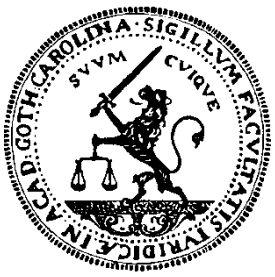

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On Hospitality and Hostility: Re-reading of Expulsion Through Kant and Schmitt

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Markus GUNNEFLO

Term: Spring 2018

ON HOSPITALITY AND HOSTILITY: RE-READING OF EXPULSION THROUGH KANT AND SCHMITT

Table of Contents
Acknowledgment

1. INTRODUCTION AND METHODOLOGY

2. ON HOSPITALITY

2.1. Moral foundations of welcoming guests in Kant's cosmopolitan right
- 2.1.1. Historical background
- 2.1.2. Content of cosmopolitan law

2.2. Legal foundations of welcoming refugees in contemporary refugee law
- 2.2.1. Right to seek asylum
- 2.2.2. Refugee status
- 2.2.3. Non-refoulement
- 2.2.4. Expulsion

3. TENSION BETWEEN RIGHTS OF GUESTS AND RIGHTS OF RESIDENTS

3.1. Political membership and human rights

3.2. Expulsion Practices
- 3.2.1. United Kingdom
- 3.2.2. United States of America
- 3.2.3. Turkey

4. ON HOSTILITY

4.1. Schmitt's concept of political
4.2. Humanity vs. Exception

5. RETHINKING UNIVERSALITY OF HUMAN RIGHTS

5.1. Universality idea of human rights law
5.2. State-centrism in international law
5.3. The Right to have rights 'as a place in the world'

6. CONCLUSION
Bibliography

ACKNOWLEDMENT

First of all, I would like to thank my supervisor, Markus Gunneflo, who always believed in me and in this thesis. Markus, you always encouraged me even in my most troubled times. It was my honor and luck to study with you, thanks for everything.

I would like to thank the Swedish Institute for the scholarship they provided to me during my studies in Sweden. Without their support I would not have been able to conduct this thesis.

I would like to thank my family as well for their love, support and faith. Thanks to my beautiful mom. Turşu, Cücük, Şerbet and Şeri, my beautiful birds, I did not forget you.

Zeynep, Sinem and Linnea; you amazing women made my days in Sweden unforgettable; Bala and Nurgül I am thankful for having you.

Carmela, the most beautiful dog I have ever met, thank you for your beautiful company in Malmö streets. I will always remember you.

Lastly, I would like to thank the beautiful forests and landscapes of Sweden. If there is something like heaven, it must be somewhere in Sweden. It was the most beautiful two years of my life, thank you, beautiful Sweden.

To Paulette Wilson…

"I felt like I didn't exist."
Paulette Wilson[1]

1. INTRODUCTION AND METHODOLOGY

When I was preparing to go to Sweden for my Master's studies in Human Rights Law, there were heated debates in the Turkish media about the Syrian refugees in Turkey - almost 4 million people according to unofficial figures- and how they imposed a great financial burden on the country, how the crime rates were increasing where they are located, as well as how they would obtain citizenship, get the right to vote soon and vote in favor of the current government. It was not new though. Discussions on Syrian refugees have been an important agenda in Turkish politics for a long time. On the other hand, as a human rights defender, I was also observing that many new organizations and associations founded through EU budgets, were starting to conduct large refugee rights projects. However, it was still clear that Syrian refugees could not access the most basic rights, especially housing, they mainly had to live in streets, were deprived of access to health services and education, and were significantly exploited since they often had to work as illegal workers. All this made me realize that although the projects conducted by civil society were growing day by day, the effort to realize rights of refugees cannot go beyond the sort of philanthropy or solidarity practice in the absence of an extensive state policy.

Because of the geographical limitation Turkey made on the 1951 Refugee Convention, Syrians are not entitled to get the refugee status. Therefore, they are not subjects of refugees' rights which are protected by international human rights law. In this sense, based on how the state decides to call them, sometimes they are 'Muslim brothers and

[1] Paulette Wilson, 61 years old refugee who has been threatened with deportation after 50 years in the U.K by claiming that she is 'illegal'. See more at https://www.theguardian.com/uk-news/2017/nov/28/i-cant-eat-or-sleep-the-grandmother-threatened-with-deportation-after-50-years-in-britain

sisters' or more recently they are referred to as our 'guests'. Here, the word of 'guest' is perfectly accurate: it does not allow for equal participation in the community or for claiming basic rights since its structure refers to 'temporariness' and 'philanthropy'. When I realized that international human rights law remains silent while Turkey prevents such people from accessing rights through defining them as "guests", a completely extralegal term; or more precisely, the "guest" has no other option but to remain silent because of its structure and its formulation, I have decided to study the universality claim of human rights by focusing on the role of the sovereign state in exclusion of refugees.

Indeed, there is a great conflict when human rights argument which states that 'all human beings are born free and equal in dignity and rights' and yet the inclusion and exclusion practices against the refugees depend on the mercy of the sovereign state. As we have been seeing recently in national practices, you can be deported from a country just because of your nationality, or an insignificant criminal record may lead to your deportation on the grounds that you disrupted the public order. Indeed, in contrast to the universality that human rights offer us, refugees are subjected to the sovereign state to which they claim to entry in or stay in. They are subjected to the sovereign state, because they have to exist in a blurred threshold as an invisible object since they face the risk of expulsion from the very first moment that they seek an entry in.

Within the context of the so-called "migration crisis", in spite of a recent increase in the visibility of the studies which focus on the right to have rights and state sovereignty and which claim that the human rights are inaccessible to migrants (especially those who are undocumented) and the stateless, such discussions do not offer a deep critique of the universality of human rights. Perhaps this is because of the fact that we wish to hold on to the idea that human rights is the biggest current challenge to state sovereignty. Or as Noll says, maybe we are not eager to criticize it or express its flaws since 'we let ourselves be seduced by an untenable claim of the universality of human rights'.[2] However, I believe that the only tool to realize human rights is to reconsider and rebuild such dilemmas and paradoxes of the universality. Otherwise, we find ourselves trapped

[2] Noll, Gregor, "Why Human Rights Fail to Protect Undocumented Migrants", European Journal of Migration and Law 12, Martinus Nijhoff Publishers, 2010, pg. 242

in a discourse which regards a child fleeing from war as born free and equal in dignity and rights like all the others around the globe. But unfortunately, this discourse would not make such a child born free and equal in dignity and rights.

In this study, I aim to provide a critique of the universality of human rights by focusing on how having the right-holder status is subject to the sovereign inclusion/exclusion decision. In this sense, the thesis can be read as an attempt to intertwine political philosophy and positive law on refugees' rights. The main argument of the thesis is that despite its universality claim which supposes every human being has rights by virtue of being human, human rights law has a subject and such subject is not human beings but citizens because of the state-centered structure of international law: What rights mean and how they are applied can only be determined by the politics of the states. In order to maintain such a discussion, I focus on such questions as: What are the moral and legal foundations and limits of tolerating a guest/refugee? Do such foundations and limits lead to a tension between rights of citizens and refugees or rights of residents and guests? If there is such a tension, then what is the role of sovereign states in there and could it be possible to water down the universality claim of human rights by referring to the role of sovereign in inclusion/exclusion of refugees/guests? As a starting point, I provide a general frame for moral and legal foundations and limits of tolerating a guest/refugee. Here, I start with Kant's concept of cosmopolitan right as known as hospitality, since Kant is the first philosopher who formulates hospitality as a matter of right, but not as a moral matter, and who provided a theoretical frame for articulating the content of refugee rights as reaffirmed by the today's contemporary refugee law. Indeed, as seen 200 years after Kant's writing, refugees' human rights reaffirmed by the 1951 Refugee Convention have significant similarities to Kantian hospitality. In this study, I only analyze the 1951 Refugee Convention and not the regional treaties, since it is widely ratified and so as to avoid going beyond the main aim of this thesis. The main goal of the first chapter is to present the content and limits of refugees' rights as almost the same both in moral philosophical as well as positive legal grounds.

Then, I discuss whether refugee laws lead to a tension between the rights of the members of the community and the rights of the guests, between the residents and the strangers, or in a broader sense, between the nationals and the non-nationals by focusing on the

legitimate grounds for expulsion as stated both in its philosophical roots as well as in contemporary law. Here I mainly use the work of political theorists and legal scholars who contributed to the literature on political membership, sovereignty and human rights. The main argument of the chapter is that the grounds for exclusion, both in a moral and legal sense, refer to political membership, thus, creating a tension between rights of members and guests by drawing a boundary around the political community, or the national territory.

This is followed by a discussion on the role of the sovereign state in such tension. Here, I first present some expulsion practices from different states to show how the usage and interpretation of the same legitimate grounds for expulsion stated in the Convention differs so dramatically from state to state. I briefly put the recent policies from three of the biggest hosting countries UK, USA and Turkey. The UK is a state-party to the 1951 Convention. The USA, however, is not a signatory. Turkey, on the other hand, is a state-party but it is a unique example since it has geographical limitation on the Convention. Regardless of whether they are a signatory or a limited signatory or not a signatory, what these examples from different countries say about to what extent guests shall be tolerated or in other words, when they will become a threat to 'national security or public order' therefore be deported, is in fact a political question rather than a legal question. Here, I use Carl Schmitt's concept of the "political" and argue that such question is always in need of a political decision based on friend/enemy distinction which can be made only by the sovereign. The reason why I use Schmitt is to strengthen my argument on refugees' rights which refers to political membership, as refugee rights create a tension between boundaries of such membership and are always subjected to a political decision.

Later, I mainly present a discussion of the universality claim of human rights by referring to the question of who is the subject of human rights. I demonstrate that the cardinal concept of human right law, as a branch of public international law, is the state sovereignty. By referring to Hannah Arendt's right to have rights, the thesis concludes that when the sovereign decides to not tolerate anymore and expels the guest/refugee, it also decides whether one has right to have rights or not; therefore, what rights mean and how they are applied can only be determined by the politics of states.

After all, the thesis cannot be understood as an attempt of outright rejection of human rights. On the contrary, as Kapur says, "we cannot not want" human rights.[3] However, in order to analyze the paradoxes of human rights, first we need to truly analyze its game-maker's primary key-word, "sovereignty". This study aims to contribute to efforts in response to the need for secure justifications of human rights in an age of globalization in which dynamics of state sovereignty is rapidly changing, by focusing on politics of exclusion of migrants.

It should be noted that while I used the term "exclusion" mostly referring to removal from state territory, it of course refers to formal denial of particular rights like articulated in human right instruments. In this sense, the term "exclusion" does not refer only to deportation in this study. On the other hand, I used different translations of texts written by Immanuel Kant and specified the exact translation in the footnotes. It should also be noted that I focused only on the 1951 Refugee Convention while referring to refugees' rights but not the regional treaties, since the 1951 Convention is widely ratified and valid at global level. Lastly, all emphases throughout the thesis are added by myself.

2. ON HOSPITALITY

2.1.Moral Foundations of Welcoming Guests in Kant's Cosmopolitan Right

Peace is in fact one of the central concepts in modern political and legal philosophy. Widely agreed to be necessary for human flourishing and for a just political order, the peace of political order stands in sharp contrast with the violence of the state of nature.[4] Then what is peace? Is it simply the absence of war? Kant does not think so. Global peace is not only the goal of Kant's universal and progressive philosophy of history, which is explicitly written from the perspective of the cosmopolitan citizen; but also an achievable goal. Kant proposes specific practical mechanisms (made efficacious by historical trends) by which the abolition of 'the practice of war' becomes a feasible goal

[3] Kapur, Ratna, "Human Rights in the 21st Century: Take a Walk on the Dark Side", Sydney Law Review Vol.28 665, pg. 682

[4] "Perpetual Peace: Essays on Kant's Cosmopolitan Ideal", edited by James Bohman and Matthias Lutz-Bachmann, Massachusetts Institute of Technology, the MIT Press, 1997, pg.4

for future generations rather than an abstract moral demand or a utopian ideal.[5] According to him, a peaceful global order can be created only by a cosmopolitan law that enshrines the rights of world citizens and replaces classical law among nations.[6]

Among many others, "Toward Perpetual Peace" is now widely accepted as a central work of Kant's political and legal philosophy and as in many respects his most innovative work in this area. "Toward Perpetual Peace" owes its significant importance in modern legal philosophy to Kant's visionary depth in 18th century, which is almost 200 years before the emergence of the contemporary refugee law.

1.1.Historical Background

Immanuel Kant wrote his essay "Toward Perpetual Peace: A Philosophical Sketch" in 1795 and revised it in 1796. Kant writes that humanity can find perpetual peace only "in the vast grave that covers all the horrors of violence together with their perpetrators."[7] Perpetual peace emerges from the state of nature among nations with a new form of cosmopolitan law and a "peaceful federation among all the peoples of the earth." This cosmopolitan ideal was not only necessary for survival but also a requirement of practical reason[8] and according to Kant, "the Reason absolutely condemns war and makes peace an immediate duty."[9]

The immediate reason for Kant's essay was the March 1795 signing of the "Treaty of Basel" by Prussia and France. In this treaty, Prussia ceded to France all territory west of the Rhine, in exchange for which Prussia expected to be allowed to join Russia and Austria in partitioning Poland to the East.[10] Indeed, it was a typical example for treaties that Kant declares as illegitimate since "it is only the suspension of hostilities, not a peace": the 'pure illusion' of the balance of power does nothing to change existing

[5] Ibid, pg.3
[6] Ibid
[7] In this study I will use two different translation of Immanuel Kant's "Toward Perpetual Peace: A Philosophical Sketch". First one is the translation of David L. Colclasure in "Toward Perpetual Peace and Other Writings on Politics, Peace and History, edited by Pauline Kleingeld, Yale University Press, 2006". Second one is the translation of Hans Reiss in "Kant: Political Writings, edited by Hans Reiss, Cambridge University Press, 1991". The exact translation will be referred as is here : Kant, [1795], as translated by Colsclasure, 2006.
[8] Bohman and Lutz-Bachmann, 1997, pg.1
[9] Kant, [1795], as translated by Colsclasure, 2006.
[10] Bohman and Bachmann, 1997, pg.1

conditions between states or to create a new condition that would permit peace to become more than the temporary silence of weapons.[11]

In the broader context, when at the end of the eighteenth-century Kant penned his reflections on cosmopolitan right, the expansion of Western imperialist ventures in to the Americas had been underway for several centuries, since the late 1400s, while in the same period the Dutch, the Portuguese, the Spanish, and the British imperial navies had been vying with each other for dominance in the Indian Ocean, Southeast Asia and the Far East. Hospitality was articulated against the background of such Western colonial and expansionist ambitions. Kant's extensive references to the opening of Japan and China to western travelers and merchants in the Perpetual Peace give us a very lively sense of this historical context.[12]

On the other hand, Immanuel Kant was not the first nor the last scholar to mention perpetual peace, there have been well-known others before Kant. Indeed, it is true that Kant owes both the title of his essay as well as its form to Charles Irenée Castel de Saint-Pierre's "Project pour render la paix perpétuelle en Europe" which offers the convention of imitating the structure of a peace treaty with its articles and clauses already in 1713.[13] However, while Saint-Pierre suggests that peace could be realized only by an 'eternal peace treaty' that established a permanent congress of the states of Europe[14], Kant generalizes it to include all peoples in a universal, cosmopolitan peace. Unlike Saint-Pierre, Kant addresses his treatise not to the princes and rulers of Europe but to a public of all enlightened citizens of the world who see the necessity of establishing genuine peace.[15]

Historically 'Perpetual Peace' inspired not only numerous works in the contemporary discussions of politics such as citizenship or globalization but also leaded to democratic peace theory and emerging of international institutions such as the United Nations and

[11] Ibid, pg.1-2
[12] Benhabib, Seyla, "The Rights of Others: Aliens, Residents and Citizens", Cambridge University Press, 2004, pg.71
[13] See the extract from Celine Spector, "The Plan for Perpetual Peace: From Saint-Pierre to Rousseau", in 'Principes du droit de la guerre, Ecrits sur le Projet de Paix Perpétuelle de l'abbé de Saint-Pierre, ed. by B. Bachofen et C. Spector, translated by Patrick Camillier, Paris: Vrin, 2008, pg.229-294, http://celinespector.com/wp-content/uploads/2011/02/Rousseau-Saint-Pierre-Spector.pdf, 19.04.2018.
[14] Ibid.
[15] Bohman and Lutz-Bachmann, 1997, pg.2

the European Union. Since recent history has clearly shown that violence did not stop among states and current mechanisms of international law are not efficient to realize its promises, even after 200 years since its publication, the theoretical and practical relevance of the cosmopolitan ideals is still alive. Moreover, it is true that it enjoys considerable attention in recent years and it is not without reason: it is the visionary depth of Kant's project for perpetual peace that makes his essay particularly interesting still in the twenty-first century.

1.2.Content of cosmopolitan law

It can be said that Kant is most likely the first to have introduced the category of 'cosmopolitan law' as a special category of public law. According to traditional views held by Kant, international law is the law between states. In contrast, cosmopolitan law regulates the interaction between states and individuals of foreign states insofar as their interaction is not regulated by legitimate treaties between those states.[16] In a broader sense, cosmopolitan law is concerned with international commerce, including any kid of communication, interaction, trade or business across borders. It applies to travel, emigration and intellectual exchange as well.[17]

The content of cosmopolitan law is 'the right to hospitality'. 'Toward Perpetual Peace: A Philosophical Sketch' which the content of the right to hospitality is elaborated on in detail, contains two sections, two additions and two appendices. In the first section, Kant articulates 'Preliminary articles of a perpetual peace between states'. These preliminary articles are as such:

1. No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war.
2. No independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange, purchase or gift.
3. Standing armies will gradually be abolished altogether.

[16] Kleingeld, Pauline, Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany, Journal of the History of Ideas, Vol. 60, No. 3, July 1999, University of Pennsylvania Press, pg.513
[17] Ibid.

4. No national debt shall be contracted in connection with the external affairs of the state.
5. No state shall forcibly interfere in the constitution and government of another state.
6. No state at war with another shall permit such acts of hostility as would mutual confidence impossible during a future time of peace. Such acts would include the employment of assassins or poisoners, breach of agreements, the instigation of treason within the enemy state, etc.[18]

As is seen, according to Kant, if peace is no more than a truce used by both parties to regain strength for their next attack, if peace is no more than the continuation of war through political means, if peace is no more than the successful subjugation of one party by another, or if peace is merely local and hence still threatened by the world beyond—then there is no real peace. Real peace requires the rule of just laws within the state, between states, and between states and foreigners, and it requires that this condition be a global one.[19]

The second section, however, contains 'Definitive articles of a perpetual peace between states'. Kant proposes three definitive articles:

1. The civil constitution in every state shall be republican.
2. The right of nations shall be based on a federation of free states.
3. Cosmopolitan right shall be limited to condition of universal hospitality.[20]

This study will revolve around the third definitive article of a perpetual peace which frames hospitality.

First of all, Kant starts with making a distinction. According to him, hospitality is "not about a relation of philanthropy, but about *right*."[21] In other words, hospitality is not to be seen as kindness or generosity one may show to strangers who come to one's land or who become dependent upon one's acts of kindness through circumstances of nature or

[18] Kant, [1795], as translated by Reiss, 1991.
[19] Kleingeld, 2006, pg.16
[20] Kant, [1795], as translated by Reiss, 1991.
[21] All emphasizes in this study are added by the author.

history; hospitality is a *right* which belongs to all human beings insofar as we view them as potential participants in a world republic.[22]

After defining hospitality as a right, Kant writes that hospitality means "the right of a stranger not to be treated in a hostile manner by another upon his arrival on the other's territory."[23] Thus, according to Kant, hospitality is the *right* of a visiting foreigner not to be treated as an enemy. Here, Kant first accepts a right to visit one's land as a stranger, and then a right to not to be treated in hostile manner. However, this is not an absolute right: Kant adds that "as a stranger he can be turned away, if this can be done without causing his death; yet as long as the stranger behaves peacefully where he happens to be, his host may not treat him with hostility."[24] In other words, the stranger's claim to visit cannot be refused if such refusal will cause his destruction. According to Kant, the refusal of victims of piracy or victims of religious wars when such refusal would lead to their demise, is untenable.[25]

However, "it is not the right of a guest that the stranger has a claim to (which would require a special, charitable contract stipulating that he be made a member of the household for a certain period of time), but rather a right to visit, to which all human beings have a claim."[26] In other words it is not that they have a right to be received as a guest, but just that they have right to visit, a right that all men have as members of any society. Thus, Kant's right to hospitality is merely a right to visit, which Kant understands as the right to present oneself and 'try' to establish contacts with people and states in other parts of the world. Thus, the term "hospitality right" does not imply a right to be treated as a guest. Strangers have a right of 'approach', not 'entry'. They do not have a general right to be supported, to be taken in, or to be tolerated by a foreign state.[27]

Here, Kant makes a distinction between right to be a permanent visitor and temporary right of sojourn. There is no right to *settle* on the soil of one's land as long as it is agreed

[22] Benhabib, 2004, pg.26
[23] Kant, [1795], as translated by Reiss, 1991.
[24] Ibid
[25] Benhabib, 2004, pg.28
[26] Kant, [1795], as translated by Colsclasure, 2006
[27] Kleingeld, 1999, pg.514

by a special treaty. As Benhabib explains, it is a special privilege which the republican sovereign can award to certain foreigners who abide in their territories, who perform certain functions, who represent their respective political entities, who engage in long-term trade, and the like. Within this context, the special trade concessions that the Ottoman Empire, China, Japan, and India granted Westerners from the eighteenth century onward would be some historical examples.[28]

Kant writes that "right to visit is a right which all human beings have a claim". Here, Kant puts the very moral foundations of human rights: any human being is the potential subjects of covenants and the bearer of certain basic rights.[29] Indeed, it is argued that the cosmopolitan concept means first and foremost the creation of a new world legal order in which the human being would be entitled to rights in virtue of their humanity alone.[30] Any human being is the potential subjects of covenants because first of all cosmopolitan law includes the conditions for the possibility of requesting entrance into a legal relationship. Human beings have the original human right that antecedes all treaties and make them possible: a stranger has "the right to have all human beings presuppose that they can enter into a legal relationship with him through treaties".[31] On the other hand, Kant also proposes that any human being is the bearer of certain basic rights because even if the states have the right to send a stranger away when they do not want to enter into a relationship with them, that does not mean that the stranger has no rights at all: the refusing state shall do this without causing their death and without hostility.

According to Kant, "all people have this right (*right to hospitality*) by virtue of the right of common possession of the surface of the earth. Since it is the surface of a sphere, they cannot scatter themselves on it without limit, but they must rather ultimately tolerate one another as neighbors, and originally no one has more of a right to be at a given place on earth than anyone else."[32] As is seen, the spherical character of the earth and the fact that it has limits, plays a fundamental role in Kant's reasoning. As Benhabib puts, he

[28] Benhabib, 2004, pg.28
[29] Willams, Howard, "Kant's Political Philosophy", Oxford, 1983, pg.260
[30] Benhabib, Seyla, "Dignity in Adversity: Human Rights in Troubled Times", Polity Press, 2011, pg. 7-8
[31] Kleingeld, 1999, pg.515
[32] Kant, [1795], as translated by Colsclasure, 2006

bases the right of human beings to enter into civil association with one another upon the claim that, since the surface of the earth is limited, at some point or other, we must learn to enjoy its resources in common with others. Kant suggests that to deny the foreigner and the stranger the claim to enjoy the land and its resources would be unjust.[33] However, it should be noted that it is not the common possession of the earth, but rather this right of humanity, that serves as the philosophical justification for cosmopolitan right.[34]

As Kleingeld points out, limiting the content of cosmopolitan law to the right to hospitality seems to make it very limited, but in fact the implications of this right are quite significant. Kant defends a right that under certain circumstances is even broader than a right to asylum, including protection from starvation and from fatal disease.[35] Indeed, Kant's conception of cosmopolitan law contains the building blocks for the justification of the main refugee rights that have been established in the twentieth century.[36] Under the following subsections, such main rights and concepts of contemporary refugee law will be briefly mentioned.

2.2.Legal foundations of welcoming refugees in contemporary refugee law

International refugee law which is concerned with the status and standards of treatment of refugees, had emerged in the historical background of the Second World War, in which millions of people were displaced and had to flee all over the world. While there are also regional refugee law instruments, the primary sources of the refugee law are the 1951 Convention relating to the Status of Refugees (herein after "the 1951 Convention" or "the Convention") and the 1967 Protocol relating to the Status of Refugees (herein after "1967 Protocol") since they are widely ratified and provide protection at the global level.[37]

[33] Benhabib, 2004, pg.30
[34] Ibid, pg.59
[35] Kleingeld, 1999, pg.514
[36] Ibid.
[37] Edwards, Alice, "International Refugee Law", in Internatioanl Human Rights Law edited by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, Oxford, 2014, pg.513-515

The 1951 Convention contains several rights to which refugees are entitled such as the freedom of religion, freedom of association, property rights and access to courts. Beyond these rights, refugees also have economic, social and cultural rights such as welfare, employment and education rights. Under the Convention, refugees are not to be penalized for seeking protection, nor exposed to the risk of return to their state of origin.

The UN High Commissioner for Refugees (UNHCR) has been charged with the task of supervising international conventions providing for the protection of refugees. This includes supervising the application of international conventions for the protection of refugees.[38] As stated in the Convention itself, State parties to the 1951 Convention and 1967 Protocol are required to cooperate with UNHCR in the exercise of its function.[39]

Needless to say, refugee rights are human rights and it forms an integral part of the international human rights law regime. Within this context, the 1951 Refugee Convention is a human rights treaty which codifies the rights of refugees and obliges the states to respect, protect and fulfill those rights.[40] Under the following subsections, the main concepts of contemporary refugee law will be briefly analyzed.

2.2.1. Right to seek asylum

Under the Article 14 of the Universal Declaration of Human Rights (UDHR), "everyone has the right to *seek* and to enjoy in other countries asylum from persecution." As is clearly seen, it is not a right to asylum nor right to *obtain* asylum. While the original text proposed by the Commission on Human Rights had stipulated that 'everyone has the right to seek and be *granted*, in other countries, asylum from persecution', the text was altered to remove the obligation on States to accord asylum to individuals seeking it, replacing the words 'and be granted' with the vaguer and far more innocuous 'and to

[38] Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(V), 14.12.1950, para.8
[39] The Refugee Convention, Art.35
[40] Edwards, 2014, pg.514

enjoy' by the suggestion of the United Kingdom.[41] Lauterpacht notes that states had no intention to assume even a moral obligation in the matter during the drafting debates.[42]

Since the 1951 Convention is grounded in Article 14 of the UDHR, the 1951 Convention does not contain either the right to asylum or the right to obtain asylum. On the other hand, article 12 of the International Convention on Civil and Political Rights (ICCPR) states that "everyone shall be free to leave any country, including his own". The right to leave, the right to seek and to enjoy asylum, and the principle of non-refoulement share a significant relationship. The right to leave suggests a dual obligation on the State: a negative obligation not to prevent departure, and a positive obligation to issue travel documents. It is, however, an incomplete right, since there is no corresponding duty on other states to guarantee entry to persons other than their own nationals. While the principle of non-refoulement circumscribes state action in this regard, it still cannot be fully equated with a legal right of entry.[43]

Such articulation of article 14 of the UDHR was criticized by Lauterpacht arguing it simply restates states' existing right under international law to grant refuge to individuals. According to him, its inclusion in a declaration of human rights, posited as though it were a right pertaining to individuals, was 'artificial to the point of flippancy', since it lacked any correlative duty on states to give effect to that right and thus any assurance that the right to seek asylum would result in protection.[44]

However, while it is true that no international instrument imposes an express duty on states to grant asylum to persons fleeing persecution, the right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the Article 14 of the UDHR and Article 12 of the ICCPR, implies an obligation on states to respect the individual's right to leave his or her country in search of protection. Thus, states that impose barriers on individuals seeking to leave their own country, or that seek to deflect or obstruct access to asylum procedures, may breach this

[41] Goodwin-Gill, Guy S. and McAdam, Jane, "The Refugee in International Law", Oxford, 2007, pg.358-359
[42] Lauterpacht, Hersch, "International Law and Human Rights", Stevens & Sons, London, 1950, pg.421
[43] Goodwin-Gill and McAdam, 2007, pg.382
[44] Lauterpacht, 1950, pg.422

obligation and, more generally, demonstrate a lack of good faith in implementing their treaty obligations.[45]

In fact, Lauterpacht was right on his critique since the main objective of many states is denial of access to avoid certain obligations rising from the 1951 Convention, particularly non-refoulement. As is observed all around the world, movements of asylum seekers are controlled even outside territorial jurisdiction, through restrictive non-arrival policies. Thus, as is argued by Goodwin-Gill and McAdam, it is not wrong to say that states retain considerable discretion to construct sophisticated interception policies within the letter of the law.[46]

2.2.2. Refugee status

Under the Article 1(A)(2) of the Convention, a refugee is anyone who is "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." While the Convention was limited to refugees fleeing events in Europe prior to 1 January 1951, such limitation was removed by the article 1(F) of the 1967 Protocol amending the Convention to allow states to lift these geographical and temporal caveats.

The Convention identifies refugees by four elemental characteristics: (1) being outside their country of origin; (2) being unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion. As it can be observed by the nature of the definition, the assessment of claims to refugee status contains a complex of multiple factors. Thus,

[45] Goodwin-Gil and McAdam, 2007, pg.369-370
[46] Ibid, pg.370

the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (herein after "the Handbook") was prepared for the guidance of governments in 1979.

As affirmed by the Handbook, the phrase 'well-founded fear of being persecuted' is the key phrase of the definition. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements.[47] Here, in general, the applicant's fear should be considered well-founded if they can establish, to a reasonable degree, that their continued stay in their country of origin has become intolerable to them for the reasons stated in the definition, or would for the same reasons be intolerable if they returned there.[48]

'Persecution' is generally understood to include, at a minimum, threats to life or freedom.[49] The term covers serious human rights violations such as torture, arbitrary detention, arbitrary prosecution and other serious harm.[50] However, it cannot be said that every human rights violation is persecution. Indeed, as the Handbook puts, due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.[51] Some scholars notes that, as a regime predicated on the absence or loss of state protection, such that sanctuary in another country is needed, the regime of refugee law is not appropriate to respond to all human rights violations.[52]

As to the 'grounds' on which an individual is at risk of being persecuted, it is observed that the Convention is limited to the only five specific grounds: namely race, religion, nationality, membership of a particular social group or political opinion. Here, 'membership of a particular social group' as a ground deserves a closer attention. As is seen at the case-law, through social group ground, the scope of refugee protection has been expanded to include persons based on age, gender, sexual orientation, family

[47] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, para.37
[48] Ibid, para.42
[49] Ibid, para.51
[50] Edwards, 2014, pg.518
[51] UNHCR Handbook, para.52
[52] Edwards, 2014, pg.518-519

membership as well as child soldiers and victims of trafficking. However, economic or social standing has not yet been widely accepted as a ground for refugee status.[53]

On the other hand, pursuant to article 1(F) of the Convention, the Convention does not apply to persons for whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity, or; a serious non-political crime outside the country of refuge, or; they have been guilty of acts contrary to the purposes and principles of the United Nations. Here, the term of 'a serious non-political crime' is worth close analysis. As the Handbook puts it, what constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term 'crime' has different connotations in different legal systems. While in some countries the word "crime" denotes only offences of a serious character, in others it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act.[54]

While the Handbook indicates that a person becomes a refugee at the moment when he or she satisfies the definition, in other words, determination of status is declaratory, rather than constitutive[55], in practice, states are keeping their position as the first and likely the only actor since the obligation to protect lies on states. Indeed, the 1951 Convention defines refugees and provides for certain standards of treatment to be accorded to refugees, but it says nothing about procedures necessary for determining refugee status and leaves to states the choice of implementation means at the national level.[56] Therefore, problems arise where states decline to determine refugee status, or where states and the UNHCR reach different conclusions. Thus, it is important to note that while the Handbook is widely approved by states and referred to in refugee status proceedings all over the world; it is not binding.

2.2.3. Non-refoulement

[53] Ibid, 520
[54] UNHCR Handbook, para. 155
[55] Ibid, para.28
[56] Goodwin-Gill and McAdam, 2007, pg.54

Concerned with the protection of refugees from persecution at the hands of their own governments, the cardinal provision in the Refugee Convention is Article 33, non-refoulement, which is acknowledged as a norm of customary international law.[57] According to Article 33, states are obliged to not expel or return a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However, the obligation under Article 33 is not absolute and has some exceptions. According to the Article 33(2), a refugee whom there are reasonable grounds for regarding as a *danger to the security* of the country in which she/he is, or who, having been convicted by a final judgment of a particularly *serious crime constitutes a danger to the community* of that country can be expelled.

As expressed in Article 33, the principle of non-refoulement raises questions as to its personal scope. Although the article itself clearly states that the beneficiary is refugee in the sense of article 1 of the Convention; it was argued that its benefit ought not to be predicated upon formal recognition of refugee status.[58] Indeed, as the UNHCR Executive Committee reaffirmed: "the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."[59] In other words, asylum seekers, at least during an initial period and in appropriate circumstances are entitled to protection under Article 33 since otherwise there would be no effective protection.

Here, consideration has been given to the ways in which the duty of non-refoulement may be infringed by actions specifically intended either to block the arrival, or to bring about the return, of refugees. Refoulement may also be affected by a very wide range of actions taken by, or with the acquiescence of, a state party. As Henkin expressed during the drafting of the Convention, ''… the sole purpose was to preclude the forcible return of a refugee to a country in which he feared both the persecution from which he had fled

[57] Edwards, 2014, pg.520
[58] Goodwin-Gil and McAdam, 2007, pg.205
[59] UNHCR Executive Committee Conclusion No. 6, "Non-Refoulement", 1977, via http://www.unhcr.org/excom/exconc/3ae68c43ac/non-refoulement.html

and reprisals for his attempted escape."[60] Thus, the duty under Article 33 is to avoid certain consequences (namely, return to the risk of being persecuted), whatever the nature of the actions which lead to that result.[61]

As already stated, protection under Article 33(1) is not absolute and permits lawful refoulement of refugees in two cases: With respect to refugees for whom there are reasonable grounds for regarding as a danger to the security of the country as well as those who having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of that country. In such cases, the asylum country is authorized to expel or return even refugees who face the risk of extremely serious forms of persecution. It's standard of proof, however, is more exacting than that set by Art.1(F)(b). As described in more detail below, the criminality exclusion requires conviction by a final judgment of a particularly serious crime, rather than simply 'serious reasons for considering' that a person may be a criminal. Also, it is not enough that the crime committed has been 'serious', but it must rather be 'particularly serious'. Beyond this, there must also be a determination that the offender 'constitutes a danger to the community.'[62]

On the other hand, neither 'national security' nor 'danger to national security' are defined in legislation dealing with refugees and asylum. It is also unclear to what extent a person who convicted of a particularly serious crime must also be shown to constitute a danger to the community. However, it is argued that invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[63]

Apart from national security, refoulement is also allowed in the case of a refugee who has been 'convicted by a final judgment of a particularly serious crime' and who is determined to constitute 'a danger to the community' of the asylum state. First, it should be noted that the gravity of criminality which justifies refoulement is higher than that

[60] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.22, 2 February 1950
[61] Hathaway, James, "The Rights of Refugees Under International Law", Cambridge, 2005, pg. 318
[62] Ibid, pg. 344
[63] Ibid, pg. 345-347

which justifies the exclusion under article 1(F)(b) of the Convention. Indeed, Article 1 denies protection to a criminal who has committed a 'serious non-political crime outside the country of refuge', and within this context, serious criminality is normally understood to mean acts that involve violence against persons, such as homicide, rape, child molesting, grievous body harm, arson, drugs trafficking, and armed robbery.[64] The gravity of harm necessary to justify the refoulement of a person who qualifies for refugee status, however, is expressly framed as a 'particularly' serious crime. Although it might be argued that it is still a vague expression, it is true that even when the refugee has committed a serious crime, refoulement is only warranted when account has been taken of all mitigating and other circumstances surrounding commission of the offence.

It is true that 'national security' and 'public order', have long been recognized as potential justifications by states to avoid obligations and whether he or she may be considered a security risk is left very much to the judgement of the State authorities.[65] Thus, as long as the criteria under Article 32 are satisfied, an asylum state may expel a refugee, even if the only option is to send the refugee to his or her country of origin.

As is clearly seen from the non-absolute scope of non-refoulement principle, 1951 Convention is not capable enough to deal with all the issues refugees facing. In order to fill such gaps in the refugee protection system and especially provide protection against return to asylum seekers and refugees, right human rights law and courts are increasingly being used. Particularly, Article 33(2) has been rendered largely irrelevant by developments in international human rights law, where non-refoulement to certain violations such as torture, are considered absolute without exception or derogation.[66] For example, as stated by the Committee Against Torture, protection under Article 3 of the Convention Against Torture is absolute, even in terms of national security concerns.[67] On the other hand, although European Convention of Human Rights (ECHR) does not contain a specific non-refoulement provision, it is reaffirmed by the European Court of Human Rights that non-refoulement is an inherent obligation under Article 3 (prohibition of torture) of the ECHR in cases where there is a real risk of

[64] Ibid, pg.349
[65] Goodwin-Gill and McAdam, 2007, pg.235
[66] Edwards, 2014, pg.522
[67] See Agiza v. Sweden, CAT/C/34/D/233/2003 (2005), para.13.8.

exposure to torture, inhuman or degrading treatment or punishment. It was stated by the Court that the activities of the individual, regardless how it is undesirable or dangerous, cannot be a material consideration, unlike paragraph 2 of Article 33 of the 1951 Convention.[68]

2.2.4. Expulsion

According to article 32 of the 1951 Convention;

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

When a refugee first arrives in search of protection, they enjoy a very limited right of non-return. At this stage, the only safeguards which an unauthorized asylum-seeker may claim derive from the duty of non-refoulement under Article 33 and the right to be exempted from arbitrary detention and from penalties for unlawful entry pursuant to Article 31. These duties do not necessarily preclude a state party from expelling a refugee claimant from its territory during the earliest phases of refugee reception. Therefore, governments are only barred from effecting expulsion which is at odds with the duty of non-refoulement, interpreted in the light of the Convention's context, object, and purpose. This means that there must be no real chance that the expulsion will lead,

[68] Ibid, para.80.

directly or indirectly, to the refugee being persecuted, or of being denied such international rights as they may already have acquired. Where these requirements are met, a refugee whose presence is not yet lawful – for example, because they have yet to apply for recognition of refugee status, or to comply with the formalities necessary to that end – may be expelled to another country.[69]

As the Executive Committee recommended in 1977, expulsion should be employed only in very exceptional cases. Where execution of the order was impracticable, it further recommended that States consider giving refugee delinquents the same treatment as national delinquents, and that the refugee be detained only if absolutely necessary for reasons of national security or public order.[70] In 2005, the Executive Committee again stated deep concern that refugee protection is seriously jeopardized by expulsion of refugees leading to refoulement, and called on States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of non-refoulement. In other words, expulsion under Article 32 is limited by principle of non-refoulement, under Article 33.[71]

First of all, Article 32 applies to all refugees 'lawfully in a state party's territory' which includes refugees those undergoing status verification, admitted for a set period of time, or whose claim to refugee status the asylum state has opted not to assess.[72] Indeed, allowing such persons stay in the asylum country until their refugee status will be finalized is a matter of basic fairness since it has not been yet decided whether they would be outside of the Convention or not.

On the other hand, 'where compelling reasons of national security so require', Article 32(2) allows state parties to justify limits on a refugee's right to submit evidence, to appeal, and to be represented. But it should be noted that there is no general right to avoid respect for due process norms even when it comes to compelling national security concerns. Therefore, for example, compelling national security concerns would not be

[69] Hathaway, 2005, pg.663-664
[70] Executive Committee Conclusion No. 7, "Expulsion", 12 October 1977, via http://www.unhcr.org/excom/exconc/3ae68c4320/expulsion.html
[71] Goodwin-Gill and McAdam, 2007, pg.263-264
[72] Hathaway, 2005, pg.666

a legal justification of an expulsion under a procedure which is arbitrary or without any hearing.

Besides procedural constraints on expulsion, there is only two grounds to justify the expulsion of a refugee lawfully present: namely 'national security' or 'public order'. The clearest situation in which a refugee may lawfully be expelled is when his or her presence in the asylum state poses a risk to that country's national security. Although national security was not precisely defined in the legislation concerned, as mentioned above, it might be said that invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[73]

The more fluid ground for expulsion is 'public order'. Here the essential concern is to allow an asylum state to expel refugees who pose a fundamental risk to the safety and security of their citizens. In other words, while national security primarily addresses threats coming from outside the host state's borders, public order is understood as a general category of concerns focusing on the importance of maintaining basic internal security. Within this context, refugees who committed serious crimes, or who 'obstinately refused to abide by the laws' were the main objects of public order exclusion under Article 32. On the other hand, states ought to be allowed to expel a refugee who had not engaged in criminal activity, but who refused to conform his or her conduct to the basic manners and customs of the host state.[74]

While the UNHCR Executive Committee notes that 'expulsion measures against a refugee should only be taken in very exceptional circumstances and after due consideration of all the circumstances',[75] it is obvious that such wordings leave states a substantial margin of appreciation. Which criminal acts really do pose a serious risk to the stability of a state? Or to what extent refugees would be tolerated and when would they become a threat to peace of citizens? Indeed, since manners and customs differ

[73] See footnote 59
[74] Hathaway, 2005, pg. 680-682
[75] Executive Committee Conclusion No. 7, "Expulsion", 12 October 1977, para. (c), via http://www.unhcr.org/excom/exconc/3ae68c4320/expulsion.html

greatly from one country to another, then what would be a question of public order in one country would not be the same in another. It means that, there would be no one clear threshold to determine grounds which allow states to expel refugees. Therefore, determining the grounds for expelling refugees is exclusively subjected to margin of appreciation of asylum states.

3. TENSION BETWEEN RIGHTS OF GUESTS AND RIGHTS OF RESIDENTS

Although there is almost 200 years between Kant's Perpetual Peace and the 1951 Refugee Convention, it might be surprising to observe that Kant's understanding of welcoming guests and limits on welcoming of migrants as articulated in international refugee law have significant similarities. As described on the previous chapter, neither right to visit as formulated by Kantian cosmopolitan concept nor right to seek asylum articulated in international refugee law does not provide absolute protection and has some limitations. Indeed, Kantian right to visit does not mean to be taken in or right to settle on one's land. Thus, the visitor is only a guest, who only has a temporary right of sojourn. Similar to distinction of permanent visitor and temporary sojourn in Kantian cosmopolitan right, the only right which might be claimed is right to 'seek' asylum but not the right to 'obtain' asylum, thus, international refugee law does not provide right to enter or right to settle permanently.

On the other hand, Kantian cosmopolitan right is conditional because it allows exceptions by legitimate grounds of self-protection. When it would endanger the residents' own life and peace, then there is no obligation to welcome the guest; the host society has every right to remove them. Thus, as Benhabib rightly argues, as a moral claim, showing hospitality to foreigners and strangers cannot be enforced; it remains a voluntarily incurred obligation of the political sovereign.[76] The guest is someone who can present in the land of the host society by permission of the society, and in any case their presence cannot be permanent within the land of the host society. In this sense, as

[76] Benhabib, 2004, pg.29

Noll notes that, Kantian thinking consider the guest as one eternally moving: "they can only appear in the capacity of a migrating human, a human characterized by their ability and propensity to disappear – or to be made to disappear."[77]

It is possible to see the same limitation in international refugee law as well. According to the 1951 Convention, states may expel refugees by grounds of national security or public order. Where a refugee's presence or actions give rise to real possibility of directly or indirectly harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions, the refugee may be expelled. Besides, refoulement is also allowed in the case of a refugee who has been 'convicted by a final judgment of a particularly serious crime' and who is determined to constitute 'a danger to the community' of the asylum state. About the latter, even refugees who had not engaged in criminal activity, but refused to conform their conduct to the basic manners and customs of the host state may be expelled. Even though the Convention obliges state parties not to expel refugees if doing so would threaten their life or freedom on account of their race, religion, nationality membership of a particular social group or political opinion under the non-refoulement principle, it is observed that states tend to define life and freedom narrowly and to remove refugees and asylees in so-called safe third countries in order to disable the non-refoulement principle.[78]

3.1.Political Membership and Human Rights

All these constant emphasizes on protecting the host society or host state both in moral roots of welcoming guests as in Kantian hospitality as well as its contemporary legal relevance as in the 1951 Refugee Convention lead us to the one same result: Physical presence of the guest or migrant is subjected to the decision on whether they are dangerous to security or peace of the polity. In this sense, their "ability and propensity to disappear – or to be made to disappear", in Noll's words, is realized and legitimized by the same exceptions referring to political membership: 'you', as the guest or the refugee, can stay in 'our' land as long as you do not harm to 'us, the people'.

[77] Noll, 2010, pg.249-250
[78] Benhabib, 2004, pg.35

Political membership might be defined as the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers into existing polities.[79] The modern state system which is known as the Westphalian model state system emerged towards the end of the eighteenth century has been regulated as a political organization generated by a homogenous political community within a territory identified by borders, therefore border control and border policies became one of the vital signs of the state's sovereignty. Such model sees sovereignty as territorial and the exclusion of external actors from domestic authority structures.[80] According to this view, states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior.[81]

The modern state formation in the West begins with the 'territorialization' of space. The enclosure of a particular portion of the earth and its demarcation from others through the creation of protected boundaries, and the presumption that all that lies within these boundaries, whether animate or inanimate, belongs under the dominion of the sovereign is central to the territorially bounded system of states in Western modernity.[82] Here, borders are not real physical lines, obviously, but as Balibar puts it, are artificial 'institutions'[83] which have political and social meanings as well. While boundaries determine the territory of the political community[84], they also establish a collective identity[85] by subordinating differences between members within the territory to the overarching distinction between 'ourselves' and 'foreigners'.[86] In other words, the border is the place where the distinction between members and aliens is created. Thus, membership is meaningful particularly when accompanied by rituals of entry, access and belonging, as Benhabib argues.[87] Since transnational migration is about seeking contact with or entry into, or wanting to become a member of territorially bounded

[79] Ibid, pg.1
[80] Krasner, Stephen D., "Sovereignty: Organized Hypocrisy", Princeton University Press, 1999, pg.20
[81] Ibid
[82] Benhabib, 2011, pg.99
[83] Balibar, Etienne, "We, the People of Europe? Reflections on Transnational Citizenship", translated by James Swenson, Princeton University Press, 2004, pg.109
[84] Noll, 2010, pg.252
[85] Balibar, Etienne, "Politics and the Other Scene", translated by James Swenson, Christine Jones and Chris Turner, Verso, 2002, pg.78
[86] Kesby, Alison, "the Right to Have Rights: Citizenship, Humanity and International Law", Oxford University Press, 2011, pg.31
[87] Benhabib, 2004, pg.1

communities, the guest or migrant is the person who appears at the exact place in which the membership is produced and protected, namely, borders.

As Cohen states, "we, the people", as members of the polity, are potentially able to see themselves as collective authors of the laws and political institutions under which they are governed. As the author, not only the subject, shaping these institutions involves political processes that are and ought to be uniquely theirs, because such uniqueness helps delimit one political community from another. In this light, the concept of sovereignty grounded on such self-determination power does not only construct and protect the external autonomy of the community, but also the autonomy of the ethical political practice of the members that shapes its political institutions and gives content to the rights articulated in domestic laws.[88] Within this context, the members of the polity are the distinctive audience of the legitimacy claims by state institutions since they are the subjects of such institutions. Herein is the crucial normative distinction between internal and external legitimacy: the audiences and criteria cannot be the same for insiders and outsiders.[89]

However, political membership brings along inclusion and exclusion. It makes a distinction between members and foreigners by drawing a boundary around the polity. Exclusion may mean a formal denial of a particular right as well as physical removal from the territory. As Benhabib rightly puts, "the rights of foreigners and aliens define that threshold, that boundary, at the site of which the identity of 'we, the people' is defined, bounded and circumscribed".[90]

But, "we, the people" is a tension-riven formula because it creates and expels 'the others'. Benhabib uses 'democratic closure' while referring to such tension. According to Benhabib, principles of membership affirm that some are entitled to political voice while others are excluded. The decision as to who is entitled to have political voice and who is not can only be reached if some who are already members decide who is to be

[88] Cohen, Jean L., "Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization", Political Theory, Vol. 36, No: 4, August 2008, pg. 589
[89] Walzer, Michael, "The Moral Standing of States", Philosophy and Public Affairs, Vol. 9, 1980, pg. 209-29 as cited in Jean Cohen, Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization, 2008, pg. 591
[90] Benhabib, 2004, pg. 178

excluded and who is not. In this sense, such determination presupposes that some are already members with the privilege to exclude others; while others have no voice in their own exclusion. Therefore, Benhabib argues that the boundaries of the polity remain as a matter of political domination.[91]

Indeed, it is a tension-riven formula, because in its very articulation it contains the constitutive dilemmas of universal rights claims which every human being has by virtue of their humanity and sovereignty; claims of an autonomous polity based on self-determination. Cole argues that here there is a tension, if not an outright contradiction, between the principle of moral equality and the perceived need for closure of polities.[92] Accordingly this leads a huge tension between rights of the guests or refugees and interest or rights of members. On one hand, the guest or refugee has some rights as reaffirmed by moral and legal grounds by virtue of their humanity, on the other hand, the content and realization of such rights are subjected to examination to be made by the host state or polity. When the guest or the refugee is considered as a danger to the polity or to the public, then they are "removed to 'seek and enjoy' their rights elsewhere".[93] As Cohen rightly states, what these policies of exclusion or laws "say" to the targeted group is "you are not one of us, you are no longer a member of this political/cultural community, you are the enemy, you as a group have no right to exist, or you as a group are so inferior that you have no right to have rights as members, we can use you and your labor but you are not persons or citizens under our law."[94]

Then here significant questions arise: under what circumstances can members determine that the security or peace of the polity is violated, and that exclusion of the guests or refugees may be called for? Indeed, how widely should the obligation to welcome the guest or the refugee be interpreted? To what extent should the guest or the refugee be tolerated? How should the legitimate grounds of self-protection be understood? For example, what is the role of protection of culture in self-protection? And what amount of decline in welfare is permissible as grounds for expulsion of the guest or the refugee?

[91] Benhabib, 2011, pg. 143
[92] Cole, Phillip, "Philosophies of Exclusion : Liberal Political Theory and Immigration", Edinburg University Press, 2000, pg.2-3
[93] Noll, 2010, pg. 254
[94] Cohen, 2008, pg. 587

In order to seek answers for these questions, now I will describe a main frame of expulsion policies and practices from three different countries, the United Kingdom, the United States and Turkey.

3.2. Expulsion Practices

On Chapter 1 it is already mentioned that The Universal Declaration remains silent in obligations of states when it comes to right to asylum. It is also stated that determining refugee status and the grounds for expelling refugees is exclusively subjected to the margin of appreciation of receiving states since there is no clear threshold to determine such grounds in the 1951 Refugee Convention. As the following practices show, refugees are constantly being criminalized with claims that they are potential security risks and deliberately discredited under claims that they are lying in order access rights. Several visa requirements and border policies aiming to catch refugees before landing on receiving state's soil are being used by several states. They are being removed to so-called safe third countries or being subjected to economic agreements between states like a sort of 'exchange'.

3.2.1. United Kingdom

Under the Section 3(5) of the Immigration Act 1971, "a person who is not a British citizen is liable to deportation from the UK if the Home Secretary deems his deportation to be conductive to the public good." The UK Borders Act 2007 allows automatic deportation of foreign criminals. According to Section 32(5), the Home Secretary must make a deportation order in respect of a foreign criminal. However, different rules apply to foreign criminals from the European Economic Area (EEA) countries, since deportation of EEA nationals is restricted by European Law, particularly the Directive 2004/38/EC.[95] The Directive does require that expulsion must be proportionate and based exclusively on the personal conduct of the individual concerned and level of threat that they pose to public policy or public security. In this sense, first it should be noted that deportation of foreign criminals from the UK differs based on nationality of the

[95] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF

foreigners, since it is a *must* to order deportation in respect of foreign criminals, while there is higher threshold requires more adequate examination when it comes to deportation of EEA nationals.

In September 2012, a new intelligence and data sharing mechanism called Operation Nexus was rolled out by the Metropolitan Police Service and Immigration Enforcement. According to the project, Immigration Officers deployed to designated police custody suites to examine all foreign nationals who are arrested. Cases identified as illegal entrants suitable for detention will be referred to Immigration Enforcement. On the other hand, police forces refer High Harm cases to the Nexus High Harm team where the individual is deemed whether they are threat to the public or not. The Nexus High Harm team assess every referral and establishes whether the known offence justifies referral for immigration enforcement action. This action can include administrative removal, conviction-led deportation and *intelligence-led deportation*.[96]

The Operation Nexus policy has been deservedly criticized because it could allow deportations of people with no criminal conviction by virtue of the 'intelligence-led deportation' clause. It also attracted criticism for its scope which is clearly much wider, and it targets specific groups for deportation.[97]

On the other hand, since International Human Rights Instruments that the UK must obey prohibit deportation when there is a real risk of torture or inhuman or degrading treatment or punishment in the receiving state, the UK pursues a policy of Deportation with Assurances to several countries such as Jordan, Libya, Lebanon, Algeria, Ethiopia and Morocco since 2005, when it comes to deportation of foreigners suspected of terrorism. Under such arrangements, the receiving countries give assurance about safeguard the rights of people who are returned, including right to access to medical treatment and accommodation.[98]

[96] Home Office, Operation Nexus: High Harm, 15 March 2017, pg.4
[97] McGuinnes, Terry, "Deportation of Foreign National Offenders", Briefing Paper 8062, House of Commons Library, 1 August 2017, pg.12-13
[98] Anderson, David & Walker, Clive, "Deportation with Assurances", July 2017, pg.16, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630809/59541_Cm_9462_Accessible.pdf

Critics of Operation Nexus's policies of Deportation with Assurances emphasize that such assurances are unreliable and carry little weight in deciding whether the risk of torture has been eliminated, and that negotiating with countries known to use torture is in principle wrong.[99]

All these policies and practices can be read as materialization of the main aim as declared by the Home Secretary in 2012: "to create really hostile environment for illegal migration."[100] Indeed, the statistics seem to show that such policies work well. While the number of foreign offenders returned was just under 4500 in 2011/2012, this number has dramatically increased by an annual average of %6 between 2011 and 2017 and was stated as 6171 in 2017.[101]

3.2.2. United States of America

The Immigration and Nationality Act 237 creates a very extensive list of legitimate grounds allowing for the deportation of foreign nationals. As an example, according to the Act 237, a person can be deported in cases of drug addiction or illegal voting, or if they committed marriage fraud or falsely claimed to be a U.S. citizen or failed to notify their changes of address within ten days, as well as many other crimes or forms of document fraud.[102]

The usage of the Immigration and Nationality Act has dramatically increased after new immigration policies in January 2017 framed immigration as a 'major threat' to the economic and national security of Americans.[103] According to the statistics, more than 61.000 foreign nationals were deported from the US between January and September 2017, an increase of 37% when compared to the same period in 2016. Similarly, more than 110.000 people, although more than 31.000 of them had no criminal convictions,

[99] McGuinnes, 2017, pg.15
[100] Statement from Theresa May, Home Secratary, 25 May 2012, available at https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html
[101] Home Office, Immigration Statics, 2017, last updated in March 2018, available at https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2017-data-tables
[102] See Immigration and Nationality Act, INA 237, General Classes of Deportable Aliens, available at https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5684.html
[103] Pierce, Sarah & Selee, Andrew, "Immigration Under Trump: A review of Policy Shifts in the Year Since the Election", Migration Policy Institute, December 2017, pg.3

have been arrested. An increase of 42% when compared to 2016.[104] On the other hand, the ceiling for the number of people to be resettled within the US has been dramatically dropped recently. While the ceiling for resettlement had been determined as 110.000 for 2017[105], this number was reduced to 45.000 for 2018[106], which is the lowest level since 1980[107].

The U.S. administration has made important changes which increase vetting of immigrants and slow down the legal admissions process. Such enhanced vetting policies basically focused on limiting the entry of foreigners who were deemed to be a threat to public safety. Besides that, vetting has been expanded by increasing the amount of information needed to assess applicants' admission. For example, some applicants must to provide 15 years of travel and employment histories as well as residential addresses. They are also asked for their usernames on all social media accounts used within the last five years.[108]

Another important change was limitations put on Temporary Protected Status (TPS). The aim of the TPS is providing temporary humanitarian protection to people in El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria and Yemen where there is violent conflict or suffering from a natural disaster. In 2017, it was announced that TPS would not be extended to Haiti, Sudan and Nicaragua, and in 2018, to Nepal and Honduras since conditions in these countries are safe to enough to return to.[109] When it is taken into consideration that more than 400.000 people currently are covered by TPS, the issue whether the home countries could accept and provide adequate facilities for such deported people from the U.S. remains questionable.

[104] U.S. Immigration and Customs Enforcement, Fiscal Year 2017 ICE Enforcement and Removal Operations Report, available at https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf
[105] Etilperin, Juliet, "White House Raises Refugee Target to 110.000", Washington Post, 14 September 2016, available at https://www.washingtonpost.com/news/post-politics/wp/2016/09/14/white-house-plans-to-accept-at-least-110000-refugees-in-2017/?noredirect=on&utm_term=.8c525dad8ada
[106] White House, Presidential Determination on Refugee Admissions for Fiscal Year 2018, 2017-13, 29 September 2017, available at https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-4/
[107] Pierce&Selee, 2017, pg.4
[108] Ibid, pg.5
[109] See more on TPS Countries at https://www.uscis.gov/humanitarian/temporary-protected-status

The most striking recent development in immigration policy was the ban which is known as 'Muslim Ban' on entry for nationals of certain countries. By Executive Order 13769 and 13780, "Protecting the Nation From Foreign Terrorists Entry Into the United States", entries of nearly all nationals of Chad, Iran, Libya, Somalia, Syria and Yemen has been suspended. Such decisions made a big impact on the US public, and huge protests have been organized all over the country, especially in international airports.[110] Although the orders have been legally challenged, the Supreme Court eventually allowed for the partial implementation of the travel ban.[111]

3.2.3. Turkey

Turkey was a country of emigration (or migrant-sending country) only a few decades ago. Over the past two decades, however, this situation has changed very dramatically and "as a result of intense migratory movements", Turkey has become a country of immigration.[112] Furthermore, by hosting 3.9 million refugees, now Turkey has the world's largest refugee population.[113]

Although I prefer to use the term of 'refugee' above, almost none of them are technically refugees under the 1951 Convention. Because of the geographical limitation that Turkey made on the 1951 Refugee Convention, only refugees originating from Europe are entitled to get the Convention refugee status in Turkey. In other words, although Turkey is a signatory to the 1951 Convention, the Convention does not apply to refugees coming from any country outside of Europe. Since almost all of refugees in Turkey are coming from mainly Middle-East countries[114], they are subjected to the protection provided by Turkish domestic law.

However, provisions under the domestic law also differ from each other. The first immigration act, the Law on Foreigners and International Protection (LFIP), was

[110] "Thousands protest against Trump travel ban in cities and airports nationwide", The Guardian, 30 January 2017, available at https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports
[111] Pierce&Selee, 2017, pg.8
[112] Icduygu, Ahmet, "Turkey's Evolving Migration Policies: A Mediterranean Transit Stop at the Doors of the EU", IAI Working Papers, Istituto Affari Internazionali, 15/31, 2015, pg.1
[113] UNHCR Turkey: Key Facts and Figures, April 2018, available at http://www.unhcr.org/tr/en/unhcr-turkey-stats
[114] Ibid

adopted in 2013 in order to regulate foreigners' entry into, stay in and exit from Turkey.[115] While LFIP repeats the refugee definition of the 1951 Convention for the refugees coming from outside of Europe, under the Article 62, it creates 'conditional protection' for those from outside European countries. Refugees under the conditional refugee status are permitted to reside in Turkey temporarily "until they are resettled in a third country".

Nevertheless, to handle with the mass Syrian refugee flow through the Syrian border, another option rather than conditional refugee status was required. Within this scope, in 2014, Temporary Protection Regulation was adopted to provide 'protection for those who crossed (the) borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment.' Such formulation may seem like a humanitarian response, and this may be the case, however, it might be problematic since it can be used to limit Syrians' right to seek international protection under the UNHCR.

Indeed, Syrians in Turkey cannot be registered under the Convention as refugees, nor are they given the option to go through a UNHCR process 'due to the enormity of the caseload'[116]. Although it is theoretically possible for Syrian refugees to apply to the Turkish government for temporary protection and, to seek for resettlement to a third country by referral of the Turkish government based on vulnerabilities and other criteria, it should be noted that resettlement is not a right nor an application-based process, but a process which is solely subject to the receiving countries' immigration procedures and provided for a very small number of refugees, which constitutes less than %1 of all refugees around the world.[117] Therefore, although the protection offered them is so-called 'temporary', it is not incorrect to say that by virtue of such a limiting legal frame, Syrians are permanently stuck in Turkish territories as being deprived from their rights under the 1951 Convention.

[115] For the full text of the Act, see http://www.goc.gov.tr/icerik/law-on-foreigners-and-international-protection-lfip_913_975
[116] Icduygu, 2015, pg.7
[117] See more at http://www.unhcr.org/tr/en/ressettlement

Accordingly, in November 2015, the EU and Turkey agreed on a Joint Action Plan to bring order into migratory flows and help stem irregular migration.[118] In exchange for Turkey's engagement to stop refugees leaving its shores, the EU committed to opening new negotiation chapters with Turkey, lifting visa requirements for Turkish citizens and providing 3 billion Euro in aid. In March 2016, Turkey agreed to accept "the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants" intercepted in Turkish waters.[119]

While Turkey continues to call Syrian refugees as 'guests' in official rhetoric, it introduced visa restrictions for Syrians arriving by air and sea and started to build a wall along the Turkey – Syria border to stop immigration. It is planned to be the third longest wall of its kind, once it completed. On the other hand, Turkey threatens European countries that it will "open the gates" and allow hundreds of thousands of refugees on its soil into Europe when complaining that the EU had not delivered the 3 billion euro as promised in exchange.[120]

4. ON HOSTILITY

In Kant's formulation of the right to hospitality, as in subsequent observable state practices in expulsion of refugees, there remains an element of unchecked sovereign power. As Jacques Derrida has argued, hospitality always entails a moment of dangerous indeterminacy. This indeterminacy prompted Derrida to coin the term "hospitality" in order to capture that dangerous moment when the cosmopolitan project can get mired in hostility rather than hospitality.[121] As Benhabib rightly asks, doesn't

[118] Fact Sheet on the EU-Turkey Joint Action Plan, European Commission, 15 October 2015, available at http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm
[119] Fact Sheet on the EU-Turkey Statement, European Commission, 19 March 2016, available at http://europa.eu/rapid/press-release_MEMO-16-963_en.htm
[120] Akkoc, Raziye & Holehouse, Matthew, "Turkey Threatens to Open the Gates and Send Refugees to Europe", the Telegraph, 11 February 2016, available at https://www.telegraph.co.uk/news/worldnews/europe/turkey/12151701/Turkey-threatens-to-open-the-gates-and-send-refugees-to-Europe.html
[121] Derrida, Jacques, "On Cosmopolitanism and Forgiveness", transleted by Mark Dooley and Michael Hughes, Routledge, 2001, pg.xx

this indeterminacy account for the linguistic proximity of the terms hostis and hospice - hostility and hospitality? [122]

What these practices and policies tell us is that "'you' as a refugee, do not have right to entry or stay in 'my land' by virtue of the humanity that we share, in fact, you are not 'welcomed' here, you are here only if and to the extend 'we' decide so." Indeed, while it is uncontroversial for many that migrants are generally entitled to human rights by virtue of their humanity, it remains patently unclear how this entitlement relates to the state's power to exclude by virtue of its personal and territorial sovereignty.[123] When the states do not hesitate while declaring that they will create a 'very hostile environment' for refugees, or issuing a total ban truly based on nationality, or making them an object of a financial bid; it becomes hard to argue that every human being universally has the same rights by virtue of being human.

Indeed, framing the issue in terms of membership invites reflection on the politics of membership and exclusion. It signals that politics are always at stake when it comes to human rights. As Cohen rightly puts, these practices violate individual moral rights but they must also be understood politically as a politics of exclusion. So understood, although membership is a substantive moral principle, it is also deeply political.[124]

4.1.Schmitt's concept of political

In 1922, Carl Schmitt published Political Theology: Four Chapters on the Concept of Sovereignty. This text, along with The Concept of the Political from 1932, and The Crisis of Parliamentary Democracy from 1923, established Schmitt as one of the most important theorists. Schmitt documented not only the sociological transformation of liberal parliamentarianism into the rule of special interest groups and committees; he also drove home the rationalistic fallacies of liberalism until its limited concepts were uncovered. These limited concepts, in Schmitt's view, constituted the secret and

[122] Benhabib, 2011, pg.7
[123] Noll, 2010, pg.243
[124] Cohen, 2008, pg. 587-588

"unthought" foundations upon which the structure of the modern state rested and one of such limited concepts was sovereignty.[125]

The Concept of the Political starts with one of Schmitt's well-known arguments: "the concept of the state presupposes of the concept of the political." While he posits that the state is a specific entity of a people in its literal sense and in its historical appearance, he expresses that it [*the state*] is in the decisive case the ultimate authority vis-a-vis the many conceivable kinds of entities. Thus, according to Schmitt, since all characteristics of entity and people receive their meaning from the distinctive trait of the political, it is crucial to understand the nature of the political, otherwise all characteristics become incomprehensible.[126]

Schmitt argues that the political has its own criteria which express itself in a characteristic way, therefore the definition of the political can be obtained only by discovering and defining it in its own ultimate distinctions, which all action with a specifically political meaning can be traced through. If it is assumed that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable; Schmitt asks that whether there is also a special distinction which can serve as a simple criterion of the political and of what it consists.[127]

The answer that Schmitt gives to such question constitutes one of his most famous thesis': "the specific political distinction which political actions and motives can be reduced is that between friend and enemy." The core sense of the political lies in this definition. On the other hand, as the meaning of the political, friend-enemy distinction cannot be reduced to a mere metaphor or symbol, indeed, every aspect of life could manifest the friend–enemy distinction. It is independent from economic, moral or other conceptions; hence, the political enemy does not necessarily mean morally evil or aesthetically ugly, or economic competitor. The only sufficient indicator for its nature,

[125] Benhabib, 2011, pg.169
[126] Schmitt, Carl, "The Concept of the Political", translated by George Schwab based on the 1932 edition published by Duncker & Humblot, The University of Chicago Press, 2007, pg.19-20
[127] Ibid, pg.26

nevertheless, is being the other, existentially something different and alien, the stranger.[128]

Schmitt argues that the political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping.[129] In this sense, according to Schmitt, the political derives its energy from the antagonism. It signals the *intensity* of such antagonism. In any event, the friend-enemy grouping is always political which focuses on this most intense and extreme antagonism. Therefore, Schmitt says that this grouping is always the decisive human grouping, the political entity. Here, this political and decisive entity is the sovereign.[130] Moreover, the political entity is either the decisive entity which decides friend-enemy grouping, or, the political entity is non-existent at all.[131]

In returning to the beginning, for a Schmittian, the state is the political entity which determines friend and enemy. As long as people exist in the political sphere, it must have a clear view who its enemies are, otherwise, the state will cease to exist, Schmitt says. In other words, as Koskenniemi puts, if the state is a political body, then the definition of its enemy constitutes its principle of identity. Hence, it is the task of the state to be clear about who its internal and external enemies are. Moreover, to the extent that the state is "depoliticized" or reduced to a social association among others, it has lost this capacity and, no longer able to recognize its enemies, will not be able to maintain order, will no longer be a real State at all.[132]

4.2.Humanity vs. Exception

In his radical definition, Schmitt defines the sovereign as "he who decides on the exception."[133] In this sense, the sovereign is who decides on whether there is an extreme

[128] Ibid, pg.27-28
[129] Ibid, pg.29
[130] Ibid, pg.38
[131] Ibid, pg.39
[132] Koskenniemi, Martti, "The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960", Cambridge University Press, 2004, pg. 431
[133] Schmitt, Carl, "Political Theology: Four Chapters on the Concept of Sovereignty", translated by George Schwab based on the 1985 translation, The University of Chicago Press, 2005, pg.5

emergency as well as what must be done to eliminate it.[134] Here, the relationship between the rule and exception in Schmittian thought is significant to recall. I would like to quote the whole paragraph as it is:

"The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception."[135]

In the first chapter, it is already stated that right to seek asylum is conditional both in Kantian hospitality as well contemporary refugee law, because it allows exceptions. When the rule-exception relationship is understood in a Schmittian sense, the rule, namely, the right to seek asylum or right to hospitality, is always limited with the same exception which refers to political membership: protection of the polity. In this sense, one's status as a right-holder is contingent upon the recognition of one's membership. Then here Benhabib rightly asks: Who is to give or withhold such recognition? Who are the addressees of the claim that one "should be acknowledged as a member"?[136]

While for Kant the answer of such questions should be humanity itself, for Schmitt the answer is most specific: it is precisely the role of the sovereign to decide who is enemy and friend, therefore, who will be tolerated and to what extent they will be tolerated. If we follow the Schmittian path stating that friend-enemy grouping is always political which focuses on the most intense and extreme antagonism; then the most intense moment would be the moment when the stranger/refugee demands entry to or stay in the territorial boundaries of the state. This is exact moment requires the political decision based on a friend-enemy grouping. As it is already expressed, it is the sovereign state to decide. Because indeed, in the conception of modern state, immigration and immigrant has been turned into 'exceptions' by describing the modern state as an organization generated by a homogenous community within a territory identified by

[134] Ibid, pg.7
[135] Ibid, pg.15
[136] Benhabib, 2004, pg.57

borders. As is demonstrated above in the section on state practices, nation-states retain refugees in a state of 'exception'. They are treated as quasi-criminal elements, and are closely monitored. They are always at risk of being expelled because of their nationality. They can be described as a 'guest' while being deprived of making any further right claim, and even be made a good in financial bids. Within this context, as Benhabib rightly states, they exist at the limits of all rights regimes and reveal the blind spot in the system of rights, where the rule of law flows into its opposite: the state of the exception and the ever-present danger of violence.[137]

Then one can ask that whether it is possible to challenge the role of the sovereignty in determining right-holder status in Schmitt's theory by humanity as offered by Arendt. For Schmitt, it was clear that "humanity" had no political content; that no political entity, ideal or status. According to him, as long as a state exists, there will always be in the world more than just one state, simply because the political entity presupposes the real existence of an enemy and therefore, coexistence with another political entity. Thus, a global state which embraces the entire globe and all of humanity cannot exist, since universality would necessarily have to mean total depoliticization and with it, particularly, the nonexistence of states.[138]

Within this sense, Schmitt draw attention into the contradictory structure of the League of Nations, for example.[139] According to him, this body is an organization which presupposes the existence of states, regulates some of their mutual relations, and even guarantees their political existence. It is neither universal nor even an international organization. It does not eliminate the possibility of wars, just as it does not abolish states. On the contrary, it introduces new possibilities for wars, permits wars to take place, sanctions coalition wars, and by legitimizing and sanctioning certain wars it sweeps away many obstacles to war.[140] Indeed, as Koskenniemi rightly states, it is not a coincidence that the twentieth century saw the most widespread use of the concept of

[137] Ibid, pg.163
[138] Schmitt, 2005, pg.53-55
[139] Although here Schmitt only mentions about the League of Nations, I think it is possible to extent his conceptualizing to international law as well, since he basically criticizes the state-centered structure of the system that presupposes itself 'international'.
[140] Schmitt, 2005, pg.56

humanity in warfare; and the most atrocious destruction of lives ever carried out under the pretense of war.[141]

Furthermore, Schmitt argues that the declaration of outlawing war does not abolish the friend–enemy distinction, but, on the contrary, opens new possibilities for giving an *international hostis declaration* new content and new vigor.[142] In practice, the declaration was accompanied by specific reservations concerning war in self-defense – reservations that were, Schmitt correctly observed, no mere exceptions to the norm of peacefulness but "gave the norm its concrete content … in dubious cases."[143] Indeed, in example the of international refugee law, inclusion of the refugees, namely being entitled to entry in or stay in to the host country, may be possible only in the absence of exceptions, namely legitimate grounds for expulsion. As is seen in both its moral as well as legal articulation it the same way, expulsion grounds are determined on the basis whether the guest or refugee is not a 'threat' to the host country and the community. Thus, since such determination creates a tension between at one hand, the rights of the community and on the other hand, rights of the guests/refugees, it requires to make a friend-enemy distinction by itself, therefore, it is always political, and it is always subjected to sovereign decision.

5. RETHINKING THE UNIVERSALITY IDEA OF HUMAN RIGHTS

As discussed in previous chapters, there are a series of contradictions between international refugees' rights and sovereign claims to control borders as well as to monitor the quality and quantity of refugees. Indeed, the idea of universal human rights which presupposes that every human being has rights by virtue of being human is in dispute with that of a personally circumscribed contractual base. As Noll points out, the contract metaphor underlying much of contemporary constitutional thinking stops making sense when everyone is a contract party by nature.[144] Since the refugee law is

[141] Koskenniemi, 2004, pg.434
[142] Schmitt, 2005, pg.51
[143] Koskenniemi, 2004, pg.433
[144] Noll, Gregor, "The Exclusionary Construction of Human Rights in International Law and Political Theory", The Institute for International Integration Studies Discussion Paper Series, No:10, IIIS, 2003, pg.3

highly designated on a personally circumscribed contractual base as described so far, it offers a unique opportunity for testing the idea of the universality of human rights.

It should be tested, because as Amartya Sen points out very well, the conceptual doubts must be satisfactorily addressed if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing. In this sense she states that it is critically important to see the relationship between the force and appeal of human rights, and their reasoned justification and scrutinized use.[145] Otherwise, we would face the fact that the whole system of human rights would fails when it fails its universalist purposes for one particular group, namely refugees?[146]

5.1.Universality of Human Rights

It is mainly assumed that the phrase of "human rights" refers to timeless and unalterable high moral standards. They cover freedom, equality and justice for every human being due to its very nature. Indeed, it cannot be said that such an assumption is not correct; human rights are not necessarily an equivalent of but are related to justice, democracy and common good. Hence, the idea of human rights is a political idea with moral foundations which suggests the rights of all human beings anywhere and anytime.[147] In fact, the universality idea of human rights is the very basic fundamental principle placed into the heart of human rights discourses. Consequently, it is not a big surprise to see that the Universal Declaration of Human Rights, the cornerstone of the international human rights law, starts by emphasizing: "All human beings are born free and equal in dignity and rights."

However, universality is a challengeable claim and from the very beginning it has been challenged by several scholars. Here, any discussions on the universality of human rights needs definition and a conceptualization of the term. First of all, what is referred by universality of human rights? At the most fundamental level, universality of law

[145] Sen, Amartya, "Elements of a Theory of Human Rights", in Philosophy and Public Affairs 32, No:4, Blackwell Publishing, 2004, pg.317
[146] Noll, 2010, pg.244
[147] Henkin, Louis, "The Universality of the Concept of Human Rights", The Annals of the American Academy of Political and Social Science, Vol. 506, Human Rights around the World, Sage Publications, November 1989, pg. 11

signifies its omnipresence which means that law can be encountered everywhere at once. It is law's invariability and ineluctability. At a second level, universality means generality: the fact for a legal order to be valid and applicable to all subjects in a given class or category.[148] From a third point of view, it means being accepted by, valid for and binding in all states.[149]

Being accepted by a majority of states or in other words 'legal universality' as used by Henkin[150], clearly cannot be the true aspect at least for this study embarking on a scrutiny of the philosophical premises underlying human rights. Because human rights are primarily an ethical demand rather than putative legal claims.[151] Any emphasis on "to be born free and equal in dignity and rights" as the most constitutive claim at the heart of human rights law, solely refers to a question of ethics. In other words, human rights as not prescribed as universal just because majority of states accept so, on the contrary, states accept it so since human rights are part of human nature 'as such' and unalterable for every human being. It reminds Kant's notion of 'right' as 'an assurance that each individual receives what is his due'.[152] Indeed, it is assumed that human rights are imprescriptible and unalienable rights held equally by all human beings without exceptions and regardless of the circumstances such as time and place in which they happen to live. In other words, human rights are universal and unchanging whether individuals are male or female, African or European, young or old, Christian or Muslim, educated or uneducated, so on and so forth.[153] Therefore, universality is already implied in the definition of human rights.

Nevertheless, human rights were not always universal, at least before 1950s. In this sense, one may rightly ask that while there was no such conceptualization before, how come people suddenly started to 'born free and equal' and claim their rights against the states in the 1950s? The original push to revive the concept of international human rights in the contemporary period occurred in the wake of atrocities committed by the great

[148] Prost, Mario, "The Concept of Unity in Public International Law", Hart Publishing, 2012, pg.35
[149] Simma, Bruno, "Universality of International Law From the Perspective of the Practitioner", European Journal of International Law, Vol.20, Issue 2, April 2009, pg. 265
[150] Henkin uses terms of 'political universality' and 'legal universality' while explaining universality of human rights. See Henkin, 1989, pg. 11-14
[151] Sen, 2004, pg.319-321
[152] Reiss, 1991, pg.135
[153] Jackson, Robert, "Sovereignty: The Evolution of an Idea", Polity Press, 2007, pg.118-119

powers against civilians during the Second World War.[154] In this sense, the idea of human rights law was a collective response which can be read as a concrete form of the Hobbesian Fear against the brutality of the Second World War. Hence, human rights were purely rooted in a political necessity for creating a control mechanism against threats of possible dictatorships. To do this, the only proper instrument was international law, simply because there was no choice but to draw on the body of law existing at the global level.[155] In this sense, once its historical context is understood, it becomes clear that human rights law was a response to historical developments during 1940s at the most, rather than a sudden exploration of the idea of universal justice or common good.

5.2. State-centrism in international law

However, such arguments should not be read as an attempt to discredit human rights, on the contrary, the aim here is to pour –in Holmes' terms- some "cynical acid" over the idea of universality of human rights to see if something of value remains.[156] As Koskenniemi put it, moral groundings of rights are not available in today's morally agnostic world and the social meaning of rights is exhausted by the content of legal rights which gives them meaning and applicability.[157] Indeed, as Bentham said, it is clear that "real rights come from real law".[158]

First of all, human rights law is a branch of public international law. Only states are duty-bound under international law, it is a state-centrist norm system.[159] This sets it apart from, say, moral philosophy, which can afford to be anthropocentric. Hence, the philosopher finds no problem in obliging every human being to respect human rights, while the positivist international lawyer is limited to states as respondents to human rights norms.[160] Within this sense, international law is created by, between and for states. Its cardinal concept is state sovereignty and the typical source of obligations are state

[154] Cohen, 2008, 579
[155] Megret, Frederic, "Nature of Obligations", in "International Human Rights Law" edited by Moeckli, Shah and Sivakumaran, Oxford University Press, 2010, pg.125
[156] Holmes Oliver Wendell, "The Path of the Law", Harvard Law Review, Vol. 10, 1897, pg. 462.
[157] Koskenniemi, Martti, "The Politics of International Law", Hart Publishing, 2011, pg.156-157
[158] Jeremy Bentham, "Critical Assessments", edited by Bhikhu Parekh, Routledge, 1993, pg.707
[159] Noll, 2003, pg.8
[160] Ibid

voluntarism.[161] As a branch of international law, human rights law is sovereign state centered as well. States are completely free to sign or not to sign the human rights treaties. They may modify their obligations by reservations. They may limit their obligations under their domestic law by presupposed legitimate grounds such as "morality, public order or general welfare" allowed in human rights treaties. States are also free to suspend some of their obligations under human rights treaties if a "state of emergency requires to do so". Furthermore, states may even withdraw from treaties they already signed. The contractual structure of rights forces us into the specifics of treaty law and leaves us with a host of questions stemming from the law of treaties. Is an alleged violation attributable to a state? Is that state bound by a pertinent human rights obligation? How is that obligation to be interpreted and applied?[162] Such state-based structure and the legal tools are allowed by international law and used by states often as a valid excuse to refrain from obligations. In this sense, by recalling Schmitt, that human rights law which is supposed to be against the state is very much more about legitimizing the role of the state.

As a consequence of being a state-centered system, "the obligation to respect and enforce human rights rests on states" as Louise Arbour said.[163] Here is the paradox of international human rights law today: human rights which is supposed to protect people against states is at the mercy of states. As any treaty under international law, a human rights treaty is the product of consent among states, hence, legal human rights obligations are derived from the will representation of a particular political community organized in a nation-state with delimited territory. As Noll correctly states, as long as the social-contractarian paradigm is hinged on the idea of the state and replicates all its limitations, there are no cogent reasons to grant rights to non-contractarians "outside" the state.[164] Within this context, a refugee who runs away from a war ongoing in their country and believe that they have rights by virtue of being human may surprisingly find themselves in a legally vulnerable condition as 'guest' or 'Muslim brother/sister" in the destination country just because the state put geographical reservations on the refugee

[161] Megret, 2010, pg.125
[162] Noll, 2003, pg.8
[163] Statement by Louise Arbour, UN High Commissioner for Human Rights, the 61th Session of the Commission on Human Rights, 14 March 2005, available at http://unpo.org/article/2145
[164] Noll, 2003, pg.10

convention. Similarly, the same reason would explain why a refugee who lives for years in the host country suddenly could be faced with the risk to of expulsion just because of their nationality.

It would also explain why refugees are suddenly started to be treated as an enemy, in a 'hostile environment', very unlike what Kantian hospitality affirms. All these technical means derived from the state-centered structure signal that, indeed, what rights mean and how they are applied can only be determined by the politics of states, as Koskenniemi points out.[165]

5.3.Right to have rights as 'a place in the world'

Indeed, human rights are defined and examined by and within the sovereign state and as Hopgood pointed out, are much more like citizenship rights– that is, rights you qualify for and can even have taken away from you if you misbehave.[166] This then leads us to the direct analogical link between the universality of human rights and the question of the object of human rights. If a universality is assumed true, then it means there is no particular object of human rights since every human being regardless who they are, has the same human rights equally. But, vice versa, if every human being regardless of who they are do not have the same human rights equally, then it means that there is a particular beneficiary, as the object of human rights, and the idea of universality can be challenged. In fact, since states are designated as the primary units determining access to human rights under the international human rights law regime, "human beings can be born free and equal in dignity and rights" only provided that the state where they are citizen of it, voluntarily accept to be a party to human rights treaties that indicate so. Consequently, it is citizenship which makes it possible to claim the rights. In this sense, it is the citizens who can be the beneficiaries of or in other words, the objects of human rights.

Hannah Arendt was one of the few theorists to draw our attention to such relationship and confirmed the priority that the world of nation states has accorded to citizenship.[167]

[165] Koskenniemi, 2011, pg.153
[166] Hopgood, Stephen, "The Endtimes of Human Rights", Cornell University Press, 2013, pg.18
[167] Tambakaki, Paulina, "Human Rights or Citizenship?", Birkbeck Law Press, 2011, pg.3

For Arendt, the totalitarian disregard for human life and the eventual treatment of human beings as "superfluous" entities began, when millions of human beings were rendered "stateless" and denied the "right to have rights."[168] She states that we became aware of the existence of a right to have rights and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain their rights because of the new global political situation.[169] According to her, the loss of nationality status or the loss of citizenship rights means the loss of all rights. Thus, when a person is deprived from the nation and became stateless, they are deprived of any human rights. As she rightly puts, once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were right-less, the scum of the earth.[170]

For Arendt, citizens' rights are the only rights worthy of the name. Indeed, she was correct to state that "a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a man".[171] Similarly, Douzinas rightly points out if human rights are entitlements given to people on account of their humanity and not their membership of some narrower group such as nations, then those people who have no law or group to protect them should have at least the protection offered to humans qua human.[172] However, as is already described on previous chapters, the unstable relationship between the power of sovereign states and the rights claims of refugees impose a great challenge to the universality idea of human rights law. In fact, these are people who have no or very few rights. In this sense, Douzinas states that human rights do not exist; because birth and basic humanity does not come with any attached rights. As rightly analyzed, politics creates rights and only rights created and enforced by domestic legal systems give protection to political actors, in other words to citizens.[173]

[168] Benhabib, 2004, pg.50
[169] Arendt, Hannah, "The Origins of Totalitarianism", Harcourt Brace Jovanovich, 1979, pg.296-297
[170] Ibid, 267
[171] Ibid, 300
[172] Douzinas, Costas, "Human Rights and Empire: The Political Philosophy of Cosmopolitanism", Routledge-Cavendish, 2007, pg.99
[173] Ibid

"Rights of man proved to be unenforceable whenever persons appeared who were no longer citizens of any state".[174] According to Arendt, "the conception of human rights based upon the assumed existence of a human being as such broke down at the very moment when those who professed to believe in it were for the first time confronted with persons who had indeed lost all other qualities and specific relationships, except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[175] Arendt uses 'abstractedness' to refer the refugees who suddenly found themselves without a fixed abode and frown all over Europe after the Second World War. It was exactly that time when those, in Arendt's terms, 'right-less' and stateless refugees have been deprived of their very basic rights by the fact that they were only human. Here, this creates a distinction between the rights of the human and the rights of the citizen, where the "rights of the human are the rights of those who have no rights."[176] and this is the distinction which Arendt's conceptualization of 'right to have rights' refers to.

As Benhabib puts, in a territorially bounded nation-state system, which is in a state-centric international order, the person's legal status is dependent upon protection by the highest authority that controls the territory upon which one resides and issues the papers to which one is entitled. Thus, refugees, minorities, stateless and displaced persons are special categories of human beings created by the nation-state.[177] Within this sense, it is possible to argue that having rights depends on receipt of a special sort of social recognition and acceptance within a particular political community.[178]

Then what is such a 'receipt of a social recognition and acceptance' Michelman referred to, and more importantly who is entitled to issue such 'receipt'? From Arendtian view, it might be said that such recognition and acceptance should be understood as a recognition and acceptance to membership to the polity, since the person's status as a right-holder person is subjected to the recognition of the person's membership. Then,

[174] Arendt, 1979, pg.293
[175] Ibid, 297
[176] Ranciere, Jaques, "Who is the Subject of the Rights of Man?", The South Atlantic Quarterly, 2004, pg.298
[177] Benhabib, 2004, pg.55
[178] Michelman, Frank, "Parsing 'A Right to Have Rights'", Constellations, Vol.3/2, Blackwell Publishers, 1996, pg.203

the vital question is that who is to give or withhold such recognition, or in other words, who is to issue such 'receipt'.

6. CONCLUSION

I would like to answer the question above by turning back to the discussion on tension between rights of the guests and rights of the residents. As described in the first chapter, welcoming a stranger or a refugee has been formulated in a very similar way, both in its very first moral foundations as Kantian hospitality affirmed in the 18th century as well as in conventions on refugees' rights reaffirmed by contemporary international human rights law. Both formulations are conditional since they allow exceptions, but more interestingly, regardless of there being almost two hundred years in between, they both significantly consist of similar limitations deriving from the same justification: self-protection. A stranger or a refugee may be welcomed only if they do not pose a threat to security and peace of the polity.

Such conditional formulation apparently prioritizes and favors the polity itself, and subsequently, draws a line between the guest/refugee and the polity by bordering the physical boundaries of the polity. It says, "you can only entry into and stay in my land the extent to I wish (I may call you 'guest'), for a period I wish (I may expel you when my administration has been changed) and in a way I wish (I may welcome you in a 'hostile environment')". In this sense, the decision of your inclusion to my community is always a political decision that requires me to determine whether you are an enemy or a friend. And this decision can only be made by the sovereign, who decides on exception.

This decision is subjected to sovereign, not because Schmitt theorizes it in that way, but on the contrary, international human rights itself formulates it so, by describing the rights of refugees as exceptions. Indeed, the rule does not guarantee anything by itself. The issue to what extent the rule is realized, can only be understood by focusing on the exception. In this sense, the right to 'seek' or 'enjoy' the asylum does not make sense, when the refugee is returned to 'seek' and 'enjoy' her right elsewhere. When the state decided to expel the refugee, it also deprives them of 'a place in the world', and as

Arendt correctly points out, when a refugee is deprived of a place in the world, they deprived from all rights, from 'the right to have rights' first and foremost.

In conclusion, I would like to clarify that it is not the aim of this study to offer an absolute denial of the importance of human rights. On the contrary, I believe that human rights continue to serve as an important rhetoric in expanding right-based claims. However, as Noll's words, I do not let myself 'be seduced by the untenable claim of the universality';[179] since I believe the conceptual doubts must be satisfactorily addressed if the idea of human rights is to command reasoned loyalty, as Sen so correctly asserts.[180] Hopefully this study has shown why this is the case.

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[179] Noll, 2010, pg.242
[180] Sen, 2004, pg.317

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