INSTITUTIONALISING TRADE IN HUMANS: A CRITICAL ASSESSMENT OF REFUGEE TRADE QUOTAS

Dissertation submitted to Jawaharlal Nehru University
in partial fulfillment of the requirements
for the award of the degree of

MASTER OF PHILOSOPHY

ARPAN ACHARYA

CENTRE FOR THE STUDY OF LAW AND GOVERNANCE
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067
2015

Jawaharlal Nehru University
Centre for the Study of Law and Governance
New Delhi-110 067 INDIA

Date: 27/07/2015

Declaration

I declare this thesis entitled **'Institutionalising Trade In Humans: A Critical Assessment of Refugee Trade Quotas'** submitted by me in partial fulfillment of the requirements for the award of the Degree of Master of Philosophy, of Jawaharlal Nehru University, to be my own work. It has not been submitted for any other degree of this University or to any other University.

Arpan Acharya

Arpan Acharya

Certificate

We recommend this thesis be placed before the examiners for evaluation.

Prof. Amit Prakash
Chairperson

प्रो. अमित प्रकाश/Prof. Amit Prakash
अध्यक्ष/Chairperson
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Dr Jaivir Singh
Supervisor

पर्यवेक्षक/Supervisor
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Office Tel : 91-11-26704021, 26742506 • Telefax : 91-11-26742506 • E-mail : dir_cslg@jnu.ac.in, dir.cslg@gmail.com

Acknowledgement

I would like to take this opportunity to thank my supervisor, Prof. Jaivir Singh. He has been an amazing guide through the drafting of this dissertation. He has been an inspiration as a teacher and has helped me a lot through the last year. I cannot thank him enough and acknowledge that any inadequacies in the dissertation are only due to my own shortcomings.

I would also like to extend my gratitude to Prof. Niraja Gopal Jayal, Prof. Amit Prakash, Prof. Pratiksha Baxi and Prof Amita Singh for their wonderful coursework and meaning discussions inside and outside the classroom which has helped me immensely in formulating my thinking around areas of my interest.

I would like to thank each and every member of the office staff for their help and support.

I would like to thank Naimitya, Shayequa and Dwayne for being there as a constant source of help and support. I will always be grateful for the same.

I would like to thank my parents and family for their love and encouragement.

Arpan Acharya

Table of Contents

Introduction....1

Chapter I: The Framework of Law and Policy....7

Definitions....7

Institutional Framework and Overlaps....9

Cold War and After....11

United Nations Convention on the Law of the Sea....14

Australia....16

Mechanics of the System: Trade Imbalance....21

International Obligations....23

Customary International Law....25

Violations of International Law....27

Chapter 2: The 'Other'....31

Internal Security....31

Culture Clashes....35

Defending a way of life....36

Chapter 3: Trade, Refugee Law and Dignity....46

What is Fungible?....46

Thinking about dignity in Economics....50

Paper Values....54

Refugees as Currency....56

Unfair Exchange....60

Conclusion....63

BIBLIOGRAPHY....69

Introduction

Refugee has never been a welcome word in international law. The changing geopolitics of refugee protection after the Cold War era has made it an even more unfriendly word. This was the time when the convention of granting refuge in designated 'safe havens' within the country or persecution came to be practiced and institutionalised. The first post-Cold War test for the "safe haven" idea came in the immediate aftermath of the Persian Gulf War, in 1991, when a massive and sudden exodus of Iraqi Kurds was stopped cold at the Turkish border.[1] The world stopped seeing refugees as people who had to be protected and started to look at them as a threat to global security. The victims were now the threat; their flight, would "threaten international peace and security in the region", said UN Security Council Resolution 688.[2] We will discuss this change and the reasons for it subsequently. Nations are rarely prompted by just humanitarian considerations. The political capital of a refugee and the way this could be used to expose flaws in a competing regime has always played a part in how nations, especially those from the global North, welcome refugees.

It is most definitely a humanitarian crisis the likes of which the world has not faced since the UN was formed. The sheer magnitude of the problem makes it incumbent that solutions be found to the refugee crisis. If anything, the world in the last two decades has been more apathetic to the plight of refugees than ever. In this scenario various theories have come up regarding the issue and not surprisingly one of them which has received some attention (and indeed been formalised by individual countries) is a proposal to trade in refugees. In the neo-liberal where everything (including children via the surrogacy method) is for sale, it does not take an immense leap of imagination to come up with a solution for refugees that invokes the market.. The danger of this approach is not merely theoretical; after all treating citizens as consumers and clients started out as a theoretical idea. The problem is that too many developed nations are already taking the approach of offering aid to developing nations (sometimes dependant on them for day to day existence) to take in refugees

[1]Bill Frelick, *Unsafe Havens: Reassessing Security in Refugee Crises*, Harvard International Review, Vol. 19, No. 2, Spring 1997 at 40

[2] United Nations Security Council Resolution 688 passed on April 5th, 1991

on their behalf. The fear is that essentially they are palming off their responsibilities to countries in the worst possible position to fulfil these responsibilities.

Schuck's Proposal

Schuck essentially it posits a carbon credits type of system for refugees. [3] Every country will be allotted a certain quota of refugees that it has to admit every year. There is a question as to what this allotment should be based on but the major indicator seems to be national wealth. However, the country, instead of admitting such number by itself may trade its quotas on the international market. In essence it pays another country to take refugees off its hands. According to Schuck there will be a needs assessment process conducted by the UN or another international agency set up for such purpose which will allot to each nation the number of refugees that need to be taken care of by them (temporarily and permanently).[4] He accepts that the needs assessment process would be controversial and be subject to negotiation; however he argues that this is part of any administrative process and that their 'design in the protection context should pose no special difficulties, other than the political ones owing to the weaker enforcement mechanisms in the international realm and the delays that such challenges might entail'.[5] He also clarifies that the current regime has the same problem with regard to what numbers need protection and thus it is not really different from the present system.

The criteria for deciding how many refugees are allotted to which country should be a function of national wealth. He does mention assimilative capacity and the fact that sometimes smaller but richer states (like Singapore) will have no option to but to get another nation to buy their share since they do not have the geographical space to accommodate large numbers of refugees. At this point we are also forced to consider the possibility of a state with area as well as money i.e states like the USA and Australia. Schuck does not in any way imply that such states should have a fixed quota (because of the space they have) that they have to accommodate and then sell their share over and above this number. He also does not consider that accommodating refugees has a social cost as well and this is especially true of poorer

[3] See generally Peter H. Schuck, "*Refugee Burden-Sharing: A Modest Proposal*", 22 Yale J. Int'l L. 243 1997

[4] Id at 278, 279

[5] Id at 279

nations. He seems to especially not consider this when he speaks of the relative costs of refugee protection in developing nations as opposed to developed nations.[6]

He goes on to provide two exemptions to this system; countries with a history of human rights violations and which lack basic protection for their own citizens and also countries which do not have the financial capacity to support refugees i.e which fall below a certain minimum national wealth criteria.[7] One cannot help but wonder if the second exemption is largely theoretical. The largest refugee flows occur in Africa and the nations of first asylum are generally amongst the poorest in the world. It is a factual situation and unless there is a possibility of airlifting millions of refugees one is hard pressed to see how the second exemption is workable.

As for the first exemption it is simply another international obligations that regimes which violate human rights can avoid; this time with international sanction. One is also forced to consider possibilities like Saudi Arabia which is fabulously wealthy but guilty of human rights violations. Are we not supposed to allot quotas to a country which is that rich? If we do allot, then the only thing that is possible is for Saudi Arabia to sell it's quota, in which case we are already distorting the free market. He also assumes that regional leaders (one assumes that he is speaking of democracies here) would not allow human rights violators to participate in such a market because of the threat of public censure.[8] We shall see subsequently how regional leaders might not be interested in who takes the refugee off their hands.

As for promotion of the market system, he points to the fact that countries are already employing this system and gives the example of Rwanda (the paper was written in 1997)[9] where developed nations had to pool aid to mitigate the refugee crisis. He claims that the problem is that the 'delegation transactions are inevitably ad hoc, with each transaction having to be organized and coordinated by UNHCR, a dedicated but sluggish and highly politicized bureaucracy'.[10] He does not point out any fundamental flaw with arrangements being ad hoc and does not comment on the fact that dealing

[6] Id at 285
[7] Id at 281
[8] Id at 282
[9] Id at 282-283
[10] Id at 283

with a refugee flow is generally an ad hoc matter and that the UNHCR has been successful in many cases in providing assistance in this manner.

The transaction may be for cash, aid, political support i.e any currency that both the countries are amenable to and which they decide they can mutually agree on.[11] He does not at any point entertain the possibility that the transaction (especially on part of the buyer) may not be voluntary. Developing nations are arm-twisted by developed nations all the time. Is it too hard to imagine that with a quota they *have to* sell or face some sort of censure (Schuck does not mention this either) developed nations will ensure that the sale happens at any cost?

He then goes on to recognise that the buyer market i.e mostly developing nations, will be more crowded.[12] He correctly states that these states desperately need the cash, aid and political support that developed nations can supply. He deduces from that that there should be plenty of takers for the refugees in return for such currency. It is necessary here to draw attention to the fact that there are many ways to attract such resources from developed nations (for example opening up markets or voting a certain way at world forums) and this particular way, given its attendant social costs, might not seem very attractive. There is no clear formulation of this reasoning in Schuck's paper.

What he however does mention is the fact that before such a market exists, dossiers on the refugees need to compiled which contains 'data on the refugees' social class, level of education, ethnicity, age, religion, family status, and any other demographic variables that may help them predict how quickly those refugees will assimilate, how productive they will be, which public services they will consume, and so forth'.[13] That will help states assess how much they are willing to buy/sell refugees for. He accepts that this will result in states picking and choosing but points out that this already happens. It is to be noted here that discriminatory immigration and asylum policies have always existed but never have they been accepted as part of international law. In fact they are explicitly prohibited under article 3 of the Refugee Convention. In a way

[11] Id at 284
[12] Id at 285-286
[13] Id at 286

it is difficult to see how this is very different from a traditional auction market. The people whose fate is being decided have no say in the matter and their fate is decided according to the qualities they bring to the table.

One of the questions that we have to ask, repugnant as it may at first seem, is if such a market may work. Can more people actually find refuge under such a system? Indeed before this we have to ask if such a market may exist without some element of coercion on part of developed nations. What does it say about our present system of ethics (and indeed the magnitude of our failure with regard to refugees) that we are willing to countenance and put in a place a proposal which speaks of treating persecuted human beings as tradable entities? We have to see what kind of systemic problems might arise by letting market norms dictate a situation where ideally market norms should not have a say. These systemic problems could possibly arise from the fact that trading conditions will be unequal. Can we really say that Papua New Guinea (or indeed Indonesia) which is dependent on Australian aid to a great extent will be in a position to refuse if Australia decides to foist refugees on it? The fundamental problem with the free market system is unequal bargaining positions.[14] In that sense we have not even come to willingness and ability to pay or indeed willingness to accept. What countries might really be paying for is the privilege of not having refugees (rather than having refugees as Schuck envisages). It is clear that developed nations have the willingness and ability to pay while developing nations have no ability to pay. In fact they might be forced to accept payment without having the willingness to accept. In that case where does the free market leave us? A group of persecuted people stuck in an almost penal set up in a country which could be hostile to them for the social costs that are incurred by hosting refugees. Integration and resettlement have nothing to do with money. All the money in the world will not offset the challenges of having refugees in a country which has less than an optimal ability to absorb them.

The dangers of institutionalising such a system by giving it the blessing of international law are immediately apparent when we posit that the tradable commodity is not the refugee but his/her absence. It is one thing for individual nations

[14] That is why labour laws are essential.

to follow such policies. It is an entirely different matter for international law to condone such policies which are apparently biased toward letting developed nations off the hook for their part in creating refugee crises around the world in the first place. The only thing that stops countries from entirely abdicating their responsibilities toward refugees is adverse public opinion. It is probable that if such policies are countenanced by international law it might give nations an excuse to claim that they are acting under the aegis of international law in the event of public outcry. Initially there might still be a movement against it but with time it will become normalised as an international law precept. It is contended that institutionalising such a system will lead to countries (which can afford it) behaving like Australia and refugees being kept in glorified penal colonies indefinitely; all of this with the sanction of international law. Rather than ameliorate it might exacerbate the present crisis.

The scheme of the dissertation is simple. Section I deals with important concepts, laws (municipal and international) and explains some of laws governing the way countries deal with refugees. It also deals with the changing perceptions about refugees since the Cold War ended. As a specific example of Schuck's proposal, Australia's refugee policy (commonly called the Pacific Solution) is discussed. In section II there is a discussion of how governments affect and direct the discourse around refugees and what kind of injustices it has the potential to perpetrate. It gives a detailed portrayal of how the 'other' is presented to the general public. Section III which concludes the dissertation discusses the ethical problems which seem to be reflected in Schuck's proposal. It also discusses the structural flaws due to which marketisation of the refugee issue may actually lead to a worse situation than we are at right now. The way market principles override other kinds of principles and ways of valuation is also seen. The tremendous cost we pay in terms of human dignity in case of refugees and how this cost might increase Schuck's proposal is also seen. The way marketisation might alter public perception about refugees is also seen. Inspite of the fact that developed nations are already following Schuck's proposal in spirit, there seems to be a strong case for not countenancing and condoning the same under international law i.e in effect giving it a sanction which it probably ought not to be given.

Chapter I: The Framework of Law and Policy

Definitions

Before we delve into these questions, it is important to understand what a ‘refugee’ is in international law. Under Article 1A.2 of the 1951 Convention, as updated by the 1967 Protocol to the Convention, a refugee is one who is outside her or his country of nationality and who, owing to a well-founded fear of persecution on account of her or his race, religion, nationality, membership of a particular social group or political opinion, is unable or unwilling to avail her or himself of the protection of the country of nationality.

The United Nations Declaration on Territorial Asylum of 14 December 1967

Article 3 of this Declaration adopted by the United Nations General Assembly states the following:

> *"1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.*
>
> *2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.*
>
> *3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."*

In 1969, the then Organization of African Unity (now, African Union) promulgated the Convention Governing the Specific Aspects of Refugee Problems in Africa that provided a supplementary and much broader route for refugee status within that continent: "Article 1 .2 : 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 of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

It should be noted that one becomes a ‘refugee’ only once an international border is crossed. Authors point to how this “definitional trip wire”[15] has been used by nations

[15] Bill Frelick, *'Preventing Refugee Flows : Protection or Peril?’*, World Refugee Survey, 1993, at 5

to evade responsibility. Refugee flows are prevented before an international border is crossed. The UNHCR started discussing preventive protection in the 80s. This was described in the High Commissioner's *Note on International Protection*, submitted to the UNHCR Executive Committee in 1992. Essentially it institutionalises the preventive approach i.e every effort shall be made to mitigate the cause of departure and thus contain cross border movements. However, it also states that this should not mean compromising with asylum and that prevention is not a substitute for asylum. It is meant to complement efforts to prevent the crisis. Expectedly countries have ignored this qualification. The idea was to take proactive action i.e get in the country of origin and create (supposed) 'safe havens'. Frelick notes;

> *As images of the Kurds clinging to sides of mountains flashed across the world's televi- sion screens, the victorious Western coalition grew uneasy. Well-established principles of refugee protection dictated that Turkey keep its border open and provide at least temporary asylum, as had been demanded of Thailand in the 1970s when confronted with Cambodian, Lao, Hmong, and Vietnamese refugees, and of Pakistan in the 1980s when Afghan refugees poured across its borders. But the times - and the rules of the game - had changed. In the 1990s, it seemed, one's allies should be protected from an influx of refugees. Rather than persuade or pressure Turkey to comply with traditionally accepted responsibilities, the coalition partners, led by the United States, decided to take the pressure off Turkey and to keep it on Iraq.*[16]

However, it was "also driven by a migration control agenda within which many Northern states have identified the 'internal flight alternative' as a means to ensure that individuals fleeing persecution do not need to leave their countries of origin but can receive protection within their own states".[17] "The international refugee regime is the collection of conventions, treaties, intergovernmental and non-governmental agencies, precedent, and funding which governments have adopted and support to protect and assist those displaced from their country by persecution, or displaced by war in some regions of the world where agreements or practice have extended protection to persons displaced by the general devastation of war, even if they are not specifically targeted for persecution".[18] As with a lot of international law this translation from convention to reality if often a problematic one especially when it

[16] Frelick *supra note* 1 at 40

[17] Alexander Betts, *Institutional Proliferation and the Global Refugee Regime*, Perspectives on Politics, Vol. 7, No. 1, March, 2009 at 54

[18] Charles Keely, *The International Refugee Regime(s): The End of the Cold War Matters*, International Migration Review, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance, Vol. 35, No. 1, Spring 2001 at 303

involves nations which are too important in international terms for any enforcing principles to apply.

Institutional Framework and Overlaps

Under the refugee protection regime the United Nations High Commissioner for Refugees is the primary agency, and the governing legislations are the Convention (1951) and Protocol (1967) on the Status of Refugees in international law. The present regime dates from the negotiations following World War II that led to the UN Statute creating the Office of the High Commissioner of Refugees and the 1951 Convention on the Status of Refugees. The changing nature of the UNHCR's mandate is described by Bond;

> *The office of UNHCR was established to protect refugees, and its work was to be "humanitarian." It was not established to address the question of how to eliminate the refugee problem, which, by definition, must always require major political action. The role for which it was established was to protect refugees and to facilitate the finding of a place of permanent settlement for them. Yet today, in order to carry out the donors' wishes to promote voluntary repatriation, UNHCR must become directly involved in initiating political action through tripartite agreements which have the objective of reducing the numbers of refugees.*[19]

The parallel institutions enable states to circumvent UNHCR and the 1951 Convention. International refugee law only imposes obligations upon states once refugees reach their territory; if they can find alternative ways to avoid refugees reaching their territory then they can avoid these legal obligations.[20] For example, states have increasingly used other organisations like the International Migration Organisation (IOM) in service provider roles that would traditionally be the domain of UNHCR including refugee return and the care and maintenance of asylum seekers and refugees. "The IOM is preferred because it is outside of the UN framework and therefore unencumbered by the human rights obligations and state scrutiny the UNHCR faces".[21] For example, through regional cooperation, the EU has developed Frontex, the EU s border control agency, which engages in military patrol of attempts

[19] Barbara Bond, *Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research,* African Studies Review, Vol. 32, No. 1, April 1989 at 47
[20] Betts *supra note* 17 at 54
[21] Id

by migrants to acquire access to the EUs Southern or Eastern borders.[22] At the international level, IOM "provides services to European states that enable them to limit the access of asylum seekers crossing from Sub-Saharan Africa to the EU via the Maghreb".[23] "Geopolitical arrangements among state and non-state institutions, whether entrepreneurial with third parties or bilateral with other states, carry out the complicated work of processing, deterrence, and detention, re-placing sovereign arrangements in the management of displacement".[24] We shall subsequently how these arrangements have been formalised by certain nations like Australia in their domestic law. Obviously the convention and the protocol do not mention that actively using force to prevent asylum seekers access to one's nation is an unacceptable practice. However with each such operation, the international protection guaranteed to refugees is watered down some more till we come to ridiculous situations like nations excising parts of their own dearly held sovereign territories so as not to grant legal status to those reaching them. The new institutional framework on Internally Displaced Persons (IDP) protection "has watered down the quality of refugee protection insofar as it has been used by states as a tool of containment for would-be refugees, provided a justification for forcibly returning refugees to their country of origin, and has diverted resources from refugee protection to IDP protection".[25] "The danger for UNHCR is that, as it enters new policy arenas and takes on a greater role in areas such as migration and IDP protection, it risks diluting or undermining its original refugee protection mandate".[26] However, the "danger of not engaging with the new competitive institutional environment is that the organization and the refugee regime risk irrelevance".[27] For a while now authors have discussed "new, complementary protection strategies . . . that . . . rest on activities principally in the fields of *prevention and solutions* to refugee problems and depend on an early clarification of the parameters of UNHCR's involvement, particularly inside the country of origin".[28] The issue simply is this; if the UN refuses to engage with these organisations, it risks losing relevance because countries interested in keeping

[22] Id
[23] Id 55-56
[24] Alison Mountz, *The Enforcement Archipelago: Detention, Haunting, and Asylum on Islands,* Political Geography, Vol. 30, 2011 at 126
[25] Betts *supra note* 17 at 56
[26] Id
[27] Id
[28] BS Chimni, *The Meaning of Words and the role of the UNHCR in Voluntary Repatriation,* International Journal of Refugee Law, Vol. 5, No. 3, at 444 discussing Frelick *supra note* 15

refugees off their territories might not cooperate with the UNHCR without it supporting or even condoning principles like preventing refugee flows. It has to engage with these organisations because they are funded by developed nations. Imagine the kind of horrors that an organisation like the FRONTEX may get away without UN reporting and engaging with its activities. As we shall subsequently see, one if the ways Australia gets around its international obligations is simply by sequestering refugees so no one has access to them, including media.

Cold War and After

During the Cold War it was evident that the reason for the West granting asylum to people from communist nations was a ploy to embarrass the USSR. Keely actually posits that there were two refugee protection regimes during the cold war, one for communist countries (the Northern Solution) and one for the rest of the world. There are three solutions to a refugee crisis; the preferred solution is repatriation in safety following changes that allow for return or, failing that, settlement in the place of first refuge or resettlement in a third country.[29] "In the United States and Canada, mechanisms for permanent resettlement of refugees from first asylum countries were well developed but neither had institutionalized mechanisms for being countries of temporary refuge, especially in cases of mass influx".[30] Part of the reason for this difference is that Europe has traditionally treated refugee protection as part of its immigration policy: immigration law is about controlling entry, whereas refugee law should be about offering protection.[31] "Following the Mariel boat lift in 1980, the United States followed a policy of deterring access to U.S. soil from Cuba and Haiti in order to reduce the probability of a mass influx of asylum seekers".[32] Individual defections were allowed and encouraged during the Soviet era; however states weren't ever keen on any kind of mass influx of refugees especially from the global South. Nobody of course spoke about the kind of Western policies that were responsible for generating refugees in the first place.[33] There was a glamour to the

[29] Keely *supra note* 18 at 304
[30] Id at 305
[31] Geoff Gilbert, *Spread Too Thin? The UNHCR and the New Geopolitics of Refugees*, Harvard International Review, Vol. 31, No. 3, Fall 2009 at 57
[32] Keely *supra note* 18 at 305
[33] The West's support of Congolese dictator General Mobutu after helping topple democratically elected Patrice Lumumba

man who sought asylum from communist Russia and for that glamour the public and governments were willing to assume the role of protectors.

"The Northern refugee regime was an instrument to embarrass communist states, and in some cases was used with the intent of frustrating the consolidation of communist revolutions and hopefully destabilizing nascent communist governments".[34] "The program itself was a tool to further reinforce internal political support for an anti-Soviet, anti- communist foreign policy because Western generosity would reinforce the domestic constituencies' indignation at the evils of communist ideology and oppression".[35] Internal support was not a problem in a bipolar world. The public were convinced of the need to grant refuge to people who were suppressed by communism.[36] The advanced industrial states created the international refugee regime, supported it politically, diplomatically, and financially, and had large (in some cases majority) support from domestic constituencies for the refugee regime as part of foreign and domestic policy.[37] Nevertheless, they did not themselves have the legal or institutional framework for being a country of first asylum.[38]

The preferred solution to a refugee crisis (and the most durable) is voluntary repatriation, once conditions for return have been satisfied. However in the regime described above repatriation was not a part of the solution because the primary objective was not protection. Refugees had value and were tolerated so that they could be paraded as examples why the West was preferred. The other important factor that needs to be noted here is that the number of people who sought asylum was not unmanageable. In fact, it was during the Mariel boat lift that the US was faced with huge numbers for the first time (approx. 120,000 in this case). The normal logic of refugee law is something very different. When a large number of people flee their state of origin and spill over international borders, the world community is supposed to get together and provide them with assistance and support and work towards creating conditions for repatriation. However, this logic was twisted during the cold war and that resulted in rules and procedures which were suited to resettling and integrating small numbers rather than providing temporary refuge to and repatriating

[34] Keely *supra note* 18 at 307
[35] Id at 308
[36] Id at 307
[37] Id at 306
[38] Id

mass exoduses. "With the end of the Cold War the firm basis of interest in refugees, particularly from the developing world, has been removed: refugees no longer had ideological or geopolitical value".[39] Thus "an image of a 'normal' refugee was constructed—white, male and anti-communist—which clashed sharply with individuals fleeing the Third World".[40] Nations are not supposed to owe them the same responsibility that they did during the cold war because their nature had changed. As discussed above, they were now the threat;

> *Now, especially after the end of bipolarity, external security agencies (the army, the secret service) are looking inside the borders in search of an enemy from outside. They analyse 'transversal threats' (supposedly coming from immigrant, second generation of citizens of foreign origin, people from some inner cities or from the populous and disadvantaged suburbs). Internal security agencies (national police forces, police with military status, border guards, customs) are looking to find their internal enemies beyond the borders and speak of networks of crime (migrants, asylum seekers, diasporas, Islamic people who supposedly have links with crime, terrorism, drug trafficking, transnational organised crime). This so-called convergence towards new threats and risks is considered the main justification for new structures and more cooperation between the agencies (internal as well as external) as well as a rationalizing of their budgets in a period of financial crisis for security affairs. The core of this new securitization is related to transnational flows and to the surveillance of boundaries (physical, social, and of identity), and can be seen as attempts to re-draw a border between an inside and an outside, a border different from the state frontiers.*[41]

Chimni, (discussing Hiram Ruiz) on changing international mores says;

> *Most refugees repatriating in this post-Cold War era are doing so with relatively little help, largely left to fend for themselves in their war-ravaged homelands. After decades of pursuing their geopolitical interests at a cost of billions of dollars, millions of lives, and massive human displacement, the Cold War's major Western protagonists . . . are now loathe to invest even a fraction of the funds that they spent fuelling Cold War conflicts on helping those conflicts' victims rebuild their lives.*[42]

---

[39] Chimni *supra note* 28 at 443-444

[40] B S Chimni, *The Geopolitics of Refugee Studies: A View from the South*, Journal of Refugee Studies Vol. 11. No. 4, 1998 at 351

[41] Didier Bigo, *'When Two Become One: Internal and external securitisations in Europe',* in Eds., Kelstrup, Morten, & Williams, Michael, *International Relations Theory and The Politics of European Integration: Power, Security and Community*, Routledge, 2000 available at http://www.didierbigo.com/students/readings/When%20Two%20Become%20One.pdf at 320-321 (accessed on 25/7/2015)

[42] Chimni *supra note* 28 at 445

The image of a different refugee goes hand in hand with developed nations blaming postcolonial nations (especially in Africa) for being unable to manage their internal affairs and thus creating refugee flows in the first place. Culpability is laid squarely at the door of developing nations, forgetting the role of developed nations in colonial times. Before getting into how that translates to policy we have to first look at the international laws governing sovereignty in domestic and international waters and how they deal

United Nations Convention on the Law of the Sea

The oceans are divided into various sectors over which States have decreasing levels of jurisdiction as the proximity to land recedes. These zones include the territorial sea, the contiguous zone, the exclusive economic zone (EEZ), and the High Seas. The territorial sea is defined in the United Nations Convention on the Law of the Sea as an area of up to 12 nautical miles measured from the base line. [43] The contiguous zone is defined as the area of sea adjacent to the coast which extends up to 24 nautical miles from the same base line used to demarcate the territorial sea. [44] The Exclusive Economic Zone or EEZ is an area extending up to 200 nautical miles from the territorial sea base line and natural resources therein can be exploited. [45] The High Seas are essentially all those areas beyond all of the other abovementioned zones in which States exercise some sovereign power.[46] States may take steps that they need to in the contiguous zone to prevent and punish violations of immigration laws within the territorial sea.[47]

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.[48] Hot pursuit can begin in the territorial waters or the

[43] United Nations Convention on the Law of the Sea (UNCLOS) articles 2-15
[44] The area of sea adjacent to the coast which extends up to 24 nautical miles from the same base line used to delimit the territorial sea. UNCLOS at art 33(2)
[45] The area extending up to 200 nautical miles from the territorial sea base line which may be used for the purposes of exploring, exploiting, conserving and managing natural resources, UNCLOS art 56, 57
[46] those areas beyond any of the other zones in which States exercise a certain measure of sovereign power (the territorial sea, contiguous zone, EEZ etc), UNCLOS art 86.
[47] UNCLOS at art 33 and Convention on the Territorial Sea and the Contiguous Zone, April 28, 1958 at art 24(1) (concerning exercise of control necessary to prevent violations of immigration laws within the territorial sea)
[48] UNCLOS art 111

contiguous zone. The right of hot pursuit extends to "mother ships" i.e those larger ships which have stayed beyond the limits of a State's jurisdiction and deployed smaller boats to ferry people into the territorial sea or contiguous zone.[49] "Hot pursuit is designed to enable the effective enforcement of laws, including immigration laws, by ensuring that offenders do not simply escape by fleeing the territorial sea or contiguous zone, rather than to give States the ability to apply their laws upon the High Seas which are free to all States and beyond national jurisdiction".[50] The problem is that countries with large coastlines, most notably Australia, use these provisions to systematically target and interdict ships with refugees in them. Sometimes it is not even a question of targeting a ship within their domestic waters. In a sense "regardless of where the ship is intercepted, it does not seem right to characterise preventative action such as interdiction as hot "pursuit", the aim of which is to apprehend offenders and bring them to justice".[51]

The Protocol used is that against smuggling of migrants. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. [52] If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law. However, 'without a determination of status, it is impossible to be sure that a State is merely preventing violations of its domestic immigration laws, rather than violating the prohibition on *refoulement*'.[53] The exception in para 2 of article 33 cannot in any way be taken as an indication that the Article has no application to rejection at the frontier. It can rather be taken to support the opposite conclusion. It would indeed be wholly inconsistent to provide a refugee in the territory of a Contracting State with all the safeguards contained in paragraph 2 while at the same time giving Contracting States an unqualified right to reject them at the

[49] UNCLOS art111(1) and 111(4)
[50] Penelope Mathew, *Legal Issues Concerning Interception*, Stemming the Tide or Keeping the Balance, International Association of Refugee Law Judges (IARLJ), 5th Conference, Wellington, 2002 at 91-92 available at http://www.iarlj.org/general/images/stories/WorldConferences/5-2002-wellington.pdf (accessed on 25/07/2015)
[51] Id at 92
[52] Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, Nov 15, 2000, art 8(2)
[53] Mathew *supra note* 50 at 98

frontier and to return them to a country of persecution.[54] The idea that States may simply extend their jurisdiction in order to protect their territories from the arrival of asylum-seekers also falls afoul of the principle of *non-refoulement*. Yet, the United States and Australia have adopted the view that entry to State territory is crucial to the reach of the Convention.[55] The fact is that forcing ships back out to sea may be tantamount to *refoulement*. Authors state that the 'law is always at its limit at the border, because the decision of entrance to the territory and correspondent membership in the community is the equivalent to force'.[56] In this situation there is no question of any notional or potential force. It is physical force, understood in its simplest form, which is used to interdict and then tow these boats to the edge of the contiguous zone.

Australia

As mentioned already, one country which already employs a system similar to the one that Schuck proposed (though it has not been institutionalised under international law) is Australia. However, there have been allegations that Australia uses its economic might to force smaller island nations around it to accept refugees on its behalf.[57] It uses aid to these countries as a method of domination. Though the mechanics of the system are not exactly the same as the one Schuck proposed because it is not a part of international law the concept remains the same i.e neighbouring island nations take refugees on behalf of Australia in return for aid. In a sense we get Schuck's system without the minimal safeguards that he proposed. There is a regional leader who brings together a group of nations to host refugees which it should have hosted under the provisions of international law. There is no quota obviously because there is no international agency setting such a quota. However there is a strong incentive on Australia's part to 'sell' the number of refugees it would otherwise host. As we shall

[54] Para 21 of UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html> (accessed 23 July 2015) (UNHCR Advisory Opinion hereinafter)

[55] Mathew *supra note* 50 at 96

[56] Mark B. Salter, *When the Exception becomes the Rule: Borders, Sovereignty, and Citizenship*, Citizenship Studies Vol. 12, No. 4, August 2008 at 369

[57] Savitri Taylor, *Australia's Pacific Solution Mark II: The Lessons to be Learned,* University of Technology, Sydney Law Review, Vol. 9, 2007 at 120

subsequently see, owing to trade imbalances and the fact that most of these nations are dependent on Australian aid to simply survive there is a possibility that the transactions may not be entirely voluntary on their part.

The most outrageous claim of the Bush administration about Guantánamo was thatthe Republic of Cuba has "ultimate sovereignty over this territory, that therefore neither the Constitution nor U.S. obligations to international treaties apply, and, as a result, that the prisoners at Guantánamo have no rights".[58] Such strategies will "often be accompanied by detention of the asylum-seekers and their return to the country of origin, to an alternative destination where asylum may be sought, or, in some cases, such as the Australian 'Pacific Solution' or the United States' 'offshore safe havens camps', to a situation of limbo where the final destination for any refugee is left uncertain".[59] It is clear that this limbo is not something permissible as far as the convention and protocol go because it would defeat the purpose of the two documents. However, seemingly voluntary agreements with surrounding island nations are what allow the Australian government to get away with such practices. Nobody is hurt and countries voluntarily take refugees off Australian hands. We will have to see if the nature of these agreements is actually voluntary and how these island prisons are used to shunt refugees away from domestic and international spotlight.

In 2001 Australia amended its migration legislation to similar effect. The most important part of the new scheme was the concept of 'excised' places;

> *On September 26, 2001, the Australian government procured the passage of, among other acts, the Migration Amendment (Excision from Migration Amendment Zone) Act (Migration Amendment Act). Under this Act, Christmas Island, Ashmore and Cartier Islands, and Cocos (Keeling) Islands were defined to be "excised offshore places." The Migration Amendment Act also allows for the making of regulations designating other places to be "excised off-shore places."A person, who becomes an unlawful non-citizen by entering Australia at an "excised offshore place," is now labeled an "offshore entry person." Section 46A of the Migration Act of*

[58] Amy Kaplan, *Where is Guantanamo?*, American Quarterly, Volume 57, Number 3, September 2005 at 834
[59] Mathew *supra note* 50 at 86

1958 (Migration Act) invalidates a purported visa application made by an offshore entry person who is an unlawful noncitizen in Australia.[60]

Thus in "Australia, political geographies of the state have been altered by the state itself: for the purposes of asylum, the government has excised its own shores".[61] "Bilateral accords, especially readmission and safe third country agreements, create a geographical game of hopscotch for asylum seekers, with fewer and fewer spaces through which to pass to make a refugee claim".[62] This is a way of creating a legal fiction to ensure that even if refugees land in Australia, they are treated as not having landed on Australian soil. This means that Australia can evade its responsibility under international law of being the first country that refugees land at. In the process it also creates a whole new category of people called 'unlawful non-citizens'. The term has no real meaning. It is just a way of denying legitimate rights to a group of people who are fleeing persecution. The Australian solution is to transfer refugees to 'declared countries'. Similarly Schengen "paved the way to the removal of the 'internal' borders of its member-states, 'compensating' the 'security deficit' created by this move by inventing a new border—the 'external frontier'—which is to protect their combined territory".[63] The glaring contradiction here is the fact that the same sovereignty that Australia invokes to protect its shores is foregone when it is inconvenient. Whether is it done by legislation or executive fiat makes no difference to the fact that it is probably illegal under international law.

Australia boasts the highest number of agreements, with some 20 bilateral arrangements with source countries like Indonesia and Malaysia to suppress smuggling or accept returnees, often in exchange for informal aid projects.[64] These are other (generally island nations) nations around Australia which sign (or are forced to sign) Memorandums of Understandings with Australia and these nations then take in refugees on behalf of Australia. These "islands emerged as spatially significant

---

[60] Savitri Taylor, *The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing*, Asian-Pacific Law and Policy Journal, Vol. 6, 2005 at 6

[61] Jennifer Hyndman and Alison Mountz, *'Another Brick in the Wall? Neo-Refoulement and the Extemalization of Asylum by Australia and Europe'*, Government and Opposition, Vol. 43, No. 2, 2008 at 268

[62] Id at 268

[63] William Walters, *Secure Borders, Safe Haven, Walters, Secure Borders, Safe Haven, Domopolitics*, Citizenship Studies, Vol. 8, No. 3, September 2004 at 252

[64] Hyndman & Mountz *supra note* 61 at 261

sites of exclusion in the geographical landscape where migrants tried to access asylum processes and where nation-states invested significant resources in enforcement to manage entry".[65] "Whether open or closed, publicly or privately managed, officially or unofficially sanctioned, facilities on islands serve the purpose of isolating migrants from communities of advocacy and legal representation, and in some cases from asylum claims processes that can only be accessed by landing on sovereign territory".[66]

They are between states and in interstitial states: neither at home where claims to citizenship are stronger nor in the asylum process having their claims heard by a signatory state to the 1951 Convention relating to the status of refugees.[67] At the border, the Australian government conduct is mostly ungoverned by statute and, therefore, almost ungovernable by the courts. A people's willingness to accept this situation reflects the understanding of the 'state' as our only defence against 'the state of nature'.[68] It is true that the examination is experienced differently: "some who are secure in their nationality, status, or social position may feel no terror and merely irritation – or might be amused in fooling the border guards…refugees and asylum claimants need no explanation of the border as a state of exception".[69] It is important for those who claim the state to be a bulwark against the invading hordes to understand the kind of terror that goes through members of the horde when they are clutching their children in despair and experiencing what it is to be non-persons. In fact presently the law makes it impossible for anyone to arrive by boat and claim refugee status in Australia. The injustice of such a provision when it is tested against the accepted principles of refugee law is highlighted by the length of Austrlia's coastline and the modes of transport available to persecuted refugees.

On 20 May 2013 the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* ("the Act") came into effect.[70] The Act removed the definition of "offshore entry person" from section 5(1) of the *Migration Act* and

---

[65] Mountz *supra note* 24 at 118
[66] Id
[67] Id at 120
[68] Salter *supra note* 56 at 370 discussing Savitri Taylor, *Sovereign Power at the Border*, Public Law Review, Vol. 16, No. 1, 2005 at 75-76
[69] Id at 371
[70] See more at: http://www.iarc.asn.au/_blog/Immigration_News/post/excision-of-the-australian-mainland-for-boat-arrivals/#sthash.0hyvp4Fm.dpuf (accessed on 25/07/2015)

inserted a new definition of "unauthorised maritime arrivals" in section 5AA. An unauthorised maritime arrival is defined as a person who enters Australia by sea at an excised offshore place, or any other place, and becomes an unlawful non-citizen as a result. That is, they are not an Australian citizen and they do not hold a valid visa for Australia. All boat arrivals are now also subject to Australia's offshore processing regime and can be transferred to a regional processing country under section 198AD of the *Migration Act*, even if they first land on the Australian mainland. There are serious concerns that "Australia prides itself on some of the most controlled cross-border flows and has used isolation and racialized dehumanization to exclude asylum seekers in particular from accessing asylum, sovereign territory and Australian society".[71] These are of course new methods to deter the derisively termed 'boat people'.

Detainees do not have access to advocates or translators. "This removal continues today, wherein as punishment, detainees are flown to more remote detention centres away from contact with friends and advocates".[72] "By enacting enforcement in extra-territorial locales, states "use geography to subvert international refugee law".[73] In a sense "the normal order on the one hand geographically contains and confines the asylum seeker, and on the other hand keeps them in a space outside juridical law, despite the law's existence, by excluding them from sovereign territory where they could make a legal refugee claim".[74] The comparison is with a computer system;

> *The image is of the state/home as a computer terminal located in a proliferating network which is both a space of resources and risks. The asylum system is a core element of this scanning infrastructure regulating the passage of flows which traverse the state/home. Properly organized it is to work in the background, effectively and silently. It blocks malicious incoming traffic, while the non-malicious can smoothly cross its threshold. Crucially, it allows us to work with materials in confidence that we are not at significant risk; that they are not 'abusing' the welfare or the asylum systems. It confers a kind of safety mark upon the elements which circulate within the system: they have been checked; you can trust them.*[75]

[71] Hyndman & Mountz *supra note* 61at 256
[72] Id at 257
[73] Mountz *supra note* 24 at 120
[74] Hyndman & Mountz *supra note* 61 at 251
[75] Walters *supra note* 63 at 255

The state (or government) is the anti-virus and it vets the incoming traffic. Analogies like this serve to highlight the kind of absurd portrayal of an asylum seeker that pervades media and the law.

Mechanics of the System: Trade Imbalance

"Australia is the region's main source of imports and investment, a leading aid donor and major defense and security partner".[76] Most island nations around Australia are too small to be self-sufficient. Australia's continuing aid is essential to their survival. It would seem that there is very little chance that they will actually refuse to process these refugees on their soil if that is what Australia requires of them. "Australia's historical ties with Nauru and Papua New Guinea are particularly intimate; however, rather than treating those ties as a source of special responsibilities to the islanders, Australia chose to use them for its own opportunistic ends".[77]

As far as Nauru is concerned, part of the reason why a country as small as it chose full independence rather than integration with Australia was due to historical maltreatment and exploitation by Australia.[78] Between 2001 and 2003 Australia signed MoUs with Nauru to the effect that Nauru was to host refugees (and immigrants) for Australia till 2005 at least and in return was promised almost AUD$50 million in aid.[79] In the process Nauru almost completely ceded control of its police forces and administration as far as these processing centers were concerned. When announcing the treaty, the Foreign Minister took the opportunity to "reinforce Australia's continuing commitment to working cooperatively with Nauru in addressing its long-term challenges *alongside the management of the Offshore Processing Centres"*.[80] Kneebone describes the process;

> *On Nauru the International Organisation for Migration (IOM) had responsibility for the management and administration of the sites. Camp security was managed by a private company, Chubb Protection Services, based on a protocol signed by Nauru Police Force, the IOM and Australian Protective Service (APS). Under this arrangement, APS officers were appointed*

[76] Taylor *supra note* 60 at 19
[77] Id
[78] Id at 20-21
[79] Id at 21-23
[80] Id at 25, quoting Press Release, Australian Minister for Foreign Affairs, Treaty Enables Australian Assistance for Nauru Apr. 19, 2004), *available at* http://www.foreignminister.gov.au/releases/2004/fa054_04.html (last accessed on 25th April, 2015)

> *reserve officers of the Nauru Police Force. Under the arrangements Australia covered the cost of building and running the detention facilities, including the cost of IOM's management and administration, pursuant to a contract with the Australian government.*[81]

The case of Papua New Guinea is not too different. "Throughout the period of Australian administration, Australia was more intent on using Papua New Guinea as a buffer against possible invasion and ensuring that Australian companies reaped the economic rewards of exploiting its immense natural resources than in serving the interests of Papua New Guinea's people".[82] There was some discussion about admitting Papua New Guinea as the seventh state of Australia. However, "considering that the population was Melanesian rather than White, Australia decided to portray a region of tribes speaking 700 different languages as a nation and left the country in some haste, thus consigning it to present-day living standards which are worse than sub-Saharan Africa".[83] As with Nauru, Papua New Guinea too has signed MoUs with Australia for the processing of refugees through 2001 and 2002. Australia did not formally commit to any funding, except for the administration of the processing centers themselves. However;

> *…, the spin-off benefits were expected to be many. First, the Lobrum Base was an operating naval base so improvement of its physical infrastructure would provide a lasting benefit to the Papua New Guinea Defense Force. Second, the local community would also benefit from Australian funded upgrading of electricity, water, sewerage and other essential services. Further, although Papua New Guinea, unlike Nauru, did not receive a promise of extra development assistance, it did benefit from the fast tracking of several important AusAID projects. The new Papua New Guinea Minister for Foreign Affairs, John Waiko, did not doubt that this was a reward for services rendered.*[84]

Burden-sharing is one of the pillars on which on which refugee law stands. As far as possible burdens (financial and otherwise) vis-à-vis refugees must be equitably distributed. It is a fact that most of the world's refugee population is hosted by developing nations and it is also a fact that they are the ones least equipped to handle a large influx of human population. Such situations have not just financial but also social implications that are detrimental to the country hosting refugees. For example,

---

[81] Susan Kneebone, *The Pacific Plan: The Provision of 'Effective Protection'?*, International Journal of Refugee Law, Vol. 18, No. 3-4, September/December 2006 at 709-710
[82] Taylor *supra note* 60 at 25
[83] Id at 26-27
[84] Id at 29,30

there was an incident where East Timor (after having successfully resisted Australia'a attempts to get it to accept refugees on its behalf) had to accept a boatload of refugees from Sri Lanka because the boat was almost floundering.[85] "If the men had made successful asylum claims, East Timor would have had to host them until the UNHCR found resettlement places".[86] If the refugees had made unsuccessful asylum claims, the UNHCR could not have forcibly repatriated them because that is not something within its mandate. Thus;

> *"Australia, faced with either of these scenarios, would have been able to respond without feeling the cost. The same cannot be said of East Timor, which was and still is struggling to find its feet as a newly independent country. In addition, it is trying to manage the return of thousands of its own nationals from the Indonesian province of West Timor".*[87]

International Obligations

What are the obligations that Australia incurs under international law with regards to refugees? Do Australia's obligations vis-à-vis human rights of refugees extend beyond its own territorial boundaries? If refugees are transferred to other nations (apparently 'safe' third countries), who bears responsibility if the conditions in the internment camps are not up to the mark? "On December 10, 2003, nine residents of the processing centers in Nauru commenced a hunger strike protesting their detention and the numbers participating grew over the next few days".[88] Australia's Immigration Minister and Attorney-General both took the position that Australia could under no circumstances be held liable for the situation of the refugees because they were in processing centers not located on Australian soil. The UNHCR was unequivocal that both countries were liable;

> *From an international legal perspective, the UNHCR's position that both countries are responsible for the residents of the processing centers is the correct one. Nauru owes a customary law non-refoulement obligation to asylum seekers within its territory, regardless of how those asylum seekers came to be there. Although Nauru chose to entrust the practical fulfilment of this obligation to the UNHCR and Australian officials, it did not thereby rid itself of the obligation. Nauru also owes human rights obligations under customary international law to persons within its territorial jurisdiction. Since the processing centers are located within its*

[85] Id at 33-34
[86] Id at 34
[87] Id at 34-35
[88] Id at 14

> *territory, Nauru's human rights obligations are owed as much to the residents of the centers as to any other persons within its territory.*[89]

European Court of Human Rights has also held generally that states are obliged to treat people they have transferred to third countries and have "effective control" over, in a manner consistent with the human rights obligations they have signed and ratified.[90] Along with that, this is what the UN Human Rights Committee has to say about Article 2(1) of the ICCPR;

> *Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.*[91]

The obligation of *non-refoulement* is both an obligation of result and an obligation of conduct, and there is no break in the chain of causation when a State has failed to ensure that an asylum-seeker receives protection from *refoulement* elsewhere.[92] It is clear that Australia retains significant control over these 'off-shore processing' centers, even to the extent of not allowing any *refoulement* without its permission. The security forces for these camps are Australian because most of the nations hosting these refugees do not have the requisite numbers of security personnel to spare. The infrastructure and the administration are also overseen to quite an extent by Australia. In such circumstances we have to assume that the island nations have no real agency when it comes to dealing with the refugees, even if they are located on what is the nations' sovereign soil. If we read this with what the United Nations has said about state responsibility, it is not hard to sustain the view that Australia is ultimately responsible for the fate of these refugees.

---

[89] Id at 15
[90] See generally Christina Boswell, *The 'External Dimension' of EU Immigration and Asylum Policy*, *International Affairs (Royal Institute of International Affairs 1944-,)* Vol. 79, No. 3, May, 2003
[91] *Lopez Burgos v Uruguay* Communication No. 52/1979 ¶ 12.3 (Human Rights Committee, July 29, 1981)
[92] Mathew *supra note* 50 at 96

Australia has also been heavily criticized for its failure to fully assess the appropriateness of transferring asylum seekers to Nauru and Manus Island. We have already discussed the case of East Timor.[93] If the men had made successful asylum claims, East Timor would have had to host them until the UNHCR found resettlement places.[94] If the refugees had made unsuccessful asylum claims, the UNHCR could not have forcibly repatriated them because that is not within its mandate. East Timor is a country struggling with its own (crippling) refugee inflows from West Timor. It does not have the financial, administrative or police resources to handle refugee inflows in any significant number. Yet, it was forced to accept and then process refugees, inspite of the fact that, in all probability, it would not have the resources to settle them or even to repatriate them. In essence, Australia did not care about the kind of 'refuge' that these people were going to have access to. "The lack of standardised determination procedures has been one of the most powerful arguments against reliance on 'safe third countries'".[95] The asylum-seekers' destination is left uncertain, "except for the fact that the agreements with the Pacific Solution countries state that Australia will take eventual responsibility for removing any asylum-seekers remaining in those countries".[96]

Customary International Law

What are the rules to determine whether a certain principle can be considered customary international law. The International Court of Justice says;

> *In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact*

[93] Taylor *supra note* 60 at 33-34
[94] Id at 34
[95] Mathew *supra note* 50 at 101-102
[96] Id at 104 discussing *"Not for Export": Why the International Community Should Reject Australia's Refugee Policies*, Sept. 2002, available at http://www.hrw.org/press/2002/09/ausbrf0926.htm (accessed on 25/07/2012)

justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [97]

Governments of States not parties to the Convention or the Protocol have frequently confirmed to UNHCR that they recognize and accept the principle of *non-refoulement*. Thus, according to the experience of UNHCR, there is either an express or tacit understanding on the part of Governments that the principle has a normative character.[98] The International Court of Justice again observes;

For speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provision will figure amongst those in respect of which a right of unilateral reservation is not conferred or is excluded."[99]

Article 3 of the Convention relating to the International Status of Refugees of 28 October 1933, says:

"Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures such as expulsions or non-admission at the frontier (refoulement), refugees who have been authorized to reside there legally, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their country of origin

During the discussion on *non-refoulement* provisions when the Convention was being discussed the United Kingdom proposed that an exception be made for national security. However the representative from France opposed it. *Non-refoulement* in the sense of not turning away someone to a place where his life may be in danger ought to

---

[97] Judgement of the International Court of Justice of 27 June 1986 (Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America) I.C.J. Reports 1986 page 88 paragraph 186

[98] UNHCR Advisory Opinion *supra note* 54 at para 6

[99] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, pages 38-39, para 63 available at: http://www.refworld.org/docid/50645e9d2.html (accessed 23 July 2015)

be an absolute principle.[100] Also, the President did not place on record the interpretation suggested by the representative of Switzerland that the words "return" or "*refoulement*" only applied to refugees who had already entered the territory of a Contracting State.[101] If an exception is considered necessary for overriding reasons this should not automatically result in persons being forcibly returned to a country of persecution. The persons concerned should be given the opportunity by provisional asylum or otherwise of proceeding to another state.[102]

Thus we see that Australia is liable under the provisions of the convention and the protocol regardless of what its domestic laws say because provisions relating to *non-refoulement* are customary international from which no derogation is permissible. We also note that the provision is not in any way diluted in a case of mass influx. The *travaux preparatories* are not documents we should be looking into if the meaning of provisions is clear as it is in this case. There is no mention of a threshold beyond which the provisions of the Convention or Protocol stand diluted. However, even if we go back to the founding documents it is clear that there was no support for this particular stance of certain nations. Thus Australia stands implicated in international law in every way possible. Legally as well as historically it is condemned by the founders of the documents governing principles of refugee law.

Violations of International Law

According to Goodwin-Gill, Australia is taking upon itself the following decisions which according to international cannot be made unilaterally without the UNHCR overlooking things;

> *(1)to determine the destination of a ship carrying refugees and asylum seekers rescued at sea;(2) to determine the point of disembarkation and therefore the locus of claim; (3) to determine the character of an interim solution; (4)to determine the ultimate solution (not in Australia); (5)to determine the level of UNHCR engagement (assistance but no protection, and no international meeting); (6)to determine the scope of law of the sea freedoms and obligations; and (7) to determine the applicability of domestic law.*[103]

---

[100] UNHCR advisory opinion *supra note* 54 at para 20
[101] Id at para 28
[102] Id at Para 37
[103] Guy S. Goodwin-Gill, *Refugees and Responsibility in the TwentyFirst Century: More Lessons Learned From the South Pacific,* Immigration & Nationality Law Review, Vol. 24, 2003at 345-346

As we have observed it does all of the above and does it in a manner which is consistent with what Schuck had proposed. There are refugees which land up on it's shores and instead of determining their status on Australian soil with the UN's help, it unilaterally takes the decision to not allow them to disembark in Australia. They are instead taken to off-shore processing sites which are available in surrounding island countries through mutually negotiated MoUs in return for aid. The situation works out almost exactly as detractors of Schuck might have pointed out. Trade imbalances ensure that these nations are not really in a position to refuse Australia. In a sense the sluggish bureaucracy of the UNHCR that Schuck spoke of is done away with and the result is that Australia is able to get away with violations of international law without any agency looking at the same.

The exemptions that Schuck spoke of i.e for poor nations and human rights violators, as predicted above do not materialise here. The nations that take in refugees are amongst the poorest in the world almost completely dependent on Australian aid. They however house refugees on its behalf. Australia also negotiates with Indonesia to do the same and Indonesia is not even a signatory of the Refugee Convention. Australia cannot directly violate *non-refoulement* obligations and so it does it indirectly. In fact we have to keep in mind that by taking such steps unilaterally and confining refugees to the islands without recourse to the legal system (since they are legal non-persons) it is also in violation of articles 31 (non-penalisation of refugees landing unlawfully in a state's territory) and articles 16 (access to courts and appeals from decisions regarding status as refugees). Most importantly it has excised its own shores so that refugees who eventually land there are denied the benefits that a refugee should normally have without exception under international law. It is clear violation of article 16 when they are made legal non-persons by a questionable exercise of legislative power by declaring certain places within its jurisdiction off limits for refugees. Also the fact that anyone who arrives by boat is automatically denied any rights of appeal to courts and denied a visa unless explicitly sanctioned by the state seems to be a breach of international obligations to say the least.

As discussed, under present Australian law, any asylum seeker attempting to reach Australia without a valid visa is an 'unlawful non-citizen' and subject to mandatory detention. But asylum seekers who arrive with a visa, such as a tourist or student visa,

and who subsequently claim asylum are 'lawful noncitizens'.[104] Also as, noted above there has been a recent shift in policy to classify all boat arrivals as unlawful non-citizens. This is again a clear breach of the non-discrimination clause in the Convention. It is quite possible that a significant majority of those arriving on Australian shores have no access to a visa or an air ticket. This makes it incumbent on the state to not create artificial distinctions. One could argue that these are aimed at deterring or making sure that a certain class of asylum seekers are automatically excluded from the officially recognised process.

It is possible that Australia can get away with this because it can send them for off-shore processing to other nations. It can do so because of the MoUs signed by these nations in return for aid. We have to subsequently see if such behaviour is encouraged under the system that Schuck advocates and which Australia practises. It is possible to make an argument that this excision would not happen if the only other option for Australia was *refoulement.* It is also to be noted here again that Schuck proposes to institutionalise this system through the dossier on refugees which will determine how much countries are willing to buy and sell them. This is not permissible under the present regime which means that countries have to find colourable ways to discriminate as noted above. Promoting such a system could mean that only a certain class of refugees find resettlement (temporary or permanent) options in developed nations.

That of course brings us to another question; is this diluted form of *non-refoulement* the only binding obligation that nations have under the Convention? What of effective protection? As far as Papua New Guinea and Nauru were concerned "the MoUs contained a *non-refoulement* clause and there was no evidence that either Nauru or PNG *refouled* any person".[105] However there were serious concerns about the legal status of refugees and accountability for their welfare. For example;

> *…[a]lthough the Australian government funded and directed the Pacific 'protection' centres, primary liability for incidents within the centres were dealt with under local laws under the terms of the MoU. But when asylum seekers in Nauru were charged with offences there was little transparency in the process. For example, in 2003, the Government of Nauru barred lawyers, human rights activists, health care professionals and independent observers from*

[104] Kneebone *supra note* 81 at 718
[105] Id at 710

> *visiting the republic during the trial of 21 detainees allegedly involved in riots at the two detention centres on Nauru. For a period after riots on Christmas Eve 2003 in the Nauru detention centres, one of the centres was reportedly 'self-managed' and deemed 'unsafe to enter' Julian Burnside QC, who had been asked to represent some of those charged, was not only denied access to those charged, but even rudimentary details of the charges.*[106]

The isolation makes it easier for a state to take such steps and when we institutionalise a system which puts up humans for trade we risk condoning the same at an international level. The fact remains that such violations happen even now and sometimes in areas which have UNHCR protection.[107] If we leave it to countries to simply negotiate amongst them about the kind of protection that refugees should enjoy it is bound to end up as it has in Australia; with a lack of accountability and reluctance to accept responsibilities on both sides. Throughout Schuck's paper a constant refrain is that everything that is seemingly a problem with his proposal is already a problem under the current regime. Admittedly it is so; the crucial difference is simply that countries still face public censure when they violate international in the way Australia does. If we bring such a system under the auspices of international law there a chance that the public censure may eventually be muted.

In a sense, with the lack of a formal implementation mechanism, public censure (domestic and international but especially domestic) is still the only thing keeping states true to their international commitments vis-à-vis refugees. In the next chapter we shall see how the effects of that censure are mitigated and kept in check by propaganda and policy. Ultimately we shall also have to see what effect the trading system, if implemented, might have on public discourse regarding refugees. Since we have seen (as Schuck claims) that most of the problems that arise out of his proposal are ones which are already present in the present regime, we also have to check whether institutionalising his proposal might create issues which he himself has not taken into account and which might exacerbate existing problems or create new ones. We also have to put these issues in context of Australia and compare to see if the outcomes mentioned are something which are inevitable if trading is allowed.

---

[106] Id at 710

[107] See generally Ahilan, Arulanantham, *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System*, Human Rights Quarterly Vol. 22, No.1, 2000 where a lack of proper reporting from Sri Lanka is discussed.

Chapter 2: The 'Other'

Internal Security

In 2002 the UK produced a White Paper on immigration control;

> *Strong civic and community foundations are necessary if people are to have the confidence to welcome asylum seekers and migrants. They must trust the systems their governments operate and believe that they are fair and not abused. They must have a sense of their own community or civic identity—a sense of shared understanding which can both animate and give moral content to the benefits and duties of citizenship to which new entrants aspire. Only then can integration with diversity be achieved.*[108]

Who are these people (or groups) that UK (and Australian) policies seek to deter? What is this shared sense of understanding that plays out as a trope when refugees of a certain colour (or colours) are deemed to be unacceptable? There was a furore in Australia over the fact that refugee intake with respect to people from Sudan was significantly reduced. Amongst other things, the Australian Minister for Immigration stated that there has been a problem in terms of integration of certain groups into the Australian way of life and hence that may be a reason as to why they are wary of accepting refugees from certain nations. A refugee is someone who is, by definition, a person who has been deprived of certain essentials in life; like education. If we cite the same deprivation as a reason for the problem of non-integration, then this deprivation, which is the crux of the identity of a refugee is not being acknowledged and accounted for. This lack then becomes a defining characteristic of an entire nationality but in a way which makes it seem as if it is innate to the nationality rather than a product of certain circumstances beyond their control.

This is thus seen "not simply a lack of educational opportunity, but a morally ascribed cohesion that secretes itself through the fibre of the group, manifesting itself though violence and social dissonance".[109] The characteristics of group behaviour are then seen as simply manifesting themselves in individual behaviour.[110] In this process, an individual's story is no longer his own but simply a reproduction of group behaviour.

---

[108] White Paper Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2002, Secure Borders, Safe Haven Integration with Diversity in Modern Britain (UK White Paper hereinafter) at 9

[109] Scott Hanson-Easey and Martha Augoustinos, *Out of Africa: Accounting for Refugee Policy and the Language of Causal Attribution*, Discourse Society, Vol. 21, 2010at 307

[110] Id

Also, an individual is not seen as having agency and hence responsibility for his/her actions. "From this perspective, Sudanese refugees are constituted as performing frequent category-bound asocial and violent acts because as prescribed group members, organized as part of a homogenized moral collective, they share 'race', educational deficits and pre-arrival deprivations in common".[111]

Thus "the implication is that shared pre-arrival experiences and 'race' concomitantly determine problematic behaviours that must be managed by restricting Sudanese refugee numbers".[112] It is a problematic (and naïve) causality that is associated with a policy decision like this. It homogenises a situation and then imagines that a whole-sale solution can be found. By reinforcing "surveillance over a specific group, the state has been able to consolidate its hold over territory and guarantee the security of other strata of the population, but at the same moment securisation has created insecurisation, fears and the myth that the full implementation of the public order, of tranquillity, of the peace of the public space is always endangered by revolts, or even by hunger strikes of the people excluded or under surveillance".[113]

Asylum is increasingly characterized as a security issue, rather than one of protection for refugees as is ensconced in international law. "Its categories, codes, and conventions shape the practices of those who draw upon it, actively constituting its object . . . in such a way that this structure is as much a *repertoire* as it is an archive".[114] As many commentators have observed, this redefinition of migration as a threat "was not simply a product of real changes in the scale or costs of migration; rather, it reflected a growing tendency to channel diffuse socioeconomic and cultural concerns into the migration problem".[115] Everything, and especially crime, is seen as a consequence of immigration and granting asylum to refugees who cannot fit in. It is as if there was a golden period in society before immigration ruined it. This flies in the face of facts that most western nations have always had these problems. Essentially these are problems of social class which are now being foisted on to

[111] Id
[112] Id at 308
[113] Bigo *supra note* 41 at 330
[114] Hyndman and Mountz *supra note* 61 at 250 quoting Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, Malden, Blackwell, 2004
[115] Boswell *supra note* 90 at 623 discussing Ulrich Beck, '*Risk society: Towards a New Modernity',* (London, Newbury Park and Delhi: Sage, 1992) at 49

refugees. Poverty, income inequality, crime rates being high in poor neighbourhoods is not a new problem nor will they go away anytime soon. Yet, denying refugees the right to settle is seen as the magic bullet. These problems might manifest themselves more significantly in areas which have more refugees; however, these are the problems generally associated with poverty and they are not indicative of any specific pathology that exists within certain ethnicities. Claiming otherwise, regardless of the euphemisms we choose is a form of racism.

Describing the same change discussed above in the EU Bigo writes;

> *There is a change in the categories of police action (from national police forces controlling national crime to internal European security, tracking world-wide organized crime, migration flows and refugee movements), a change in security-check targets (from the control of and hunt for individual criminals to the policing of foreigners or to the surveillance of so-called risk groups that have been defined using criminology and statistics that, according to circumstances, bring them to focus on extra-community immigration and those diaspora that are the origin of the most frequent and most serious of threats to security), an alteration in the time frame of security-checks (from systematic, generally slow intermittent checks to virtually permanent surveillance that focuses on a few target groups and reacts with maximum rapidity)*[116]

"The externalization of asylum represents a shift from the legal domain where international instruments to protect refugees are still very much intact to the political domain where migrant flows are managed, preferably in regions of origin".[117] The protection of refugees is "invoked not by law but through ad hoc decisions of governments made through offshore processing centres, bilateral readmission agreements, and other tools of the transnational state that aim to prevent asylum seekers from ever landing on the territory of a signatory to the 1951 Refugee Convention or the 1967 Protocol".[118]

Another important thing to note in this regard is the use of empirical evidence to prove that the establishment is neutral and that actions are motivated by data rather than biases. There is no acknowledgement of the fact that the collection of data and

[116] Bigo *supra note* 41 at 335
[117] Hyndman and Mountz *supra note* 61 at 251
[118] Id at 252 discussing Alison Mountz, *'Human Smuggling and the Canadian State'*, Canadian Foreign Policy, Vol. 13, No. 1, 2006

the way it is formulated may itself be problematic.[119] For example there is some discussion of the fact that race-based gangs are often formed groups from Africa and more specifically by the Sudanese. This characterisation does not acknowledge the socio-cultural context in which such gangs are formed. They are formed "because of their status as new groups settling in Australia, take on a particularly threatening and dangerous identity".[120] "In time, these 'gangs' become less threatening as the group loses its 'Otherness', and become increasingly recognized as historical urban myth, rather than posing a real threat".[121] So, even if data shows that there is a problem with certain groups as far as problems of integration and gang-formation are concerned, it has to be understood as a reaction to conditions rather than a characteristic of the group which would threaten a way of life. To further buttress this argument, there is the fact that this type of gang-formation has historically happened in almost every country which has had significant immigration inflows.

This part of Australia's justification to not allow refugees from certain parts of the world would be rooted in what Nancy Fraser calls the 'culture-valuational' axis of the injustice.[122] Everyday readings around the situation have a way of delinking the problem from history. It has been the experience of any nation which accepts immigrants that integration is a long and tedious process. Groups facing majority hostility will tend to ghettoisation and gang-formation. It is a part of the process of adjustment rather than a standalone pathological characteristic of a certain culture. History is replete with examples of such ethnic groups coming and adjusting in another country, changing their own ways of life as well as the culture of their adopted homeland. As an example we could maybe think of the Irish and the Italians in New York in the late 19th and the early 20th century. To 'demonise' certain groups using these kind of circumstances as an example is covertly racist if not overtly so.

The other end of the spectrum is the 'political-economic' part of it. It is admitted (even by Fraser) that such dichotomies do not exist in real life because these two concepts are enmeshed with each other. However, it helps us to understand certain

[119] Hanson-Easey and Augustinos *supra note* 109 at 309
[120] Id at 311
[121] Id
[122] Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a `Post-Socialist' Age,* New Left Review I/212 July-August. pp. 68-93 (1995) at 71

aspects of the refugee situation. Macedo argues that "the comparative standing of citizens matters in some ways that the comparative standing of citizens and non-citizens does not".[123] He thus goes on to say that "distributive justice is an obligation that holds among citizens".[124] Something similar is claimed when Australia refuses to accept refugees and uses resources as a justification.

Culture Clashes

One of the routine reasons for turning away refugees is that they are not actually refugees but immigrants. Law works with a violence which is innate to it and which tends to routinise individual experiences. In the process law creates a declared history which is actually more important than what really happened. It tends to freeze certain categories which repeat themselves in different forms; like the 'White Australia' policy being reflected in the fact that they are reluctant to accept refugees from Africa. Even if *non-refoulement* is a peremptory norm of international law which (technically) cannot be violated, there are ways and means of shirking responsibilities as Australia does through its off-shore processing centres. The disparity in wealth vis-à-vis the neighbouring island nations means that Australia is able to use aid as a tool to get these nations to accept refugees on its behalf.

Questions have been raised with regards to the culture of various ethnic groups and how far such particular cultures are compatible with 'Australian' culture. It has been asserted that the various immigrant and refugee groups who had come to Australia in the past had shared certain commonalities with the country's already existing culture.[125] "The Western democratic qualities that are deemed essential for integration are, through this logic, innate, immutable qualities not easily learnt and, as such, seem almost biological in their essence".[126] In a sense, "culture is an essentialized, immutable attribute, akin to other ideological markers of difference such as 'race' or nationality".[127] The advantage of invoking culture, rather than 'race' or 'ethnicity', is that it helps the establishment avoid charges of blatant racism, pay lip-service to the

[123] Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?* in Ed., Carol M. Swain, '*Debating Immigration',* New York, 2007 at p.64
[124] Id.
[125] Hanson-Easey and Augustinos *supra note* 109 at 312-313
[126] Id at 313
[127] Id

idea all cultures have equal worth, and at the same time devise policies which are, in fact, racist. Thus, the political motivation behind policies can now be masked by a concern for compatibility between two inherently incompatible *cultures*. This gives policies the garb of respectability that present day politics insists it have. This logic is then employed to draft legislation which is exclusionary in nature.

Defending a way of life

What is this necessary for? What is Australia trying to defend? There are a few myths that have sprung up (or been created) around the refugee situation in Australia. "The first trope surrounds the belief that Australian culture (read, white and Anglo-Saxon) is under a constant and growing threat and that without adequate measures for protection, it will vanish".[128] "A second trope, flowing directly from the first, is the belief that Australia, as a nation under attack, has the right to control its borders".[129] "The evolution of security and its various forms throughout history is explained either as an anthropological need (ontological security or security desire), as a legitimate demand from citizens (safety), or as a speech act which varies according to the moment (security discourses), rather than analysing the practices of securisation/insecurisation and the set up of the social power balance that enables them to be applied".[130] "A third trope is the belief that those seeking asylum in Australia are not refugees but are people seeking a better life, and that even if they are refugees, they are queue jumpers".[131] Though human smugglers often facilitate the migration of populations characterized as 'mixed flows' (i.e. out of place for both political and economic reasons), these applicants tend to be scripted as economic migrants and therefore 'bogus refugees'.[132] In fact the UK admits that it is hard to distinguish which is which;

> *Disentangling the many motives—from seeking better economic prospects to seeking protection—which people have for coming to the UK is not always easy. But we need to do more to ensure that clear, managed routes into the UK exist so that people do not use inappropriate routes to effect their entry.*[133]

---

[128] Richard Wazana, *Fear and Loathing Down Under: Australian Refugee Policy and the National Imagination,* Australian Refugee Policy and the National Imagination, Vol. 22, No.1, 2004 at 86
[129] Wazana at 86
[130] Bigo *supra note* 41 at 327
[131] Wazana *supra note* 128 at 86
[132] Hyndman and Mountz *supra note* 61 at 258
[133] UK White Paper *supra note* 108 at 13

"The border inspection is a primary institution of citizenship which contains, disciplines, and normalizes the passage from the anarchic, dangerous international to the political, safe domestic".[134] In a way it is necessary for governments to claim this because they are then justified in preventing them access. It is not the civilised West's problem that some dictator in some banana republic is not able to guarantee his citizens (chattel/property?) a standard of living which has been achieved in the West through democracy. Once this is established, it is easy enough for public opinion to favour not granting asylum to those who need it. The fact that men uproot themselves and their families only under the direst of circumstances, especially when they know that the reception granted them will be at best hostile and at worst penal, is something that government propaganda conveniently sidesteps.

Official definitions of the refugee emphasize persons who have fled from *political* violence. But political and economic factors in mass migrations invariably overlap and it is difficult to establish exact cause. "Political violence is often triggered by worsening economic conditions, and economic hardship often results from the exercise of repressive political power".[135] "The explanatory narratives that these are not 'genuine' convention refugees enable their remote detention and removal from the support of translators, refugee advocates, refugee lawyers and legal processes usually housed in urban centres".[136] "Multiple processes mark and differentiate, simultaneously grouping, homogenizing, racializing, medicalizing, criminalizing and isolating".[137] While detention serves to contain and isolate individual detainees, it simultaneously reconstitutes contained individuals as mobile collective threats. "Individual migrants and their bodies become mobilized as massive 'tides', 'waves', or 'floods' that threaten to overwhelm society".[138] "Migration issues provided an easy target on which to focus a range of concerns about crime and internal security, welfare state reform and job security, and the declining relevance of traditional

---

[134] Salter *supra note* 56 at 374

[135] Id quoting H Overbeek, *'Towards a new international migration regime: globalization'*, in: R. Miles and D. Thra¨nhardt (Eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion,*1995 (London, Pinter) at 15

[136] Id

[137] Hyndman and Mountz *supra note* 61 at 258

[138]A. Mountz, K. Coddington, RT. Catania and J. Loyd, *'Conceptualizing detention: Mobility, Containment, Bordering, and Exclusion'*, Progress in Human Geography, Vol. 37, No.4, 2013 at 528 discussing Hyndman and Mountz *supra note* 61

collective identities in postindustrial societies".[139] The point remains that refugees or recent immigrants are amongst the most scrutinised groups in their chosen host countries Nobody asks as to why groups looking to threaten overwhelm and swamp Western societies would choose the most conspicuous hence uncertain (and illegal) route into the country and then be part of an impoverished and scorned ethnic minority. However, "even if we agree with some of the descriptions concerning the convergence of threats, they need to be analysed as a social construct which is not independent from the security agencies and whose legitimacy to declare the truth of the threats needs to be put in question".[140] Instead of that we slot them into categories that are arbitrary but which seem to be adequate given the nature of the discourse. We never stop to ask, why citizens would uproot themselves bag and baggage to become non-citizens unless they had really compelling reasons;

> *Never mind this complex interrelation of the political and the economic in the production of exodus. Nor that the decision to pack one's bags and move thousands of miles facing all sorts of life-threatening risks in the process is never made lightly. If this complex reality doesn't fit our moral categories, we'll make it. We'll filter the white noise of multiple mobilities and establish clear 'routes' and 'channels'. If we can just identify the genuine refugee, or the high-skilled migrant, this will allow us to deal with the others, the 'bogus', with greater confidence from the public and thus with more firmness.*[141]

Ironically, through detention, a process that disconnects migrants from environments where they could be identifiable, the migrant becomes an official entity. The relative distance of islands from mainland territory exacerbates the isolation of detainees, limiting access to advocates and asylum.[142] The fact that these are all security threats who need to be kept apart from society till the genuine refugees have been sorted out from those looking to take advantage of the generous immigration policies of the West plays a huge role in mobilising public opinion to treat them in a way that they would let a fellow citizen be treated. In this sense it is almost a given that till they are accorded some sort of official status they are somehow of a sub-human category. The official status is what turns them into genuine refugees. It is not necessary according to the convention or protocol that one needs to have documents to be a refugee. There is no category in between being a refugee and not being one. That is a created

[139] Boswell *supra note* 90 at 623-624
[140] Bigo *supra note* 41 at 324
[141] Walters *supra note* 63 at 249
[142] Mountz *supra note* 24 at 121

category; as discussed earlier the creation of this category means that the attributes of this category have to be decided upon. Such attributes are then used to mobilise public opinion against acceptance of a destitute people.

The first trope that we discussed above plays out quite emphatically with regards to football in Australia;

> *Known as an "ethnic" game that is often called "wogball," soccer in Australia is a perfect venue for examining the above-mentioned fears and anxieties around multiculturalism. Most club teams until recently had "ethnic" names, such as "South Melbourne Hellas," "Preston Makedonia," and "Heidelberg Alexander." For obvious reasons, these clubs are largely populated by European immigrants who have led the charge of Australian soccer for decades. This trend generated some fears among government officials that "old world" conflicts, such as that between Greece and Macedonia, were being played out on the soccer pitch. More importantly, they feared that as long as soccer was associated in the Australian consciousness with ethnicity, it would never enter the mainstream.*[143]

The football example shows us how these identities are formed and sustained even to the extent of manifesting themselves in terms of the names of football teams. It is an example of how ethnic groups reassert cultural identities in the face of discrimination. What is to be noted here is the fact that eventually these groups get assimilated into the mainstream and that this initial separation is not a pathological condition but a perfectly normal explanation for the separation that these groups face. As with the football teams being renamed, these groups fit in eventually with the mainstream. More than any inherent cultural incompatibility, in a way it is the comfort level that an incoming ethnic group has with the majority. So when the media portrayal is such that the establishment concentrates on one side of the story i.e the incoming refugees/immigrants having differences with the mainstream population. However, what these stories do not tell us is the fact that all these groups were eventually assimilated into the majority population. The eventual renaming of the football teams by the Commission and the fact the groups for which the teams were named accepted this rechristening is an indicator of that. That is the part of the story that is not told. The fact that the Sudanese way of life (if indeed there is a generalised way of viewing it) is seen as incompatible with Australian culture points to that basic fact the argument is being envisaged from one direction but not from the other.

[143] Wazana *supra note* 128 at 86

Sarat "examines law as an active participant in the process through which history is written and memory constructed".[144] It is possible to think of law in a broader sense (though that is not how Sarat uses the term) and include legislation and public policy decisions within the ambit of the word 'law'. The fact that Australia had an issue with immigrants who were not White up until the 60s manifests itself even now in terms of the way the racial identity of certain African groups is constructed. Discourse in society produces a certain kind of declared history (just like judges do) and sometimes that declared history is more important and enduring than what actually occurred. Gang-formation may have been a response to the 'alienness' that immigrant groups feel when they come in. However, when the story is told, it is the cultural incompatibility that is stressed on rather than the alienation faced by incoming groups, especially in the face of hostility by the existing population. Criminalizing migrants invokes a circular rationale that legitimizes detention: migrants might be criminals, necessitating detention; migrants must be criminals, because they are detained.[145]

"The connections which are made between terrorism, drugs, crime, delinquency, border surveillance, fighting against major drug trafficking, and controlling clandestine immigration widen the spectrum of public security towards different activities: information and military activities to fight against clandestine organisations coming from abroad (from a government, community or diaspora) who use political violence against citizens or use the national territory as a transit site or for sale of drugs, and have an effect on the usual activities of custom officers (border controls, the fight against drug trafficking, economic intelligence) who find themselves drawn into internal security, surveillance activities which are increasingly delegated to private operators on a local scale".[146] As already pointed out these are ways of connecting existing problems which probably have systemic roots to the issue of refugees and invoking a whole host of negative emotions about them. Concerns about native culture and livelihood are deeply emotional issues and it is easier to accept that these problems stem from somewhere outside the state.

[144]Sarat and Kearns, "Writing History and Registering Memory in Eds. Sarat and Kearns Legal Decisions and Legal Practices: An Introduction" in *History, Memory and the Law*. 1-24 at 1
[145] Mountz, et al. *supra note* 128 at 527
[146] Bigo *supra note* 41 at 334-335

"Various 'wars' on traffickers and illegals allow Western governments to position themselves as a force for good, acting in many cases to protect the human rights of illegal immigrants who are cast as victims of sinister forces, but most of all to protect their citizens who, in a secondary effect, also become subjectified as potential victims".[147] Internal security is not an "internal problem between communities in a public sphere about the definition of national identity', internal security is a transversal vision of some knowledge about public order and surveillance inside or outside the territory, associated with specific devices of control".[148] In a sense the body of the refugee is the border and that is where internal security resides. It does not matter whether the actual line is physically somewhere else; the border starts and ends with the body of the refugee. Legal fictions like Australia's excised territories are easy to imagine in such a scenario. Regardless of where sovereign actually ends and begins, the body of the refugee is always outside sovereign territory in matters of asylum. He is always stuck outside the state's sovereignty. This is of course if he manages to not be physically towed away from sovereign waters. In a sense there are layers of 'refugee-proofing' that are employed and the last (and insurmountable) layer is the body of person. One cannot inhabit a territory from which one is excluded by merely existing.

Nandini Sundar puts forth the proposition that the state uses emotions in a way which is inherently lopsided and that this is a deliberate ploy to ensure that the sensibilities of the populace remain with the establishment rather than with the 'other' side.[149] "Social movements are also essentially emotional movements—where the successful mobilisation of righteous anger or a sense of injustice, or the maintenance of solidarity through humour, songs (which evoke emotions) and other rituals of resistance are as critical to the existence of these movements as the structural reasons which drive people to participate in them".[150] "In times of civil war the emotions performed by the state range from the inculcation of fear to a calculated display of indifference to the exhibition of injured feelings, as if it was citizens and not the state who were violating the social contract, and as if the social contract consisted of the

[147] Walters *supra note* 63 at 248
[148] Bigo *supra note* 41 at 322
[149] See generally Nandini Sundar, *'Winning Hearts and Minds': Emotional Wars and the Construction of Difference*, Third World Quarterly, Vol. 33, No. 4 , 2012
[150] Id at 709

state's right to impunity".[151] It is not asserted that there is anything close to the Maoist situation in Australia. However, the portrayal of the Australian way of life under siege is close enough for us to use the Maoists' example from India as an analogy. As asserted above these people are perceived almost as sub-human unless documentation says that they are genuine refugees.

"Left unchallenged, fear and the threats of invasion upon which it is predicated represent a deeply geopolitical problem that eschews legal approaches to asylum and migration in general, preferring a politicized, comprehensive and transnational approach of invisible policy walls".[152] As with Maoists, "these persons are codified as less than human and less deserving of human, international, or constitutional rights". "This dehumanization is shaped by racial, national, and religious typologies and shored up by revamped historical imperial taxonomies, which rebound across national borders".[153] Large states make use of their small, far-flung and remote island jurisdictions to facilitate activities that would be not normally be humane treatment in their countries.[154] Nowhere is this creativity more evident than with Australia creating buffer zones within its own sovereign territories.

As far as the idea that Australia (or EU or USA) reserves the right to protect its borders by whatever means possible goes, it tells us something about the nature of law and the violence that is innate to its functioning. Let us again imagine the term 'law' to be something broader, including legislation and public policy decisions. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence".[155] Cover gives us an excellent example of the routinisation of law's violence, when he talks about the sentencing of a defendant in a criminal trial;

> *...examine the event from the perspective of the defendant. The defendant's world is threatened. But he sits, usually quietly, as if engaged in a civil discourse. If convicted, the defendant customarily walks-escorted-to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the*

[151] Id
[152] Hyndman and Mountz *supra note* 61 at 255-256
[153] Boswell *supra note* 90 at 853
[154] Mountz *supra note* 24 at 122
[155] Robert M. Cover, *Violence and the Word*, Yale Faculty Scholarship Series. Paper 2708, 1986 at 1601

> *civil facade is "voluntary" except in the sense that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.*[156]

"Persons taken by Australia to Nauru and Papua New Guinea were admitted into those countries on visas that were subject to a condition that they would not leave designated processing centers".[157] Amnesty International and UNHCR have concluded that as far as international humanitarian law goes, the refugees are effectively in detention.[158] Though the UNHCR has been involved in the settlement of refugees after the Tampa Bay incident, it has pointed out that it was due to exigent circumstances and its actions could not be taken as creating a precedent.[159]

However we try and disguise it, the essential fact remains that there is a threat implicit in these processes which is actually the reason that law, to quite an extent, is obeyed. As with the defendants going to prison quietly, there is a sense of despair in the way refugees accept the fact that they are almost herded from one place where they are not wanted to another place where they are not wanted. Because they "arrive on territory where access to asylum is mediated, these migrants do not necessarily become asylum-seekers or refugee claimants, but remain instead in interstitial legal categories without citizenship status in the territories traversed en route".[160] The tragedy is truly this limbo that the imaginative use of law and the implicit threat of violence creates.

The language of international law discourse which categorises contributions to the refugee situation as 'burden-sharing' is itself construing them as a 'burden'. Nowadays there has been an effort to shift to a more nuanced phrase i.e 'responsibility-sharing'. However, it is difficult to undo years of referring to them as burden. It is the unpalatable truth that all nations, especially the ones which have the resources to deal with them, perceive them as burdens. What is even more troubling is the fact that there is no acknowledgement of the fact that developed nations and their foreign policies have been responsible in instances for creating refugee outflows. The word 'burden' is a refusal to take on that responsibility which should come home to

[156] Id at 1607
[157] Taylor *supra note* 60 at 9
[158] Id at 9-10
[159] Id at 11
[160] Mountz *supra note* 24 at 121

these nations. Insidious practices "follow migrants across borders, capture and detain in ambiguous interstitial sites, exclude them from landing on sovereign territory to make a claim for protection, hide them from view of public and media, distance them from advocates, and invest tremendous resources, privatizing along the way". [161] And nobody is too concerned because they are, after all, burdens. The cost is not just economic but also social because it is quite a task to integrate different marginalised groups within a society which is already enjoying the benefits of being developed (nobody asks if this development comes at the cost of the very people that Western nations are trying to keep out). The question thus arises; which society has the optimal resources to take on this kind of responsibility; East Timor or Australia?

In a sense this is just an extension of colonialism inasmuch as the fact that Australia no longer cares what happens to the country as long as the refugees do not land on its own soil. East Timor cannot handle refugees on its own nor can it forcibly repatriate them. Australia left Papua New Guinea when it was not viable as an independent nation. In a sense it bears the moral responsibility for the fate of that nation. Instead of bearing that responsibility, Australia's activities undermine the nations in question socially and politically. There is a threat of violence that lingers over refugees as well as its own neighbouring countries. This violence may be of a physical or an economic nature; what cannot be denied is the overwhelming advantage Australia's economic might gives it in dictating policy in the region. In a situation such as this it is inconceivable that responsibility for what happens to refugees in internment camps cannot be laid at Australia's door. It has tried to evade this responsibility by invoking 'culture' and the African bogeyman; nonetheless it is clear that their policies are indeed racially motivated and operate with more than a modicum of bias against refugees of certain ethnic regions.

We have seen clearly how a certain kind of discourse is built around refugees and their acceptance. What the discussion above points at is the fact that it is much easier to further this discourse in a way which is detrimental to refugees if they remain unseen. Policies are designed in a way that they remain unseen and out of public eye. One of the problems with Schuck's proposal was that it would confine refugees to the

[161] Id at 122

south and that it doesn't take into account the fact that there is in fact a cost associated with this non-exposure in the north. Australia's policies are a demonstration of that idea. The fact is that it can do so because of trade imbalances. We run a risk in thinking that we can institutionalise these trade imbalances across the world as a method of dealing with refugees. In the next chapter we shall have to see if there certain characteristics of Schuck's proposal which encourage the sort of policies that Australia has devised to deny refugees their right. We shall also have to see what such deals do to human dignity and whether they help to promote certain derisory ways of thinking about refugees.

Chapter 3: Trade, Refugee Law and Dignity

What is Fungible?

The issue at stake here is the legitimizing of an approach which could have potentially detrimental implications as far as the actual quality of a refugee's life and his treatment as a human being is concerned. Australia uses the market approach as a matter of domestic policy and the resulting human rights violations may be attributable to it as a nation. However, if we institutionalise the market as a factor in international refugee law, then there is a good chance that other countries of the global North might get away with such violations under the garb of fulfilling their international obligations. The obligation to accept refugees is one which cannot be compromised on under the present international regime. If we accept the market solution, we are, in essence, allowing countries to be paid (and to pay) for what they already should be doing. It is alright to think of this payment as aid which comes in for the upkeep of the refugees. It is far more difficult to think of it as payment for doing one's legal duty. From (binding) legal obligations, we move to voluntary acceptance of the responsibility in lieu of payment. What kinds of issues arise from such perverse incentives? This kind of thinking might have an impact as far as public perception is concerned as we shall subsequently see.

We have to locate the question of the refugee within a larger context where everything that can be commodified is being commodified and some things which cannot be also. The traditional way of looking at economic issues is inspired from utilitarianism. Even the present solution is inspired by utilitarian considerations. However, recently there has been some work on looking at economic problems through Kantian lenses. The question obviously remains; can we find a way of approaching economics in which the human being is central, in which human emotions are central? It is worth examining if we can approach the problem of human relations in economics and use it to understand how the refugee problem, even with a market approach, may have a different conception (if not solution).

Ellerman talks about the concept of labour relations from a Kantian perspective.[162] He discusses how the economists have come to separate labour from other factors of production on the basis of agency and responsibility.[163] The human element in labour makes it unique. According to Bowie one needs to look at it not just in the quantitative sense, but also in the qualitative sense in "that a corporation cannot be moral if it does not provide jobs sufficient for people to be independent and satisfy some of their desires, and meaningful in the sense of supporting our autonomy and rationality".[164] This gives us a starting point into a conception of economics where a human being fits in a 'human' sense i.e with his desires, emotions and other human qualities factored in along with his labour power. Intuitively it seems a good analogy from which we can proceed to refugees in a trading system because in its essence the problem remains the same; how to fit in the 'human' in the market in a way which is different from the traditional *homo economicus* model of the rational utility maximising individual.

Reasonably enough a proposed trade in human beings (which is the essence of the proposal) arouses some level of revulsion. There seem to be whole host of ethical objections to the fact that human beings are bartered. This kind of proposal leaves no room for the choice of the refugee in deciding where he/she wants to settle. It is understood that even in the present system the choice of the refuge is not given a lot of priority; however it is another thing to entirely discount that possibility legally. It also has the potential to put an end to the idea of eventually developing a working transnational regime for handling refugees. It also means that the global North is in a position to shun its responsibility vis-a-vis creating situations in the South which produce refugees. To allow developed nations to not take responsibility for their part in creating the crisis by means of commodifying human beings seems problematic to say the least. Also, repatriation and a long-term solution, as far as their settlement in other nations goes, do not seem to be a part of the scheme.

---

[162] David Ellerman, *The Kantian Person/Thing Principle in Political Economy,* Journal of Economic Issues, Vol. 22, No. 4, December 1988 at 1113-1114

[163] Id at 1114

[164] Norman Bowie, *A Kantian Theory of Capitalism,* Business Ethics Quarterly, Special Issue: Ruffin Series: New Approaches to Business Ethics, 1998 at 44

One of the major criticisms that this proposal has faced is the fact that it treats human beings as commodities.[165] According to Sandel this is typical of modern society which believes that a solution can always be bought. Though this has been dismissed as idealistic, there is some merit to it especially in view of the Australian example. There is also the question of treating humans as merely means to an end rather than ends in themselves which Kant raises.[166] If refugees are merely trading chips in a global game, where is this respect for human dignity that is so central to Kant's (and JS Mill's) thesis? What is this special quality of being human that seems to be intrinsically connected with the idea of not being treated as a tradable entity; especially in view of how Schuck's proposal which might end up with price differentials according to the qualities one possesses? Is this idea so strong that it ought to trump any differences as far as the refugees' 'quality' go?

In the past decade or so environmental trading mechanisms (ETMs) have developed as a (supposed) solution to the problem of environmental pollution.[167] "One molecule of CFC, kilo of halibut, or ton of carbon dioxide seems much the same as another, both in terms of identity and impact".[168] The fact is that "ETMs must assume fungibility-that the things exchanged are sufficiently similar in ways important to the goals of environmental protection-otherwise there would be no assurance that trading ensured environmental protection".[169] However, that assumption that one thing may be exchanged for another is a problematic one. For example when we talk of replacing a certain type of ecosystem on an acre for acre basis the "ecosystem services provided by the wetlands-positive externalities such as water purification, groundwater recharge, and flood control-are largely ignored".[170]

Frame underscores the problem quite succinctly;

> *in order to apply market-based approaches to environmental problems we need to have both a good understanding of the dynamics of the system which we are commodifying, and a good, or at least shared, understanding of the criteria against which the policy is to be evaluated. In many settings within natural resource economics these are often taken for granted, or*

[165] Micheal Sandel, *What Money can't Buy: The Moral Limits of Markets,* New York, 2012 at p. 64
[166] Immanuel Kant, *Groundwork of the Metaphysics of Morals,* Cambridge, 1998 at 429
[167] See generally James Salzman and J. B. Ruhl, *Currencies and the Commodification of Environmental Law,* Stanford Law Review, Vol. 53, No. 3, December 2000
[168] Id at 611
[169] Id
[170] Id at 612

> *assumed to be relatively straightforward to obtain. Yet, as illustrated by the development of carbon markets in the context of climate change, structural problems can arise from a limited scientific understanding of system dynamics or of resource fluxes, or from inadequate framings of complex problems.*[171]

When the sole exchange equivalent is money (or market norms), in a sense we are ignoring everything that makes a certain ecosystem part of that particular society. This exchange is even more problematic when we consider Kant's ideas about the difference between price and dignity;

> *In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent, what on the other hand is raised above all price and therefore admits of no equivalent has a dignity*.[172]

In a way, modern economics does not take into account the fact that there may be different ways of valuing goods, services, ecosystems, etc and that this value may depend on a lot of factors, one amongst which may be money (or its equivalent). If we look at the abovementioned passage carefully, we understand that for Kant human dignity is something that can admit no equivalent. In modern terms we could say that there are certain things (object, services, goods, etc) which are simply not fungible. What this seems to bring out quite clearly is that the refugee has no dignity when he has a price. We have discussed how they are declared legal non persons and that the quality of their care and the impact they have on international discourse is affected when they are put in island detention centers which are not accessible to media or public.

Again we come to the same conclusion that this benefit of having society (in the North) discuss what happens to create refugee outflows is lost in a system where they can be transferred for money. In fact this benefit is not something which can be adequately represented by paper values. The irony of course we are still looking for a value to having the persecuted human beings there. We still can't accept that they can be there without any redeeming quality, be it money or public policy initiatives. There is simply no substitute for public discourse regarding refugees. As demonstrated in

---

[171] David Frame, *The Problems of Markets: Science, Norms and the Commodification of Carbon*, The Geographical Journal, Vol. 177, No. 2, June 2011 at 138

[172] Immanuel Kant, '*Groundwork of the Metaphysics of Morals',* Cambridge, 1998 at 434

the case of Australia there is quite a probability that refugees under a trading regime will simply be pushed and confined to the global South. When Schuck speaks of more 'bang for the buck'[173] in terms of the same amount of money being able to do more in the South than the North, he definitely does not take this into account. In a sense he is predicting the probable outcome of his system i.e refugees being confined to the South by the buying power of the North. This is just an example of the dangers of equating every possible influencing factor with money. As with the ecosystem, there are simply too many factors, only one of which ought to be the relative costs of upkeep in the North and the South.

Thinking about dignity in Economics

Mark White proposed that there was a way that Kant could be incorporated into economics.[174] The methodology of preferences remains the same in the sense that there are still choices and these choices can be assigned certain utilities. However, if we use Kant's categorisation of duties as perfect and imperfect, then we can think of perfect duties as constraints and imperfect duties as choices balanced against self-interest. It is important to note of course that one of the major issues in any kind of economic theory is the translation between micro and macro and vice-versa. Provided we can get around this obstacle, we could say that as regards refugees, there are certain duties which cannot be compromised on, *non-refoulement* being the primary amongst them. We could start looking for other examples of perfect duties and countries should not have a choice in whether they carry these out or not.

White posits that agents "can base their preference ordering on self-interest, altruism, misanthropy, or any other goal that the agent may have".[175] This is because "the term "preference" in modern economic theory does not imply any mental state, such as happiness and pleasure, but merely an ordering or ranking".[176] "If the agent can rank some duties higher than other duties as well as inclination-based preferences, and can do so completely and transitively, then these duty-based preferences can be included

[173] Schuck *supra note* 3 at 285
[174] See generally Mark White, *Can homo economicus follow Kant's categorical imperative?,* Journal of Socio-Economics, Vol. 33, 2004
[175] Id at 98
[176] Id

in an ordinal utility function just as can any other set of preferences".[177] Unlike perfect duties, imperfect duties do not demand specific performance of action (or inaction), but instead only mandate general ends that should be adopted, ends that are derived from the categorical imperative.[178] However, "perfect duties, which take precedence over all inclinations *and* all imperfect duties, cannot be included among preferences".[179]

Of particular importance here is to note how the Arendtian 'right to have rights'[180] applies. In a sense that is the primary right without there are no other rights. As she states the world finds nothing "sacred in the abstract nakedness of being human".[181] In this sense we can see start to see for the first time the actual danger of allowing nations to declare certain refugees as off-shore entry persons whereby they become unlawful non-citizens. The isolation is just a physical reminder of how far they are from a place where they can claim even the minimum rights of being refugees. In the modern world with its rigid bureaucratic categories, it is simply a way of refusing to categorise altogether. The issue is not so much "that they are oppressed but that nobody even wants to oppress them".[182] One does not have existence even as a refugee outside official categories and that is precisely where the problem is. In a system like Schuck's there is no categorisation till they are accepted as part of a deal. In that sense we have to be Kantian in White's way and be very careful of any derogation from this primary principle of categorisation. Not even the right to *non-refoulement* exists till there is an acceptable categorisation. As we have seen earlier *non-refoulement* in its truest sense i.e the kind which guarantees effective protection is not available. We have to check if there are inherent flaws in Schuck's system which promotes this type of refusal to categorise thus placing refugees beyond the pale of rights.

What about constraints? Constraints "of a financial, physical, or temporal nature, constraints are usually assumed to be given".[183] In the Kantian sense perfect duties are

[177] Id
[178] Id at 99
[179] Id at 98
[180] Hannah Arendt, *The Origins of Totalitarianism*, Cleveland, 1962
[181] Id at 299
[182] Id at 296
[183] White *supra note* 174 at 97

negative i.e there is absolutely no compromise with them. "Therefore, it is appropriate to include them as constraints, in the same way that budget constraints limit a consumer's spending".[184] As soon as a choice is made "with respect to the agent's duty, and an ordinal utility function is constructed from them, he will maximize as usual; therefore, Kantian economic agents differ from consequentialist ones not so much in how they optimize, but *amongst what* they optimize and *how they choose* what to optimize".[185] *Non-refoulement* should be a constraint. In a way a constraint could be everything that cannot be expressed in monetary terms. In the broadest possible sense this could be everything starting from a refugee's choice of refuge. We have to accept that in a real world scenario this will not happen. In fact, as we have seen, sometimes that most essential of constraints i.e *non-refoulement*, is violated quite blatantly. Sovereignty is held to be a constraint in the sense that a country has the absolute right to decide who is admitted but is conveniently forgotten when excising parts of the country so as to colourably hold refugees in a legal vacuum. In this kind of scenario the most that we could hope for right now is to at least start a dialogue in Kantian terms. As we discussed earlier, this is probably where non-discrimination and not adhering to Schuck's idea of the dossier and different prices for different refugees comes into the picture. Human dignity is a constraint. However, that is rather broad a term and in this context needs to be chiselled out a little bit. One of it's components could be the non-discrimination clause. It is a way of valuing humanity over all other qualities. With the present system there is an acknowledgement of the same in the Convention. With Schuck's system there is explicitly no place for such a valuation. A bargain necessarily entails some way of valuing the entity being haggled over. Human beings are different except for the somewhat admittedly abstract notion of humanity.

But what can be said about one's own self-interest? Can we be moral and still act in favour of our own self-interest from time to time? "Kant uses the term *character* to denote one's strength of will or steadfastness to the moral law in the face of such potential lapses".[186] Beneficence is supposed to be an example of an imperfect duty and according to Kant these can be balanced against our self-interest. As regards the

[184] Id 99
[185] Id
[186] Id 100

extent of it, he cautions that it cannot be to "the extent that he himself would finally come to need the beneficence of others".[187] It is easy to see what countries might make of such a formulation. If they admit refugees indiscriminately, they will put their economies under strain. However if we look at how many refugees the North actually admits, we see that this argument if fallacious.[188] Countries which are forced to accept refugees (in millions) because they constitute the immediate neighbourhood of the nation of origin can actually argue thus. It is buttressed by the fact that these countries are amongst the poorest in the world.

There is however a second way of conceptualising Kant here and that may be a little more helpful in analysing this situation which Laffont conceptualised.[189] Laffont proposes that we imagine a beach where there are dustbins every hundred metres or so. If we take rational choice to its logical conclusion where everyone is a utility-maximizer, no one would ever throw litter in the dustbins and in some time the beach would wind up dirty. If the beach is to be preserved, everyone on that beach has to understand this cost associated with everyone being a utility-maximizer. In a Kantian world of rational beings (for that beach) this will most certainly be in contradiction to the universal maxim. Thus in the universe of the beach it can never be rationally willed that people should not discard their own rubbish.

In a completely utility-maximizing world, countries which are not directly affected by refugee inflows would never step in with any kind of assistance. However (for reasons of self-interest or humanitarian considerations) countries realise that this would ultimately result in spillover effects which would make the situation untenable. In the same sense as above they realise that there is a cost associated with being a utility-maximizer. However, it has been empirically seen that this burden-sharing may extend to financial contributions but very often is accompanied by an unwillingness to host refugees. Unlike capital, goods and services, and environmental effects that also

[187] Immanuel Kant, *Metaphysics of Morals*, Cambridge, 1991 at p. 248

[188] http://apo.org.au/files/Resource/Asylum%20seekers%20and%20refugees%20-20what%20are%20the%20facts.pdf (accessed on 25/07/15). Australian Policy Online is a research organisation which has the government as its partner.

[189] Jean-Jacqes Laffont, *Macroeconomic Constraints, Economic Efficiency and Ethics: An Introduction to Kantian Economics*, Economica, New Series, Vol. 42, No. 168, 1975

cross national borders, refugees raise issues of social membership.[190] To a limited extent they have to be included in the society that hosts them, even though this inclusion might take the form of ignorance. It cannot be denied that the mere presence of refugees on a country's soil is a constant reminder to its public (especially if it is a developed country) of the human tragedy unfolding before them. Would it then be easier on them to buy their way out of this bind? Would it be easier for them because there is a possibility that they will host only those they wish? Is implausible to think that the 'White Australia' policy would not then find echoes around the world? Is it alright for people to find refuge at the cost of some inequity?

Paper Values

What brings us to this juncture? "The trading currency superficially makes the commodities fungible, determining what is being traded and, therefore, protected".[191] If the value of everything in society is brought down to a (supposedly) common denominator i.e money, it becomes easy for us to forget that there is an intrinsic (and non-instrumental) value of things that money may not be able to replace. The same problem crops up with regard to fossil fuels. Even if we ignore the environmental impact for a moment, there is still the question of non-replaceability. Indiscriminate use of fossil fuels, without concurrently developing alternatives, will lead us to a situation where we run out of these fuels. Leaving all moral considerations of disparities in incomes of (and usage by) nations aside, it does not make sense even at a practical level to say that we simply charge a higher price. The fact remains that exchanging a valuable and irreplaceable source of fuel for its (supposed) paper equivalent means absolutely nothing in the long run if we do not develop other solutions to the crisis of fuel. Paper currency has absolutely no value to a man stranded in the desert if he cannot exchange it for water. If the supply of water is extremely limited, it can have no paper equivalent.

Kant's proposition is contextual to the fact that he is talking of human beings and their inherent dignity and how that is a reason for not treating them merely as means to ends. However, since we are talking of goods and services also, we have to be

[190] See generally Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action,* Journal of Refugee Studies, Vol. 11, No.4, 1998
[191] Salzman & Ruhl *supra note* 167 at 613

careful in our extension of his argument. Living, as we do, in a modern world we have to (rather we so) make our compromise with the fact that most things can be (and are) bought and sold in exchange for money. In such a scenario, the only thing that we find feasible to do when questions of inherent value are raised is to ascribe a higher paper currency value to the thing in question. In a way what we try and achieve is to find a money equivalent of the instrinsic non-instrumental value. At the cost of repeating the abovementioned argument, one has to say that this is possible (actually probable) in a society which is geared towards thinking that money can buy everything.

We see this all the time in land displacement cases. There is a value that people attach to their land that can never have a complete monetary equivalent. We cannot put a price on the fact that certain lands have been in people's families for generations. We cannot put a price on the memories people have of growing up in and around their village. We cannot put a value on the village gods and goddesses that are so intrinsic to not just their religions but also their cultures. We can never compensate them for the loss of their mooring once they are displaced form the land. We cannot compensate them in any manner for the hostility they face from the middle-class when their urban slums crowd cities. We cannot do any of this; unfortunately we do all of this and much more. Our standard way of dealing with such problems is to simply offer those affected a higher quantum of monetary compensation. Loss of income, loss of homestead, the pain of separation from one's ancestral lands, loss of productivity, being forced into the informal urban economy; all of this is clubbed under the miscellaneous column and a number is written next to it and that is the end of the story.

Sandel explains how this was not always how economics perceives itself;

> *The classical economists, going back to Adam Smith, conceived of economics as a branch of moral and political philosophy. But the version of economics commonly taught today presents itself as an autonomous discipline, one that does not pass judgment on how income should be distributed or how this or that good should be valued. The notion that economics is a value-free science has always been questionable. But the more markets extend their reach into noneconomic aspects of life, the more entangled they become with moral questions.*[192]

[192] Michael Sandel, *Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy*, Journal of Economic Perspectives, Vol. 27, No. 4, Fall 2013 at 122

The formulation of society through the lens of the market has a way of distorting the way we look at things. The only obligation that remains in such a scenario is that of money. We could also try and think of the issue of freedom of speech as an analogy. In India, freedom of speech and expression is a fundamental right. What this means is that unless there is a specific legislation which restricts that right, one is free to speak and express the ideas that one wishes to convey. Thus if the state wants to restrict this right, the burden is on the state to show that this right needs to reasonably restricted in certain given instances. However, if we conceive of this as a power-immunity relation then the questions become very different. If however, we think of the free speech as immunity from state power, the burden shifts to the individual to show that his free speech would not be a violation of state power.[193] In the former case free speech is a right and the state cannot violate it under normal circumstances unless it carves out an exception. In the latter case, it is the individual who has to show that his case falls in an exceptional category. Thus, all the intrinsic value attached to land becomes something that the landowner has to prove and get compensation for; instead of being something that should form a core consideration when we are formulating public policy. The question that we are then looking at is what do we want to institutionalise as a default setting in international law; an obligation shared by all nations which lets us see persecuted human beings for who they are or a system where the richest seller can palm off these 'commodities' to the lowest bidder (or a 'bidder' who hasn't really bid as explained above).

Refugees as Currency

If we go back to the question of refugees, we realise that the moment it becomes a question of trading, it will be assumed that a country has fulfilled all its obligations once payment is made. The burden of proof as regards any further demands (or legitimate claims) with regards to living conditions, work, papers, resettlement, visa-processing, etc will suddenly shift to the refugee. The market has a way of distorting relations and crowding out any priorities which are not tangible tradables. To borrow from Polyani, it has a way of grounding the social in the economic rather than the

[193] For a discussion of the types of jural relations see generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, The Yale Law Journal, Vol. 23, No. 1, November 1913

economic in the social. Market incentives have a tendency to crowd out non-market incentives (the ones which have traditionally operated vis-à-vis refugees).

Gerver raises objections to the fact that trading, "in essence, awards countries for 'voluntarily' accepting refugees, when many of these refugees should, under the current policy, be able to access asylum without the receiving countries being rewarded for providing asylum".[194] "With refugee quota-trading, the final country to receive refugees would be rewarded for not breaking what is currently the law, rather than rewarded for receiving more refugees than is required under the law".[195] She cites an example of a society where one could buy and sell murder points and the fact that this could potentially result in lower rates of murder because one would need to purchase a certain number of points to commit murder legitimately. "An action which is seen as unquestionably wrong, and which no human being should take, is being rewarded simply for not being taken".[196] If we accept refugee trade quotas, we will in fact be rewarding countries for performing an action which they are obligated to under the present international law regime. Once the incentive structure changes, refugees are no more than pawns in a game of global political manoeuvring to see which can country can wring the maximum benefits out of hosting refugees. It is alright to think of this payment as aid which comes in for the upkeep of the refugees. It is far more difficult to think of it as payment for doing one's legal duty. From (binding) legal obligations, we move to voluntary acceptance of the responsibility in lieu of payment.

Sandel also gives us an example of how schools in the USA initiated a system of making parents pay a fine for picking up their wards late from school.[197] Instead of deterring parents from being late, it came to point where the number of late pick-ups increased because parents increasingly saw it as a 'convenience fee' for being late. The moment money came into the equation as a major factor, the perception of the thing itself changed. Being on time was no longer seen as a moral obligation on the part of parents. We cannot help but extend the analogy to the refugee situation. The

[194] Mollie Gerver, *Refugee Quota Trading within the Context of EUENP Cooperation: Rational, Bounded Rational and Ethical Critiques*, Journal of Contemporary European Research, Vol. 9, No. 1, 2013 at 72
[195] Id
[196] Id at 73
[197] Sandel *supra note* 165

problem is essentially this; what is the public perception regarding the money spent on refugees? Is it seen as humanitarian aid or is it seen as part of a deal? As Schuck correctly points out a lot of the problems in his scheme are those which already exist under the present system. However, it is important to note that even with all the reservations regarding them humanitarian aid to refugees is seen as something that nations generally owe a persecuted and homeless people. Perception regarding this might change the moment money or aid is exchanged as part of a formal deal under the auspices of international law. Once that happens, there might be a tendency to look at refugees as people already paid for and hence, in a sense, for whom the selling nation is no longer responsible. Public perception, the only real bulwark against maltreatment of refugees, might be moulded in a way which is not conducive to the best interests of refugees. As already mentioned, this is already being done in myriad. One more brick will be added to the wall when people start seeing the money exchanged as not humanitarian aid but as fair exchange for goods. It does take a bit of imagination to stretch Sandel's analogy. Nonetheless the fear that market values corrode non-market values is a real one and needs to be under consideration if we are looking to marketise a commodity more complex than ecosystems i.e human dignity.

Refugees are amongst the most deprived people on earth. If we take a pragmatic view they are fed and housed it is because of the charity. As Arendt mentions neither being fed or put up changes the fundamental nature of their rightlessness.[198] She says that something more fundamental than freedom and justice are at stake in case of refugees. They are deprived of the right to action rather than freedom; they are denied not the right to think but the right to have their opinion matter.[199] Only when humanity is completely organised is it possible for people to not be part of humanity unless they fall into accepted categories. As it stands the category of a refugee is one with the least rights of almost any people. As already discussed new null categories are further depriving them of this basic right to be human. As Arendt rightly points out, it is more difficult for a state to destroy the legal personality of a criminal than that of refugee.[200] The tragedy of the savage is that he cannot master nature and lives and dies without leaving a trace of his life, refugees are thrown back into a peculiar state

[198] Arendt *supra note* 180 at 296
[199] Id
[200] Id at 300

of nature and that is the foremost tragedy.[201] Ironically, this regression takes place, and indeed is only possible, in a world which, according to our modern benchmarks, is civilised completely.[202]

Foucault gives us a short history of how liberal theorists, namely Becker, Schultz and Mincer have approached this problem.[203] In a way, all three are concerned with 'investment in human capital' through means like health and education. Even though they conceive of human beings as more than just production and consumption units, they still have a utilitarian approach. A human being is to be invested in because he can contribute something. We are still treating human beings as a means to an end. This ties up with the refugee problem because, *prima facie,* they are not contributors to the host nations (making the public in host countries aware of the crisis is disregarded). Hence our conceptualisation of the issue has to move beyond the question of human capital. Alongwith the abovementioned concepts of Kantian economics, it give us a starting point. However, even this utilitarian consideration of the meaning of human life is not possible in the space that refugees inhabit. In a sense the tragedy is that there is no meaning in their lives. The space for dignity does not exist and that problem is likely to be exacerbated if we accept that their dignity is up for sale.

Any development in this direction is particularly troublesome especially with regard to the fact that even now this is exactly how refugees are seen. The trouble arises in a significantly different form when we talk of institutionalising such a system. Here we are not even theoretically considering the fact that refugees are not to be seen as tradable commodities but as people who face destitution through no fault of theirs (indeed in quite a few circumstances it is the foreign policies of developed nations which lead to refugee outflows). As with all other examples discussed above, the sole criterion of judgment now becomes the exchange value that refugees have in the international market. Anker et al raise an objection that under this proposal, asylum-seekers would largely be removed from the realm of law and consigned to the realm

[201] Id
[202] Id
[203] Michel Foucault, *Birth of Biopolitics: Lectures at the College de France 1978-79*, Hampshire, 2008 at 223-224

of political bargaining.[204] As discussed already a very interesting observation that they have is with regards to the fact that the mere presence of refugees in the global North sometimes creates an awareness about the issues in the original country (mostly in the South) which in turn helps in relieving the crisis to some extent.[205] Under the market system, chances are that the refugees shall be confined to the South. This would completely negate the possibility that the public in the North will be made aware of the crisis on a first-hand basis. In a sense this would allow the North to evade its responsibility for creating the crisis in the first place. It is hard to condone a system where all responsibility towards these people is allowed to be evaded by the law itself.

Unfair Exchange

One of the oft repeated arguments for the market is the efficiency. The single answer that the supporters of this proposal seem to give is the fact that it will result in a more efficient system and will ensure that more refugees find a home, albeit a temporary one.[206] However, what they do not seem to consider is that "severe inequality can undermine the voluntary character of an exchange".[207] A person selling his land in conditions of abject poverty or because he is not strong enough to withstand the government-corporate nexus cannot be thought of as engaging in a voluntary exchange for a monetary consideration. It is hard to postulate that he is giving informed consent in exchange for compensation in some form or another. The absolute lack of agency that refugees by definition have makes it even harder to support a system that entails them being herded around for money. Even if we disregard refugees and think of the countries which accept refugees for payment (developing nations obviously) and countries which pay them to do so (developed nations), it is hard to ignore geo-political reality. The proposed market is fundamentally underpinned by economic disparities between nations.

---

[204] Deborah Anker, Joan Fitzpatrick and Andrew Shackove, *Crisis and Cure: **A** Reply to Hathaway/Neve and Schuck*, Harvard Human Rights Journal, Vol.11, 1998 at 305
[205] Id at 306-307
[206] See generally Schuck *supra note* 3 and Alexander Neve and James Hathway, *Making International Refugee Law Relevant Again: **A** Proposal for Collectivized and Solution-Oriented Protection*, Harvard Human Rights Journal, Vol. 10, 1997
[207] Sandel *supra note* 165 at 123

In a sense, it is not just a question of fairness vis-à-vis trade and refugees; it is also a question of trade and trading partners. In a realistic scenario, how much of a choice does Vanuatu have when it deals with Australia? It is very hard to imagine developed nations being altruistic enough to not send refugees to those countries whose regimes have been guilty of gross human rights violations as long as such countries are willing to take them; for a price. It might eventually lead to a scattered system where the wealthy nations decide who goes where and for how long. We just have to look at the armaments industry (run mostly by the global North in terms of manufacturing and sale) to understand that we have to at least ground the whole idea of refugee intake and resettlement in some notion of human dignity rather than in money (or other tradables).

The single answer that the supporters of this proposal seem to give is the fact that it will result in a more efficient system and will ensure that more refugees find a home, albeit a temporary one. Thus it is important that we try and understand the economic background that such a proposal comes from and the assumptions that it (like every other economic solution) works with. It is important that we understand it from this perspective because (the proponents say) the question of morality arises only in a circumstance where the proposed system is not able to find refuge for as many refugees as the present system does. In that sense one needs to understand how economists in general deal with the question of human beings as part of the economic structure.

Cook says that since "Schuck has proposed an economic solution, it may be more productive to first examine the proposal's economic implications".[208] Economists have approached it from two different theoretical backgrounds; neo-classical and behavioural. According to the Coase theorem (neo-classicists), if there are no transactions costs, regardless of the entitlement, parties will negotiate and reach the optimal solution. If we apply it to tradable refugee quotas, countries take the place of interested parties and can negotiate amongst themselves. However, the behavioural economics people criticise it by saying that the Coase theorem does not take into

[208] Benjamin Cook, *Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden---Sharing and a Proposed Refugee Market*, Georgetown Immigration Law Journal, Vol. 19, 2005 at 353

account the 'endowment effect' which basically means that if people have a right to an entitlement they value it more. In this case the right that will exist for countries will lower quotas is the right not to take in more refugees. If such a right exists then a countries willingness to accept a certain price for more refugees might be more than another country's willingness to pay for such refugees. If enough such cases were to occur then the market might not exist anymore.

Thaler et al demonstrated the existence of this endowment effect by an experiment where participants first traded in tokens which had an induced value and then with actual consumption goods; in this case coffee mugs.[209] They found that people were more willing to trade the tokens than the coffee mugs because of some value that they seemed to attach to good that was actually consumable. The problem with the 'endowment effect' is that it is highly contextual and there is no way of knowing what the real value people attach to entitlements is.[210] Also, the fact that here the tradable commodities are people, increases the complexity of the question of value. In a sense that forces us to think of the value that human beings (in a qualitative sense) have in economics generally and the market in particular.

[209] See generally Daniel Kahneman, Jack L. Knetsch, Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, The Journal of Political Economy, Vol. 98, No. 6, December 1990
[210] Cook *supra note* 208 at 359

Conclusion

Will such a market exist without coercion? We have to understand what the 'product' is here. The product for developed nations is the convenience of not hosting refugees on their soil and the product for developing nation is whatever aid developed nations are willing to offer for this convenience. It is quite clear that both the parties would do without refugees if they could. In that sense refugees are the unwanted by-products of the process of negotiation. They are the reason for the negotiations but they are also the ones who are the most reviled in the process. There is no market for them because nobody wants to incorporate them into the country in any way that they can actually contribute. These are real people with skill sets; in the new fangled dictionary of MBA graduates they are potential human resources. However the potential has no meaning for nations dealing with (in?) them because they cannot be used in the state. They cannot be used because of various reasons, the most important being the 'othering' that we have already spoken of. It is possible to conclude (with some trepidation since no field studies with the explicit aim of confirming this have been done) that such a market for refugees can only exist under the kind of coercive pressures (economic and otherwise) which are clearly demonstrated in the case of Australia.

If we think of institutionalising this system in international law, we take away that modicum of respect that countries need show to the tenets of a global refugee regime. It is now lip service and sometimes that lip service is sufficient cause for protests against a regime which brutalises refugees on the pretext of national sovereignty. If we take away that fig-leaf then countries will be brazen about what they already do because international law would now support them. As with most things in today's world it will happen under the garb of a system which purports to be just, fair and unreasonable and is anything but that i.e the 'free' market.

The market is here to stay (at least for the foreseeable future). What we cannot (or ought not) allow it to do is to crowd out non-market norms in those areas which have traditionally been governed by considerations other than trading. Refugee issues have not been handled in a manner that accords them dignity as human beings stripped of everything except their 'abstract nakedness' of being human.[211] The world has very

[211] Arendt *supra note* 180 at 299

evidently found nothing scared in this ideal of humanity stripped of any political affiliation.[212] However, that is not a reason to believe that we should abandon that claim of valuing humans as beings of dignity; if not on a practical everyday level then at least at the level of theoretical discourse. If we allow the market to corrupt these norms that ought to be cherished as the heritage (and goal) of all mankind, then where is the Kantian dignity that is the basis for the human rights movement in the modern world? In a way this position is axiomatic because one really sees no real world evidence (especially with regards to refugees) that anything close to dignity is ever accorded to them. However, we need to keep Kant's admonition about motives in mind; just because we may not have ever performed our duty solely for its own sake does not mean that is not a good ideal to strive for.

The way this story is often told involves that unwashed millions coming to the West to seek a better life which their governments have not been able to provide. The truth of the matter is that the poorest countries around affected regions in the Global South are the ones which host the maximum number of refugees. The truth is that these refugees are fleeing an immediate threat to their lives rather than looking for economic opportunity. The costs associated with uprooting a family are too high for people to take the decision as lightly as the North portrays it to be when it vilifies 'migrants' dressed in the garb of refugees. The issue is not even one of money. For the amount spent on offshore processing camps, Australia could easily accommodate the refugees there. The issue is one of accepting a certain class of people. As the British rapper Akola says, it is easier for those people who fought two world wars against Britain to get into Britain than those from the Global South (and then commonwealth) to get into Britain.

The only circumstances under which we might accept a system which institutionalises trade in humans is if, as Schuck claims, it has the potential to be more effective than the present regime. Utilitarian and consequentialist methods have merit, even if they sometimes come at the cost of certain groups. However this merit arises from the fact that the efficient outcomes claimed actually come about. At a theoretical level that is

[212] Id at 291-291

the reasoning behind land acquisition even though sometimes it displaces thousands of people. The outcomes may not come about for many reasons and execution is only one of them. Sometimes structural flaws in the proposal itself may be the reason why desired outcomes may not be achieved. As we have discussed, Schuck's proposal carries within itself many of the issues of the present system. In fact he deals with those issues in a matter of fact manner by stating the same. However, his answer in a way is to use that fact as a justification to move on to a new system. However, as we have discussed, he does not seem to have taken into account some ramifications which are unique to his proposal. To add on to that we have also discussed how some of the present problems may be exacerbated under the system he proposes. We have also seen what the consequences are when countries follow a regional refugee policy which is similar to Schuck's in spirit.

When we are discussing a proposal which mulls allowing ethics of the market to formally occupy a space which ought not to be subject to them, we have to be careful because, as discussed, market considerations have a way of changing perceptions about what is acceptable. We have to even more circumspect when there are structural flaws in the proposal like the ones we have discussed. The real problem with Schuck's proposal is not so much that it might not achieve outcomes; as discussed outcomes may not be achieved even under the present system. The real problem lies in the fact that it has the potential to bring about a new normal as far as refugees are concerned; a normal which might shift focus from the plight of a persecuted people to optimising a deal with their plight as it's basis. The fear is that their plight might not get the importance it deserves because the new normal is that money has exchanged hands with these refugees as the specific product rather than as humanitarian aid. Human rights as we understand them in the real world do not accrue to refugees because they do not have the right to have rights. The proposal considers introducing the market into a world where human dignity already hangs by a thread. This minimum dignity is needed for human beings to lead a life of meaning.

At present there are an estimated 14 million refugees worldwide of which more than 10 million are under the auspices of the UNHCR.[213] Along with actually handling

[213] UNHCR Global Report 2014 at http://www.unhcr.org/5575a78416.html (accessed on 25/07/2015)

refugee crises in tandem with governments around the world, the UNHCR also carries out the invaluable of setting and vetting standards for acceptance and treatment of refugees around the world.[214] A proposal which depends entirely on negotiations between nations and (admittedly) is led by regional leader (in trade) may not have space for the job which is traditionally the UNHCR's.

For a refugee, the first step toward that meaning is a categorisation which allows him access to some basic safeguards. It cannot be left to negotiations and realpolitik. This of course brings us to the role of the UN and why a system like the one Schuck proposes might detract from the eventual goal of a seamless universal system for handling refugees. It is admitted that at the present moment that seems distant; however that is no reason for moving in the opposite direction. One of the dangers of a market system is a race to the bottom with countries trying to provide services (i.e hosting refugees) at cheaper prices. As countries increase their buying power it might even become an aspiration to be counted amongst those who buy off their quota of refugees rather than actually house them. Refugees essentially keep getting pushed to the poorer countries. Along with the real world scenario of refugee crises happening in and around the poorest nations it is quite possible that the ramifications might be disastrous. Indeed the domino effects of letting the developed nations buy their way out of hosting refugees might have the same aspirational value as coal and development do for nations like India and China nowadays. The argument is that all the developed nations used it to power their industrialisation process and thus it is legitimate for these nations to do the same. The consequences for the environment are of course disastrous. In a way this is one of the reasons why allowing countries to negotiate on their own with regard to refugees could splinter the system to an extent beyond which it becomes difficult to move to a seamless transnational regime. This is after all the real goal of refugee law; to create a world where those who have lost their political community by dint of tragedies may regain it. As Arendt says the unprecedented situation in the modern world is not so much that people lose their homes; it is that they cannot regain it somewhere else.[215]

[214] Tom Clark and James Simeon, *UNHCR International Protection Policies 2000–2013: From Cross-roads to Gaps and Responses,* Refugee Survey Quarterly, Vol. 33, No. 3 at 10
[215] Arendt *supra note* 180 at 293

Skogly and Gibney speak of extraterritorial human rights obligations and the reason they put forward for it is the simplest there is; the 'moral – but also legal – basis for these obligations is really very simple: it is a matter of taking responsibility for one's own actions or omissions.[216] According to them "examples of "extraterritoriality"would include the human rights protection (or lack thereof) for Iraqi civilians under the occupation of Coalition Forces; the effect that support for or rejection of family planning programmes through United Nations agencies by major state donors would have on the right to health of individuals in poor countries; situations in which one state applies economic sanctions against another state, which negatively affects the ability of this other state to feed its population; and, finally, the manner in which funding by foreign states of massive hydroelectric power projects may directly result in the violation of a number of human rights, including the right to housing, to food, to education".[217] The examples they provide are seemingly straight forward. However causality is an inexact science and casuistry is a trap. We have to be very careful if we are to base the responsibility of states to protect refugees on their own actions which might (or might not) have caused the crisis in the first case. With very few exceptions, the exact cause of events on a large scale is impossible to determine. Hence deniability is easy if that is a major reason for asking countries to protect and resettle refugees. However utopian it may sound we might have to conclude that we have no appeal stronger than that of persecuted humanity.

The idea of a refugee is not one that should evoke scorn or derision or fear. However, as we have seen, it engenders all of these emotions because of a certain way the story is told. The idea behind this discussion on refugees was two-fold 1) it was to talk about how the 'other' is seen and perceived and 2)it was also to ponder the larger issue of a certain kind of economic rationale which now inhabits most political, social and cultural thought and thus policy eventually. Organisations fronted by countries are using force beyond permitted national boundaries to stop these refugees and not allow them access to the legal systems of the countries concerned. At the same time, parts of sovereign territories are excised by dubious legislation which ensures that even if the refugee manages to run the gauntlet of these agencies and finds himself on the shores of the country he has no legal status as a refugee.

---

[216] Sigrun I. Skogly and Mark Gibney, *Economic Rights and Extraterritorial Obligations, 267-283 in* Eds. Shareen Hertel & Lanse Minkler*, 'Economic Rights: Conceptual, Measurement, and Policy Issues',* Cambridge and New York, 2007 at 268

[217] Id

What indeed is the solution to these injustices being meted out in the garb of national sovereignty? The problem is partly that of apathy and partly that of antagonism on part of the public of receiving states. This is due to the story that is being spun. That story is what we discussed earlier. The only way past the apathy is telling a better story, one grounded in truth rather than suppositions about the demonic 'other'. It is not the easiest thing in the world but the public in the West, especially America and Britain need to know and understand that the four million refugees streaming out to avoid the ISIS were created by the dual act of Bush and Blair. If that is indeed the case we have to ask who is responsible for the same. If a multinational company registered in Delaware (easiest registration requirements in America) is responsible for contamination of ground water in Africa and a resulting drought due to crop failure, who should accept responsibility for the same? As mentioned causal links, especially where international trade is concerned, are very hard to establish and they cannot be the sole basis for asking questions of developed nations. Nonetheless it is one of the places where we ought to start looking.

BIBLIOGRAPHY

- Allain Jean, *The Jus Cogens Nature of Non-Refoulement,* International Journal of Refugee Law, Vol. 13, No.4, 2001, pp. 533-558
- Amnesty International, *Australia/Pacific: The "Pacific Solution" – Offending Human Dignity*, 26 August 2002, AI Index: ASA 12/009/2002 available at http://www.refworld.org/docid/3d6b8dbda.html (accessed on 25/07/2015)
- Amy Kaplan, *Where is Guantanamo?*, American Quarterly, Volume 57, Number 3, September 2005, pp. 831-858
- Anker, Deborah, Fitzpatrick, Joan & Shackove, Andrew, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck,* Harvard Human Rights Journal, Vol.11, 1998, pp. 295-310
- Arendt, Hannah, *The Origins of Totalitarianism,* Cleveland, A Meridian Book, The World Publishing Company, 1962
- Arulanantham, Ahilan, *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System,* Human Rights Quarterly Vol. 22, No.1, 2000, pp. 1-56
- Betts Alexander, *The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR*, Refuge, Vol. 22, No. 1, pp. 58-70
- Betts Alexander, *The Political Economy of Extra-territorial Processing: Separating 'purchaser' from 'provider' in Asylum Policy*, New Issues in Refugee Research, Working Paper no. 91, for the UNHCR June 2003
- Betts, Alexander, *Institutional Proliferation and the Global Refugee Regime,* Perspectives on Politics, Vol. 7, No. 1, March, 2009, pp. 53-58
- Bigo, Didier, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, Alternatives, Vol. 27, 2002, Special Issue, pp. 63-92
- Bigo, Didier, *When Two Become One: Internal and External Securitisations in Europe,* in Eds., Kelstrup, Morten, & Williams, Michael, *International Relations Theory and The Politics of European Integration: Power, Security and Community*, Routledge, 2000. p. 171 – 204 available at http://www.didierbigo.com/students/readings/When%20Two%20Become%20One.pdf (last accessed on 25/07/15)

- Black, Richard, *Fifty Years of Refugee Studies: From Theory to Policy*, International Migration Review, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance, Vol. 35, No. 1, Spring, 2001, pp. 57-78
- Bloch, Alice & Schuster, Liza, *At the extremes of exclusion: Deportation, Detention and Dispersal*, Ethnic and Racial Studies, Vol. 28, No. 3, May 2005, pp. 491-512
- Bond, Barbara, *Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research,* African Studies Review, Vol. 32, No. 1, April 1989, pp. 41-69
- Books, Berghahn, *Refugees and Asylum Seekers in Australia: An Editorial Comment*, Social Analysis: The International Journal of Social and Cultural Practice, Vol. 48, No.3, Fall 2004, pp. 3-7
- Boswell, Christina, *European Values and the Asylum Crisis*, International Affairs (Royal Institute of International Affairs 1944-), Europe: Where Does It Begin and End?, Vol. 76, No. 3, July 2000, pp. 537-557
- Boswell, Christina, *The 'External Dimension' of EU Immigration and Asylum Policy*, *International Affairs (Royal Institute of International Affairs 1944-,)* Vol. 79, No. 3, May, 2003, pp. 619-638
- Bowie, Norman, *A Kantian Theory of Capitalism*, Business Ethics Quarterly, Special Issue: Ruffin Series: New Approaches to Business Ethics, 1998, pp. 37-60
- Bubb, Ryan, Kremer, Michael & Levine, David I., *The Economics of International Refugee Law,* Journal of Legal Studies, Vol. 40, 2011, pp. 367-404
- C.W. Chan, Phil, *The Protection of Refugees and Internally Displaced Persons: Non- Refoulement under Customary International Law?,* The International Journal of Human Rights Vol. 10, No. 3, September 2006, pp. 231–239
- Carlos Manuel Vaquez, *The 'Self-Executing' Character of the Refugee Protocol's Non-Refoulement Obligation*, Georgetown Immigration Law Journal, Vol. 7, 1991, pp. 39-65
- Chimni, BS, *The Meaning of Words and the role of the UNHCR in Voluntary Repatriation,* International Journal of Refugee Law Vol. 5 No. 3, 442-460

- Chimni, BS., *The Geopolitics of Refugee Studies: A View from the South,* Journal of Refugee Studies Vol. 11. No. 4, 1998, pp. 350-374
- Clark, Tom & Simeon, James, *UNHCR International Protection Policies 2000–2013: From Cross-roads to Gaps and Responses,* Refugee Survey Quarterly, Vol. 33, No. 3, pp. 1–33
- Cook, Benjamin, *Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden---Sharing and a Proposed Refugee Market,* Georgetown Immigration Law Journal, Vol. 19, 2005, pp. 333-362
- Cover, Robert M., *Violence and the Word*, Yale Faculty Scholarship Series, Paper 2708, 1986 at http://digitalcommons.law.yale.edu/fss_papers/2708 (accessed on 25/07/2015)
- Crawford, James & Hyndman, Patricia, *Three Heresies in the Application of the Refugee Convention,* International Journal of Refugee Law, Vol. 1, No. 2, 1989, pp. 155-179
- Crock, Mary, *Echoes of the Old Countries or Brave New Worlds? Legal Responses to Refugees and Asylum Seekers in Australia and New Zealand*, Legal Studies Research Paper No. 09/65 July 2009 at http://ssrn.com/abstract=1431730 (accessed on 25/07/2015)
- Crock, Mary, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, Pacific Rim Law and Policy Journal, Vol. 12, 2003, pp. 49-95
- Dastyari, Azadeh, *Refugees on Guantanamo Bay: A Blue Print for Australia's 'Pacific Solution'?*, Australian Quarterly, Vol. 79, No. 1, Jan-Feb 2007, pp. 4-8
- Doussa, John von, *Human Rights and Off-shore Processing,* University of Technology, Sydney Law Review, Vol. 9, 2007, pp. 41-56
- Dowty, Alan &Loescher, Gil, *Refugee Flows as Grounds for International Action,* International Security, Vol. 21, No. 1, Summer, 1996, pp. 43-71
- Ellerman, David, *The Kantian Person/Thing Principle in Political Economy,* Journal of Economic Issues, Vol. 22, No. 4, December 1988, pp. 1109-1122
- Foucault, Michel, *Birth of Biopolitics: Lectures at the College de France 1978-79,* Hampshire, Palgrave MacMillan, 2008

- Frame, David, *The Problems of Markets: Science, Norms and the Commodification of Carbon*, The Geographical Journal, Vol. 177, No. 2, June 2011, pp. 138–148
- Frelick, Bill, *Preventing Refugee Flows: Protection or Peril?,* World Refugee Survey, 1993, pp. 5-13
- Gerver, Mollie, *Refugee Quota Trading within the Context of EUENP Cooperation: Rational, Bounded Rational and Ethical Critiques*, Journal of Contemporary European Research, Vol. 9, No. 1, 2013, pp. 61-77
- Gibbings, Beth, *Remembering the SIEV X: Who Cares for the Bodies of the Stateless, Lost at Sea?*, The Public Historian, Where Are the Bodies? A Transnational Examination of State Violence and its Consequences, Vol. 32, No. 1 Winter 2010, pp. 13-30
- Gilbert, Geoff, *Spread Too Thin? The UNHCR and the New Geopolitics of Refugees*, Harvard International Review, Vol. 31, No. 3, Fall 2009, pp. 56-59
- Goodwin-Gill, Guy S., *Confronting Complexity: Interpretation or Over-Interpretation?*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 106, March 2012, pp. 439-443
- Goodwin-Gill, Guy S., *Refugees and Responsibility in the TwentyFirst Century: More Lessons Learned From the South Pacific*, Immigration & Nationality Law Review, Vol. 24, 2003, pp. 323-347
- Goodwin-Gill, Guy S., *Refugees: Challenges to Protection*, International Migration Review, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance, Vol. 35, No. 1, Spring, 2001, pp. 130-142
- Goodwin-Gill, Guy S., *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement,* International Journal of Refugee Law Vol. 23, No. 3, 2011, pp. 443–457
- Hamlin, Rebecca, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, Law & Social Inquiry, Vol. 37, No. 4, 933–968, Fall 2012
- Hanson-Easey, Scott & Augoustinos, Martha, *Out of Africa: Accounting for Refugee Policy and the Language of Causal Attribution*, Discourse Society, Vol. 21, 2010, pp. 295-323

- Harrington, Alexandra R., *Citizens of the World*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 104, March 2010, pp. 55-57
- Harvey, CJ, *Strangers at the Gate: Human Rights and Refugee Protection*, Irish Studies in International Affairs, Vol. 10, 1999, pp. 7-20
- Hathway, James, C., *A Reconsideration of the Underlying Premise of Refugee Law*, Harvard International Law Journal 31, No.1, Winter, 1990, pp. 127-183
- Hohfeld, Wesley Newcomb, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* The Yale Law Journal, Vol. 23, No. 1,November 1913, pp. 16-59
- Hurwitz, Agnès, *Norm-Making in International Refugee Law*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 106, March 2012, pp. 430-433
- Hyndman, Jennifer & Mountz, Alison, *Another Brick in the Wall? Neo-Refoulement and the Extemalization of Asylum by Australia and Europe*, Government and Opposition, Vol. 43, No. 2, 2008, pp. 249–269
- Hyndman, Jennifer, *The Securitization of Fear in Post-Tsunami Sri Lanka*, Annals of the Association of American Geographers, Vol.97, No.2, 2007, pp. 361–372
- Jastram, Kate, *Looking to Human Rights and Humanitarian Law to Determine Refugee Status*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 106, March28, 2012, pp. 436-439,
- Kahneman, Daniel, Knetsch, Jack L. & Thaler, Richard H., *Experimental Tests of the Endowment Effect and the Coase Theorem,* The Journal of Political Economy, Vol. 98, No. 6, December 1990, pp. 1325-1348
- Kant, Immanuel, *Groundwork of the Metaphysics of Morals,* Cambridge, Cambridge University Press, 1998.
- Keely, Charles, *The International Refugee Regime(s): The End of the Cold War Matters,* International Migration Review, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance, Vol. 35, No. 1, Spring 2001, pp. 303-314 at 303

- Kneebone, Susan, *The Pacific Plan: The Provision of 'Effective Protection'?*, International Journal of Refugee Law, Vol. 18, No. 3-4, September/December 2006, pp. 696-721
- Laffont, Jean-Jacqes, *Macroeconomic Constraints, Economic Efficiency and Ethics: An Introduction to Kantian Economics*, Economica, New Series, Vol. 42, No. 168, 1975, pp. 430-437
- Lee, Shin-wha, *Preventing Refugee Crisis: A Challenge to Human Security,* Asian Perspective, Vol. 23, No.1, 1999, pp. 133-154
- Legomsky, Stephen H., *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, International Journal of Refugee Law, Vol. 15, No. 4, 2003, pp. 567-677
- Loescher, Gil & Milner, James, *The Missing Link: The Need for Comprehensive Engagement in Regions of Refugee Origin*, International Affairs (Royal Institute of International Affairs 1944-),Vol. 79, No. 3, May, 2003, pp. 595-617
- Loescher, Gil, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, International Migration Review, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance, Vol. 35, No. 1, Spring, 2001, pp. 33-56
- Mathew, Penelope, *Legal Issues Concerning Interception,* Stemming the Tide or Keeping the Balance, International Association of Refugee Law Judges (IARLJ), 5th Conference, Wellington, 2002, pp. 85-122
- Matthew Penelope, *Australian Refugee Protection in the Wake of the Tampa*, The American Journal of International Law, Vol. 96, No. 3, July 2002, pp. 661-676
- Milner, James, *Sharing the Security Burden: Towards the Convergence of Refugee Protection and State Security*, Refugee Studies Centre, University of Oxford Working Paper No. 4, (2000)
- Mountz A, Coddington K, Catania RT and Loyd J, *'Conceptualizing detention: Mobility, Containment, Bordering, and Exclusion'*, Progress in Human Geography, Vol. 37, No.4, 2013, pp. 522–541
- Mountz, Alison, *Embodying the Nation-state: Canada's response to human smuggling*, Political Geography, Vol. 23, 2004, pp. 323–345

- Mountz, Alison, *Human Smuggling, the Transnational Imaginary, and Everyday Geographies of the Nation-State*, Antipode, Vol. 35, No.3, July 2003, pp. 622-644
- Mountz, Alison, *The Enforcement Archipelago: Detention, Haunting, and Asylum on Islands*, Political Geography, Vol. 30, 2011, pp. 118-128
- Nafziger, James A. R., *The General Admission of Aliens under International Law*, The American Journal of International Law, Vol. 77, No. 4 (Oct., 1983), pp. 804-847
- Nethery, Amy, Rafferty-Brown, Brynna, & Taylor, Savitri, *Exporting Detention: Australia-funded Immigration Detention in Indonesia*, Journal of Refugee Studies available at http://jrs.oxfordjournals.org/content/early/2012/12/07/jrs.fes027.full.pdf+html (accessed on 25/07/15)
- Noll Gregor, Fagerlund Jessica, Liebaut Fabrice, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, Danish Centre for Human Rights on Behalf of the European Commission (Directorate General for Justice and Home Affairs) 2002 available at http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/asylumstudy_dchr_2002_en_en.pdf (accessed on 25/07/2015)
- Norman, George & Trachtman, Joel P., *The Customary International Law Game*, The American Journal of International Law, Vol. 99, No. 3, July 2005, pp. 541-580
- Reid-Henry, Simon, *Exceptional Sovereignty? Guant´anamo Bay and the Re-Colonial Present*, Antipode, Vol. 39, no. 4, September 2007, pp. 627-648
- Roper, Steven D. & Barria, Lilian A., *Burden Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good*, The Journal of Conflict Resolution, Vol. 54, No. 4 (August 2010), pp. 616-637
- Salter, Mark B., *When the Exception becomes the Rule: Borders, Sovereignty, and Citizenship*, Citizenship Studies Vol. 12, No. 4, August 2008, pp. 365–380

- Salzman, James & Ruhl, J. B., *Currencies and the Commodification of Environmental Law*, Stanford Law Review, Vol. 53, No. 3, December 2000, pp. 607-694
- Sandel, Michael, *Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy*, Journal of Economic Perspectives, Vol. 27, No. 4, Fall 2013, pp. 121–140
- Sandel, Michael, *What Money Can't Buy: The Moral Limits of Markets,* New York, Allen Lane, An Imprint of Penguin Publishers, 2012
- Schuck, Peter H., *Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later*, John M. Olin Centre for Studies in Law, Economics, and Public Policy Research Paper No. 480 (2012)
- Schuck, Peter H., *Refugee Burden-Sharing: A Modest Proposal,* Yale Journal of International Law Vol.22, 1997, pp. 243-297
- Schultz, Theodore W., *Investment in Human Capital*, The American Economic Review, Vol. 51, No. 1, March 1961, pp. 1-17
- Skogly, Sigrun I. & Gibney, Mark, *Economic Rights and Extraterritorial Obligations,* 267-283 in Eds. Shareen Hertel & Lanse Minkler, *'Economic Rights: Conceptual, Measurement, and Policy Issues'*, Cambridge and New York, Cambridge University Press, 2007
- Smith, Tony, *Testing Citizenship, Failing Human Rights*, Australian Quarterly, Vol. 78, No. 3, May - Jun., 2006, pp. 28-33
- Stark, Oded, *On the Economics of Refugee Flows*, Review of Development Economics, Vol. 8, No.2, 2004, pp. 325–329
- Suhrke, Astri, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action,* Journal of Refugee Studies, Vol. 11, No.4, 1998, pp. 396-415
- Sundar, Nandini, *'Winning Hearts and Minds': Emotional Wars and the Construction of Difference,* Third World Quarterly, vol. 33, no. 4 , 2012, pp. 705-720
- Szczepanikova, Alice, *From the Right of Asylum to Migration Management: The Legal–Political Construction of 'a Refugee' in the Post-Communist Czech Republic* Europe-Asia Studies, Vol. 63, No. 5, July 2011, 789–806

- Taylor, Savitri, *Australia's Pacific Solution Mark II: The Lessons to be Learned*, University of Technology, Sydney Law Review, Vol. 9, 2007, pp. 106-124
- Taylor, Savitri, *Sovereign Power at the Border*, Public Law Review, Vol. 16, No. 1, 2005, pp. 55-77
- Taylor, Savitri, *The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing*, Asian-Pacific Law and Policy Journal, Vol. 6, 2005, pp. 1-43
- Thom, Graham, *Australia's Obligations Under Article 31(1) of the Refugee Convention: What are penalties?* Alternative Law Journal, Vol. 31, No.3, September 2006, pp. 142-164
- Trebilcock, Michael J., *The Law and Economics of Immigration Policy*, American Law and Economics Review, Vol. 5, No. 2, Fall 2003, pp. 271-317
- UNHCR Handbook and Guidelines On Procedures And Criteria For Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, December, 2011.
- Walters, Williams, *Secure Borders, Safe Haven, Walters, 'Secure Borders, Safe Haven, Domopolitics*, Citizenship Studies, Vol. 8, No. 3, September 2004, pp. 237–260
- Wazana, Richard, *Fear and Loathing Down Under: Australian Refugee Policy and the National Imagination*, Australian Refugee Policy and the National Imagination vol. 22, no.1, 2004, pp. 83-95
- Weiner, Myron, *Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows,* International Security, Vol. 21, No. 1, Summer 1996, pp. 5-42
- White, Mark, *Can homo economicus follow Kant's categorical imperative?*, Journal of Socio-Economics, Vol. 33, 2004, pp. 89–106
- Wood, Tamara and McAdam, Jane, *Australian Asylum Policy all at Sea: An Analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia–Malaysia Arrangement,* International and Comparative Law Quarterly, Volume 61, Vol. 01, January 2012, pp. 274-300

Annexure II

Jawaharlal Nehru University

Thesis/Dissertation Metadata Form

1.	Title	INSTITUTIONALISING TRADE IN HUMANS: A CRTICIAL ASSESSMENT OF REFUGEE TRADE QUOTAS
2.	Alternative title, if any	
3.	Name of Research Scholar	Arpan Acharya
4.	Name of Guide/ Supervisor(s)	Dr. Jaivir Singh
5.	Name of Degree	Master of Philosophy
6.	Level of Degree	
7.	Department/Centre	Centre for study of Law and Governance
8.	School	Centre for study of Law and Governance
9.	Name of affiliated institution for which JNU is granting the degree	
10.	Date of submission	27.07.2015
11.	Subject Key words	1. Refugee 2. Trade 3. Quotas 4. 5.
12.	Coverage(for time periods or spatial regions only)	
13.	Language of the thesis	English
14.	File Format of thesis and accompanying material, if any(Pdf, Mpeg, etc.)	PDF