciences, engages with the specificity ascribed to the refugee concept, yet focuses on its exclusionary side. The refugee concept, as seen in its very basic definition, contains a dual demarcation: from other migrants and from the citizens at the place of a refugee's presence. Regarding conditions of mobility, the refugee is a category of entitlement, which strengthens the perception that other migrants have no legitimate claim to access. In that vein, the refugee concept is criticized as part of an order, which unfairly distributes freedom of movement. For instance, Simon Behrman describes how refugee law works as a means of controlling, placing the person claiming asylum in dependence on criteria they have no influence over.[26] Heaven Crawley and Dimitris Skleparis argue that the monopolization of claims to territorial entry under the refugee notion tends to ultimately reduce the schemes for legal migration.[27]

The perspectives on the refugee concept that I have described in this section do not require adjudication. They do not always mean a disagreement in substance, although some views do. Foremost, they highlight the complexity of the refugee concept. Rather than searching for a "right view," my interest in the following is to unpack this complexity by exploring the concept's history and its theoretical position in thinking about law.

3. The Emergence of the Refugee Concept Alongside the Territorial State

The terms "réfugié" in French and "refugee" in English appear in the 16th and 17th centuries.[28] The flight of about 200,000 Huguenots from France in the late 17th century is re-

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[24] See Matthew Lister, "Who Are Refugees?" (2013) 32:5 Law & Phil 645 at 648. Cf Andrew E Shacknove, "Who is a Refugee?" (1985) 95:2 Ethics at 274.
[25] *Cf* Max Cherem, "Refugee Rights: Against Expanding the Definition of a "Refugee" and Unilateral Protection Elsewhere" (2016) 24:2 J Political Phil 183 at 183—877.
[26] Simon Behrman, "Refugee Law as a Means of Control" (2018) 32:1 J Refugee Stud 42 at 42; Simon Behrman, *Law and Asylum. Space, Subject, Resistance* (New York: Routledge, 2018) at 116. See also Patricia Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996) at 24.
[27] Heaven Crawley & Dimitris Skleparis, "Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis'" (2017) 43:1 J Ethnic & Migratory Stud 48 at 48–49. See generally Robert Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20:2 J Refugee Stud 172.
[28] See Aristide Zolberg, Astri Suhrke & Sergio Aguato, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989) at 5; Patricia Tuitt, "Rethinking the Refu-

ferred to as the first case of refugees in this sense,[29] although several events of forced migration took place within Europe around that time.[30] What can explain the emergence of the refugee notion during that period, and how is it distinct from prior concepts dealing with persecution and flight?

When the refugee concept emerges in Europe, it is a time in which the political order and legal thinking undergo fundamental changes. From an order mainly structured by religious belonging, a process of change towards a territorially defined order begins. The Westphalian Peace Treaties from 1648 are in that sense viewed as the birthdate of the territorial state order.[31] They ended the Thirty Years' War, which had been fought between Catholic and Protestant states, and were largely concerned with religious groups and belonging. Already, the Peace of Augsburg in 1555 had introduced the principle *cuius regio eius religio*, according to which the confession of the ruler should determine the religion of the population, leaving the option to move away or to change one's religion.[32] While by no means an instantaneous change, these treaties mark an attempted aligning of religious and territorial belonging.

Hand in hand with the changes in political order, legal and political thought changes fundamentally. While the Westphalian Peace Treaties were negotiated, Thomas Hobbes wrote his book "The Leviathan," which appeared in 1651 and introduced the idea of a social contract, by which individuals establish a society and submit to a governing authority. John Locke's "Two Treatises of Government" in 1689 builds on this conception of the social contract and develops it further, complementing the focus on peace and security with one of property and rights. Together with further thinkers of their time, these works on the social contract mark a turn to the individual as a reference point of legitimacy.[33] From the idea of natural or divine law and the discretionary ruling of a monarch, the understanding of law moves towards the notion of agreement. The social contract represents an imagined first agreement of individuals about the existence of society and the necessity of government.

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gee Concept" in Frances Nicholson & Patrick Twomey, eds, *Refugee Rights and Realities* (Cambridge: Cambridge University Press, 1999) 106 at 110.

[29] See Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14:2/3 Int J Refugee L 238 at 239; Philip Marfleet, "Refugees and History: Why We Must Address the Past" (2007) 26:3 Refugee Surv Q 136 at 140.

[30] See Heinz Schilling, *Early Modern European Civilization and Its Political and Cultural Dynamism* (Hanover, NH: University Press of New England, 2008) at 37.

[31] *Cf* Hendrik Spruyt, "The End of Empire and the Extension of the Westphalian System: The Normative Basis of the Modern State Order" (2000) 2:2 Intl Stud Rev 65 at 69.

[32] See Emma Haddad, "The Refugee: Forging National Identities" (2002) 2:2 Stud in Ethnicity & Nationalism 23 at 25—6.

[33] Cf Volker Gerhardt, "Kants kopernikanische Wende" (1987) 78:2 Kant-Studien 133.

The refugee concept emerging during this time period can be understood in relation to these two changes: firstly, as territory is gaining significance as a criterion of political belonging, the perspective on migration changes. Reasons for migrating become more relevant, and the refugee concept, at the very basis, offers a distinction of reasons: it describes that a person migrates for reasons of hardship. Secondly, the refugee concept links to the growing focus on the individual. What distinguishes the refugee concept from the prior concept of asylum is a turn of perspective: person, rather than place, becomes the reference point of the rule. The Greek term *a-sylon* expresses that something is exempt from seizure, a status often linked to the sanctuary of a religious place.[34] Asylum relates to a certain place, either in the sense of a religious place or, in the case of political or diplomatic asylum, a state; it is an expression of competing sovereignty.

There are several legal institutions today that belong to this strand. Church asylum reflects a certain sovereignty of the church within the state. Diplomatic asylum that an individual can seek in an embassy reflects the sovereignty of one state's diplomatic presence even on the territory of another state.[35] Political asylum expresses the sovereignty of one state *vis-à-vis* the state from which the individual flees. In all these cases, the point of contention is extradition of the individual and the contending parties are the two sovereign entities. The refugee concept, by contrast, does not link to a specific place but to a person and her act of migration. The point of contention is not primarily extradition but the access and protection. The contending parties are not two sovereigns but rather the individual or plural migrants and the state which they seek protection in. While the concepts of asylum and the refugee intersect in practice and certainly in the use of terms, the distinct angles of perspective are worth distinguishing to understand the underlying normative histories.

4. The Refugee Concept as a Counterbalancing Exception

The emergence of the refugee concept as well as the changes in the political order and legal thinking were slow, gradual and complex developments. From the refugee concept's

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[34] See Kay Hailbronner & Jana Gogolin, "Asylum, Territorial" (last modified September 2013) at para 1, online: *The Max Planck Encyclopedia of Public International Law*, ed, Rüdiger Wolfrum <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e757>.

[35] See Charles Chatterjee, *International Law and Diplomacy* (New York: Routledge, 2013) at 8. See generally Gregor Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law?" (2005) 17:3 Intl J Refugee L 542.

appearance to its first codification in law, more than two centuries passed. Equally, from the Westphalian Peace Treaties, the territorial state developed in Europe over the course of the subsequent two centuries. The French Revolution marks the emphasis on a principle of popular sovereignty, where the territorial state gradually developed into a constitutional and later a democratic state.

The conception of law and legitimacy that begins to form centres on the individual, thereby building on the principles of human equality and freedom. That justice comes to be understood with reference to individual self-determination is more than a mere historical path that could run differently or be reversed.[36] The human capacity to question social orders and demand justification is asserted in practice through political movements and forms the core of our thinking about legitimacy, linking the discussed content of justice and the practice of reflecting about it. This understanding of justice means for law a continuous tension between demands of concreteness and universality.[37] In order to be concrete, law requires institutions through which persons mutually recognize and guarantee their rights. Concreteness requires delimitations, and in the case of the territorial state, the most basic delimitations are along borders and along boundaries of membership determined with reference to the territory. The territorial state constitutes the framework for institutions of public law; it is through these institutions that legal obligations and rights primarily exist. These delimitations conflict, however, in some cases with law's demand of universality: the underlying principles of human freedom and equality. Based on these principles, the delimitation of membership and obligations of solidarity along territorial borders appears, in many cases, arbitrary. The claim of the individual at the border forms a particularly acute question in that regard.

The question of what right a person has to migrate, or of what claim to enter a state, occupied legal thinkers throughout the centuries. In the 16th and early 17th centuries, Francisco de Vitoria and Hugo Grotius discussed a principle of free movement.[38] Their reflections take place mainly against the background of the conquest of the New World, the right to pas-

[36] Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life*, translated by Joseph Ganahl (New York: Columbia University Press, 2014) at 17.
[37] *Cf* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989) at 2–8 (for a general discussion of international law in terms of "normativity" rather than "universality").
[38] See Vincent Chetail, "Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vittoria to Vattel" (2016) 27:4 Eur J Intl L 901 at 903; Jane McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty" (2011) 12:1 Melbourne J Intl L 27 at 33—6.

sage on the high seas, and to settle in a place.[39] But, Grotius was also concerned to some extent with conditions of individual migration.[40] Their reflections clearly differ from later thinkers who draw on the territorial state and a social contract conception. Scholars such as Samuel von Pufendorf, Christian von Wolff, and Emer de Vattel focus less on the question of free movement, but accept the general right of a state to control immigration. Their framing of the question thus shifts from a view on conditions of movement and collective processes of settling towards individual migration and the specific claims of persons.

In these accounts, the state's right to decide about access always corresponds with the idea of an exception to the state's unilateral discretion. Hugo Grotius, in that sense, advocated for a right to stay in a foreign country if there exists a "just cause," suggesting that refugees are entitled to protection.[41] Pufendorf writes about a duty to admit strangers "driven from their former home."[42] Von Wolff, while putting large emphasis on state sovereignty, asserts an exceptional admittance of persons expelled from their homes.[43] De Vattel recognizes that a "right of necessity" under certain conditions restricts the state's sovereign prerogative to exclude persons, which amounts to a right to illegal entry.[44] Most famously, Immanuel Kant, in his essay "Perpetual Peace," speaks of the right of a stranger not to be rejected if it cannot be done without causing his destruction.[45] Kant emphasizes that this obligation towards the stranger is legal in nature and is not a mere question of philanthropy.

In the normative reasoning about conditions of migration and territorial access thus appears, in different terms, the idea of an exception. This idea of an exception should be understood against the background of the above described tension between the demands of universality and of concreteness in the territorial state framework. The exception applies to a person with a certain link to the state, either being present already or at the border, and it regards a situation of particular necessity or hardship, in which the person's life or liberty is seriously threatened. While the limitation of the *universality* of rights is generally accepted in favour of the *concreteness* of rights, this is deemed not acceptable in certain extreme cases,

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[39] Elke Tießler-Marenda, *Einwanderung und Asyl bei Hugo Grotius* (Berlin : Duncker & Humblot, 2002).
[40] Chetail, *supra* note 38 at 907.
[41] *Ibid* at 909, citing Hugo Grotius, *De Jure Belli Ac Pacis*, 1625 ed, edited by Richard Tuck, from the edition by Jean Barbeyrac (Indianapolis, Ind: Liberty Fund, 2005) at 1075.
[42] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, vol 2, translated by C H Oldfather & W A Oldfather, 1688 ed (Oxford: Clarendon Press; London: Humphrey Milford, 1934) at 366.
[43] Christian von Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, translated by J H Drake, vol 2 (Oxford: Clarendon Press; London: Humphrey Milford, 1934) at 149, 175.
[44] Chetail, *supra* note 38 at 920.
[45] Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, translated by Mary Campbell Smith (London: Swan Sonnenschein, 1903) at 137ff.

when the life of a person is threatened and this person is at the border. There is thus a link to universality, the equal worth of that person and a link to concreteness, because it is not any person, but the stranger *at the border* who *can* be saved. The idea of an exception in that sense builds on the universalist principles that underlie the modern state and counterbalances their delimitation along territory and membership.

The idea of an obligation towards the stranger at the border and an exceptional limit on the state's discretion about access is thereby not bound to the refugee concept. While the concept's appearance in the same period as the territorial state is noteworthy, it is not dominant in the subsequent political and legal discourse. Several of the mentioned scholars do not speak about refugees. It is only towards the end of the 19th and beginning of the 20th centuries that the refugee notion turns omnipresent.[46] As the concept becomes prevalent, however, it firmly joins with the described idea of a normative exception, and it is this idea and its fundamental role in the legitimacy framework of the modern state which makes the refugee concept influential and its contestations so vehement. Therefore, I suggest thinking of the idea of an exceptional claim at the border as the "normative idea of the refugee."

5. The Codification of the Refugee Concept and its Perplexities

In the course of the 19th century, the conditions of political membership and mobility in Europe successively tightened, for a variety of factors. Among them was a shift in the political significance of nationalism in Europe, from popular movements using the reference to the nation, to a form of "official [nationalism]" in which dynasties in their struggle to retain power referred to a legitimating national subject.[47] The idea of such national subject went hand in hand with an increasing focus on unified language and a projection of cultural homogeneity. How migration was treated in relation to the nation state thereby differed, yet overall, immigration became regulated in a more restrictive manner.[48] At the end of the 19th century, the assumption that the state had full discretion in regulating immigration was broadly shared and

[46] See Nevzat Soguk, *States and Strangers: Refugees and the Displacement of Statecraft* (Minneapolis: University of Minnesota Press, 1999) at 101–103.
[47] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised ed (London, UK: Verso, 2006) at 85–86.
[48] See John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000) at 93.

reflected in law.[49] The 1905 British Aliens Act reflects this restrictive stance towards immigration. Yet, it also contains a clause about an exception to the bar on entry, in case of persecution for political opinion or religious identity.[50]

This legal codification of an individual right to seek asylum was a novelty.[51] In concerning the conditions of entry, it reflects the described normative idea of an exception. At the same time, a second line of normative history joins refugee law, namely debates centering on the obligation between states to cooperate in criminal proceedings and the conditions under which a duty to extradite can be limited or excluded.[52] These debates align more with the tradition of asylum and competing sovereignty; they inform provisions regarding protection against political persecution, yet they are concerned with a question distinct from the claim to entry, and are less critical for today's debate. The paramount contestations in refugee law today do not pertain to whether a state has the right to protect the national of another state and not to extradite her, but to what rights individuals hold that no state is bent on accepting.

From the 1880s onwards, large-scale movements of flight took place in Europe, especially of Jews from Russia and Eastern Europe and of populations formerly part of the Ottoman Empire.[53] World War I further raised the extent of displacement to unprecedented levels.[54] In reaction to these events, the first international legal instruments of refugee protection were established. In 1921, Fridtjof Nansen was appointed High Commissioner for Refugees in the League of Nations.[55] The refugee notion became the term of reference for humanitarian activities, legal protection, and the surrounding normative debate.[56] At the same time, the first instruments for international protection worked without explicit definitions of the refugee. Refugees were understood as persons deprived of *de jure* protection by their states of origin,

[49] See Henry Sidgwick, *The Elements of Politics*, 2nd ed (London, UK: Macmillan, 1897) at 248. See also David Miller, "Immigrants, Nations, and Citizenship" (2008) 16:4 J Political Philosophy 371 at 374; *Fong Yue Ting v United States*, 149 US 698 at 711 [*Fong*] cited in Thomas Alexander Aleinikoff, "Federal Regulation of Aliens and the Constitution" (1989) 83:4 Am J Intl L 862 at 863.
[50] (UK), 5 Edw VII, c 13, s 1(3).
[51] See Alison Bashford & Jane McAdam, "The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law" (2014) 32:2 L & Hist Rev 309 at 311—12.
[52] See generally Charles Brocher, "Rapport sur l'extradition et les commissions rogatoires en matière pénale" (1879-80) 3-4 Annuaire Institut Dr Intl 202.
[53] Saskia Sassen, *Guests and Aliens* (New York: The New Press, 1999) at 77.
[54] *Ibid* at 83.
[55] See Gilbert Jaeger, "On the History of the International Protection of Refugees" (2001) 83:843 Intl Rev Red Cross 727 at 728.
[56] See e.g. Norman Angell & Dorothy Francis Buxton, *You and the Refugee: the Morals and Economics of the Problem* (Harmondsworth, Middlesex, UK: Penguin Books, 1939).

either by denaturalization or by similar forms of denying them legal membership status.[57] An abstract definition seemed, however, dispensable as international instruments applied to specifically identified groups of certain origins. The 1933 Refugee Convention Relating to the International Status of Refugees applied to Russian, Armenian, and assimilated refugees.[58] In the subsequent years, international endeavors focused on refugees from Nazi Germany and occupied European countries. A specific Convention Regarding the Status of Refugees Coming from Germany in 1938 also abstained from a specific definition; it excluded from its scope of application persons "who leave Germany for reasons of purely personal convenience."[59]

The Constitution of the International Refugee Organization (IRO) in 1946 for the first time contained a section on the "definition of refugees."[60] It sets as a general criterion the situation outside one's country of nationality or of former habitual residence, and subsequently enumerates as an additional requirement several categories of persons. On the one hand, the definition remains case-specific with a focus on "victims of the Nazi or fascist regimes" or their allies,[61] or "victims of the Falangist regime."[62] On the other hand, the definition includes, rather broadly, persons "considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion,"[63] persons who have left their state of origin in the context of World War II and are "unable or unwilling to avail [themselves] of the protection of [its] government,"[64] victims of Nazi persecution waiting to return to Germany or Austria,[65] as well as "unaccompanied children who are war orphans or whose parents have disappeared,"[66]

In 1949, the UN Economic and Social Council (ECOSOC) convened a committee to discuss the possibilities of a new international convention on protection of stateless and refu-

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[57] See James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 2.
[58] See Convention relating to the International Status of Refugees, 28 October 1933, 159 LNTS 3663 art 1 (assimilated refugees encompassed Syrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks); Jaeger, *supra* note 55 at 729—30.
[59] See Convention concerning the Status of Refugees coming from Germany, 10 February 1938, 192 LNTS 4461 at art 1(2).
[60] See Constitution of the International Refugee Organization, 15 December 1946, 18 UNTS 3 at 12.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid* at 13.
[65] *Ibid*.
[66] *Ibid*.

gees.[67] Members of the IRO also participated centrally in the first draft for the later Refugee Convention.[68] For the Convention's refugee definition, the drafters proposed three possible solutions: a competence of the United Nations General Assembly to decide in each case which groups of persons should receive legal protection, the list from the annex to the IRO Constitution, or a definition to be contained in the Refugee Convention itself.[69] After state representatives had settled on the third possibility, the negotiations revolved around the formulation of the definition.[70] After deciding in favour of a general definition, different models of refugee definitions were discussed, ranging from the reference to concrete groups of displaced persons to more abstract determinations.[71] In the end, a mixed solution was chosen, which included an abstract definition. The GRC is applicable to all persons regarded as refugees in prior international treaties,[72] but also stipulates general criteria for refugee status, as seen in the beginning.

James Hathaway described this evolution of refugee definitions as consisting in three periods:[73] a juridical perspective from 1920 to 1935, which focused on persons who lost *de jure* protection, was complemented by a social perspective in the years from 1935 to 1939, which included those who were *de facto* deprived of protection by their state of origin. A third period led, according to Hathaway, to an individualist perspective that became the basis for the 1951 Convention. Gilad Ben-Nun describes the evolution as an opposition between an *ad-hoc* and a universal approach.[74] He notes how traditions of protection underlie the League of Nations activities, while the responses before the 1951 Convention were piecemeal rather than encompassing and left non-European refugees mostly out of view.[75]

These descriptions of the beginnings of international refugee law underline how the codification revolved around questions of universality and concreteness. Responses that fo-

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[67] See ECOSOC, *UN Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary-General*, UN Doc E/AC.32/2, 1950 [ECOSOC Memorandum].
[68] See Irial Glynn, "The Genesis and Development of Article 1 of the 1951 Refugee Convention" (2011) 25:1 J Refugee Stud 134 at 136.
[69] ECOSOC Memorandum, *supra* note 67 at Annex art 1.
[70] See generally Paul Weis, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed, with a Commentary*, (Cambridge: Cambridge University Press 1995) at 1.
[71] See especially UN Ad Hoc Committee on Statelessness and Related Problems, 1st Sess, 5th Mtg, UN Doc E/AC.32/SR.5 (1950); UN Ad Hoc Committee on Statelessness and Related Problems, 1st Sess, 6th Mtg, UN Doc E/AC.32/SR.6 (1950).
[72] *GRC*, *supra* note 12 at art 1A(1).
[73] James Hathaway, "The Evolution of Refugee Status in International Law, 1920–1950" (1984) 33:2 ICLQ 348 at 359–61.
[74] See Gilad Ben-Nun, "From *Ad Hoc* to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954" (2015) 34:2 Refugee Surv Q 23 at 30.
[75] *Ibid* at 26.

cused on specific situations were less universal in Ben-Nun's terms, because they left other regions out of view. At the same time, they were relatively inclusive for those groups. An individualist codification such as the GRC definition opened the way for a universal regime, yet also became more restrictive by setting up elaborate criteria. Of course, the choice did not have to be between a piece-meal approach and a narrow definition. The first definition proposed by Paul Weis in the drafting of the convention was both universal, not limited to specific regions or states, and rather wide in its criteria.[76] The challenge for codification was not simply a pragmatic question of how the best legal response could be designed, it was also a political contention between a commitment to the basic normative idea that refugees must receive protection, and states' endeavors to limit their responsibilities.

The perplexities around codifying the normative idea of the refugee are thus threefold. They involve firstly, the general violence of law: that the stipulation of criteria to some extent closes the negotiation of justice.[77] A piece-meal approach can allow for a more flexible look to the claims raised, although historically it did not necessarily mean a more generous approach. Secondly and more specifically, the codification of refugee law poses a democratic dilemma. The normative idea of the refugee concept is a norm that regulates the relationship between the stranger at the border and the state. The codification, however, takes place in state-centric procedures. In the negotiations for the GRC, this bias towards the state interest and states' concerns about limiting their sovereign prerogative was evident. There is, in other words, a fundamental asymmetry in the codification of refugee protection. The regulations build on the refugee concept as an exception to unilateral discretion regarding territorial access, yet the concrete implementation remains subject to that very kind of unilaterality. While Kant speaks of the obligation to not reject the stranger in need as the "one cosmopolitan law," the international legal rules are clearly not cosmopolitan in nature; they might be compared to a static print of that "cosmopolitan" law. This structural distinction is part of the explanation as to why the normative idea of the refugee retains such vigour beside the legal definition. Thirdly, the codification exposes the tension between the universalist idea behind the refugee concept and its particular history. The history is particular in that it relates to the specific history of the territorial state in Europe and emerges alongside and as a response to it. The legitimacy assumptions of the territorial state are in that sense present in the refugee concept. This

[76] *Ibid* at 34.
[77] Cf Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11:5/6 Cardozo L Rev 920 at 937.

dilemma is tangible in much refugee law litigation and advocacy.[78] Moreover, the particular history of the refugee concept relates to a hierarchy of reasons of hardship.[79] The described European history in which the refugee concept emerges is one of religious and political persecution. This shapes the concept's understanding. English and French were the languages in which the GRC was negotiated,[80] and the history of these terms became the reference point for international discourse.

6. Politics of Designation: Competing Refugee Definitions in Law

The European focus of the GRC was explicit in its geographic and territorial limitations. The formal universalization with the 1967 Protocol brought to the fore the question if the wording of the definition was apt to cover refugee situations globally. It was thereby of relevance that the UNHCR, which had been founded in 1950, worked without geographic limitations. While its mandate initially foresaw mainly the coordination of legal protection by states, UNHCR quickly broadened its scope of activities. For refugees situations outside Europe in the late 1950s and the 1960s, UNHCR began to provide material assistance under the formula of "good offices."[81] While the international treaty law on refugees remained restricted, the UN refugee agency thus already reached beyond the European focus and the narrow definition of the GRC.

The passing of the 1967 Protocol took place already in view of negotiations for an African Refugee Convention. In 1969, the Organization of African Unity (OAU) passed a convention that defines the refugee firstly with reference to the GRC-definition,[82] but furthermore states that:

> "the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place

[78] See Jacqueline Bhabha, "Internationalist Gatekeepers?: The Tension between Asylum Advocacy and Human Rights" (2002) 15 Harv Hum Rts J 155 at 160—61.
[79] See Michelle A McKinley, "Conviviality, Cosmopolitan Citizenship, and Hospitality" (2009) 5 Unbound: Harv J Leg Left 55 at 64.
[80] See generally Glynn, *supra* note 68 at 137, 146.
[81] See Gil Loescher, "The UNHCR and World Politics : State Interests vs. Institutional Autonomy" (2001) 35:1 Intl Migration Rev 33 at 36.
[82] See *Convention Governing Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45 art 1(1).

of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[83]

Most importantly, this definition extends the refugee notion to persons fleeing indiscriminate violence, for example through civil wars. The definition contained in the OAU-Convention has not only been relevant for refugee protection in Africa but also became a blueprint for broader conceptions in general, and especially for refugee definitions in states of the Global South.

The 1984 *Cartagena Declaration on Refugees* between Latin American states makes reference to the OAU Convention.[84] It explicitly notes that based on the experiences in the region, it appears "necessary to consider enlarging the concept of a refugee."[85] It recommends that the notion of the refugee shall also include

> "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."[86]

This definition goes in some respects beyond the definition of the OAU-Convention, especially in its reference to human rights violations. The *Cartagena Declaration* is not legally binding, but its refugee definition has been approved by the General Assembly of the Organization of American States (OAS), which urged member states to adhere to the Declaration in their laws on refugee protection.[87] In consequence, the definition has been incorporated in the legislation of most Latin American states.[88]

For Asian countries, neither a binding regional framework of refugee protection nor a comparably uniform refugee notion exists. What offers some indication of the refugee definition endorsed in the region are the 2001 Bangkok Principles issued by the Asian-African Le-

[83] *Ibid*, art 1(2).
[84] See *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 19–22 November 1984 (22 November 1984) at III(3) [*Cartagena Declaration*] (the declaration is available here: www.refworld.org/docid/3ae6b36ec.html).
[85] *Ibid*.
[86] *Ibid*.
[87] See e.g. Hathaway, *supra* note 57 at n 7 citing *Cartagena Declaration*, *supra* note 84.
[88] See Michael Reed-Hurtado, "Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America" (2013) Leg & Protection Policy Research Series No 32 (UN, High Commissioner for Refugees) at 16.

gal Consultative Organization (AALCO), which comprise a definition of the refugee concept identical to the OAU Convention.[89]

Other legal frameworks equally diverge from the GRC in defining the refugee.[90] The refugee concept of the United States *Refugee Act of 1980* is broader in scope in that it does not require the person to be outside her country of nationality or habitual residence, thus including internally displaced persons.[91] In contrast to these broader definitions of the refugee, other legal frameworks equally recognize the need to offer protection beyond the scope of the GRC yet created different terms to respond to that need. The *Canadian Immigration and Refugee Protection Act* distinguishes between "convention refugees" and other "persons in need of protection."[92] Within this second strand, the Canadian legislation refers to, among other bases for protection, the Convention Against Torture (CAT).[93] The Australian *Migration Act* foresees protection visas either for convention refugees, or for persons whose refoulement would result in serious harm.[94] Australia's refugee policy generally builds on the separation between a "refugee component" and a "special humanitarian component," with an increasing part of migrants being dealt with under the latter.[95] The legal framework of the European Union distinguishes between protection of persons as refugees, and "subsidiary protection" for individuals who would without protection face "serious harm."[96] The EU Qualification Directive thereby cites the GRC definition,[97] while explicitly allowing member states to employ a broader definition of the refugee.[98]

What these different choices of designation mean for the respective stance towards protection is not a simple equation. The scope of the refugee definition cannot say anything

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[89] Asian-African Legal Consultative Organization, Assembly of the Member States, 40th Sess, *Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees*, (2001), art. 1(1–2).
[90] The following comparative outlook is cursory in nature and does not claim to provide a conclusive picture.
[91] *Immigration and Nationality Act*, 8 USC § 1101 (1986), s 42(b) as amended by *Refugee Act of 1980*, Pub L No 96-212, 94 STAT 102 at Title 2 (1980). See Stephen H Legomski, "Refugees Asylum and the Rule of Law in the USA" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 122 at 131, 161.
[92] SC 2001, c 27, ss 96, 97.
[93] *Ibid*, s 97(a).
[94] (Austl) 1958/62, s 36.
[95] See Susan Kneebone, "The Australian Story: Asylum Seekers Outside the Law" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law*: Comparative Perspectives (Cambridge: Cambridge University Press, 2009) 171 at 177.
[96] See EC, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9, art 2(f).
[97] Ibid, art 2(d).
[98] Ibid, art 3.

about the scope of protection offered under the respective legislation. However, the choices regarding the refugee definition or alternative terms of protection are not insignificant either. Given the normative role of the refugee concept, these variations of the legal definitions can be read as contestations not only of legal rights but also of the perception of legitimacy of different asylum seekers' claims. In that vein, Michael Reed-Hurtado describes how the adoption of the *Cartagena Declaration* responded to changing protection needs, which international law addressed insufficiently.[99] Following the large-scale flight of persons from Cuba, Bolivia, Haiti, Honduras, Nicaragua, and Paraguay in the 1960s, the Inter-American Commissioner on Human Rights diagnosed a difference from "refugees of former times,"[100] and recommended the preparation of a regional instrument.

These forms of flight and displacement were, however, not new as such, nor were they specific to Africa or Latin America. Early instruments of international refugee protection dealt with large-scale displacement rather than individual asylum seekers. Within Europe, the breakup of Yugoslavia caused the flight of large numbers of persons. And, it was also not a given that flight and displacement from African and Latin American states would have to be responded to within the regions alone. While regional political developments can explain that broader refugee definitions were adopted in the OAU-Convention and the *Cartagena Declaration*, they do not explain the reluctance in many states of the Global North to follow suit. This reluctance, in turn, illustrates how terms serve to delimitate not only states' legal obligations but also shape the public perception of normative obligations. The creation of separate protection schemes such as subsidiary protection in Europe comes with a minus in rights for those protected under the latter notion, and it has an impact on public perception. Moreover, retaining a narrow refugee definition and adding additional designations contributes to what B.S. Chimni has called the "myth of difference."[101] This idea that refugee flows in and from the Global South are dissimilar in nature from former refugee flows in and from Europe tends to legitimize strategies of containment and deterrence.[102]

In that sense, the adoption of different labels for protection reflects a certain set of politics of designation. Whether a legal claim to protection is linked to the refugee notion has

[99] Reed-Hurtado, *supra* note 88 at 6—7.
[100] *Ibid* at 7.
[101] See BS Chimni, "The Geopolitics of Refugee Studies: A View from the South" (1998) 11:4 J Refugee Stud 350 at 351.
[102] Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 2.

significance for the public debate about its legitimacy, and by framing situations as similar or dissimilar also affects the future direction of legal frameworks. On the one hand, these politics of designation highlight the normative dimension that the refugee concept has beyond its immediate legal significance. However, *vice versa*, the choice of terms also affects the broader conceptions of the refugee, as it influences the vocabulary and distinctions in public debates that yield effects even where they are contested.

7. Democratic Iterations of the Refugee Concept

The codification of the refugee definition and of refugee law more broadly exposes a democratic dilemma. The regulations affect those who are fleeing their states of origin, whether they qualify as refugees or not; these persons, however, are mostly excluded from a political voice in the development of refugee law. The fact that refugees typically fall outside the state structures of democratic representation means that refugee law systematically lacks the political voice of those most directly affected by its rules. At the same time, we should not mistake the state-centered nature of law-making for an exclusive hold of state interests in the content of the refugee concept. The state interest in a discretionary decision about access does not equate an interest to exclude; legislation regarding refugee protection is the outcome of the diverse and conflicting normative demands inside the state. This includes on the collective level the intent of a self-conception as generous,[103] but more importantly, it is influenced by the various individual opinions of what the normative idea of the refugee means and demands. For assessing the significance of this normative idea today, the view should not be limited to formal decision-making.

The concept of the refugee is used for making claims within, outside, and against the law. Expressive of universalist values of freedom and equality, it forms a critical lens for the concretization of those values in institutions. While the refugee concept can serve as a critical lens to oppose an idealization of the state framework, it points to a cosmopolitanism that is not abstract. Instead, it links to concrete instances of encounters at the border, in which the existence of rights and obligations is petitioned and answered at each specific instance

[103] See generally Rebecca Stern, "Our Refugee Policy Is Generous: Reflections on the Importance of a State's Self-Image" (2014) 33:1 Refugee Survey Q 25.

anew.[104] In this role, the refugee concept offers a lens that avoids binary oppositions between the global and local, between the universal and the particular.

These described contestations in law and in public debates can be understood as democratic iterations of the refugee concept. This notion of democratic iterations was coined by Seyla Benhabib to describe "processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society."[105] Based on the Derridian concept of the iteration, Benhabib outlines the idea that a universalist norm does not have one actual or original meaning, but is shaped by each use in different contexts.[106] Not only can a concept be used with different meanings, the respective employments constitute a part of the concept as such.

The refugee concept links to universalist claims, but also the need to justify the right to enter a territory under the scheme of an exception. Both these sides of the concept are contested and concretized in the context of legal norms and social interactions. While employing the refugee concept in different ways, whether engaging explicitly with its meaning or implicitly making use in a certain manner, its ambivalence as affirming and challenging the territorial state order is reflected. Public reports and statements that describe persons in distress as refugees, communicate their experiences, and support their claim to protection, re-introduce the general normative claim of the refugee concept. With reference to the refugee concept, the Eurocentrism of laws of international protection is also negotiated, as the "politics of designation" indicate. The concept, in its dual role as linked to the territorial state framework and forming a category of exception therein, is a site for claims about universalism and concrete institutions.

The *Al Jazeera* article in August 2015 explaining the choice of using the term "refugees" in relation to the Mediterranean migration closes with a brief reference to the question of a voice. The term "refugees," the author writes, constitutes a small attempt to give back some voice to people regularly stripped of theirs.[107] This assertion comes unexpected: how would a denomination give back voice? While the choice of terms does, of course, not change

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[104] See generally Itamar Mann, Humanity at Sea: Maritime Migration and the Foundations of International Law (New-York: Cambridge University Press, 2016) at 42ff, 137ff.

[105] Benhabib, *supra* note 8 at 179; Seyla Benhabib, "The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism, and Statist Realism" (2016) 5:1 Global Constitutionalism 119 at 122.

[106] Ibid.

[107] Malone, *supra* note 1.

the structure of political voices and representations, the refugee concept can indeed be understood as a call to listen to specific experiences. It represents the idea of an exceptional obligation towards the stranger at the border. This normative idea is not abstract but developed within the territorial state framework and in relation to its conception of legitimacy. As such, the refugee concept retains a surplus meaning beyond its legal definition, while the codification and practices of refugee protection also influence the understanding. In this role as a normative idea that concerns the obligations towards the stranger at the border, the refugee concept is where to begin considerations of a concrete cosmopolitanism.

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